



# **HUMAN RIGHTS AND IMPUNITY IN SOUTH ASIA**

**STATES, SOCIETIES AND INSTITUTIONS**



**National Human Rights Commission - Nepal**

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*Edited by*

**Mohna Ansari  
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**National Human Rights Commission (NHRC) - Nepal**

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## Abbreviations

ADC	: Autonomous District Council
AHRC	: Australia Human Rights Commission
AICHR	: ASEAN Intergovernmental Commission on Human Rights
AIHRC	: Afghan Independent Human Rights Commission
ANNI	: Asian NGOs Network on National Human Rights Institutions
APF	: Asia Pacific Forum
ARC	: Autonomous Regional Council
ASEAN	: Association of Southeast Asian Nations
CBCID	: Crime Branch Crime Investigation Department
CCTNS	: Crime and Criminal Tracking Network and Systems
CEDAW	: Convention on the Elimination of all Forms of Discrimination Against Women
CERD	: Convention on the Elimination of All Forms of Racial Discrimination
CHT	: Chittagong Hill Tracts
CIEDP	: Commission of Investigation on Enforced Disappeared Persons
CMIS	: Complaint Management and Information System
COIDP	: Commission on Investigation of Disappeared Persons
CRC	: Convention on the Rights of the Child
CRF	: Central Relief Fund
CRPD	: Convention on the Rights of Persons with Disabilities
CRRF	: Central Relief and Rehabilitation Fund

## Human Rights and Impunity in South Asia

- CRSV : Conflict Related Sexual Violence
- CSO : Civil Society Organization
- CVCP : Conflict Victims Common Platform
- DDR : Disarmament Demobilization and Reintegration
- DIMIA : Department of Immigration Multiculturalism and Indigenous Affairs
- EVAW : Elimination of Violence Against Women
- FATA : Federally Administered Tribal Areas
- FIR : First Information Report
- FRS : Flexible Research System
- GA : General Assembly
- GANHRI : Global Alliance of National Human Rights Institutions
- GF : Governance Facility
- GPI : Genuine Progress Indicator
- HRD : Human Rights Defenders
- ICCPR : International Covenant on Civil and Political Rights
- ICESCR : International Covenant on Economic, Social and Cultural Rights
- IDP : Internally Displaced Person
- ILO : International Labour Organization
- IPC : Indian Penal Code
- KDS : Kerala Development Society
- LGBTI : Lesbian Gay Bisexual Transgender, Intersex
- LGBTIQ : Lesbian Gay Bisexual Transgender Intersex Queer
- MLA : Member of the Legislative Assembly
- MoWD : Ministry of Women's Development
- MP : Member of Parliament
- NAECL : National Authority for Elimination of Child Labour
- NCLP : National Child Labour Project
- NCSW : National Commission on the Status of Women
- NFDIN : National Foundation for Development of Indigenous Nationalities

NGO	: Non-Governmental Organization
NHRC	: National Human Rights Commission
NHRI	: National Human Rights Institution
NIFT	: National Institute of Fashion and Technology
NMIRF	: National Mechanism for Implementation Reporting and Follow up
NRRP	: National Relief and Rehabilitation Policy
OBCs	: Other Backward Classes
OECD	: Organization for Economic Cooperation and Development
OHCHR	: Office of the United Nations High Commissioner for Human Rights
PHR	: Protection of Human Rights
PHRA	: Protection of Human Rights Act
PIL	: Public Interest Litigation
POCSO	: Protection of Child Against Sexual Offenses
PPCB	: Punjab Pollution Control Board
PRI	: Panchayati Raj Institution
PRP&P	: Policy Research Projects and Programmes Division
R&R	: Rehabilitation and Resettlement
RBI	: Reserve Bank of India
RTI	: Right to Information
S./Ss.	: Section/Sections
SAARC	: South Asian Association for Regional Cooperation
SC	: Scheduled Caste
SCs	: Scheduled Castes
SDGs	: Sustainable Development Goals
SHRC	: State Human Rights Commission
SOP	: Standard Operating Procedures
ST	: Scheduled Tribe
STs	: Scheduled Tribes
TRC	: Truth and Reconciliation Commission
UDHR	: Universal Declaration of Human Rights

Human Rights and Impunity in South Asia

- UGC : University Grants Commission
- UN : United Nations
- UNDP : United Nations Development Program
- UNDRIP : United Nations Declaration on the Rights of Indigenous Peoples
- UNHRC : United Nations Human Rights Council
- UNICEF : United Nations Children's Fund
- UPR : Universal Periodic Review
- URG : Universal Rights Group
- VAW : Violence against Women

## Foreword

When Nepal's National Human Rights Commission (NHRC) hosted the largest high-level meet for human rights institutions of South Asia in April 2018, the symbolic aspect was that the seven national human rights commissions took only just over an hour to agree on the **Kathmandu Declaration** (Annex-IX), which has been attached in this volume as well. Our nations face many different challenges, but the conference showed that we, in South Asia, share common goals and the same set of basic principles of universal rights when we set out to find solutions. The level of unity, including in the condemnation of the repression of the Rohingyas in Myanmar, was impressive for those of us who tend to associate regional discussions with discord over national interests. Whether in Afghanistan or Maldives, Bangladesh or Pakistan, India or Nepal, people are often denied justice, linked more often than not with the central issue of the conference, impunity.

The participants, which included the leading rights-related NGOs of the region, emphasised that impunity reflects a deficit in the rule of law. All citizens (including women, children, minority groups and marginalised communities) are accountable to the justice system equally and without discrimination, and all must have equal access to it. The organisations underscored their support for the vetting of all personnel in security forces that are seeking promotions or intending to take part in UN peacekeeping missions, so as to exclude those facing human rights cases. This was done not in the spirit of revenge or harsh punishment,

but to find ways in which the citizenry's confidence in the institutions of justice can be rebuilt—a key step for building social harmony and instituting the political stability that we need for prosperity.

In the session on Transitional Justice, there was consensus around full consultation with victims' groups in the process from the start, and the need to see that all four pillars—truth, reparations, justice and reforms—are fulfilled to ensure that the crisis is not repeated. There can be little doubt that institutions which in times of crisis have been used for repression need profound reforms to instil new habits and methodologies. Investigating without the use of torture being one of them. This was perhaps the most moving part of the three-day event. Not only did the session look at the general principles, but also explored in depth Nepal's own peace process and transitional justice, which remains mired in problems over capacity. It was reassuring to hear Attorney General (AG) of Nepal Agni Kharel commit to amending the transitional justice commissions' flawed mandate and working with victims' groups and civil society. But it was clear that there are still big differences in approach and vision. Getting the mandate of the commissions to comply with the 2015 Supreme Court ruling and basic standards is only the beginning. The TRC and CIEDP have been castigated by victims for appearing to lack political will and inability to create a realistic work plan. The TRC has received about 60,000 complaints in three years. There is a reported gap in the commission's mandate and resource capacities to handle the large number of complaints and conduct investigations. Thus, further instilling frustrations among the victims. As a victim leader rightly put it, he has been waiting for sixteen years to find what transpired when his father was murdered.

The Kathmandu Declaration also calls on all South Asian states to review national security and counter-terrorism laws and to ensure that they meet international norms and standards. While the declaration

recognises the inalienable right of states to call a state of emergency when national security is genuinely in peril, it states categorically that under no circumstances can the use of torture or attacks on the right to life and the protection of civilians be justified. All the signatories to this document committed to remain vigilant to any attempts to improperly use national security as a justification for illegitimate restriction of rights that in no circumstances can be suspended.

The conference discussed at length the issue of migration and stressed the importance of the right of freedom of movement, including in search of employment. While recognising the economic benefits of migrant labour and the contribution of remittances to the economies of the region, it is increasingly clear that those who migrate for employment, particularly women, are frequently subject to serious abuses including under the *kafala* system. The signatories therefore called on governments to collectively negotiate for migrant rights, including minimum wage. The commissioners agreed on the need to reach out to civil society and to end the crackdown on dissent and speech. They also agreed to promote measures to defend the judiciary and police from political influence and maintain their independence. For the NHRC, and the Nepali organisations who took part, the conference was a real boost, a reassurance that we are not alone in the values we share and the demands we are making—including that governments act on the recommendations. The fact that the event was inaugurated by President Bidya Bhandari and brought to a close by Law Minister Sher Bahadur Tamang (on behalf of Prime Minister KP Oli) is a cause for optimism that our voice is being heard. We stand ready to work with the government to meet the noble commitments it has made: to turn their words into actions.

**-Mohna Ansari-**

Commissioner and Spokesperson

National Human Rights Commission of Nepal



## Acknowledgments

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Also, we express our sincere gratitude to national speakers and panellists including Executive director of Kathmandu School of Law (KSL) Dr. Yubaraj Sangroula; Columnist CK Lal; senior advocate Prof. Dr. Surya Dhungel; Dean of Kathmandu University School of Law (KUSL) Dr Bipin Adhikari; researcher at Martian Chautari Dr. Bhaskar Gautam; founding chairperson of Women Resource Centre (WOREC) Dr. Renu Adhikari; chief editor of *The Kathmandu Post* Akhilesh Upadhyay; human rights activist in Nepal Mandira Sharma; human rights accountability and transitional justice expert Govinda 'Bandi' Sharma; political activist Brabim Kumar; advocate Shankar Limbu; conflict victims Suman Adhikari and Ram Kumar Bhandari.

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We also kindly appreciate the support of Chairperson of Asian Pacific Forum Dr. Sima Samar; GANHRI representative Katharina Rose; member of NHRC Bangladesh Nurun Naher Osmani; member of NHRC India Justice D. Murgesan; President of HRC Maldives Aminath Eenas; Chairperson of NHRC Pakistan Justice Ali Nawaz; and Chairperson of HRC Srilanka Dr. Deepika Udagama; member at NHRC Nepal Prakash Ost; Justice Kedar Nath Upadhyay; Deputy Director at APF Pip Dargan; and unforgettably Ramyata Limbu and Deepak Thapa for moderating different sessions. Also, we are indebted to the logistical and technical support extended by secretary at NHRC-Nepal Bed Prasad Bhattarai and Human Rights Officer at NHRC-Nepal Loknath Bastola. Thanks are also extended to rapporteurs of the different sessions of the international conference on Human Rights and Impunity.

**-Anup Raj Sharma-**

Chairperson

National Human Rights Commission of Nepal

## **Regional Collaboration for Human Rights Promotion**

Despite of the effective presence and salutary endeavors of human rights defenders and institutions across South Asia, achieving human rights objectives, especially in post-conflict setting remains a daunting task. All the states of the region - Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka face common problems in realizing their human rights goals. Impunity, endemic violence, and institutionalized discrimination have become unfortunately routine. These challenges, which have long historic roots, are further aggravated by the high prevalence of poverty, imbalanced development, political instability, crawling economic growth rates, low literacy, widespread malnutrition, rampant gender-based violence and discrimination in education, nutrition, health and employment – all of which stifles access to human rights, and flouts states’ professed commitments to the protection and promotion of human rights.

The South Asian Association for Regional Cooperation (SAARC) has itself raised the issues of human rights in achieving peace and development in the region. In 2002, SAARC member states signed the Convention on Preventing and Combating Trafficking of Women and Children for Prostitution. In the same year, member states also committed themselves to creating better circumstances for the development and well-being of children in our rapidly growing region, signing the Convention on Regional Arrangements for the Promotion of

Child Welfare in South Asia. In 2004, the SAARC Social Charter further affirmed the Association's unflinching belief in the importance of human dignity and human rights through the creation of environment that enables the development and protection of all individuals, particularly the most vulnerable. Unforgettably, Asia Pacific Forum (APF) also has a key role to play as the coalition of National Human Rights Institutions (NHRIs) in forging common understanding among the NHRIs by providing the capacity and expertise in further support.

Also, a regional dialogue on human rights promotion and protection was held in New Delhi of India in August 2014, and in Dhaka of Bangladesh in November of the same year. In different regional seminars, held in Bangladesh (1996), Nepal (2010), Pakistan (2014), Kabul (2014) and Bangladesh (2014), human rights defenders emphasized on the development of a regional mechanism, and recognized the importance of cross-border collaboration and community-level exchange for the implementation of human rights norms. But, SAARC's relative inaction on human rights to date has prompted the development of independent organizations that put pressure on member states and the Association itself to honor their commitments against injustice and indignities.

National Human Rights Commissions (NHRCs) have been playing important roles despite the difficulties they have encountered while advocating for human rights protection and promotion. For example, despite the plight of defunding, the Maldives Human Rights Commission continued to advocate for the rights of detainees and create an environment for the realization of human rights.<sup>1</sup> Apprehending the

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1 E.g. The Maldives Human Rights Commission's National Report of 2010, recognizing grave areas of concern to modern democracy - <http://www.hrcm.org.mv/publications/annualreports/AnnualReport2010Eng.pdf>; *Democratic Processes, Foreign Policy, and Human Rights in South Asia*, Joseph Benjamin, 2010, Gyan Publishing House, pp. 320; FORUM-Asia and Asian NGO Network on National Human Rights Institutions (ANNI) 2015 *Report on the*

activities of the National Human Rights Commissions of India and Pakistan, they are attentive to the matters of Civil and Political Rights<sup>2</sup> as well as Economic and Social Rights including the issues of health and physical well-being.<sup>3</sup> This demonstrates the need for state governments and human rights commissions to be alert and independent in their responses.<sup>4</sup> The attention displayed by these national commissions underscores their commitment to human rights at every level. It also highlights some of the challenges faced by both active and recognizably independent commissions, along with the ways in which younger commissions have significant areas for growth, and ways in which their lack of independence hurts vulnerable populations in the country.<sup>5</sup>

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*Performance and Establishment of National Human Rights Institutions in Asia*, emphasizing the different compositions and impact of national human rights institutions around the Asia Pacific Region, including each one in South Asia, available at [https://www.forum-asia.org/uploads/wp/2015/09/ANNI\\_Report\\_2015.pdf](https://www.forum-asia.org/uploads/wp/2015/09/ANNI_Report_2015.pdf))

- 2 (see, e.g. the NHRC-India National Report, 2012-13, available at [http://nhrc.nic.in/Documents/AR/NHRC\\_FINAL\\_English\\_Annual\\_Report\\_2012\\_2013.pdf](http://nhrc.nic.in/Documents/AR/NHRC_FINAL_English_Annual_Report_2012_2013.pdf). See also “NHRC [Pakistan] Demands End to Climate of Fear” regarding freedom of expression, available at <http://hrnp-web.org/hrnpweb/hrnp-demands-bloggers-recovery-end-to-climate-of-fear/>)
- 3 (see, e.g. <http://nhrc.nic.in/dispArchive.asp?fno=34222> -- Press Release of February 2017 regarding a suspicious number of hysterectomies at public hospitals in a particular district within Karnataka and also <http://nhrc.nic.in/disparchive.asp?fno=24108>, regarding a notice to the Indian Railways in September 2017 on the link between degraded tracks and threats to passengers’ right to life), Workers’ Rights (for both employees and bonded laborers; see, e.g. India Commission’s report from 2012-13, *supra*, at p. 66, regarding silicosis; see also “Another Accidental Death Reported at Gadani Shipbreaking Yard” in Pakistan, <http://hrnp-web.org/hrnpweb/another-accidental-death-reported-at-gadani-ship-breaking-yard/>)
- 4 (see, for example, “State Governments need to give more respect to the work of State Human Rights Commissions,” February 2017, <http://nhrc.nic.in/dispArchive.asp?fno=34207>)
- 5 Asia Pacific Forum, a network of National Human Rights Institutions that also engages constituent groups, and FORUM-Asia, which specifically coordinates

Like its counterparts and supporters, the National Human Rights Commission of Nepal firmly believes that the protection and promotion of fundamental universal human rights is non-negotiable to achieving meaningful peace, stability, and development. For the promotion of peace and the growth of domestic and regional economies, the states in the South Asian region have in front of them a series of challenges. National Human Rights Institutions have a primary role as watchdogs for the promotion and protection of human rights domestically by independently monitoring the actions of state bodies and security forces, responding in a timely manner to the complaints against abuses, coordinating with Human Rights Defenders, and developing institutional mechanisms that allow for independence from state mechanisms and partisan political pressure. As difficult as may be for any institution to achieve impartiality and neutrality, it is the responsibility of NHRIs to work rigorously and in good faith toward such a goal.

Realizing the need of regional mechanism and regional collaboration, NHRC Nepal decided to take a step toward identifying and taking account of the many common challenges across South Asia. In this tradition of periodic gathering, but with an added expectation of follow-up, the National Human Rights Commission Nepal (NHRC) organized a South Asian regional conference in Kathmandu to facilitate a regional dialogue, titled “**Identifying Challenges, Addressing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia**” (Annex-X). Regional conferences in the past also chose particular themes for discussing challenges and common solutions. For example, the meeting in Bangladesh in the year 2014 had human rights objectives ending poverty and child marriage as its main theme.

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constituent groups, recognizes some of the human rights defenders and institutions most active in the region, here: <http://www.asiapacificforum.net/members/> and [http://www.forum-asia.org/?page\\_id=4001](http://www.forum-asia.org/?page_id=4001), listing more than 20 prominent organizations in the South Asia region)

The Kathmandu conference on Human Rights, which was held in Kathmandu from 9-11 April, 2018 created a platform for NHRIs, government bodies, civil society members, lawyers and human rights activists to discuss human rights challenges in the region, and to identify common approaches and joint initiatives for the protection and promotion of human rights. The international gathering focused primarily on impunity, an area of human rights relevant to all of the South Asian countries particularly for four of the countries in South Asia enduring a post-conflict context. Discussions were organized on the difficulties faced by human rights defenders while examining best practices in the work of different human rights actors, particularly with respect to engagements of national human rights institutions. This allowed human rights activists, civil society members to identify common challenges and discover ways for NHRIs to move forward in working with each other, and with Human Rights Defenders (HRDs), domestically and regionally (Annex-IX).

Reflecting on the issue of fundamental rights – those rights that are necessary for democratic society and good governance, it was an opportunity to discuss the state of execution of these rights, and challenges in their implementation and the problem of impunity. By creating a space in which civil society actors, members of constitutional bodies, human rights activists and other stakeholders can come together, the international conference on human rights and impunity contributed to peace-building and legal development for the realization of human rights in South Asia. The ultimate goal of the conference was to strengthen the impact of NHRIs by enhancing the mechanisms of cooperation existing among them in the region and in their own respective countries with the participation of other HR stakeholders, and by showing effective pathways for working with HRDs and key civil society actors in order to promote accountability and justice, and to overcome problems of impunity. By explicitly acknowledging these challenges – some of

which may be particular to one or more states, while resonate throughout the region, the three-day conference called for strategic interventions, greater transparency and accountability from NHRIs in partnership with local, national, regional and international human rights defenders, human rights institutions and activists for more effective outcomes. While legal mechanisms for achieving justice are important, this conference sought to advance an understanding to advance the protection and promotion of human rights with the use of media and policy advocacy. Besides creating a foundation for strengthening the functioning of NHRIs, the overall purpose of this conference was to bring together National Human Rights Institutions for identifying challenges and sharing good practices in combating impunity and promoting and protecting human rights in South Asia (Annex-X). The political reality of many states in the region is that of a post-conflict transition, or else of the ongoing violence—both of which have had serious implications on everyday life, in access to health, education, livelihood, and food security, as well as on the political rights and judicial mechanisms of redress. This conference provided an opportunity to identify and begin responding to the most pressing current issues, and to reassess the South Asian region's approach to international human rights norms while developing a regional vocabulary and philosophy for the advancement of people's rights (Annex-IX).

Thus, we anticipate that when commissions and other stakeholders across the region have developed more robust relationships regionally and with each other within the countries, they will be able to advocate effectively for the marginalized groups and victims of human rights abuses.

*Introduction:*

## **Persistence, Crisis and Response to Human Rights in South Asia**

This volume accommodates narratives on human rights situation and human rights challenges across the region. Kathmandu Conference on Human Rights and Impunity itself fostered a fruitful discussion on the value of regional and cross-border cooperation on transitional justice, migration livelihood, and women's rights. Contrary to what some may argue, human rights do not cause conflict, rather can prevent conflict and create justice – a necessary condition for peace, distinguished human rights defenders and activists, scholars and academicians in the conference shared their views about peace building and legal development.

Since human rights jurisprudence promotes democratic governance, democracies must be understood as more than civil and political rights, and must incorporate the rights of minorities and historically marginalized groups. Human rights are only fully realized when they include civil and political rights, and economic and social rights. The Constitution of Nepal, chapter on fundamental rights, addresses all of these. The National Human Rights Commission of Nepal has a complex task in front of it. But, its role in ensuring the protection of human rights - as enshrined in the Constitution and in the agreements that Nepal has signed regionally and internationally - can be

achieved with the support of civil society, and regional and international bodies. Apprehending the same, let's focus on lessons learned from Afghanistan, and identify the importance of prioritizing justice, not just stability. However, there are also major challenges to the recognition of justice, namely the continued presence of warlords, the 2007 amnesty law passed by Parliament, government opposition to the release of reports by the international community, general lack of political will to deal with issues of transitional justice, and rampant corruption within a war economy. The majority of government budgets in the region are spent on the military, instead on the provision of basic services. Thus, justice is not a luxury. It must be understood as a basic right for everyone that cannot be exchanged for stability.

Events threatening human rights around the world in past two decades render NHRIs more importance than ever as they have an essential role in monitoring developments in human rights, investigating violations, challenging authorities, protecting victims, offering constructive advice and guidance to those holding power, in some cases, handling truth and reconciliation. Guided by the UDHR, core international and regional human rights treaties, the Paris Principles, and more recently, the SDGs, NHRIs serve as an essential bridge between the international and national protection of human rights. Despite their importance, NHRIs can only be effective if they have the support of their national government, which is a difficult task during the time of conflict and war. This requisite support is challenged by difficult situations in post-conflict countries and by threats to the security of NHRI staff. It is really disappointing and sometimes also frustrating despite of the efforts we have been putting for the promotion and the protection of human rights globally. Thus, GANHRI, along with partners at the OHCHR, supports NHRIs to overcome these challenges and have

even created guidelines for dealing with issues of security and reprisals (Annex-II). Moving forward, it is important that UN safeguards are recognized and that NHRI independence continues to be strengthened in all regions and contexts. Addressing impunity is integrally linked to promoting rule of law and development. It is clear that no Sustainable Development Goals of the United Nations can be achieved without addressing impunity in this region. Freedom of expression and the voice of the voiceless and marginalized people should be heard properly to respect human rights. As we look back, we can clearly see that the roots of the conflict lie in the denial of the enjoyment of human rights. It is now almost 12 years since the Comprehensive Peace Agreement put an end to the decade long armed conflict in Nepal but the victims of the conflict still yearn for justice. The next step will be for the new government in Nepal to implement the Supreme Court's ruling on the twin Truth Commissions. "It is a priority for us to modernize our legislation and bring it fully in line with the many human rights treaties ratified, for example, by criminalizing both torture and enforced disappearance" (Annex-I). The newly elected government of Nepal will provide the necessary legal instruments and resources for both Truth and Reconciliation and Commission on Disappeared People.

Nepal, as a newly elected member of the Human Rights Council must be seen to be a responsible member state of the United Nations to which we contribute much for the Common People. We must take advantage of our hard-earned peace to root out and eliminate discrimination wherever we find. NHRC alone cannot perform this, but constantly seeks ways in which NHRC could be a true partner to our people as they strive for this vision of a better society for all. We have a duty by the constitution, to provide leadership as we accompany our people. "We have to learn how to be a loyal duty bearer to our people" (Annex-I).

The constitution of Nepal was promulgated in 2015 after it was drafted by the Constituent Assembly lawmakers. It prioritizes human rights from its preamble through to its body, and is an apt example of an extremely progressive Constitution. Fundamental rights have been incorporated as a matter of constitutional rights, and the constitution itself guarantees inclusion and proportional representation. The Government of Nepal now bears responsibility for drafting the laws that will implement and guarantee these fundamental rights.

Nepal's own experiences of a peaceful transition, and a framework for transitional justice, shows that it is crucial to internalize and embrace mechanisms that provide justice to victims of conflict -- and that the judicial system of Nepal, including the courts, are capable of dispensing justice. Human rights are important beyond formalized agreements and speeches. An understanding of human rights must permeate our everyday lives. Human rights, democracy, and the rule of law are interdependent, and human rights protections are achieved through the internalization of democratic values and the guarantee of due process. People-oriented democracy requires the implementation of human rights, and with it, strong efforts to combat impunity.

### **Role of NHRIs and Status of Human Rights in South Asia**

Rampant corruption and weak rule of law in the South Asian countries stifles progress, leaving nearly 6 billion men and women dissatisfied with the level of efforts and activism made for human rights in their respective countries. Also, it is a time to call on governments to cooperate and bring about necessary legal and administrative measures to protect rights of migrants, in both countries of origin and countries of destination as per the International Labour Organization standards, including the monitoring and regulation of recruiters, and assuring access to justice. The fact that Afghanistan still has Polio, but its government decides to employ resources to obtain more

planes and bombs is a powerful example of the challenges facing the full recognition, respect, and fulfillment of human rights promotion and protection. Additionally, the prevalence of regional, international and state-sponsored terrorism serve as a surmountable barrier to the recognition of human rights in the region. However, there is a hope in moving forward if individual and collective efforts are made to prioritize human rights. For example, the sustainable development goals provide a good opportunity to expand efforts both nationally and multilaterally. These efforts to promote and protect human rights should pay heed to the plight of women and children, identify the condition of refugees and internally displaced people, focus on the access to quality education and health care, raise the voices of those fighting against corruption, support good governance and rule of law, ensure that peace is inclusive of women and human rights, and finally, promote the universal character of human rights.

There has been considerable progress in the recognition of human rights in Bangladesh over the last 30 years, particularly with the creation of an NHRC and in the progress of women in the political sphere. However, there are several challenges facing further progress by the country's NHRC. Namely, the Commission is unduly limited in its mandate and it lacks a permanent office space. The number and diversity of internationally recognized human rights has been growing. However, the recognition of these rights continues to be challenged and threatened by the existence of abject poverty, armed violence and conflict by both state and non-state actors, gender inequality, conflict, environmental degradation, the systemic denial of economic, social and cultural rights, and most importantly, the prevailing culture of impunity. Since 1993, NHRC India has attempted to combat these challenges in its promotion of human rights, but it is limited in its effectiveness due to legislation which renders its work largely recommendatory.

Thus, the Commission is demanding the government to give it more authority in order to increase its effectiveness. Also, the Human Rights Commission of Maldives (HRCM) has steadily been given more power since it was established by a presidential decree in 2003. Its role spans from investigating and adjudicating complaints to disseminating information and educating the public. However, in the wake of weak and dysfunctional institutions of governance which lack knowledge of human rights, the role of NHRCs in monitoring and evaluating state actions is extremely important both domestically and regionally.

NHRC Nepal has made notable achievements in the protection of human rights as exemplified by its mobilization following the Gorkha earthquake and its contribution to the drafting of the constitution. However, the Commission faces several surmountable challenges, such as the failure of the government to obey its recommendations and the prevalence of corruption. Structurally, the Commission needs to learn how to coordinate with the seven newly created constitutional commissions and how to restructure itself so it can work effectively within the new government structure. More generally, the Commission needs to discover ways to reach the lower levels of government to ensure that marginalized groups have access to rights and justice and to formulate a strategy so it can shift from civil and political rights to economic, social and cultural ones.

Human rights are supported by people of all different creeds because they can rally under the single, powerful and unifying creed of human rights itself. Thus, NHRCs should be viewed as part of this human rights creed and should not be stifled by religious biases. While this unifying creed is growing in its importance, the continued prevalence of impunity continues as a threat to the campaign of human rights in general because of a failure of states to

meet their international obligations. In the Pakistan's context, the fight against terrorism cannot continue to be used as an excuse to perpetuate enforced disappearances and violate freedom of expression and religion. Regionally, governments are allowing human rights abuses to continue without impunity which perpetuates injustice globally. In sum, NHRCs around the region should join hands to bring an end to impunity and promote human rights. Human Rights Commission in Sri Lanka is able to function relatively efficiently under a powerful and broad mandate, which allows it to advise the government, run a robust complaints mechanism, and monitor the human rights situation in the country. The most important success is the HRC's ability to gain the confidence of the public in regards to its independence. This success compliments general improvements in the country, such as the growth in democratic space and the eradication of enforced disappearances and extrajudicial killings, following the 2015 governmental transition from authoritarianism. Despite these improvements, there are serious challenges both domestically and regionally. For example, the precarious situation of the rule of law is demonstrated by the delay in implementing legislation, which incorporate human rights treaties and by the weakening of the independence and capacity of institutions necessary for the recognition of the rule of law. Moving forward, governments must focus on deepening democracy, as opposed to upholding "prop-democracies," and implement measures which strengthen the citizenry, such as measures which improve the literacy of women.

### **Role of Security Forces in Impunity**

It is essentially important to examine the role of security forces in South Asian countries, and their part in promoting and combating impunity. In doing so, we shall discover institutional gaps in India's context. Institutional gap in a sense that legislation continues to exist that

bans full investigations of government activities. These gaps existed from British colonial era, and continue through to the present day. The NHRC is limited in its investigatory capacity, and the current statute of limitations on offenses leads to impunity. There is a continuity to the culture of enforced disappearances in militarized zones. Also, we see women at the forefront of campaigns against enforced disappearances through long-term, non-violent, action -- including sit in protests. Enforced disappearances are still not a crime codified in the penal code. The only possible legal claim that can be brought forth is that of "missing persons," which does not sufficiently capture the crime, and the role of the state in this activity. Furthermore, there is no law that prohibits torture in all circumstances. The NHRC of India has taken a strong stance against this. Still, institutional gaps constrain an exercise of rights, and promote impunity.

Nepali perspective on the role of role of security forces in promoting or challenging impunity is little different in comparison to the other countries in South Asia. Nepal has been through a great deal of political change and transition. Taking these changes into consideration, a question with regards to impunity is often raised in academic debate attaching the role of security forces to it. Impunity, which broadly means the failure to bring perpetrators of violations to account, is primarily accessed by examining the role of security forces of the nation. Security forces have the initial as well as the final responsibility in the justice system, thus, their role is paramount. The first part of this discourse focuses on the comprehensive understanding of impunity in context of Nepal, and how security forces are the main agents in relation to it. While there are various national institutions responsible for combating impunity, security forces are in direct connection with the general public and are reflective of national/institutional policies and strategies regarding human rights violation and administration of justice. Security

forces in Nepal which is inclusive of Nepal Army, Armed Police Force (APF) and Nepal Police all have included human rights wings as an internal mechanism to ensure adherence to and protection of human rights. The Human Rights wing in Nepal Police apart from monitoring police activities, also registers human rights violations complaints committed by police personnel, investigates and takes necessary actions if found to be guilty. Further, Nepal Police can also be seen as taking the initiative of community policing to gain the trust of the local people. Such initiatives help to remove the psyche among the local people with regards to existence of impunity and its relation to security forces. The initiatives and efforts of Armed Police Force (APF) are also noteworthy with their continued support and commitment towards protection and promotion of Human Rights in Nepal. The security forces have been taking several initiatives to discourage impunity and human rights violations by developing their own action plans reflecting the essence of national human rights action plan (2071/72-2075/76) prepared by the Office of the Prime Minister and Council of Ministers and implementing it efficiently. The Second part of the discourse takes into consideration the actions the security forces have been taking and their efficacy in addressing impunity in the present context. The security agencies are sometimes tied by bureaucracy, political dimension along with some institutional inefficiency in their part as well. If these situations are not considered and resolved they are likely to contribute tacitly into promoting the state of impunity rather than reducing it despite of the positive approach taken by the security agencies. The third part of the discourse deals with the problems that cause hindrances in challenging and reducing the state of impunity as well as tries to elucidate the strategies that have to be further adopted so that the security agencies can address such issue.

While extending the discourse of human rights and its relation to national security, the relationship should not be seen as oppositional,

but as issues that are necessarily discussed together. The best way of ensuring national security is by respecting and realizing human rights. Unfortunately, at this time, we are seeing a larger attack on human rights than at any point since 1945. First, since September 11, 2001, there has been an increased use of national security as a justification for the derogation of core human rights principles. The use of torture, prolonged detentions, and unfair trials are all examples of this -- and also become ways for terrorist organizations to recruit. Similarly, the use of drone warfare, such as in this region, has increased enmity against user-states, instead of successfully contributing to any fight against terrorism. The use of mass data surveillance erodes the right to privacy and, undermines freedom of association and speech. A third attack comes from the an increasing weaponization of migrants by right-wing governments around the world, in order to gain political capital. By militarizing borders, escalating xenophobic rhetoric, and excluding groups, governments cause further harm to vulnerable individuals. We must invite deeper collaboration between national security practitioners and human rights activists, to have security sector reform that ensures the punishment of violators of human rights, and the prevention of future violations (pp.181-205). In this regard, the UN Rule of Law indicators provide a helpful guide, and potential ways to measure change. NHRIs can help to gather data, and to advocate for the rights of victims in receiving remedies -- a right without a remedy is an empty right. Working domestically, and regionally, as well as with the UN Special Rapporteur for on Truth, Justice, Reparation, and Guarantees of Non-Recurrence, can help establish independent oversight of the security sector, and help restore confidence in the state.

## **Fundamental Rights and Human Rights**

Reaffirming that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, let's focus on fundamental

rights and the constitutional status of human rights in Nepal, assessing progress in human rights, and flagging potential areas of work for NHRCs in the days ahead. Enumerating some statistics around the tremendous demographic and cultural diversity that exists in Nepal and across the border region, let's try to identify opportunities for deeper understanding of diversity through shared lessons, as well as challenges in reaching consensus. It is necessary to reflect on the post-conflict constitution in Nepal, which presents opportunities for greater realization of human rights and social justice – but which still need to have a more clear articulation of competencies at different levels of government and judiciary in a federal system. The full implementation of human rights, including economic and social rights, across the federal system, which would create three levels of government, with 753 municipal governments, 7 provincial governments, and 1 federal government, compared to the previous state structure in which only the central government could enact legislation is a daunting task. He remarked that the realization of these rights would require “special lead-frame enactments,” that would need to be completed through the Nepali legislature by September. Civil society actors have successfully used the courts, winning verdicts for greater inclusivity and the realization of human rights. Civil society organizations have pushed cases that led the judiciary to produce meaningful decisions, and encouraged NHRCs to work more closely with community organizations for better monitoring and enforcement of human rights norms across all three new levels of government. Still, marked enforcement at the level of the municipal government is a serious concern.

Linking human rights with the issue of development, peace and security and realizing how they are interrelated and mutually reinforcing, it is really important to have a collaboration between NHRIs as well as with civil society in addressing issues related to conflict and its consequences. Aligning human

rights international standards and institutions to grass-roots human rights culture and its impact on social cohesion in South Asia, it is fundamentally important to identify the linkage between the concepts of human rights and social cohesion and look into some complementarity of both concepts. Furthermore, how the international human rights standards and associated implementation machinery could be used to advance social cohesion around the world. Sev Ozdowski's paper inside the book, "Human Rights as an Instrument of Social Cohesion in South Asia" (pp. 61-103) reviews the contemporary social cohesion trends globally and in South Asia, and focuses on the role of National Human Rights Institutions (NHRIs) in advancing human rights culture. Attention is paid to the role of human rights education in advancing social cohesion.

### **Voices of Human Rights: Freedom of Expression and Its Meaning in South Asia**

There are four basic conditions of human life: Freedom from pressures of basic need, freedom from fear, freedom from domination, and freedom from alienation. For these conditions to be met, there must be freedoms of expression, religion and culture, peaceful assembly, and association. Freedom of expression is the most important, but is threatened by the state which acts as a watchdog, the market and its advertising-based model, the intolerance of dominant religions and cultures in society, the self-censorship of individuals, and technology which is prone to propaganda and centralized control. Challenges in addressing these threats include monitoring the panopticons of the state, and reigning in the power of supra-structure players and other non-state actors. The National Human Rights Commission can aid in the protection of freedom of expression by engaging in a dialogue with the international community and by experimenting with citizen human right institutions. Freedom

of expression is integral to the protection, respect, and promotion of human rights. However, this right is not given, it is only guaranteed and protected by the constitution and can only be accessed if the government can provide security to media persons (Annex-III). There are reasonable restrictions to freedom of expression, but these restrictions must only be regulated by law. Threats to freedom of expression can arise from several fronts, ranging from the government or the judiciary to broader society.

The media has had a distinct role in the democratization of Nepal throughout history. Despite heavy levels of censorship and oversight during times of insurgency in Nepal, the media pushed to make human rights a matter of national discourse. The work of the media became easier after 2006 and was able to include the voices of marginalized and Madheshi peoples. Today, it continues to lead the voice for democracy and human rights. It is important to remember the important role of the press in providing debates and ideas because history demonstrates that whenever the government is very strong, the first casualty is the press.

To enrich the debate on freedom of expression and its relation to human rights, it seems inevitable to cite the 2016 UNESCO Director General Report on Impunity of Freedom of Expression, which demonstrates the grim reality that the number of journalists killed in non-armed conflicts is rising and only few cases of journalist killings are resolved. To help protect journalists, and by extension, freedom of expression, there should be increased cooperation at the regional level, including the creation of regional treaties, courts, and enforcement mechanisms. Within this framework of cooperation, NHRIs should strengthen their internal capacity, ensure cyber safety, and engage in raising awareness, work to improve the capacity of media workers and press, promote inclusion within educational institutions relevant to journalism, remain sensitive to gender issues, and make pragmatic use of the UNESCO Director General Report.

## **Rights of Women and Marginalized Communities and Challenges to Combating Impunity**

The protection of all marginalized groups in Nepal grew following the promulgation of the new constitution which paves the way for a more inclusive democratic system. Nonetheless, challenges of impunity remain and it will be difficult to garner the necessary political will to combat it and fully protect these marginalized groups. Marginalised person is defined as anyone who does not have access to human rights protections. Women who are marginalized have proved their ability to contribute to society and any state that does not support these women are guilty of deprivation (pp. 105-128). Thus, states have a duty to protect women's dignity, including freedom from rape and molestation, to ensure usufructuary rights, and to combat trafficking. In addition to regional cooperation and coordination in progressing human rights, the two commissions should be established for the protection of marginalized women: a trafficking commission to address trafficking in Nepal and Bangladesh and a general compensation commission to compensate any woman who has been sexually tortured.

The biggest challenge that we face currently in South Asian Region is the lack of accountability of the state to its people. The impunity that exists is the direct result of the unequal, unjust system that has been existing. If you belong to the right class, have close association with the correct power base; if your ethnicity and ideology is that of the majority, the rulers; if your gender determines your status, then its different. The section of the population you belong to, your identity decides what you can expect to receive as a citizen, that it is understood and accepted as being the norm and becomes the responsibility of those in power to determine who gets away with what level of impunity (pp. 207-212). In other words, the total disconnection of those who govern and those who are governed, i.e. the people who in principle are

meant to be the source of their power, but in the present context are of no consequence whatsoever.

Marginalized women include women from indigenous communities, Dalit, minorities, and other marginalized groups. Their human rights include civil and political rights, economic social and cultural rights, and collective rights. The recognition of these rights requires an intersectional approach which does not have to occur in reverse order from security and stability. Focusing on South Asia, the status and progress of these rights varies from country to country. For example, legal and institutional reform is more progressive in India & Nepal, but good legislation does not tend to transfer into practice. Issues of impunity for violence against women is of the most serious concern in Afghanistan, Bangladesh, and Pakistan. Moving forward, the governments of these countries must intervene to legalize protections for marginalized women and to combat government impunity. NHRI's also have a role in monitoring governments and holding them accountable. Most importantly, women and indigenous peoples should continue voicing their views and fighting for their rights with the support of NGOs and CSOs, the press and media, and UN organs and agencies.

Indigenous women in South Asia have been subjected to discrimination, exclusion, marginalization, violence and disempowerment, both historically and today as well. Their individual rights as humans, and their collective rights as members of indigenous peoples have been violated, and exacerbated by their status vis-à-vis their ethnicity, gender and class. Attempts to deter and prevent such occurrences, punish their perpetrators, compensate and rehabilitate the victims, and empower them, equally with men, calls for an intersectionality analysis. Such an analysis must look at the historical

legacies, along with current dynamics, to understand the extent and nature of marginality and vulnerability of indigenous women, and likewise, to look at the factors that perpetuate it, including the perspectives, acts and omissions of important factors, such as the state (in its different constituents), patriarchal elements in society (including women), politics and economics. In the process, factors that support impunity of perpetrators of human rights violations from being brought to justice and otherwise prevented from such acts and omissions, will also be addressed. In the same line, Raja Devasish's paper (pp.237-277) focuses on three aspects of indigenous women's human rights: (a) empowerment; (b) discrimination in family and personal laws; and (c) violence against women. All of the three are co-related, and remedial measures are required to understand their intersections. Along with indigenous women's rights, his study also looks at the "larger picture" of the state of women's empowerment and disempowerment, marginalization, and violence against them, in some, if not all of the countries of the study: Afghanistan, Bangladesh, India, Nepal and Pakistan.

Focusing on the issue raised by indigenous communities of Nepal, much of the discrimination originated from the existence of a single national identity prior to 1991. The power of this dominant culture and discrimination against indigenous peoples has not been remedied by the new constitution, but rather exacerbated as it fails to recognize collective rights, offers no interpretation of indigenous peoples, and does not fully realize indigenous people's access to justice. NHRC Nepal has done a commendable job at responding to the issues of indigenous peoples, but there is more work to be done in order to remedy the complex problems attached to the issues of indigenous people. Moving forward, there should be meaningful consultation with indigenous peoples and the consent should be recognized as enumerated by ILO Convention 169 and UNDRIP.

## Migration and Livelihood

Categorizing migration into two parts, namely, legal and illegal migration. The latter form poses numerous problems for migrants caught in a “no man’s land,” which renders them susceptible to criminalization. It also places women and children at a distinct risk of being trafficked. Thus, there should be a common standard operating procedure to deal with these migrants who need access to human rights protections under the law. Meanwhile, countries that are experiencing mass exoduses should uncover why their citizens are moving. Failure to do so could itself be deliberate abuse. The problem starts from the point at which a migrant worker arrives in a foreign airport, and continues through to when they return home. It’s true that there are problems with the recruitment process – there is still a need to have a fair recruitment process. There are also many lapses in the law. The NHRC Nepal is currently conducting research in partnership with the relevant Ministries, and with the families of migrant workers. And if a regional mechanism is established, Nepal should collaborate within a South Asian mechanism to ensure that the rights of migrant workers, within and beyond this region, are all upheld.

While it is important to recognize the plight of Nepali women migrants, such as mental health and their susceptibility to violence, it is also important to challenge the patriarchal discourse and legislation surrounding their protection. Women who are migrating are actually challenging patriarchal attitudes by exercising their autonomy. Laws protecting these women should not fall under the guise of “honor”, but should be based on their *rights*, distinctly separate from any discriminatory values. The rights of women “left behind” by migrating husbands must also be accounted for, as these women are notably vulnerable to domestic and sexual violence. To protect the rights of women, NHRIs must reach out and collaborate and cooperate with civil society in a clearly inclusive manner. NHRIs have a role in

protecting women migrant workers and in combating the prevailing patriarchal norms in this protection. However, in order to do this, NHRIs must act proactively, not just reactively.

Going abroad is no longer a compulsion in Nepal, but also a matter of culture. There is a hidden pressure and desire to go abroad. But, semi-literate and unskilled people are going abroad. A majority of Dalit workers are going to India. This is because of access/ease, and of politically and ethically marginalized groups consistently being compelled to find work abroad, as well. In terms of age group, more than 70% are youth. Youth bulge could be an opportunity for economic enhancement if it was to be properly utilized. 90% of young people in Nepal are working in the informal sector – or more specifically, about 80% of men, and 90% of women. We can see that both those going abroad as well as in Nepal, are facing challenges – without care, and without proper social security services. According to the Nepal government, the majority of those going abroad are less educated, and are unskilled. We need to understand that the migrant workers are saving the country from financial collapse, however, comes at a certain cost. There is an increasing number of individuals being trafficked to and through Africa and the Middle East, as well as those using informal/irregular channels to get to countries like the US.

There are three main categories of work that migrant workers are falling into: dirty, demeaning, and dangerous. If one person from every four is going abroad, if more than 90% of young people entering the labour market are going abroad, and more than 75% are entering unskilled labour, shouldn't this be the core of our national agenda? Unfortunately, No. Instead, we see a national discussion around issues like a bullet train – which is completely out of touch with real needs. We need to approach this in a more technical, and political, way. One issue? Political enfranchisement of migrant population – a matter that the Supreme Court has recently referred to relevant agencies. So who

is participating in the discussions being hosted around migrant workers and marginalized peoples, between which there is a significant overlap? Are we actually trying to provide a space for voices of those who aren't represented? This is what we should be doing, not just representing those who are called "voiceless", with our own voices. The time to act is now, before the number rises beyond the present.

While migration is increasingly being understood as a human rights issue, efforts to realize migrant rights have been historically uneven. There was a glimmer of hope when the issue was brought before the UN through the creation of the Global Compact for Migration. However, the negotiation phase of this Global Compact is slowly being stifled by populist and xenophobic practices introduced by some member states. This is unfortunate considering mounting abuses faced by migrant populations, many of whom are immediately thrust into a spiral of exploitation the moment they approach recruiters, or enter their country of destination. There needs to be firewalls established to combat this exploitation so that migrant workers can have the confidence to reach out to authorities without the fear that doing so will mark them as irregular, thereby excluding them from the protections of human rights law. NHRIs have a role in ensuring that migrant workers receive human rights protections. Namely, NHRIs should research collaboratively on issues of human rights and migrants, address issues of corruption, explore bilateral agreements in countries of origin, and work to raise the levels of consular services. A regional mechanism for migrant workers should also be considered. In his paper, "Role of Human Rights Institutions in Migrant Rights Advocacy," (pp. 225-236) William Gois discusses how the policy space of migrant rights and human rights overlap each other as well as the prominent role of National Human Rights Institutions in advocacy. It also discusses the possible ways NHRIs can build capacity, especially in migrant rights advocacy through collaborative strategies keeping in

mind their various roles and responsibilities in different countries. His paper attempts to outline the various challenges NHRIs face in countries of origin and the questions of accountability to be asked to governing bodies when dealing with migrant rights. His paper argues for multi-level engagement of NHRIs in the migration process and the increasing need for active participation in the face of increasing authoritarian sentiment in regimes. In recent years, migrant rights has gained traction as an essential area of intervention and topic of research. It has become necessary to study it as a phenomenon that pertains to human rights in general. The policy space of migration involves stakeholders of different power-interest groupings, which opens up a wide arena for institutions that are primarily independent in authority while catering to public interests. National Human Rights Institutions (NHRIs) in both origin and destination countries for migrants, play a major role in empowering civil society while holding the government accountable for its priorities.

### **Challenges to Human Rights Promotion**

NHRIs are well placed to understand the source of conflict, identify the needs of vulnerable groups and to advise the government on SDG 16 on Peace and Access to Justice for All. However, in order to be most effective, NHRIs should be fully independent and have the ability to evaluate the past in post-conflict situations. During times of conflicts, they should also be creative and flexible. Despite the huge responsibilities, NHRIs face several challenges, such as over-stretched resources and unresponsive governments. The APF supports NHRIs in the Asia-Pacific region in addressing its challenges and promoting their effective work (Annex-VIII).

There are major challenges being faced by NHRIs, including corruption and the issue of impunity. Impunity is particularly a difficult issue because it is an issue of authority. No matter how strong

civil society or NHRIs are, it is impossible to get rid of impunity without the exercise of political power. Thus, impunity is primarily a state responsibility, so when we rely too much on civil society organizations and NHRIs, we are misplacing our emphasis. At the constitutional level, it has been assured that states are active in the fight against impunity, but unfortunately there are no institutions in place to make this a reality. Political issues undermine efforts to combat impunity and, by extension, the work of NHRIs. It's an appropriate time for NHRIs and human rights advocates to engage in self-reflection and move beyond the rigid framework of existing human rights infrastructures. In the Nepali context, limits to the understanding of human rights are exacerbated by the domination of exclusive and majoritarian politics, the toothless character of the transitional justice commissions, the failure to understand the complex classifications of violence, and the need to disentangle existing social power relations so to move beyond the middle-class imaginary. The NHRC has the potential to own the peace process and exercise its mandates if it takes the lead in working with various marginalized communities and if it challenges the rigid boundaries of existing human rights infrastructures in the country.

The key domestic stakeholders who should hold their governments accountable are NHRIs, civil society and parliaments. Internationally, efforts to enforcement and implementation are notably weak as UN mechanisms are unduly occupied with panel debates, an expansion of human rights mechanisms and resolutions, and an increasingly politicized Human Rights Council all the while facing gross underfunding within the UN budget. The renewed stamina of the “implementation agenda” offers a particular platform for NHRIs to adopt a national mechanism of implementation, reporting and follow-up and related software. Hopefully this will push states to translate the wealth of NHRI recommendations

into concrete policies. In his paper (pp. 213-223) Marc Limon highlights three principal areas: (1) The UN Human Rights Council's mandate and prerogatives relating to human rights accountability and compliance by member states, and whether this mandate is being fulfilled; (2) Domestic implementation of universal human rights norms; and (3) Prevention of human rights violations.

### **TRCs and Impunity**

There is no single process, or recipe, for setting up a commission, or for achieving reconciliation. For instance, for over 40 years, Sri Lanka faced painful processes of conflict and violence. Our societies need to heal through justice, and at the end of the day, a political process that ensures a better and more inclusive future, where everyone has access to human rights protections. An inclusive process whereby people feel ownership of the process -- with constant reporting, consultation, and the ability to monitor the process should be emphasized. Constructive partnerships that are not only about Commissions working independently, but in collaboration should be prioritised. The lesson may be in part not to start anything at midnight, but also more importantly, to have very sound legislation in establishing the legislation that sets up constitutional bodies. Looking at Sri Lanka, it's evident that there is a need of a very clear process. And when you try to translate "transitional justice" into local languages, you end up with tongue twisters. So, it's important to unpack these terms, and to explain them that these are processes that will take care of their needs, and address the harms committed against them. This challenge is especially acute in a context like that of Sri Lanka, where there was not a clear transitional process but a single victor.

Restating that the rule of law signifies all individuals (including women, children and minority groups and marginalized communities) are protected by the justice system equally and without discrimination, there have been some serious questions of credibility raised about

truth commissions. We must address these, otherwise the creation of these commissions will have no meaning. Suffering of victims must be at the heart of these commission. The commissions are not meant to go in for individual investigations or individual rights. They speak generally of people who have been wronged. There are currently 60,000 petitions pending in TRC of Nepal, which presents a huge challenge. The state must cooperate earnestly. Because if the commitment is to ensuring that wrongs are not repeated, then the state must be committed to telling the truth. But what is the advantage to security officials, to the government, of speaking the truth - when they may be found culpable? It shows why the work of a commission is especially difficult. A shared goal of avoiding the future repetitions of conflict should empower everyone to come forward with the truth, facilitated by processes and resources from the state.

Still, let's underline the works that are being done to make the truth commissions in Nepal more effective. The Attorney General's Office understands that prosecution is integral to truth and reconciliation efforts and is anticipated to actively address the most serious human rights violations, which include extrajudicial killings, enforced disappearances, torture and rape and other offenses. In an effort to ensure these prosecutions come to fruition, the office has engaged in discussions with the government about obtaining necessary resources and personnel for the commissions and is expected to continue working with the NHRC to implement its recommendations. Nonetheless, holistic reforms are needed for the Commissions and the Attorney General to fully support the transitional justice process, and international supports and collaborations in this regard are most welcome. In the meantime, the Attorney General's office is open for all those who have concerns about the progress of transitional justice in Nepal.

Truth and Reconciliation Commission has faced numerous challenges since its creation under a controversial governmental act, which fueled distrust and hostility in the country. While the commission has been able to enter most districts and speak with victims, it currently faces the challenging task of investigating 63,000 cases. These cases cannot be forgotten, meaning there must be a holistic approach taken to reform the transitional justice system in Nepal.

To further list out the challenges faced by the commission itself, there is no law criminalizing the act of enforced disappearances during armed conflict. The current provision for reparation requires amendment to be effective, and a special court is yet to be established. In regards to resources, the Commission is woefully underfunded, contributing to its lack of personnel and expert equipment. The government has begun to address these problems, but there needs to be a significant increase in political will and support if the Commission is to fulfil its mandate and combat impunity. Reflecting on updates, challenges and issues centered on truth and reconciliation in Nepal, victims have been waiting for past 20 years for justice and reparation and want to move ahead to realize peace. In order to move ahead, the commissions must be able to answer to victims as to why they have been unable to deliver under their mandates and investigate violations. In light of these failures, victims demand that they are consulted in the work of the commissions and that they are given real ownership in the transitional justice process. The current working modality of the commission is clearly not working. If it continues in the same way, it will continue to be dysfunctional, denying victims their right to truth.

Nepal Government formed Truth and Reconciliation Commission (TRC) and Commission of Investigation on Enforced Disappeared

Persons (CIEDP)<sup>6</sup> in 2015 in political consensus and with discretionary power of reconciliation under the Act, ignoring the Supreme Court verdicts. UN, national and international human rights communities did not engage with commissions citing the faulty Act, while Conflict Victims Common Platform (CVCP) adopted a 'critical engagement' approach, playing the role of watchdog. CVCP monitored their works and demanded to adopt victim-centric approach, ensuring the trust while formulating policies, procedures and structures so that victims feel their ownership.

In 3 years, CIEDP<sup>7</sup> collected 3,093 complaints, formed 8 investigation teams, completed preliminary investigation, identified 2,302 disappeared persons, and has claimed of filling up ante-mortem and reparation forms, carrying out detail investigation. TRC registered 62,878 complaints, established 7 provincial offices with 7 investigation teams, carried out preliminary investigation of 1,300 complaints<sup>8</sup> and is discussing on reparation. Their process is criticized on following criminal investigation process, without adequate training to staff, lack of psychosocial counselling and healing the trauma of victims. Commission has done nothing on exhumation, public hearing, reconciliation, and to combat root causes of conflict and mitigation measures. The commissions have not revealed truths of a single case nor made any recommendation.

Interim relief/financial support by the government along with limited skill, training and psychosocial counselling programs to victims fulfilled immediate needs to some extent, but aren't supportive for long term livelihood. Victims of torture, rape and sexual violence are not recognized as victims.

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6 As mentioned in Comprehensive Peace Agreement(CPA) 2006

7 Interim Report of CIEDP, 2018

8 Press releases of TRC Feb, 2018

TRC and CIEDP are not credible. They lack will power, independence, resources, expertise and foundation of laws. Commissions are not able to utilize available mandate, resources, collaborate with stakeholders and manage special provisions for Victims of Conflict Related Sexual Violence (CRSV), senior citizens, women and children. Torture and enforced disappearance are not criminalized. Transitional justice has never been a priority to government and political parties, while the interests of civil society, media, and international community are fading. Transitional justice programs are focused on advocacy, but not on capacity building and economic empowerment of victims. Hence, the victims are frustrated with no trace of justice and degraded socio-economic status, security, and protection. There is no collaboration among National Human Rights Commission (NHRC), TRC, CIEDP, victims, and human rights groups. Supreme Court verdicts and NHRC recommendations on relief/compensation are partially implemented but there is no action on criminal investigations and prosecutions. Alleged persons are awarded with election candidates or appointed/promoted in public positions like security forces.

### **Burning Issues in Nepal**

- a) **Amendment:** Conflict victims and human rights groups are pressing the Government to amend TRC/CIEDP Act in line with Supreme Court Directives, that included clarity and no amnesty in serious crimes/human rights violations, reconciliation with informed consent of victims, jurisdiction on cases sub-judice at courts, statute of limitation in grave violations, and Special Court provisions and reparation as rights of victims. Similarly, criminalization of disappearance and torture, mechanisms to protect victims and witnesses, archiving, vetting, institutional reform, and non-recurrence are the equally crucial issues that have been raised.

- b) *Credibility and Collaboration:*** Stakeholders have been demanding ownership, impartial process, independence, trustworthy, adaption of victim-centric provisions, and competent commissions; and allocating essential budget, human resources and experts to fulfill their tasks.
- c) *Relief and Reparation:*** TRC Act and Regulations define reparation as concession and facilities<sup>9</sup> focusing on limited financial compensation. CVCP has been demanding to amend the Act and Regulation defining reparation from rights perspective and formulate long term Comprehensive Reparation Policy on free education, health care, employment, livelihood, social security, skill training, memory, psychosocial counselling etc. in collaboration of concerned state agencies from national, provincial and local level.

Individual and collective victims are not at peace as the government continues to fail in addressing the root causes of the conflicts where people's rights were systematically violated. This is partly the fault of deep flaws within the two commissions established to bring about truth and reconciliation. These commissions were created without the consultation of victims and suffer from a weak mandate, as well as a lack of accountability due to political interference. Moving forward, the transitional justice process should be localized and take a victim-centered approach. For this to be possible, the root causes of the exclusion and isolation of victims need to be identified and addressed to bring an end to violence and hate crimes based on caste, religion, ethnicity, political affiliation, regional origin and gender. Still, in the process of reforming the transitional justice process in Nepal, the creation and design of the commissions need to be critically evaluated, namely the establishment

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9 Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014, TRC Regulation, CIEDP Regulation, 2016

of two commissions, their limited mandates, and their misallocation of resources should be questioned. The lessons from these failed commissions can help Nepal move forward. Truth commissions should fully understand their mandates and that they embody a process rather than an outcome. Finally, it is clear that empowering law is necessary for a truth commission to complete its work. In Nepali context, this includes amending the TRC Act to limit amnesty powers. However, fixing the law will not solve all the problems of transitional justice. There needs to be a massive shift in political will. Truth commissions, in many jurisdictions, have been set up to establish an accurate account of incidents of human rights violations with the aim of preventing a recurrence of such violence. Hence, these mechanisms are expected to contribute to end impunity, facilitate the justice process, design reparation programs and contribute to the reconciliation. The first truth commission, known as the ‘National Commission on the Disappeared,’ was established in Argentina in 1983. Later, it was exercised in Africa, Asia and Latin America. So far, there have been more than 100 truth seeking process globally<sup>10</sup>, however, experience from across the globe suggests that it has had a mixed success at achieving these goals. South Asian countries also have a long history of setting up commissions of inquiry for any matter of public concern. Many such commissions have been established in Sri Lanka, Pakistan, India, Bangladesh and Nepal in order to investigate into the facts and circumstances surrounding violent incidents, and to provide recommendations. However, these commissions, particularly in Nepal, often seem to have largely promoted impunity by diverting investigation of human rights violations and crime through the criminal justice

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10 Jeremy J. Sarkin, Prof and David Tetevi (2017) *The Togolese Truth, Justice, and Reconciliation Commission, Lessons for Transitional Justice Process Elsewhere*, *Peace and Conflict Studies*, Vol.24 No.1. Article 2 available at : <https://nsuworks.nova.edu/pcs/vol24/iss1/2/> ( accessed on 3 April 2018)

process<sup>11</sup>. Thus, it is best to ensure the full participation of victims' groups, civil society and NHRIs in any transitional justice process through a consultative and transparent engagement from the start.

## **Role of Truth Commission**

The role of the truth commission varies depending on the context and political interest of a particular country. However, almost all of the truth commissions have given the mandate to gather fact and information as much as possible<sup>12</sup>. Looking into the comparative practices and international standards the key role of the truth and reconciliation commissions can be traced as follows:

- a) to clarify and officially acknowledge the truth by conducting an official inquiry into the facts of the conflict and establish a record of past abuses;
- b) to pave the way for justice by creating records to serve as a foundation for criminal prosecutions or other judicial proceedings;
- c) to formulate reparation policy or schemes to victims;
- d) to formulate recommendations for institutional reforms; and
- e) to create an environment for reconciliation.

## **Truth Commission in Nepal**

The idea of a establishing truth commission came into play during the peace negotiation. By signing on the Comprehensive Peace Agreement

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11 Commission of Inquiry in Nepal: Denying remedy Entrenching Impunity (2012), ICJ, available at : [http://nepalconflictreport.ohchr.org/files/docs/2012-06-00\\_report\\_icj\\_eng.pdf](http://nepalconflictreport.ohchr.org/files/docs/2012-06-00_report_icj_eng.pdf) ( accessed on 3 April 2018)

12 Bkiner, O. (2013) Truth Commission Impact, an assessment of how commissions influence politics and society, *International Journal of transitional Justice*, 8(1)6-30.

(CPA), the then Communist Party of Nepal - Maoist and the Government of Nepal expressed their commitment for seeking truth, obtaining justice and ensuring remedy and reparation for the victims of human rights violation of a decade long armed conflict. For this, they agreed to the establishment of a high-level Truth and Reconciliation Commission (TRC) in order to investigate about those involved in “serious” violations of human rights and crimes against humanity during the conflict<sup>13</sup>. On 10 February 2015, a TRC and a Commission on Investigation of Disappeared Persons (CoIDP) were created. The TRC has been charged with investigating human rights violations that were committed during the armed conflict and the CoIDP has been charged to investigate the incidents of disappearance.

Both commissions are mandated to:<sup>14</sup>

- bring the real facts before the public by investigating and documenting the truth relating to the incidents of serious violation of human rights;
- Identify the victims and perpetrators;
- facilitate reconciliation between the perpetrator and the victim and make reconciliation;
- recommend reparations to be provided to the victims and their family;
- recommend actions against those perpetrators who are not included in amnesty and reconciliation;
- provide prescribed identity card to the victims.

The Nepalese TRC looks quite similar to South Africa’s Truth and Reconciliation Commission which was created to investigate gross

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13 Article 5.2.5 of the CPA

14 Section 13 of the TRC Act

human rights violations that were perpetrated during the period of the Apartheid regime from 1960 to 1994, including abductions, killings, and torture. The South African TRC aimed both at inter-personal reconciliation between former offenders and survivors as well as national unity between former political opponents. However, TRC in Nepal is more focused on mediation between the victim and perpetrator rather than reconciliation, as it is understood in South African context. The South African model was “tell the truth and be forgiven”. The TRC Act had similar provision<sup>15</sup> under Section 26, but the Supreme Court struck down this provision,<sup>16</sup> thereby removing the power to grant amnesties for serious crimes by the commissions. Nevertheless, the Supreme Court allowed the Commissions to mediate cases upon application by either the victim or the perpetrator on “lesser” violations with the informed and involuntary consent of the victims. The idea of amnesty emerged in the Christian context where the culture of confession has had to play a principle role. But the Hindu/ Nepali culture demands justice - if not revenge. This cultural dimension may play significantly role on the work of the commissions, which does not seem to have been properly explored while designing the truth commission in Nepal. Nepal has had a long history of failed commission of inquiry. About 40 commission inquiries have been set up after 1990, which largely remained ineffective because of political manipulation. Therefore, there is enough reason to suspect that the TRC and CoIDP would serve the political interest rather than seeking the truth, providing reparation to the victim, design and implement the reparation programs. Further, these commissions do not enjoy the desired degree of trust because of the lack of credible and transparent nomination process, failure of the Government to amend the TRC Act as required by the Supreme Court directives and absence of

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15 Section 22 of the TRC Act empowers the Commissions to mediate between victim and perpetrator

16 Suman Adhikari et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2016, Issue 6, Decision no 9612.

political will within the commission to address the past human rights violation. This has significantly impacted the work of the commission. Consequently, the commissions have done nothing than collecting the complaints from victim until their 3 years of the terms of office.<sup>17</sup>

## **Challenges of the Truth Commissions**

### **Trust Deficit**

The victims, civil society and transitional justice expert view that these commissions are not independent as the members of the commissions were selected with out proper consultation and in a non-transparent manner. There is also an allegation that they have been appointed on the basis of their political affiliations with powerful leaders of the major political parties, which may have adverse impact to the victims' right to truth, justice and reparation.

On the other hand, the security agencies and former combatants seem to be reluctant to engage with these Commissions, as they do not have amnesty power. Without amnesty power, they think that, it will be suicidal to give a detailed account of the atrocities, which may have been involved or witnessed. The lack of trust from both sides may have adverse impact on truth seeking process.

### **Legal Gaps**

The Supreme Court ruling requires the amendment on TRC Act as it has curtailed the amnesty powers of the Commission<sup>18</sup>. However, even after the 3 years of the judgment, no efforts are made in order to amend the TRC Act. Apart from the amendment to the TRC Act, there have

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17 Both the Commission have collected around 63,000 complaints of human rights violations and incidents of enforced disappearance.

18 Suman Adhikari et al v. Prime Minister and Council of Ministers, Nepal Law Journal 2016, Issue 6, Decision no 9612.

been calls right from the beginning, of the need for the enactment of new laws and amending some existing laws to make the Commissions more effective as well as to provide justice to the conflict victims. Both the Commissions have also mentioned about the need to enact legislation in order to make the Commissions functional and effective in their interim reports. This includes the laws on criminalization of torture and enforce disappearance. In the absence these laws, recommendation for prosecution by the Commissions will have no practical impact.

### **Lack of Resources and Capacity**

The Commissions are entirely dependent on the Government of Nepal for the resources. Section 11 of the Act makes the provision for the Peace Ministry to provide necessary staff and resources for the Commissions. This restricts commission to hire staff by themselves. Both commissions are under staffed. Further, the current staffs significantly lack the required expertise and specialties. This may impact the effectiveness of the truth and reconciliation process.

### **Weak Secretariat**

The effectiveness of transitional justice process depends more on the work of effectiveness of the Secretariat. The Secretariat should have adequate and trained staff, experienced and effective advisors, along with technical and administrative experts. Apart from this there is also the need of independent legal advisors along with experienced and impartial investigators, physicians, experts of forensic science, psychologists, sociologists and anthropologists. However both commission have been operating with very weak Secretariat.

### **Coordination and Cooperation**

Both Commissions lack cooperation and coordination with other stakeholder and concerned authorities. The records and evidences of the major incidents occurred during the armed conflict are in possession

of the NHRC and other agencies or organizations, but due to lack of clear provision or policies about the cooperation and coordination, these agencies seems hesitant to provide the evidence. Moreover, there also the lack of coordination between these two commissions themselves.

### **Misunderstood Reconciliation**

Nepal's leaders have repeatedly stated that the purpose of the transitional justice process is to achieve reconciliation.<sup>19</sup> However, there remains a huge misunderstanding about the meaning and scope of reconciliation. The preamble of the TRC Act states the truth seeking process is to facilitate reconciliation by establishing the truth, providing reparations and justice to victim. However, the substantive and procedural part of the law does not reflect the spirit of the preamble, limiting the objective of the reconciliation to the individual mediation. The term used under Section 22 of the TRC Act has unjustly narrowed the scope of reconciliation by limiting it to mediation between the individual victim and perpetrator.

Similarly, it was observed that there was the debate of Amnesty vs. Prosecution. The then conflicting parties are largely advocating for the amnesty for past incidents whereas victims and their family are advocating for the prosecution. Hence, the Amnesty vs. Prosecution debate is also major challenge of the Commissions. The Nepali transitional justice process is currently at a complex but decisive point. In later days, victims and other stakeholders have moved down from the boycott approach to a 'critical engagement approach' - though not

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19 The drafter of the Bill Pardeep Gyawali and Ramesh Lekhak said in an interview with Kathmandu post that the central issue of the TRC law was reconciliation. For details see Please see <http://kathmandupost.ekantipur.com/news/2014-04-14/the-purpose-of-the-trc-is-reconciliation-in-society.html> Last accessed on April 4, 18.

IDEA hand book p.13

clearly defined what exactly it means. Similarly the Maoists and allied forces now seem to have realized that amnesty for serious violations of human rights is not acceptable. Therefore, they in principle agree to resolve this “on the basis of transitional justice principles” through the creation of a Special Court. Similarly, the international community including the United Nations which had adopted the “wait and see” approach for a long time, are afraid of being seen as obstacles to this process. But unless certain minimum standard of transitional justice is reached it is certain that this process cannot gain participation and contribution of stakeholders including international community.

The creation of the two truth commissions in Nepal was a deeply problematic process in which political actors undermined the voices of civil society by passing a flawed act at midnight. This act had several troublesome provisions, including one that allows the commission to recommend amnesty, even for those involved in gross violations of human rights. The government went ahead with the creation of commissions despite opposition by the international community, victims, and civil society, leading to a deep sense of betrayal. The Act is finally being reviewed and this will hopefully remedy the mistakes of the past. In this review, there are two major concerns that deserve close attention: the protection of victims and the assurance of fair trial standards. Most importantly, reforms must take a holistic approach to transitional justice, including holistic thinking and planning.

The primary objectives of truth commissions are: to tackle the very difficult questions of *why* the conflict and atrocities occurred; to evaluate a country’s past in order to ensure non-repetition and institutional reform in the future; and to respond to the needs and interests of those most affected by the past violence. In fulfilling their mandates, it is important that truth commissions are guided by the

principles of independence and consultation, both of which strengthen the legitimacy of the transitional justice process. Truth commissions may also consider adopting the following best practices: taking in-depth statements from victims in a respectful manner, engaging in public hearings, undertaking thematic research about the root causes of conflict, and including recommendations about next steps in their final reports. It is important for truth commissions to look beyond individual cases, and instead focus on key representative cases to help create global view conclusions. Finally, when these commissions struggle in balancing truth and reconciliation, they should remember that it is always pertinent to emphasize the truth and not to undermine it.

# Human Rights as an Instrument of Social Cohesion in South Asia

-Sev Ozdowski-

## 1. The Concept of Human Rights

People differ in their understanding of where human rights have come from. Some of us point to religious origins, others to '*natural law*' as a source, and some see them simply as hard-won concessions from the State.

Looking back at the history of Western civilisation, one could conclude that human rights, particularly in respect of the 'individual' rights, are not a recent invention. In fact, ideas about individual human rights can be traced back thousands of years. Key milestones include:

- values developed by ancient civilizations and the teachings of the world's major religions;
- Ideas about justice, democracy and the individual citizen were very important in Greek and Roman societies;
- The *Magna Carta* (1215);
- The American *Declaration of Independence* (1776);
- The American *Bill of Rights* (1791);
- The French *Declaration of the Rights of Man and the Citizen* (1789);

- Thomas Paine's (1791) '*The Rights of Man*';
- The *Geneva Conventions* (1864) governing the lawful treatment of civilians and enemy soldiers in war time or so-called humanitarian law.

The genesis of the contemporary international human rights protection system is firmly rooted in the human rights abuses of WWII in which tens of millions died across the world. Particularly abhorrent was the Nazi holocaust and the concentration camps which were, to put it simply, industrial slaughter houses for the efficient killing of human beings. The human rights violations of imperial Japanese forces during WWII provide another example.

After WWII, the general feeling amongst the victorious coalition was 'never ever again' – let us build a new world order that would prevent all these atrocities from happening ever again. It was asserted that human rights were no longer just the private business of individual nations but were a matter of international concern.

The world-wide protection of human rights became one of the key responsibilities of The United Nations (UN) when it was established in October 1945. The United Nations Charter '*reaffirmed faith in fundamental human rights, and dignity and worth of the human person*' and committed all member states to promote '*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*'. It also proclaimed that: '*inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*' (United Nations, 1945).

In February 1947, the UN Commission on Human Rights was tasked to create an '*international bill of rights*' to apply to every human being regardless of such characteristics as sex, race and religion.

## **2. International Human Rights Standards**

### **2.1 The Universal Declaration of Human Rights**

This year on 10<sup>th</sup> December we will celebrate the 70th anniversary of the adoption by the United Nations (UN) General Assembly of the Universal Declaration of Human Rights (UDHR).

Reaching to agreement on the contents of the document was not easy. Member states voted more than 1,400 times on practically every word and clause of the text. The Soviet Union would not accept the inclusion of freedom of expression and other civil liberties; some Islamic states objected to the articles on equal marriage rights and on the right to change religious belief; and several Western countries criticised the commitment to economic, social and cultural rights seeing them as introduction of socialism by stealth. But the final vote on 10 December 1948 was 48 in favour, with 8 abstentions, for adoption of the Universal Declaration. In favour votes included Asian nations such as Afghanistan, Burma, India, the Philippines and Siam (as Thailand was then called).

The Declaration was a visionary document; a triumph of hope and optimism. It was the first global statement of universal human rights standards; of what we now take for granted – the inherent dignity and equality of all human beings. Article 1 proclaimed that *'All human beings are born free and equal in dignity and rights'* (United Nations, 1948).

This principle of universality of human rights is now the cornerstone of international human rights law. The principle simply asserts that the basic values and principles underlying the concept of human rights are universal across all humanity.

The 30 articles of the UDHR set out in unprecedented detail the standards of dignity, respect and justice to which everyone is entitled,

simply because they are human. The Declaration focuses on individual rights ('Everyone has the right...', 'Every human being...') and lists such fundamental rights as:

- the right to life;
- freedom from slavery;
- freedom from torture and arbitrary arrest;
- freedom of thought, opinion and religion;
- the right to a fair trial and equality before the law;
- the right to work and education; and
- the right to participate in the social, political and cultural life of one's country.

Although the Declaration is not binding on states, its key importance is that it provides a generally-recognised common standard of achievement for all people and nations and for the states that represent them. In fact, this Universal Declaration continues to be one of the most important documents of the 20<sup>th</sup> century. It has become the inspiration for a global movement and it sets the benchmark for the whole world to attain and against which we can all be judged.

## **2.2 Development of International Human Rights Standards**

Over the past 70 years, a great number of conventions, treaties and declarations have been adopted by the United Nations General Assembly and by other international institutions like the International Labor Organization to create the body of international human rights law. Such laws created universal human rights standards dealing with:

- civil and political rights,
- genocide,
- economic, social and cultural rights, and
- rights of particular groups such as women, children, indigenous people, people with disabilities, refugees and others.

The principle of universality of human rights with its emphasis on individual rights was reiterated in each of the above international human rights instruments.

These internationally-recognized secular standards established an internationally-agreed, minimum standard of decent behaviour for member states. These standards define limits of government power, entrench dignity and empower individuals. They determine working relationships between individuals and their governments, and between different groups of people. They describe civil liberties and freedoms, economic rights and prohibit discrimination.

International human rights instruments are subject to adoption and ratification by individual states. Upon ratification of relevant human rights instruments, the state, not its citizens, is responsible in international law for observance of its human rights obligations. It is further expected, that upon ratification of a human rights instrument, the ratifying state will incorporate the relevant provisions into its domestic statutes.

There have always been variations between states in both, which human rights treaties they ratified, and how those treaties were incorporated into their domestic law system. Such variations often reflected political objectives of individual states or, at occasions, local cultures and economies. For example, the former Soviet bloc emphasised economic rights and neglected civil and political rights. At several occasions, individual states have hidden behind specific cultural attributes to effectively undermine the universality of human rights; for example, provisions dealing with equality between the sexes was sometimes seen as undermining local culture.

The post-Cold War Vienna World Conference on Human Rights of 25 June 1993 reaffirmed the universality of human rights and made

regional particularities (e.g. Asian or African Values) subservient to universal standards. Article 1 in Part I of the Vienna Declaration and Programme of Action adopted at this conference declared that *'The universal nature of these rights and freedoms is beyond question'*, and Article 5 that *'All human rights are universal, indivisible and interdependent and interrelated'* (OHCHR, 1993).

The Vienna statement put an end to the debate between the former Soviet and Western block states about the relative importance of civil liberties and political rights versus economic and social rights. The Declaration also proclaimed that it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The Vienna Declaration also rejected the radical cultural relativism doctrine which holds that culture, and not international law, *'is the sole source of the validity of a moral right or rule'* (Donnelly, 1984), and it did not go as far as accepting the view that there are 'Asian', 'African' or 'Islamic' human rights which take precedence over the principle of universality.<sup>20</sup>

However, Article 5, Part I, of the Vienna Declaration acknowledged that the universality of human rights must be seen in the context of *'the significance of national and regional particularities and various historical, cultural and religious backgrounds'*.<sup>21</sup> Thus a concession has been made that some cultural relativism may be justified in some circumstances.

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20 For a good discussion of the concepts of cultural relativism and universality of human rights see: Donnelly (1984).

21 There are also authors who argue that human rights are not universal in their nature. For example, some suggest that human rights serve to advance western domination (Douzinas, 2000; Hopgood, 2013). Others insist that, for human rights to apply in Islamic societies, Sharia law must also be reflected.

More recently, the '*Asian values*' approach to the understanding of human rights has gained some ground. This approach argues that human rights are not necessarily a universal standard but may vary from country to country. A special case is advanced for Asian countries, some of which claim that individual states may define rights to suit their specific cultural needs and historical context. What follows is that human rights are seen as a sovereign state issue and as such are not subject to interference from foreign states or international organisations. This approach, alongside a policy of '*non-intervention*' in the affairs of member states, has often been criticised as being toothless in addressing individual human rights abuses and egregious legal breaches by governments.

There can be quite a significant disconnect in the relationship between international human rights standards and in the everyday cultural and social norms in South and South-East Asia, especially when focusing on such elements of human rights standards as the status of women and such civil liberties as freedom of expression and from corruption. But this disconnect is arguably emphasised when the state can be simultaneously positioned as upholder, abuser and arbiter of international human rights standards.

The discussion about the relative importance of civil liberties and economic rights continues at the UN Human Rights Council and in other fora. For example, on 23 March 2018, the UN HRC adopted a China-sponsored (and supported by Nepal, Pakistan and others, but opposed by the USA with 17 other countries abstaining) resolution titled '*Promoting mutually beneficial cooperation in the field of human rights*' (HRC, 2018A).

Although the resolution may advance economic, social and cultural rights, several human rights experts as well as Western officials have argued that the resolution has a state-centric approach which enhances privileges of the sovereign state over those of people and communities,

and that it seeks to downplay Council's accountability for individual rights violations and justice for victims, and even entrench impunity for human rights violations (Kothari M., 2018). The resolution was also described as a tool to reshape international rights to make the world a safer place for autocrats. China's support of '*peace and security and development*' is not new – China has also previously asserted that the right to development is to be understood as the right to development for and by states, not for people and communities.

### **2.3 South Asia as Part of International Human Rights Law**

South Asia actively participates in the work of the UN HRC, and international human rights standards apply to South Asia. Individual South Asian countries have incorporated a range of human rights provisions into their constitutions and relevant domestic legislation.

South Asian countries are also an integral part of the international human rights law system.

The 1948 Universal Declaration of Human Rights was signed by all South Asian member countries. The examination of the record of ratification of international human rights instruments suggests that South Asian countries are making solid progress in this area. The table below lists the record of signing by the South Asian countries of six key international human rights conventions, namely:

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Convention on the Rights of the Child (CRC);
- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention Relating to the Status of Refugees (RC).

**Table 1.** Ratification (R) or Accession (A) to UN Human Rights Conventions by South Asian Countries

	<b>CEDAW</b>	<b>CRC</b>	<b>ICCPR</b>	<b>ICESCR</b>	<b>CERD</b>	<b>RC</b>	<b>All</b>
Afghanistan	R	R	A	A	A	A	6
Bangladesh	A	R	A	A	A	N	5
Bhutan	R	R	N	N	N	N	2
India	R	A	A	A	R	N	5
Maldives	A	R	N	N	A	N	3
Nepal	R	R	A	A	A	N	5
Pakistan	A	R	N	R	N	N	3
Sri Lanka	R	R	A	A	A	N	5
All R&A	8	8	5	6	6	1	

*Source: University of Minnesota (2008)*

To sum up, CEDAW and CRC were ratified by all south Asian countries, while ICESCR, CERD and CRC were ratified by a majority. The Convention Relating to the status of Refugees does not have support in South Asia. Bhutan and Pakistan are lagging behind in ratifications.

### **3. International Human Rights Enforcement Structures**

The international human rights system also provides well-defined enforcement machinery to monitor the human rights performance of its member states.

To begin with, the United Nations Security Council has a major responsibility for advancing peace and stopping major human rights violations. Its impact, however, can be rather limited if there is no agreement between Council members. The Security Council, for example, did not prevent the Cambodian genocide carried out between 1975 and 1979; or the 1994 Rwandan genocide in which up to one million people were killed in three months; or the current human

rights violations during the war in Syria. In fact, the international response at the UN Security Council level is often limited to assigning blame, focussing on delivery of humanitarian aid and perhaps, years later, enabling delivery of justice to a few of those responsible.

The day-to-day responsibility for addressing human rights violations world-wide stays with the Human Rights Council (HRC), which consists of 47 member states, with Australia and Nepal being recently elected to the HRC. The Council functions are detailed in the 2006 United Nations General Assembly resolution establishing the Human Rights Council, and include: the promotion of universal respect for human rights and fundamental freedoms for all; addressing gross and systemic violations of human rights by member states; and the effective coordination of human rights within the UN system (United Nations, 2006).

The HRC employs a range of specific mechanisms to implement its mandate. The HRC initiates and is responsible for the work undertaken under the UN '*special procedures*' mechanisms. It coordinates the work of any independent government human rights experts working either as Special Rapporteurs or in Working Groups appointed to examine thematic or country-specific human rights issues.

For example, the HRC has established several investigations into war crimes, the risk of genocide, ethnic cleansing or crimes against humanity, as well as accountability for crimes committed. Countries investigated include: Burundi, the Democratic People's Republic of Korea, Eritrea, Gaza, Lebanon, Libya, Sri Lanka and Syria. The HRC has held Special Sessions to address particularly urgent situations and has adopted a significant number of resolutions resulting from such inquiries.

Currently, the HRC manages 43 thematic and 14 specific country mandates and there are at least 38 Special Rapporteurs, Special Representatives and Independent Experts who serve. Some human right treaties also contain optional protocols whereby individual or group complaints about violations resulting from an act of a State Party can be investigated. Such protocols allow for inquiries relating to systemic or grave violations of rights by State Parties, and for making recommendations on how to address them.

In addition, on 15 March 2006, the UN General Assembly established the Universal Periodic Review (UPR). The UPR is an important universal monitoring and accountability measure requiring the Human Rights Council to undertake a review of each UN member state's fulfilment of its human rights obligations. To this end, the UPR reviews all international obligations held by a state, including those stemming from the UN Charter, the Universal Declaration of Human Rights, international human rights treaties, as well as voluntary pledges and commitments.

While the UPR system has a role in "naming and shaming" individual states, it offers no redress to individuals. UPR recommendations about states do not necessarily result in named governments adjusting and improving their human rights records. The impact of UPR processes on grass-roots human rights culture is quite intangible as UPR findings are not widely known. However, UPR participation by National Human Rights Institutions and civil society, means that UPR processes benefit from thoughtful, in-depth reviews, while also contributing to human rights education and awareness at home.

Nevertheless, UPR processes are not helped by the fact that some HRC members themselves have very doubtful human rights records, and that, on occasion, there is a lack of consistency in the standards applied

to Western democracies and un-democratic non-Western countries. Additionally, UN HRC involvement comes with minimal human rights education; this could be partly related to inadequate resources being allocated for this purpose.

In other words, the UN HRC has a comprehensive machinery to monitor individual states' observances human rights law, and South Asia is a part of this system.

### **3.1 Regional Human Rights Protection Structures**

In addition to the UN human rights protection system, there are also several regional human rights conventions and regional mechanisms for the protection of human rights. The best known of these are the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Court of Human Rights in Strasbourg. Under the European Convention, complaints could be brought against Contracting States by other Contracting States or by individuals, groups of individuals or non-governmental organizations (Council of Europe, 1950).

In comparison, the Asia-Pacific region has established a few inter-governmental bodies, but they are only marginally concerned with the protection of human rights and they do not handle individual complaints. For example, the South Asian Association for Regional Cooperation (SAARC), which was established in 1985 mainly to promote the development of economic and regional integration, needs to be acknowledged for their human rights work, although this has been done mainly in the context of achieving peace and development in the region. In 2002, SAARC member states signed the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. The SAARC Social Charter of 2004 further affirmed their purported belief in the importance of human dignity and human rights through the creation

of an environment that enables the development and protection of all individuals, particularly the most vulnerable. It has also held various conferences that attempted to develop regional dialogues on human rights promotion and protection. The unifying element of SAARC is that all the South Asian states have a democratic form of government.

The Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights (AICHR) is another regional organization. ASEAN is a group of ten Southeast Asian countries, including Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Thailand, Singapore and Vietnam, organized to promote intergovernmental cooperation and facilitate economic, political, security, military, educational and socio-cultural integration. Human rights are referenced in the ASEAN Charter (Articles 1.7, 2.2.i and 14) and other key ASEAN documents, including the ASEAN Human Rights Declaration adopted in 2012.

AICHR, the ASEAN Intergovernmental Commission on Human Rights, was inaugurated in October 2009 as a consultative body of ASEAN and meets at least twice per year. Its mandate is to promote and protect human rights and regional co-operation on human rights in its 10 member states. AICHR operates through consultation and consensus with each member state having veto power. The Commission also has responsibility for capacity building, advice and technical assistance, information gathering and engagement with national, regional, and international bodies.

These inter-governmental human rights bodies have been the subject to criticism, because they have limited mandates and also, because of allegations they are more concerned with the rights of the states rather than the rights of individual citizens or NGOs. AICHR has been criticized as *'toothless'* and *'too soft in its approach to promoting human rights and democracy'* (Ganjanakhundee, S., 2016). The

ASEAN chair at the time of AICHR's founding, Abhist Vejjajiva, said that '*...the commission's 'teeth' would be strengthened down the road*', but six years after AICHR's founding, critics charge that '*...since it was launched ... [AICHR] has yet to take any action to safeguard the most basic freedoms of citizens it supposedly represents.*' During the recent summit of ASEAN countries in Sydney in April 2018, the Australian Prime Minister was challenged by human rights advocates to make human rights a central and public focus.

The difficulty for AICHR is that it includes both democratic and non-democratic states. It appears that the ASEAN emphasis on consultation, consensus, and non-interference, forces the organization to adopt only those policies that satisfy the lowest common denominator. In particular, Myanmar, Cambodia, and Laos emphasize non-interference, while older member countries focus on co-operation and co-ordination. For example, during a United Nations vote against the ethnic cleansing of Rohingya people in Myanmar, the majority of Southeast Asian nations either abstained or voted against the condemnation. Only the Muslim-majority countries of Malaysia, Indonesia, and Brunei voted in favor of condemning the ethnic cleansing of the Muslim Rohingya in Myanmar.

The regional human rights mechanisms of South Asia have a more policy and educational orientation, and there is little impact on states violating human rights. They do not offer individual redress, and are too government- and consensus-focused.

#### **4. The Concept of Social Cohesion**

A question one needs to ask is: what is the relevance of human rights to the maintenance of social cohesion? To be more specific, how relevant are the international human rights standards and associated implementation mechanisms for the advancement of human rights culture and social cohesion in the South Asia? Does international human rights system

deliver higher awareness and acceptance of human rights at community level and, through it, contribute to social cohesion and peace in South Asia and elsewhere?

#### **4.1 Background**

The concept of social cohesion has grown in importance in social policy development and implementation since early 1970 as a concept aiming at the creation of a just and peaceful society that is inclusive of all. Although in the past some governments advanced utopian views of national unity that resulted in massive human rights violations, for example the Nazi government in Germany or the Khmer Rouge government in Cambodia.

According to some writers, the concept of social cohesion or '*asabiyah*' can be traced back to the writings of Ibn Khaldun, a Muslim scholar born in Tunis in the 15<sup>th</sup> century (World Bank 2013, p.128). The concept entered modern sociology through the writings of Emile Durkheim and Max Weber and in the 1990s, it was linked to the concept of social capital.

The extensive examination of relevant literature points out that although there are many definitions of social cohesion, there is no single agreed definition. Most definitions involve notions of solidarity, willingness to participate and togetherness. For example, the Organisation for Economic Co-operation and Development describes a cohesive society as one that '*works for the well-being of all its members*' (OECD 2011, 17). The United Nations defines socially cohesive societies as those where all groups have a sense of belonging, participation, inclusion, recognition and legitimacy. Nat Colletta in his book on social cohesion and conflict prevention in Asia defines social cohesion '*as the glue that bonds society together, promoting harmony, a sense of community and a degree of commitment to promoting the common good*' (Colletta, N. et al., 1999).

To sum up, the notion of ‘social cohesion’ focusses on the ability of different communities to cooperate with each other and form a united whole.

#### **4.2 Western World Interest in Social Cohesion**

The European model of social cohesion derives from a homogenous nation ideal and it is now advanced in the context of societies that have already embraced the concept of liberal democracy, usually grounded in:

- a secular Constitution preferably including a charter of citizens’ rights;
- robust parliamentary institutions and separation of the executive, the parliament and the judiciary;
- freely-contested elections with universal adult suffrage;
- an independent and honest judicial system based on the ‘rule of law’;
- an independent, diverse and questioning media;
- a civil service, especially the policing function, that is merit-based and not prone to systemic corruption;
- defence forces that are subordinate to and yet uninvolved with the democratic process;
- the existence of independent watchdog bodies such as ombudsmen in the areas of ‘corruption’, ‘finance’ and ‘consumer protection’;
- a robust civil society that on one hand follows the laws, but on the other is willing to challenge authorities;
- a level of community prosperity that facilitates adequate health and education access and appropriate ‘safety nets’ for the disadvantaged and infirm; and over and above all these
- a human rights culture that includes some knowledge and commitment to the internationally enshrined human rights instruments and standards.

Initially, in post-World War II years, the concept of social cohesion in Western countries was narrowly defined to include economically disadvantaged, low-status minorities and other vulnerable groups into broader community through government welfare measures. More recently, the concept has been primarily being used to guide government policies and programs aiming at the integration of culturally, linguistically and religiously diverse groups that immigrated to host countries and also, to a lesser extent, LGBTIQ communities. Most Western contemporary governments focus on policies of integration and/or inclusive outcomes for all and reject both, 'assimilationists' and 'separatists' models of managing social diversity.

For example, a definition developed by Professor Ted Cattle of the Interculturalism and Community Cohesion Foundation in London, has been widely applied by government agencies and NGOs in the United Kingdom to guide work with diverse ethnic, cultural and religious communities. Professor Cattle writes: *'By community cohesion, we mean working towards a society in which there is a common vision and sense of belonging by all communities; a society in which the diversity of people's backgrounds and circumstances is appreciated and valued; a society in which similar life opportunities are available to all; and a society in which strong and positive relationships exist and continue to be developed in the workplace, in schools and in the wider community'* (Cattle, 2006).

In Australia, the usage of the term social cohesion directly refers to cultural, linguistic and religious diversity. A definition developed by Professor Andrew Markus and the Scanlon Foundation utilises five indices to inform the Index of Social Cohesion, namely: *'Belonging; Social justice and equity; Participation; Acceptance and rejection, Legitimacy; Worth'* (Scanlon Foundation, 2016).

Most recently, the Australian Minister for Citizenship and Multicultural Affairs in his speech to the Menzies Research Centre on 7 March 2018, reinforced the Australian government's commitment to social cohesion and proposed a range of new policies aiming at the '*integration*' of a diverse range of ethnic, cultural and religious groups into the broader community (Tudge, A., 2018).

### **4.3 Asian Perspective on Social Cohesion**

The literature focusing on South and South East Asia indicates that most Asian governments view social cohesion as a positive objective and take a range of actions to advance it. Some authors even claim that in the post-economic crisis of the 1990s social cohesion had become '*the paramount policy priority for the region, even at the expense of a rapid return to economic growth. The trade-offs between political and social stability and economic efficiency have never been more prominent*' (Colletta N. et al., 1999, p. 10). In contemporary Nepal, the focus on addressing the impunity of past human rights violations constitutes an integral part of building social cohesion for the future.

Asian understandings of social cohesion, however, appear to be broader and clearly differ from Western notions. Although there are significant differences between individual nations, in general terms, the South and South-East Asian perspective is more oriented towards economic development and nation-building and does not necessarily see individual freedoms as the foundation stone on which social cohesion should be built. The role of the state is paramount, and the state is responsible for the design and implementation of macro-economic and bureaucratic solutions to satisfy local conditions. Government initiatives may include measures to build democratic institutions, extend individual freedoms and civic engagement, but the main focus is economic development.

A brief review of research assessing the levels of social cohesion of different South and South East Asian societies suggests that researchers focus on the following factors:

- **Common vision**, defined by a shared sense of belonging by all communities; identification with a state of residence and trust in civic institutions.
- **Equality of all communities**, not only in terms of similar life opportunities available to all but also in terms of equitable outcomes.
- **Participation**, of diverse communities in decision making both at national and local levels and in voluntary work.
- **Integration**, where people of different backgrounds mix together in a wider community through intermarriage, diversified workplaces, education systems and are included in media and culture.
- **Peaceful Conflict Resolution**, an agreement of the measures and processes to be used to resolve social conflicts. This may include elections, justice systems, negotiations and other measures.
- **Valuing diversity**, including possible expression by government leadership in support of diversity, non-discriminatory measures and, on a community level, the respect for others and positive attitudes towards minorities.

#### 4.4 Where the West and South Asia meet

When comparing the Western and Asian perspectives on social cohesion, both concepts are about the local sets of beliefs about how a just society should be organized. Both are grounded in dominant social values and express national aspirations for peace and development.

Western countries strive to achieve social cohesion but considering that they already have well performing economies and stable democratic

governments, the inclusion of marginalized minorities is the key focus of government social cohesion programs. Also, the bulk of current social cohesion research in the West focuses on the disadvantage and discrimination associated with race, ethnicity, migrant or refugee status and religion and is likely to advocate for governments to adopt a range of measures to ensure that the host population ‘includes’ the newcomers.

The South Asian concepts are much broader and focus on whole of society through government-initiated solutions. Economic, political and social development are the drivers. On occasion, this may create a dissonance between universal human rights standards and local aspirations. Both the West and South Asia are working to achieve the highest possible levels of social cohesion in their states and are aware that achieving social cohesion is always a work-in-progress phenomenon which requires constant vigilance and support.

It is well-documented that, if appropriate action is not taken, social cohesion, peace, democratic institutions and community harmony may quickly disintegrate. There are many examples of societies that were seen as exemplary in terms of their community cohesion in the past but which disintegrated almost overnight - Khmer Rouge Cambodia or Lebanon in 1975 comes to mind.

Having examined both, the concept of international human rights and the concept of social cohesion, a conclusion could be drawn that although they are different in their nature – international human rights are a set of universal legal standards and cohesion is a social phenomenon based in local culture and beliefs – both concepts are complementary and serve the same goal of delivering a peaceful and just society. On the other hand, human rights violations undermine social cohesion and suggest that the concept of social cohesion cannot replace the human rights values that underpin a given society.

## 5. Contemporary Challenges to Social Cohesion

### 5.1 In the Contemporary World

Human rights practices often fall well behind the agreed standards in some states. For example, Article 7 of the UDHR declares that everyone must be *'equal before the law'*, but we know that at least 23 countries have laws discriminating against women. Article 19 acknowledges *'freedom of opinion and expression'*. Sadly, Amnesty International is aware of 77 countries in which this peaceful expression of views would bring the threat of repression and even death. Article 25 stresses that *'Everyone has the right to a standard of living adequate for their health and well-being'*. But 8 out of 10 people around the world still live in poverty. The death penalty, for example, is commonly-used in such countries as China, Iran or USA.

This paper does not aim to deal with all human rights violations worldwide, but it will mention two key contemporary human rights challenges that are judged to be of importance to maintaining social cohesion.

First, the recent rise in racism and xenophobia especially, but not only, in the West must be one of the biggest threats to any multi-ethnic society and to its cohesion, as it slows integration and may create a permanent under-class. Recently, on the 2018 International Day for the Elimination of Racial Discrimination, several human rights experts<sup>22</sup>

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22 The UN experts include: E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Michal Balcerzak, Chairperson of the Working Group of Experts on People of African Descent; Jose Francisco Cali Tzai, Acting Chairperson of the Committee for the Elimination of Racial Discrimination; Felipe González Morales, Special Rapporteur on the human rights of migrants; Fernand de Varennes, Special Rapporteur on minority issues; Victor Madrigal-Borloz, Independent Expert on protection against violence

issued a statement to alert States, civil society organisations and activists to the problem.

The experts stated that *‘Racial, ethnic and religious bigotry fuels human rights violations, including extreme violence against minorities, and against refugees, migrants, stateless persons, and internally displaced, including people of African descent, with a particularly acute effect on women, and sexual and gender diverse populations. This bigotry is unashamed’* (OHCHR, 2018). The experts also argued that more attention must be paid to the structural economic, political and legal conditions which stoke racism and xenophobia among populations who perceive minorities and non-nationals as threats.

Or as Kofi Annan: warned *‘...the perception of diversity as a threat is the very seed of war’*. It is important to create respect for other cultures and tolerance of religious differences. For example, Australia is not immune to the recent rise in racism and xenophobia, although many commentators would agree that today’s Australia is a relatively cohesive society.<sup>23</sup> Scanlon and other research suggest there is an increasing experience of discrimination and racist behavior, especially among visibly different migrant groups. The proportion of respondents indicating experiencing discrimination based on skin color, ethnicity or religion increased from 9% in 2007 to 15%

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and discrimination based on sexual orientation and gender identity; Alda Facio, Chairperson of the Working Group on the issue of discrimination against women in law and in practice; Urmila Bhoola, Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Agnes Callamard, Special Rapporteur on extrajudicial, summary or arbitrary executions. Inter-American Commission on Human Rights expert: Margarete May Macaulay, Rapporteur on the rights of Afro-descendants and against racial discrimination.

23 There are also some other significant challenges emerging to social cohesion in Australia. See: Ozdowski, S. (2016 and 2017). See also: Dunn et al. (2009).

in 2015 and to 20% in 2016 – the highest level recorded in the Scanlon Foundation surveys (Markus, A., 2017).

The 2017 Scanlon survey notes that *‘the relatively high level of negative feeling towards Muslims is a factor that enters into evaluation of future risk’*. The survey indicated that 41 percent of respondents were negative towards Muslims compared with 6 percent being negative towards Buddhists.

This could be the key by-product of countering violent extremism measures that appear to be contributing to the stigmatization of Muslim communities. According to Markus, this negativity could also be *‘in part fed by the reality – and the heightened perception of radical rejectionism of Australia’s secular democratic values and institutions within segments of Muslim population, which in 2016 was the largest of the non-Christian faith groups’* (Markus, A., 2017).

A most disturbing current example of racism and xenophobia in the Asia-Pacific region is Myanmar’s persecution of the minority Muslim Rohingya. Since August 2017, the Rohingya community of more than a million people living in western Rakhine State, have been the subject of a violent campaign of arson, rape, and murder by Myanmar military personnel, with tacit support of the Buddhist Myanmar population. The violence has resulted in some 700,000 Rohingya seeking refuge in neighboring Bangladesh. Professor Yanghee Lee, *the UN HRC* Special Rapporteur on the Situation of Human Rights in Myanmar has described it as ethnic cleansing (Human Rights Council, 2018).

The second major threat to social cohesion is the delegitimization of democratic processes and institutions and downgrading of important of civil liberties and freedoms by governments. This trend will have an impact that is more negative on the developing world and possibly on South Asia. For example, the Freedom House 2018 survey reported that democracy faced its most serious crisis in decades as its basic tenets –

including guarantees of free and fair elections, the rights of minorities, freedom of the press, and the rule of law – came under attack around the world. *‘Political rights and civil liberties around the world deteriorated to their lowest point in more than a decade in 2017, extending a period characterized by emboldened autocrats, beleaguered democracies, and the United States’ withdrawal from its leadership role in the global struggle for human freedom’*(Freedom House 2018). Seventy-one countries suffered net declines in political rights and civil liberties, with only 35 registering gains. This marked the 12th consecutive year of decline in global freedom.

In fact, we are witnessing a proverbial tightening of the human rights belt in the countries where democracy, at least until recently, was taken for granted. It looks as though leading democracies in the Western world are mired in seemingly intractable problems at home, such as terrorist attacks, social and economic disparities, partisan fragmentation, and an influx of refugees that has strained alliances and increased fears of the ‘other’. This human rights belt-tightening is particularly noticeable in relation to the reduction in civil liberties through, for example, restrictions on freedom of expression and freedom of press, mandatory detention of asylum seekers or creation of new offences to protect national security. This haphazard attitude to democracy is certainly impacting developing countries where democratic institutions are relatively recent or are exploring the possibility of reforms.

Below I focus on challenges to social cohesion in the South Asian region, including Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka.

## **5.2 Challenges to Social Cohesion in South Asia**

The South Asian region has made enormous progress since WWII. There has been a shift of power downwards toward the people and there has been democratisation of economies and of culture. I agree however, that much more needs to be done to achieve better alignment

among South Asian countries with international human rights standards. Convenors of the international conference, *Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia*, **held in Kathmandu, Nepal in April 2018**, noted that '*Despite of active work of human rights defenders and the energetic participation of human rights institutions across South Asia, achieving human rights objectives, particularly in the post-conflict setting remains a daunting task*'. Such failures in advancement of human rights objectives must certainly impact on social cohesion in South Asian countries.

I do not examine human rights and social cohesion records in every South Asian country individually, but rather to look at three indicators illustrating relative progress in the region.

Firstly, the Global Peace Index 2017 (GPI) uses 23 indicators, including ongoing domestic and international conflict, evaluation of the level of harmony or discord within a nation and militarization, to provide a comprehensive analysis on the state of world peace (Institute for Economics and Peace, 2017). It is possibly the best available index of social cohesion currently available.

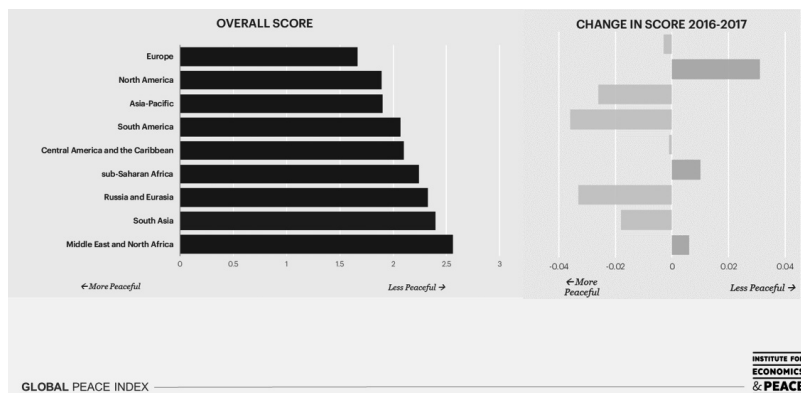
The overall 2017 GPI finding is that the world slightly improved in peace last year with 93 countries improving and 68 deteriorating. Iceland remains the most peaceful country in the world, a position it has held since 2008. Syria remains the least peaceful country in the world, followed by Afghanistan, Iraq, South Sudan, and Yemen.

Looking at different world regions, overall, South Asia and the Asia Pacific as well as Europe, South America, Russia and Eurasia became more peaceful last year. North America, Sub-Saharan Africa, the Middle East and North Africa also became less peaceful.

When comparing the individual South Asian countries' overall score ranking on the GPI, a significant difference emerged. Bhutan ranked the

highest on the overall rank of peace followed by Sri Lanka and Bangladesh. On the other hand, Afghanistan followed by Pakistan were named as the least peaceful countries. Looking at the change in score between 2016 and 2017, Bhutan, Nepal and Afghanistan improved, while the scores of Sri Lanka, Bangladesh, India and Pakistan went down slightly.

**Table 2.** Peace in South Asia, 2017



Source: Institute for Economics and Peace (2017)

**Table 3.** Global Peace Index, South Asia – Overall Scores\*

Regional Rank	Country	Overall Score	Change in Score 2016-2017	Overall Rank
1.	Bhutan	1.474	0.029	13
2.	Sri Lanka	2.019	-0.116	80
3.	Bangladesh	2.035	-0.012	84
4.	Nepal	2.08	0.052	93
5.	India	2.541	-0.024	137
6.	Pakistan	3.058	-0.085	152
7.	Afghanistan	3.567	0.029	162

Source: Institute for Economics and Peace (2017)

\*The Overall World Peace Index Score ranges from 1 (most peaceful) to 4 (least peaceful). Overall country rankings were given where 1 = Most Peaceful and 163 = Least Peaceful

The Institute for Economics and Peace analysis demonstrated that building high levels of *Positive Peace* is an effective way to reduce the potential for violence and that ‘*Nepal was one of the five countries with the greatest improvements in Positive Peace Index from 2005 to 2015.*’ (Institute for Economics and Peace, 2017, p.69) In particular, since the 2006 Peace agreement Nepal was able to improve its score for *Free Flow of Information* by 30 percent and made significant gains in *Acceptance of the Rights of Others* and *Equitable Distribution of Resources*.

Comparable results for South Asia were recorded on the 2017 Political Terror Scale, which is based on qualitative assessment of Amnesty International and US State Department yearly reports. Sri Lanka and Pakistan were named as countries which have slightly improved since 2016 while Nepal, Bhutan and Bangladesh as countries in which the situation has somewhat deteriorated.

**Table 4.** South Asia, Political Terror Scale, 2017\*

<b>Regional Rank</b>	<b>Country</b>	<b>Overall Score</b>	<b>Change in Score 2016-2017</b>	<b>Overall Rank</b>
1.	Bhutan	2	1	44
2.	Sri Lanka	3	-1	94
3.	Bangladesh	3	0.5	94
4.	Nepal	4	0	138
5.	India	4	0	138
6.	Pakistan	4	0.5	138
7.	Afghanistan	4.5	0	152

*Source: Institute for Economics and Peace (2017)*

\*The Political Terror Scale overall score ranges from 1 (low incidence of terror) to 5 (high). Overall rankings were given where 1 = No Terror and 163 = High Incidence of Terror

Another important index is the Freedom in the World annual report produced by Freedom House in the USA since 1973. In comparison with the Global Peace Index, it is narrower as it focusses on political rights and civil liberties only. It uses external experts to collect and assess information about 209 countries and territories. The experts use a combination of on-

the-ground research, consultations with local contacts, and information from news articles, nongovernmental organizations, governments, and a variety of other sources (Freedom House, 2018).

The Freedom House report suggests that the South Asian countries, except for Afghanistan, rank in the middle of political liberties and civil liberties scales. The analysis of scores between 2013-2017 suggests that the Freedom Status in South Asia has been relatively stable with slight improvements being made in Maldives, Sri Lanka and, in 2017 in Afghanistan.

Also, the Freedom House 2018 report acknowledged that in Nepal, the first national, regional, and local elections were held under a new constitution, with higher voter turnout despite some reports of violence.

The outcomes of the 2017 survey for the South Asian countries are produced below.

**Table 5.** South Asia Country Scores from the Freedom in the World 2017 Survey\*

<b>Country</b>	<b>Freedom Status</b>	<b>Political Rights</b>	<b>Civil Liberties</b>	<b>Aggregate Score</b>
Afghanistan	Not free	4	5	26
Bangladesh	Partly free	4	4	45
Bhutan	Partly free	3	4	55
India	Free	2	3	77
Maldives	Partly free	5	5	35
Nepal	Partly free	3	4	55
Pakistan	Partly free	4	5	43
Sri Lanka	Partly free	3	4	55

*Source: Freedom House (2018)*

\* Where Political Rights, Civil Liberties were ranked from 1 = most free to 7 = least free. The Aggregate Score was ranked from 0 = least free, 100 = most free

Finally, an index which deals with governance is the Corruption Perceptions Index. This index, which ranks 180 countries by their perceived levels of public sector corruption according to experts and business people, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. This year, the index found that more than two-thirds of countries score below 50, with an average score of 43. New Zealand and Denmark rank highest with scores of 89 and 88 respectively and Syria, South Sudan and Somalia rank lowest with scores of 14, 12 and 9 respectively (Transparency International, 2018). For South Asia in 2017, the outcomes were:

**Table 6.** South Asia Country Scores at the Corruption Perceptions Index 2017

Country	Score*
Afghanistan	15
Bangladesh	28
Bhutan	67
India	40
Maldives	33
Nepal	31
Pakistan	32
Sri Lanka	38

*Source: Transparency International (2018)*

\*Where 1 = Maximum corruption and 100 = Minimum corruption

The examination of the South Asia Country Scores in the Index indicated that the corruption in many South Asian countries is still very strong. All countries but Bhutan scored below the world average score. While Afghanistan rates very low on the index, its score increased by seven points in the last six years, moving from 8 in 2012 to 15 in 2016 and 2017. Police and elected officials were most often named as most corrupt (Transparency International, 2018).

This report reinforces the findings of the 2010-11 survey on corruption levels in six South Asian countries – Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka (Hardoon D. & Heinrich F., 2011). Key findings of that survey were that 39% of respondents paid a bribe in the past year. The result was startlingly high in Bangladesh at 66 per cent, followed by India and Pakistan, with 54 per cent and 49 per cent respectively reporting to have paid a bribe. An average across all six of the South Asian countries corruption levels were found to be highest in political parties and the police, followed closely by the parliament and public officials. Religious bodies were perceived to be the least corrupt institution.

Further analysis of the 2017 results by the Transparency International team indicate that countries with the worst rates of corruption also tend to have the least protection for press and non-governmental organizations. It was reported by Transparency International that *‘In some countries across the region, journalists, activists, opposition leaders and even staff of law enforcement or watchdog agencies are threatened, and in the worst cases, even murdered’*.

According to the Committee to Protect Journalists (2018), Pakistan, India and Bangladesh are among the worst regional offenders in this respect. These countries score high for corruption and have fewer press freedoms and high numbers of journalist deaths. Last year, Yameen Rasheed, an outspoken critic of the Maldives government was murdered for his efforts to uncover the truth about the disappearance of journalist Ahmed Rilwan.

Although significant progress has been made to advance development and social cohesion in South Asia, almost all the countries in the South Asian region face common challenges in realizing their human rights goals. These challenges are further aggravated by the high prevalence of poverty, political instabilities, slow economic growth

rates, low literacy, widespread corruption, and rampant cases of gender-based violence along with discrimination in education, nutrition, health and employment.

To further advance development and social cohesion in South Asia, priority must be given to further advancement of democratic institutions and equality of opportunity to all, as well as to effective preventions of corrupt practices in government, police and economy.

## **6. Advancing Human Rights in South Asia**

So, let us ask the question what we could do to advance acceptance of international human rights standards in South Asian societies that would lead to greater social and economic development, better government and more equality.

### **6.1 National Human Rights Institutions in South Asia**

To start with I wish to acknowledge the important role of National Human Rights Institutions (NHRIs) in South Asia. They are the key mechanism responsible for the advancement of human rights observance in the region and, through this advancement, of social cohesion.

The Asia-Pacific region has witnessed a remarkable increase in National Human Rights Institutions through the 1990s into the early years of the 21<sup>st</sup> century. By NHRIs, I mean independent institutions established and resourced by national governments, compliant with the United Nations standards set out in the 1993 Paris Principles, to protect, monitor and promote human rights in a given country. In most countries, a constitution, a human rights act or institution-specific legislation will provide for the establishment of a NHRI.<sup>24</sup>

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24 For discussion of NHRI characteristics see: Ozdowski, S. (2003)

Today, all but one of the South Asian region countries have National Human Rights Institutions and the majority of these countries with NHRIs are members of the Asia-Pacific Forum of National Human Rights Institutions (Bhutan and Pakistan are the exceptions).

Although the priorities and structure of the South Asian NHRIs differ from country to country, their responsibilities include:

- investigation of complaints from individuals (and occasionally, from groups) alleging human rights abuses committed in violation of existing national law;
- policy research and analysis that may involve reviewing national legislation's compliance with international law; examining acts or practices of the government which may involve breaches of human rights - this may include holding major public inquiries and/or consultations; reporting or making recommendations to governments or parliaments on legal changes or policy issues; and promoting the ratification of appropriate or relevant international instruments;
- human rights education; and
- participation in the international human rights protection system.

I especially value the NHRIs' ability to create an effective human rights culture both at community and government levels. There is concern, for example, about the potential dual role of the state in on the one hand, ratifying international human rights treaties and overseeing their incorporation into domestic law, while on the other hand, not enforcing or even being a potential abuser of them (Tibbitts, F. & Katz, S. R., 2018; Russell, S. & Suárez, D., 2017). NHRIs are definitively distanced from the apparatus of the state and instead connect with a wide range of stakeholders. They have some standing with government officials, they maintain close links with civil society – especially

human rights NGOs and advocates, and they are an integral part of the international human rights system. Furthermore, the fact that NHRIs protect the rights of vulnerable groups such as religious or ethnic minorities, persons with disabilities or women and freedoms of those who challenge the majority's view, gives them additional legitimacy and standing with all actors.

In fact, all the above enumerated NHRIs responsibilities could be used by them to win hearts and minds and to develop an effective human rights culture at the everyday, grass-roots level. For example, NHRIs can use their investigative, policy and international work to stimulate community discussion about the universality of human rights and about limits on state power. NHRIs can effectively work with educational institutions and the broad community to popularize human rights standards, to advance principles of good governance and democracy, to secure respect for and protection of human rights and fundamental freedoms, and to reduce the disconnect between state-filtered human rights standards and norms and on-the-ground individual understandings of human rights. Such actions result in better understanding of universal human rights standards and advance social cohesion.

## **6.2 Working as Australian Human Rights Commissioner**

I held the position of the Australian Human Rights Commissioner from 2000-2005. As one of its responsibilities, the Australian Human Rights Commission (AHRC) has a mandate to conduct public inquiries into topical human rights issues. For example, in 1997, it conducted the ground-breaking *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* and produced a report entitled '*Bringing them home*'.

When I was appointed to the position of Australian Human Rights Commissioner, there was a range of identified major human

rights violations resulting from the Australian mandatory immigration detention system.

I was not sure how to tackle the issue. There was already a report by the former Australian Human Rights Commissioner documenting in detail why Australian immigration laws are in breach of the International Covenant on Civil and Political Rights. The report was tabled in Parliament and no relevant changes to the mandatory detention policy were made. So, soon after I took the position, I visited several immigration detention centers, documented further breaches of international human rights specified in ICCPR and reported to parliament. Again, the government did not change the system of mandatory detention.

After some further thinking, I decided to change my approach. I understood that, to change the Government's approach, I needed not only to be able to demonstrate breaches of international human rights law, I also needed to win the battle for the minds and hearts of the Australian public.

Therefore, I decided that I would not focus on asylum seekers from predominantly Muslim countries but on children who, in the public's mind, are innocent and not associated with any religion or culture. I also decided that the inquiry would not focus on legal issues, but on real people and the suffering and injustices that the mandatory detention system creates.

My national inquiry into the children in immigration detention started in 2002 and took over two years to complete. Its methodology was very comprehensive and included visits to all immigration detention centers, written and oral submissions, public hearings, subpoenas of Department of Immigration, Multiculturalism and Indigenous Affairs (DIMIA) documents and focus group discussions.

It resulted in a detailed report entitled '*A last resort?*' (Ozdowski, S. 2004) that was tabled in Parliament. The report found that the mandatory immigration detention of children was fundamentally inconsistent with Australia's international human rights obligations and that detention for long periods created a high risk of serious mental harm.<sup>25</sup>

What is of particular importance is that the Inquiry was conducted in the public domain. This alerted the Australian public to the fate of children in long-term detention. It raised awareness in the wider Australian community, and aimed to win their hearts and minds and secure the children's release. With the explanation of the extent of the mental health damage suffered by children in immigration detention, Australians changed their minds and stopped supporting the government policy of indefinite mandatory detention of children.

In fact, public opinion shifted dramatically during the Inquiry from about 65 percent of Australians supporting government mandatory detention policies, to 65 percent opposing children being kept in immigration detention because of human rights violations. There were clear electoral consequences to follow after such a significant change in public opinion. Following the tabling of the report, within a month or so, the Government released all children with their families from mandatory detention.

In 2005 I used the same technique to produce a report '*Not for Service - Experiences of Injustice and Despair in Mental Health Care in Australia*'. Again, the report had a major impact on public opinion and brought major human rights issues into the public domain, enabling major government reform and the allocation of major financial resources to address the problems (Ozdowski, S. 2007).

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25 See also: Ozdowski, S (2009)

Although the educational activities of the Australian Human Rights Commission are multipronged<sup>26</sup>, I have found that engagement with the public through a public inquiry on a topical issue was a very effective mechanism of education.

## **7. Human Rights Education**

This brings us to human rights education whereby international human rights standards can be used as important mechanisms to advance social cohesion. To enhance human rights culture and impact on government human rights practices, we need to win the hearts and minds of our fellow citizens. Human rights standards must not only be a letter of law, but an expected standard of behaviour. When international human rights standards are known to, and internalised by, local communities, they can become effective agents of change. Education about international human rights standards is thus an important mechanism to advance human rights culture and deliver greater social cohesiveness.

### **7.1 UN focus on Human Rights Education**

Human rights education is a high priority for the United Nations (UN) and many governments world-wide. It is based on the premise that human rights are universal and indivisible, and it aims to build an understanding and appreciation for learning about rights and learning through rights. The UN Decade on Human Rights Education (1995–2004) provided a global human rights education implementation framework through its Plan of Action.

It was followed by the 2004 UN World Human Rights Education Programme. The 1st Phase (2005–2009) of the Programme emphasized

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26 For discussion about human rights education in Australia see: Ozdowski S (2015) There is also a range of good human rights education materials available elsewhere, see for example Council of Europe (2010) or European Commission (2012).

the primary and secondary school curricula and formal education, while the 2nd Phase (2010–2014) focused on those who further mentor tomorrow's citizens and leaders, such as: higher education institutions, government officials and the military. The 3rd Phase (2015–2019) is currently being implemented with initial focus on media professionals and journalists, and will have an emphasis on education and training in equality and non-discrimination.

One important result of this emphasis on human rights education was the formulation of the UN Declaration on Human Rights Education and Training which was adopted by the UN General Assembly in December 2011. The Declaration asserts that everyone has the right to know, seek and receive information about their human rights and fundamental freedoms and recognizes that human rights education and training is a lifelong process that includes all parts of society (Tibbitts, F. & Fernekes, W.R., 2011).

This non-binding Declaration also defines human rights education and training as comprising '*all education, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of human rights and fundamental freedoms*' and calls on all to intensify efforts to promote the universal respect and understanding of human rights education and training (United Nations General Assembly Resolution, 2011).

Since early 2010, a grass-roots movement has developed around the world to advance human rights education, as evidenced by the establishment of popular annual International Conferences on Human Rights Education.<sup>27</sup> The movement recognizes that a respect for human

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27 The first ICHRE was convened in 2010 in Sydney and since then the Conference has been held in: Durban, South Africa; Cracow, Poland; Taipei, Taiwan; Washington DC, USA; Middleburg, the Netherlands; Santiago, Chile; and Montreal, Canada. For more see the 9<sup>th</sup> ICHRE website: <http://ichre2018.com.au>; see also: [www.westernsydney.edu.au/equity\\_diversity/equity\\_and\\_diversity/conferences](http://www.westernsydney.edu.au/equity_diversity/equity_and_diversity/conferences)

rights is key to a well-functioning, efficient, cohesive and transparent state, socio-economic system based on equality of distribution and well-functioning justice, and of democratic institutions. Furthermore, it is acknowledged that a respect for human rights is likely to mitigate emerging conflicts.

Human Rights Education focuses on fundamentally reducing the disconnect between the abstract ideals of human rights treaties and principles so often lodged (and locked) at the level of the state, and applying those ideals to everyday life, everyday learning and everyday bodies. That is, Human Rights Education seeks to embed knowledge and awareness at the level of individuals in civil society.

Thus, awareness of human rights standards in South Asian societies is the first step to achieve that:

- citizens of South Asian states consider themselves to be full stakeholders in their societies and not feeling alienated, disfranchised or stake-less;
- high-income economies are created where labor markets are unconstrained, people have access to land, full employment and education;
- peaceful and productive relations between different ethnic, cultural and religious groups; and
- inclusive social policies and social justice are permanent features of government agendas.

If social cohesion is to be advanced further, there needs to be a high degree of social acceptance of key human rights tenets. To achieve this, a widespread promotion of human rights is needed. A promotion that would stress human rights as values that benefit all groups within society as well as protect individuals. In my view, this is the key responsibility of NHRIs in the South Asia region.

## 8. Conclusion

Human rights are not only legal pronouncements in international or domestic law books. Human rights set up important universal standards that should guide our governments and communities. Human rights are not a luxury to be given only after countries develop economically. Human rights deliver social cohesion. Without cohesion, there is no economic development. Human rights are also about values. Better understanding of human rights by ordinary people – winning their minds and hearts – limits governments' human rights transgressions, demands greater government accountability, and delivers a more just and cohesive society. Allow me to finish with a quotation from Nelson Mandela: *'No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.'* Let us work together to win hearts and minds in our communities for a cohesive and fair society through human rights.

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## The State of the Rights of Marginalized Women in India

-Sona Khan-

People of Delhi (during the midnight protests at India Gate) and at many other cities of India, were gathering to voice their shock and anguish against the account of savagery, sexual violence and deaths in Kathua (Jammu) and Unnao (UP) of the children of marginalized families, when I was attending the International Conference on Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia, in Kathmandu, in very serene, pictorial and comfortable surroundings, from April 9-11, 2018. It was graciously hosted by National Human Rights Commission of Nepal. In both cases, the alleged rapists were either from political alliances of section close to the seat of authority and they were being shielded by senior members of their political outfits. The state machinery's disinterest made its officials actively involved in the crimes in the case of Kathua, the victim, an eight-year old girl from a marginalized minority community. The reports point towards police officials who were also culprits of gang-raping, brutalizing and killing the little girl. Her body was found in a jungle after ten days of her missing. The details of her torture and brutal killing have not been covered by most of the media. The account is astounding and repugnant to any human mind. In the case of Unnao, the alleged accused is a sitting BJP MLA and the victim was a 16-year old girl, whose father died in police custody. The pattern was almost same. In both

cases, police officials tried to scuttle investigations, as victims were poor and from the marginalized section of society. The huge public outcry forced the administration to take action. In the case of Unnao, the High Court of UP came heavily on the police administration and resultantly, accused has been arrested now. In the case of Kathua, some state ministers had rallied for the protection of the rapists, who have been sacked (or have resigned). It seems like a repeat of Nirbhaya's gang rape of 2012.

These incidents have horrified every one and one wonders where our sense of right and wrong is. Justice for such helpless children and people of their families and communities seems a far cry. Rapes are regularly reported from all over, especially of young defenseless and innocent children. Now, another incident has emerged from Surat, Gujrat, of an 11-year old girl. Reports of rape and sexual crimes from Uttar Pradesh are very high. In the cases, where power play, lawlessness and impunity embedded clearly, they leave a stamp on our minds and stir our consciousness for a long time. The details coming from crime branch's charge sheet in the case of Kathua, along with the manner of brutality show the unbelievable perversion of mind and degradation of human behavior. Besides, the savagery of police officials, fathers and their sons and friends gang raped the child in a temple for days and later bludgeoned her to death. Assessing the activities of legislators, lawyers and other groups in Jammu close to ranks and power, flanking around the accused trying to detail the necessary legal procedures and related activity, for bringing the culprits to book, the girl's picture is all over.

Rapes are rampant. As per the national survey, there has been a 36% increase in rapes in the last three years. Every day, newspapers report, cases of sexual violence against children. According to a survey of the Delhi police, in 41 % cases, the perpetrator is either a family member or a friend. The psyche behind rape crimes lies in a traditional social order, where women are considered male property, especially in economically

weaker section by the lower castes, highly practiced against the working-class women, ethnic minorities or tribal, *adivasis*. Due to their weak social status, the social trend has been that they could be violated with impunity. If an upper caste man rapes a Dalit woman, in the eyes of society, his crime is not considered to be grave. To settle the scores of animosity, a young girl or boy may be brutalized, raped and killed by the opponent, dehumanized, raped and killed to settle a political scores or personal issue with her or his family, is considered lesser crime, though not by courts but by society in view of provocation of animosity. Rape is a tool of social power and domination, for keeping marginalized section of society under control and subdued. It also generates the psychology of fear. They feel scared all the time. They and their children get demoralized and act as per the command of local powerful forces.

Who are marginalized people? They are different groups of people within a given society, culture, context and history. They are often at risk of being subjected to multiple discrimination due to the interplay of different socio-economic forces, personal characteristics or grounds, such as religion, sex, gender, age etc. By social exclusion, or social marginalization, they are ousted from the mainstream of development and are thus at social disadvantage and are relegated to the fringe of society. It is a term used across disciplines including education, sociology, psychology, politics and economics. The situation of women of marginalized communities is rather more precarious. Sometimes, a woman of the upper strata of society can also be vulnerable, if she is placed under different circumstances and is powerless.

After the end of World War II, most countries became independent from the colonial rule. The precondition for their recognition as independent nations was that they would fully conform to the 1948 Human Rights Convention, to ensure that all citizen of the new nation shall have equal rights. They all did in theory. Some are still struggling

to do so. Religion, caste, gender, color and creed are still the issues to be handled to the satisfactory degree of acceptability. Due to the lack about understanding of gender equality, security of women is in critical state in most countries today, especially that of the marginalized women. Theoretically, all the countries in Asia have guaranteed equal rights now but cultural, religious and socio-economic issues obstruct it. Even in a country, which guarantees right to equality to all its citizens, it is unfortunate that it is the marginalized women, who are often the victims, be it, landlessness, hunger, poverty or inadequate primary health services. They easily become the victims of sexual assault/rape (within the house or outside), trafficking, are paid less for the same amount of work. They also lack access to governmental resources and welfare schemes.

Whenever a country moves towards democracy, challenge of accommodating and promoting the rights of ethnic, religious and other minorities tends to emerge. After 1947-48, when the Middle East and North Africa embarked on its own democratic transition, they made endeavors by learning lessons from their earlier experience.

After the two decades marked by a quantum leap in the number of countries formally considered as democracies, it is widely understood that new and emerging democratic states confront a complex, multi-layered political, social and economic challenges. In the sphere of institutional design and development, the main challenges are holding free and fair elections, establishing functioning political parties, entrenching an independent judiciary.

Development story of South Asian women is centric to the contributions of its marginalized women. Be it the white revolution of Amul (milk), which started from Anand with the help of small scale women's milk co-operative in Gujrat of India, or the Grameen Bank of Bangladesh, giving small business loans to women with the philosophy that by trusting these marginalized women, a local network of

development can be created to be expanded at the national level. Mobile phones provided to these women was of immense help. Stories of silk weavers of Northern Eastern India explain how they sustain their families and village economies, in the absence of any industrialization. We hear the same from the coastal areas, where women of fishing communities successfully handle the trade of perishable commodity, like fish, by selling it door to door, without any product insurance and economic security or refrigeration facilities. Women engaged in agricultural activity in most agrarian societies, without the ownership of land is a common sight in all Asian countries, in spite of huge propaganda of land reforms. Their ownership of land is 0.5% as per the statistics presented by Food and Agriculture Organization. Communication technology, like mobile phones has helped these women to grow but their lives are still hard in the absence of adequate healthcare, education, portable drinking water, clean air, adequate job opportunities and social securities.

Everyday life of women outside the house is vulnerable. Rape and sexual assault has assumed very high degree of occurrence. Survivors become laughing stock and society looks down upon them. Unable to bear the indignities, many resort to suicide. In the well-known case of Nirbhaya (not real name), who ultimately succumbed to the brutal injuries inflicted on her internal organs by the gang of six rapists, in a bus on a late winter evening in December 2016. The beast like, unspeakable inhuman actions of these criminals has not gone unpunished. A fund after her name, called Nirbhaya Fund and many other welfare schemes have been initiated to help other survivors. Even the provisions of rape laws have been amended to provide for more stringent punishment. Evidence act has also been accordingly amended to facilitate the amendments. In spite of such penal reforms, there is no day when rapes are not reported. Numbers of minor children as victims, is going up and up. Even adults are not being spared. Some victims in non-urban areas are forced to make compromises in all spheres of life, as law and order being weak

and sometimes far to reach. The victims are often shunned by one and all, even by close relatives, and are left to lead a life of isolation”, leading to the perpetuation of further untold misery. In a case of a minor victims of rape, the court stated in its judgment that such instances leave a permanent scar on the survivors.

In the case of Raju, a 14-year old boy, who was sexually molested and killed thereafter, the determination of Raju’s parents kept the child right activists on the move reaching out to other states, looking for his killer. The alleged accused, Rasul, surrendered when the investigations took aggressive proportions. State Child Rights Commissioners were also involved. When a child goes missing or is trafficked, it has impact on the entire family. The missing and trafficked children are not just numbers, they are real people and each case has to be treated with utmost seriousness. Raju’s case shows we are in a dire need face recognition software. Despite clear directions from the Delhi High Court wherein, the investigating agency was asked to introduce face recognition software to track missing children. It is yet to happen. With the said software, if police comes across another case of a lost child, there will be a better chance of tracing them back to their families. Delhi Police is in the process of procuring an updated facial recognition software that will help them match an unidentified person/child with the photograph of a missing person on record. At present, cops are using database, if they have the details, like name, age, etc., of the missing person. In the wake of a directive issued by Delhi High Court, police is required to procure it. The process seems very slow. The software will also function through a mobile app, which will be developed for iOS and Android. It also includes the factor of ageing during the identification process. This software facilitates the investigation system and investigation authorities will be capable of processing live videos with feeds from over 100 live cameras simultaneously. There will also be the provision for online matching of missing persons using Android

and iOS mobile applications. The software will be able to distinguish facial images of people of different race and ethnicity and will be capable of enrolling facial attributes, besides providing the best matches for any given image. It will also have the technology to determine the changes due to ageing while performing the match because several children are often found after months or years. The FRS software is said to be capable of searching for over 2,000 face images per hour. Once functional, the software will also act as a valuable repository of images, which can be used by investigative units and state police through the CCTNS network.

Court was very serious and directed that waiting for the perfect software to be developed with an open-ended timeline, does not serve the purpose of addressing the issue of missing children on an urgent basis, therefore, no further time should be lost. Recently the Supreme Court of India summoned the Maharashtra DGP to explain the failure of law-enforcement officials to unearth systematic channels of human trafficking in the state, when 68 girls, including 18 minors, were rescued from a red light area of Shahada, Nandurbar, in January 2017. The court expressed its dissatisfaction over the probe conducted by the state police, which contended that all girls had “confessed” that they had gone there on their own and no other person was involved in human trafficking.

Unbelievable! The court found that all the girls were from a particular community and had come from six districts of Rajasthan and it showed that there might be a well-established channel under which they were being taken and pushed into flesh trade. “How can you not see what is happening behind the scenes. It is troubling to us the way you are conducting the probe. There must be some channel through which these girls were taken to Maharashtra and you should find out who are the persons behind it,” the bench said. This action was on a petition filed

by an NGO, Rescue Foundation, which pleaded the court to intervene to protect the interests of the minor girls, who were rescued last year but were handed over to their guardians without following due procedure of law and sought a proper inquiry before handing over the custody to “so-called” guardians to safeguard the interests of the minors. These are little drops in the sea of crime of trafficking, which has gathered huge proportions all over the world for sexual and forced labor purposes. We need a common definition and a common law on trafficking, so that criminals involved can be tried even beyond the jurisdiction of the commission of the crime.

The judge of the court of Protection of Children Against Sexual Offences Act (POCSO Act) said in a recent case “The convict was an adult of 22 years of age at the time he committed the crime, having a thinking mind and therefore ravishing a helpless and naïve 11-and-a-half year-old victim only to satisfy his lust, speaks volumes of his perversity.” The convict was survivor’s neighbor. He lured her on December 30, 2015, when she was on her way home.

Some legal minds feel that the general provisions under Indian Penal Code was more stringent than the POCSO Act. In the instant case, the court awarded 14 years to the man for raping the minor under IPC and fined Rs 40,000. The girl was awarded Rs 3 lakh towards her welfare and rehabilitation by the court, though stating that no amount could compensate her loss.

Often victims are lured by a person, who is known to them and whom they trust. They are threatened not to disclose their ordeal to anyone. Some show courage to speak up, others suffer silently. The sheer number of such cases is shocking and also makes us wonder why the state's action to prevent such atrocities is not enough? Possibly the difference between law and implementation is grave.

In 1985, rape laws and related provisions of the Indian Evidence Act were amended, when in the case of a Gujarati young tribal girl, called Mathura, was raped in a police station by four policemen on duty. They were all acquitted even at the level of Supreme Court, in the absence of any other corroborative evidence, than just the victim's testimony. Thereafter, as per the amended provisions and the law, the sole testimony of the victim is enough to lead to conviction of the accused. This is the law today.

Child marriage is a bad practice in many parts of South Asia. Identifying policies that work best against child marriage is the empowerment of girls. It is the key. Despite significant progress against child marriage, it remains a huge challenge. Last year, 320 lakh girls under 18 were married in India alone according to UNICEF. Very critical and landmark ruling of the India Supreme Court criminalizing sex with a minor even within marriage forms part of a solid legal framework. Years of experience (from the times of the Sharda Act of 1936, wherein the age of the bride was enhanced to be 12, after brutalization of a six years old bride by a much older man's matter was globally highlighted), laws alone are not enough to entirely change this practice. The negative consequences of child marriage include making girls less educated and less healthy. This practice is also linked to more domestic violence, due to weak powers of the girl. By focusing on a range of interventions, governments are trying to do more and more under pressure.

The Tata Social Trusts and Copenhagen Consensus have added new data to the problem of child marriages, with research papers that assess child marriage prevention policies for Andhra Pradesh and Rajasthan. Such policies emerged to deal with many challenges but states lack adequate resources. Spending wisely means helping more people, either with better health, more education, a cleaner environment,

or an economic boost. Hundreds of experts in each state have differently helped to identify promising ideas in dozens of policy areas. Specialist researchers are analyzing interventions so far undertaken. Complete eradication of child marriage is still a dream. When girls drop out of school, they increase their risk of being child brides. According to available statistics, Rajasthan has among the highest incidence of young girls marrying.

Even providing a cash transfer of about Rs 8,000 each year to girls from age 14 obliging them to stay in school will result in a 19% increase in secondary enrollment. Even including the increase in schooling costs and foregone opportunity for the girls to earn money, the cost over four years will run to Rs 950 crore. Despite that it will avert 9,620 child marriages. Thus girls are less likely to be victims of domestic violence, will receive better education and hence higher incomes over their lifetimes. Moreover, their children will be better fed and have better lives. In total, the benefits for Rajasthani women and their children will approach Rs 2,700 crore. Therefore, every rupee spent will generate nearly three rupees in benefits to Rajasthan society.

Some studies have linked school dropouts with menstrual issues and a lack of appropriate sanitation facilities. In this regard, if linked, the Swatchh Bharat Abhiyan can be understood to be an integral part of the response to early marriage. Building of new toilets, gender segregating toilets that exist, and repair of the broken toilets is important. This would slightly increase school attendance and have health benefits, as well as delay marriages. In total, each rupee spent would generate just over four rupees of social good.

A third approach is to tackle the lack of safe transport to secondary school. By giving every girl starting in secondary school a bicycle would lead to about 12.5% more girls completing at least the first year.

(Bicycles have been tested elsewhere, including in Andhra Pradesh). The annual cost would be around Rs 8,000 per participating girl over four years. That includes the extra costs of education, along with lost wages from girls who would have had a job earlier. The benefits of delaying nearly 8,200 early marriages would lead to wage increases for the duration of the girls' lives, add up to 4.5 times the costs.

Economic analysis on child marriage policies in Andhra Pradesh, where the context is different and therefore costs, benefits and impacts differ, as they will for every state in India. While it broadly shows what works, the concrete results will necessarily differ from state to state. What is clear, though, is that for every state in India, empowerment of girls can be an effective policy intervention to prevent child marriage.

Dowry deaths have risen from about 19 per day in 2001 to 21 per day in 2016. It is alarming that the rise in dowry deaths is unabated despite greater stringency of anti-dowry laws. In 1961, the Dowry Prohibition Act made giving and taking of dowry, its abetment or the demand for it an offence punishable with imprisonment and fine or without the latter. This was an abysmal failure as dowries became a nationwide phenomenon, replacing bride price. More stringent laws followed. The Criminal Law Amendment Act in 1983 inserted a new section (498-A) to deal with persistent and grave instances of dowry demand and such offences were punishable with imprisonment extendable to three years. As cases of brutal harassment and dowry deaths continued to rise. Another Act was passed in 1986, relating specifically to the offence of dowry death. Such deaths were punishable with imprisonment for a period not less than seven years, but may extend to life imprisonment. The Supreme Court in its judgment (*Durga Prasad & Anr vs. State of MP*) on 14 May 2010, rejected an appeal for dowry death on the grounds that, apart from the fact that the woman had died on account of burn or bodily injury, otherwise than under normal circumstances, within

seven years of her marriage, it had also to be shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Only then would such death be called a “dowry death” and such husband or relative shall be deemed to have caused the death of the woman concerned. It is of course arguable that establishing priority in time of cruelty against the female spouse before her death or “suicide, alleged or otherwise is yet another major and nearly insurmountable hurdle in punishing the perpetrators of dowry deaths.

Conviction rates for dowry deaths at all-India level have hovered around a low of one-third of registered cases. In fact, the conviction rate was about 32% in 2001 and fell to about 30% in 2016, pointing to growing inefficiency of the judicial and police systems. Besides, in several states (notably Andhra Pradesh, Karnataka, Maharashtra, and Telangana), the conviction rates were abysmally low (10% or lower). Worse, in some of these states (notably, Maharashtra and Andhra Pradesh), there were sharp reductions from already low levels in 2001. The variation across states remained high in both years, suggesting that the gaps between high and low conviction rates were large.

Emerging reports abound in cruelty towards a bride are shocking, with the natal family failing to comply with hugely inflated dowry demands and subsequent extraordinary demands. As if daily humiliation, wife beating, torture, threats of bodily harm, and forced sex with male relatives were not ghastly enough, often brutal killings through wife-burning, or asphyxiation, and not infrequently through hired assassins follow in quick succession. The natal family is left a silent spectator constrained by tradition, custom, lack of resources for legal redressal and not least by perceived difficulty of marrying another daughter. It is thus not an exaggeration that the distinction between dowry death and murder is blurry.

New insights are emerging from socio-economic analysis data of dowry deaths at the state level, constructed from the National Crime Records Bureau for the period 2001-2016, and other supplementary data from the RBI and the Census. This allows us to isolate the contributions of several factors including marriage squeeze (age adjusted ratio of females to males), state affluence, conviction rates, nature of political regime, and the Supreme Court judgment of 2010 to the variation in the incidence of dowry deaths (or ratio of dowry deaths to women's population in a state).

Marriage squeeze is used as a proxy for surplus of marriageable women over marriageable men or scarcity of the latter in a stylized marriage market. If there is a growing scarcity of such men in the marriage market, higher dowries are likely and so more dowry deaths may occur. Thus higher sex ratios result in more dowry deaths. The greater the affluence of a state, the higher was the incidence of dowry deaths. The effect of conviction is negative and significant, pointing to the important role of speedy convictions in lowering dowry deaths. Finally, as dowry deaths are embedded in archaic community and family norms, and in a corrupt and ineffective judicial and police system, curbing of this heinous crime remains a daunting challenge. Whether the *Beti Bachao Beti Padhao* campaign is a likely solution or not. Let's not be over-optimistic, if not reductionist.

Dowry deaths are a big blot on our society and the reasons seem to be well ingrained in our way of life. Thus, in spite of stringent laws, as the figures show, the number of dowry deaths is on the rise. Consumerism and 'get rich soon' culture have played havoc with the way we perceive life. A newlywed is considered as one more head to be fed and since the parents' family has one less member to take care of, they must compensate in a big way. Aspiring and ambitious husbands feel they have the right to demand a share in whatever resources the wife's family possesses.

Education is changing some stereotypes. In some states, the demand for dowry has been replaced by the girl having, “a well-paid job.” So, she is not allowed to have any other choice but to continue to work. Changing the attitudes of the people has always been a long drawn battle which needs to be fought anyway. An all-out effort is required to make our women economically independent at all level of society so that they are able to fight being exploited and live a life of dignity.

Even while being educated, the life of our young girls is a constant fight for a secured life. Recently in Kannur, Kerala, the Taliparamba police directed girl students of the National Institute of Fashion & Technology (NIFT) to ‘maintain certain discipline and not go outside alone at night’. The police made the request after students had held a protest demonstration a week ago and said that over 50 instances of harassment had happened during the present semester. Police have started night patrolling and CCTV cameras are being installed, as a deterrent. At the same time, the overall feeling among the police is that often such cases are not reported from other campuses because girls do not venture out at odd hours and dress appropriately. The police in charge said, “We do everything possible to prevent such attacks. But we have a request; girls should maintain certain discipline and not go out alone at night,” The police had arrested two persons acting on two complaints a couple of months ago, instances of such harassment are increasing said NIFT students. The students said that they represent a premier institute with students from all parts of the country. They feel insecure outside the campus during evenings because of anti-social elements target, stalk and harass them. At times, their conversation is crude with sexual overtones. NIFT is part of a huge campus that includes Government Engineering College, Ayurveda Medical College and Kannur University. The campus has a cosmopolitan culture. Issue of prevention of such kind of harassment is serious because it affects the confidence of students. Some feel that such incidents reflected how women-unfriendly

and gender-insensitive the society is; besides, police trying to abdicate their responsibility of providing proper security, while girls are fighting for a secured space and gender equality, people should stop considering them as mere physical objects. Same was the story of the campus of Banaras Hindu University last year.

In Delhi, in another case, a court opined that judiciary should sternly deal with the issue of stalking, as the perpetrator, "if not treated", becomes dangerous over time and poses a threat to the lives of women. It also termed Delhi as one of the "most dangerous" cities for women in recent times, and added that "acts of rude and continuous staring at body parts, ogling, lewd remarks and gestures, filthy jokes and brushing against a female's body" are the things that women in the city face all the time, while dismissing two appeals of two convicts in a stalking case and upholding their six months' jail term. For the court, there was no reason to disbelieve the statement of the victim, who was stalked in 2013 by her two classmates. According to the court, Indian society has been struggling to find ways to deal with the crime of stalking, which was made an offence in 2013, but there have been several shortcomings in the existing law and a stalker cannot be allowed to roam around freely as his activities could be dangerous for others.

Society often blames women saying they failed to wear "modest clothes", however, it has been observed that even those wearing dresses that "society claims are decent" are also not spared. Same court held that "Eve-teasing is not to be judged by men by using their own parameters but by women as to how they feel about the same. To a perverted mind, it does not matter how a woman is dressed, how old she is, how pretty she is, where she is - whether in a public transport or hospital, etc. Eve-teasing, the court observed, is almost institutionalized in public transport and public places and "perverts look for easy preys" and vulnerable victims so that they do not get caught.

The court said refusal to act on the testimony of a survivor of sexual assault in the absence of corroboration as a rule amounts to "adding insult to injury" and asked why should the evidence of the woman who complained of stalking or molestation be viewed with suspicion?

Involvement of women in the participation of political process of the country is very important. Universal franchise is a gift of democracy. Countries claiming to be democratic, had no option but to give right to vote to all women. Not too long ago, women of most Middle Eastern and some African countries did not have the right to vote and participate in the political process of their countries. It was a challenge to promote rights of women in view of the conservative religious traditions that these countries arbitrarily held. The fallout of Iraq war and efforts to establish a constitutional regime in Afghanistan since the conflict of 1979, attention was focused on the state of women's rights. The neighboring countries, not directly involved in these conflicts, woke up to the realization that moving towards democratic political process was imperative to avoid external intervention. It also dawned on them that one of the parameters of assessment of effective democratic process by the international community was the delivery of women's rights to the women citizen, failing which the erring nations could attract action and intervention on this ground alone that women's rights of their population were not being respected. Thus, the challenge of accommodating and promoting women's rights is a recent addition to the politics and so is to have a Constitution and a proper judicial infrastructure. Things are slowly changing with gradual democratic transition.

The fundamental principles of equality, equity, justice and inclusion of all citizen would warrant women's participation, including people of all sections of society, like, old, able-bodied and disabled alike, regardless of race, class, religion or sexual orientation. Ensuring such inclusion is a continuing challenge for all democracies. The light to life

includes right to live with dignity. Education adds to dignity and also generates awareness, important for protection of one's rights. Education of all citizen is a key factor to facilitate respect for such democratic values. Women are realizing all over the world the importance of education in the changing world. A pleasant and promising example has been recently reported from Afghanistan. 25-year-old Jahantap Ahmadi, a high school pass, teacher at the only elementary school, in an open field, in her village in central Afghanistan, dreamed of going to college. A mother of three children under the age of five and with a husband who could neither read nor write. On March 15, 2018, she happily set out for the Daikundi provincial capital of Nili, to take the university entrance exam. She walked most of the way to catch the bus with her infant daughter. The result was that she scored 152 marks out of 200! Her picture posted on Facebook, sitting cross-legged on the floor, her 2-month-old baby asleep on her lap as she took the exam stunned. A teacher in Nili who was moved by Jahantap's determination to get an education posted pictures on Facebook. In Afghanistan, where women still are struggling for even the most basic of their rights, the Jahantap story went viral. People contacted her to make sure that it was true. Later in an interview in Kabul, she said (where she is now enrolled at a private university) "I wanted to get my education, so I could help my village, change my village. I want to help my society. But first I wanted it for my children, so one day they could be educated, but now I want for all the children of my village as well."

Malala Yusufzai's as another example from the neighboring Swat Valley of Pakistan, inspiring endless young girls for quite some years now. Her zeal and courage for promoting education of girls are highly commendable. We all know how she almost died for the cause in the conservative patriarchal society of northwest frontier area of Pakistan. She is continuing her education abroad and today is a world leader in the area of promotion of education of girls.

During the Taliban regime, women's education was not permitted. It is almost 17 years that Taliban is theoretically out of the Afghan polity. However it takes a long time for the society to change its attitude towards women. Education of girl child is moving at snail's speed. An estimated 6 million children are in school in Afghanistan and a third of them are girls. However, most girls don't study beyond elementary school, and of the 3.5 million Afghan children who have never gone to school, 75 percent are girls (according to the 2017 annual report of the United Nations Children's Fund, which was released this February).

In a country that remains deeply conservative and functioning on patriarchal values, Jahantap's husband, Musa Mohammadi is a ray of hope. He said "I am so proud of my wife," "That's not the life I want for my children," he said. "I see a sign on the road and I can't read it. I go to the pharmacy to get medicine, but I can't read the name of the pills. That's not right. It is very difficult for me." Prophet placed education for men and women both as a priority. He had said that if need be go as far as China to seek education. Both in her case and in the case of Jahantap, both had the support of their families in the pursuit of their goals. A very important factor for women to succeed.

At a conference on violence against women, one conservative member of Afghan parliament argued that Islamic law permitted for violence against women. In a traditional Afghan society, even when a woman laughs, these conservative men say that according to Shariah (Islamic law) it is wrong for them to laugh. One should ask them, how is it that when men do anything and there is nothing in Shariah against them. Such interpretation of Muslim Jurisprudence for the sake of oppressing women is incorrect and it is an un-Islamic act.

A 2017 Human Rights Watch report on Afghanistan said attempts to reform family law, including divorce provisions, have been stalled. Around the same time the lives of similarly marginalized Indian Muslim

women went a sea change. Referring to a petition filed by four Muslim women from different parts of India, suffering marital discord, leading to termination of their marriages by instant verbal divorce pronounced by their respective husbands (triple talaq or Talaq e Bidal). Triple talaq or verbal divorce, is practiced by some Muslim communities to instantly divorce their wives by saying talaq three times. It is an un-Islamic practice and is very different than the procedure prescribed in Quran for divorce, which takes three months to mature and termination of marriage is not instant. In the three months waiting period, reconciliation efforts of family and friends are very important and it is a imperative that both parties make serious efforts to reconcile.

Shayara Bano, a 35-year-old woman, challenged the practice in 2016, a year after her husband of 15 years divorced her via triple talaq, others who had also filed similar petitions were Aafreen Rehman, Gulshan Parveen, Ishrat Jahan and Atiya Sabri. All petitions were tagged with Saira Bano's plea.

Some Muslim groups see the issue as a matter of religious right while others, including the government termed it unconstitutional. On 22nd of August 2017, the constitution bench of the Indian Supreme Court held by 3:2 majority that the Muslim practice of triple talaq to be unconstitutional because among other things, the triple talaq violates the fundamental rights of Muslim women, as it irrevocably ends marriage without any chance of reconciliation. Hence it is un-Islamic in any case because Muslim law provides for a divorce to mature in three months. This period is to be used for reconciliation by friends and family. The judgment in the case of Dadju Khan vs. Rahim Bibi (2002) beautifully describes the Muslim law in this regards and also declared that all kinds of divorces, both oral or otherwise, must be confirmed by an appropriate court of law. Unfortunately, this judgment was not widely publicized.

In the recent matter of Syrabano and others, Justices Rohinton Nariman, Uday Lalit and Joseph Kurien ruled that triple talaq is unconstitutional. Justice Joseph said what cannot be true in theology cannot be protected by law. He added that triple talaq is not recognized by Quran and hence it couldn't be a practice to be protected under the right to religion (Article 25 of the Indian Constitution).

Justice Abdul Nazeer and the then Chief Justice JS Khehar upheld the validity of triple talaq. CJI Khehar asked the government to bring legislation in six months to govern marriage and divorce in the Muslim community. He added that talaq-e-biddat is an integral part of the Sunni community and has been practiced for a 1000 years. The parliament of Philippines is exploring the possibilities of providing for the provisions of divorce for their women because, being a catholic country, there is no provision of divorce so far. Thus there were three different judgments in this matter but majority holding the instant or triple talaq to be illegal and unconstitutional.

The Indian Parliament's draft of legislation on the issue is going beyond that of mere illegality of verbal divorce or triple talaq. The proposed legislation is designed so as to even provide for a jail term of three years for a husband, who does not respect law and still indulges in the practice of triple talaq. What has been opined by the apex court needs to be respected as it is a part of the law too. The practice of triple talaq is illegal and should not be resorted. The Indian government is determined to legally regulate marriage and divorce among the Muslim community. A vibrant judiciary is necessary to protect women's rights, especially of marginalized. Applicable Muslim law went a huge change to help poor marginalized Muslim women, Muslim women and likes of her have immensely benefitted thereafter. In 1985, the Indian Supreme court had come to the aid of 79 years old Shahbano, a victim of utter neglect by the husband, a lawyer from Indore, who remarried after 19

years of marriage with her. She gave him five children. She was granted maintenance by the court under the secular provisions, even when her husband had divorced her by using the practice of triple talaq. In this landmark judgment, the Supreme Court interpreted Verse 241 of Sura Bakr of the Quran, to facilitate and to direct the delivery of maintenance to a divorced Muslim woman by her former husband. It is now the law because Indian parliament thereafter passed the Rights of Muslim Women on Divorce Act of 1986, providing therein for making appropriate provision for the maintenance of Muslim woman, whether divorced or not. Earlier, men did not pay any maintenance to their divorced wives on the ground that Muslim marriage is a civil contract between two adults and if it terminates, there cannot be any contact between them thereafter.

The applicable Muslim law has undergone serious changes in India since independence. Whenever possible, endeavor of the court is to bring its parity with the mandate of the constitution. In 1985, in the case of Shahbano begum, court ruled that Muslim women are entitled to maintenance under the provisions of secular law (section 125 of the Cr. P. C.), even after having been divorced by her husband. Maintenance is an issue linked with right to live with dignity, which is a part of the fundamental right to life guaranteed, by the constitution. Now it is the practice of triple talaq, a unilateral right of the husband to divorce his wife, is not in conformity with right to equality, which has been abrogated by the Supreme court. The lives of people cannot be allowed to be oppressed in the name of unjustified traditions, being source of untold misery in marriage over one spouse by the other.

Marital rape is yet not an offence per se in India but can be dealt with under the provisions of domestic violence Act. Recently, the High Court of Delhi has decided to conduct day-to-day hearing of a batch of matters filed on account of marital rape and the double bench of the Acting Chief Justice fixed April 16, 2018 to hear the matter on a daily

basis. In the same matter, an NGO representing men's group has claimed that married women have been given adequate protection under the law against sexual violence by their husbands, therefore, these petitions are frivolous.

During the hearing the bench also posed questions to the men's association if they are of the opinion that a husband has a right to perpetrate sexual offence on his wife and can force himself on her, irrespective of her denial. Court also remarked, that a rape is a rape. Is it that if one is married, it's okay? If you are not, then only it's a rape? If an uncle or grandfather sexually assaults a woman or a girl, it is covered under the offence of rape. Similarly, husband should also be equally responsible.

However, opposing the PIL seeking to make marital rape an offence, the NGO Men Welfare Trust claimed that the exception in Section 375 of the IPC, which says intercourse or a sexual act by a man with his wife is not rape, is "not unconstitutional" and setting it aside will create more injustice to husbands.

It was opposing petitions filed by NGOs RIT Foundation and the All India Democratic Women's Association, which have challenged the constitutionality of Section 375 (which defines rape) of the IPC on the ground that it discriminated against married women being sexually assaulted by their husbands.

The Central Govt. has opposed the petitions saying marital rape cannot be made a criminal offence as it could become a phenomenon which may destabilize the institution of marriage and an easy tool for harassment of husbands by their wives.

Equality of spouses in marriage is an important factor in enjoying its bliss. Recently, the Philippines' legislature took a step towards making divorce legal. The lower house of the Congress passed a law allowing

their citizen to dissolve marriages, despite opposition from the President and Bishops in the mainly Roman Catholic country. Philippines has the largest Catholic population in Asia. It and the Vatican are the only two states in the world without a divorce law. In response to a clamor from women, who wanted to get out of failed marital relationships, particularly from abusive husbands, a bill was passed with 134 votes in favor, 57 against and with two abstentions. In spite of opposition from President Rodrigo Duterte. The legislative process will take its course. For the bill to become law in the upper house of Philippines, the Senate, must also pass, what is known as a counterpart bill. Drafting by Senate of such a bill is yet to begin. President Duterte himself is legally separated from his wife and opposes making divorce legal on the ground that he is concerned about the welfare of children, whose parents get divorced. Last year's survey on the issue found that 53% of the population of Philippine's was favor of legalizing divorce.

The strength of democracy, gender equality and security of women are inter related. Evidence of positive effects of gender equality on the growth and development of society are emerging. Higher levels of gender equality are strongly correlated with a nation's relative state of peace, a healthier domestic security environment, and lower levels of aggression toward other states are also being indicated. Strategies to strengthen democracy and human rights have never been so relevant. The female empowerment, accountability for attacks against women and girls and closing the political and economic gender gap are important indicators. efforts to prioritize policies designed to mainstream gender equality are critical.

Human rights will be seen as relevant only if they are sourcing changes in society, though may be small. When human rights are exercised on daily lives of marginalized people, experiencing humiliation, they are rightly valued as tools for the assertion of human dignity.

The promotion of democratic values and principles within a society is essential. Putting the institutional architecture of democracy is imperative for having a strong foundation of such a political statecraft. Without institutional framework, democracy cannot be sustainable. In the area of institutional design, holding of free and fair elections, establishing functioning political parties, entrenching an independent judiciary are essentials, for ensuring domestic political reforms and for seeking international assistance. For delivery of women's rights, an effective law and order system, along with a vibrant judiciary coupled by activist's vision are essential. When the state of marginalized women, be it in a society, household or politics of a country is equitable and healthy, the nation is bound to grow to be a greater democratic and inclusive institution.

# **Role of NHRIs in the Aftermath of Civil Unrest and Post-conflict Transitional Justice: Indian Perspective**

-Justice D. Murugesan-

## **1. The Protection of Human Rights Act, 1993**

The Human Rights Commission Bill introduced in the Lok Sabha on May 14, 1992, was referred to the Standing Committee on Home Affairs of the Parliament. The President of India promulgated an Ordinance, establishing a National Commission on Human Rights on September 27, 1993. Thereafter, a Bill on Human Rights was passed in the Lok Sabha on December 18, 1993, to replace the ordinance. The Bill became an Act, having received the assent of the President, on January 8, 1994 (Act 10 of 1994) and was published in the Gazette of India, Extraordinary Part II, Section I, on January 10, 1994. Thus, the Protection of Human Rights Act (No. 10 of 1994) came into force. Article 1(3) provided that the Act should be deemed to have come into force on the 28th day of September 1993. Section 1(2) states that the Act is extended to the whole of India and that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters related to any of the entries enumerated in List I or List III in the Seventh Schedule of the Constitution applicable to that State. The purpose of the enactment is laid down in the Preamble of the Act i.e., it provides for the establishment of a National Human

Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights.

### **1.1 Autonomy and Budget**

The National Human Rights Commission (NHRC) of India is an autonomous body constituted on 12 October 1993 under the Protection of Human Rights Ordinance of 28 September 1993. It is given a statutory basis by the Protection of Human Rights Act, 1993 (TPHRA). The NHRC is the national human rights institution, responsible for the protection and promotion of human rights, defined by the Act as “rights relating to life, liberty, equality, and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants”.

Budget proposals formulated by the NHRC and approved by a Committee headed by the Chairperson of the Commission are included in the overall budget proposals made to Parliament by the Ministry of Finance. Once the budget proposals are passed by Parliament, the grants are remitted to the NHRC. Once the budget is passed by Parliament, Section 32(2) of the PHRA lays down that the NHRC “may spend such sums as it thinks fit.” The NHRC has the power to appropriate funds from one head of expenditure to another, giving it the freedom to change its priorities, if need be, even after the budget has been passed. No percentage of the NHRC's budget is donor-funded.

## **2. Ganhri and Nhrc**

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), renamed as GANHRI is a representative body of National Human Rights Institutions established for the purpose of creating and strengthening National Human Rights Institutions which are in conformity with Paris Principles. It performs this role through encouraging international coordination of joint activities and cooperation among these NHRIs,

organizing international conferences, liaison with the United Nations and other international organizations and, where requested assisting governments to establish a National Institution.

The Sub-Committee of Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI) awarded 'A' STATUS ACCREDITATION TO THE National Human Rights Commission of India in 2017 as an acknowledgment of the important work that the Commission has carried out for the protection of human rights and promotion of human rights awareness within the country. Thus after a gap of four years, NHRC India has again become a member of GANHRI Bureau with the election of Justice Shri H.L Dattu, the present Chairperson of the Commission from this year i.e. 2016. During the period under review, the National Human Rights Commission of India, which is a member of the GANHRI and a founder member of APF, participated in number of meetings, seminars, workshops and interaction with foreign delegates in the Commission.

### **3. Asia Pacific Forum**

The Asia Pacific Forum of National Human Rights Institutions (APF) is the leading regional human rights organization in the Asia Pacific Region established in 1996. It is a member-based organization that supports the establishment and strengthening of independent National Human Rights Institutions in the region. Its goal is to protect and promote human rights of people of Asia Pacific Region through the network of member institutions. Every member of this organization represents a diverse range of countries, across the region. The NHRC (India) is one of the founding members.

### **4. The Functioning of NHRC**

There are five Divisions in the Commission. These are the – (i) Law Division, (ii) Investigation Division, (iii) Policy Research, Projects and

Programmes Division, (iv) Training Division, and (v) Administration Division. The Law Division of the Commission handles scrutiny, registration and disposal of around one lakh cases, registered on the complaints of human rights violation made to it. During the period from 01.04.2017 to 20.03.2018, 77,685 cases were registered for consideration and the Commission disposed of 83,484 cases. The Commission also transferred 20,847 cases to the State Human Rights Commissions (SHRCs) for disposal as per the Protection of Human Rights Act, 1993 (as amended by the Protection of Human Rights (Amendment) Act, 2006). The Division has also been organizing camp sittings in State capitals to expedite disposal of pending complaints and sensitize the State functionaries on the human rights issues. The Division is headed by a Registrar (Law), who is assisted by Presenting Officers, a Joint Registrar, a number of Deputy Registrars, Assistant Registrars, Section Officers and other secretarial staff.

The Investigation Division carries out spot investigations all over the country on behalf of the NHRC. Furthermore, it facilitates in collection of facts relating to varied complaints made to the Commission, in scrutinizing reports received from the police and other investigation agencies and in looking into reports of custodial violence or other misdemeanors. In addition, the Division analyzes the intimations and reports from the State authorities regarding deaths in police and judicial custody as well as deaths in police encounters. It also renders expert advice on other matters related to police or armed forces.

The Division has set-up a Rapid Action Cell to attend to complaints that require immediate attention and action. Other than this, it assists the Training Division in spreading human rights literacy as envisaged in Section 12(h) of the PHRA. Investigation Division is headed by an officer of the rank of Director General of Police, and is assisted by a Deputy Inspector General of Police, Senior Superintendents of Police,

and Deputy Superintendents of Police, Inspectors, Constables and other secretarial staff.

The Policy Research, Projects and Programmes Division (PRP&P Division) undertakes and promotes research on human rights and organizes conferences, seminars and workshops on important human rights issues. Whenever the Commission, on the basis of its hearings, deliberations or otherwise, arrives at a conclusion that a particular subject is of importance, it is converted into a project/programme to be dealt with by the PRP&P Division. Besides, it reviews policies, laws, treaties and other international instruments in force for the protection and promotion of human rights. It assists in monitoring the implementation of NHRC recommendations by the Central, State and Union Territory authorities. It further aids the Training Division in spreading human rights literacy and in promoting awareness about the safeguards available for the protection of human rights. The work of the Division is handled by Joint Secretary (Training & Research) and Joint Secretary (Programme & Administration), a Director/Joint Director, a Senior Research Officer, Research Consultants/ Research Associates, Research Assistants and other secretarial staff.

The Training Division is responsible for spreading human rights literacy among various sections of the society. As such, it trains and sensitizes various government officials and functionaries of the State and its agencies, non-government officials, representatives of civil society organizations and students on different human rights issues. For this purpose, it collaborates with the Administrative Training Institutions/ Police Training Institutions and Universities/Colleges. Besides, it conducts internship programmes for college and university students. The Division is headed by a Joint Secretary (Training & Research), who is supported by a Senior Research Officer (Training), an Assistant and other secretarial staff.

The Administration Division looks after the establishment, administrative and related requirements of the Chairperson and Members of the NHRC. Besides, it looks into personnel, accounts, library and other requirements of the officers and staff of the NHRC. The work of the Division is handled by the Joint Secretary (P&A) who is assisted by a Director/Deputy Secretary, Under Secretaries, Section Officers and other secretarial staff. The Information and Public Relations Unit under the Administration Division disseminates information relating to the activities of the NHRC through the print and electronic media. It brings out a bilingual monthly Newsletter 'Human Rights' and other publications of the Commission. Furthermore, it looks into applications and appeals received under the Right to Information Act, 2005.

#### **4.1 Special Rapporteurs**

The reach of the Commission is considerably enhanced by the appointment of Special Rapporteurs and the constitution of Core and Expert Groups. Special Rapporteurs are senior officers who, prior to their retirement, have served as Secretaries to the Government of India or Directors General of Police or have done exemplary service in a human rights-related field. They are either assigned specific subjects to deal with, such as bonded labor, child labor, custodial justice, disability, etc., or a zone comprising of a group of States/ Union Territories to look into human rights concerns and violations.

#### **4.2 Core Groups**

Core/Expert Groups consist of eminent persons or representatives of bodies working on human rights issues. These Groups render expert advice to the Commission on various issues. Some of the important Core/Expert Groups currently functioning in the NHRC are:

- Core Advisory Group on Health
- Core Group on Mental Health

- Core Group on Disability
- Core Group on NGOs
- Core Group on Lawyers
- Core Group on Right to Food
- Core Group on Protection and Welfare of Elderly Persons
- Core Advisory Group on Bonded Labor
- Expert Group on Silicosis
- Expert Group on Emergency Medical Care

### 4.3 Thematic Reports

An illustrative list of thematic emerging of human rights issues are given below:

S. No.	Theme	Subjects Covered
1.	Criminal Justice System	Jails Juvenile Justice Correction Homes
2.	Police and Police Reforms	All matters related to Police and Police Reforms
3.	Terrorism	Urban Terrorism Counter Insurgency Cross Border Terrorism Left Wing Extremism (Anti Naxalite Operation)
4.	Communal Riots	All matters related to Communal Riots
5.	SC, ST, OBC, Minorities	All matters related to atrocities on SC, ST, OBC, Minorities
6.	Bonded Labour and Child Labour	All matters related to Bonded Labour and Child Labour
7.	Food	Nutrition Food Adulteration Mid-day meals schemes
8.	Elder/ Senior Citizen Matters	All matters related to Elder/ Senior Citizen Matters

9.	Spreading Human Rights Education and Gender Equality	All matters related to Gender Equality and Human Rights Education
10.	Health	Mental Health HIV/ AIDS Spurious Drugs Sanitation Silicosis Diagnosis and Diagnostic Labs
11.	Disabilities	All matters related to Disabilities
12.	Tribal Welfare	All matters related to Welfare of Tribal
13.	Environment	All matters related to Environment
14.	Issues relating to Women and Child Rights	Sexual Violence and Rape Domestic Violence Sexual Harassment at Work Place
15.	Human Trafficking	
16.	Transgender	

### 5. Complaint Handling Mechanism

The complaints are sent to the Commission either by the victim or any other person on behalf of the victim or on receipt of an intimation from authorities concerned, regarding custodial death, custodial rape, death in police action, or on suo motu cognizance by the Commission or on a direction or order of any court. The Law Division also receives intimations regarding deaths in police/judicial custody, deaths in the custody of defense/paramilitary forces and custodial rapes. Suo motu cognizance of serious matters taken by the Commission is also dealt with by the Division. All complaints received in the Commission are assigned a diary number and thereafter scrutinized and processed using the Complaint Management and Information System (CMIS) software especially devised for this purpose. After registration of complaints, they are placed before the Commission for its directions and accordingly,

follow up action is taken by the Division in these cases till their final disposal.

Cases of important nature are taken up by the Full Commission and matters pertaining to deaths in police custody or police action are considered by the Division Benches. Some important cases are also considered in sittings of the Commission in open court hearings.

### **5.1 Focal Point**

There is also a Focal Point for Human Rights Defenders who is accessible to HRDs round the clock. Another compilation on the initiatives taken by the Commission on retrial benefits as human right is almost in its final stages.

### **5.2 Open Hearings**

The Commission has also been organizing open hearings on complaints relating to the atrocities on Scheduled Castes to have direct interaction with the affected persons. The Law Division further provides its views / opinion on various Bills/draft legislations referred to it for better protection and promotion of human rights. Five Camp Settings i.e. Thiruvananthapuram (Kerala), Hyderabad (AP), Allahabad (UP), Puducherry, Patna (Bihar) and three open hearings i.e. Thiruvananthapuram, Hyderabad and Mumbai were held by the Commission during 2015-16. During the year 2016-17 up to 31.03.2017, the camp settings/ open hearing of the Commission were held at Patna, Bihar from 21<sup>st</sup> to 23<sup>rd</sup> April, 2016, Ranchi, Jharkhand from 7<sup>th</sup> to 8<sup>th</sup> September, 2016. Pondicherry for one day on 16.12.2016. Odisha from 9<sup>th</sup> to 11<sup>th</sup> January, 2017 and Andaman and Nicobar Islands from 19<sup>th</sup> to 20<sup>th</sup> January, 2017. During the year 2017-18 up to 20.03.2018, the camp settings/ open hearing of the Commission were held at Nagaland on 24.04.2017, Assam and Meghalaya at Guwahati from 17<sup>th</sup> to 18<sup>th</sup> May, 2017, Dehradun, Uttrakhand from 13 to 14 July, Lucknow, UP from 9<sup>th</sup> to 11<sup>th</sup> August, 2017, Rajasthan at Jaipur from 18 to 19 January, 2018.

## **6. Directions in the Form of Recommendations**

Section 18 of the Protection of Human Rights Act, 1993 mandates the NHRC to both recommend compensation and prosecution “where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority”. Section 18(ii) provides the NHRC to “initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons”. Further, Section 12(b) of the Human Rights Protection Act empowers the NHRC to “intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court”.

## COMPENSATION, DISCIPLINARY PROCEEDINGS AND PROSECUTION

The figures of the number of cases registered for the last five years are as stated below:

NATURE OF INCIDENT	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	TOTAL
CHILDREN	1,568	2,560	1,657	1,211	906	7,902
JAIL	2,597	2,583	2,670	2,447	2,416	12,713
DEATHS IN JUDICIAL CUSTODY (INTIMATION)	1,577	1,588	1,668	1,616	1,636	8,085
BONDED LABOUR	3,174	1,017	3,345	240	210	7,986
POLICE	32,968	34,954	35,533	27,845	2,6391	15,7691
DEATHS IN POLICE CUSTODY (INTIMATION)	140	130	151	145	146	712
DEATH IN POLICE ENCOUNTER (INTIMATION)	137	188	179	169	155	828
ENVIRONMENT	271	334	457	446	403	1,911
WOMEN	8,991	9,904	8,105	7,413	7,460	41,873
SC/ST	3,210	3,555	3,454	3,207	2,679	16,105
RIOTS	23	24	26	12	3	88
TOTAL NO. OF CASES REGISTERED IN ALL CATEGORIES	98,136	114,167	117,808	91,887	79,612	501,610

Statement showing number of cases where NHRC recommended monetary relief, disciplinary action and prosecution during the last five years (data as per CMS on 05.04.2018) is also given below:

DURATION	MONETARY RELIEF		DISCIPLINARY ACTION	PROSECUTION
	NO. OF CASES (including carry forward)	AMOUNT (in Rs.)		
2013-2018	2422	631, 335, 585	141	7

Note: A total compensation of Rs. 12, 50,000 is given in 7 cases where the commission recommended prosecution. The commission recommended disciplinary action in 141 cases whereby a total compensation of Rs. 1, 86, 75,000 was given.

### 6.1 Rehabilitation

Ever since its establishment, National Human Rights Commission has been taking cognizance of the plight of people displaced by natural disasters or man-made disasters and development projects. The Commission has been receiving complaints about inadequate and insensitive response regarding relief and rehabilitation of displaced persons. Apart from the powers of the Commission as stated in Section 18 of the PHR Act, 1993, the Commission also ensures rehabilitation to the displaced people. It may direct the appropriate State Governments to rehabilitate the displaced people under their respective welfare schemes. Besides directing the State Governments to do so, the Commission itself also ensures relief and rehabilitation of such persons giving special importance to the vulnerable people amongst them, mainly women, children or disabled.

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

## **6.2 General Recommendations**

1. Pre-displacement, displacement, relief and rehabilitation should be viewed from a rights based perspective rather than as an administrative/governance issue that focuses on needs of beneficiaries. For instance, the lexicon of welfare/charity ("gratuitous relief" "beneficiary") should be jettisoned for language that respects human rights of the displaced or to-be-displaced people. In all instances of displacement, there should be minimum non- negotiable human rights standards that should be adhered to for all and especially for vulnerable and marginalized groups such as women, children, elderly and disabled.
2. As part of relief and rehabilitation, authorities provide food, potable water, clothing, shelter, basic health care, education etc. It is important to note that access to these basic minimum services is not a matter of welfare or charity but is a human right. Basic minimum standards for such facilities /services should be defined.
3. There is a need for Central and State Governments to re-examine and amend laws, policies, plans, regulations and practices to mainstream and integrate human rights concerns on issues related to pre-displacement, displacement, relief and rehabilitation. For instance, human rights principles should inform the relief manuals of various states.
4. Authorities concerned with pre-displacement, displacement and post-displacement activities should be sensitized about human rights through capacity building.

5. All affected and displaced persons have the right to be treated with dignity. In particular, no arbitrary decision, without reasoning should be taken in the matters that affect their source of food, shelter and livelihood. Furthermore, before any such decision is taken, they should have right to be heard/consulted. They should also have the right to appeal against such decisions in appropriate forums.
6. All affected and displaced persons have the right to be treated without any discrimination in matters relating to rescue, relief and rehabilitation. In respect of vulnerable groups among them such as women, the disabled, elderly persons and children, the appropriate authority shall take special measures to protect their rights. Displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.
7. All affected persons and displaced persons have the right to information regarding all aspects related to immediate humanitarian assistance, relief and rehabilitation. This includes, but is not limited to the following:
  - a. Adequate measures to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
  - b. Proper publicity by the State Government so as to enable the affected people to become aware of their entitlements in the form of relief and compensation;
8. All displaced persons, in particular displaced children, have the right to receive education, which shall be free and compulsory

at the primary level. Education should respect their cultural identity, language and religion. Education facilities should be made available as soon as conditions permit. Special efforts should be made to ensure the full and equal participation of women and girls in all educational programmes.

9. All displaced persons have the right to an adequate standard of living. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide displaced persons with and ensure access to:
  - a. Essential food and potable water
  - b. basic shelter and housing
  - c. Appropriate clothing
  - d. Essential Medical Services and Sanitation

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

### 6.3 Recommendations on Development Induced Displacement

10. The basic principles in the National Relief and Rehabilitation Policy [NRRP] must be incorporated in the Rehabilitation and Resettlement Bill, 2007 (R& R Bill). {For instance, the five year residence limit (Sections 3(n), 3(d), 3(iii), 21(2)(vi) 35(2) of R& R Bill) is higher than the one in the NRRP, which only specifies three year residence (see Sections 6.4(vi),3(o),7.3, 3.1(d), 3.1(b)(iii) of NRRP). Given that inter-state and intra-state migration for work occurs at a large scale in India and that the beneficiaries of these provisions are among the poorest and vulnerable sections of our society, it would be appropriate to lower the limit of the number of years to three.
11. There should be a mechanism to ensure equitable sharing of project benefits with the displaced people. This may be in terms of providing direct or indirect employment or reservation of a quota of shares.
12. The conditional availability of certain resettlement provisions in the Relief and Resettlement Bill are a matter of concern (S.36(1) reads "Each affected family owning agricultural land in the affected area and whose entire land has been acquired or lost, [...] shall be allotted, [...] agricultural land or cultivable wasteland[...] if Government land is available in the resettlement area..". S.41(i) provides, "In case of a project involving land acquisition on behalf of a requiring body-(i) the requiring body shall give preference to the affected families in providing employment in the project, at least one person per family, subject to the availability of vacancies and suitability of the affected person for the employment;[...]" S. 49(4) says, "Each affected family of Scheduled Tribe followed by Scheduled Caste categories shall be given preference in allotment of land-

for-land, if Government land is available in the resettlement area.) Alternatives should be spelt out if these conditions are not met.

13. The Bill should be in line with other existing legislations such as those related to lands of tribal people and forest lands.
14. Time limit should be defined for various stages in the process for acquisition of the land. Besides, where land has been acquired and has not been used for the intended purpose or any other public purpose, then instead of auctioning the land, option should be given to the original owner to take it back on laid down terms. (Section 22 of the Land Acquisition Bill)
15. There shall be no arbitrary displacement of individuals from their home or place of habitual residence by state authorities. In particular, public interest should justify any large-scale development project. In all cases of large-scale development projects, authorities should hold public consultation with people likely to be displaced.
16. The concept of "eminent domain" should be in line with constitutional obligations and the proposed amendments to the land acquisition act and the relief and resettlement bill should provide for more scope for consultation/participation of affected people both in the acquisition as well as relief and rehabilitation process. (According to Section 6(2) of the R&R Bill, "The public hearing undertaken in the project affected area for the environmental impact assessment shall also cover issues relating to social impact assessment." The Bill does not envisage public hearing for social impact assessment where no environment impact assessment is required. Public hearing should be held during all instances of social impact assessment.)

17. Under the Rehabilitation and Resettlement Bill, 2007, a multiplicity of authorities are sought to be created. In several cases, modalities relating to their operation are "as may be prescribed" by the Government. It is imperative to define their roles so that they are complementary and there is synergy in their functions. (Sections 9, 11, 12,13,14,16 and 19 of the R&R Bill envisage creation of various administrative authorities.)
18. The guiding principle in cases of development related displacement should be minimal displacement.
19. Where agricultural land is sought to be acquired, it should be mandatory that area of wasteland equal to double the area acquired will have to be acquired and reclaimed for public purpose or at least funds for the same should be deposited in a special fund to be created for the purpose of rehabilitation of displaced persons or in the Central Relief and Rehabilitation Fund.
20. People who are displaced due to development projects include not only property owners but also others such as tenants, farm laborer or others whose livelihood may be dependent on the land even though they may not have legal title to it. Therefore protection of their rights must be ensured. (Reading Section 3(b) (ii), 3(c) and Section 20(i) of R&R Bill it appears agricultural or non-agricultural laborer, landless person, rural artisan, small trader or self- employed person will be covered under this Act only in cases where there is likely to be involuntary displacement of four hundred or more families en masse in plain areas, or two hundred or more families en masse in tribal or hilly areas, DDP blocks or areas mentioned in the Fifth Schedule or Sixth Schedule to the Constitution. An explicit provision to this effect should be provided in the R& R Bill to guarantee the rights of

this category of people. LA Bill also should reflect the interest of people who do not have legal title to the land.)

21. It shall be mandatory for all local bodies to formulate land use plans and building rules so as to minimize and regulate conversion of agricultural lands for other uses. No non- agricultural activity should normally be allowed in areas marked for agriculture unless there are overriding and compelling reasons in public interest.
22. It has been the experience that where infrastructure projects like highways, roads are planned, the land values of the adjoining areas go up. Appropriate legislation should be put in place to charge additional duty/tax for such enhanced value, at least at the time of the subsequent transfers of the land and sums so collected should be transferred to the Central Relief and Rehabilitation Fund or any special fund created for the purpose of rehabilitation of displaced persons.
23. Social impact assessment and understanding local aspirations are best captured through continuous dialogue with local people who are affected and NGOs. Hence while carrying out social or environment impact assessment, local people especially those who are likely to be displaced and/or some expert NGOs may be consulted.
24. Norms of social impact assessment should be laid down and at least three alternatives should be examined in the same or different areas. (Section 4 of the R&R Bill should be appropriately amended to reflect this.
25. Where there are multiple displacements, it is necessary to compensate the displaced people appropriately e.g. by enhancing the solatium amount provided for in the bill or otherwise.

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

#### **6.4 Recommendations on Displacement on Account of Natural and Man Made Disasters Including Conflicts.**

27. The Rehabilitation and Resettlement Bill, 2007 must explicitly cover persons displaced due to violence as also due to natural or other man-made disasters. The NRRP as well as the R&R Bill, 2007 have to be comprehensive. The reference to any "involuntary displacement due to any other reason" is very vague. It does not specifically cover conflict induced and disaster induced displacement. Also the definition of disaster has to be widened taking into account the environmental vagaries in different parts of our country. For instance, soil erosion does not fall within the category of natural disaster. (According to Section 2 of the R&R Bill "The provisions of this Act shall apply to the rehabilitation and resettlement of persons affected by acquisition of land under the Land Acquisition Act, 1894 or any other Act of the Union or a State for the time being in force; or involuntary displacement of people due to any other reason.")
28. In disaster related displacement, rehabilitation is the biggest challenge. There is a need to address as to how one rehabilitates displaced persons in locations similar to their former residence. In instances relating to displacement on account of conflicts,

there is a need to focus on what assurances would displaced persons require in order to repatriate to former place of residence voluntarily?

29. People displaced on account of conflicts or natural disasters should be able to return to their former places of residence voluntarily in safety and dignity. Authorities should ensure that their property is protected against destruction and arbitrary and illegal appropriation when they are displaced. When they return to their places of habitual residence, they shall not be discriminated against. Authorities shall assist the returnees to recover, to the extent possible, their property that they left behind or were dispossessed of upon their displacement. Where it is not possible to recover property and possession, then authorities shall be responsible for providing just reparation to them.
30. Temporary Settlement should not be long drawn and there should be a time frame for the completion of relief and resettlement of people displaced on account of conflict and natural disasters.
31. In the case of conflict, natural or human-made disasters, there is a need for a larger vision, which emphasizes the "prevention" aspect of displacement.
32. The Central Relief Fund (CRF) should be renamed as Central Relief and Rehabilitation Fund (CRRF) and funds should be set aside for rehabilitation of displaced individuals.
33. All affected and displaced persons have the right to security for their physical well being and their property. Security agencies functioning under the administrative control of the States / Central Government must be geared towards preventing looting and other anti-social activities, and instilling a sense of security amongst the affected and displaced persons.

34. All affected and displaced persons have the right to immediate humanitarian assistance. In particular, they have right to food, shelter, healthcare (including mental health care) and education. To ensure smooth rescue, relief and rehabilitation, lists of persons dead or missing as also property damaged fully or partially etc. should be prepared in a transparent manner at the earliest and authenticated by appropriate authority. Such lists should be given wide publicity so that people can easily have access to the same. Special attention should be given to the vulnerable groups, e.g. disabled persons, women, children and elderly in this regard.
35. All affected persons have right to information about their missing relatives, friends, colleagues etc. Authorities concerned should put in place appropriate arrangements to collect information about missing persons and keep their kin/relatives informed about progress in the matter. Similar efforts should be made and arrangements put in place about identification of dead and dissemination of information about them, and handing over their mortal remains to their kin after following all procedures. Till then, the mortal remains shall be preserved properly. If the dead are not identified within reasonable time, their last rites may be performed after obtaining appropriate orders and with full respect for dignity as per customs of religion to which she/he is believed to belong based on prima facie evidence.
36. The concerned authorities after reasonable verification shall issue to affected and displaced persons all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates, death certificates and marriage certificates. Any lack of access to such legal documents or not having such legal documents shall not disentitle them for recompense.

## **7. Major Problems**

Recently the Apex Court noted that NHRC does not have power to take action against persons or authorities who do not follow the guidelines laid down by it [NHRC] nor does it have power to give directions or pass orders but can only make recommendations.

The commission told the apex court that it had no power to act against persons or authorities who did not follow the guidelines laid down by it nor did it have the power to issue directives or pass orders but could only make recommendations. The Commission painstakingly investigates human rights cases, sometimes in remote areas, with its limited resources. The evidence collected is put to forensic judicial adjudication by its chairman and members. But at the end, when NHRC arrives at a finding, it can only recommend remedial measures or direct the state concerned to pay compensation. It cannot directly investigate complaints of violations by the armed forces; it can only seek reports from the central government and make recommendations. Problems faced by the NHRC and SHRCs are stated below:

### **7.1 Legal Problems**

Problems with the current Protection of Human Rights Act, 1993:

- Though Commission is of the firm view that the recommendations are binding on the government and shall be implemented unless the same is challenged by the court of law, but there is contrary view expressed by certain quarters that the recommendations of the Commission have no binding force. Hence it is necessary to make suitable amendment in the PHRA, 1993 for incorporation of an express provision regarding binding nature of the recommendation made by the Commission or give power to the Commission to enforce the recommendations by execution.

- The Section 19 of the PHRA, 1993 lays down a separate procedure with respect to Armed Forces. It imposes a restriction on the inquiry procedure when it comes to inquiry involving armed forces personnel. The powers of the National Human Rights Commission relating to violations of human rights by the armed forces have been restricted to simply seeking a report from the Government, (without being allowed to summons witnesses), and then issuing recommendations. The Commission, with its past experience is of clear opinion that there is no justification in giving immunity to armed forces personnel from an independent inquiry by the Commission. There is no justification in carving out an exception in relation to the armed forces as no distinction can be carved out between an extra judicial killing by police personnel or armed forces personnel. Section 19 is therefore required to be read down or be liberally read/ construed so to include an independent inquiry by the Commission, if the case so requires.
- The Commission, as per Sections 36 (1) and 36 (2) of the PHR Act, 1993, has no jurisdiction over any matter that is pending before a State Commission or any other Commission duly constituted under any law. It has no jurisdiction in respect of an act that may have taken place more than a year preceding the date on which the act is alleged to have been committed. Except for the aforesaid two conditions listed in the PHR Act, 1993, the Act does not specify the category of complaints that are not admissible. Under Section 10(2) of the PHR Act, 1993, the Commission is empowered to lay down its own procedure through regulations. The Commission has prescribed its procedure under the 1994 Regulations (amended in 1997).

- The lack of clarity regarding jurisdiction of the Human Rights Courts to be set up under Section 30 of the PHR Act, 1993 also contributes to lack of implementation of this provision in the Act. Very few Human Rights Courts have been set up in the States and those which have been set up suffer from lack of clarity regarding jurisdiction affecting over all functioning of this arm of the human rights legal infrastructure. As a result, there is more burden of cases shared by the National Human Rights Commission.
- Powers are required by Commission to issue bailable warrants and impose costs/penalties in case of non-submission of reports/nonappearance by authorities as this affects the working of the Commission as far as inquiry into cases are concerned or at least delays the action on the part of the Commission.

## **7.2 Policy Matters**

Since the task of formulating policy matters falls under the purview of government, NHRC cannot intervene into the same. Hence the human rights perspective into nation building policies is usually absent or negligible.

## **7.3 Matters Pending in Courts**

One of the major limitations of NHRC is that NHRC cannot take cognizance in the matters that are pending in the court. Various cases of human rights violations are reported by the complainants while their complaint is being heard in any judicial court. Since the litigation process takes time, people often suffer human rights violations during the pendency of their case, there is a need for the intervention of NHRC to ensure protection of human rights during the period.

#### **7.4 Public Servants**

Another major issue is NHRC is constrained to take action only against public servants. It is important to note that many cases reported with NHRC also have flagrant human rights violations that are concerned with private parties. NHRC's inability to take action against such private parties is one of its greatest impediments. The Act does not categorically empower the NHRC to act when human rights violations through private parties take place. Nevertheless, the Commission adopts liberal construction of the provision to protect Human Rights whenever they are violated by private individuals as well.

#### **7.5 Procedural Problems**

- Most state human rights commissions are functioning with less than the prescribed Members. This limits the capacity of commissions to deal promptly with complaints, especially as all are facing successive increases in the number of complaints.
- Scarcity of resources is another big problem. Large chunks of the budget of commissions go in office expenses, leaving disproportionately small amounts for other crucial areas such as research and rights awareness programmes.
- India is a country with huge population. Since the creation of NHRC in 1993-1994, the number of cases of human rights violations registered has increased manifold. Additionally there has been also a tremendous expansion in the activities of the Commission pertaining to areas other than its quasi-judicial mandate. NHRC is thus deluged with too many complaints. Hence, in recent days, NHRC is finding it difficult to address the increasing number of complaints. This is also causing delay in redressing the complaints.

## **7.6 Section 36 of the PHR Act, 1993**

The jurisdiction of the Commission is curtailed by the presence of this provision which states that : (1) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force. (2) The Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.

## **7.7 Insurgency**

Insurgents also have basic human rights. However, there has been failure on the part of NHRC to do so because of lack of appropriate legislation and non-ratification of international conventions.

## **7.8 Illegal Migrants**

The failure of the government to ratify appropriate conventions to protect the rights of illegal migrants is a hindrance for NHRC in its effective functioning. Due to non-ratification, NHRC is unable to fully protect the rights of illegal migrants.

# **8. Area of Success**

## **8.1 Women Related Issue**

The NHRC is an embodiment for the promotion and protection of human rights. Since it came into existence, its efforts to protect and promote the rights of women have evolved in a variety of ways over the past two decades. The commission disposes number of complaint that it receives pertaining to issues of women example- rape, dowry demand, domestic violence, sexual harassment in general, sexual harassment at work place etc. Some of the important activities undertaken by the Policy

Research, Projects and Programmes by NHRC, on rights of women and children.

**A.** The Commission has constituted a Core Group on Trafficking, Women and Children in November 2016. The Members of the Core Group include experts on the subject representing Central Government, Police, Research Institutes, NGOs and Civil Society Organizations. The meeting was held to discuss the agenda prepared on issues related to Trafficking, Women and Children.

**B.** Combating Sexual Harassment of Women at the Work Place

The Commission has taken a keen interest with regard to the implementation of the guidelines and norms prescribed by the Supreme Court on preventing and combating sexual harassment at the workplace (1997 VII AD S.C. 53), popularly known as the Vishakha guidelines. Due to its persistent perseverance and supervision, all the States and Union Territories have forwarded their compliance reports confirming thereby the constitution of complaints mechanism and the required amendments in the Conduct Rules for their employees.

**C.** Harassment of Women Passengers in Trains.

The Commission has been deeply concerned about harassment of women passengers in trains. In order to find a solution, it held several meetings with the officials of the Ministry of Railways, Railway Protection Force, Government Railway Police and representatives of NGOs. In pursuance of the decisions taken in those meetings, the Ministry of Railways has made available FIR forms in Hindi, English and a few regional languages in trains. It has also incorporated a module on gender sensitization in the training programmes for the Probationers of the Traffic and Security Department of the Railways. The Commission also recommended to the Ministry of Railways the following – (i) availability of FIR forms in all other regional languages,

(ii) preparation and display of messages in the railway coaches, (iii) preparation and display of graphics and other publicity materials at the railway platforms, (iv) printing of the message on the back of the ticket saying that sexual harassment of women in trains is a crime, and (v) preparation of power point presentation that could be made in software for the television showing briefly the issue and its implications.

#### **D. Rehabilitation of Marginalized and Destitute Women**

The Commission, since 2000, has been monitoring the implementation of its recommendations for the rehabilitation of marginalized and destitute women residing in Vrindavan. In this context, it had also directed the concerned officials of the Government of Uttar Pradesh to regularly apprise the Commission about the overall progress made towards improving the condition of destitute and marginalized women.

In order to have firsthand information about the status of marginalized and destitute women in Vrindavan, Members and senior officials of the Commission, have been visiting Vrindavan from time to time and reiterating Commission's directions regarding grant of pension, accommodation, LPG connections, ration cards, health care & sanitation, cremation fund, vocational training, social security cards and recreational facilities to the concerned officials so that expeditious action is taken on the matter.

## **8.2 Child**

Child rights are often considered the most critical of all human rights reforms as they define the future for both current and upcoming Indian generations. "Children's rights" have radically changed; from the middle ages, which refused to recognize the concept of a childhood and saw children work side by side with adults to today understands of nurturing a child's unique identity while providing him access to necessities.

Children's rights apply to the special protection and care that minors under the age of 18 are provided. Based on international legislations, these include right to association with both parents, physical protection food, free education, healthcare, and legal protection from violence or discrimination.

The NHRC has an important role in ensuring effective implementation of international standards at the national level. In addition to the promotional and advocacy role, one of the primary functions of the NHRC is to receive complaints and initiate investigations into the violation of human rights by public servants. The Commission, first and foremost, concentrated on issues of child labor, especially those employed in hazardous industries. In order to provide suitable remedies to the problem of child labor,

#### Preventing Employment of Children by Government Servants: Amendment of Service Rules

With a view to preventing employment of children below 14 years of age by Government servants, the Commission recommended that the relevant Service Rules governing the conduct of Central and State Government employees be amended to achieve this objective. The Union Ministry of Personnel and Public Grievances and Pensions (Department of Personnel & Training), has informed the Commission that the Central Government has amended the All India Services (Conduct) Rules, 1968 as well as the Central Civil Services (Conduct) Rules, 1964. Except for the State of Manipur, all the States/UTs have also brought out the required amendments to the Conduct Rules of their employees.

The Commission intends to monitor the issue and see whether the Central and State Governments actually take action against those public servants who continue to employ children as domestic servants.

The NHRC has been deeply concerned about the employment of child labor in the country as it leads to denial of the basic human rights of children guaranteed by the Constitution and the International Covenants.

The Commission on 'child labor has observed that – “No economic or social issue has been of such compelling concern to the Commission as the persistence, fifty years after Independence, of widespread child labor in our country. It prevails, despite articles 23, 24, 39(e) & (f), 41, 45 and 47 of the Constitution and despite the passing of various legislations on the subject between 1948 and 1986. It has defied the terms of six Conventions of the International Labor Organization to which India is a party and the Convention on the Rights of the Child, in addition. Despite the announcement of a National Child Labor Policy in 1987, the subsequent constitution of a National Authority for the Elimination of Child Labor (NAECL) and the undertaking of National Child Labor Projects (NCLP) in an increasing number of areas of our country, the goal of ending child labor remains elusive, even in respect of the estimated two million children working in hazardous industries who were to be freed from such tyranny by the year 2000”.

The Commission focusing its attention on the following industries where from rampant reports of child labor were received. These inter alia include Bangle/glass industry, Silk Industry, Lock industry, Brick Kiln, Diamond cutting, Ship-breaking, Construction-work, Carpet-weaving.

The Commission monitors the child labor situation in the country through its Special Rapporteurs, visits by members, sensitization programs and workshops, launching projects, interaction with the industry associations and other concerned agencies, coordination with the State Governments and NGOs to ensure that adequate steps are taken to eradicate child labor. The Commission believes that unless and until the reality of free and compulsory education for all up to the

completion of the age of 14 years is realized, the problem of child labor shall continue. The Commission has involved the NGO sector in the non-formal education of child laborer and a number of such schools/training centers are functioning in the districts of the carpet belt. There has also been a distinct improvement in the level of awareness among the general public about child labor issues.

### **8.3 Rights of Elderly Person**

The involvement of NHRC in respect of rights of the elderly persons initially began with redressal of complaints received from them. This association increased gradually in 2000 when it participated in the work of the National Council for Older Persons constituted by the Ministry of Social Justice & Empowerment, Government of India and gave suggestions on its Action Plan (2000-2005) in relation to the implementation of the National Policy on Older Persons. Since then, it has kept close contact with groups and organizations working for the rights of elderly and has been making recommendations to the Central Government. It recommended to the Ministry of Health & Family Welfare, Government of India, to make provision for a separate queue for elderly persons in all hospitals. The concerned Ministry, on its part, circulated this recommendation to all the States and Union Territories.

It also expressed its concern over the plight of elderly persons belonging to the economically weaker sections of the society, especially those in the unorganized sector. Furthermore, in collaboration with the non-governmental organizations working for the elderly, NHRC has been organizing health awareness camps and lectures focusing on different ailments affecting older persons. Besides, it has focused its attention on cases related to non-payment, delayed payment and partial payment of retirement benefits to employees after their retirement and in cases where the retired person dies, timely payment of all statutory

dues to their legal heirs. The Commission has constituted a Core Group in NHRC on Protection and Welfare of the Elderly Persons.

#### **8.4 Disabled Person**

The Persons with Disability Act, 1995 was recast in December 2016 as the Rights of Persons with Disabilities Act, 2016, so as to bring it in consonance with the United Nations CRPD, 2006. The UNCRPD was ratified by the Government of India on 1 October 2007. The Commission, which played a prominent role in drafting of the Rights of Persons with Disability Act, 2016 has all along been looking at the issue of disability from the lens of human rights so that people with disabilities are considered as holders of rights and not recipients of charity. During the year 2016-2017, the Commission undertook the following activities with regard to persons with disabilities. The Commission undertook the following activities with regard to persons with disabilities. A meeting of the Core Group on Disability was conducted on 23 December 2016. After intensive discussions, several important recommendations emerged, which, if implemented properly, may help in better protection of rights of persons with disabilities. The Union Ministries have been asked to get these recommendations examined and issue necessary directions for early implementation.

#### **8.5 Transgender**

The research study entitled ‘Study on Human Rights of Transgender as a Third Gender’ has been entrusted by NHRC to Kerala Development Society (KDS), New Delhi. The main objectives of the research project were to study the socio-economic profile of transgender as the third gender. Further, the study was to examine the various kinds of discrimination and the violation of human rights issues faced by transgender and to evaluate the problems faced by transgender for receiving the benefits of the various government programmes related to

education and employment and reasons for their exclusion. Additionally, this study was to make an in-depth analysis of the programmes/schemes launched and facilities provided for transgender by the Centre, State or Local Government as well as of the laws and policies, along with the Supreme Court judgment and the steps taken for the overall development of the transgender. Meetings were held with the Principal Investigator from Kerala Development Society before the Commission. The reports submitted by the Principal Investigator were thoroughly examined and the gaps in the report were communicated to him to be filled up.

## **8.6 Environment Pollution**

The right to a clean and healthy environment forms part of the ‘right to life’, which, as mentioned earlier, is a fundamental human right, the establishment of the NHRC in 1993 fostered a lot of expectation that a body headed by an ex-Chief Justice of India would be able to apply the principles laid down by the Supreme Court and take cognizance of environmental violations for providing quick relief to the victims of pollution and environmental degradation. Since the NHRC is empowered under Section 12(a) of the PHR Act, 1993 “to inquire suo-motu or on a petition by a victim or a person on his behalf into violation of human rights or abetment thereof or negligence in the prevention of such violation, by a public servant”, it is well within its powers to take cognizance of complaints relating to the environment.

Promoting Human Rights literacy and awareness is one of the main functions of the NHRC, as per section 12(h) of the Protection of Human Rights Act, 1993. The Commission has been serving this encompassing purpose within its best means. Since its inception, the Commission has been endeavoring to spread human right education at both school and university levels. Pursuant to Commission’s efforts, the UGC introduced human rights education at the university level, which is now being

imparted in over 35 Universities/Colleges across the country, besides in the National Law Schools.

On the other hand, the Commission has taken suo motu action in number of cases pertaining to environmental pollution matter. The National Human Rights Commission (NHRC) has sent notices to the Centre and the governments of Delhi, Punjab and Haryana in view of “life-threatening” pollution levels in Delhi-NCR. Another case on related to environmental pollution *Health Hazard due to the Contamination of Sutlej River in Ludhiana, Punjab*<sup>28</sup>The Commission received a complaint from Rohit Sabharwal, President, Council of RTI Activists, Ludhiana, Punjab stating that due to the contamination of Sutlej river, the lives and health of the common masses are at risk. It is stated that due to the apathetic working attitudes of Punjab Pollution Control Board (PPCB) and the Municipal Corporation, Ludhiana people are forced to use contaminated/polluted water of Sutlej river, due to which they can get infected with various contagious diseases.

Pursuant to the Commission’s directions, reports were received from the Municipal Corporation, Ludhiana and Department of Science, Technology and Environment and Punjab Pollution Control Board stating that every sincere effort is being made by the Government of Punjab/Pollution Control Board to mitigate the problems of the residents of the State and to ensure safe environment in the State of Punjab.

The Commission considered the reports and called for the comments of the complainant on the same. The comments received are under the consideration of the Commission.

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28 *Case No.430/19/10/2016*)

## **9. Custodial Death and Encounter Killings**

Custodial violence and torture is so rampant in this country that it has become almost routine. It represents the worst form of excesses by public servants entrusted with the duty of law enforcement. The Commission regards crimes like rape, molestation, torture, fake encounter in police custody as manifestations of a systemic failure to protect human rights of one of the most vulnerable and voiceless categories of victims. Therefore, it is deeply committed to ensure that such illegal practices are stopped and human dignity is respected in all cases. Besides awarding compensation to the victims or next of their kin, the Commission's efforts are also geared towards bringing an end to an environment in which human rights violations are committed with impunity under the shields of "uniform" and "authority within the four walls of a police station, lock-up and prison, where the victims are totally helpless".

Custodial death which has been bifurcated into 2 i.e. death in police custody and other is death in judicial custody. Efforts of the NHRC to curb custodial violence. The curbing of custodial violence has been a major objective of the Commission ever since it was established. It will thus be recalled that, as early as 14 December 1993, the Commission issued instruction that it must be informed of any incident of custodial death or rape within 24 hours of the occurrence; it was added that the failure to report promptly would give rise to the presumption that an attempt was being made to suppress the incident. In subsequent instructions, it was stated that information on custodial deaths was to be followed by a post-mortem report, a videography report on the post-mortem examination, an inquest report, a magisterial enquiry report, a chemical analysis report, etc. in order to avoid delays in the scrutiny of such cases, asking the States to send the required reports within two months of the incidents; it was underlined, inter alia, that the post mortem report should be submitted in accordance with a new format that had been devised by the Commission.

The guidelines issued by the Commission in respect of procedures to be followed by the State Govts. in dealing with deaths occurring in encounters with the police were circulated to all Chief Secretaries of States and Administrators of Union Territories on 29.3.1997. Subsequently on 2.12.2003, revised guidelines of the Commission have been issued and it was emphasized that the States must send intimation to the Commission of all cases of deaths arising out of police encounters. On a careful consideration of the whole matter, the Commission recommends following modified procedure to be followed by the State Governments in all cases of deaths in the course of police action :-

- A. When the police officer in charge of a Police Station receives information about the deaths in an encounter between the Police party and others, he shall enter that information in the appropriate register.
- B. Where the police officers belonging to the same Police Station are members of the encounter party, whose action resulted in deaths, it is desirable that such cases are made over for investigation to some other independent investigating agency, such as State CBCID.
- C. Whenever a specific complaint is made against the police alleging commission of a criminal act on their part, which makes out a cognizable case of culpable homicide, an FIR to this effect must be registered under appropriate sections of the I.P.C. Such case shall invariably be investigated by State CBCID.
- D. A Magisterial Inquiry must invariably be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such inquiry.
- E. Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/ police investigation.

- F. Question of granting of compensation to the dependents of the deceased would depend upon the facts and circumstances of each case.
- G. No out-of-turn promotion or instant gallantry rewards shall be bestowed on the concerned officers soon after the occurrence. It must be ensured at all costs that such rewards are given/recommended only when the gallantry of the concerned officer is established beyond doubt.
- H. A six monthly statement of all cases of deaths in police action in the State shall be sent by the Director General of Police to the Commission, so as to reach its office by the 15th day of January and July respectively.

The statement may be sent in the following format along with post-mortem reports and inquest reports, wherever available and also the inquiry reports:-

1. Date and place of occurrence
2. Police Station, District.
3. Circumstances leading to deaths: i. Self-defense in encounter ii. In the course of dispersal of unlawful assembly iii. In the course of effecting arrest.
4. Brief facts of the incident
5. Criminal Case No.
6. Investigating Agency
7. Findings of the magisterial Inquiry/enquiry by Senior Officers:
  - a. disclosing in particular names and designation of police officials, if found responsible for the death; and
  - b. whether use of force was justified and action taken was lawful.

## **10. Guidelines for Prison Reform**

The National Human Rights Commission organized a two-day National Seminar on Prison Reforms in New Delhi on 13-14 November, 2014. The aim of the seminar was to assess the status of the implementation of the recommendations made in its earlier seminar on the subject held on the 15 April 2011 and to discuss what further steps would require to be taken to improve prisoners' condition and prison administration with a human rights perspective. The recommendations emerged from the seminar were sent to all the States and Union Territories seeking for an action taken report. The recommendations of the seminar are also available in the NHRC's website.

In pursuance to the recommendations of National Seminar on Prison Reforms 2014, the NHRC constituted a Committee of Experts on 18 March 2015 to suggest amendments to the Prison Act, 1894, in order to make it in conformity with human rights norms, Supreme Court judgments and International Conventions/Covenants binding on India. The third meeting of the Committee in connection with the amendment of Prison Act, 1894 was held in the Commission on 22.07.2016. The draft amendment submitted by the Chairman of the Committee was sent to all the members of the Committee/general public through website seeking their opinions/suggestions.

The inputs/suggestions submitted by the members of the Committee were discussed in detail and the Chairman of the Committee was asked to incorporate the same and submit a final draft for perusal of the Commission. The final draft is to be submitted by the Chairman of the Committee.

## **11. Guidelines in Regards to Trafficking**

The Commission has constituted a Core Group on Trafficking, Women and Children in November 2016. The Members of the Core Group

include experts on the subject representing Central Government, Police, Research Institutes, NGOs and Civil Society Organizations. The meeting was held to discuss the agenda prepared on issues related to Trafficking, Women and Children. The Core Group drafted a Standard Operating Procedures (SoP) and Guidelines for Combating Trafficking of Persons in India. The SoP comprises in great detail the concept of Trafficking, Collection of Intelligence for Prevention of Trafficking, Actions to be Taken Before Rescue, Rescue Process, Post-rescue Process, Rehabilitation and Compensation, Monitoring and Accountability, Law Enforcement and Legal Provisions which includes related provisions of Law relating to different aspects of trafficking. The Guidelines provides the policy and legal framework including international obligations and national framework, Situational Analysis of Trafficking in India.

## **12. Implementation of Various Welfare Schemes of Both Centre and State**

The Commission over the years has been focusing its attention on specific issues of Right to Food Security, Rights of Women, including reproductive rights, Right to Education, Right to Health and Hygiene and Sanitation, Right to Housing, Women and Child Trafficking, Issues related to Juvenile Justice, Abolition of Bonded Labor and Child Labor, Abolition of Manual Scavenging, Police and Prison Reforms etc. It has been receiving Action Taken Reports from the State Governments/ Concerned Officials and also the Special Rapporteur of the Commission (of the particular zone) on the status of above mentioned Human Rights issues.

The primary concern, of the Commission, is the lack of awareness of human rights issues at the ground level. Therefore the Commission decided to spread the human rights awareness on focused human rights issues, by organizing workshops and conducting field visits in selected districts of the States. The programme is attentively for four days

duration. The first two days are for field visit and the last two days are exclusively for the workshop on Awareness and Facilitating Assessment and enforcement of Human Rights at District Level Administration. The other objective of these workshops is to monitor the implementation of the recommendations of the Commission, issued from time to time on specific human rights issues.

The 28 districts, one from each State, has been selected from the commonality of the list of backward districts, getting “Back ward Regions Grant Fund”, prepared by Ministry of Panchayati Raj and also endorsed by Planning Commission and the list of backward districts selected for the National Agricultural Innovation Project by ICAR. The grounds of selection are the percentage of illiteracy, percentage of SC and ST population, percentage of forest area, State wise BPL poverty ratio, percentage of State wise rural household, percentage of State wise Urban Household and Infant Mortality Rate. The list of the 28 districts is as follows:

<b>S.No.</b>	<b>State</b>	<b>District</b>
1.	Andhra Pradesh	Adilabad
2.	Arunachal Pradesh	Upper Subansiri
3.	Assam	Karbi Anglong
4.	Bihar	Jamui
5.	Chhatisgarh	Dantewada
6.	Gujarat	Dangs
7.	Goa	South Goa
8.	Haryana	Ambala
9.	Himachal Pradesh	Chamba
10.	Jammu & Kashmir	Kupwara
11.	Jharkhand	Chatra
12.	Karnataka	Bidar
13.	Kerala	Wayanad
14.	Madhya Pradesh	Jhabua

15.	Maharashtra	Gadchiroli
16.	Manipur	Tamenglong
17.	Meghalaya	South Garo Hills
18.	Mizoram	Siaha
19.	Nagaland	Mon
20.	Orissa	Kalahandi
21.	Punjab	Hoshiarpur
22.	Rajasthan	Banswara
23.	Sikkim	North Sikkim
24.	Tamil Nadu	Tiruvannamalai
25.	Tripura	Dhalai
26.	Uttar Pradesh	Sonabhadra
27.	Uttarakhand	Champawat
28.	West Bengal	Jalpaiguri

The implementation of aforesaid awareness programme by NHRC is expected to achieve good results in better implementations of programmes, which have been based upon human rights issues. It will give an opportunity to the Commission to have firsthand idea of situation on the ground level and will also help it in planning its future strategies for better protection and promotion of human rights. The review will be done with the help of Special Rapporteurs, State Human Rights Commissions, Government and local NGOs. The proposed strategy is expected to be a benchmark for all the district administrations and will also benefit the State Human Rights Commissions.

The Commission has so far conducted the aforesaid Human Rights Awareness Programme in the following district in the country:

S.No.	District	State	Period
1.	Chamba	Himachal Pradesh	3-5 July 2008
2.	Ambala	Haryana	6-8 August
3.	North Sikkim	Sikkim	26,27& 30 <sup>th</sup> Sep 08
4.	Jalpaiguri	West Bengal	3-6 Nov 2008
5.	Dhalia	Tripura	25-28 Nov 08
6.	Sough Garo Hills	Meghalaya	16-19 Dec 08
7.	Sonbhadra	Uttar Pradesh	2-5 Feb 09
8.	Dang	Gujarat	10-12 Feb 2009
9.	South Goa	Gao	25-27 Feb 2009
10	Wayanad	Kerala	15-18 Sep 2009
11.	Jamui	Bihar	16-17 Nov 2009
12.	Hoshiarpur/ Amritsar	Punjab	27,28, 30 Nov. 09 & 1 <sup>st</sup> December 2009 and Amritsar Jail on 3 <sup>rd</sup> Dec 2009

The participants of the workshop interacted with the team of NHRC on aforesaid issues and enriched their knowledge on these issues. The feedback on the workshops was very encouraging and the workshops proved very fruitful for the district administration.

(4) To keep advisory check on legislation.

The NHRC keep advisory check on legislation in following manner:

- The NHRC had provided comments on Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015 to the Ministry of Women and Child Development on 5 June 2016 as was desired by the Ministry.
- The Commission, which played a prominent role in drafting of the Rights of Persons with Disability Act, 2016

### **13. Treaties and Role of NHRC**

The Protection of Human Rights Act, 1993 under which the National Human Rights Commission has been set up, mandates the Commission to study Treaties and other International Instruments on human rights and make recommendations for their effective implementation through domestic legislations as well as programme and policies. A committee under the Chairmanship of Justice Shri H.L. Dattu, Chairperson, NHRC and consisting of 10 other members, has been constituted for advising the Commission regarding necessary changes in the existing domestic laws as well as proposed legislations and programmes/ policies. The first meeting of the Committee on International Conventions and Treaties was held in the Commission on 24<sup>th</sup> May, 2017. Thereafter, the meeting was held on 16.11.2017 in the Commission. The Recommendations emanating from the meeting of the Committee on International Conventions and Treaties were forwarded to the Members of the Committee, Chairperson, Members of the Commission, Secretary General and all Divisional Heads of the Commission for kind perusal and necessary action.

### **14. Rule of Law and Human Rights**

There is direct and undeniable link between the two-true respects for human rights can exist only where the rule of law is diligently adhered to. Without the foundation of rule of law and accountability, human rights cannot be protected and violations cannot be addressed effectively. Under international human rights law, it is the primary responsibility of states to protect against and impartially investigate human rights violations with the aim of identifying perpetrators and bringing them to justice.

The international comity of nations has made phenomenal strides in the progressive development of human rights since the adoption of

Universal Declaration of Human Rights. The list of internationally recognized human rights has not remained constant –new treaties and documents have clarified and further developed human rights. The third generation rights go beyond mere civil, political and social rights and covers a broad spectrum of rights, including group and collective rights, right to self-determination, right to development, right to healthy environment, and the right to natural resources among others.

Yet, despite these positive developments, there continues to remain major challenges to the realization of a truly just and egalitarian global society. Among the greatest challenges facing the world today, are abject poverty, armed violence both by state and non-state actors, gender inequity, conflict, and environmental degradation. We live in paradoxical times, when despite celebrating more and more our commitment as global citizens to human rights, we continue to witness the grim spectra of heightened violence –both physical and structural, against the most vulnerable sections. A systematic denial of economic, social and cultural rights, like the right to food, healthcare, education etc. are important casual factors for large-scale exclusion of people from mainstream socio-economic life and in turn, engender dissatisfaction and even conflict.

What further exacerbates these challenges is the culture impunity which seems to be slowly taking roots not only in South Asia, but across the globe impunity at its very basic can be understood as the lack of accountability for human rights violations committed, or worse, violations condoned by the state. Often times, such impunity takes form of a lack of punishment for those who commit or are complicit in the commitment of human rights violations and sends a clear message to the perpetrators of such crimes that those activities are condoned by the state, and that government agents can kill torture or disappear without fear of being brought to justice.

Impunity, especially when it begins to become the norm rather than exception, poses a patent threat to human rights as well as rule of law which is vital for the continued existence of a democratic society. Since states have the obligation to both respect and promote human rights, impunity encourages human rights violations and thus, in essence, violates these state obligations. In addition, impunity violates the right of victims to justice clearly established in many human rights covenants and also violates their right to truth. The struggle against impunity is an essential part of the struggle for human rights –only when human rights violators are held accountable for their actions can we hope that human rights violations will cease and justice will prevail.

## **15. Truth and Reconciliation: Experiences and Recommendation**

There is increasing recognition of the need for enhancing the protection and promotion of human rights, especially in situations of civil unrest/conflict, by utilizing approaches and insights from the conflict management field and by integrating ‘rights’ in conflict intervention. There is much to gain from involving actors/ bodies, strategically placed to impact the development of human rights culture and the transformation of a society in conflict, and that operate on the intersection between rights and conflict management.

This entails, in particular, a focus on statutory bodies such as National Human Rights Institutions (NHRIs), which have an oversight function and serve to strengthen the developing culture of human rights in their respective countries. NHRIs can contribute constructively to conflict management and peace- building in their respective societies.

While the causes of conflict may be complex and diverse, they are often related to human rights issues. The relationship between conflict

and human rights is two- fold. Firstly sustained denial of human rights can lead to violent conflict and secondly, violent conflict may lead to massive and egregious human rights violations such as the loss of limb, life, property and dignity during war.

Therefore, human rights violations can be both, a cause and a consequence of violent conflict. Seen in this light, the promotion and protection of human rights would then lessen the potential for violent conflict. Human rights can, therefore, be used as basis for the mechanism or framework for conflict management. Thus, since the violation of human rights is an important factor in the generation and manifestation of violent conflict, human rights need to be taken into account in the management, resolution and prevention of such conflict.

The protection and promotion of human rights requires human security and social justice; democracy, transparency, accountability and rule of law; peacemaking, peace- building and post- conflict reconstruction; and conflict prevention and early warning/ detection. These are imperative for the creation of environments in which the dignity of citizens is respected, their relationships and interactions are constructive and their potential can be developed.

NHRIs shall be the key actors in securing the protection and promotion of human rights, assisting states in upholding their responsibilities strengthening democracy and governance, and facilitating the implementation of human rights standards.

**Institutional Reform:** Institutional reform refers to the transformation of public institutions that contributed to conflict or supported an authoritarian regime. The institutional reform process should transform such institutions into efficient and fair institutions that respect human rights, maintain peace, and preserve the rule of law. Institutional reform measures may include:

- Creation of oversight, complaint and disciplinary procedures;
- Reform or establishment of new legal frameworks ;
- Development or revision of ethical guidelines and codes of conduct;
- Provision of adequate salaries, equipment and infrastructure.

The restoration of civic trust in public institutions is based on the notion that these institutions will work for every citizen, irrespective of race, ethnicity, religion, gender, or other characteristics. Peace agreements can provide an important opportunity to establish useful frameworks and mandates for security sector reform as well as other transitional justice mechanisms.

It has been further recognized that structured disarmament, demobilization and reintegration (DDR) process that aims at forging a peaceful coexistence among former adversaries without sacrificing justice and accountability, is one of the keys to transition out of conflict. It is important that DDR programmes are informed by international human rights standards and that more systematic attention is paid to the coordination between DDR and transitional justice processes so as to ensure that they can reinforce each other.

Role of NHRIs in the aftermath of civil unrest and in post- conflict transitional justice.

NHRIs are well placed to contribute to transitional justice processes through information gathering, documenting and archiving human rights abuses, and conducting investigations, monitoring and reporting, cooperating with national, regional. International judicial mechanism, providing assistance to victims ensuring respect for international standards, advising on legislatives and institutional reforms and conducting education and training on human rights and national reform efforts.

NHRIs are well placed to assist victims by ensuring that they have equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. NHRIs can also assist victims and witnesses with measures such as relocation and resettlement.

Moreover, NHRIs can raise awareness about various transitional justice mechanism and lessons learned worldwide, engage civil society and institutional actors in the transitional justice discourse, facilitate national consultations on transitional justice while ensuring the participation of victims, women and vulnerable groups, assist in establishing and implementing transitional justice initiatives, and facilitate a follow-up on the recommendations of various transitional justice mechanism.

NHRIs can play an important role in developing an enabling environment for transitional justice initiatives, rule of law and sustainable peace and ensuring that international human rights standards are observed. NHRIs can foster an enabling environment through such activities as conducting investigations, monitoring and reporting on human rights violations, providing human rights education and assisting institutional and legislative reform.

Additionally, NHRIs are uniquely placed to act as a bridge between government and civil society and facilitate dialogue and cooperation between them regarding transitional justice processes. This unique position between the national government and civil society facilitates exchanges between actors with diverse viewpoints. For example, NHRIs can support national consultations that incorporate the views of all stakeholders, including civil society, victims, women and vulnerable groups.

NHRIs can also promote create and democracy in periods of transition by helping to establish and implement transitional justice initiatives while promoting accountability, remedies for victims and other measures facilitating the non- reoccurrence of violations. NHRIs are well placed to follow up on the outcomes and recommendations of these mechanism and processes.

- NHRIs can also play an important role in assisting in the mechanisms. For example, NHRIs can contributor to the drafting of legislation establishing a truth seeking body, reparations measures or vetting initiatives.
- Representatives of NHRIs can also meaningfully participate by serving as commissioners, advisors or in other related capacities.
- Further, NHRIs can advocate for and mobilize society's support for the establishment and implementation of transitional justice mechanisms.
- NHRIs can ensure that the establishment and operation of any transitional justice mechanism is in compliance with international human rights standards and practices. To this effect, they could call attention to applicable international standards, as well as best practices and lessons learned on transitional justice. Further, they could also encourage their government to ratify international and regional human rights treaties.
- NHRIs could call for the implantation of the recommendations of transitional justice bodies, and to this effect, they could bring them to the attention of the government and mobilize the support of the civil society.
- Monitoring and reporting on the implementation of the recommendations of the recommendations of transitional justice bodies.

During a period of transition to peace and democracy, it is particularly important that States should undertake legislative, administrative and constitutional reforms to restore respect for the rule of law, a culture of respect for human rights and trust in government institutions. It is also essential that States undertake institutional, administrative and constitutional reforms that can restore the public trust in State institutions.

Human rights education is highly relevant in transitional contexts and can help to create and sustain a culture of respect for human rights and the rule of law. Human rights education and training can facilitate institutional reform and prevent reoccurrence of human rights and humanitarian law violations by creating both government and civil society capacity for the protection and implementation of these international norms and standards. Therefore, NHRIs can and should take the lead in spreading human rights awareness and education among members of civil society and providing human rights training to public functionaries to heighten rights awareness and sensitization.



# National Security or Human Rights: A False and Dangerous Choice

-Bill O'Neill-

## Introduction

The tension between national security and human rights is rooted in the UN Charter and has undermined the struggle to enhance liberty, freedom and respect ever since the founding of the United Nations in 1945. The UN Charter, in its Preamble, notes that one purpose in creating the United Nations is to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women” (UN Charter, Preamble, 1945 ). Article 1.3 reiterates the promotion and respect for human rights and fundamental freedoms as a primary purpose of the organization.

Yet a few lines later, in Article 2.7, the Charter states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...” (UN Charter, 1945, Article 2.7). Coupled with Article 51 in Chapter VII of the Charter, which provides that member states have an inherent right to “individual or collective self-defense” if an armed attack occurs against a member state, this provision has created ambiguity and tension between the state’s obligation to protect human rights and its right to conduct its own affairs without outside interference

and to act in response to external threats. Where is the line between promoting and protecting universal human rights and protecting national sovereignty?

Three years after the founding of the UN, a committee led by Eleanor Roosevelt and comprised of experts from every region of the world drafted the Universal Declaration of Human Rights (Glendon, 2001, p. 164). For the first time in human history, the fundamental rights and freedoms mentioned in the UN Charter were described and identified. Seventy years ago, the UDHR was unanimously approved by the General Assembly, with only a handful of states abstaining (Glendon, 2001, p. 169). While not a binding treaty, the UDHR specifies civil and political, along with economic, social and cultural rights. Interestingly, the UDHR never mentions the term “national security.” In Article 29, the UDHR notes that in exercising their rights, 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” (Universal Declaration of Human Rights, Article 29, 1948).

### **International Human Rights Law and National Security**

When diplomats convened to create a binding human rights treaty from the basis of the UDHR, the limitations on rights were a major concern. After all, these were state officials who shared a priority to limit state responsibility for breaches of human rights, which in turn meant seeking broad and flexible powers on when and how to limit the exercise of human rights. However, they could not agree on including all the rights enumerated in the UDHR in one treaty. The Soviet bloc objected to civil and political rights, favoring economic, social and cultural rights, and the Western states largely favored civil and political rights—the US, in particular, objected to economic social and cultural rights. After

a long impasse, the negotiations split and the two treaties resulted in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

This paper focuses on the ICCPR, since it was the introduction of the concept of “national security” as a possible limitation on the exercise of rights—although regional human rights treaties covering Africa, the Americas and Europe contain similar provisions. The most significant limitation in the ICCPR appears in Article 4, the so-called “derogation provision.” This allows states to unilaterally, in a time of a “public emergency, which threatens the life of the nation,” derogate or suspend their obligations under the Covenant. The state must declare this emergency publicly and officially, and the derogation must be strictly limited and consistent with the exact exigencies of the situation. Even in such a state of emergency, certain rights, like the prohibition on torture and slavery and the right to life and freedom of conscience/belief/religion, can never be suspended.

Less sweeping, but more dangerous to human rights than the derogation provision, are the general limitations to the enjoyment of rights found in several articles in the ICCPR. For example, in Article 21 of the Covenant, which guarantees the right to peaceful assembly, this right is subject to restrictions which are “necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.” Of course, the decision of whether “national security” should trump enjoyment of the right to peaceful assembly lies with the state. Examples are legion over the roughly 42 years since the ICCPR came into effect, where states have used the alleged threat to national security to subvert human rights. Recourse for such abuse is limited since the Human Rights Committee, which oversees

adherence to the treaty by states parties, has no enforcement powers and little leverage. The situation, with certain minor modifications, is also true for the various regional human rights treaties.

There is a gaping hole in human rights law and practice that states are not hesitant about using: claim a threat to national security, no matter how baseless or ludicrous, and cut back rights, especially those of perceived political opponents, despised minorities, or anyone whom the state wants to suppress and control. For most of the past decade, “national security” was used as a pretext to crack down on political opponents and on speech that was critical of those in power, as well as to weaken anyone viewed as a threat to a party’s hold on power.

For example, the UN Human Rights Committee has expressed concerns over many derogations utilizing Article 4 over the years, particularly over the issue of states derogating rights that are non-derogable under Article 4. (See, for example: Concluding Observations of the HRC for the Dominican Republic (1993), Jordan (1994), Nepal (1994), Russian Federation (1995), Zambia (1996), Colombia (1997), Israel (1998), Mongolia (2000) and Kyrgyzstan (2000), cited in note 3 to General Comment No. 29 of UN Doc. CPPR/C/21/Rev. 1/Add.11). Of course, certain situations genuinely endanger national security and public order. For example, the government in Sri Lanka recently declared a national emergency after attacks by Sinhalese Buddhist extremists on Muslim shops, homes and mosques which put people’s lives and property in real danger (Mashal and Bastians, 2018)

The Committee’s 1994 comment on Nepal is particularly telling: “The Committee deplores the lack of clarity of the legal provisions governing the introduction and administration of a state of emergency, particularly article 115 of the Constitution, which would permit derogations contravening the State party’s obligations under article 4, paragraph 2, of the Covenant.” This is not at all unique to Nepal but is

interesting historically given what happened a few years later after the outbreak of the Maoist hostilities. The Committee also expressed concern “with the excessive restrictions on the right to freedom of expression and information and the restrictions which apply to the manifestation of religion and to change of religion” (UN Doc. CCPR/C/79/Add.42, 1994).

## **Counter-Terrorism and Human Rights**

The tension between national security claims and human rights reached an apogee following the terrorist attacks on New York, Washington, D.C., and Pennsylvania on September 11, 2001. The United States, whose record on this precise issue was not particularly bad, suddenly seemed to become unmoored and used the attack to justify an all-out assault on human rights. Not only was this devastating to human rights in the US, but it also provided a pretext for many leaders around the world to launch a similar offensive against human rights, all the while claiming it was “necessary” due to concern for national security.

This paper does not go into great detail about the massive violations against human rights committed in the name of national security in the US and elsewhere since 2001. This has already been documented at length by many; for example, see any annual report by Human Rights Watch or Amnesty International from 2001 to the present. Each of them offer a wealth of depressing detail on how many states have engaged in arbitrary arrests, prolonged pre-trial detention, suspending numerous freedoms including expression, assembly, association and movement—all in the name of national security. Even torture, prohibited by every major international treaty and by the principle of *jus cogens*, was used by the United States and several other states engaged in “renditions,” in which people were knowingly transferred to jurisdictions, where torture was likely to occur. Twisted legal rationales were created by Bush administration-era lawyers to define away “torture” and recast practices prohibited by international and even domestic law in the US

as “enhanced interrogation techniques” For more information on this, see the Rumsfeld Memorandum on Enhanced Interrogation Techniques (2003), the Rizzo CIA Memoranda (2005), and the Bybee Memorandum (2002).

In another insult to international law, especially the ICCPR and the Convention Against Torture (CAT), the US government at the time argued that its human rights obligations extended only as far as US territory, thus creating the legal black hole of Guantanamo Bay Prison. Finally, in perhaps the most breathtaking renunciation of its obligations under binding international law, a March 2003 memorandum from the Department of Defense declared that President Bush was not bound by either the CAT, which the US has ratified, or by a federal anti-torture law because he had authority as Commander-in-Chief to approve any technique needed to protect the nation’s security (The New York Times, 2012).

The discourse and actions taken by many states soon created a very unhealthy dynamic, in which national security and human rights were mutually exclusive. They could not co-exist in this new, post-9/11 world, and security concerns had to prevail over human rights. Many dictators, needing little excuse to restrict human rights, jumped on this bandwagon and gleefully noted that if the US, Britain and France were cutting back on human rights, then who is to say that Zimbabwe, Egypt, Syria, Sri Lanka, Burma, Russia, Iran and other states hostile to human rights could not adopt similar methods. States that already tortured, killed, arbitrarily arrested and detained people now felt they had an unfettered license to continue these abuses in the name of fighting terrorism and ensuring national security.

The election of Donald Trump to the US Presidency has only worsened these trends. Candidate Trump stated throughout the 2016 campaign that torture “works,” and that he would allow

the US military to use methods like waterboarding and worse. Vice President Mike Pence has refused to rule out waterboarding, and both he and Trump favor maintaining the prison at Guantanamo Bay. When asked about torture and waterboarding, Pence stated: “We’re going to have a president again who will never say what we’ll never do” (Bellware, 2016).

Trump has also said he would intentionally order the killing of the relatives of suspected ISIS members. “We’re fighting a very politically correct war,” Trump responded to a question about avoiding civilian casualties, “and the other thing is with the terrorists, you have to take out their families. They care about their lives, don’t kid yourself. When they say they don’t care about their lives, you have to take out their families” (LoBianco, 2015). So much for the principles of distinction and humanity under the laws of armed conflict, let alone the prohibition in human rights law on summary or arbitrary executions.

We don’t know if Trump will actually order US military and/or the CIA to commit war crimes and crimes against humanity, which systematic torture and the intentional targeting of civilians would be, but for now we are left with what Trump has said many times. Moreover, his first head of the CIA, Mike Pompeo, often argued for using harsh interrogation measures and criticized the Obama administration for outlawing torture techniques like waterboarding. The person recently named to replace Pompeo at the CIA, Gina Haspel, actually ran a secret torture center in Thailand shortly after the 9/11 attacks (Goldman, 2018).

Authoritarian leaders around the world took such statements as a license to torture and commit other violations against human rights and the laws of war. Many reacted positively to Trump's victory. Philippine President Rodrigo Duterte's response was revealing; following his congratulatory phone call to Trump, he said: “We don't have any quarrels. I can always be a friend to anybody, especially to a president,

a chief executive of another country. He has not meddled in the human rights.” That last sentence is essentially signaling to do business with the Philippines but don’t raise pesky questions about their human rights record. Zimbabwe’s ex-president Robert Mugabe, said that he was looking forward to re-establishing diplomatic relations with the US. Fortunately, that will now happen under his successor. Brutal dictators like Putin of Russia, Sissi of Egypt and Erdogan of Turkey all welcomed Trump’s victory (The Washington Post, 2016).

### **Terrorism and the Laws of Armed Conflict**

Terrorism itself poses a great danger to human rights. By definition, terrorism constitutes a serious human rights violation. While the UN cannot agree on a definition of terrorism, relying instead on the shibboleth of “one person’s terrorist is another person’s freedom fighter,” it does not stop us from concluding that attacking civilians with the express intent of creating terror violates human rights and cannot be justified by any alleged political goal. The ICRC’s approach is eminently sensible, noting that while International Humanitarian Law does not provide a definition of “terrorism,” the law does prohibit acts that “would commonly be considered ‘terrorist’.” IHL does expressly prohibit “acts of terrorism” in Article 33 of the Fourth Geneva Convention and in Article 4 of Additional Protocol II. This Protocol and Additional Protocol I both prohibit “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (ICRC, 2015, p. 2).

Of course, IHL applies to armed conflict situations and emphasizes a core principle of distinction/discrimination between combatants and non-combatants. The latter can never be intentionally targeted, which is precisely what terrorists do. In situations not involving armed conflict, IHL does not apply but international human rights law and domestic criminal laws do govern behavior. Regardless of the motives of terrorists, international human rights law prohibits the unlawful use of force by

state actors or those acting on behalf of or with the acquiescence of the state and non-state actors; criminal law prohibits individuals or groups from engaging in acts involving the illegal use of force or violence against other individuals or against the state. Thus, regardless of the applicable legal regime, torture is illegal and a serious crime, war crime and/or human rights violation (ICRC, 2015, p. 1).

The problem, however, has been that in countering terrorism, some states have only made matters worse. They have committed terrorist acts themselves (Myanmar's treatment of Rohingya and South Sudan's genocidal campaign against certain minorities as two recent out of many examples). As shown above, under the pretext of countering terrorism, they have also unlawfully restricted human rights. The so-called "war on terrorism" is more than a misleading misnomer since terrorism is a tactic and you cannot have a war against a tactic. It also creates and sustains a political environment that seeks to justify using illegal means such as torture and extrajudicial killings to protect national security.

Unfortunately, a harmful dynamic has developed often pitting human rights defenders against national security activists. In the most extreme cases, each side sees a zero-sum game, wherein the two goals are mutually exclusive. More human rights mean less national security and vice-versa. It behooves human rights advocates to gain a deeper appreciation of the real threats that terrorism poses, and national security advocates need to grasp how using fears about security as a justification to erode human rights only reinforces many of the factors that can lead to terrorism and violent extremism. Rights have limits as described above, yet limitations on rights are not absolute or open-ended and must be proportionate and truly necessary.

### **Three Current Worrying Trends**

During a major conference in 2006 on *National Security and Human Rights* at the Woodrow Wilson Center in Washington, D.C., it was noted

that “suppressing democratic freedoms as an expedient to national security will only weaken security further by radicalizing and isolating certain populations, which in turn will contribute to these populations’ perceived grievances and thereby increase the impetus to violence” (Woodrow Wilson Center, 2006, p. 7). In fact, respect for human rights, ensuring the rule of law, and combatting corruption can be crucial tools in enhancing national security. It is a false dichotomy to postulate that security concerns require limiting certain freedoms.

Despite these insights made by many over the past 17 years since the 9/11 attacks, the two worlds have not often come together and the dynamic remains one of opposition rather than complementarity. Several recent trends are particularly worrying, and let's turn to them now.

### **1. The Use of Drones and Remotely Piloted Aircraft**

A vast literature now exists, analyzing the impact of the use of armed pilotless aircraft (drones). For more information on these, see “Unlawful Killing with Combat Drones,” (July 2010), “Interview with Harold Koh,” (April 2012), and “Predators over Pakistan,” (March 2010). Now, let's focus on the issues of the legal regime that should govern their use, thereafter turning to the impact of drones on the dynamic between human rights and national security.

Drones offer the possibility of increased precision in targeting enemy combatants. Instead of bombing or sending rockets, drones can identify the exact location of the targeted persons along with the presence of civilians. The operator watching the live feed then has to decide whether to pull the trigger or not.

There is nothing inherently illegal in using drones. The key question is whether there is an armed conflict or not. If there is not, then the use of armed drones to kill people without first attempting to arrest, disarm, or

use a less deadly force to control the situation is highly suspect and quite possibly illegal. Also, using drones in the name of enhancing national security can have the exact opposite effect. It is vitally important to avoid confusion between the legal regime governing armed conflict and the norms governing counter-terrorism.

First, the laws of war by definition only apply in armed conflicts which can be international (between two or more states) or non-international (between states and non-state actors or between non-state actors). If an armed conflict exists, combatants can lawfully kill other combatants: this is what war is all about. Any weapon that increases the accuracy of the combatants, thereby lowering the risk of civilian deaths or injury, can be a good thing. A drone offers this technological advance. Its high-resolution, real-time picture of the battlefield offers combatants an accurate assessment of who is there: combatants, civilians or a mix. Of course, the principles of the laws of war apply always: distinction, proportionality, necessity and humanity.

Drones can greatly improve the chances of distinguishing between combatants and civilians, thus, lowering the risk of disproportionate civilian casualties. Whether they actually have done so in the armed conflicts in Afghanistan and Yemen remains a subject of great debate (Trégan, 2013). The legal issues will grow increasingly complex as non-state armed groups actors start to use drones. The CIA already uses drones. CIA officers sitting in air-conditioned offices in the US, not wearing uniforms and not part of a military chain of command are “combatants” under the laws of armed conflict and do not enjoy the combatant privilege to kill other combatants (O’Connell, 2010, p. 7).

If there is no armed conflict, then the use of drones at all becomes much more problematic, regardless of their accuracy. Human rights law takes precedence in situations where there is no armed conflict. Here, the state may only use deadly force as a last resort, in self-defense, or to

protect the life of a third party, which is in imminent danger (UN Basic Principles on Force and Firearms, 1990, art. 9). The state must only use force carefully calibrated to control the situation, and deadly force is always the last resort. If a warning can be given, an arrest made, or a perpetrator brought under control by non-lethal means—none of which a drone can do—then such means must be used.

In all cases, the use of drones, legal or illegal, has a huge psychological effect on everyone in the region. Their use can also have a negative impact on the population's ability to enjoy economic, social and cultural rights (UN Special Rapporteur on Promoting Human Rights while Countering Terrorism, 2017, p. 9). Children can be traumatized and unable to go to school. Farmers may fear going to their fields so crops go UN harvested and hunger grows.

States always claim they need to use drones to protect national security. In the case of an armed conflict this is likely true, and as such the question becomes, have drones been used in accordance with the laws of armed conflict? Even if the answer is yes, the impact of the drones may have such a negative impact on society, including the ability to enjoy human rights, that it is at least arguable whether the drones are having a net positive effect on national security.

If there is no armed conflict, then, in addition to the legal issues raised above, the idea of whether using drones enhances national security is debatable. States claim that they must act in self-defense because an armed group poses an imminent threat, and the state has “no other option to defend the country from attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror” (UN Special Rapporteur on Promoting Human Rights while Countering Terrorism, 2017, p. 9). While states under the UN Charter as noted previously have the right to self-defense, many have challenged its applicability regarding non-state actors operating outside theatres of war who may

someday pose a threat. Where is the “imminence”? As the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston noted in discussing the US claim that it has the right based on self-defense to target anytime anywhere al Qaeda, the Taliban and “associated groups” years after the September 11, 2001 attacks: “This interpretation of the right to self-defense is so malleable and expansive that it threatens to destroy the prohibition on the use of armed force contained in the United Nations Charter” (Horton, 2010). Alston further noted that if other nations used the same rationale as the US in their fight against terrorism, “the result would be chaos.”

The ICRC has clearly stated on numerous occasions that it rejects the notion often put forward by the US that it is fighting a “forever war” against al Qaeda and the Taliban and any “associated forces” wherever they may be. “With respect to the phenomenon of armed groups that are perceived as having a global reach, such as al-Qaeda or the Islamic State group, the ICRC does not share the view that an armed conflict of global dimensions is, or has been, taking place,” it states, further explaining: “This would require, in the first place, the existence of a ‘unitary’ non-State party opposing one or more states.” (ICRC, 2015, p. 5). The ICRC correctly notes that based on the available evidence, this is simply not true for al Qaeda or ISIS. The ICRC also rejects the claim that the laws of armed conflict apply wherever anyone associated with armed groups may be found, e.g. al Qaeda in the Maghreb. Unless there is the requisite level of intensity of conflict and organization of armed groups, IHL does not apply.

Regardless of the legal issues, using drones may undermine national security by creating such enmity towards the state using drones that many more enemies are created than are killed. This practical policy question is often overlooked or dismissed. But reliable accounts from Pakistan and Yemen claim that drones, in addition to traumatizing the

population has also motivated some of its member to resist the party using the drones.

In the town of Obeiraq in Dhamar province in southwestern Yemen, after a series of US drone attacks in 2013, a local leader declared: “I assure you, the young of men of Obeiraq may soon be joining AQAP [al Qaeda in the Arabian Peninsula]” (Trégan, 2013). And after an earlier series of deadly drone strikes also in Yemen, a young Yemeni writer noted: “Drone strikes are causing more and more Yemenis to hate America and join radical militants; they are not driven by ideology but rather by a sense of revenge and despair” (Mothana, 2012). And regarding the use of drones in Pakistan, a country with which the US has never been at war and is nominally an ally, two experts on counter-terrorism have written that “while violent extremists may be unpopular, for a frightened population they seem less ominous than a faceless enemy that wages war from afar and often kills more civilians than militants” (Kilcullen and Exum, 2009).

## **2. Mass Digital Surveillance**

Another relatively new issue in the ongoing dichotomy between rights and national security is the mass surveillance of digital information imposed by the state in the name of national security. The UN General Assembly has made this a priority concern (A/C.3/71/L.39/Rev.1 2016). Numerous human rights bodies within the UN system have taken up the issue, noting that the right to privacy plays a “pivotal role in relation to other rights” (UN Special Rapporteur on Promoting Human Rights while Countering Terrorism, 2017,p. 10). The Human Rights Council has even named a Special Rapporteur on the Right to Privacy and issues of digital privacy have been considered by the Human Rights Committee of the ICCPR and in various commentaries in the Universal Periodic Review conducted by the Human Rights Council (Human Rights Council Resolution 28/16).

The state's activities regarding sweeping online surveillance of virtually anyone with no prior notice or any basis or finding of "probable cause" to suspect criminal activity has also been the subject of numerous court cases in national and regional courts. For example, the European Court of Justice has held that generalized access to electronic communications, essentially electronic eavesdropping with no prior judicial review of the propriety of such actions, undermines the essence of the fundamental right to privacy and respect for a private life (*Schrems v. Data Protection Commissioner*, 2015). The European Court of Human Rights has confirmed this result in a case involving a surveillance law from Hungary, noting that the law contravenes the right to privacy found in the European Convention on Human Rights and that human rights principles must be "enhanced" to take into account the increasing appetite of states for "massive monitoring of communications" (*Szabó v. Hungary*, 2016).

The retention of so-called "meta-data" without a reasonable suspicion of illegal activity is not allowed, since it would be impossible then to balance whether the need for such data outweighs the intrusion into the private lives of individuals. This proportionality principle should govern every assessment of whether the needs for national security trump concerns about privacy but if massive and indiscriminate surveillance exists such a test is impossible to apply.

Perhaps no other issue illustrates just how dangerous the fight against terrorism can be for human rights. A case from the Constitutional Court in Germany perfectly captures the challenges in this era. The Court ruled that a general screening of data across public and private data bases hunting for possible terrorist "sleepers" is illegal; only a concrete and imminent danger to the lives or safety of persons or to the state, not a general threat level or heightened tensions, could justify such a screening. The methods and technology now available, or likely to be

in the future, make it imperative that human rights advocates constantly be on guard for new and creative infringement of rights, all “justified” in the name of national security (UN Special Rapporteur on Promoting Human Rights while Countering Terrorism, 2017, p.11).

### **3. Migration and Refugees**

The exploitation by political leaders of the phenomenon of migration and refugees poses a grave threat to human rights. The rhetoric is chilling and becoming all too commonplace. From Hungary to Slovakia, Italy, France, Germany, and most tellingly, to the United Kingdom with a drive to leave the European Union, the intentional fear-mongering of the “other” has led to disastrous policies for migrants and asylum-seekers in Europe. The rise of nationalist verging on fascist parties, like the *Alternatif fur Deutschland* (AFD) in Germany, the League in Italy (formerly the Northern League but the name was changed to attract southern Italians to a party that had previously insulted southerners and foreigners) and the long-standing racist and anti-Semitic *Front National* in France (who just changed its name to try to hide its insidious roots and extend its appeal) has been devastating for human rights. Hate speech abounds, as do attacks on minorities/refugees/migrants and restrictions on freedom of movement, all in the name of protecting people from a non-existent threat, have become a terrifying norm in Europe.

The United States, under Trump’s administration, takes a backseat to no country in spewing anti-immigrant rhetoric and attempting to enact policies that violate fundamental human rights. The infamous wall that Trump wants to build is the most physical example. Trump’s attempts to restrict migration from countries based on their alleged threat to the US, which was in fact based solely on an anti-Muslim prejudice, has so far been largely held in check by the US federal courts, but the battle is far from over.

Dictators and authoritarians from around the world have looked to these precedents to justify their own harsh actions against migrants and asylum-seekers. The most egregious case is in Myanmar, where the government has stoked anti-Muslim sentiment to justify its policy of the forced expulsion of over 700,000 Rohingyas on the pretext that they are Bangladeshi interlopers and not really Burmese at all, even though the Rohingyas have been in Burma for centuries. The UN Special Representative on the Prevention of Genocide recently stated, regarding the Rohingya: “all the information that I have received indicates that the intent of the perpetrators was to cleanse northern Rakhine State of their existence... possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide” (Beech and Nang, 2018).

Complicating all this is the fact that many modern migrants are fleeing war zones where terrorist groups operate. Thus the fear that among those fleeing are terrorists who will do harm even though virtually every study worthy of repute has shown that refugees and migrants are no more likely to commit crimes than the host population, and are even less likely to engage in terrorism or to become radicalized. Instead of posing risks, migrants and refugees are at greater risk fleeing conflicts. Over 16 million refugees in 2014 alone fled five countries with the highest amount of terrorist activities (Institute for Economics and Peace Global Index, 2015).

What is true is that the numbers of refugees, internally displaced persons, and migrants have reached all-time records. In 2015, the number of displaced has reached more than 65.3 million globally (UNHCR, Global Trends 2015). Many states, instead of protecting and welcoming these desperate people, are stigmatizing, stopping and even arresting, detaining or expelling them. States have every right to protect their borders and every effort should be made to disable terrorists and

their networks. However, these concerns about national security cannot infringe on the rights of migrants and refugees not only because they violate international law but ultimately are counterproductive. As the Special Rapporteur noted, a worrying trend has been that "institutional and policy structures, migration and border controls have been increasingly integrated into security frameworks that emphasize policing, defense and criminality over a rights-based approach" (UN Special Rapporteur on Promoting Human Rights while Countering Terrorism, 2016, p. 5).

Yet the militarization of border patrols, crackdowns on migrants and refugees, and increasing security have only created chaotic and deadly migration by handing power to traffickers who do not hesitate to abandon or even murder migrants. This can assist those intent on committing terrorism by intensifying xenophobia and vilification of certain groups. This is a gift to terrorists seeking to recruit new members.

Borders are not "human rights-free zones," and states have obligations under the UDHR, ICCPR, refugee law and customary international law to seek and enjoy asylum and to not be forced to return to the place where they fear persecution (the principle of non-refoulement") (Convention Relating to the Status of Refugees, 1951, Art. 33). The Office of the High Commissioner for Human Rights has issued an excellent paper on how to address security concerns while fulfilling human rights obligations (OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders, 2014). For example, while screening and registering all those who arrive at borders is perfectly acceptable, profiling based on ethnic, religious, ethnic, national or other grounds is strictly prohibited, since it violates the core human rights principle of non-discrimination. Any differential treatment of migrants at international borders must be necessary and proportionate.

The issue of mass data collection analyzed above is relevant to migration. Border agents now routinely collect data allegedly to

identify terrorist among those seeking entry. Again, collecting data is permissible as long as it respects core human rights principles. As noted above, data collection must respect the right to privacy which migrants do not abandon as they move. The Office of the High Commissioner for Human Rights underscores that collecting biometric data at borders must be accurate and up to date, proportionate to a legitimate aim, obtained lawfully, stored for a limited time and disposed of safely and securely.

The mass and prolonged incarceration of migrants and asylum-seekers is also an affront to human rights and refugee laws (Gomez, 2018). In the United States, even women and children are incarcerated, and in some recent cases, young children have been separated from their parents (Hawkins, 2018).

Words and language are important. The UN Special Rapporteur on Human Rights of Migrants has emphasized that migration is not a crime and that the term “illegal migrants” should not be used to refer to migrants in an irregular situation (Press Conference by Special Rapporteur on Human Rights of Migrants 2013). States should never criminalize irregular entry or residence in a country.

Those who seek, however, to criminalize migration and castigate vast numbers of people by tarring them with the terrorist label, also sow confusion by asserting that refugee law undermines national security by providing a haven for those who “hate us.” Nothing could be further from the truth. Refugee law explicitly prohibits awarding refugee status when there are “serious reasons to consider” that anyone who has committed war crimes, crimes against humanity, crimes against peace or other acts contrary to the purposes and principles of the UN ” (Convention Relating to the Status of Refugees, 1951, Art 1[F]). Clearly, terrorism falls within all of these categories and the level of proof required is not very high to exclude someone from refugee on these grounds.

## **Conclusion**

Ever since Cicero had Cataline executed in 63 BC without a trial under emergency powers granted to Roman Consuls, the debate between national security and human rights has continued. Two thousand years ago, just as now in many similar cases, there was real doubt about how much a threat to the state Cataline and his followers presented. Was Cicero using an “emergency” to enhance his powers while getting rid of a pesky rival? (Beard, 2013, p. 83).

What I have attempted to show in the preceding analysis is that even when there might be a real threat to national security, a state’s powers to suspend or limit human rights is itself constrained by international law, both treaty and customary. Any derogations or limitations must be proportional to the threat and not discriminate based on ethnic, national, religious or other prohibited grounds in their application. And certain suspensions, such as the obligation never to torture or to execute arbitrarily or summarily, are on their face illegal, whether or not there is a real threat or an armed conflict. The use of drones makes this legal imperative even more compelling as the technology undermines the legal regime. And now that non-state actors increasingly have access to drones, the resistance by some to accepting that non-state actors are subject to international human law obligations will have to change.

State and non-state perpetrators of human rights violations, whether committing acts of terrorism or in the efforts to counter-terrorism in the name of national security, must face justice. Impunity only encourages more violations. There has been a tendency to exploit for political purposes the victims of terrorist attacks. This must be countered and the focus must be on genuine justice and compensation where possible for terrorist victims. Similarly, when counter-terrorism campaigns violate people’s rights, including those of migrants, refugees and other vulnerable groups, then appropriate remedies such as restitution, reparations, compensation

rehabilitation and guarantees of non-recurrence must be offered. And, of course, those responsible must be prosecuted and punished consistent with due process guarantees. Finally, suspending or restricting the enjoyment of human rights can have the exact opposite effect from the claimed rationale for the limitations. Abusing human rights can only fuel resentment and become an effective recruiting tool for the very terrorists or violent extremists that the state is seeking to combat. A much more effective response would be to extend human rights, including key rights such as education, access to health care, housing, food and clean water, to as many people as possible without regard to race, nationality, social class or ethnicity. This would dampen the appeal to violence, reduce resentments that inevitably arise from exclusion, and have the added benefit of improving the lives of billions of people.

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# Rights of Women and Marginalized Communities and Challenges of Combating Impunity

-Khushi Kabir-

Rights of women and marginalized communities, and the challenges at the institutional, societal and state-led level of combating impunity need to be identified and realised. As we all know women are an integral component of all, be it communities, marginalized, excluded or otherwise. Rights activists all over the world are trying to ensure that all citizens globally and locally, have the right to ensure access to entitlements as given to them by their constitutions, at all levels, and that all conventions, declarations, covenants and instruments that have been signed, agreed upon and ratified are enacted, specially to those, who are most vulnerable and the most excluded. Despite being half the population, a majority of women strangely are part of this group.

The fact that we had such a conference "Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia," which was an indicator of how ineffective the implementation of such laws are, laws that are debated, discussed and enacted ostensibly for the benefit of the people. Unless there are mechanisms in place to not just monitor implementation, but also in the spirit of non-compliance or violations, it would be difficult to identify what

the possible means are to bring the issue of inaction into the public sphere. We have to accept and agree that such violations exist and through adopting means, hopefully force systems, to take responsibility for their actions or inactions. It is also necessary and important to reiterate as well clarify, why women are needed to be addressed specifically.

During situations of conflict, war and even within the realm of establishing power locally, women have been specifically and intentionally targeted, sexually and physically violated or abducted, whether by political communities or for individual control. Women are considered as the lesser being within the current system that exists not just within this region, but globally. The system that promotes and reproduces this is obviously patriarchy and all existing system and structures, ideologies, institutions that are supposed to protect one's rights, as given, are not just playing to the desires of those who control them politically but also infiltrating in the minds of men being superior, of men having to always take the lead, of being in control. It is not just the male species who internalize this, but women too. Thus, our systems that we have created to govern us, the people, through different state mechanisms and machineries are all a reflection of this same form of patriarchy, whether it be the institutions, which enact laws, the institutions acting as the custodian of ensuring the laws, are maintained and followed, or the institutions through which governance is ensured for its peoples. But are these institutions really doing what they are intended for? Does the average citizen, leave alone women and marginalized communities, feel that all these state institutions are created in favor of ensuring justice for all, particularly them?

The biggest challenge that we face currently is the lack of accountability to the people. The impunity that exists is the direct result of the unequal, unjust system that exists. If you belong to the right class, have close association with the correct power base, if your ethnicity and ideology is that of the majority, the rulers, if your gender determines

your status even among all the different categories mentioned above, in other words intersectionality, any form of violation you may face is met with impunity - should you even wish to challenge the violation, the injustice, the lack of any form of access to any entitlements. Thus, the section of the population you belong to, your identity decides what you can expect to receive as a citizen, that it is understood and accepted as being the norm and becomes the responsibility of those in power to determine who gets away with what level of impunity. In other words, the total disconnection of those who govern and those who are governed, i.e. the people who in principle are meant to be the source of their power, but in the present context are of no consequence whatsoever.

Those who create policies, make laws, and are responsible for its implementation are intrinsically patriarchal in their psyche. Even when laws and policies are enacted for women specifically, we still see particular and specific violation and attacks on their rights and entitlements as mandated to them as citizens. These laws, policies etc are never seen as something to be implemented or even taken seriously. The main problem is not simply the lack of will in implementation of all specific policies towards maintaining women's security, but the ingrained mindset that exists whether that be amongst individuals, groups or within every institutional system. Hence, we have to really understand to learn more about to acknowledge how intersectionality is needed to be understood, to deconstruct the nexus that exists between elitism and impunity, to understand the real structures that create the chasm between those who are able to take control to remain in power and those who are powerless and voiceless, the vulnerable and the defenseless in relation to the power makers, the power breakers. Once this is understood, only then can one really begin to discuss what is needed to be done, whether words such as rights and liberty and security and equality in its true sense are merely words, or do they, can they ever be implemented as all declarations, conventions, commitments are meant to do. Are these

merely an eye-wash or do Governments who adopt them really mean to do so. Is the world that is really ready to do away with class, race, ethnicity, communalism, gender roles and identities?

Further, how do we then 'combat' this culture? Culture of impunity, yes, but the culture of political and territorial identities so strongly ingrained within us, within the State machineries, within even the so-called civic independent bodies, and projected through the formation of our own niches, projection of our own definition of cultures, formulation of rules and norms similar to the way the Official, National/State and International Institutions work.

There have been moments in History, when people have come together to bring about changes. Thus, one's agency is of utmost importance. The agency can only become effective when it gains collective agency, which, in other words, is collective mobilization of people. We cannot afford to be emotional nor romanticize mobilization and change, in other words, revolution, with a small r. It must be recognized that change brought about by any means, even when it is through a strong peoples' revolution can never remain so, unless there is in place peoples' collective agency, which again will only happen when they are in charge, make decisions collectively taking into consideration how can accountability to all citizens be entrenched as a strong system of governance. Otherwise and ever so often, as we have seen, mobilization is very temporary, losing its momentum and impact once the immediate demands are met.

Therefore, its time to ensure that systems are put in place, where continuous and sustained examination of exerting voice, questioning systems, evaluating situations and existing laws and institutions are prevailing. Where not only should they be regularly monitored, but also develop a system which can force that these systems are made truly accountable. The UN mandate holders are a very definite mechanism through which all rights defenders,

specially women's organizations and those working to establish women's rights can make submissions, raise issues and insist on bringing to the fore the real situation. Apart from the mandate holders, the different UN meetings, reviews etc. where nation states are required to give their status report and other players, i.e. Human Rights Groups, Women's organizations, NGOs, CSOs as relevant are allowed to also submit their alternate reports, which can help member states to pick up what the concerns or contentious issues need to be raised, are some of the mechanisms in place. But, they are obviously not enough, as the balance of how and who gets to ask questions is extremely limited to say the least. The UN systems seem to have lost most of what the main rationale for its creation was and, thus, is not really able or allowed to play its mandated role. Is it time now for us, the global citizens to work towards making existing International/Global Institutions more effective or create spaces, through various means. The need for this alternative method and seeing how the use of social media has allowed citizens movements to become such a huge phenomenon currently, as can be seen from the different and varying global movements such as WSF, #Metoo, #NotInMyName etc., the huge demonstrations in the US organized by school children. These movements and demonstrations which are in essence a statement of protest against the non-action of Nation States will again lose their momentum unless these voices are amplified, made louder, more vigorous, more effective.

Conferences and Annual events such as CSW, CEDAW etc. in my mind play an important role but definitely they are not enough as they act merely as a platform, which we all use for reasons mentioned earlier, but which in real terms is not effective, nor implementable, nor of consequence to women and people at large, as these bodies, institutions and conferences have no means of ensuring implementation and thus do not nationally affect women.

Democratic space needs to be reclaimed. Rights of all workers, landless peasants, indigenous communities, peasants, workers etc. have to take into account the issue of intersectionality if one is serious in addressing the issue of women's exploitation, oppression, subordination and sexual violence which is different from that of men belonging to the same class, ethnicity, ideology, religion or belief. As someone who is involved in ensuring rights of all such marginalized communities, each time the situation of women is raised, the response almost always is 'Let us first get our identities and rights in place and we shall then take up the issue of women's rights, entitlements as equal within us'. Why should this be a first and later issue? Especially, when we state women's rights are human rights. That has to be understood by all and taken into serious consideration, of.

# Linking International and National: Role of NHRIs in Domestic Implementation of Universal Norms and in Prevention of Human Rights Violations

-Marc Limon and Nikhil Narayan-

The UN Human Rights Council (HRC) was established in 2006, replacing the Commission on Human Rights, as a subsidiary organ of the UN General Assembly (GA) by GA resolution 60/251.<sup>29</sup> The HRC is granted a broad mandate under GA resolution 60/251 for both the promotion and protection of human rights. Both the promotion and protection of human rights ‘should be based on the principles of cooperation and genuine dialogue and aimed at the strengthening the capacity of member states to comply with their human rights obligations.’<sup>30</sup>

The HRC is mandated to promote the implementation of human rights by member states. GA resolution 60/251 tasks the HRC with promoting ‘the full implementation of human rights obligations undertaken by

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29 Human Rights Council, UN General Assembly Resolution 60/251, UN Doc. A/Res/60/251 (2006).

30 GA Res A/Res/60/251, preamble.

States',<sup>31</sup> along with 'human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States'.<sup>32</sup>

To promote the implementation by States of their international human rights obligations and commitments, the GA decided to maintain existing 'implementation mechanisms' such as the Special Procedures, but also to add a new mechanism: the Universal Periodic Review (UPR). This is of course in addition to the treaty-based implementation mechanisms – the Treaty Bodies. HRC Member States are expected to engage with these mechanisms in a 'results-oriented' manner, so as to allow 'for subsequent follow-up discussions to recommendations and their implementation.'<sup>33</sup>

On the first point, the HRC is mandated to 'assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedure'.<sup>34</sup> Regarding the new mechanism, the HRC is mandated to 'undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the [UPR] review shall be a cooperative mechanism based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of the treaty bodies[.]'<sup>35</sup>

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31 GA Res A/Res/60/251, para. 5(d).

32 GA Res A/Res/60/251, para. 5(a).

33 GA Res A/Res/60/251, para. 12.

34 GA Res A/Res/60/251, para. 6.

35 GA Res A/Res/60/251, para. 5(e).

This then (broadly speaking) is the human rights promotion mandate of the HRC: to move States, through cooperation and dialogue, towards improved compliance with their international human rights obligations and commitments, to follow-up on domestic implementation (including by receiving and reviewing periodic progress reports from States), and to provide capacity-building and technical assistance, as necessary, to support improved implementation.

All UN Member States are expected to implement their human rights obligations and ensure compliance; however, Member States of the HRC have a particular responsibility (according to the GA). GA resolution 60/251 makes clear that Members elected to the HRC ‘shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the [HRC] and be reviewed under the [UPR] mechanism during their term of membership.’<sup>36</sup>

The HRC also has a clear and robust protection mandate. That includes the power to work to prevent human rights violations from happening in the first place by building domestic resilience and capacity, the power to ‘respond promptly to human rights emergencies,’<sup>37</sup> and to ‘address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon.’<sup>38</sup> In doing so, the HRC’s work should be ‘guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation.’<sup>39</sup>

This protection mandate comes into play where a State does not respect and thus actively violates the human rights obligations it has

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36 GA Res A/Res/60/251, para. 9.

37 GA Res A/Res/60/251, para. 5(f).

38 GA Res A/Res/60/251, para. 3.

39 GA Res A/Res/60/251, preamble, para. 4.

signed up to, or fails to protect the rights of victims of violations. In such cases, the HRC is expected to address the situation, investigate violations, and hold perpetrators to account.

### **UN Paris Principles and NHRIs' Role and Relationship with the Human Rights Council and other UN Human Rights Mechanisms**

NHRIs are an important link between national governments and the international human rights system. They play a crucial role in both the promotion and protection of human rights through the domestic implementation of international human rights obligations and through close engagement with the international human rights system. The Principles relating to the Status of National Institutions ('The Paris Principles') prescribe the competencies and responsibilities with which all NHRIs should be vested.<sup>40</sup> With respect to the UN human rights system, NHRIs have the responsibility, *inter alia*, to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation; to encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation; to contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence; and, to cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights.<sup>41</sup>

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40 Principles relating to the Status of National Institutions (The Paris Principles), UN General Assembly Resolution 48/134, UN Doc. A/Res/48/134 (1993).

41 GA Res A/48/134, 'Competence and responsibilities', para. 3.

NHRIs are similarly an important link between government and civil society, helping to bridge the ‘protection gap’ between the rights of individuals and the responsibilities of the State.<sup>42</sup> In carrying out their work, the Paris Principles encourage NHRIs to develop strong relationships with non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups or to other specialized areas.<sup>43</sup>

### **Is the HRC Fulfilling its Mandate: Are Member States Being Held Accountable?**

Unfortunately, almost ten years after its establishment, the Human Rights Council is failing to fulfill its ambitious promotion and protection mandate. The HRC is doing good work: the UPR has proved very successful in identifying key ‘implementation gaps’ and in providing recommendations on how to fill those gaps. On the protection side of its mandate, the Council has addressed a wide range of situations, including when other parts of the UN (e.g., the Security Council) have not been able to do so.

However, while the work and output of the HRC has increased significantly over the past ten years, it has faced a number of challenges in terms of its effectiveness. In particular, while the HRC has continued to debate, elaborate and clarify international human rights norms (e.g., by passing thematic human rights resolutions), it has made insufficient progress in pushing States to implement and realize those norms at domestic level. In other words, it has failed to bridge the long-standing UN human rights ‘implementation gap’.

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42 Global Alliance of National Human Rights Institutions, ‘Roles and types of NHRIs’, available at <https://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx>.

43 GA Res A/Res/48/134, ‘Methods of operation’, para. (g).

There are some legitimate structural reasons for this. For example, the UN's human rights pillar receives only around 3% of the UN's regular budget – far less than the development and security pillars. However, the main reasons for the perpetuation of the 'implementation gap' are: a lack of political will on the part of States; and insufficient technical assistance and capacity building support to help developing countries improve implementation.

Where States lack the political will to implement their international human rights obligations, and thus refuse to cooperate with the UN's implementation mechanisms, and, worse still, systematically violate the rights of people living within their jurisdiction, then the Council is expected to act. Over the first ten years of its existence it has done so on a number of occasions – around a dozen situations of serious human rights violations have been placed on the Council's agenda. However, nearly all of those situations are in Africa or the Middle East – very few violations in the West, in Latin America, in Eastern Europe or in the Asia-Pacific region have been investigated. This flies in the face of the GA's expectation that the HRC shall work in an objective and non-selective manner.

The Council has also failed to operationalize its prevention mandate under paragraph 5(f) of GA resolution 60/251. Rather than working to build domestic resilience to prevent violations happening at all, or responding promptly during the early stages of an emerging crisis, the HRC has tended to do nothing until a situation has become extremely serious – and then respond by establishing an accountability mechanism such as a Commission of Inquiry.

Regarding the promotion of human rights, the HRC – as noted – has continued to do important work to clarify and consolidate universal human rights norms. However, too often it has not pushed States to implement and comply with those norms, or to follow-up with States

to ensure accountability. This has led to the emergence of a major and highly damaging ‘implementation gap’ and to questions about the UN’s capacity to address that gap. Notwithstanding, over the past two years there are signs that this situation may be changing.

## **The Implementation Agenda**

In 2006, UN Secretary-General Kofi Annan called on the HRC to lead the international community from ‘the era of declaration’ to the ‘era of implementation’ of universal human rights norms.<sup>44</sup> However, the record of the UN and the HRC since 2006 suggests that it has made greater progress on elaborating norms and standards rather than implementing or enforcing these norms. The UN mechanisms established to promote domestic implementation – the Treaty Bodies, Special Procedures and the UPR – rely on State cooperation and dialogue to assess compliance with international human rights obligations and to provide recommendations for further improvement. Yet, while the work of these mechanisms, and the number of recommendations from their processes, have proliferated, there has been little or no focus given to whether and how the recommendations are implemented domestically.

This gap between international norm-setting (i.e., declaration of commitments) and domestic implementation is primarily due to a combination of a lack of political will and domestic capacity constraints. Most States lack the capacity or systematic internal processes to internalize UN recommendations within their national policymaking, monitoring or reporting. According to a 2015 snap survey by the Universal Rights Group (URG), most State representatives in Geneva thought their country did not have (or at least they did not know about)

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44 Secretary-General’s Address to the UN Commission on Human Rights, Geneva, 07 Apr 2005, available at <https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights>.

specialized human rights implementation and reporting systems (e.g., inter-ministerial committees to coordinate human rights compliance).

However, this situation has begun to shift. Since 2015, a number of countries – mostly small developing countries (e.g., Bahamas, Ecuador, Fiji, Paraguay, Samoa, Seychelles, Uruguay) have begun to set up specialized standing national mechanisms to coordinate implementation, monitor progress, assess impact and streamline reporting. These structures have come to be known as ‘national mechanisms for implementation, reporting and follow-up’ (NMIRFs).

Building on these spontaneous initiatives by these States, which have independently recognizing the need to do more and better with fewer resources despite their domestic capacity constraints, the Office of the High Commissioner for Human Rights (OHCHR) has also begun to promote the concept of NMIRFs. In 2016, OHCHR published a global study on NMIRFs. This provided a practical guide for effective domestic implementation and engagement with international human rights mechanisms, and identified nearly thirty emergent NMIRFs.<sup>45</sup> As part of this growing interest in NMIRFs, in 2015 Brazil and Paraguay tabled an HRC resolution on ‘promoting international cooperation to support national human rights follow-up systems and processes.’<sup>46</sup> Through this resolution, the HRC encouraged more States to create such systems.

Building on the OHCHR study, through a series of dialogues with Member States in 2016, the URG identified several critical common features of NMIRFs: (1) Inclusivity – involving all relevant agencies, ministries, branches of the State in any such mechanism; (2) Political will – clear backing and authority granted by the executive or by statute;

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45 OHCHR, National Mechanisms for Reporting and Follow-Up, Policy Report (2016).

46 UN Human Rights Council Resolution 30/25, UN Doc. A/HRC/Res/30/25 (2015).

(3) Consultation – the work of the NMRFs should be participatory and based on meaningful national consultations with stakeholders throughout the country; and (4) Transparency – information on progress should be readily available to the public. The URG study also noted importantly that the goal of such mechanisms was not to add to bureaucracy but rather to streamline processes and improve coordination.

A crucial element in this emerging ‘Implementation Agenda’ is the role of NHRIs and civil society in ensuring effective implementation, monitoring progress and guaranteeing balanced reporting. In other words, in ensuring that implementation and compliance is a democratic rather than a bureaucratic exercise.

Given civil society’s special on-the-ground expertise, they can and should play a crucial role in pressing governments to implement UN recommendations and to independently monitor and report on progress both domestically and internationally. By the same token, given their unique position as a bridge between government and civil society, NHRIs can play a pivotal role in mobilizing, coordinating and amplifying civil society monitoring and reporting efforts. NHRIs can also play an important role in working with governments to ensure full implementation and follow-up of UN recommendations. NHRIs and civil society must therefore be involved in all phases of the implementation process (including through regularized engagement with NMIRFs), including: domestic implementation of UN recommendations; tracking or monitoring of progress; monitoring of impact (using impact indicators); domestic reporting (for instance, to the parliament or other government oversight bodies, as well as public reporting); and international reporting (e.g., to the Treaty Bodies or to the UPR). NHRIs can also provide key expertise for the effective implementation of UN recommendations and can advise NMIRFs throughout the implementation cycle. NHRIs also serve as an independent and authoritative interface with the public – promoting transparency and public accountability.

## Prevention

The UN has traditionally been a reactive body with respect to human rights violations. Following a determination that violations in a particular country or context have reached sufficient gravity, the UN has issued statements, resolutions or established Special Procedures mandates and/or Commissions of Inquiry. Despite the UN Secretary-General's recent statements that the prevention of violations must be the UN's top priority, the focus of his efforts has been the UN's security pillar and the Security Council, rather than the institutions of the human rights pillar including the OHCHR, the HRC and even NHRIs. The inherent problem with this approach is its highly politicized and selective nature. This also undermines an important function of the HRC's mandate. Under paragraph 5(f) of GA resolution 60/251, the HRC has the express mandate to 'contribute, through dialogue and cooperation, towards the prevention of human rights' and to 'respond promptly to human rights emergencies'.<sup>47</sup>

There are signs that member states are moving to strengthen the international community's ability to identify evidence of non-compliance – for instance, patterns of emerging serious violations of human rights – as 'early warning' signals of developing instability. In theory, this would allow to address situations at an earlier stage and take measures to prevent or forestall further escalation of such crises. Nevertheless, there remains lack of consensus on what 'prevention' means in practice, and what tools or mechanisms ought to be brought to bear both domestically and internationally. At its essence, questions have been raised as to when the HRC should act, whether it has or can have access to the necessary information in order to act, and what type of action it can take in order to prevent an escalating crisis where the human rights situation is rapidly deteriorating and urgent action is required. In an attempt to answer these

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47 GA Res A/Res/60/251, para. 5(f).

questions and build an operational prevention strategy at the HRC, in 2017/2018 around 70 States, led by Colombia, Norway, Sierra Leone and Switzerland, began an initiative to ‘operationalize the HRC’s mandate under paragraph 5(f)’. This comprises two elements: to build national capacity and resilience (primary prevention), and to respond promptly to early warning information concerning emerging patterns of violations (secondary prevention). The proposals discussed include: the strengthening of capacity-building / implementation assistance; mandating the High Commissioner for Human Rights to bring situations of emerging concern to the attention of the HRC; creating platforms for dialogue; utilizing ‘Good Offices’ missions; better utilizing existing mechanisms, such as special procedures; and possibly creating new mechanisms.

As with implementation, NHRIs must necessarily play a crucial role in this operationalization of the HRC’s prevention mandate. In terms of primary prevention, NHRIs are key national stakeholders to help build domestic human rights capacity and resilience (e.g., by advising the government, or by undertaking human rights training). In terms of secondary prevention, they are key providers of early warning information on emerging patterns of violations, and can also help provide a platform for national dialogue and ‘preventative diplomacy’ to help a State change course and prevent further escalation.



# Role of Human Rights Institutions in Migrant Rights Advocacy

-Ashley William Gois-

## 1. Migrants Rights as a Part of Human Rights Advocacy

Governance, when it pertains to migrant rights, recognizes it as a concept that requires a multi-stakeholder approach. Migrant rights, in turn, cannot be discussed without including major bodies of governance. It possesses the complexity that requires approaching it from different levels of authority, industry and service.

While migrant rights require specific standards, interventions and definitions, the push for it to be considered under the wider umbrella of human rights has been taking place due to the cross-cutting nature of the abuse and discrimination migrant face everyday. The agreement or consensus to recognize the incorporation and indivisibility of these rights is informed by the human rights based approach. The human-rights based approach to migration and migrant rights necessitate deeper engagement from all stakeholders, regardless of their authority, to protect particularly vulnerable groups.

Relevant examples can be found from global processes and consultative/regional processes. During the period of 2004 - 2009, the Bali Process reported role of human rights in their regional consultative

and senior officials meetings, however the discussions held regarding them no longer have prevalence in global discourse. In 2009, Jordan became the first Arab country to sign an agreement with the Philippines, giving rights to domestic workers and access to justice measures. The follow-up to the agreement has unfortunately been lacking. In 2007, the Human Rights Bureau of South Korea established National Action Plan for the Protection and Promotion of Human Rights. The Action Plan did not materialize in practical terms. With regards to countries of origin, positive developments in the relations with destination countries has been observed- a particular instance being the visits of the National Human Rights Council of Qatar to Nepal, Sri Lanka and the Philippines to develop and sign MoU's in 2012, 2016 and 2017 respectively. The Global Forum on Migration and Development had formulated two Global Compacts for migrants and refugees separately. It continues to remain an intergovernmental forum outside of the UN process.

The common challenge, we as civil society, observe across the board is the follow-up and consistency of the agreements and processes. National governments, in association with their human rights institutions, use various institutional tools at their disposal to prosecute, protect and prevent and thereby, regulate migration and tackle human trafficking. Without accountability measures in place, in terms of an ombudsman or a similar institution, the efforts to implement these tools are in vain. This is especially relevant in cases where the agreement/process/related tools are non-binding.

Another persistent gap in the policy field, if any, is the absence of evidential bases. This is primarily due to the nature of a concept like migration. Evidence-based outcomes to various studies are important in shaping public and private perception on it. The importance of migrant rights lies in the strength of its advocacy – in terms of how the evidence found is used to further push for change. The power to use the outcomes

of research and the resultant statistics, to ensure efficient, responsible and inclusive change requires an institution or individual with authority and advocacy within its mandate.

## **2. The Policy Space of NHRIs in Migrant Rights**

The space in between governing bodies and private organizations are taken up by organizations holding independent decision-making while not being entirely involved in the policymaking process. The organizations that fall under this category become imperative in representing the gaps between ‘real economy’ represented by private sector and the institutional field represented by governing bodies. National Human Rights Institutions as independent and essentially quasi-judicial entities fall within this gap and help inform and monitor both sides of interests. They help operationalize the rights-based approach at a country level by being an advisor, mediator and monitor to all stakeholders.

The Paris Principles forms a major part of what guides NHRIs working the world over. As per this discourse, the primary aim of NHRIs in terms of migrant rights would be, in explicit terms, to protect and promote human rights. The level of conformation to the Paris Principles determines, through assessment, the strength and capacity of NHRIs in their own countries. However, the Principles need to be translated contextually and in specific workable terms by NHRIs. In terms of rights protection, they have the authority with the use of international human rights instruments by holding different institutions accountable to their commitments regarding these instruments. By ‘holding accountable’, it does not necessarily signify legal; rather moral and ethical accountability. Moreover, on the ground, NHRIs additionally serve as an archive for data related to their national context with regards to human rights. Despite the services, roles and responsibilities of these institutions, they face several challenges in functioning in the policy space. (Refer pg. 6)

NHRI can work complementarily and conflictingly with the national apparatus to urge for a more inclusive and sustainable approach to migration and migrant-related issues. It is also true that the functions of NHRI cannot be narrowed down into watertight compartments, precisely since the range of responsibilities it has, overlaps the policy spaces of other authorities working in different capacities on the same issues.

This also means that, NHRIs have similarly conflicting and complementary roles with civil society. For civil society specifically, NHRIs serve as protectors as well as collaborators of human rights defenders in the country. However, they may also occupy space that could crowd out significant indirect forms of mobilization that civil society members that are essential counter-institutional forces are capable of. Consequently, the occurrence of redirecting vital resources (financial, institutional and other forms) away from civil society actors. Spaces for functioning need to be determined contextually through constant engagement with each other.

Regardless of their mandates in each country, the strength in capacity of the NHRI, therefore, can essentially influence, shape and dictate the public narrative of migrant rights and migration as a whole.

## **2.1 The Use of Human Rights Based Approach to Migrant Rights by NHRIs**

Under the human rights-based approach, NHRIs have a large ‘playing field’ to operate on. Across the spectrum of human rights provisions, there are several that relate to the migrant experience. The challenge of civil society, and the bodies like NHRIs that fall within the buffer area of policymaking, is to ensure the space for migrants to be included under each provision while making sure that migrant rights are not explicitly differentiated from other groups, say those facing forced

migration. This is again, due to the overlapping nature between the reasons and types of migration. “*The underlying feature of a human rights-based approach identifies rights-holders, who have a claim to certain entitlements, and duty-bearers, who are legally bound to respect, protect and fulfil the entitlements associated with those claims.*” (IPU, 2015, p.1). Current policy discourse in this regard is primarily non-binding, giving the state the upper-hand in decision-making with regards to rights protection and promotion. The foundation of migration governance relies upon the strength of institutions in implementation, as guided by robust laws. The human rights based approach to migrant rights would fortify NHRIs to tackle the issue with public bodies by providing an inclusive, accountable, unbiased view on ground realities while effectively using their authority to make programmatic and systemic recommendations.

For this, however, the prolonged and concerted effort to make migrant rights a part of human rights discourse need to be undertaken – first, within NHRI deliberations in terms of including migrant rights as a part of women and child rights (for example) or more importantly, ensuring migrants fall under the labor provisions that ensure economics, social and cultural rights; and second, monitoring and ensuring accountability of government bodies that are related to migration. With regards to effective implementation and monitoring, the three concepts of policy management, human rights and statistics (or evidence) become essential precursors.

By upholding the rule of law and bringing international conventions and processes into context, NHRIs promote an agenda that is sustainable and relevant to their country. It is in this view that NHRIs can contribute to their government’s position and fortify human-right based argument whether it be for the Global Compact on Migration or in the incorporation of the Sustainable Development Goals into the larger national policy.

Within their country and between countries, they may define, promote and monitor decent work with the relevant ministries, parliamentarians and associated organizations while still maintaining independence and pluralism in their functioning and advocacy.

### **3. Challenges Faced in Migration Policy Space**

In the migration policy space, a primary challenge NHRIs face is the inclusion of migrant rights under the wider arch of human rights. This means making concerted efforts to ensure that migrants from and within their country benefit from a comprehensive mechanism for the promotion and protection of their rights. By description, this includes legal measures, an implementation framework to promote migrant rights, and instruments of monitoring to protect rights. As mentioned earlier, it becomes imperative for NHRIs to nudge and direct state discourse regarding human rights issues that need focus. The focus in this context needs to be on the aspects of their lives that migrant give up during the process of migration, specifically family unity, dignity of labor and fundamental rights in some cases- for economic benefits in return. In countries of origin this becomes particularly relevant as far too often migration is considered an economic phenomenon and not one with social and possibly political repercussions. Rigorous efforts are, hence, required from an independent institution with state-level authority to provide the impetus for the aforementioned focus.

Continuing this discussion, NHRIs in both countries of origin and destination also need to ensure the discourse does not ignore the phenomenon of irregular migrants and moreover must demonstrate commitment to tackling the issue of irregular migrants from a human rights approach. In South Asia, this phenomenon is one of chief consequence and NHRIs in these countries need to emphasize this due to prevailing practices of exploitation. Examining ground realities, we find that every worker enters the state of irregularity from the pre-

departure stage itself (confiscation of passport and papers by agent and by sponsors upon arrival). Employers hold complete authority over the migrants' lives and their fundamental rights. In the same vein, access to justice, in terms of laws, institutions and the opportunity to avail services, becomes a focal point in advocacy and social mobilization. For example, migrants in countries of destination have been proven to be wrongfully imprisoned and many continue to suffer on death row. Research and evidence-based advocacy can be undertaken by NHRIs and their affiliated bodies with regards to access to justice for migrants in jails, detention centers and to examine the causes for their detainment.

Currently, all institutions that fall within public sphere dealing with migration are facing a severe pushback from the anti-immigrant rhetoric prevalent in many countries of destination. Countries of destination, due to the prevailing regional tensions, have indulged in policies that appease their citizens by developing employment opportunities (for example) and enforcing regulations to limit migration into the country. The use of national sovereignty and security as a thin veil renders migrants without agency and resorting to irregular migration. Refoulement without appropriate frameworks to address the issue of unexpected migratory patterns by either providing transitory refuge or access to local missions of the countries of origin is a violation of the human rights of the migrant in general. However, the application and enforcement of effective and appropriate firewalls between basic social security services and immigration law enforcement allow migrants, in spite of their undocumented status, to fulfil their basic fundamental rights (access to medical services or legal recourse for labor abuse, for example).

The underlying concern for NHRIs in countries of origin is the trend of general anti-immigrant sentiment and lowered demand for migrant labor leading to countries of origin pandering to the requirements of destination countries in a 'race to the bottom' as it were. This is done

by lowering their minimum wage requirements and other regulatory roadblocks to employing their labor, regardless of whether the rights of the migrant in question are at risk. Relevant examples being the access to a comprehensive insurance plan or access to market conditions. NHRIs play an irrefutable role in the process of monitoring these rights violations and managing the effects of externalities on their migrant economy.

With regards to relations between countries of origin and destination, NHRIs may well monitor the power differential that exists between the countries, as evidenced by the MoUs, agreements or any other instruments of mutual cooperation developed that is related to migrant labor. The monitoring and assessment of the aforementioned instruments are to be carried out in terms of its follow-up (“*how often it is reviewed*”), evidences to its enforcement/implementation, and related protocol. NHRIs of both countries may coordinate for such an exercise- however, parallel reports need to developed to understand the challenges faced in the relations between the two countries and where the inequalities and gaps lie. Under the same umbrella, the ratification of conventions, especially on forced labor, need to be reflected upon. NHRIs have the mandate (in most cases and as an entity independent from the government) to guarantee that their governments have been able to follow up on their ratifications and push for the recognition of the conventions and agreements that have not yet been considered in public or state discourse.

Lastly, corruption in the state apparatus of the country of origin is and continues to be a major challenge that NHRIs in South Asia face, particularly in terms of tackling the nexus between local recruiting agents and government officials (including police, immigration, passport officers and officers in the missions abroad).

Another pertinent challenge that relates to institutional gaps are

the lack of agreements between NHRIs in countries of destination and concerned departments of the government in the country of origin. The lack of instruments of mutual cooperation in relation to this leads to information asymmetry between the two countries. Moreover, without cross-cutting reviewing, monitoring and vigilance of implementation, the aforementioned instruments remain without teeth – leading to further agreements being chalked up depending on changing socio-economic-political conditions.

#### **4. Building Capacity**

The varying nature and mandates of NHRIs from country to country enable collaborative practices across borders. This particular exercise is what civil society would urge as well since both countries of origin and destination have different requirements for rights promotion and protection. These differences in mandate are caused due to historical contexts of engagement between citizens and state as well as the contemporary nature of political and civil mobilization. NHRIs hence have to navigate the policy space carefully and build their own capacities accordingly.

ICPs, RCPs and bilateral agreements between governments and ministries form the aspect of institutional practice. Contrarily, collaborative processes between civil society organizations, migrant and human rights organizations, faith based organizations, etc. form the other end where grass-root level work and advocacy are jointly undertaken. The exact space in between these two, where an institution of decidedly higher authority than private interests while remaining wholly independent of governmental procedure can operate, is where the alliance between NHRIs in various countries can play a role. Not only do they help in filling gaps, they additionally assist in building capacity through promoting compliance to the Paris Principles, an imperative component in NHRI functioning.

In the context of migration, NHRIs in both destination and origin countries, this would include, but not restricted to:

- (a) Developing a case management for specific abuses – whether it be passport/visa-related offences or physical, mental and sexual abuse and harassment
- (b) Formulating a specific plan for migrants with regards to each context of the country of origin and bilateral agreements or MoUs signed
- (c) Guaranteeing accountability of government departments through formulation or implementation of current referral systems with follow-up mechanisms, that deal with migrant labor, to the MoUs/agreements/policies in their mandate
- (d) Evolving collaborative strategies and agreements with the NHRIs of the migrant-receiving countries
- (e) Instituting relations with civil society/ domestic networks in their own countries, followed up by a comprehensive plan or policy for engagement.

Since not every NHRI functions the same way or has the same powers, the effort to move across borders to develop capacity, standards and activities help fill the gaps in functioning, monitoring and advocacy. For example, NHRIs assisting each other to expand their mandate beyond their assigned roles and take up a visible and active role in rehabilitation and reintegration of migrants.

#### **4.1 Core Strategies:**

- (1) Sharing best practices – This may mean setting benchmarks of performance (vis-à-vis *legal foundation, membership, mandate, funding*, etc.) and engagement dependent on the compliance to these benchmarks.

- (2) Fostering relations between institutions inter- and intra-regionally – Relations may be fostered with due regard to consultative processes nationally and regionally. Increased role in advocacy collaboratively in recognized regional networks (ASEAN / SAARC, for example). Aligning existing norms with universal/regional norms on migrant rights.
- (3) Providing mutual supportive services to ensure complete knowledge on themes specific to migration (*tackling information asymmetry*) - This may include sharing of plans of action and memorandums implemented as well as consistent information dissemination on annual and emerging trends in migration.
- (4) Peer reviewing of technical needs, project design and implementation either through an ombudsman or between NHRIs of different countries.

## **Conclusion**

Currently, in the face of growing clampdown on human rights activists and organizations by governments across the world as well as growing criticism of private rights-based organizations, the need for NHRIs across the world to develop an entirely independent and unbiased mandate on migrant rights becomes crucial at this time in history. The incorporation of migrant rights into the larger mandate of human rights and the subsequent advocacy that needs to be generated in public discourse largely depends on the capacity and efficiency of public and private stakeholders. NHRIs play a vital role in this incorporation and sustaining of engagement and public dialogue on the issue.

As per the Paris Principles as well, NHRIs have the authority to urge reluctant governments to ratify the international conventions on migrant workers by effective advocacy efforts to tackle the probable causes of disagreement. The state of human rights issues in a country, requires

the multi-level engagement of the commissions, authorities and NHRIs working with it. The capacity of NHRIs can only be acknowledged in the level and nature of its independence from state structures, although contexts may vary and in countries of civil strife, it becomes strenuous to separate state and civil responsibilities. However, in both sending and receiving countries, NHRI involvement on migrant rights would ensure that governments are well-equipped and well-advised.

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# Human Rights of Indigenous Women in South Asia

-Raja Devasish Roy-

## 1. Introduction and Scope of Discussion

During the international conference on human rights in Kathmandu in April 2018, when this author participated as a panelist on the theme, *Rights of Women and Marginalized Communities and Challenges of Combating Immunity*, he brought in issues of both women's and marginalized communities' rights, and convergently, the rights of marginalized women, including indigenous women. However, when asked to write about the aforesaid issues, he realised that they were far too broad for a paper of this length. Instead, the author has chosen to address the situation of indigenous women's human rights in South Asia, also because his experience in advocacy and research over the last few decades has been on indigenous peoples' issues.<sup>48</sup>

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48 As in the case of minorities, UN instruments do not ALSO define the term 'indigenous'. Identifying criteria are contained in ILO Conventions No. 107 and 169 and in the UN-sponsored study by Cobo (1986). The World Bank and the Asian Development Bank take a pragmatic approach and include different groups - such as Adivasi-Janajati (Nepal), 'tribes'/'tribal' (Pakistan, India and Bangladesh), 'small ethnic groups' (Bangladesh) and 'ethnic minorities' (Lao PDR, Vietnam) – in their understanding of 'indigenous'.

The discussion has of necessity brought in rights of women other than indigenous, *and* issues of marginalized communities other than indigenous, including minorities, Dalits and other disadvantaged groups. Furthermore, in keeping with the broader theme of marginality, the author has sought to address the subject from an intersectionality approach. Indigenous peoples, including indigenous women, have suffered and continue to suffer from some of the most extreme forms of discrimination, both worldwide, and in South Asia.<sup>49</sup> They are subjected to multiple layers of discrimination, which is generally not the case for other women.

This paper covers Afghanistan, Bangladesh, Nepal, India and Pakistan. All of these countries officially recognise indigenous peoples, although in their English rendering, the terms “tribes” or “tribal”, rather than ‘indigenous’ or ‘aboriginal’, are used, except in Nepal, where the terms *Adivasi-Janajati* and ‘indigenous nationalities’ are both used. Except Afghanistan, the other countries have ratified or acceded to one of the two ILO Conventions on indigenous and tribal peoples/populations. Bhutan, Maldives and Sri Lanka are not included on account of the author’s unfamiliarity with their situations.

Table 1 below gives a bird’s eye view of the official names of indigenous peoples in the countries studied.

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49 A preambular paragraph of the UN Declaration on the Rights of Indigenous Peoples refers to the historic injustices suffered by indigenous peoples.

**Table 1:** Officially-Recognized Terminology for Indigenous Peoples in Afghanistan, Bangladesh, India, Nepal & Pakistan

Country	Term	Law
Afghanistan	Tribes	Arts. 4, 6, Constitution of Afghanistan
Bangladesh	Tribes, Small Ethnic Groups, Minor Races & Sects	Art. 23A, Constitution of Bangladesh
	Aboriginal	S. 97, State Acquisition & Tenancy Act 1950
	Indigenous	Rules 4, 6, 52 & Schedule, CHT Regulation 1900
	Adibashi (Bengali)	S. 2(2), Small Ethnic Groups Cultural Institutes Act 2010
India	Tribes (Janajati: Hindi)	Part XVI, Schedules V, VI Constitution of India
Nepal	Indigenous Nationalities (Adivasi-Janajati: Nepali)	Arts. 18(3), 51(j)(8), 261(1), etc. Constitution of Nepal
Pakistan	Tribal	Arts. 246, 247 Constitution of Pakistan

The focus on indigenous women and other women is not uniform. Where legal instruments and other data and information are available, or at least to this author, he has focused upon indigenous women, especially for Bangladesh, India and Nepal. In other cases, the discussion is generic, as reliable disaggregated data and analyses are unavailable, such as in Afghanistan and Pakistan. The generic discussions are valuable because they provide a yardstick to compare the situations of indigenous and non-indigenous women, but also because the status of indigenous women in the countries concerned is also often intertwined with the status of women in general, if not in all cases.

The chapter begins with an overview of the empowerment of indigenous and other women, and their participation in governance and decision-making in the countries under focus. Then, the chapter

discusses indigenous women's right under customary personal laws and family laws of indigenous peoples in India and Bangladesh. Also the paper looks at the status of violence against women in all the five countries, with focus on indigenous women in Bangladesh and India. The paper also makes some concluding observations and suggestions, theme wise and country-wise, or generally, regarding ways to empower indigenous women and to eliminate discrimination and violence against them.

## **2. Empowerment of Indigenous and Other Women and their Participation in Governance & Decision-Making**

The marginality of women is often caused or exacerbated by their state of disempowerment. Therefore, the *Beijing Declaration* declares: "Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace" (UN, 1996: Annex 1, para 13).<sup>50</sup>

### **2.1. Women Empowerment in Afghanistan**

In Afghanistan, there has been limited progress in women empowerment since 2001, after the collapse of the Taliban regime, with some women holding positions of authority in politics, business and civil society (Nijat & Murtazashvili, 2015: 1). However, authority and leadership may be different, because the latter entails mobilization to "question long-lived habits and deeply held beliefs", which cannot be addressed by authority alone (Nijat & Murtazashvili, 2015: 4). Generally,

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50 In addition to para 13 of the *Beijing Declaration*, see also, paras 19, 21, 24 (Elimination of Discrimination) and 32 (Equal Enjoyment of Human Rights, including for Indigenous People), along with paras 181-195 of the *Platform for Action*.

representation of women in the state bureaucracy has been disappointing (Nijat & Murtazashvili, 2015: 6). The impact of the creation of the *Ministry of Women's Affairs* and the introduction of women's quota in public employment are said to have been modest and "top-down" (Nijat & Murtazashvili, 2015: 6). Actual or threatened violence against women have thwarted their empowerment, such as in the case of *Sima Jioyenda*, a female governor, who, under compelling circumstances, was transferred elsewhere from her charge in *Ghor* province in December 2015 (Human Rights Watch, 2017). There is no reliable disaggregated data on indigenous peoples and indigenous women in Afghanistan, and therefore their status cannot be assessed separately.

## **2.2. Women Empowerment in Pakistan**

Women empowerment in Pakistan is regarded to have been more quantitative than qualitative (Asghar & Akhtar, 2012: 222), including in parliament (Aurat Foundation, 2012: 10). Despite the reservation of 33% of seats in local government and increased reserved seats in the provincial and federal legislatures, along with higher nomination by political parties, the gains are regarded as modest at best (Asghar & Akhtar, 2012: 225, 226).

The limited progress as aforesaid, has been unequal, with Baluchistan and the Federally Administered Tribal Areas (FATA) lagging behind, particularly on account of 'cultural' and 'social' barriers (Tanwir, 2014: 150, Bhattacharya, 2014: 192, 193). These are also the areas with a significant indigenous ("tribal") population.

In a critique of the Pakistani bureaucracy, Tanwir (2014: 148, 149) states that it is highly gendered and hierarchical, leading to the low intake of women, along with compulsions upon female bureaucrats to adapt to, and adopt, "masculinist" roles, leading to the self-perpetuation of male domination, and consequently, disempowerment of women.

### **2.3. Women Empowerment in Other Parts of South Asia: Bangladesh, India, Nepal**

Women have held some of the highest political offices in Bangladesh, India and Nepal, and still do so. That, however, is no indication of the state of women's rights therein. The observation of L. K. Richter in this regard, as cited in Halder (2004: 34), sums up the situation, at least in essentialist terms: "Thus, the apparent contradiction between the overall status of women in Asian societies and the startling prominence of a few is less attributable to their having surmounted formidable barriers than their proximity to established male power."

#### **2.3.1. Indigenous and Other Women Empowerment in Bangladesh**

The role of Bangladeshi women in governmental positions of decision-making has significantly increased over the last few decades, but its impact on empowerment of women as a whole is questionable.

Women are allocated 14% or 50 indirectly-elected reserved seats out of 350 in parliament.<sup>51</sup> In the last elections in 2014, women's direct election in general seats raised their representation to 20%. However, Jahan (2014:1) states that judging over the last two decades, women's representation has been below the expectations of the 1995 *Beijing Platform for Action*.

Similarly, one-thirds of seats in local government bodies have been reserved for women since 1983, and they have been seen to "participate" in most designated areas of work (Amin & Akhter, 2005: 4,6,7). However, Jahan (2014:2) found that women's access to politics and decision-making was "still insignificant owing to various socio-cultural and [other] ... forces ... faiths ... [and] obscure legal frameworks."

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51 Article 65(3), Constitution of Bangladesh.

Likewise, Sultana & Ferdous (2017: 1) suggest that the quantitative gains did not reflect “ideal gender balancing”.

Women leaders’ voices from civil society platforms have generally been bolder and perhaps more persuasive, but expected changes have remained largely elusive. City-based lobby, advocacy and promotional work too has yet to make deep outreach into the countryside, where most Bangladeshis live.

Data on the status of women from indigenous, *Dalit* and minorities (and Tea Estate workers) backgrounds is unavailable in Bangladesh, unlike in India and Nepal.<sup>52</sup> There is however no doubt that the aforesaid groups are severely under-represented in public decision-making processes, even if judged against their respective populations.

Hindus form 9-10% of the national population, but account for only 4% of MPs (one woman), 3% of ministers, 12% of bureaucrats of Secretary rank (one woman),<sup>53</sup> and 5% of High Court judges (one woman).<sup>54</sup> Hence Hindus’ representation in the aforesaid positions is disproportionately low, except in the case of the civil service.<sup>55</sup> In the case of the armed forces, the percentage of indigenous and minorities groups, including women, is even smaller.

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52 Dalits and minorities are not officially recognised in Bangladesh and the National Bureau of Statistics does not publish appropriately disaggregated data, including for “small ethnic groups” (indigenous peoples).

53 In 2008-9, when the author served in the Interim Non-Party Caretaker Government of Bangladesh as a Minister-of-State, he failed to facilitate the appointment of even one Secretary from among the minorities groups.

54 According to Ferdous (2016), the number of Hindu MPs from the 6th to the 10th (current) parliaments has been 6, 5, 3, 10 and 14, respectively. During the early years of Pakistani rule, based on the Separate Electorate system, Hindus, including Dalits, were constitutionally guaranteed higher representation.

55 Ethnic and religious minorities’ representation in the bureaucracy has generally been far more equitable under Awami League rule than under other regimes.

The situation of non-indigenous Christians, who are largely concentrated in the urban centers, with around 0.55% of the national population, is similarly marginal, with only a few having ever held high office in government service.

From independence of Bangladesh in 1971 to this day, few indigenous men and fewer indigenous women have held high positions as ministers or bureaucrats. The few indigenous women to hold prominent positions recently have been the members of the National Human Rights Commission. This is because the concerned law makes it obligatory to appoint a member from the “small ethnic groups”. Quotas in the civil service address “small ethnic groups”, women, and persons with disability, but not minorities groups and *Dalits*.

In the Chittagong Hill Tracts (CHT) region, although indigenous women generally face less discrimination within their own societies than their Bengali counterparts, their status regarding empowerment and rights in the sphere of personal and family law is substantially no better (Yan & Roy, 2018).<sup>56</sup>

The CHT has two sets of institutions of governance that are unique to the region; the traditional indigenous institutions of the Circle Chief (Raja), Mauza Chief (Headman) and Village Chief (Karbari), and the specialized indigenous-majority councils at the district and regional levels.

Women are largely excluded from holding office in the traditional institutions, although recently, a significant number of women village

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56 The indigenous peoples of Bangladesh are pre-dominantly non-Muslim. These non-Muslim faiths and beliefs are now regarded to have ‘equal status’ to Islam (the State Religion) according to article 2A of the national constitution. However, this has been regarded as contradictory and discriminatory, and conducive to “shrinking space” for minorities and (secularist) civil society (Bielefeldt, 2016).

chiefs have been appointed (Yan & Roy, 2018). Historically, some regnant queens ruled their chiefdoms, including one who resisted British hegemony in the mid-19<sup>th</sup> century, as have other indigenous women leaders in several parts of India (Barla, 2015).

In the case of the CHT Regional Council and the three Hill District Councils, women are guaranteed only 12% and 8% of the seats, respectively.<sup>57</sup> Hillwomen have nevertheless struggled against the odds, and are engaging in different fields, locally, nationally and internationally (Chakma, 2010). One such student leader, the enigmatic Kalpana Chakma - who was allegedly abducted by military personnel in 1996, and never heard of since – remains as an icon for her selfless and courageous stand in peacefully defending her peoples' homeland, identity and integrity, and in resisting patriarchy, whether perpetrated by state security forces, non-indigenous settlers or by her own people (Guhathakurta, 1997, 2000).<sup>58</sup>

### **2.3.2. Women Empowerment in India**

India has some of the most extensive constitutional safeguards for its Scheduled Tribes (STs), Scheduled Castes (SCs) and Other Backward Classes (OBCs).<sup>59</sup> 47, or 8% of seats in the lower house of parliament are reserved for STs, out of which only 5 are women (10% of total women MPs). Similar reservations are kept in the legislative assemblies

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57 Section 4, Hill District Councils Act 1989 and section 5, Chittagong Hill Tracts Regional Council Act 1998.

58 “Kalpana Chakma Abduction: Rights Activists Demand High-Level Enquiry”; A. N. Rasheda, “Kalpana Chakma, Where Are You, How Are You?”; “Editorial: Government Should Take The Kalpana Abduction Case Seriously”; New Age, Dhaka, 12 June 2018. Retrieved from <http://epaper.newagebd.net/12-06-2018/8>.

59 For reservations for STs and other affirmative action measures, see, articles 16(4), 46, 330, 332, 335, 339, 342, 371-series and the 5th and 6th Schedules, Constitution of India.

of states with a significant indigenous population. Nationally, about 13% of all MLAs are STs. The number of women among them is not known to the author.

In the recent state legislative elections, indigenous women secured four MLA seats in Meghalaya (with one minister), two in Manipur, and one in Tripura (also a minister), averaging less than 10% of the total MLAs of the concerned state. Nevertheless, the relative, if modest, success of women in Meghalaya and is perhaps reflective of their historical legacies of strong if not prominent roles within the family and outside.

Indigenous legislators in the *Scheduled Areas* in states of peninsular India have a prerogative of being consulted on legislation concerning their areas, including in Chattisgarh, Jharkand, Odisha and Madhya Pradesh.

Other such safeguards include special legislative prerogatives of the states of Nagaland and Mizoram. These are mirrored at sub-state levels, such as for the Tripura Tribal Areas Autonomous District Council. Furthermore, there are “reserved seats” quotas in public service, a separate federal *Ministry of Tribal Affairs* and a national-level *Scheduled Tribes Commission* to oversee safeguard measures for “ST”s.

At sub-state levels, there are three major types of self-government or local government units. These are: (i) the *Panchayati Raj Institutions* (PRI) in peninsular India under the “PESA” Act; (ii) the *Autonomous District Councils* (ADCs) and *Autonomous Regional Councils* (ARCs) in Northeast India; and (iii) the local government institutions in Northeast India other than ADCs and ARCs.

Although the ADCs and ARCs – under the 6th Schedule of the Constitution - have more autonomous political powers than the aforesaid two other units, the latter - particularly the 5<sup>th</sup> Schedule PESA units

- generally have more equitable representation of women and higher access to funds (ISAWN et al, 2014).

Traditional socio-political institutions of self-governance exist in several states, particularly in the northeast (where they have formally-sanctioned roles in land administration and administration of justice), but women are largely excluded from prominent roles throughout the country.

Bannerjee (2018) states that, despite adhering to matrilineal and matrilocal traditions, Khasi women in Meghalaya State are excluded from senior positions in traditional office, with power dynamics in the state being “heavily skewed in favour of men”. Brara (2017: 83) therefore concludes that matriliney doesn’t necessarily overcome or negate patriarchy, and hence, “women are [still] compelled to occupy subsidiary spaces”. Nevertheless, the recent election of more women MLAs in the state than in other indigenous-majority northeastern states probably indicates some positive co-relation with matrilineal traditions.

Brara (2017:85) says that: “More or less, all the states in Northeast India have a very strong patriarchal edifice... Political space has largely been an exclusive domain of men”. This is perhaps partly reflected in the resistance against the constitutionally-mandated 33% reservation for women, in this case in urban councils in Nagaland State, in 2017 (Hazarika, 2017, Brara, 2017: 76).

### **2.3.3. Women Empowerment in Nepal**

The issue of inclusion of indigenous women in governance and decision-making in Nepal needs to be understood by accounting for its historical legacy of acute marginalization and exclusion (Tamang, 2014; Pradhan, 2014). Data on the socio-economic, political and other status of the *Adivasi-Janajati* as uncovered by scholars such as Bhattachan (2008, 2012), Subba et al (2014) and Nilsson & Stidsen (2014) is extremely helpful in this regard.

Following the successful people's uprisings in 1990 and 2006, the monarchy was dismantled, a new constitution was adopted and a federal republic proclaimed. Meanwhile, some political agreements involving indigenous peoples had been made. Some of their provisions, such as on the inclusion of Adivasi-Janajati in the Constituent Assembly and the ratification of ILO Convention No. 169, have been implemented since (Jones & Langford, 2011).<sup>60</sup> Others, including proportionate inclusion in political parties, were only partially met, and *identity-based federalism* or "ethnic federalism" (Shneiderman & Tilin, 2014), was cast aside to oblivion.

Indigenous peoples constitute a substantial 36% of the national population of Nepal (Census of Nepal, 2011).<sup>61</sup> Nepal also has other features that are absent elsewhere in South Asia. Firstly, Nepal has ratified the ILO Convention No. 169, which has higher standards than Convention No. 107. Secondly, the status of international treaty law in Nepal is higher than national law.<sup>62</sup>

Nepal has a proportional representation system of elections that provides for the *participation of Adivasi-Janajati in decision-making*, including in nominations of political parties to the federal and provincial legislatures. There are provisions on *Special, Protected and Autonomous Regions* and on an *Adivasi-Janajati Commission*.<sup>63</sup> All of these must be

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60 These agreements include the *Joint Dhulikhel Declaration*. See, Karki & Edrisinha (2014).

61 Other estimates suggest it is about 50%. See NCARD (2015).

62 The Nepal Treaty Act 1990 provides, at section 9, that (a) where Nepalese law is inconsistent with the provisions of a treaty to which Nepal is a party, the latter shall prevail; (b) provisions of such a treaty may be enforced in the same way as Nepalese law.

63 The provisions on the Adivasi-Janajati Commission and the special autonomous areas are yet to be effected, although a bill has been passed for the former. There are also provisions on an Inclusion Commission, Dalit Commission, a Madhesi Commission and a Muslim Commission, among others.

read with the provisions on the inclusion of women and Adivasi-Janajati, based on the *Principle of Proportionate Inclusion*. In addition, there is the *National Foundation for Development of Indigenous Nationalities* (NFDIN), functional since 2002, with representation of indigenous peoples.

Discrimination on grounds of race, etc. is illegal, punishable, justiciable in court and compensable. Women, including indigenous women, have the right to *equal property and family affairs* and to *obtain special opportunity in education, health, employment and social security, on the basis of positive discrimination*. An overview of the aforesaid provisions is provided in Tables 2(1) and 2(2) below.

**Table 2 (1) : Provisions of the Constitution of Nepal Supporting Women Empowerment**

<b>Provision</b>	<b>Source</b>
Special Provisions for Empowerment of Women & Adivasis	Art. 18(3), Proviso, Constitution of Nepal
Right of Victim of Discrimination to Compensation	Arts. 21, 24, 51(j)(2) Constitution of Nepal
Remedies for Victim of Human Trafficking	Art. 29, Constitution of Nepal
Remedies for Violence Against Women	Art. 38(3) Constitution of Nepal
Proportional Inclusion of Women in State Structures	Art. 38(4) Constitution of Nepal
Special Opportunity for Women in Education, Health, Employment & Social Security	Arts. 38(5), 51(j)(2) Constitution of Nepal

**Table 2(2): Provisions of the Constitution of Nepal Supporting Women Empowerment**

<b>Provision</b>	<b>Source</b>
Equal Spousal Rights in Property & Family Affairs	Art. 38(6) Constitution of Nepal
“Backward Women’s” (sic!) Employment in State Structures	Art. 42(1) Constitution of Nepal
“Helpless Single Women’s” (sic!) Rights to Social Security	Art. 43 Constitution of Nepal
Participation of Adivasi-Janajati in Decision-Making	Art. 51(j)(8) Constitution of Nepal
Special, Protected & Autonomous Regions	Art. 56(5) Constitution of Nepal
Proportional Representation of Adivasis in the House of Representatives	Art. 84(2) Constitution of Nepal
Proportional Representation of Adivasis in the Provincial Assemblies	Art. 176(6) Constitution of Nepal

In the first Constituent Assembly, out of the 601 members, 197 (about 32%) were women, and out of this, 70 were Adivasi-Janajati (35% of all women CA members). Representation of Adivasi-Janajati in the current Federal parliament is no longer so high, but they constitute the majority in two provincial assemblies, following elections in November-December 2017 (IWGIA, 2018: 376).<sup>64</sup>

Safeguards on the Adivasi-Janajati in the present constitution are no doubt weaker than those of the interim constitution (Roy, 2016a). However, the author feels that concerted efforts are needed to “...face the immediate challenges in carving out the required space to influence

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64 The representation of women in parliament (in the the lower house, if it is bicameral) is 33% in Nepal, 27% in Afghanistan, 17% in Pakistan, 14% in Bangladesh and 11% in India.

sub-constitutional legislation and policy-making...” (Roy, 2016a). It is a matter of concern that the recent debates before and after the passing of the bill on the Adivasi-Janajati Commission seem to be more oriented towards fears of its likely future deficiencies than on how its composition can be made more inclusive and its mandate expanded, until the aspired-for amendments to the constitution take place. The advent of the provincial units minus the *identity* component did not stop indigenous people from participating in their elections. This may also happen in the case of the *Special, Protected and Autonomous Regions*.

According to the the Civil Service Act 1993 [section 7(7)], 55% of the seats in the Civil Service is retained as “Merit/General” category, and the rest is reserved for different groups: women (15%), Adivasi-Janajati (12%), Madhesi (9.9%), Dalit (4.05%), persons with disability (2.25%) and Backward Areas (1.80%).

But what is the real situation like? A study by Bajracharya & Grace (2014: 12) shows that before the Civil Service Act was amended in 2007, women constituted only 7-8% of the total employees, which rose to 15.3% (mostly at “non-gazetted” level) by 2014. However, the study does not indicate what percentage of women in Nepal’s Civil Service are of Adivasi-Janajati origin.

Given the aforesaid stipulations, disaggregated data needs to be generated. If the 33% quota for women is followed, then Adivasi-Janajati women would be entitled to 4% of all vacancies. If current legal and policy instruments do not so clarify, the matter needs to be addressed through reform, and the indigenous peoples need to articulate their demands with specific detail.

### **3. Indigenous Women & Family and Personal Law**

Many aspects of Family laws of citizens of India and Bangladesh, similarly with Pakistan, depend on their religious or ethnic affiliation.

Hence these laws are also known as *personal laws*, in that it they attach to the person of that group wherever she or he might be.

Personal laws of indigenous peoples are varied. Even in such a small territory as the Chittagong Hill Tracts (CHT) in Bangladesh, the laws of its eleven “tribes” are different to one another and occasionally with variations among clans and other sub-groups. The extent of differences in India is far greater. However, for our purpose, the main question is not so much the differences, *per se*, but whether they are discriminatory against women.

One evil that still persists in South Asia, is polygyny: a man having more than one wife at the same time. In the case of indigenous peoples who are Christian, in both Bangladesh and India, it is clearly weakening, and generally too it is in decline, but not yet eradicated.

Divorce among indigenous peoples is allowed, and both divorced spouses may marry again. But the circumstances in which an indigenous woman may obtain a divorce is often thwarted by her low economic status, partly a result of discrimination in inheritance laws. A recent study in the CHT describes such a predicament thus:

“[Many] indigenous women, who have little or no financial independence, or opportunities of inheriting anything substantial from their parents’ families in the event of divorce, may get stranded in a marriage that they would have terminated if they had a choice” (Yan & Roy, 2018).

The aforesaid study also found that with regard to divorce, inheritance, child custody and guardianship, most customary law principles discriminate against women, such as in the case of the Chakma people (of which the author is a member), both in Bangladesh and India (Yan & Roy, 2018; Wangza 2018).

Most indigenous peoples exclude women from inheritance of land, as of right, albeit less severely than do Bangladeshi Hindus following the *Dayabhaga* principle, with widows and unmarried daughters having rights to maintenance, and/or shares in property, if consensually allowed (Yan & Roy, 2018). With the matrilineal Garo, Jaintia and Khasi, in both India and Bangladesh, women inherit as of right, excluding the men. Even so, where it concerns alienation, the decision generally needs acquiescence of the men in the family or village. Somewhere in between are the Marma and the Rakhine in Bangladesh, among whom women inherit, as of right, along with the men, in equal or other shares, depending on the context (Yan & Roy, 2018).

There are other nuanced divergences too. In some cases daughters inherit the mother's property while the sons inherit the father's, and the son who looks after the parents during their lifetime gets a larger share than his siblings (Yan & Roy, 2018). In yet others, consensus within the family can operate outside the usual – and gendered – rules of inheritance, except among the matrilineal societies, which forbid inheritance of landed property by men.

The aforesaid practices pose some seemingly paradoxical questions on the gender dimensions of inheritance laws. Without getting into a theoretical debate on the issue, this author would simply suggest that at the operational level, the issue has to be looked at holistically. In other words, by merely *de-gendering* inheritance laws in the case of the aforesaid matrilineal societies – and thereby promoting equal inheritance for both sexes - without a commensurate de-gendering of related political, economic and other spheres, would probably facilitate the overall disempowerment of the women of these communities. The lesson is that, empowerment of women has thus to be looked at holistically, taking into account very complex circumstances and their interactions.

## **4. Violence against Indigenous and Other Women**

The issue of violence against women (VAW), including indigenous women and girls in South Asia, is of serious concern not only with regard to its large scale but also the rampant impunity enjoyed by its perpetrators. The range of issues or themes is far too wide to adequately cover in this study, and therefore, a few of the most serious matters are mentioned, with differing focus in the different countries.

### **4.1. Violence against Women in Afghanistan**

About the same time as Bangladesh, in 2009, Afghanistan started to combat discrimination and violence against women through specific legislation, including the law on the Elimination of Violence Against Women (EVAW). The EVAW law includes *forced prostitution*, *forcing suicide*, and *sale of women for purchase*, in addition to sexual or other violence.

In 2016, the Afghanistan Independent Human Rights Commission reported that in the first eight months of 2016 alone, it had documented 2,621 cases of domestic violence, similarly to that of the previous year (Human Rights Watch, 2017). In a report in 2015, the CHR Michelsen Institute, stated: “Despite widespread abuse and violence against women, few men are punished. The prosecution and conviction rates for rape are low, the prosecution and conviction reports for beating, virtually non-existent” (CHR Michelsen Institute, 2015).

In a rare case involving a brutal attack and murder of a woman by several men - involving a false accusation of burning a copy of the *Holy Quran* - a swift trial led to punishment for the murderers and some policemen who had neglected their duties (CHR Michelsen Institute, 2015). However, this is an exception to the general trend. Huge challenges remain, including the blatant VAW perpetrated by rebel fighters.

## 4.2. Violence against Women in Pakistan

Pakistan has several laws on VAW. These include the *Criminal Law (Amendment) Act 2004*, *Protection of Women Act 2006*, *Protection against Harassment of Women at the Workplace 2010*, *Domestic Violence (Prevention and Protection) Act 2012*, and *Khyber-Pakhtunkhwa Elimination of Custom of Ghag Act 2013*. It has acceded to CEDAW, but like Bangladesh, it has exempted itself from the application of certain provisions through “reservation” clauses. Like India, it has refused to ratify CEDAW’s *Optional Protocol*.

Despite the aforesaid laws, VAW continues to rear its ugly head. Even the malpractice of *Ghag* – forcefully facilitating or preventing a marriage – continues. Incidentally, the practice is known to be against the tenets of Islam, the faith followed by its practitioners (Bhattacharya, 2014: 188). Similarly, the Criminal Law (Amendment) Act 2004 is said to have failed to check ‘honour killings’ (murders, perpetrated largely against women, to allegedly protect the honour of the family, clan, etc.) (Aurat Foundation, 2012: 11).

Addressing the issue of discrimination and violence suffered by women from religious minorities groups in Pakistan, Aurat Foundation (2012:15) says:

“In cases of violence and discrimination, women from non-Muslim communities face double jeopardy on account of gender and religious difference. The existing personal laws of Pakistani Christians need urgent revision ... At present, adultery is recognized as the only ground for dissolving marriages under Christian law; while ... personal status laws of Hindus remain uncodified. No law on inheritance exists. Forms of violence which minority women face are: abduction, forced marriages with Muslim men, and conversion of women from the Hindu and Christian communities.”

Pakistan has two major institutions to deal with discrimination against women, namely, the *Ministry of Women’s Development* (MoWD)

and the *National Commission on the Status of Women* (NCSW). In its *shadow report* to the CEDAW Committee in 2012, Aurat Foundation (2012:10) stated that the aforesaid institutions “ ... [lacked] sufficient human and financial resources and/or technical capacity to carry out mandated functions ...”.

### **4.3. Violence against Indigenous and Other Women in India**

Violence against Women (VAW) is as serious a problem in India as elsewhere in South Asia. Violence may be perpetrated by family members, strangers and security forces, among others.

Despite the provisions of the *Protection of Women from Domestic Violence Act* 2005, domestic violence continues to plague indigenous and non-indigenous societies alike. In the case of indigenous communities in the central tribal belts of Chhattisgarh and Odisha, it was seen to have been exacerbated by alcohol abuse (Oxfam, 2016). Thus another lesson for the needs of an intersectional approach to dealing with such evils.

Violence against women and female children in the sex industry is compounded by trafficking from Bangladesh and Nepal. The matter received some much-needed attention through rulings by the Supreme Court in 2011, and by the visit to the country by the *UN Special Rapporteur on violence against women* in 2014.

In the landmark case of *Buddhadev Karmaskar v. State of West Bengal*, the Supreme Court of India ruled, on a case involving female sex workers, even citing from Buddhist and secular literature, stating that “ ... [a] person becomes a prostitute not because she enjoys it but because of poverty. Society must have sympathy towards the sex workers and must not look down upon them ...”.<sup>65</sup>

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65 Judgment by Markandey Kadju & Gyan Sudha Misra, JJ., Supreme Court of India, 15 September 2015. Retrieved from <https://indiankanoon.org/doc/99194/>.

The visit to India, by Special Rapporteur Rashida Manjoo (who also visited Bangladesh around the same time) drew attention to various matters, including the de-criminalization of the work of sex workers and attention to ensure that “measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers” [Manjoo, 2014a: Para 78(e)].<sup>66</sup> Manjoo criticized the Armed Forces (Special Powers) Act and the Army Act 1950, referring to allegations that these laws prevented justice for VAW, including in Northeast India (Manjoo, 2014a: para 68).

Despite the aforesaid developments, VAW persists. For example, security personnel have been implicated in cases of *rape* from Bishnapur, Manipur (IWGIA, 2013: 313), the South Garo Hills, Meghalaya (IWGIA, 2014: 339), West Tripura (IWGIA, 2012: 355) and Bijapur, Chhattisgarh (IWGIA, 2016a: 332). Similarly, there have been cases of *assault*, in Dantewada, Chhattisgarh (IWGIA, 2012: 353), *torture* in various parts of Chhattisgarh and Madhya Pradesh (IWGIA, 2012: 355; IWGIA, 2013: 317) and *murder* in Bastar, Chhattisgarh (IWGIA, 2018: 354).

#### **4.5. Violence against Indigenous Women in Bangladesh**

Bangladesh too has an impressive arsenal of laws to combat VAW, including the *Women and Child Repression Act 2000*, *Domestic Violence (Prevention and Protection) Act 2010*, *Cruelty to Women and Children Act 2012* and the *Prevention and Suppression of Human Trafficking Act 2012*.

However, the storyline is the same. The aforesaid legal and accompanying institutional initiatives are regarded to “have not been

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66 In a novel based on actual research, McCormick (2006) chronicles the heart-rendering account of an adolescent girl (likely of indigenous origin) from Nepal, who was tricked into being trafficked to India and sold into a brothel.

translated into concrete improvements in the lives of the majority of women who remain marginalized, discriminated against and at a high risk of being subjected to violence” (Manjoo, 2014b: para 83).

VAW continues to linger, including against indigenous women and girls. The aforesaid laws do not account for the specificities of indigenous peoples. Substantially, intersectional approaches are missing here, as also in the *Women’s Development Policy* and in other relevant national policies (Tripura, 2014).

According to IWGIA (2016b), “Over the past few years, the most appalling issue facing indigenous women and girls in Bangladesh is the alarming rate of violence against them”. Between January 2007 to September 2016 there were 466 reported cases of VAW (IWGIA, 2016b). In 2017 alone, at least 56 indigenous women and girls were allegedly sexually and physically assaulted (IWGIA, 2018: 366). Estimates in 2014 indicate that 50 out of a total of 665 reports of rape and sexual attacks involved indigenous women or girls (IWGIA, 2016b). This is about 7% of the total incidents of such violence, whereas the indigenous population is only about 1.8% of the national population. In other words, indigenous women and girls were three times more susceptible than their non-indigenous counterparts. IWGIA (2016b) concludes that “impunity enjoyed by the perpetrators plays a crucial role” in such violence.

Referring to the indigenous-inhabited CHT region in its report submitted to the CEDAW Committee in 2016, Amnesty International (2016: 5) observed:

“Sexual and gender-based violence against Indigenous women and girls does not happen in isolation from general perceptions of Indigenous people and Indigenous women and girls in Bangladesh and from the history of conflict, division and political contest over control of the Chittagong Hill Tracts.”

In the vast majority of cases involving sexual violence against indigenous women and girls, the perpetrators were alleged to be non-indigenous men. Security forces have been implicated in several cases of rape over the last few decades in the CHT (Bhaumik et al, 1997, CHT Commission, 1991, Guhathakurta, 2000, IWGIA et al, 2012). Such incidents had visibly decreased after the end of the political unrest and armed conflict in 1997, with the signing of the CHT Accord. But the recent incident of rape and sexual assault against two indigenous sisters in Bileisori sub-district of the CHT in January 2018, allegedly by security personnel “in operation”, has raised fears of a further resurgence of similar events.<sup>67</sup>

The alleged attempts by government agencies to cover up the crime suggest that the ‘culture of impunity’ for violent crimes committed by security forces is not about to go away any time soon from the CHT,<sup>68</sup> or even from the country as a whole (Human Rights Watch, 2018). But the situation in the CHT is rather extreme, given the huge presence and dominant role of the security forces therein (Al Faruque, 2013: 56; IWGIA et al, 2012: 15-24). Such deviations add credence to complaints by indigenous and civil society leaders that democratic norms and the *Rule of Law* are yet to be revived in the region, despite the end of the internal conflict in 1997.<sup>69</sup>

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67 “Identify Rapist of Marma Girl”, *The Daily Star*, Dhaka, 5 February 2018. Survival International (2018).

68 Rape, Sexual Assault of Marma Sisters: Rape Epidemic as Perpetrators Enjoy Impunity, Say Speakers”, *New Age*, Dhaka, 24 February 2018. See also, IWGIA et al (2012: 11) and Al Faruque (2013: 67).

69 The former guerilla leader and current chair of the CHT Regional Council, J. B. Larma, recently alleged that a “state of emergency was being enforced by the army [in the CHT]”. See: “Govt trying to wipe CHT minorities off map: Santu Larma”, *New Age*, Dhaka, 14 June 2017.

## **5. Conclusion and Recommendations**

The nuanced challenges with regard to discrimination, disempowerment and violence against indigenous and other women can best be articulated by the concerned women themselves. Some of their voices are contained in statements, communications and reports to or by UN bodies and human rights procedures. Others make their way into research studies. The remainder remain un-expressed and un-articulated. Therefore facilitation is required, to strengthen these voices.

An intersectionality approach is vital to ‘connect the dots’; to understand the negative and positive co-relations between the different situations faced by indigenous women and their societies. It is an undeniable fact that arbitrary divorce of a woman and her deprivation from inheritance contributes to her disempowerment. Likewise, VAW or its threat can thwart a woman’s empowerment, whether she is from ‘high’ socio-economic status (like Governor *Sima Jioyenda* of Afghanistan) or from less privileged backgrounds (like Kalpana Chakma of CHT, Bangladesh).

Access to disaggregated data is indispensable, as emphasized by the United Nations (UNGA, 2014: para 10). Marginality cannot be addressed effectively without knowing its nature and extent, and thereby, its causes and possible remedies. With the aforesaid approach in mind, the author makes some observations and suggestions for the three major themes discussed above, in reverse order.

### **5.1. Violence Against Indigenous Women**

Effective punitive, deterrent, rehabilitative, compensatory and other measures, whether by the state, or other actors, will fail unless the application of the concerned laws account for the context-specific disempowered state of the ‘victims’, the extenuating circumstances, the

‘empowered’ status of the individual or group or class of perpetrators, and practices of impunity, if any.

In the long run, the socio-political and other empowerment of indigenous women has to be addressed. For the short term, support is needed for the strengthening of their organizational capacities, and in facilitating strategic alliances with governmental and non-governmental actors.

Concerted efforts to make investigative and judicial processes non-discriminatory and transparent are essential. The ‘culture of impunity’ has to be addressed, legally politically and socially. Special attention is needed in places where security forces are deployed in war-like conditions, such as in Afghanistan, Baluchistan in Pakistan, the CHT in Bangladesh and in central and northeastern India. Recalcitrant security personnel often invoke “security” and “anti-terrorism” slogans and labels to hide their illegal acts, and will continue to do so if impunity is not tackled.

Where there is interference with justice - whether by the perpetrators or their institutions, or police charged with investigation, or judicial officers dealing with cases, or political or bureaucratic “high-ups” – impartial and independent inquiries must be conducted and the guilty punished; a demand and recommendation echoed and re-echoed in the human rights universe! However, inquiries are often not independent, and their reports often remain undisclosed to the public, and their recommendations un-implemented, such as in CHT, Bangladesh.

The role of the national human rights institutions (NHRIs) and UN human rights bodies and *special procedures* is vital. Strengthening of the mandates and independence of NHRIs and the equitable inclusion of representatives of marginalized groups therein, including women,

needs particular attention. Most South Asian NHRIs do not engage in court litigation, directly or at all. Their engagement with the media too is generally limited. This should change. The process of monitoring their work has many loopholes, legal and political. With regard to the mandatory inclusion of indigenous-origin members, Bangladesh's example may be followed elsewhere. With regard to independence and assertiveness, Bangladesh's NHRI can learn from the others, and all can learn from each other's strengths and deficiencies.

## **5.2. Personal and Family Law of Indigenous Peoples**

Measures dealing with discriminatory practices under personal and family laws will need to address both the contents of laws and the manner in which they are administered.

### **5.2.1. Personal and Family Laws of Indigenous Peoples**

Regarding the contents of personal laws, the best approach is to facilitate reform by the peoples and communities themselves, as a matter of principle; by respecting rights of peoples to self-determination, and as a matter of strategy; particularly in Bangladesh, India and Pakistan, where the legal system prevents or discourages the state to interfere with personal laws of indigenous peoples.

Indigenous leaders must realize that they cannot invoke human rights principles to say that their peoples' rights to self-determination, land and culture are part of human rights law, whilst customary law and traditional justice systems that discriminate against women are not.

In some cases, indigenous peoples have voluntarily codified their laws. But this has the risk of "freezing" their law, preventing reform with ease and subverting flexible ways to deal with exceptional circumstances, including vulnerabilities of disadvantaged members

(Roy, 2004, Roy, 2011, Roy, 2012b). Also, with written codes, the state machineries define the laws, and not the peoples themselves, thereby depriving the peoples of one of the few tools of advantage they have in their interface with the state, particularly in its majoritarian and oppressive forms (Ibid.).

In other cases, advocates have asked the state to step in with formal legislation, such as in Bangladesh, through the adoption of a *Uniform family Code* to apply to all citizens (Women for Women, 2005: 98, 99). This writer does not agree with such a view. The basic human rights question here is not one of uniformity, but of equity and non-discrimination. If peoples' collective ingenuities find pluralistic ways to provide fairness and justice, that should not be compromised, as long as international human rights standards are adhered to (Yan & Roy, 2018). The proposed code also has serious negative implications for the identity of the different indigenous peoples, who may thereby be further assimilated into the dominant culture.

In some cases states have legislated to outlaw certain practices, such as dowry, child marriage and *Ghag* marriage. However, mere penal sanctions do not always work, as demonstrated by the constant violation of laws, including those mentioned above. This therefore calls for other measures, in tandem, or in lieu, depending on the evil that is sought to be removed.

Polygyny may be considered among the issues that can be addressed by national legislation to apply to indigenous peoples, if not all citizens, although in some jurisdictions, such as in Nagaland and Mizoram, the consent of the states' legislative assemblies will be required, as constitutionally mandated. In other indigenous-inhabited territories too, effective and extensive consultations, if not consent, will be required. The penal measures will of course have to be substantiated through social and other initiatives.

### **5.2.2. Administration of Justice Involving Customary Law**

Where indigenous authorities have legally-mandated roles in justice administration, such as in Bangladesh, India and Pakistan, efforts are needed to sensitize them on the minimum standards of international human rights law, including those pertaining to the rights of women. This must go hand in hand with efforts to increase the number of women in traditional offices, such as is being done with women village chiefs in the CHT, Bangladesh (Yan & Roy, 2018).

There have been some moves to introduce state-appointed Family Courts in the CHT, but they were rejected by CHT Regional Council and social leaders, among others because this would be contrary to the letter and the spirit of the CHT Accord of 1997, and also because it would bring in non-indigenous judges that are largely ignorant about the nuances of customary laws and who may thereby cause injustice even if well-intentioned (Roy, 2012a).

In a few cases, superior courts in different South Asian countries have stepped in when they have felt that constitutionally-mandated human rights had been infringed upon. In some cases their jurisdiction is limited, as in certain Tribal Areas of Bangladesh, India and Pakistan. Therefore, the courts' jurisdiction, if at all invoked, wherever, needs to be done sparingly and 'judiciously'.

Whichever of the aforesaid options are appropriate to the different jurisdictions concerned, a balance needs to be maintained between individual and collective rights, and the dignity and identity of indigenous peoples respected. Training and orientation on these matters to different stakeholders, as has been done in Bangladesh, may provide at least modest dividends.

### **5.3. Indigenous Women Empowerment**

The author would like to focus on three forms of indigenous women's empowerment: (a) representation in elective bodies; (b)

representation in traditional offices; and (c) representation in the state bureaucracy.

Nepal and India offer some good examples as regards elective bodies. However, gender parity is not integrated into India's ST seat allocations in the legislatures and in some local government bodies. Nepal has similar challenges. In addition, the legally-mandated involvement of political parties in nominating candidates to legislative bodies in Nepal has both advantages and disadvantages. The advantage is that it ensures more equitable representation through its party-based proportionate representation system, where direct elections provide inadequate representation for the concerned groups. The disadvantage is that party exigencies often thwart independent action, as seems to be the case for the recently-elected indigenous members of Nepal's Provincial Assemblies (IWGIA, 2018: 374).

These complex problems have no easy solutions. But leaders and activists have to strive to identify workable solutions, and seek to get them accepted in the polity concerned. For what they are worth, the Indo-Nepalese practices, taken together, may be a pointer for some reforms in this direction in the other countries.

The supportive role of traditional institutions, whether state-recognized or not, may be indispensable in many spheres. In fact, in places where the indigenous peoples' numerical marginality prevents them from securing representation in elective state bodies, they will most likely turn to their indigenous chiefs, headmen and elders, for counsel, advice and leadership, rather than to the elected non-indigenous leaders of their areas, even if the traditional offices are not recognized by the state.

Campaigns need to be mounted, preferably by indigenous peoples themselves, to promote the idea that indigenous societies can no longer afford to invoke 'tradition' to deny traditional offices to women. If indigenous societies can accept women leaders in elective offices, which

they have to, in most circumstances, there is no justification to deny that for traditional offices. Traditions and customs are made by communities, in evolutive ways, as also to deal with exigent situations. They are not static, nor were they ever meant to be, if historical lessons are to be taken to heart.

With regard to equitable inclusion of indigenous peoples in the Civil Service and other public employment, unfortunately, gender parity is not officially sanctioned, nor maintained, even where indigenous quota systems are in place, such as Bangladesh, India and Nepal. In some cases, such as in Bangladesh, such quota seats remain largely unfulfilled, for both women and men, on account of bias, discrimination and legal ambiguities and loopholes, among others (Roy, 2016b). In Afghanistan and Pakistan, there is no such system that includes indigenous peoples.

South Asian countries may learn from each other regarding indigenous and women's quota. With this in mind, given below, in Tables 3(1) and 3(2), in brief form, are some existing good practices from India and Nepal. Many of these may be of use in one or more countries of this study, and beyond. However, the issue of gender equity must cross-cut the different groups that require special measures to secure inclusion and representation, for the greater needs of equality and non-discrimination.

**Table 3 (1) : Measures to Facilitate Equitable Inclusion of Indigenous Women in the Civil Service**

<b>Measure</b>	<b>Current Practice</b>
Job Advertisements to be complete with necessary information on vacancies and disseminated widely	India
Specialized preparatory trainings	None
Separate examinations for indigenous candidates	India
Assessment through “relaxed standards”	India
Prohibitions & restrictions against “de-reservation	India, Nepal
Fraction posts be added, accumulatively	India, Nepal

*Source: Roy (2016b)*

**Table 3 (2) : Measures to Facilitate Equitable Inclusion of Indigenous Women in the Civil Service**

Measure	Current Practice
“Roster” system to ensure fulfillment of quota posts	India
Penalties for non-compliance	India
Relaxation in promotion (experience, etc.)	India, Nepal
Transparent monitoring of appointment & promotion	India
Effective & easy complaints & redress mechanism	India

*Source: Roy (2016b)*

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## Annexes

### *Annex- I:*

**Speech Delivered by the Chair of the National Human Rights  
Commission of Nepal, Anup Raj Sharma  
at the Kathmandu Conference.**

*Rt. Hon. President of Nepal Ms. Bidya Devi Bhandari  
Hon. Chairpersons and members of NHRIs present here,  
Chairperson of the Asia Pacific Forum of National Human Rights  
Institutions,  
Representative from Global Alliance of National Human Rights  
Institutions,  
Former Chairperson of National Human Rights Commission, of Nepal  
Government officials,  
Heads of security bodies,  
Excellences and Representatives of diplomatic missions,  
Human rights activists, civil society members,  
Distinguished guests, Media persons,  
Ladies and Gentleman,*

I am delighted to welcome you all here in Kathmandu today. As the Chair of the National Human Rights Commission of Nepal, it is my privilege to welcome you to this conference on vital issues of human rights. I hope, among other human rights issues, this event will contribute to

our on-going efforts at the national level to complete the historic peace process of Nepal. Your presence here in this conference encourages us to continue our works and demonstrate that there is no border on human rights issues. Our solidarity against impunity can enhance peace and social justice.

Ladies and Gentleman,

This is a regional conference but as the host NHRI to the event, let me indulge and allow briefly to talk about the human rights situation in Nepal as we have been observing and monitoring for more than one and half decade. Since the signing of the comprehensive peace agreement in November 2006, an interim and then a new constitution have been promulgated and now we have to make it work in practice. We must find the optimum ways to put the aspirations in the constitution into practice and make sure that it is a document that truly captures the aspirations of all people, irrespective of gender, region, ethnicity, caste and religion. Nepal is a highly diverse nation in terms of geography, linguistic and ethnicity which have made us stronger in nationality and identity. Such type of diversity can be found in all South Asian Nations.

None of us has forgotten the reality of the decade-long conflict of Nepal from mid-nineties that we all suffered in different ways and degrees. Many people say that we are living in the post-conflict period, but in my view, it would be more accurate to say that we are living in a post-peace accord period and that much still has to be done to deliver the accord, including by addressing impunity.

Addressing impunity is integrally linked to promoting rule of law and development. It is clear that no Sustainable Development Goals of the United Nations can be achieved without addressing impunity in this region. Freedom of expression and the voice of the voiceless and marginalized people should be heard properly to respect human rights.

As we look back, we can clearly see that the roots of the conflict lie in the denial of the enjoyment of human rights. Your presence here today inspires us to follow that path to create a respectful society in South Asia.

It is now almost 12 years since the Comprehensive Peace Agreement put an end to the decade long armed conflict but the victims of the conflict still yearn for justice. The next step will be for our new government to implement the Supreme Court's ruling on the twin truth commissions. It is a priority for us to modernize our legislation and bring it fully in line with the many human rights treaties ratified, for example, by criminalizing both torture and enforced disappearance. I am personally confident that the newly elected government of Nepal will provide the necessary legal instruments and resources for both Truth and Reconciliation and Commission on Disappeared People.

Distinguished Guests,

Nepal, as a newly elected member of the Human Rights Council must be seen to be a responsible member state of the United Nations to which we contribute much for the common people. We must take advantage of our hard-earned peace to root out and eliminate discrimination wherever we find. As you know, the NHRC alone cannot perform this, but we are constantly seeking ways in which we can be a true partner to our people as they strive for this vision of a better society for all. We have a duty by the constitution, to provide leadership as we accompany our people. We have to learn how to be a loyal duty bearer to our people and we look forward to benefitting from the experiences of our colleagues and experts whose presence here encourages me very much.

This conference may provide a place for NHRIs to come together to identify challenges for the respect and protection of human rights. The purpose of the conference is to create a foundation for strengthening

the work of all the NHRIs in our South Asian region. The conference conveners will provide a space for the commissioners from NHRIs as well as activists and Human Rights practitioners to discuss shared challenges. Commissioners and other human rights stakeholders will learn about best practices in the protection and promotion of human rights at the national, regional and global levels.

We also anticipate that commissioners and other stakeholders across the region will develop a more robust relationship among us and our own civil society groups. To do this, we must build a partnership with the marginalized groups and victims of human rights violations and abuses. Many issues of Economic, Social and Cultural Rights are similar in this region. We can collaborate to combat with such fundamental issues of human rights.

In this context, National Human Rights Commission of Nepal is honored to host the international human rights conference, with the support of the United Nations, Asia Pacific Forum, Government of Nepal and Governance Facility. We sincerely hope that the conference will make a contribution to increasing regional cooperation in the protection and promotion of the basic human rights in this region.

Ladies and Gentleman,

Absence and denial of rule of law is the major obstacle to combating impunity. The independence of the judiciary, the justice and administrative system and other instituting are very important as a whole. History has shown us that without rule of law, no country has been able to prosper and develop its economy to the optimum. Central to this aspiration is an end to the scourge of caste and gender-based violence in an integrated approach.

Ladies and Gentleman, as you know, we are living in complex times. Our challenge is to find the way in which we can best contribute

to the well-being of our people. We have a historic opportunity but history will judge us harshly if we fail to grasp that opportunity with sincerity and intelligence.

For me, to open a conference like this is a fulfillment of many of my own personal goals. It fills me with pride to see you all gathered here in my country to find ways together of carrying out our honorable duty. In order to do that, we have to find the ways to explain to our people the true meaning of human rights, to find the words that every man, woman and child can understand our purpose, our calling. We are proud of our peace process, but we are not too arrogant to realize that more still needs to be done to complete that process. As an NHRI we bear a heavy responsibility, but it is a task which honors us all.

Finally, I would like to take this opportunity to extend our gratitude to the Government of Nepal for providing necessary technical assistance to the commission for promotion and protection of human rights including monitoring and investigation works. I would also like to thank all the working organizations for supporting the commission to perform more actively and responsibly.

Thank You!

***Annex- II:***

**Statement made by GANHRI Geneva  
Representative Katharina Rose**

*Rt. Hon. President of Nepal Bidya Devi Bhandari*

*Distinguished Chairpersons of National Human Rights Institutions,  
representatives of the diplomatic corps, civil society, and UN agencies*

*Distinguished guests and observers*

*Warmest greetings*

I am deeply honored to address you here today at the opening of the International Conference on addressing impunity and realizing human rights in South Asia. The Global Alliance of National Human Rights Institutions (or GANHRI) is the global network of national human rights institutions, which, 25 years ago, was established by a group of NHRIs, then known as ICC of NHRIs. They recognized that they can better succeed domestically in their daunting responsibilities by working in unison with their peers, whether regionally or globally. GANHRI works closely with the four regional networks, including the Asia Pacific Forum of NHRIs (or APF), to serve as platform for our members to share experiences and expertise; to identify collectively what living up to the Paris Principles really mean; and to ensure strong and independent institutions through our internal accreditation process. Today, over 110 NHRIs exist worldwide; 77 of them are accredited in full compliance with the Paris Principles; 15 of them in the Asia Pacific region. Let me start by warmly thanking our member institution, the National Human Rights Commission of Nepal, for this important initiative, and for the warmth of their hospitality.

## **Context**

This is a critical time for us to meet and discuss how to combat impunity, strengthen accountability and promote and protect human rights. Over the last two decades, events all around the world provided stark reminders of how the absence of the rule of law can lead to violations of civil, political, economic, social and cultural rights, as well as to oppressive rule and conflict.

Today more than ever, and in every part of the world, the challenge is urgent to build societies where human rights underpin behavior, legislative and policy development and decision-making; in our homes, in our schools, in workplaces, and throughout our communities.

## **The role of NHRIs**

In that process, National Human Rights Institutions (NHRIs) have a central role and critical responsibilities. In many places, including at times of conflict and facing real danger, members and staff of NHRIs across all regions have demonstrated the contribution they can make; in monitoring developments, investigating and documenting violations, challenging authority to respect human rights at all times, providing protection for individuals, and offering constructive advice and guidance to those who hold power. In the aftermath of conflict, NHRIs have an exceptional function in promoting comprehensive approaches to help ensure accountability for past human rights violations; in promoting recognition of victims as rights-holders and redress for past violations; and in advancing broader institutional reform necessary to address the root causes of strife and conflict.

Several NHRIs across all regions have been established as part of truth and reconciliation; some have been specifically mandated to monitor the implementation of the outcomes of Truth and Reconciliation Commissions; many work with communities to promote human rights

awareness and resolve differences and avert violent conflict for occurring again. As such, and alongside other institutions, mechanisms and civil society, NHRIs can serve a unique, facilitative and catalytic role, in building bridges, in healing divisions. The world community under the auspices of the United Nations recognized this critical role of NHRIs when states adopted, 25 years ago, the Paris Principles on the role and functioning of NHRIs and called on states in all regions to establish strong and effective national human rights institutions.

Along with the Universal Declaration for Human Rights – the 70<sup>th</sup> anniversary of which we are celebrating this year - and the core international and regional human rights treaties, the Paris Principles constitute the framework for guiding the work of NHRIs along the pathway to a world where more people can enjoy freedom from want and fear. NHRIs are often referred to as the essential “*bridge between the international and domestic human rights protections*”. Their role is to help make the fine provisions of the international human rights treaties a reality for everyone who lives within the shores, the borders of their homelands. Those of you entrusted with the leadership of these still evolving institutions know that you carry great responsibilities; that you face huge expectations and challenges, at home and internationally. The unique contributions that NHRIs can make to peaceful and inclusive societies is also recognized in the context of the Sustainable Development Goals. The existence of an independent Paris Principles compliant NHRI has indeed been explicitly referred to as one of the indicators to measure states’ progress under Goal 16 on *peaceful and inclusive societies, access to justice, and effective, accountable and inclusive institutions*. This is a testimony to the value of their work and a recognition of the legitimacy of NHRIs’ efforts to be placed among the key institutions for progress on the SDG agenda, thereby embracing the interconnectedness between the three UN pillars: development; peace and security; and human rights.

## **Challenges**

However, NHRIs' role to promote and protect human rights, particularly post conflict, can only be effective when supported by a sufficient level of responsiveness from state authorities and other actors, in addition to a strong mandate and powers, adequate funding and capacity for the NHRI to carry out its mandate effectively and independently. These preconditions, however, are often challenged by the sensitive, often difficult environments surrounding NHRIs operating during or post conflict. Often, NHRIs themselves may face additional, specific challenges in times of conflict and post conflict including security issues for their own staff and operations.

A particularly worrying trend more recently is that several of our members have been subject to threats or other acts of intimidation as a result of their mandated activities, such as conducting investigations into and documenting human rights violations and supporting the work of independent commissions to address impunity. Whilst the State has the primary responsibility to ensure a safe and enabling environment for all human rights defenders, including NHRIs, this is a responsibility that is clearly shared by the international community at large.

## **Outlook**

GANHRI as the global alliance of NHRIs is working closely with regional networks of NHRIs, to support NHRIs address some of these challenges. In cooperation with our partners at the OHCHR and UNDP, GANHRI has developed Guidelines on NHRIs in situation of reprisals or other acts of intimidation, which aim at ensuring effective and coordinated global responses in situations where NHRIs require protection.

Conflict and post conflict and the SDGs are among the thematic priorities of GANHRI's current strategic plan; and they are also

confirmed as strategic priorities of the global Tripartite Partnership between GANHRI, OHCHR and UNDP in support of NHRIs in all regions.

We thus welcome this international conference as important platform for NHRIs and other actors to share experiences and expertise and identify collectively what constitutes a good practice; and to participate in debates and discussions about making human rights and responsibilities a reality.

It is important to provide such platforms for NHRIs and others to network, particularly since some conflicts are cross-border in nature and require interventions of several actors operating within a region.

Working closely with NHRI regional networks, GANHRI also continues its advocacy in support of NHRI participation and integration across the UN system. NHRIs are often the beholders of authoritative and evidence-based information on national human rights situations. This is particularly relevant in relation to conflict and post-conflict situations, as well as early warning. It is therefore vital that the UN safeguards meaningful space for NHRIs so that the international community is able to receive and act on the information that NHRIs can offer.

And, of course, we continue efforts to strengthen NHRIs to be effective and independent, in all regions and all national contexts, so that their work can be used to the advantage of rights holders in as many jurisdictions as possible. This will of course take time, and I know that GANHRI and the four regional networks with the support of our UN partners and civil society will continue working towards that end.

## **Conclusion**

So, in conclusion as NHRIs have a unique role and responsibilities during conflict and post conflict, we must remember to pack the

necessary provisions to ensure that they can flourish and fulfil their full potential when working in such particular challenging situations.

We must seek support for sufficient resources and capacity for NHRIs to effectively carry out their mandates for a safe and enabling national and international environment for NHRIs and other human rights defenders to operate and for constructive cooperation and engagement of the UN with NHRIs, with maximised opportunities for the UN to receive and action on information from the ground I believe that this international conference is an important opportunity, and I much look forward to the deliberations. I would like to thank again the National Human Rights Commission of Nepal for this important and timely initiative.

Thank You!

***Annex- III:***

**Speech delivered by Kedarnath Upadhyay, Former Chief  
Justice and Former Chief Commissioner of National  
Human Rights Commission, Nepal**

*Rt. Hon. President of Nepal Madam Bidya Devi Bhandari*

*Hon. Chairpersons and members of NHRIs present here,*

*Chairperson of the Asia Pacific Forum of National Human Rights  
Institutions,*

*Representative from Global Alliance of National Human Rights  
Institutions,*

*Excellences and Representatives of diplomatic missions,*

*Government officials*

*Heads of security bodies,*

*Human rights activists, civil society members,*

*Distinguished guests, Media persons,*

*Ladies and Gentleman,*

It gives me an immense pleasure and the sense of overwhelming pride to address this august gathering in the presence of the Rt. Honorable President of Nepal. I take this opportunity to humbly congratulate the Rt. Hon President for her being elected for second term in office, Madam President; your presence is an honor and inspiration for all of us.

While we are engaging in the conference for identifying challenges, assessing progress, moving forward addressing impunity and realizing human rights in South Asia, we cannot overlook the pace of development of human rights jurisprudence over the past some decades, It has helped to strengthen democracy and redefine the role of democratic government

in modern times. I am sure that this learned and well-informed gathering of distinguished people must have been aware of these phenomenal changes.

In the present era, we cannot think of democracy only in terms of civil liberties or democratic rights. Nor we can attribute democracy with mere majoritarian rule without considering the right of minorities and historically oppressed people. This paradigm shift has made us to think of human right to be egalitarian in nature. Its overall application as a measuring rod in evaluating economic, social and political development of a nation is deemed to uplift our standard and quality of life.

The constitution of Nepal being very recent one has incorporated most of universal human rights concepts, though some of the rights would be realizable only through legislative means. The constitution has guaranteed that the required laws would be enacted within three years. The constitution, in order to meet its wide range of commitments, purports to establish national human rights sectorial institutions beside the National Human Rights Commission. The relationship and coordination of these national institutions vis-à-vis the National Human Rights Commission, in one hand, and with the prospective provincial human rights bodies, on the other, is the subject to be neatly worked out.

Like some other nations of South Asia, Nepal has endured the scourge of 10 years long civil war which left behind scores of people subjected to grave violation of human rights and crime against humanity. Eventually, the conflict ended with the Comprehensive Peace Accord that brought the insurgents into parliament and also in power sharing process. Obviously, this situation made the transitional justice process slow and tardy and perpetrators of both sides successfully evaded prosecution and remained safe. Despite persistent recommendation for action against perpetrators and paying reparation and compensation for the victims the government of Nepal partially acted upon them, by paying reparation

and compensation to victims but ignoring to prosecute the perpetrators. At long last, the government established the Truth and Reconciliation Commission and The Commission on Enforce Disappearance. Both Commissions failed to accomplish its assigned task within stipulated time, which is now extended for one another year. It is hoped that these commissions may get the needed legislations to facilitate their work within extended period.

Respect for human rights and respect for law and order have unique similarities. The culture of impunity for the violation of human rights originates from successive disrespect to rule of law and undermining human rights. We are less anxious about the case of the conflict period but more annoyed due to the fast growing lawlessness and anarchy supported by party politics. I think, the situation is, more or less, similar in South Asia. I am looking forward to your experiences and learning in other nations of South Asia upon which we would have to ponder seriously. To combat impunity, where politicians and criminals become bed fellows, is definitely a complex task. I hope and also believe that if the National Human Rights Commission of Nepal would receive concerted support of civil societies, human right activists and also backing from regional and international bodies serious cases of human rights violation of conflict period could be substantially addressed and resolved.

Before I end, I must express my gratitude towards the National Human Rights Commission of Nepal, on behalf of my organization, namely- the forum of former commissioners of National Human Rights Commission and also on my own behalf, for affording to us this rare opportunity to deliver my opening remarks in this auspicious occasion.

Thank You!

***Annex- IV:***

**Speech delivered by Prakash Osti, Member at National  
Human Rights Commission of Nepal**

*Rt. Hon. President of Nepal*

*Hon. Chairpersons and members of NHRIs*

*Chairperson of the Asia Pacific Forum of National Human Rights  
Institutions,*

*Representatives from Global Alliance of National Human Rights  
Institutions,*

*Excellences and Representatives of diplomatic missions,*

*Government officials,*

*Head of security bodies,*

*Human rights activists, civil society members,*

*Distinguished guests, Media Persons*

*Ladies and Gentleman,*

I am delighted to welcome you all, here, at the inaugural session of the international conference on Human Rights and Impunity. This conference is the result of long discussions with our colleagues throughout South Asia. Admittedly, this conference is the byproduct of the series of intensive consultations with National Human Rights Institutions in forging common understanding among the NHRIs over the assorted issues and agendas attached to human rights. I hope it marks a step forward in the dialogue we need to constantly have with our governments and civil society. The challenges we face might often look very different, but they have a great deal in common.

I believe the agenda honestly reflect our shared priorities; the issues of transitional justice, rights of women and indigenous communities, fundamental rights and human rights, migration and livelihood, truth and reconciliation can lead us to a realistic understanding of the situation of human rights in South Asia, and help us to identify common approaches.

Distinguished Guests,

I have served in the legal field for more than 37 years. My experiences tell me that judicial capacity to safeguard human rights and combat ill-treatment and impunity is the prerequisite to strengthen the role of the court in promoting individuals' human rights. All of us present here expect that the conference will throw light on this.

I believe that the two days of discussion will be a fruitful exchange of ideas and insightful opinions with focus on impunity, an area of human rights relevant to the countries in South Asia in a post-conflict context. I also hope that the conference would be considerably valuable to take a step toward identifying many common challenges for human rights across South Asia.

We all are aware about the role that NHRIs have been playing despite of the obstacles, challenges and difficulties. I expect the conference will provide a platform for to rigorous debates on domestic and regional issues faced by us. This conference is also anticipated to allow participating delegations to recognize the common challenges, while identifying the ways for NHRIs to move forward in working with each other.

Distinguished delegates,

Discussions that we are going to be part of from tomorrow morning seek a kind of consistency to yield regular dialogues on human rights promotion and protection. Such discussions should help us in our search

for the development of a regional mechanism, and also to recognize the value of cross-border collaboration and community-level exchange for the implementation of human rights norms. Probably, the need for state governments and human rights commissions to be alert and independent in their responses is also realized.

I hope, and I am confident, that this conference will contribute to peace-building and legal development for the realization of human rights in South Asia. We must find ways to convince people that human rights do not cause conflicts but if properly upheld, they can prevent conflict and bring justice. Without justice, we cannot hope to enjoy peace. I am sure you will not miss the opportunities that this conference offers us. We must grasp them with humility that our mission is noble and essential. Last but not the least; we are happy that you have supported our endeavors. My best wishes are with you to make this conference a success through effective deliberations on the identified issues with the effective participation of NHRIs, government bodies, civil society members, academicians, lawyers and human rights activists.

Distinguished Participants,

On behalf of NHRC Nepal, I would like to welcome you all in this conference. I hope this conference will ultimately contribute to peace-building and legal development for the realization of human rights in South Asia.

Thank You!

***Annex V:***

**Statements made by Caroline Vandenebee,  
Head of Governance Facility**

*Hon. Minister of Law, Justice and Parliamentary Affairs*

*Dignitaries, and friends.*

Allow me to borrow a line from Bill O'Neill and simply state, "all formalities observed". I say this because the time is short and because there are some genuine notes of gratitude to be expressed. First, as the Head of the Governance Facility, let me join others in congratulating all of our friends and colleagues at Nepal's National Human Rights Commission. I must note, in particular, not just the leadership, but the 'human rights leadership', of two individuals: the Honorable Chair of the NHRC, Justice Anup Raj Sharma and the Honorable Commissioner Mohna Ansari. They, together with others in the Nepal NHRC, created this opportunity to discuss impunity in the region. Undeterred from their vision, they continued to promote and move forward with the conference, notwithstanding explicit and implicit objections from different corners – *I believe we can refer to this as plurality in action* -, and notwithstanding a few obstacles along the way. Of course, they had the support of an extensive team, at the NHRC itself, from the Government of Nepal, at the GF, at the UN etc. I would like to take this opportunity to thank the teams behind the scene who made this work so effortlessly.

I know I join many others in also expressing admiration and respect for the human rights leadership of all of the delegates of participating NHRIs. Your leadership has been of such obvious mutual benefit to everyone here and beyond this hall during these last couple of days. May it continue! I hope this will include a continuation of this dialogue by repeating the conference on an annual or bi-annual basis. And perhaps even the establishment of a regional human rights mechanism. I must

also express real admiration and respect for the depth of knowledge, experience, and wisdom that has been on display by our invited human rights defenders. Not only in the formal events, but in the hallways, there have been many fruitful discussions from which I and others have learned a lot.

On behalf of the Governance Facility's donors, the Swiss, Danes, and the UK, it has been a privilege to be able to support and be guided by the leadership of the NHRC. On that note, as someone who has seen the horrors of Rwanda, who has been deeply involved in efforts to try to prevent the horrors of the Rohingya, and who has spent roughly 20 years in the South Asian region in the service of equality, rule of law, and good governance, I would like to say that the GF's donors and Valerie's leadership of the UN in Nepal deserve credit for supporting this effort.

This is all the more important when we recall Bill O'Neill's comment that globally human rights are in crisis in ways that we have not even yet fully understood. This is a startling but indisputable fact. Depressingly, CK Lal is most likely correct that things will get worse - on a global scale - before they get any better. We may not fully understand it, but after these two days, I think we all agree that we understand it more than we did on Sunday. And I think we would agree even more specifically that impunity is one of the central pieces of the crisis that must be acknowledged, discussed, and addressed.

In this light, let me finish by urging the GF donors and all UN members states to do more to support human rights leadership. By that I mean that we must look beyond ticking boxes of training, awareness raising, and glossy reports. These things help, but not if they fail to support human rights leadership in ways that count.

As Mr. O'Neill reminded us, and as the 70<sup>th</sup> year of the Universal Declaration approaches, it is indeed, "We the People" (not we, the

members states!). We only know that we are doing better when we see improvement in the wellbeing of those most vulnerable to human rights violations.

That is where our obligation lies and where our commitment must be. Every single day. Together with a commitment to support each other and stand as a community that upholds, honors, and advances human rights in all circumstances. We must not let others divide us. Be that from the outside, or from the inside. Nothing kills a movement or commitment as quickly as division within. I am sure this needs no further explanation in this group of highly committed human rights leaders.

Let me end here, by once again joining everyone in saluting the human rights leadership that has been so much on display these last two days.

Thank You!

**Annex VI:**

**Remarks by UN Resident Coordinator Ms. Valerie Julliard**

*Honourable Chairperson of the National Human Rights Commission,  
Mr. Anup Raj Sharma;*

*Honourable Commissioners of the NHRC;*

*Honourable representatives of the NHRIs from South Asia;*

*Distinguished Guests and Delegates*

*Ladies and gentlemen,*

It is a great pleasure for me to be here today. I am delighted that we had this opportunity in Nepal to host in the representatives of NHRI's from Afghanistan, Bangladesh, India, Maldives, Pakistan and Sri Lanka. The timing of the conference could not have been better in this year of the 70<sup>th</sup> Anniversary of the Universal Declaration of Human Rights. The people and institutions who have come to this conference are the defenders, the torch bearers, experts and the custodians of human rights. We have looked at both the differences and similarities of human rights issues and challenges across countries and regions. Regional cooperation of human rights institutions provides a platform for stronger and more concerted efforts in defending human rights.

It has been a pleasure to hear practitioners and experts discussing topics that shape our present, impact our future and the way we plan our interventions. The last three days, has seen some brilliant minds come together to discuss how to address impunity and how to realize human rights. There have been honest and very engaging discussions. By addressing the challenges today, we are creating the future we want tomorrow. Human rights violations need to be addressed, we all have the responsibility to ensure that victims of human rights violations of are provided with remedies that meet international human rights standards.

These standards are the distillation of human experience and aspirations over the past 7 decades.

I am sure you share my enthusiasm with the session on rights of women and marginalized communities, hearing these strong and inspiring women talk about their challenges and struggles in adversity. Regrettably in South Asia, women survivors of rape and other gender-based violence face many barriers to accessing services, justice and reparations. Fear of social stigma and rejection, even from within the family, lead to under-reporting and documentation of sexual violence. We also heard views from the marginalised communities on the specific and distinct challenges that they face in combatting impunity. The clarion call from the Agenda 2030 is to not leave anyone behind, and this was further underlined in this session. As a former journalist, I wholeheartedly endorse the attention dedicated to freedom of expression. It is one of the fundamental tenants in any democracy and for human rights. Freedom of expression is also one of the vehicles for addressing impunity, by raising our voices, we can hold perpetrators accountable. Whether we are speaking up as individuals, as journalists, editors or institutions, this comes with a risk and many pay a high price. I appreciate the views of some of our esteemed colleagues, who highlighted what can happen when one speaks out against powerful institutions. Every day in Nepal alone 1,500 people leave the country in search of better opportunities, this is not just an issue of ensuring safe migration and respect for human rights in the receiving country. I appreciate the conference's focus on the core issues of instability and human rights violations, which drives all typed of migrations. The frank and open discussion on the ways to address these vulnerabilities gave ample food for thought.

As migration today is a global phenomenon, the UN calls upon all its member states to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and develop a human rights-based, holistic and comprehensive policy, aiming at better protection of women migrant workers in destination

countries. We also hope that the countries in the region will monitor the practices of recruitment agencies and investigate prevailing abuse and exploitation by them and ensure access to justice for those suffering abuse at the hands of unscrupulous businesses. NHRIs should have formal or informal mechanisms to enhance better coordination in this regard. I recognize the role of APF in this regard. However, more work to consolidate joint efforts against human trafficking and exploitation in the context of migration is needed. The South Asian region has sadly seen decades of conflict, several of which resulted in widespread and systematic human rights violations, including in Afghanistan, Sri Lanka and Nepal. Much needs to be done in these countries to deliver truth, justice and reparations to the victims and consider institutional reforms to ensure the right to non-recurrence becomes a reality. There are global standards and norms as for how to do this – and I appreciate the interesting perspectives provided by the international colleagues as well as the regional colleagues, who have presented their views on this.

We are encouraged by and welcome the commitment of the Government of Nepal to move forward with the transitional justice process and address impunity and uphold victims' right to truth, justice and reparations. We stand ready to support any reforms deemed needed to prevent recurrence. We support a victim centric approach, and collaborate with the victims' organizations and NHRC in creation of a conducive environment for a complete transitional justice process leading to the healing and reconciliation of the society.

I speak for all in the international community when I say how much we appreciate the role of NHRIs in monitoring the work of transitional justice bodies. NHRIs have so much to offer to support these structures. In order to do so optimally, they must maintain the distance and independence. Otherwise, monitoring will not be feasible or credible. Shortcomings in any Transitional Justice process must not be allowed to damage the standing and reputation of NHRIs, which represent the long-term cornerstone of HR protection. In this sense, though not really

part of this conference agenda, I would like to take this opportunity to recognise the great work NHRIs do to monitor the implementation of the Universal Periodic Review and their efforts to ensure inclusive and active participation of civil society. But more needs to be done to engage the public constantly in the UPR process, not just every 4 years.

Finally, I would like to congratulate all the national human rights institutions gathered here for leading on their respective country's human rights promotion. Full enjoyment of human rights is essential for sustainable development that is equitable for all. As such, the human rights institutions' strong leadership is indispensable.

A special appreciation goes to the Government of Nepal and the National Human Rights Commission of Nepal for hosting and organising this Conference. The country recently assumed the responsibility of a member of the UN Human Rights Council, together with Pakistan. We hope that these governments especially will take to heart the outcomes of this Conference to strengthen their commitment for the promotion of human rights in their own territory as well as globally.

Today is one of the many stepping-stones that build on the seventy years of our efforts toward Universal Human Rights for all. Recognising the great amount of efforts and achievement made so far across the region, we shall renew our commitment to continue protecting and promoting this shared universal value. The Kathmandu Declaration will guide us for the coming years to strengthen our cross-border joint efforts toward better and stronger human rights protection. Colleagues and friends from civil society, academia, as well as human rights lawyers and activists – your support and activism at all front have been and will continue to be indispensable for realisation of our commitment. The United Nations in Nepal will continue to work with you all, and I re-affirm our commitment to support your efforts to fulfil greater responsibilities in Nepal, South Asia and globally.

Thank You!

***Annex VII:***

**Closing remarks by National Human Rights Commission of Nepal  
Hon. Chairperson Anup Raj Sharma**

*Hon. Chairpersons and members of NHRIs present here,  
Chairperson of the Asia Pacific Forum of National Human Rights  
Institutions,  
Representative from Global Alliance of National Human Rights  
Institutions,  
Former Chairperson of National Human Rights Commission, of  
Nepal  
Government officials,  
Heads of security bodies,  
Excellences and Representatives of diplomatic missions,  
Human rights activists, civil society members,  
Distinguished guests, Media persons,  
Ladies and Gentleman,*

I am honored to speak at the closing of this successful conference. I have always resist the use of the word "closing" in such deliberation. Rather I would like the word "beginning". It is beginning of sitting together discussing the Human Rights issues and finding the ways forward. I want to start by thanking Commissioners and entire team for having the vision of organizing this conference and putting faith on my chairmanship. The Nepalese commission had given me absolute authority to prepare the concept as well as design of the conference. I was little frightened. I appointed Mohna Ansari as chairperson of preparation committee along with officers of NHRC. I am proud that Commissioner Mohna Ansari did commendable work for the success of this conference. Please give

a big hand for commissioner Mohna Ansari .I also give my sincere thanks to my fellow commissioner Prakash Osti, Sudip Pathak and Govinda Sharma Poudyal, secretary Bed Prasad Bhattarai and Staffs of NHRC for their restless support and very positive role they have done. Of course, we could not have reached this point without all the participants giving their dedicated energy and focus of mind on the issue of impunity in the South Asian region. My thanks goes also to the fellow commissioners from NHRIs across the region, members of civil society in Nepal and elsewhere in the region, the media, the staff of the Nepal NHRC who have worked tirelessly to make this a success. Special thanks also to the Governance Facility for believing in this initiative and even risking being criticized for doing so. And, of course, thanks to our longstanding partners, the UNDP, for their support. How can I forget the support given by APF. I am delighted that we have been reached a strong Declaration, which will help all the NHRIs in the region to work more closely together and address critical issues such as impunity, migration and potential Human Rights Issues. The time has come for impunity to be shown its place in history – the dustbin or dirt heap. We have by adopting the Kathmandu Declaration shown our commitment to ending this scorn that has marked South Asia and many other parts of the world for a long time.

We are not naïve to consider that we can do this overnight. It will be a long and slow process, but as is made clear in the Declaration, we are committed to address impunity and we have identified key stepping stones, whether it is in respect of civil and political rights and the legacy of conflict or in respect of economic, social and cultural rights and the engrained, century-old forms of discrimination against women and other traditionally marginalized groups or groups such as LGBTI, whose specific human rights concerns we are finally starting to recognize in this region.

It has been a very rewarding three days for me personally and I am sure we have learned so much from each other.

I can only end by expressing my deep-felt desire that we will all go away from here, feeling we have more clarity and resolve to address one of the key human rights issues in this region, hopefully very soon through a coordinated joint human rights mechanism.

Thank you again, and I hope to welcome you again in Kathmandu on our next joint steps on the realization of human rights in the South Asian region.

Thank You!

***Annex VIII:***

**Speech by Pip Dargan, Acting Director, APF,  
delivered on 11 April**

*Good morning  
colleagues,  
human rights defenders and friends.*

The APF is a membership organization consisting of 24 national human rights institutions from the Asia and Pacific region. Established in 1996, the APF's primary goals are to: support the development of stronger national human rights institutions, providing advice and expertise to our members and prospective members, collaborate and share knowledge, promote gender equality, contribute at the national, regional & international level and support effective leadership and governance in national human rights institutions. NHRIs work in many different contexts. Some work in economically developed countries with long democratic traditions. Others work in societies in transition. Some work in very poor countries. The most difficult contexts in which NHRIs can work are situations of violent conflict, whether due to international or internal war or foreign military occupation or coup d'état. Most NHRIs in the Asia Pacific have been confronted by violent conflict of one kind or another at some period since their establishment or in some parts of their countries.

We currently have six (6) member NHRIs from South Asia. They are the NHRIs of Afghanistan (currently the APF Chair), Bangladesh, India, Maldives, Nepal, Sri Lanka. We will potentially have a new member from the region – the National Human Rights Commission

of Pakistan with whom we work very closely along with our other South Asian Members. All of these NHRIs are in the countries that have experienced or are experiencing forms of conflict and violence. Recognizing this conference is looking back at past experience; I think it is also important to reflect on some emerging future trends that could help inform our discussions. In a report released last year (2017) by the Asia Foundation called ‘the state of conflict and violence in Asia’ it examined five emerging trends:

1. Conflict and violence affect every country in Asia, not just those identified as conflict-ridden countries

2. Asian countries have been relatively successful at managing national disputes, but often at the price of significant subnational and local violence

3. The politicization of ethnic and religious identities has frequently led to violence and creates major risks for the future

4. Development and urbanization will likely increase rather than decrease violence in the coming decade.

5. Gender-based violence is widespread in Asia and its impacts are greater than previously understood.

To this, I would also add the effects of extreme climate change with its increasingly devastating impact on lives, communities, land and water resources that will inevitably contribute to further tensions within and between populations. Corruption is also a factor which has a corrosive effect on society by facilitating inequality and dysfunctional governance. Against these emerging trends NHRIs will need to skillfully deploy their stretched budgets, legal mandate and institutional resources in more creative ways. NHRIs will also need to deploy the often untapped skills and leadership of women to help address these existing and emerging issues; they will need to work in partnership with stakeholders including civil society to utilize their human rights mandates to:

1. Target hot spots with conflict programming, but remain alert to risks elsewhere
2. Understand the history and the politics
3. Focus on building the rule of law
4. Deal with cross-border drivers of conflict and violence, and promote country-to-country, institution-to-institution learning; and
5. Support locally owned violence monitoring systems to generate better data.
6. Ensure the contribution of women and be inclusive of different groups in all stages.

NHRIs are independent state-mandated institutions tasked with the promotion and protection of human rights in and by their own countries. Their role and functions are governed by the Paris Principles, adopted by the United Nations General Assembly in 1993. This international standard for NHRIs applies to all, irrespective of the political situation within the country. This has proven to be the right approach, because realizing the human rights of all people in a state is essential both to sustaining peace within a society and to re-establishing peace, including through a successful process of transitional justice. But, it must be acknowledged that the drafters of the Paris Principles in the early 1990's did not envisage that NHRIs would undertake a key role in situations of civil conflict and political transition and no reference was included to accommodation this eventuality. Yet NHRIs do use their mandates to promote and protect against human rights violations in unfavorable circumstances. In fact, human rights violations and systemic discrimination are often among the core underlying causes of conflicts around the world including in South Asia. Violations that are not addressed and resolved in a just and inclusive manner continue to provoke societal frictions, mistrust and hatred, which can result in the

re-emergence of violence, other widespread human rights violations and conflicts. Similarly, impunity for human rights violations and injustice will prevent the establishment of a new culture of accountability and of human rights, thus resulting in an ongoing weakness of the rule of law and of respect for human rights. As independent and local bodies of human rights knowledge, NHRIs are well placed to understand the causes of conflict and to propose solutions for it.

NHRIs can play a critical role in conflict situations such as: monitoring and documenting human rights situations (including those of women, children, refugees and IDPs), advising governments on law and policy, contributing to the protection of rights of vulnerable groups during the conflict, facilitating dialogues, and monitoring peace agreements. By fulfilling these functions and promoting human rights, NHRIs can play active roles in managing, and responding to, conflict. During times of conflict, it is important for NHRIs to develop flexible strategies for responding to new crises. NHRIs should be active in engaging with political stakeholders, understanding the various perspectives of those involved in conflict, and should promote solutions to the causes of conflict. NHRIs must ensure an active and systematic approach to human rights so as to effectively monitor, protect, and promote them. NHRIs also can play an important role in identifying the needs of, and particular measures to protect, vulnerable groups in conflict, such as women and children, minorities, refugees and IDPs. Further, NHRIs need to place their first concern for the safety of those who deal with it or are involved in its work. It extends to: - Victims of human rights violations and those at risk of human rights violations, who approach the NHRI for protection or to make a complaint - Advocates for victims - Witnesses and others who assist with NHRI inquires - The NHRIs own members and staff. NHRIs in conflict situations bear an especially onerous burden of ensuring that their independence is preserved and recognized by all parties to the conflict and by the general community. In fact because the

risks are so high and the actual and potential damage is so great, there is no time in which independence is more important. NHRIs advocates for human rights, not for any particular party to a conflict. Human rights are the rights of all people, regardless of the side in a conflict that they are on. NHRIs must be seen to advocate the universality of human rights and to protect the human rights of all people equally, without favor or bias. They should also argue for all parties to be held accountable for all human rights violations perpetrated by their combatants.

The independence of NHRIs can add to their effectiveness during conflict. If all parties see them as independent and as upholding the human rights of all, they will be able to work constructively with all parties, perhaps one of the few institutions in the country that can do so. NHRIs can cross divides, offering remedies to victims and protection to those at risk of human rights violation. By advocating universal standards of human rights, they can contribute towards building a new national consensus of values, responsibilities and commitments that can assist to end the violence and to develop a post-conflict society and political culture. Where they are independent, and are seen to be independent, NHRIs can assist by: - promoting dialogue among the parties to the conflict - advocating the establishment and growth of peace-building institutions and mechanisms in the State structure and in communities - encouraging acceptable and necessary measures and mechanisms to deal with human rights issues that may in part have caused the conflict. Post-conflict NHRIs should see the end of armed conflict as no more than the beginning of a new period of challenging work for human rights. They must address both the future, to building peace generally and the institutions of democratic governance and the rule of law in particular, and the past, ensuring that victims of human rights violations receive recognition, acknowledgement and reparations. In post-conflict situations, NHRIs can investigate allegations of human rights abuses committed during conflict, and then provide such evidence in forums,

such as tribunals. They can also play an important role for the setup of referral mechanisms and facilitate access to justice and remedies for conflict-affected populations. They can apply their powers of inquiry, such as the power to access records, summon witnesses, or hold public hearings, and to report to domestic and international bodies such as the Human Rights Council and contribute to the UPR process.

NHRIs can also play a vital role as institutions of accountability in the post-2015 development framework. In particular, but not exclusively, they should advise governments and partners on the implementation of the proposed Sustainable Development Goal 16: *“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”* These are heavy responsibilities and expectations are high. To say there are challenges is an obvious understatement. In countries gripped by conflict or negotiating difficult political transitions, NHRIs are often stretched beyond capacity and required to execute a broad and expanding mandate with insufficient human and financial resources. In addition, they work with governments which are often more focused on political security than human rights and, accordingly, NHRI recommendations and advices to governments and their agencies, often based on extensive consultations, investigations and inspections; this of course can inhibit the effectiveness of NHRIs. Looking into past abuses, especially those years in the past, can pose a particular set of additional challenges in situations where evidentiary records are poor or even lacking entirely. The sensitive political aspects of transitional justice, such as issues of amnesty, impunity, and the implications for political stability and human security, also pose some serious questions to NHRIs that become involved in these processes. All conflict is contentious and complex. Further complicating some situations in environments of ongoing conflict is insecurity and weak state institutions, and the presence of many alleged perpetrators

in positions of power as in the case of Afghanistan. Impunity can prevail because the focus has been largely on ending conflict and insecurity by negotiating with insurgent leaders and reintegrating them into society. Conflict and post-conflict settings are a drain on states' budgets, so NHRIs in such settings can find themselves bearing the double burden of reduced funding and additional, urgent responsibilities. In transitional contexts, it is not uncommon for donors to step in to provide funding for NHRI activities; and although critically important, foreign funding brings its own challenges with respect to independence, autonomy and sustainability.

NHRIs will not be the silver bullet but they can, and must play, a critical role in peace and justice along with other national and international partners and stakeholders, including human rights defenders. The increasing regional and localized conflicts over the past 20 years and the increasing role that NHRIs need to play in these contexts has led to useful guidelines such as the 2015 'Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations'. These guidelines set out how NHRIs can contribute in situations of conflict and post-conflict that continues to promote and protect human rights and peacebuilding, particularly assisting vulnerable communities. The roles of NHRIs in conflict and post-conflict situations are important and significant, and learning from peer institutions is vital for NHRIs to enhance their capacities to act in these situations. Building this capacity and connecting NHRIs together is essential to the work of the APF. Collaboration and information sharing between NHRIs and stakeholders such as this conference are key to building collective efforts with other stakeholders including UN agencies and donors to strengthen mandate of NHRIs and personnel working in situations of conflict and post-conflict. Over the past 10 years the APF has brought together NHRIs in our region, including South Asian NHRIs, to share and exchange on issues pertaining to conflict and post-conflict. In 2013

at our Second Biennial Conference in Qatar the APF focused on the opportunities and challenges involved in countries charting a peaceful course to democracy. Member institutions focused on the role of women in political and democratic reform, how NHRIs can work with police and security forces, and how they can engage in the promotion of democracy and good governance. Last November, in Bangkok, at our 22nd APF Annual Meeting and Biennial Conference the role of NHRIs to protect vulnerable groups and contribute to peace process in times of conflict was the focus. We brought together more than 120 participants from NHRIs, UN agencies and NGOs in the Asia Pacific region.

The conference was hosted by the Afghanistan Independent Human Rights Commission (AIHRC), which has been striving to promote and protect human rights, especially among vulnerable groups, in the midst of armed conflict since it was established in 2002 under the Bonn Peace Accord. The conference included presentations from the NHRIs, the UN Special Rapporteur on the rights of internally displaced persons, UNDP and the Asian NGOs Network on National Human Rights Institutions (ANNI). We held group discussions on the role of NHRIs in relation to - The impact of conflict on women and children - The impact of conflict on internally displaced persons –including refugees - The role of NHRIs in peace processes We also provide other capacity building initiatives that support NHRIs in conflict and post-conflict contexts. Over the past two years' we have provided training to South Asian members of the APF on (not an exhaustive list) Investigating allegations of torture attended by NHRIs of Nepal, Bangladesh, India and Sri Lanka (2016) Complaints Handling training for the Sri Lankan HRC (July 2016) Training on human rights education (NHRIs of Afghanistan, Bangladesh, India, Maldives and Sri Lanka) Women and girls human rights workshops held for the staff of the NHRC India. Provision of advice on re-accreditation to the Indian NHRC. We are currently providing re-accreditation advice to the NHRIs of Nepal and Sri Lanka. We have recently conducted a capacity

assessment with the Pakistan Human rights Commission. In 2018, we are planning a blended learning course on monitoring economic, cultural and social rights for NHRI members in South Asia to be hosted by the Nepalese Human Rights Commission.

Future opportunities are being explored by the APF to assist our members that will have special relevance to those in conflict-affected countries such as capacity building in relation to IDPs, women and girls, human rights defenders and the SDGs. We will continue to consult the expertise residing in our membership and help bolster their efforts in promoting and protecting human rights in the most challenging of circumstances which necessarily calls for collective cooperation and collaboration.

Thank You!

***Annex IX:***

**Kathmandu Declaration on Addressing Impunity and  
Realizing Human Rights in South Asia**

The International Conference on *Identifying Challenges, Assessing Progress, Moving Forward: Addressing Impunity and Realizing Human Rights in South Asia* was held from 9 to 11 April 2018 in Kathmandu, Nepal. The representatives of National Human Rights Institutions (NHRIs) of Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka, as well as the National Women's Commission of Bhutan, participated in the conference hosted by the NHRC of Nepal. NHRIs from Jordan, Malaysia, Myanmar, Mongolia and Philippines also participated along with a broad range of human rights organisations (HROs) and journalists from the South Asia region. The United Nations Office of the High Commissioner for Human Rights, the United Nations Development Program (UNDP)-Kathmandu and a number of international human rights organisations also participated.

The President of Nepal, Mrs. Bidya Devi Bhandari inaugurated the Conference in a special ceremony.

The NHRC of Nepal expressed its sincere thanks to the Governance Facility, UNDP- Kathmandu and the Asia Pacific Forum (APF) of NHRIs for the support they extended to organize the Conference. Participants of the Conference expressed their appreciation to the NHRC of Nepal for the excellent manner in which the Conference was organized and for the hospitality extended to all delegates.

The conference unanimously adopted the following Kathmandu Declaration as follows:

*Recalling* the international instruments agreed upon by States to promote and protect human rights and fundamental freedoms, including

the Charter of the United Nations; the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); and the Rome Statute of the International Criminal Court; as well as the Agenda 2030 and the Sustainable Development Goals, alongside the Charter of the South Asian Association for Regional Cooperation (SAARC) and its Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution; Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia and the Regional Convention on Suppression of Terrorism;

*Noting* that the year 2018 marks the 70<sup>th</sup> anniversary of the UDHR, which is celebrated worldwide;

*Reaffirming* that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated fairly, equally and with the same level of attention;

*Recognizing* that core international human rights instruments make provisions for and require States to undertake measures to protect their populations, including from threats of an exceptional nature, but this must be within the framework of respect for human rights, fundamental freedoms and the rule of law;

*Recalling* that human rights, development, and peace and security are interrelated and mutually reinforcing;

*Recognizing* the Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights adopted by General Assembly resolution 48/134 on 20 December 1993 (Paris Principles) as international standards guiding the work of NHRIs and noting that the year 2018 marks the 25<sup>th</sup> anniversary of the endorsement

of the Paris Principles by the UN General Assembly. In particular, we draw attention to the need of the states to ensure that National Human Rights Institutions (NHRIs) are given adequate resources and capacity to function independently and effectively, in full conformity with the Paris Principles;

*Recalling* the 2004 Seoul Declaration, 2015 Mérida Declaration, and 2015 Kiev Declaration as well as the outcome Statement issued by the GANHRI 2017 Annual Meeting on the roles of NHRIs in early warning, during conflict and transition to peaceful societies;

*Recognizing* that NHRIs play a major role in encouraging ratification and integration of international human rights norms and standards in national legislation and practices, monitoring national human rights situations, investigating and documenting human rights violations, promoting human rights education and awareness, providing protection to individuals, providing constructive advice and guidance to authorities, and calling on states to respect human rights at all times, especially in conflict and post-conflict contexts;

*Recognizing also* the importance of the collaboration between NHRIs, as well as their collaboration with civil society, in addressing issues related to conflict and its consequences;

*Bearing in mind* the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Updated Principles to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1) including norms and standards regarding the duty to prosecute, the right to the truth and the right to remedy and reparation;

*Alarmed* by the regular recurrence of crises and conflict in the region, including armed conflict, the crackdowns on the right to freedom of expression and assembly and other fundamental freedoms, the rhetoric of divisive politics leading to hate speech, targeting of religious and

ethnic minorities resulting from the lack of accountability, and existence of impunity, which represent threats against peace;

*Recalling* that the absence of the rule of law may give rise to violations of civil, political, economic, social and cultural rights, as well as to authoritarian rule and conflict;

*Recognizing* the need for comprehensive approaches to deal with gross human rights violations and abuses of the past, to fully realise the rights to truth, justice, reparation and guarantees of non-recurrence, including investigations and prosecutions, truth-seeking, reparation programs, and vetting; and that any such combination of processes must be in conformity with international norms and standards, while taking into account national context;

*Recognising further* the unique and critical contributions being made by NHRIs, especially those in line with the Paris Principles, in post-conflict and transitional justice processes, in order to ensure accountability, serve justice and achieve reconciliation, and in advancing broader institutional reform necessary to address the root causes of conflict, including by realising economic, cultural and social rights; and considering that this role could be further strengthened;

*Underlining* the need to promote political and economic good governance as the basis of a peaceful democratic society;

*Being aware* of the foregoing, the South Asian NHRIs resolve to:

### **General**

1. *Recall* the General Assembly and Human Rights Council resolutions on NHRIs and urge all member states to implement these resolutions; in particular to encourage member states to give due consideration to recommendations and advice from NHRIs; to respect the Paris Principles to ensure strong and

effective NHRIs; and to refrain from unduly interfering with the independence and autonomy of NHRIs.

2. *Strongly reaffirm* the need for full adherence to the Paris Principles and to actively work towards this, including seeking legislative reform ensuring the integrity of the NHRIs through effective nominations and selection processes and financial independence.
3. *Call* on all states to sign, ratify and implement all international human rights instruments as well as the Rome Statute for the International Criminal Court, and ensure their implementation at the national level, and reaffirm our commitment as NHRIs to supporting, advising and monitoring our respective states in this endeavor.
4. *Call* on all states to meet their periodic treaty-body reporting requirements, in accordance with their international human rights treaty obligations.
5. *Reaffirm* that in the combat against impunity, as in other human rights endeavors, NHRIs must reach out and collaborate and cooperate with civil society in a clearly inclusive manner.
6. *Urge* states to bring an end to violence and hate crimes based on caste, religion, ethnicity, political affiliation, regional origin, and gender.

### **Impunity and Transitional Justice**

7. *Restate* that the rule of law signifies that all individuals (including women, children and minority groups and marginalized communities) are protected by the justice system equally and without discrimination.

8. *Reaffirm* that the state's failure to fulfill its duty to investigate and, where necessary, prosecute gross human rights violations perpetuates a culture of impunity, which is in turn a major obstacle to the political stability required for full enjoyment of human rights and economic prosperity.
9. *Ensure* that truth, criminal justice, reparations and measures to prevent non- recurrence (including institutional reforms) are intimately linked as pillars of transitional justice and are mutually supportive.
10. *Ensure* the full participation of victims' groups, civil society and NHRIs in any transitional justice process through a consultative and transparent engagement from the start.
11. *Reaffirm* that prosecution is one of the central elements of an integrated transitional justice strategy, aiming at moving a society beyond impunity and a legacy of human rights abuse, in compliance with the requirements of due process of law and the principles of non-discrimination.
12. *Reaffirm also* that security personnels that were complicit in violations need to be transformed into institutions of integrity that sustain peace and uphold and promote human rights and the rule of law. Public officials and employees who are personally responsible for gross violations of human rights or serious crimes under international law should not continue to serve in State institutions, in line with Principle 36 of the Updated Principles.
13. *Reaffirm* that NHRIs should play a key role in ensuring the establishment of effective vetting processes that exclude persons with serious integrity deficits from the administration of justice, law enforcement and security forces, in order to re- establish

civic trust and re-legitimize these institutions. Any removal of persons should comply with the requirements of due process of law and the principle of non- discrimination.

14. *Understand* the role that transitional justice plays in helping countries emerging from conflict restore the rule of law and ensure a sustainable peace, through the pursuit of truth-seeking, justice and reparations processes and institutional reforms to prevent the return to situations of conflict.

### **National Security and Security Sector Reform**

15. *Urge* all states in the South Asia region to review that national security and counter-terrorism laws and policies are in compliance with constitutional and international norms and standards, to ensure that they do not infringe on fundamental rights, including among others that mass surveillance measures are proportional and strictly necessary to address legitimate national security threats.
16. *Hold* non-state actors accountable for gross human rights abuses, even if they are approved and backed by civilian stakeholder communities, keeping in mind that the state response must always be proportionate and respect human rights.
17. *Recognizing* the right of states to call a state of emergency when national security is genuinely in peril, call on states to ensure that any derogation of rights is legitimate, proportional and strictly necessary, in conformity with Article 4 of the ICCPR, and that under no circumstances will the use of torture or derogations of the right to life be justified.
18. *Underline* the centrality of security sector reform, with a focus to ending extrajudicial executions, disappearances and torture.

19. *Urge* states to ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment along with its Optional Protocol, and the Convention for the Protection of All Persons from Enforced Disappearance.
20. *Stress* the need to have effective accountability mechanisms to vet security forces for internal promotions and for deployment to UN peacekeeping missions.

### **Migration and Livelihood; Refugees and Asylum Seekers**

21. *Stress* the right to freedom of movement, including migration in search of employment. Recognising the economic benefits of migrant labour to destination and origin countries alike, encourage cooperation between origin and destination countries to ensure that the rights of migrants, particularly women, are realized, to avoid serious abuses such as those that occur under the *kafala* system.
22. *Call* on governments to cooperate to bring about necessary legal and administrative measures to protect rights of migrants, in both countries of origin and countries of destination, according to International Labour Organisation standards, including the monitoring and regulation of recruiters, and assuring access to justice.
23. *Call upon* all states in the region to ratify the Convention on Refugees.
24. *Deeply concerned* by continuing gross violations of human rights in the region, such as the mass expulsion of Rohingyas from Myanmar, calling for an end to the violations, and to holding the perpetrators of the most serious violations accountable.

**Experiences and Challenges of Human Rights Organisations in Advocacy and Work against Impunity, and Best Practices, including Collaboration with NHRIs**

25. *Express* concern that global trends indicate a threatening environment for human rights defenders in all regions, including staff of NHRIs, and media personnel, with human rights defenders increasingly subjected to harassment, restrictions and reprisals amid an overall shrinking democratic space.
26. *Stress* that the work of human rights defenders and independent media is essential to promote and protect human rights and the rule of law, including in preventing conflicts and violence. Remind states that they have an unconditional responsibility to protect all human rights defenders and the media, without whom there is no democracy.
27. *Call on* states to ensure, that human rights defenders and independent media can operate in a safe and enabling environment, and implement effective measures for their protection, in line with the recommendations from the UN Special Rapporteur on the Situation of Human Rights Defenders.
28. *Reaffirm* the UN Declaration on Human Rights Defenders and resolve to promote its implementation in our respective countries.

**Commitments to future cooperation**

29. *Promote* active cooperation between NHRIs of the South Asia region in order to:
  1. *Support* each other through exchange of information on a regular basis to share challenges, lessons learned, and best practices, as well as technical assistance and capacity building;

2. *Establish* a mechanism or designate a focal point within each NHRI with the mandate of information exchange and coordination of activity;
3. *Undertake* a study to explore the possibility of establishing a regional human rights mechanism in the SAARC region;
4. *Lobby* SAARC governments on issues of key concern to NHRIs in the region in a coordinated manner including issues that cross borders such as protection of refugees and economic migrants and victims of trafficking and cooperation on responses to abuses against South Asian workers abroad;
5. *Address* human rights violations linked to the environment and climate change;
6. *Promote* efforts to protect civil and political (ICCPR) and economic, social and cultural rights (ICESCR);
7. *Ensure* that all investments in economies in the region, including by international financial institutions, are human rights-friendly and compliant with the UN Guiding Principles on Business and Human Rights (Ruggie Principles);
8. *Welcome and encourage* further efforts by GANHRI and APF to support capacity-building, sharing of experiences and good practices, as well as knowledge management with and among NHRIs, and by all governments in the region to mobilize resources to that effect.

***Annex X:***

**Objectives of the Conference**

*This conference provided a platform for National Human Rights Institutions (NHRIs) to come together as an attempt to identify challenges and share good practices in combating impunity and promoting and protecting human rights in South Asia. By bringing experts into these conversations, the conference developed more clear benchmarks that allow each state, including Nepal, to assess its current position and progress with respect to international human rights norms in transition.*

- Reflect on the changed context of Human Rights in South Asia over past 15 years;
- Provide a forum for identifying local, regional, and international challenges in human rights protection and promotion and in combating to impunity and human rights abuses. To ensure that gender and issues of gender-based violence are integrated into discussions;
- Share effective practices for responding to fundamental rights violations and where relevant, in the times of conflict and the post-conflict period;
- Identify effective collaborations between National Human Rights Institutions and other human rights defenders in overcoming challenges through “best practices” particularly in terms of government advocacy. To identify ways to build on effective practices in education and advocacy around human rights that have been employed to address these challenges.
- Strengthen relationships among human rights defenders, both thematically and in terms of universal rights, across South Asia and its sub-regions.

## Human Rights and Impunity in South Asia

- Issue a joint statement/agreement regarding next steps for addressing common institutional challenges around impunity with the establishment of a regional working committee with a timeline for follow-up that does not rely on in-person meetings.
- Initiate a regular follow up procedure with NHRIs, coordinated by the APF/based on APF grading.

## The Contributors

### **William O' Nell**

Director of the Conflict Prevention and Peace Forum (CPPF) in New York, William O'Neill has specialized in humanitarian law, human rights and refugee law. Having worked on the areas of judicial, police and prison reforms in Burundi, Liberia, Sierra Leone, South Sudan, Timor Leste, Nepal and Bosnia-Herzegovina, O' Neill has written extensively on peacekeeping and peace-building. He has also developed and taught courses on human rights, rule of law and peacekeeping for several peacekeeping training centers at a variety of institutions including UN-sponsored and government-sponsored training centers chiefly participated by senior military, police and humanitarian officials from different countries. In 2008, O'Neill was appointed as the visiting professor of law and International Relations at the Scuola Sant'Anna, Pisa, Italy's premier graduate faculty in public affairs to teach a course on civilians in peacekeeping operations. Also, he has published widely on rule of law, human rights and peacekeeping, including, "Kosovo: An Unfinished Peace and Protecting Two Million Displaced: The Successes and Shortcomings of the African Union in Darfur." O'Neill also has the experience of serving as the chief of the UN Human Rights Field Operation in Rwanda. He also led the Legal Department of the UN/OAS Mission in Haiti. He was a senior advisor on Human Rights in the UN Mission in Kosovo. He investigated mass killings in Afghanistan for the High Commissioner for Human Rights. He has also conducted

an assessment of the human rights situation in Darfur and trained the UN's human rights monitors stationed there. At the request of the UN's Executive Committee on Peace and Security, he chaired a Task Force on Developing Rule of Law Strategies in Peace Operation.

## **Marc Limon**

Presently, Marc Limon is executive director of the Universal Rights Group (URG) -- a think tank on international human rights policy. Notably, he holds an experience of serving as a diplomat at the United Nations Human Rights Council from 2006 to 2012. In those six years, he not only interacted with UN human rights treaty bodies but also drafted national reports under the Universal Periodic Review, and organized five Special Procedure country missions. Most importantly, Marc was the principal negotiator in different UN resolutions dealing with the issues of human rights and climate change; human rights and the environment; freedom of assembly and association; and the Third Optional Protocol to the UN Convention on the Rights of the Child. He also negotiated outside the Human Rights Council. He negotiated agreements and resolutions in the context of the United Nations Framework Convention on Climate Change (UNFCCC), the Economic and Social Council (ECOSOC), the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), and the Global Platform for Disaster Risk Reduction (UNISDR). His role in establishing the Human Rights Council's Trust Fund to support the participation of Least Developed Countries and Small Island Developing States is quite laudable. Before his entry into the diplomatic service, Marc worked as a government relations consultant in Brussels, advising a range of corporate and public clients on EU external relations, human rights, trade and environmental policy. He has also written extensively on the international human rights system. He holds Masters degrees from the University of Cambridge (UK), Katholieke Universiteit Leuven (Belgium) and the Libre Universite de Bruxelles (Belgium).

## **Ashley William Gois**

Ashley William Gois is the Regional Coordinator of the Migrant Forum in Asia (MFA), a regional network of migrants' organizations, NGOs, advocates, grassroots organizations and trade unions. The network promotes rights and wellbeing of migrant workers and members of their families. Mr. Gois is an educator, sociologist and human rights advocate. He has been working on human rights education for more than a decade across the Asia Pacific region. Mr. Gois also chairs Migrants Rights International (MRI), an international non-government organization with consultative status with the UN Economic and Social Council (ECOSOC). He has been working closely with UN Treaty Bodies, with the Office of the High Commissioner on Human Rights (OHCHR) and the Committee on Migrant Workers and other special mandates. Over the last twenty years, he has been at the forefront of international advocacy efforts engaging and influencing international and multilateral organizations to promote equitable and fair migration and development policies, one of which is engaging the Global Forum on Migration and Development, the only annual global platform that brings governments together to discuss migration and development. His key knowledge areas are Migration research, migration and human rights, inter-organizational management, migration advocacy, among others.

## **Dr. Sev Ozdowski**

Since 2006, Doctor Sev Ozdowski is a director for Equity and Diversity in Western Sydney University and adjunct professor for Centre of Peace and Conflict Studies at University of Sydney. He was the Australian Human Rights Commissioner and Disability Discrimination Commissioner at the then named Human Rights and Equal Opportunity Commission from 2000-2005. He also headed

the Office of Multicultural and International Affairs in South Australia for five years, and since 2006 is the President of the Australian Council for Human Rights Education. Dr Ozdowski has been recognized through various Australian and international honors, including an Order of Australia Medal in 1995, and was appointed as a Member in the General Division of the Order of Australia in 2016. Dr. Ozdowski graduated with a Master of Laws (LLM) and Master of Arts (MA) in Sociology from Poznań University, Poland and with a Doctor of Philosophy (PhD) from the University of New England, Armidale, New South Wales. In 1984 he was awarded with the Harkness Fellowship for post-graduate work at Harvard, Georgetown and Berkeley Universities in USA (1984–86).

### **Sona Khan**

Sona Khan is a former judge and now practices as an Advocate at the Supreme Court of India. She is a distinguished legal scholar, especially on Islamic jurisprudence and is an advocate of women's empowerment through law. She was instrumental in the landmark Shahbano case, which raised the issue of how to weigh a woman's rights to maintenance after divorce against India's separation of civil and religious law.

### **Khushi Kabir**

Khushi Kabir is the General Secretary of Bangladesh Indigenous Forum. In 1972, immediately after the liberation of Bangladesh, Khushi joined one of the first Bangladeshi NGOs and became the first woman to be based in the field to live and work with rural marginalized women and men, in some of the most remote areas of Bangladesh. In 1980 she joined Nijera Kori as Coordinator, a national level NGO working with 2,37,787 rural women and men in 1366 villages. Nijera Kori believes in creating strong autonomous organizations of the rural poor to assert their rights and ensure their entitlements as citizens. It believes patriarchy and

class division are the twin forces against ensuing equality of women. Khushi is passionately involved in promoting gender equality, rights of women, indigenous peoples, and land and water rights of other marginalized communities, secularism, environmental justice, food sovereignty, ensuring democratic values and accountability at all levels. She is active in Public Interest Litigations, in protecting landless and slum dwellers from eviction, preventing transformation of agriculture land to shrimp farms, use of *fatwa* as a form of repression, actively voicing strong actions against violence against women, extra judicial killings and ensuring basic human rights for all.

### **Justice D. Murugesan**

Justice D. Murugesan is a member of the National Human Rights Commission of India. Prior to his appointment as a member on the 21st September, 2013, he was the Chief Justice of Delhi High Court. Earlier, he also served as Special Government Pleader and Government Pleader for the Government of Tamil Nadu from 1994 to 2000. He was the President of Tamil Nadu State Judicial Academy for over a period of three years.



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