

A STUDY OF ENFORCEMENT PRINCIPLES OF HUMAN RIGHT IN INDIA

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ABSTRACT

Human Rights are essentially a product of Democracy. Man's struggle against tyranny and all forms of oppressions has been long and never-ending. Tyranny has, from time to time, emerged in different forms and methods. Man has been always trying to establish his right, time and again; sometimes there has been a depressing failure and the assault on human rights continues. So does man's struggle against tyranny. During this period, the actual concept of human rights and their enforcement began taking shape in the west only after the renaissance and the process of industrialisation. From that period onwards the recognition of human rights took the roots in other parts of the world.. There is currently no international court to administer international human rights law, however, quasi-judicial bodies exists under some UN treaties. The International Criminal Court (ICC) has jurisdiction over the crime of genocide, war crimes and crimes against humanity. While the European Court of Human Rights, and the Inter-American Court of Human Rights enforce regional human rights law. Although these same international bodies also hold jurisdiction over cases regarding international humanitarian law, it is crucial to recognize that the two frameworks constitute distinctly different legal regimes. The United Nations Human Rights Bodies do have some quasi legal enforcement mechanisms. These include the Treaty Bodies attached to the current seven active treaties, and the Human Rights Council complaints procedures. The enforcement of international human rights law is the responsibility of the Nation State, and it is the primary responsibility of the State to make human rights a reality. In practice, many human rights are very difficult to legally enforce due to the absence of consensus on the application of certain rights, the lack of relevant national legislation or of bodies empowered to take legal action to enforce them. This paper is an attempt to discuss the various facets of human rights, their legal, social political and economic aspects of protection and enforcement at International as well at National levels.

KEYWORDS: Enforcement, Human Rights, International Criminal Court, Democracy

INTRODUCTION

The protection and enforcement of human rights has been guaranteed by the establishment of the United Nations (UN) in 1945 and thereafter with the adoption of a

resolution on the Universal Declaration of Human Rights (UDHR) in December, 1948.v Although being a resolution it does not impose legal obligations upon the member states, rather it sets a common



standard of achievement for all people and all nations so that they strive to promote respect for human rights and fundamental freedoms by teaching and educating and by adopting progressive measures in this regard. The expression “human rights” denotes all those rights which are inherent in our nature and without which we cannot live as human beings. vi Human rights are the eternal part of the nature of human beings which are essential for the development of their personality, qualities, intelligence, talent and conscience. They are inalienable rights which are enjoyed equally by all members of the human society. This paper is an attempt to discuss various international and national enforcement mechanisms for the protection and enforcement of human rights and fundamental freedoms. The concept of Human rights has evolved over the history of mankind. In fact these rights emerged in the process of development of social and political thought. Before we understand the basic meaning and concept of Human Right, let us know what are the right and the different form of rights. Rights are reasonable claims of persons recognised by the society and guaranteed by law. Rights are of three types: (a) Legal Rights. (b) Fundamental Rights and (c) Human Rights. Legal Rights are provided under different legislation passed by the parliament or state Legislature. The Fundamental Rights are provided in part III of Indian Constitution and can be enforced through courts. Formally, Human Rights were proclaimed in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nation on 10th Dec, 1948. The

modern concepts of human Rights are comprehensive in nature and content. It includes three types of rights: civil and political, economic, social and cultural and the emerging collective or group rights. The elements of Human rights includes: Equality, Universality, Indivisibility, Interdependency, and Human dignity, Inalienability, Non-discrimination and Responsibility.

CONCEPTUAL FRAMWORK FOR PROTECTION OF HUMAN RIGHTS IN INDIA

The National Human Rights Commission (NHRC) of India was established on 12 October, 1993. The statute under which it is established is the Protection of Human Rights Act (PHRA), 1993. It is further amended by the Protection of Human Rights (Amendment) Act, 2006. This legislations is enacted inconformity with the ‘Paris Principle’ adopted at the first international workshop on national institutions for the promotion and protection of human rights held in Paris in October, 1991, and endorsed by the General Assembly of the Universal Nations in December, 1993. An obvious questions hound- prior to this legislation in India what was the enforcement mechanism for protection of human rights? After 1993 is there a changed perception of human rights in India? I have tried to answer these questions in this chapter. Pre- 1993 positions: Human rights in India is an issue complicated by the country's large size, its tremendous diversity, its status as a developing country and a sovereign, secular, democratic republic. The Constitution of



India provides for Fundamental rights, which include freedom of religion. Clauses also provide for Freedom of Speech, as well as separation of executive and judiciary and freedom of movement within the country and abroad². The Chart of Ratification of International Instruments, provided by the United Nations, should ideally form the corpus of international customary law, applicable in all democratic countries. Once an instrument is ratified a signatory is bound to bring in laws that conform to United Nations standards. Even if these instruments are not legally binding, they are morally compelling. India has yet to ratify a host of international instruments.

"Human rights", as defined in the sub-clause (d) of Clause 1 of the Human Rights Protection Act of 1993, is extremely restrictive and does not adhere to the international instruments; so restrictive, in fact, that it goes against the very spirit of the Universal Declaration of Human Rights. For example, while ratifying the International Covenants³, India expressed its reservation to Article 9 of the ICCPR relating to preventive detention. The delegation from India stated, "With reference to article 9 of the ICCPR, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of the clauses (3) to (7) of the article 22 of the Constitution of India. Further, under the Indian legal system, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest and detention against the State." However, the

Supreme Court of India in recent judgements has been attempting to broaden the scope of compensation. The reason offered by the Government of India is, as usual, a thinly veiled excuse. Though the right to compensation has been constrained by lack of adequate constitutional provisions and their official expression of reservations at the provisions in the ICCPR, compensation for illegal arrest and detention and custodial deaths have been awarded at the discretion of individual judges or benches. A whole set of rights embodied in Article 12, 19(3), 21 and 22 of the ICCPR (the right to freedom of movement, the rights permissible curbs on freedom of speech, the right to assembly and association), are restricted. Article 17 of the ICCPR relating to the right to privacy is also legally enforceable in India, especially, in post and telephone communications. In its letter to the National Human Rights Commission, SAHRDC stated that all international conventions that form the corpus of international customary law are applicable in all countries that are members of the United Nations and the World Community. SAHRDC specifically referred to the following conventions, declarations and principles in addition to the two covenants mentioned in the NHRC Act:

- Universal Declaration of Human Rights⁴
- Convention against Torture⁵
- Convention on the Elimination of Racial Discrimination⁶
- Convention on the Prevention and Punishment of Genocide



- Convention relating to the Status of Refugees
- Convention on the Elimination of Discrimination Against Women⁷
- Convention on the Rights of the Child

WHAT ARE THE ENFORCEMENT AGENCIES?

National Human Rights Commissions (NHRCs) are government agencies that have multiplied around the world in the last decade. These commissions generally have a dual agenda of promoting and protecting human rights domestically. After all, state officials exposed to human rights training may learn the wrong lessons, even the limits of what they can get away with. Cardenas argues that any human rights initiative that is underfunded and inaccessible to a segment of society, especially its most vulnerable and marginalized members should be confronted critically. Otherwise, promoters of human rights may unintentionally help reproduce the patterns of abuse they claim to battle while failing to empower human rights victims. Together with a national human rights commission, state human rights commissions in India were set up under the Protection of Human Rights Act 1993.

The State Commission consists of a chairperson who has been a chief justice of a high court; one member who is, or has been, a judge of a high court; one member who is, or has been, a district judge in that state; two members to be appointed from amongst persons having knowledge of, or practical

experience in, matters relating to human rights. There is a Secretary who is the chief executive officer of the state commission and exercises powers and discharges functions of the state commission as is delegate to him. Other than that, the commission has a body of investigators that are constituted of police officers on deputation, who will go back to their normal duties once their deputation period is over. Therefore, majority of the members are current or retired judicial officers who receive no special training prior to their appointment as members of the human rights commission. The non-judicial members are usually academicians who are trained in either political science or law.

However, as we will discuss later, this difference in training results in significant differences in their understanding and redressal of human rights violations. The commission we study has about ten staff members and a librarian. The chairperson and the secretary of the commission are scheduled to meet once a week to discuss their course of action with regard to filed cases. The commission also reserves two days of the week to meet with plaintiffs. During the first author's month long fieldwork, only six weekly hearings were held at the commission. The working divisions of NHRC are being highlighted under in brief:

→ Law Division

The Law Division headed by the Registrar (Law), who is assisted by a joint Registrar, a number of Deputy Registrars, Assistant



Registrars, Section officers and other secretarial staff. It services the commission in the receipt and disposal of complaints relating to human rights violations. Presenting officers, who are from the subordinate judiciary, assist the commission in dealing with complaint cases.

→ **Administrative Division**

The Division is headed by a joint secretary and is assisted by a director, a number of undersecretaries, section officers and other secretarial staff. It looks after the establishment, administrative, personal and other requirements of the commission.

→ **Investigation Division**

It is headed by an officer of the rank of Director General of Police, and is assisted by a Deputy Inspector General of Police, Senior Superintendent of Police, Deputy Superintendent of Police, Inspector of Police, Constables and other staff. The prime responsibility of the division is to carry out spot investigation all over the country on behalf of the commission. It also assist the NHRC in examining complaints, in scrutinizing reports received from the police and other investigative agencies and in looking into reports of the custodial violence or other misdemeanors. In addition the Division analyzes the information and other reports from the state authorities regarding deaths in police and judicial custody, and encounter deaths.

→ **Training Division**

This division is headed by a joint secretary and is assisted by a senior research officer (training), an Undersecretary and other secretarial staff. It is responsible for spreading human rights literacy among various section of the society. It also sensitizes government and non-government officials and functioning on different human rights issues. Besides, it conducts Internship Programme for colleges and University students.

→ **Policy Research, Projects and programmes Division**

The work of the Division is handled by joint secretaries, Directors, a senior research Officer, research officer, Research Assistants and other secretarial staff. It also undertake and promotes research on human rights and organised conferences, seminars and workshops on pertinent to issues. In addition, it reviews policies, laws, treaties and other international instruments in force for the protection of human rights. It also aids the training division in spreading the human rights literacy and in promoting awareness about the safeguards available for the protection of human rights.

ROLE AND FUNCTIONS OF ENFORCEMENT AGENCIES

The primary function of NHRC is to conduct inquiries into violation of human rights. NHRC conducts inquiries for the following categories of violations:

- Violation of right to life, liberty, equality and dignity.



- Violation of International treaties to which India is a party.
- Abetment of violation of human rights by public servant.
- Negligence of public servant in prevention of human rights violations.

In spite of that the main function is laid down in section 12 of the Protection of Human Rights Act 1993. The NHRC play very important role for the society to prevent the violation of human rights. There are some important instances/cases which have been taken up by the NHRC and created a positive jurisprudence to prevent the violations of human rights. The role of the NHRC in promoting and protection of human rights through these selected cases. The existence of Supreme Court in a setting like India may not be a panacea for attending to rights based litigation, in the absence of strong support of legal mobilisation at societal level. Institutions like the NHRC are the only means, which theoretically at least, hold promise of affordable access to justice for the poor and the vulnerable which constitute at least one third of India's population. Hence in such social settings institutions like the NHRC fill an important void in a poor person's search for justice¹⁰. Despite limitations, highlighting the structural inadequacy of Indian society by focusing on economic, social and cultural rights the NHRC has made great strides in making the Indian state aware of attending to economic, social and cultural rights. The real significance of the commission is advocacy, to build constant

pressure and act as reminder of the state obligations towards the rights. Due to the commission's insistence these economic, social and cultural rights have acquired constant public discourse in evaluating the effectiveness of the Indian state. Surprisingly, the NHRC itself seems to be actually aware of what it calls its 'challenges'. After the establishment it is the period of consolidation for the commission where the commission has observed in its annual report 1998-1999 that how it has to deal with challenges of credibility, scale and expectation, variety, good governance and entrenched attitudes. However, no blueprint for effective action is outlined in its documents. As observed earlier in this study that the courts are not sufficient in themselves in attending rights because of weak support structure for legal mobilisation. The view that courts and existing national institutions are sufficient to attend to the human rights agenda is based on the assumption that that support for legal mobilisation is uniform throughout. However, this is not true in some social settings as India in particular and South Asia in general. In addition, the social composition is such that the poor and the vulnerable groups form significant components in these societies. These very social segments are hardly in the position to utilise the courts as an institution to full their fundamental rights, much less their economic, social and cultural rights. In such social settings institutions like the NHRC are very much needed to keep exclusive focus on need for fulfilment of these rights and internalisation of international human



rights norms Coming to the Indian NHRC case study it becomes clear that the commission has been hampered in realising its full potential by external as well as internal factors. External factors are those, which are controlled by or influenced by the state and its agencies. Some of the external factors are numerated below:

- The NHRC emphasised the need to set up SHRCs and to establish clear functional relationship between the two but the central government has categorically dismissed the commission's proposals.
- In the area of child labour, education and other aspects of child welfare the commission has made policy recommendations but the central government has not responded to them.
- Dealing with human rights violations committed by armed force personnel but the privileged status of armed forces continues and the government has dismissed all such proposals as unnecessary, even case of death and rape while in the custody of armed forces.
- For the last five years the government has not appointed two members. While internal factors are the ones, which the NHRC has, some control but because of various factors has not been able to cash on. For example: while the government was at fault for not complying with the recommendations of the NHRC, the commission was also responsible for

not supporting its strong words with action. The NHRC has followed through on only a few of the recommendations issued in its annual reports.

JUDICIAL APPROACH AND GUIDELINES

A three-judge bench of the Supreme Court delivered the Vishaka judgment on August 13, 1997. The decision, written by then-Chief Justice J. S. Verma, described Bhanwari Devi's gang rape as an illustration of "the hazards to which a working woman may be exposed," "the depravity to which sexual harassment can degenerate," and the urgent need "for safeguards by an alternative mechanism in the absence of legislative measures." The Court embraced the task of tackling these issues "through judicial process, to fill the vacuum in existing legislation." Incorporating a broad reading of the Constitution, the Vishaka judgment recognized sexual harassment as "a clear violation" of the fundamental constitutional rights to equality, non discrimination, life, and liberty, as well as the right to carry out any occupation. In addition, the Court invoked the Constitution's Directive Principle requiring the state to secure just and humane conditions of work and maternity relief and the Fundamental Duty it imposes on all Indian citizens to renounce practices derogatory to the dignity of women²⁵. The Vishaka Court also drew heavily upon international law, noting that [i]n the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of



working women at all work places, the contents of International Conventions and norms are significant for the purposes of interpretation of the guarantee of [rights] of the Constitution and the safeguards against sexual harassment implicit therein. The judgment quoted relevant provisions of CEDAW and the CEDAW Committee's General Recommendation 19 for their definition of sexual harassment and instructions on measures that states should take to combat the practice. Summarizing its review of international law, the Court said, "Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum acceptance of this right has received global acceptance." The Vishaka Court justified its extensive application of international law by emphasizing the Indian government's legal obligations under CEDAW, the official commitments it made at the U.N. Fourth World Conference on Women in Beijing, comparable case law from Australia, and constitutional provisions permitting the state to enter into treaties, to make laws implementing treaty provisions, and generally to "foster respect" for international law²⁷. "There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity," the opinion stated²⁸. In a recent interview, Justice Verma said, "Vishaka is a landmark case [because] it lays down a new path. It was not

intended merely to deal with sexual harassment; it opened new vistas in the field of international law becoming part of national law.

CONCLUSION

Indeed, human rights are very essential for the overall development of the human being not only at national but also at international level. But these human rights should not remain on paper. But they should be protected for the betterment of the society. In India, we have human rights in our Constitution. Therefore, it is our duty to see that human rights become meaningful to a large number of people in this country. The role of judiciary in the protection of human rights is certainly commendable. However, in the quest for socio-economic justice the judiciary is sometimes overstepping the limits of its judicial function and trespass into the areas reserved for the legislature and the executive. However, it is also true that judicial activism is not only necessary but also it has become inevitable in nature as the judiciary in the guardian of our Constitution of India. Supreme Court has shown that it can go upto any extent to protect and enforce by way of incorporating various unspecified fundamental rights (human rights) into one of the most important article that is Article 21 of the Constitution.

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3. South Asia Human Rights Documentation Centre (SAHRDC), 'Judgement Reserved: The Case of the National Human Rights commission of India', September 2001, p.iii. SAHRDC can be accessed at <http://www.hrdc.net/sahrdc/>

4. indiankanoon.org/doc/767216/ 13 National Human Rights Commission of India v. State of Arunachal Pradesh, AIR 1996 SC 1235

5. Article 21 of the Indian Constitution provides, "No one shall be deprived of his life or personal liberty except according to procedure established by law.

6. East Pakistan got independence in 1971, presently known as Bangladesh

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