Ranjeet Kapadia

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Chapter 1

Introduction

Human rights are almost a form of religion in today's world. They are the great ethical yardstick that is used to measure a government's treatment of its people. A broad consensus has emerged in the twentieth century on rhetoric that frames judgment of nations against an international moral code prescribing certain benefits and treatment for all humans simply because they are human. Within many nations political debates rage over the denial or abuse of human rights. Even in prosperous, democratic countries like Canada much public discourse is phrased in the rhetoric of rights. Legal documents to protect human rights have proliferated in Canada, culminating in the 1982 entrenchment of the Charter of Rights in the Constitution. Especially since the advent of the Charter, many Canadians have claimed that particular benefits they desire are a matter of human rights and must be provided. Indeed, the claim that the desired benefit is a human right is often meant to undercut any opposition as unprincipled or even immoral.

Lost in much of the discussion is any justification for the high moral grounded occupied by human rights. Most political activists and commentators are content just to look at the United Nations' ever-growing body of human rights agreements as proof that these rights exist universally and therefore have to be respected by everyone. Domestic human rights legislation represents the local implementation of internationally-recognized rights that are universal and inalienable. Unfortunately, human rights are far more complicated phenomena than that.

Any inquiry into the origin, nature, and content of human rights reveals tremendous conceptual hurdles that need to be overcome before one can accept their pre-eminent authority. Indeed, many argue that the problems encountered in this analysis demonstrate that human "rights" are a misnomer, and that the rhetoric of human rights is really a description of ideals - and a controversial set of ideals at that.

The Historical Origins of Human Rights

Human rights are a product of a philosophical debate that has raged for over two thousand years within the European societies and their colonial descendants. This argument has focused on a search for moral standards of political organization and behaviour that is independent of the contemporary society. In other words, many people have been unsatisfied with the notion that what is right or good is simply what a particular society or ruling elite feels is right or good at any given time. This unease has led to a quest for enduring moral imperatives that bind societies and their rulers over time and from place to place. Fierce debates raged among political philosophers as these issue were argued through. While a path was paved by successive thinkers that lead to contemporary human rights, a second lane was laid down at the same time by those who resisted this direction.

The emergence of human rights from the natural rights tradition did not come without opposition, as some argued that rights could only from the law of a particular society and could not come from any natural or inherent source. The essence of this debate continues today from seeds sown by previous generations of philosophers.

The earliest direct precursor to human rights might be found in the notions of `natural right' developed by classical Greek philosophers, such as Aristotle, but this concept was more fully developed by Thomas Aquinas in his Summa Theologica. For several centuries Aquinas' conception held sway: there were goods or behaviours that were naturally right (or wrong) because God ordained it so. What was naturally right could be ascertained by humans by `right reason' - thinking properly. Hugo Grotius further expanded on this notion in De jure belli et paci, where he propounded the immutability of what is naturally right and wrong:

Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. ...Thus two and two must make four, nor is it possible otherwise; nor, again, can what is really evil not be evil.

The moral authority of natural right was assured because it had divine authorship. In effect, God decided what limits should be placed on the human political activity. But the long-term difficulty for this train of political thought lay precisely in its religious foundations.

As the reformation caught on and ecclesiastical authority was shaken and challenged by rationalism, political philosophers argued for new bases of natural right. Thomas Hobbes posed the first major assault in 1651 on the divine basis of natural right by describing a State of Nature in which God did not seem to play any role. Perhaps more importantly, however, Hobbes also made a crucial leap from `natural right' to `a natural right'. In other words, there was no longer just a list of behaviour that was naturally right or wrong; Hobbes added that there could be some claim or entitlement which was derived from nature. In Hobbes' view, this natural right was one of self-preservation.

Further reinforcement of natural rights came with Immanuel Kant's writings later in the 17th century that reacted to Hobbes' work. In his view, the congregation of humans into a state-structured society resulted from a rational need for protection from each other's violence that would be found in a state of nature. However, the fundamental requirements of morality required that each treat another according to universal principles. Kant's political doctrine was derived from his moral philosophy, and as such he argued that a state had to be organized through the imposition of, and obedience to, laws that applied universally; nevertheless, these laws should respect the equality, freedom, and autonomy of the citizens. In this way Kant, prescribed that basic rights were necessary for civil society:

A true system of politics cannot therefore take a single step without first paying tribute to morality. ...The rights of man must be held sacred, however great a sacrifice the ruling power must make.

However, the divine basis of natural right was still pursued for more than a century after Hobbes published his Leviathan. John Locke wrote a strong defence of natural rights in the late 17th century with the publication of his Two Treatises on Government, but his arguments were filled with references to what God had ordained or given to mankind. Locke had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and France's Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789. The French declaration proclaimed 17 rights as "the natural, inalienable and sacred rights of man".

The French Declaration of Rights immediately galvanized political writers in England and provoked two scathing attacks on its notion of natural rights. Jeremy Bentham's clause-by-clause critique of the Declaration, entitled Anarchical Fallacies, argued vehemently that there can be no natural rights, since rights are created by the law of a society:

Right, the substantive right, is the child of law: from real laws come real rights; but from laws of nature, fancied and invented by poets, rhetoriticians, and dealers in moral and intellectual poisons come imaginary rights, a bastard brood of monsters, `gorgons and chimeras dire'. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts.

Edmund Burke also wrote a stinging attack on the French Declaration's assertion of natural rights, in which he argued that rights were those benefits won within each society. The rights held by the English and French were different, since they were the product of different political struggles through history.

Soon after the attacks on the French Declaration, Thomas Paine wrote a defence of the conception of natural rights and their connection to the rights of a particular society. In The Rights of Man, published in two parts in 1791 and 1792, Paine made a distinction between natural rights and civil rights, but he continued to see a necessary connection:

Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.

This passage reflects another, earlier inspiration for human rights from the social contract views of writers such as Jean-Jacques Rousseau, who argued that people agree to live in common if society protects them. Indeed, the purpose of the state is to protect those rights that individuals cannot defend on their own. Rousseau had set the ground for Paine decades earlier with his Social Contract, in which he not only lambasted attempts to tie religion to the foundations of political order

but disentangled the rights of a society from natural rights. In Rousseau's view, the rights in a civil society are hallowed: "But the social order is a scared right which serves as a basis for other rights. And as it is not a natural right, it must be one founded on covenants." Rousseau then eleaborated a number of rights of citizens and limits on the sovereign's power.

The debate in the late eighteenth century has left telling traces. Controversy continues to swirl over the question whether rights are creations of particular societies or independent of them.

Modern theorists have developed a notion of natural rights that does not draw its source or inspiration from a divine ordering. The ground work for this secular natural rights trend was laid by Paine and even Rousseau. In its place has arisen a variety of theories that are humanist and rationalist; the `natural' element is determined from the prerequisites of human society which are said to be rationally ascertainable. Thus there are constant criteria which can be identified for peaceful governance and the development of human society. But problems can develop for this school of thought when notions of a social contract are said to underlie the society from which rights are deduced.

Contemporary notions of human rights draw very deeply from this natural rights tradition. In a further extension of the natural rights tradition, human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.

However, a persistent opposition to this view builds on the criticisms of Burke and Bentham, and even from the contractarian views of Rousseau's image of civil society. In this perspective rights do not exist independently of human endeavour; they can only be created by human action. Rights are viewed as the product a particular society and its legal system.

In this vein, Karl Marx also left a legacy of opposition to rights that hindered socialist thinkers from accommodating rights within their theories of society. Marx denounced rights as a fabrication of bourgeois society, in which the individual was divorced from his or her society; rights were needed in capitalist states in order to provide protection from the state. In the marxist view of society, an individual is essentially a product of society and, ideally, should not be seen in an antagonistic relationship where rights are needed. However, many socialists have come to accept certain conceptions of rights in the late twentieth century.

Thus, the history of political philosophy has been one of several centuries of debate. The child of natural rights philosophers, human rights, has come to hold a powerful place in contemporary political consciousness. However, neither preponderant belief in, nor even a consensus of support for human rights do not answer the concerns raised by the earlier thinkers - are rights truly the product of a particular vision and laws of a society? Or, are human rights so inherent in humanness that their origins and foundations are incontestable?

A further difficulty, with profound implications, that human rights theories have to overcome is their emergence from these Western political traditions. Not only are they a product of European natural rights, but the particular rights that are viewed as `natural' have been profoundly shaped by the liberalism that emerged in the 19th and 20th centuries. With human rights, the rhetorical framework of the natural rights tradition has come to serve as a vehicle for the values of Western liberalism.

An easy and powerful criticism is that human rights cannot be universal. In their basic concept they are a Western creation, based on the European tradition that individuals are separable from their society. But one may question whether these rights can apply to collectivist or communitarian societies that view the individual as an indivisible element of the whole society. Westerners, and many others, have come to place a high value on each individual human, but this is not a value judgment that is universal. There is substantive disagreement on the extent of, or even the need for, any protection of individuals against their society.

In addition to this problem with the concept itself, there are strong objections to the manner in which human rights have been conceptualized. Many lists of human rights read like specifications for liberal democracy. A variety of traditional societies can be found in the world that operate harmoniously, but are not based on equality let alone universal suffrage.

A question that will recur in later discussions is whether the `human rights' advocated today are really civil rights that pertain to a particular - liberal - conception of society. To a large extent, the resolution of this issue depends upon the ultimate goal of human rights. If human rights are really surrogate liberalism, then it will be next to impossible to argue their inherent authority over competing political values. In order for human rights to enjoy universal legitimacy they must have a basis that survives charges of ideological imperialism. Human rights must have a universally acceptable basis in order for there to be any substantial measure of compliance.

The Motivation for Human Rights

Some understanding about the nature of human rights can be gleaned from the various reasons that can be advanced for holding them. A prime concern is to offer protection from tyrannical and authoritarian calculations. Capricious or repressive measures of an autocratic government may be constrained with the recognition of supreme moral limits on any government's freedom of action. But even among governments that are genuinely limited by moral considerations, there may still be a need to shield the populace from utilitarian decision-making. The greater good of the whole society may lead to sacrifice or exploitation of minority interests. Or, the provision of important benefits within the society may be limited by calculations that public resources should be spent on other enterprises.

The attraction of human rights is that they are often thought to exist beyond the determination of specific societies. Thus, they set a universal standard that can be used to judge any society. Human

rights provide an acceptable bench mark with which individuals or governments from one part of the world may criticize the norms followed by other governments or cultures. With an acceptance of human rights, Moslems, Hindus, Christians, capitalists, socialists, democracies, or tribal oligarchies may all legitimately censure each other. This criticism across religious, political, and economic divides gains its legitimacy because human rights are said to enshrine universal moral standards. Without fully universal human rights, one is left simply trying to assert that one's own way of thinking is better than somebody else's.

The prime rhetorical benefit of human rights is that they are viewed as being so basic and so fundamental to human existence that they should trump any other consideration. Just as Dworkin has argued that any conception of `rights' trumps other claims within a society, human rights may be of a higher order that supersedes even other rights claims within a society.

Other motivations for human rights may stem from a fear of the consequences of denying their existence. Because of the currency given human rights in contemporary political debate, there is a danger that such a denial will provide support for brutal regimes who defend their repression on the grounds that international human rights norms are simply a fanciful creation that has no universal authority. The United Nations conference on human rights held in Vienna in 1993 saw some of the world's most repressive governments making precisely this argument, and few people would wish to provide further justification for this position. In addition, a great deal of political advocacy relies on human rights rhetoric to provide a legitimating moral force. Without the appeal to human rights, democratic champions would have to argue the desirability of values such as equality and freedom of speech across the often incomparable circumstances of the world's societies, rather than asserting that such benefits just inherently flow from human existence.

Challenges to the Universality and Inalienability of Human Rights

Unfortunately, the very motivations and benefits of human rights pose direct challenges to their existence. Human rights are universal since they are said to belong to all humans in every society. Human rights are also supposed to be inalienable; because they flow from and protect human existence, they cannot be taken away without endangering the value of that existence. However, these universal and inalienable qualities of human rights are disputable in both their conception and operation.

To some extent, the universality of human rights depends upon their genesis. Moral standards, such as human rights, can come into being in two manners. They may simply be invented by people, or they may only need to be revealed to, or discovered by, humans. If human rights are simply an invention, then it is rather difficult to argue that every society and government should be bound by something they disagree with. If human rights have some existence independent of human creation, however, then it is easier to assert their universality. But such independent moral standards may arise in only two ways: if they are created by God, or if they are inherent in the nature of

humankind or human society. Unfortunately, both these routes pose substantive pitfalls. No divine origin for universal human rights would be acceptable, nor is it often advanced, since there is no one God that is recognized universally; just because Christians or Moslems claim that their divinity has ordained and proscribed certain treatment of humans does not provide the legitimacy needed for that moral code to bind devotees of another religion. The alternative origin that could justify universality would be the acceptance of human rights as natural rights that anyone could deduce from the nature of humankind or human society. However, an atheistic critique of divine moral standards is just as telling when applied to rights derived from human nature. The God or human nature that is said to be the source of human rights may be nothing more than an invention of the human mind, an invention that may vary according to whoever is reflecting on the issue. A less astringent argument is still just as damning. Even if one accepts that there is a God or a core human nature, there is no definitive way to sort out differing visions that people have of God or human nature. The universal authority of any particular view is initially endorsed only by the adherents of that view. Nevertheless it is possible for human rights to have their genesis in religion or the prerequisites of human society. Even if human rights start within a specific religious or societal tradition, they could acquire universality as other people come to agree. It is also possible for human rights to become globally recognized because several different approaches may reach the same cease. For instance, atheistic natural rights theorists, Christians, and Muslims, may all eventually agree for quite different reasons on a number of ways in which people should be treated; these then can form the basis of human rights standards. However, the different paths to that agreement only lead to an agreement on the benefits, not necessarily on their origin, justification, or application. The differences become important when one moves from a focus on the benefits identified as "human rights" to their practical operation; there is a great difference between a duty-based and claim-based fulfillment of the benefits.

Another set of problems arise if human rights are creations, pure and simple, of the human intellect. Human rights standards could be created in a variety of ways. In one method, a gradual growth of consensus builds around norms of behaviour that eventually acquire an obligatory character. It may be difficult to trace the epistemological origins of this consensus, but the end result is a broad base of agreement that human beings should be treated in certain ways. In another method, there may be a conscious attempt to create binding rules of behaviour in a more contractarian manner. A certain group of individuals or state governments may lead the development of international agreements on human rights. And, as more states join in these agreements, the moral and legal force of the international accords become stronger and stronger. Essentially this is the course that has been followed in the development of the human rights documents created by the United Nations and other regional international organizations.

In both these approaches to the creation of human rights, the motivation may be principled or consequentialist. If principled, human rights are necessary because they reflect certain moral standards of how humans should be treated. If consequentialist, human rights are needed because they

standards may prevent the awful repercussions of having no limits on the manner in which governments or groups may treat other human beings.

Beyond the genesis of human rights, wherever they come from, lies a fundamental challenge to their universality, regardless of their origin. With any inception of human rights, one is faced with having to acquire acceptance of their authority. There is a problem in that not everyone will share the same motivation or inspiration for human rights. Not everyone will agree that everything asserted as a human right is indeed one. At a very basic level, the proclamation and acceptance of human rights norms inherently involves majoritarian morality. Human rights are agreed to exist because a majority says they do. Specific goods and benefits are treated as human rights because a majority says they do. But, what of the minorities who object to the concept of universal human rights, or disagree with the particular entitlements to be included in lists of human rights? Why should they be bound by what others believe? What happens when a minority sincerely believe that some benefit being deliberately denied them by the majority is a matter that they view as a human right? In many specific human rights contexts, a problem of moral majoritarianism assumes central importance.

With either an invented or natural genesis, human rights are meant to protect some aspect of humanity. Human rights may be those entitlements that we have by virtue of being human, but there are real difficulties in determining which attributes of human life require protection under human rights standards.

Basic human traits are determined by both physical attributes and the activities undertaken by a human. The most obvious physical qualities encompass gender, race, size, shape, and health - including disabilities. Among human activities, one can distinguish between those necessary for sustaining life and those which fill that life. The requirements for sustaining life include nourishment, shelter, clothing, and sleep. Proper health care is needed for human life to be sustained in the long term. And the human species can only survive with procreation. But most humans do not merely exist, they fill their lives with myriad activities. Perhaps the most important activity is that which is usually referred to in order to distinguish humans from all other animals: humans have a creative imagination that provides higher forms of thought that lead to intellectual inquiry and spirituality. Humans also communicate constantly the results of their thinking. Physical movement from one place to another is another continuous activity of all but the most disabled humans. Human beings are in essence very social animals and much of our activities take place through associating with other humans. In some instances this association is the special intimacy of kinship or close friendships. In others, humans act gregariously with acquaintances and many perfect strangers.

Most humans live within readily identifiable social units, such as family, tribal, or national groups, that fundamentally shape the manner in which an individual's most basic characteristics are manifested. These social groupings determine what languages one learns to speak, the style of dress, acceptable foods, religion, form of communication and etiquette, sense of physical beauty and

ugliness, the kind of shelter, and the notion of division of roles within one's social groupings. These are not simply superficial differences. While some individuals willingly adopt new life styles, many believe that their lives can only be satisfying by maintaining their traditional ways. For some, indeed, styles of dress, food, and behaviour are inextricably linked to deep religious beliefs. One group's delicacies or even staples may be quite unacceptable to others. There may be just disdain or revulsion, such as the reaction of many people to eating raw fish, or there may be a strong, religious offence taken to certain foods, such as offering pork to Moslems or beef to Hindus.

Thus, many profound differences emerge among human beings that are the product of where they were born and with whom they grew up. While one could identify various qualities of human life that are universal, there is tremendous variation in the manner in which those qualities are realized.

These acquired societal values pose difficulties when they define, or even conflict with, the basic attributes of human life listed earlier. Individual societies develop particular conceptions of what constitutes a dignified life, the essential needs of humans, as well as the relationship between individuals and their community. Particularly complex issues arise when there is a clash between conflicting spiritual and temporal values within or between societies. These difficulties come to the forefront when one tries to ascertain whether global standards can be set by human rights on the treatment that must be given to all human beings.

The Theoretical Foundation of Human Rights

Several competing bases have been asserted for universal human rights. It is essential to understand these various foundations, since they can result in quite different understandings of the specific benefits protected by human rights. As well, each approach to human rights has different strengths and vulnerabilities in facing the challenges posed by relativism and utilitarianism.

Many have argued that human rights exist in order to protect the basic dignity of human life. Indeed, the United Nations Declaration on Human Rights embodies this goal by declaring that human rights flow from "the inherent dignity of the human person". Strong arguments have been made, especially by western liberals, that human rights must be directed to protecting and promoting human dignity. As Jack Donnelly has written, "We have human rights not to the requisites for health but to those things `needed' for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights" (original emphasis). This view is perhaps the most pervasively held, especially among human rights activists; the rhetoric of human-rights disputes most frequently invokes this notion of striving for the dignity that makes human life worth living. The idea of promoting human dignity has considerable appeal, since human life is given a distinctive weight over other animals in most societies precisely because we are capable of cultivating the quality of our lives.

Unfortunately, the promotion of dignity may well provide an unstable foundation for the construction of universal moral standards. The inherent weakness of this approach lies in trying to identify

the nature of this dignity. Donnelly unwittingly reveals this shortcoming in expanding upon the deliberate human action that creates human rights. “Human rights represent a social choice of a particular moral vision of human potentiality, which rests on a particular substantive account of the minimum requirements of a life of dignity”.

Dignity is a very elastic concept and the substance given to it is very much a moral choice, and a particular conception of dignity becomes paramount. But, who makes this choice and why should one conception prevail over other views of dignity? Even general rejection of outlandish assertions of dignity may not indicate agreement on a core substance. There might be widespread derision of my assertion that I can only lead a truly dignified life if I am surrounded by 100 doting love-slaves. But a disapproval of the lack of equality in my vision of dignity does not necessarily demonstrate that equality is a universal component of dignity. While one of the most basic liberal beliefs about human dignity is that all humans are equal, social division and hierarchy play important roles in aspects of Hindu, Confucian, Muslim, and Roman Catholic views of human life. Indeed, `dignity’ is often achieved in these views by striving to fulfill one’s particular vocation within an ordered set of roles. But, if human rights are meant to be universal standards, the inherent dignity that is supposed to be protected should be a common vision. Without sufficient commonality, dignity cannot suffice as the ultimate goal of human rights.

An alternative basis for human rights draws from the requisites for human well-being. One advocate of this approach, Allan Gewirth, would agree with Donnelly that human rights are drawn in essence from humankind’s moral nature, but Gewirth does not follow Donnelly’s cease that human rights are a moral vision of human dignity. Rather, Gewirth argues that “agency or action is the common subject of all morality and practice”. Human rights are not just a product of morality but protect the basic freedom and well-being necessary for human agency. Gewirth distinguished between three types of rights that address different levels of well-being. Basic rights safeguard one’s subsistence or basic well-being. Nonsubtractive rights maintain the capacity for fulfilling purposive agency, while additive rights provide the requisites for developing one’s capabilities - such as education. Gewirth differentiates between these rights because he accepts that humans vary tremendously in their capacity for purposive agency. Through what he calls the principle of proportionality, humans are entitled to those rights that are proportionate to their capacity for agency. Thus, individuals who are comatose only have basic rights to subsistence, since they are incapable of any purposive action.

Gewirth’s approach, however, has been strongly criticized by those who argue that human rights cannot be universal if they are derived from one’s capacity for agency. Indeed Douglas Husak has used Gewirth’s theories to argue that there can be no rights that extend to all human beings. Husak makes the crucial distinction between humans and persons, and he points out that some humans may be considered non-persons because they are incapable of ever performing any purposive agency. Even if one accepts Gewirth’s rebuttal that all humans are entitled to at least basic rights because they are either prospective or former purposive agents, there still remains in his theory the notion some will find unsettling: not all humans possess all human rights to the same degree.

Another basis for human rights has been put forward by John O'Manique that is based on evolution and human development. O'Manique was motivated by the desire to find a truly universal basis for human rights theories that are not as susceptible, as is dignity, to controversial interpretations or denial by others. Thus, human rights should be founded upon something inherent to humans rather than some moral vision that is created by human action. O'Manique argues that a satisfactory basis may lie in the following set of propositions:

P1 I ought to survive

P2 X is necessary for my survival

P3 Therefore, I ought to do/have X.

The real hurdle in this set of propositions lies in finding agreement in P1. The requisites for survival are fairly easily ascertained by scientific inquiry. Thus if there is concordance on the notion I ought to survive, then the logical construction of this model produces the cease that one ought to have X if it is necessary to survival. O'Manique is on fairly firm ground when he asserts that, "The belief that survival is good is virtually universal". He does concede that there are religious beliefs that hold that a person's life can be sacrificed, but usually this sacrifice is done to further the survival of others. So O'Manique determines, "The exceptions do not `prove' the rule, but they do point to the strong probability that the belief that survival is good is found, explicitly or implicitly, in almost all human beings". One might add that some value in human survival may be found in any society, since no culture comes to mind that has tolerated unrestricted, recreational homicide. O'Manique also draws from theories of evolution to establish that the goal of humans has to be the survival of the species. So, there would be universal agreement with the statement, "Humans ought to survive". But survival of the group, community, or human species is very different from the survival of each and every particular individual.

O'Manique develops his theory much beyond the notion of survival. Indeed, he explicitly dismisses the idea that the source of human rights lies in the needs for human subsistence. O'Manique wishes to propel human rights into a further plane, by basing human survival upon the full development of human potential. The initial proposition P1 in the model really becomes "I ought to develop". As O'Manique says, "Human aspirations are not to the maintenance of existence but to the fulfilment of life... If we believe that one ought to survive, it is because we believe that one ought to develop". In O'Manique's vision, human rights would include rights to things needed for subsistence but also go on to cover all aspects of intellectual and emotional development. He tries to limit in some way the range by insisting that the needs for development can be ascertained through research. However, he also reveals the broad sweep of matters that could be included when he addresses this issue: "The existence of such needs for human development - the need for association with other human beings, for self expression, for some control over one's destiny, and even the need for love and for beauty - can be observed and even empirically confirmed within the social sciences and

psychology". O'Manique may well lose some support with this incredibly vast range of issues that he would include within the human rights rubric.

A fundamental difficulty with using the fulfillment of human development as a basis for human rights is that it can have a meaning that is relative to each culture and individual. This relativism even creeps into O'Manique's discussion when he concludes, "A community and its members will develop to the extent that the members of the community support the development needs of others in the community, in ways that are appropriate to that community" (emphasis added). Just what is needed for fulfillment in expression, love, or autonomy will be given profoundly different interpretations in Bedouin, German, or Japanese societies. O'Manique tries to address this aspect of his theory by conceding that the specific entitlements necessary to human development may vary over space and time, but the general grounds for those claims will remain constant.

The final alternative basis for human rights would provide the needs for human existence. Human rights may be limited to providing all humans with the needs for their physical subsistence. But, this subsistence would involve a certain degree of minimal comfort beyond merely keeping one's organs working, because human subsistence also consists of being able to function. Advocates of the other approaches to human rights have dismissed needs to subsistence as too narrow a foundation, but this criticism may not account for the ramifications that flow from the range of human needs. Human rights would guarantee the provision of the food, clothing, and shelter without which anyone would perish. In addition, basic health care assures human survival; my grandmother died in 1924 from appendicitis, while I am alive today because an operation was available for my own attack of appendicitis in 1968. Since most households are not simply provided with the requisites to life but buy them with the wages of their labour, one can easily extend the range of human rights into other benefits relating to the work force. This extension is particularly true if the satisfaction of needs is accomplished not by directly supplying the specific goods needed, but in providing the capacity for individuals to provide for themselves. In a broad socialist view, work should be guaranteed to all that are capable. In a more restricted view, the education necessary to obtaining the work needed to sustain oneself is a human right. Thus, human rights can cover a large, and very expensive, array of social-welfare programs. Quite a fundamental reformation of most political systems would occur if governments seriously addressed welfare programs as essential human rights.

There are some distinct advantages in basing human rights on the needs of subsistence. The prime benefit lies in a universality possible with this foundation that eludes the other approaches to human rights. One might possibly find a similar consensus on the propositions "Humans should survive", "Humans should develop", "Humans should lead a life of dignity (or well being)". However, there will be much less disagreement over what is meant by, or needed for, `survival' than one will find for `dignity', `well-being', or `development'. Human rights based on subsistence can be much more readily applied as global standards.

Nevertheless, there is still some concern with variations that will result from different societies' views of the specific ways in which needs should be satisfied. As noted earlier, different cultures have quite diverse notions of what food, dress, or shelter are acceptable. There are even profound differences in approaches to health care, with some societies rejecting `western' medicine in favour of spiritually-based theories of ailments and therapies.

There is also a concern that it is just not practical to translate the proposition that humans in general should survive into concrete action to ensure that each and every human being survives. There is a point at which no society can afford to devote the resources needed to keep every individual alive as long as possible.

These four approaches to human rights reflect quite different inspirations and ultimate goals, but there is common ground among them. Theories of human rights based on dignity, well-being, or development all are motivated by a desire to protect and cultivate some quality of life; because one is alive, one should lead a life filled with dignity, well-being, or continuing development. A view of human rights based on subsistence is ultimately concerned with simply preserving life itself. But this distinction should not ignore an overlap, as a common ground among all theories of human rights is the assumption that human rights include subsistence rights. Approaches based on dignity, well-being, and development add protections for these qualities of life onto the right to existence, although subsistence rights often seem to be forgotten.

However, the recognition of these common aspects of the four theories of human rights should not lead one to conclude that their differences are simply ones of emphasis. The distinctive focus of each theory results in significant variations in their lists of specific human rights or the kind of activities humans may indulge in. Human rights based on subsistence would not include the range of democratic rights that most liberals argue are an essential element of human rights based on dignity. Some liberals would argue that a life without dignity may not be a life worth living; so disenfranchised, repressed people - such as Iraqi Kurds - may be justified in an armed rebellion involving deaths but which ultimately brought liberty to the whole population. However, a human rights approach based on subsistence may require on a non-violent strategy for political change since the preservation of life is the ultimate goal.

In the end, the choice of foundation for human rights may depend upon what one wishes to protect. One may be alarmed that democratic rights or equality may not be included in a human rights approach based on subsistence, in which case a theory based on liberal dignity would be adopted. But consequentialist motivations will not serve as a firm basis upon which to promote human rights among those who do not share one's concerns.

These discussions emphasize that the foundation for human rights may be neither self-evident nor universally accepted. One chooses, explicitly or implicitly a particular justification or basis for human rights, and that choice will have important consequences upon the range of benefits that fall

within human rights. Choice pervades human rights from their conception to their delivery, and those choices may well undermine the very foundation of human rights' moral authority.

Who Holds Human Rights

Even if there were agreement upon a foundation for human rights, there remains another fundamental question: who can possess human rights? One may simply assert that all humans hold all human rights; after all, human rights are said to be those benefits to which we are entitled simply by being human. But what is meant by being `human' is vague since the life cycle of homo sapiens ranges from conception to death and decay. There is profound controversy over how and when a human acquires and then loses human rights between those two periods. Even before conception, sperm and eggs exist that contain human genetic material. One may decide easily that these are human cells but not `human beings', because they contain incomplete sets of human genes. After conception, however, controversies arise about the status of the developing foetus. From a mass of undifferentiated cells, the embryo quickly grows into a recognizably human entity. Many distinguish foetuses from babies that have emerged from their mothers and say that separate human life only begins with `birth'. This can be an arbitrary distinction since a very premature baby is at much the same stage of development whether inside or outside the womb; the differences centre on how a baby receives nutrition and oxygen. One can specify an arbitrary point for the acquisition of rights, such as conception, neural development, viability, or emergence from the womb. But this approach is bound to erupt in controversy, because not everyone will agree on a given point. Abortion is such a divisive issue precisely because various groups hold different beliefs about when human life starts.

Alternatively, one can argue that there is some special quality of human life that provides a basis for possessing rights; when that quality is acquired, so are rights. This approach is favoured by many, since it allows for the distinction between humans and other animals. Human rights are rights particular to human beings, thus the basis of the claim to rights should be something that differentiates humans from other animals. With a sharing of an enormous proportion of genetic material between humans and primates, the distinction is usually drawn on the basis of some quality of human life not shared by other animals rather than physiological characteristics. Specifically human qualities are usually identified from our capacity for intellectual, moral, or spiritual development.

The difficulty with trying to assign rights on the basis of some quality of human life is that not all human beings may possess such an attribute. Douglas Husak has written a poignant critique of the notion of human rights based on his objection that some human beings merely exist. Some mentally-ill patients lack any basis for purposive agency; they are seemingly unaware of their surroundings, incapable of rationale thought, or unable to distinguish right from wrong. But, his most telling arguments arise from comatose patients, notably those with no known chance for recovery. Husak distinguishes between humans and persons, and he points out that some humans, such as the comatose, are non-persons. Persons are human beings with capacities beyond mere existence that

produce a quality of life. Non-persons simply lack the qualities of life that one wishes either to protect or use as the key to acquiring rights. The distinction between humans and persons is often used to justify aborting foetuses, because the human foetus is not considered by many to be a person. In the end, Husak argues that the phenomena called human rights are really rights of persons: "There are no human rights".

This debate over the qualification of a human creature to possess human rights is fundamental to a number of topics. The rights of children and the mentally ill may depend greatly upon what foundation one adopts for the possession of rights. Similarly, the existence of rights to life in abortion, infanticide, and euthanasia are directly related to what status one accords to undeveloped foetuses, mutant newborns, or terminally-comatose adults.

If human rights are justified on some characteristics of the human species, can those rights be held by individual humans who lack these species traits? Some answer this question by distinguishing between possessing rights and exercising them. Thus a healthy child may possess the full range of human rights, but be unable to exercise them, particularly rights of an intellectual nature. Others may find this distinction too convenient an answer and contest the very existence of rights that cannot by exercised by their holders.

Another controversy over the possession of human rights relates to whether they are benefits intended for individual humans, or whether they can also be collective benefits for groups of humans. Some, such as Donnelly, argue that human rights are properly held by only individuals. Others contend that human lives are lived within group settings and the full enjoyment of human life can only be realized when those groups are able to flourish. Whether human rights can include collective rights is a particularly crucial issue in analyzing whether the human rights regime protects a group's culture and language, or a group's right to self-determination.

What are the `Rights' in Human Rights

The nature of human rights is complicated even beyond the controversy over their source or who may hold them. A critical debate continues over what is meant by human rights. The universality and inalienability of a human right depends to a large extent on the character of the `right' involved.

It is necessary first of all to distinguish between the adjectival use of the word `right', which means good or proper, from the substantive `a right', which is a special, possessable benefit. Not everything which is right (good) is a right, although many people mistakenly inflate the concept of a right by asserting benefits they believe are `right' to be `rights'. This confusion has become evident in the assertion of what are known as `second-generation human rights' - such as the right to economic development and prosperity - and `third generation human rights' - which cover the rights to world peace and a clean environment. While some human rights advocates accept the inclusion of these benefits as rights, others argue that prosperity and peace are `right' but not substantive rights.

Even with the substantive term `a right', however, there are several different meanings. In 1919, Wesley Hohfeld laid down a useful set of four distinctive connotations that can be given to the phrase "A has a right to X". Perhaps the most common meaning given to this phrase conveys the notion of a claim-right. It is a claim that A has against a correlative duty of another, B; A has a right to X, and B has a duty to let A have or do X. The duty B has may be positive, in the sense that action is required on B's part to allow A to enjoy X; if A has a right to health care, B has a duty to provide it. There may also be a negative duty, in the sense of B having to refrain from interfering in A's possession of benefit X; if A has a right to privacy, B must refrain from prying in A's affairs. It is important to note that the duty may be owed by a particular person or official, or the duty may generally lie in the whole community. The essential characteristic of a claim-right is the inherent connection between A's claim to a benefit and B's duty - A can make a claim that B must perform the duty.

However, there are other connotations of the phrase `A has a right to X' that do not involve a corresponding duty on another's part. The term may mean that A has a liberty with respect to X. In this view, A has no obligation not to do or have X, which may be different from the status of other people. Also, A can make no claim against another, because no-one else as a duty with respect to A's enjoyment of X. A liberty may be enjoyed by all, such as the right to wear what one pleases while doing household chores. A subset of liberty is privilege, because A may have no duty not to do X but others do. For instance, in some English colleges the dons have a right to walk across the grass in the quadrangle, although others must use the pathways instead. In any liberty there is no duty on anyone to provide the X involved; i.e., no-one has a duty to provide the lawns simply for the dons to walk upon.

To say that `A has a right to X' may also indicate that A has a power to effect changes in X. Thus an owner of a bicycle has the right to sell it, and a customs officer has the right to confiscate property or detain people at the border.

Hohfeld's fourth interpretation of `A has a right to X' conveys the notion that A has an immunity that B is unable to change. Thus, MP's have a right to free speech that protects them from prosecution for speeches given in the House of Commons, and it is a right which cannot be changed by the executive, police, or courts.

There are other uses of `having a right' that should be added to those identified by Hohfeld, because these other uses refer to ideals, needs, or wants that are simply expressed as rights. The confusion between adjectival and substantive right has led to the frequent use of rights to describe ideals. Thus, the rights to prosperity and peace are ideals or goals to strive for that some express as rights. Another confusion arises when people assert a right to a benefit because it fills a need. But, not all needs are rights; I may need a car to drive to work in, but few would agree that I have a right to a car. Finally, many confuse benefits they want with benefits they have a right to; free, post-secondary education and complete bursaries may be desirable, but are not viewed as rights by many.

These uses of rights also involve a confusion between making a claim and having a right. One does not hold a right simply because one claims so, neither is it necessary to make claims in order to possess rights. It is not the act of claiming that creates rights. Thus, the claim to a right to prosperity or world peace does not establish that those benefits exist as rights. Neither does the fact that someone satisfies another's claim confirm a right's existence; a beggar may claim a right to $5 from a businessman, who may give the money, but that does not establish the beggar's right to it.

It is important also to note that one may benefit from another's duty, without having a right to that benefit. Christians may believe that they have a duty to give money to charity, but that does not mean that charities have a right to Christians' money.

These different notions of `right' are important to bear in mind when discussing human rights. The most common interpretation given to the `right' in human rights is that of claim-rights. There is a defined benefit to which individuals are entitled, and there is a correlative duty on others in relation to that benefit. This tendency may be partly due to the increasing codification of human rights into legal documents. It is far more efficacious if human rights are conceived of as claim-rights, because those who are deprived of their rights may argue that others (usually their government) must be compelled to fulfill a duty to provide the benefit. Since much human rights activism centres on the respect for rights contained in international agreements, it is natural for attention to centre on governments as duty-holders since they are the entities directly bound by the human rights documents.

If human rights are claim-rights with a correlative duty on some body to provide or safeguard the benefit, however, a major problem arises in identifying that duty-holder. Most often it is assumed that if an individual is being denied some human right, the duty falls on their government to rectify the situation.

A serious difficulty emerges if the correlative duty lies only with an individual's government, however, because the abuse of human rights may occur by private individuals or corporations. For example, tremendous injustices result from the caste system in India because of the way people treat others who belong to a lower caste. In this instance, the actual infringement of human rights is largely perpetrated by individuals rather than the government. While the government has accepted a responsibility to try and end the practise, caste is so deeply entrenched in Indian society that it has so far proved impossible to stamp out.

A further complication arises when a government either is incapable of providing a benefit protected by human rights - such as the Ethiopian government's inability to provide food during the worst of the famines - or when a government simply fails to respect human rights. If an individual's government is the central duty-holder, then the rest of the world can shake their heads saying 'tut-tut' without feeling any sense of duty to intervene. Other governments may feel bound to act, but that feeling of obligation may simply come from their own sense of altruism rather than a belief that human rights bind all governments to help if the government most directly responsible fails to

fulfill its duties. Another scenario may arise when government leaders believe that a duty to help lies directly with its citizens rather than the government. Former Premier Van der Zalm of British Columbia argued in the 1980s that it was not his government's responsibility to provide resources to food banks that were struggling with soaring numbers of impoverished individuals. His view was that such acts of charity are best left to private individuals. One could develop this notion by asserting that every individual owes a duty to help others in their community, and that the government would be eroding this private duty if it intervened; indeed a government should not support food banks, in order to foster a relief effort by the members of the community. Another difficulty arises in those parts of the world where the state structure has dissolved into anarchy, such as occurred in Somalia and Lebanon; where there are no governments, are there no duty-holders? There is also a strong feminist critique of the idea that governments are the sole duty holders; Gayle Binion argues that non-government actors may be absolved of responsibility or left unimpeded in their ill-treatment of women.

Complex problems arise because there are many possible duty-holders. If human rights set moral standards for the treatment of all humans, those standards should bind anyone who is capable of infringing those rights - be they corporations, governments, or other human beings. Thus, the correlative duties involved in human rights as claim-rights are duties that do not necessarily reside solely with an individual's government. The violation of some human right may be perpetrated by one individual against others, such as an employer who discriminates against a racial group in hiring. Or, a duty to respect human rights may be held by a group within society, such as a religious majority's obligation to tolerate other religious practices. There may be a general duty on the community to act collectively, as with the example of community efforts to run food banks. An individual's own government often has a direct duty, for example, to refrain from arbitrary detention and torture. On some occasions, many will argue that foreign governments have a duty to intervene; for instance, the Front Line States in southern Africa believed they had some duty to help liberate the black majority from apartheid in South Africa. Finally, there may be a duty that lies with all humanity; such an obligation is often expressed in private, international relief movements to alleviate suffering among famine victims. Governments may only be intermediary duty-holders who should try and intervene to safeguard human rights from actions by their citizens, but those citizens bear the direct duty to respect the human rights of others.

With any form of rights, but particularly with claim-rights, there are problems that arise with their definition, exercise, and enforcement. There may be conflicting views even on the existence of a particular right. For example, some islamic governments have denied that there can be freedom of religion because the Koran proclaims that one of the greatest sins for a muslim is to forsake Islam for another religion. Even if there is agreement in principle on the existence of a particular right, there may be conflicts over what activities or goods are specifically protected by that right. In Canada, for instance, judges have been divided over whether the freedom of expression includes communications between prostitutes and their clients. There can also be profound debate when two or more rights conflict in a given situation. A continuing problem is

posed for women's rights by several religions that stipulate particular roles for women that are subservient to men; in these instances the right to equality conflicts with the freedom of religion. Another difficulty may arise over whether a benefit is really a claim-right, with correlative duties, or some other type of right or claim without corresponding obligations. For instance, academic freedom may be viewed as either a privilege or a claim-right. If a claim-right is involved, there may still be many questions about who in particular holds a correlative duty, and what type of action is required to satisfy that duty. For example, if there is a right to health care, must it be provided by the government or charities; and, must the health care be provided free of charge?

A central dilemma revolves around how to settle these questions of enforcement. If human rights operate uniquely in a moral plane, then the definition, acceptance, and respect for rights can involve a controversial, tortuous route. In the end, fulfillment of human rights will depend upon a spirit of consensus and the effect of community opprobrium. Disputes that involve profoundly different value systems, however, may go unresolved. With the codification of human rights into legal documents, one may limit some of the range of debate, but only with institutional structures for adjudicating can there be authoritative resolutions. Controversial interpretations of human rights are not eliminated with the creation of agencies to enforce human rights. The record of national courts reveal that judges within the same society can be deeply divided over the definition and enforcement of human rights; for example, almost 31 percent of the Supreme Court of Canada's Charter of Rights decisions between 1983 and 1989 involved dissenting opinions, where one or more judges disagreed completely with their colleagues on the resolution of the rights issues at stake. Within many societies there are patterns of deference to the judiciary that allows their court's majority view to settle authoritatively most disputes over human rights. However, some societies are so divided that deference is not voluntarily given, such as enforced black acquiescence to the white judiciary in South Africa during the apartheid regime, and the discretionary choices made by judges will not be accepted as final resolutions of rights disputes. There is an even deeper problem if international institutions are to adjudicate rights disputes that involve societies with very different cultural norms; losing parties may simply not recognize the adjudicators' authority to impose what are seen as alien values. In these circumstances, codified human rights will end up operating on much the same plane as purely moral standards.

Human Rights Treaties

International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any particular treaty (States Parties). Human rights treaties impose obligations on states about the manner in which they treat all individuals within their jurisdiction, whether or not citizens of that country. In order to stress the fundamental nature of the obligations that states have towards individuals, some human rights treaties are called 'covenants' or 'pacts' whilst others are called 'conventions'.

Human rights treaties have been adopted by states worldwide and represent a global consensus about how individuals should be treated in accordance with their inherent rights and dignity. One treaty, the Convention on the Rights of the Child, has been signed by every state except two, Somalia and the United States of America.

These treaties are 'hard law' and are legally binding. This distinguishes them from other international instruments, such as 'declarations' and the outcomes of political conferences, which are sometimes referred to as 'soft law'. Although these latter are not legally binding they reflect international consensus and represent politically binding agreements and/or obligations.

Declarations often provide the consensual basis for the latter development of binding legal instruments. The Universal Declaration of Human Rights, for example, has been given legal force in two covenants: The International Covenant on Economic, Social and Cultural Rights (ICESCR) and The International Covenant on Civil and Political Rights (ICCPR), both of which were adopted in 1966 and came into force in 1976. These are two of six core human rights treaties, which between them provide the bedrock of the international legal protection of human rights. In this way, the subject of human rights is both concrete – confirmed in international law – and dynamic – able to develop in accordance with recognition of the need.

The six core human rights treaties:

- The International Covenant on Civil and Political Rights, adopted in 1966 and which entered into force 23 March 1976
- The International Covenant on Economic, Social and Cultural Rights, adopted in 1966, entered into force 3 January 1976
- The International Convention on the Elimination of All Forms of Racial Discrimination, adopted in 1965, entered into force 4 January 4 1969
- The Convention on the Elimination of All Forms of Discrimination Against Women, adopted in 1979, entered into force 3 September 1981
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984, entered into force 26 June 1987
- The Convention on the Rights of the Child, adopted in 1989, entered into force 2 September 1990

The United Nations has played a critical role in adopting global human rights instruments and many others that deal with specific human rights issues or the rights of particular groups of people. Other international bodies, such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations International Children's Emergency Fund (UNICEF) and the International Labour Organisation (ILO) have also adopted human rights

instruments. For example, the Member States of the ILO have adopted a series of treaties concerned with labour rights.

Regional groupings have also adopted human rights texts. The European Union, the African Union, the Organisation of American States and the League of Arab States have all adopted human rights treaties open to signature by their respective member states. In addition, many States Parties to these international and regional instruments have fulfilled their legal obligation to incorporate the rights enshrined within those instruments into national law, adopting national human rights laws or 'bills of rights' and mechanisms providing access to legal redress at the national or local level.

Chapter 2

History of Human Rights

The history of human rights involves religious, cultural, philosophical and legal developments throughout recorded history. While the modern human rights movement hugely expanded in post-World War II era, the concept can be traced through all major religions, cultures and philosophies. Ancient Hindu law, Confucianism, the Qur'an and the Ten Commandments all outline some of the rights now included in the Universal Declaration of Human Rights.

The concept of natural law, guaranteeing natural rights despite varying human laws and customs, can be traced back to Ancient Greek philosophers, while Enlightenment philosophers suggest a social contract between the rulers and the ruled. The world's first Buddhist state in India, known as the Maurya Empire, established the world's first welfare system, including free hospitals and education. The African concept of ubuntu is a cultural view of what it is to be human. Modern human rights thinking is descended from these many traditions of human values and beliefs.

Early history of human rights.

Human Rights in the Ancient World

While it is known that the reforms of Urukagina of Lagash, the earliest known legal code, must have addressed the concept of rights to some degree, the actual text of his decrees has not yet been found. The oldest legal codex extant today is the Neo-Sumerian Code of Ur-Nammu. Several other sets of laws were also issued in Mesopotamia, including the Code of Hammurabi one of the most famous examples of this type of document. It shows rules, and punishments if those rules are broken, on a variety of matters, including women's rights, men's rights, children's rights and slave rights.

The prefaces of these codes invoked the Mesopotamian gods for divine sanction. Societies have often derived the origins of human rights in religious documents. The Vedas, the Bible, the Qur'an and the Analects of Confucius are also among the early written sources that address questions of people's duties, rights, and responsibilities.

Maurya Empire

The Maurya Empire of ancient India established unprecedented principles of civil rights in the 3rd century BC under Ashoka the Great. After his brutal conquest of Kalinga in circa 265 BC, he felt remorse for what he had done, and as a result, adopted Buddhism. From then, Ashoka, who had been described as "the cruel Ashoka" eventually came to be known as "the pious Ashoka". During his

reign, he pursued an official policy of nonviolence and the protection of human rights, as his chief concern was the happiness of his subjects. The unnecessary slaughter or mutilation of animals was immediately abolished, such as sport hunting and branding. The first welfare state was established. Ashoka also showed mercy to those imprisoned, allowing them outside one day each year, and offered common citizens free education at universities. He treated his subjects as equals regardless of their religion, politics or caste, and constructed free hospitals for both humans and animals. Ashoka defined the main principles of nonviolence, tolerance of all sects and opinions, obedience to parents, respect for teachers and priests, being liberal towards friends, humane treatment of servants, and generosity towards all. These reforms are described in the Edicts of Ashoka.

In the Maurya Empire, citizens of all religions and ethnic groups also had rights to freedom, tolerance, and equality. The need for tolerance on an egalitarian basis can be found in the Edicts of Ashoka, which emphasize the importance of tolerance in public policy by the government. The slaughter or capture of prisoners of war was also condemned by Ashoka. Some sources claim that slavery was also non-existent in ancient India. Other state, however, that slavery existed in ancient India, where it is recorded in the Sanskrit Laws of Manu of the 1st century BC.

Early Islamic Caliphate

Many reforms in human rights took place under Islam between 610 and 661, including the period of Muhammad's mission and the rule of the four immediate successors who established the Rashidun Caliphate. Historians generally agree that Muhammad preached against what he saw as the social evils of his day, and that Islamic social reforms in areas such as social security, family structure, slavery, and the rights of women and ethnic minorities improved on what was present in existing Arab society at the time. For example, according to Bernard Lewis, Islam "from the first denounced aristocratic privilege, rejected hierarchy, and adopted a formula of the career open to the talents." John Esposito sees Muhammad as a reformer who condemned practices of the pagan Arabs such as female infanticide, exploitation of the poor, usury, murder, false contracts, and theft. Bernard Lewis believes that the egalitarian nature of Islam "represented a very considerable advance on the practice of both the Greco-Roman and the ancient Persian world." Muhammed also incorporated Arabic and Mosaic laws and customs of the time into his divine revelations.

The Constitution of Medina, also known as the Charter of Medina, was drafted by Muhammad in 622. It constituted a formal agreement between Muhammad and all of the significant tribes and families of Yathrib, including Muslims, Jews, and pagans. The document was drawn up with the explicit concern of bringing to an end the bitter inter tribal fighting between the clans of the Aws and Khazraj within Medina. To this effect it instituted a number of rights and responsibilities for the Muslim, Jewish and pagan communities of Medina bringing them within the fold of one community-the Ummah. The Constitution established the security of the community, freedom of religion, the role of Medina as a haram or sacred place, the security of women, stable tribal relations within Medina, a tax system for supporting the community in time of conflict, parameters for exogenous

political alliances, a system for granting protection of individuals, a judicial system for resolving disputes, and also regulated the paying of blood-wite.

Muhammad made it the responsibility of the Islamic government to provide food and clothing, on a reasonable basis, to captives, regardless of their religion. If the prisoners were in the custody of a person, then the responsibility was on the individual. Lewis states that Islam brought two major changes to ancient slavery which were to have far-reaching consequences. “One of these was the presumption of freedom; the other, the ban on the enslavement of free persons except in strictly defined circumstances,” Lewis continues. The position of the Arabian slave was “enormously improved”: the Arabian slave “was now no longer merely a chattel but was also a human being with a certain religious and hence a social status and with certain quasi-legal rights.”

Esposito states that reforms in women’s rights affected marriage, divorce, and inheritance. Women were not accorded with such legal status in other cultures, including the West, until centuries later. The Oxford Dictionary of Islam states that the general improvement of the status of Arab women included prohibition of female infanticide and recognizing women’s full personhood. “The dowry, previously regarded as a bride-price paid to the father, became a nuptial gift retained by the wife as part of her personal property.” Under Islamic law, marriage was no longer viewed as a “status” but rather as a “contract”, in which the woman’s consent was imperative. “Women were given inheritance rights in a patriarchal society that had previously restricted inheritance to male relatives.” Annemarie Schimmel states that “compared to the pre-Islamic position of women, Islamic legislation meant an enormous progress; the woman has the right, at least according to the letter of the law, to administer the wealth she has brought into the family or has earned by her own work.” William Montgomery Watt states that Muhammad, in the historical context of his time, can be seen as a figure who testified on behalf of women’s rights and improved things considerably. Watt explains: “At the time Islam began, the conditions of women were terrible - they had no right to own property, were supposed to be the property of the man, and if the man died everything went to his sons.” Muhammad, however, by “instituting rights of property ownership, inheritance, education and divorce, gave women certain basic safeguards.” Haddad and Esposito state that “Muhammad granted women rights and privileges in the sphere of family life, marriage, education, and economic endeavors, rights that help improve women’s status in society.” However, other writers have argued that women before Islam were more liberated drawing most often on the first marriage of Muhammad and that of Muhammad’s parents, but also on other points such as worship of female idols at Mecca.

Sociologist Robert Bellah argues that Islam in its seventh-century origins was, for its time and place, “remarkably modern...in the high degree of commitment, involvement, and participation expected from the rank-and-file members of the community.” This is because, he argues, that Islam emphasized the equality of all Muslims, where leadership positions were open to all. Dale Eickelman writes that Bellah suggests “the early Islamic community placed a particular value on individuals, as opposed to collective or group responsibility.”

Magna Carta

Magna Carta is an English charter originally issued in 1215. Magna Carta was the most significant early influence on the extensive historical process that led to the rule of constitutional law today. Magna Carta influenced the development of the common law and many constitutional documents, such as the United States Constitution and Bill of Rights.

Magna Carta was originally written because of disagreements amongst Pope Innocent III, King John and the English barons about the rights of the King. Magna Carta required the King to renounce certain rights, respect certain legal procedures and accept that his will could be bound by the law. It explicitly protected certain rights of the King's subjects, whether free or fettered — most notably the writ of habeas corpus, allowing appeal against unlawful imprisonment.

For modern times, the most enduring legacy of Magna Carta is considered the right of habeas corpus. This right arises from what are now known as clauses 36, 38, 39, and 40 of the 1215 Magna Carta. The Magna Carta also included the right to due process:

"No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. As suggested, sell to no man, as suggested, not deny or defer to any man either Justice or Right."

Modern Human Rights Movement

The conquest of the Americas in the 16th century by the Spanish resulted in vigorous debate about human rights in Spain. The debate from 1550-51 between Las Casas and Juan Ginés de Sepúlveda at Valladolid was probably the first on the topic of human rights in European history. Several 17th and 18th century European philosophers, most notably John Locke, developed the concept of natural rights, the notion that people are naturally free and equal. Though Locke believed natural rights were derived from divinity since humans were creations of God, his ideas were important in the development of the modern notion of rights. Lockean natural rights did not rely on citizenship nor any law of the state, nor were they necessarily limited to one particular ethnic, cultural or religious group.

Two major revolutions occurred that century in the United States and in France. The Virginia Declaration of Rights of 1776 sets up a number of fundamental rights and freedoms. The later United States Declaration of Independence includes concepts of natural rights and famously states "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." Similarly, the French Declaration of the Rights of Man and Citizen defines a set of individual and collective rights of the people. These are, in the document, held to be universal - not only to French citizens but to all men without exception.

1800AD to World War I

Philosophers such as Thomas Paine, John Stuart Mill and Hegel expanded on the theme of universality during the 18th and 19th centuries. In 1831 William Lloyd Garrison wrote in a newspaper called The Liberator that he was trying to enlist his readers in "the great cause of human rights" so the term human rights probably came into use sometime between Paine's The Rights of Man and Garrison's publication. In 1849 a contemporary, Henry David Thoreau, wrote about human rights in his treatise On the Duty of Civil Disobedience which was later influential on human rights and civil rights thinkers. United States Supreme Court Justice David Davis, in his 1867 opinion for Ex Parte Milligan, wrote "By the protection of the law, human rights are secured; withdraw that protection and they are at the mercy of wicked rulers or the clamor of an excited people."

Many groups and movements have managed to achieve profound social changes over the course of the 20th century in the name of human rights. In Western Europe and North America, labour unions brought about laws granting workers the right to strike, establishing minimum work conditions and forbidding or regulating child labour. The women's rights movement succeeded in gaining for many women the right to vote. National liberation movements in many countries succeeded in driving out colonial powers. One of the most influential was Mahatma Gandhi's movement to free his native India from British rule. Movements by long-oppressed racial and religious minorities succeeded in many parts of the world, among them the civil rights movement, and more recent diverse identity politics movements, on behalf of women and minorities in the United States.

The foundation of the International Committee of the Red Cross, the 1864 Lieber Code and the first of the Geneva Conventions in 1864 laid the foundations of International humanitarian law, to be further developed following the two World Wars.

Between World War I and World War II

The League of Nations was established in 1919 at the negotiations over the Treaty of Versailles following the end of World War I. The League's goals included disarmament, preventing war through collective security, settling disputes between countries through negotiation, diplomacy and improving global welfare. Enshrined in its Charter was a mandate to promote many of the rights which were later included in the Universal Declaration of Human Rights.

The League of Nations had mandates to support many of the former colonies of the Western European colonial powers during their transition from colony to independent state.

Established as an agency of the League of Nations, and now part of United Nations, the International Labour Organization also had a mandate to promote and safeguard certain of the rights later included in the UDHR:

> "the primary goal of the ILO today is to promote opportunities for women and men to

obtain decent and productive work, in conditions of freedom, equity, security and human dignity".

After World War II

Rights in War and the Geneva Conventions

The Geneva Conventions came into being between 1864 and 1949 as a result of efforts by Henry Dunant, the founder of the International Committee of the Red Cross. The conventions safeguard the human rights of individuals involved in conflict, and follow on from the 1899 and 1907 Hague Conventions, the international community's first attempt to define laws of war. Despite first being framed before World War II, the conventions were revised as a result of World War II and readopted by the international community in 1949.

The Geneva Conventions are:

- First Geneva Convention "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field".
- Second Geneva Convention "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea".
- Third Geneva Convention "relative to the Treatment of Prisoners of War".
- Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War"

In addition, there are three additional amendment protocols to the Geneva Convention:

- Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.
- Protocol II: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As of 12 January 2007 it had been ratified by 163 countries.
- Protocol III: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As of May 20, 2008, it had been ratified by 28 countries and signed but not yet ratified by an additional 59 countries.

All four conventions were last revised and ratified in 1949, based on previous revisions and partly on some of the 1907 Hague Conventions. Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars. Nearly all 200 countries of the world are "signatory" nations, in that they have ratified these conventions. The International Committee of the Red Cross is the controlling body of the Geneva conventions.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights is a non-binding declaration adopted by the United Nations General Assembly in 1948, partly in response to the barbarism of World War II. The UDHR urges member nations to promote a number of human, civil, economic and social rights, asserting these rights are part of the "foundation of freedom, justice and peace in the world". The declaration was the first international legal effort to limit the behavior of states and press upon them duties to their citizens following the model of the rights-duty duality.

> "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

The UDHR was framed by members of the Human Rights Commission, with Eleanor Roosevelt as Chair, who began to discuss an International Bill of Rights in 1947. The members of the Commission did not immediately agree on the form of such a bill of rights, and whether, or how, it should be enforced. The Commission proceeded to frame the UDHR and accompanying treaties, but the UDHR quickly became the priority. Canadian law John Humphrey and French lawyer Rene Cassin were responsible for much of the cross-national research and the structure of the document respectively, where the articles of the declaration were interpretative of the general principle of the preamble. The document was structured by Cassin to include the basic principles of dignity, liberty, equality and brotherhood in the first two articles, followed successively by rights pertaining to individuals; rights of individuals in relation to each other and to groups; spiritual, public and political rights; and economic, social and cultural rights. The final three articles place, according to Cassin, rights in the context of limits, duties and the social and political order in which they are to be realized.. Humphrey and Cassin intended the rights in the UDHR to be legally enforceable through some means, as is reflected in the third clause of the preamble:

"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

Some of the UDHR was researched and written by a committee of international experts on human rights, including representatives from all continents and all major religions, and drawing on consultation with leaders such as Mahatma Gandhi.The inclusion of both civil and political rights and economic, social and cultural rights was predicated on the assumption that basic human rights are indivisible and that the different types of rights listed are inextricably linked. Though this principle was not opposed by any member states at the time of adoption, this principle was later subject to significant challenges.

Bill of Rights 1689

The Bill of Rights is an act of the Parliament of England, whose title is An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown. It is often called the English Bill of Rights.

The Bill of Rights was passed by Parliament in December 1689. It was a re-statement in statutory form of the Declaration of Right presented by the Convention Parliament to William and Mary in March 1689, inviting them to become joint sovereigns of England. It enumerates certain rights to which subjects and permanent residents of a constitutional monarchy were thought to be entitled in the late 17th century, asserting subjects' right to petition the monarch, as well as to have arms in defence. It also sets out—or, in the view of its drafters, restates—certain constitutional requirements of the Crown to seek the consent of the people, as represented in parliament.

Along with the 1701 Act of Settlement the Bill of Rights is still in effect, one of the main constitutional laws governing the succession to the throne of the United Kingdom and—following British colonialism, the resultant doctrine of reception, and independence—to the thrones of those other Commonwealth realms, by willing deference to the act as a British statute or as a patriated part of the particular realm's constitution. Since the implementation of the Statute of Westminster in each of the Commonwealth realms the Bill of Rights cannot be altered in any realm except by that realm's own parliament, and then, by convention, and as it touches on the succession to the shared throne, only with the consent of all the other realms.

In the United Kingdom, the Bill of Rights is further accompanied by the Magna Carta, Habeas Corpus Act 1679 and Parliament Acts 1911 and 1949 as some of the basic documents of the uncodified British constitution. A separate but similar document, the Claim of Right Act, applies in Scotland. The English Bill of Rights 1689 inspired in large part the United States Bill of Rights.

Provisions of the Act

The Bill of Rights laid out certain basic rights for all Englishmen. These rights continue to apply today, not only in England, but in each of the jurisdictions of the Commonwealth realms as well. The people, embodied in the parliament, are granted immutable civil and political rights through the act, including:

- Freedom from royal interference with the law. Though the sovereign remains the fount of justice, he or she cannot unilaterally establish new courts or act as a judge.
- Freedom from taxation by Royal Prerogative. The agreement of parliament became necessary for the implementation of any new taxes.
- Freedom to petition the monarch.

- Freedom from the standing army during a time of peace. The agreement of parliament became necessary before the army could be moved against the populace when not at war.
- Freedom for Protestants to have arms for their own defence, as suitable to their class and as allowed by law.
- Freedom to elect members of parliament without interference from the sovereign.
- Freedom of speech and debates; or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Certain acts of James II were also specifically named and declared illegal by the Bill of Rights, while James' flight from England in the wake of the Glorious Revolution was also declared to be an abdication of the throne.

Also, in a prelude to the Act of Settlement to come twelve years later, the Bill of Rights barred Roman Catholics from the throne of England as "it hath been found by experience that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a papist prince"; thus William III and Mary II were named as the successors of James VII and II and that the throne would pass from them first to Mary's heirs, then to her sister, Princess Anne of Denmark and her heirs and, further, to any heirs of William by a later marriage. The monarch was further required to swear a coronation oath to maintain the Protestant religion.

Augmentation and Effect

The Bill of Rights was later supplemented by the Act of Settlement in 1701. Both the Bill of Rights and the Claim of Right contributed a great deal to the establishment of the concept of parliamentary sovereignty and the curtailment of the powers of the monarch. Leading, ultimately, to the establishment of constitutional monarchy, while also along with the Penal Laws, settle the political and religious turmoil that had convulsed Scotland, England and Ireland in the 17th century.

It was a predecessor of the United States Bill of Rights, the Canadian Charter of Rights and Freedoms, the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights. For example, as with the Bill of Rights, the US constitution requires jury trials and prohibits excessive bail and "cruel and unusual punishments."

Similarly, "cruel, inhuman or degrading punishments" are banned under Article 5 of the Universal Declaration of Human Rights and Article 3 of the European Convention on Human Rights.

The bill continues to be cited in legal proceedings in the Commonwealth realms. For instance, on 21 July 1995 a libel case brought by Neil Hamilton against The Guardian was stopped after Justice May ruled that the Bill of Rights' prohibition on the courts' ability to question parliamentary

proceedings would prevent The Guardian from obtaining a fair trial. Section 13 of the Defamation Act, 1996, was subsequently enacted to permit an MP to waive his parliamentary privilege.

The Bill of Rights was also invoked in New Zealand in the 1976 case of Fitzgerald v. Muldoon and Others, which centred on the purporting of newly appointed Prime Minister Robert Muldoon that he would advise the Governor-General to abolish a superannuation scheme established by the New Zealand Superannuation Act, 1974, without new legislation. Muldoon felt that the dissolution would be immediate and he would later introduce a bill in parliament to retroactively make the abolition legal. This claim was challenged in court and the Chief Justice declared that Muldoon's actions were illegal as they had violated Article 1 of the Bill of Rights, which provides "that the pretended power of dispensing with laws or the execution of laws by regal authority...is illegal."

Two special designs of the British commemorative two pound coins were issued in the United Kingdom in 1989 to celebrate the tercentenary of the Glorious Revolution. One referred to the Bill of Rights and the other to the Claim of Right. Both depict the Royal Cypher of William and Mary and the mace of the House of Commons; one also shows a representation of the St Edward's Crown and, another, the Crown of Scotland.

Cairo Declaration on Human Rights in Islam

The Cairo Declaration of Human Rights in Islam is a declaration of the member states of the Organisation of the Islamic Conference adopted in Cairo in 1990, which provides an overview on the Islamic perspective on human rights, and affirms Islamic Shari'ah as its sole source. CDHRI declares its purpose to be "general guidance for Member States [of the OIC] in the Field of human rights". This declaration is usually seen as an Islamic response to the post-World War II United Nations' Universal Declaration of Human Rights of 1948.

Predominantly Muslim countries, such as Sudan, Iran, and Saudi Arabia, frequently criticized the Universal Declaration of Human Rights for its perceived failure to take into account the cultural and religious context of non-Western countries. In 1981, the post-revolutionary Iranian representative to the United Nations Said Rajaie-Khorassani articulated the position of his country regarding the Universal Declaration of Human Rights, by saying that the UDHR was "a secular understanding of the Judeo-Christian tradition", which could not be implemented by Muslims without trespassing the Islamic law.

The CDHRI was adopted on August 5, 1990 by 45 foreign ministers of the Organisation of the Islamic Conference to serve as a guidance for the member states in the matters of human rights.

The Declaration starts by forbidding "any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations". It continues on to proclaim the sanctity of life, and declares the "preservation of human life" as "a duty prescribed by the Shariah". In addition the CDHRI guarantees "non-belligerents such as old men, women and

children", "wounded and the sick" and "prisoners of war", the right to be fed, sheltered and access to safety and medical treatment in times of war.

The CDHRI gives men and women the "right to marriage" regardless of their race, colour or nationality, but not religion. In addition women are given "equal human dignity", "own rights to enjoy", "duties to perform", "own civil entity", "financial independence", and the "right to retain her name and lineage", though not equal rights in general. The Declaration makes the husband responsible for the social and financial protection of the family. The Declaration gives both parents the rights over their children, and makes it incumbent upon both of them to protect the child, before and after birth. The Declaration also entitles every family the "right to privacy". It also forbids the demolition, confiscation and eviction of any family from their residence. Furthermore, should the family get separated in times of war, it is the responsibility of the State to "arrange visits or reunions of families".

Article 10 of the Declaration states: "Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism."

The Declaration protects each individual from arbitrary arrest, torture, maltreatment and/or indignity. Furthermore, no individual is to be used for medical or scientific experiments. It also prohibits the taking of hostages of any individual "for any purpose" whatsoever. Moreover, the CDHRI guarantees the presumption of innocence; guilt is only to be proven through a trial in "which he [the defendant] shall be given all the guarantees of defence". The Declaration also forbids the promulgation of "emergency laws that would provide executive authority for such actions". Art. 19 stipulates that there are no other crimes or punishments than those mentioned in the Sharia, which include corporal punishment and capital punishment. The right to hold public office can only be exercised in accordance with the Sharia, which forbids Muslims to submit to the rule of non-Muslims.

The Declaration also emphasizes the "full right to freedom and self-determination", and its opposition to enslavement, oppression, exploitation and colonialism. The CDHRI declares the rule of law, establishing equality and justice for all. The CDHRI also guarantees all individuals the "right to participate, directly or indirectly in the administration of his country's public affairs". The CDHRI also forbids any abuse of authority 'subject to the Islamic Shari'ah.'

Article 22(a) of the Declaration states that "Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah." 22(b) states that "Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah." 22(c) states: "Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith." 22(d) states "It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination."

The CDHRI concludes in article 24 and 25 that all rights and freedoms mentioned are subject to the Islamic Shariah, which is the declaration's sole source.

The CDHRI declares "true religion" to be the "guarantee for enhancing such dignity along the path to human integrity". It also places the responsibility for defending those rights upon the entire Ummah.

Criticism

The CDHRI could be criticized for falling short of international human rights standards by distinguishing different fundamental equality of men and women (Art 6) and for permitting killing according to Sharia law (Art 2A).

Whereas the Universal declaration states:

'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

CDHRI does not guarantee equal rights, but merely equal dignity: Article 6 (a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage. (b) The husband is responsible for the support and welfare of the family.

'All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.'

In particular, CDHRI has been criticised for failing to guarantee freedom of religion.

In a joint written statement submitted by the International Humanist and Ethical Union, a non-governmental organization in special consultative status, the Association for World Education and the Association of World Citizens: a number of concerns were raised, that the CDHRI limits Human Rights, Religious Freedom and Freedom of Expression. It concludes: "The Cairo Declaration of Human Rights in Islam is clearly an attempt to limit the rights enshrined in the UDHR and the International Covenants. It can in no sense be seen as complementary to the Universal Declaration."

The Centre for Inquiry in September 2008 in an article to the United Nations writes that the CDHRI: "undermines equality of persons and freedom of expression and religion by imposing restrictions on nearly every human right based on Islamic Sharia law."

Article 5 prohibits imposing any restrictions on marriage stemming from "race, colour or nationality."

Similarly, CDHRI is criticized as not endorsing equality between men and women; moreover, it is accused of asserting the superiority of men.

Adama Dieng, a member of the International Commission of Jurists, criticised the CDHRI. He argued that the declaration gravely threatens the inter-cultural consensus on which the international human rights instruments are based; that it introduces intolerable discrimination against non-Muslims and women. He further argued that the CDHRI reveals a deliberately restrictive character in regard to certain fundamental rights and freedoms, to the point that certain essential provisions are below the legal standards in effect in a number of Muslim countries; it uses the cover of the "Islamic Shari'a " to justify the legitimacy of practices, such as corporal punishment, which attack the integrity and dignity of the human being.

Charter 08

Charter 08 is a manifesto initially signed by over 303 Chinese intellectuals and human rights activists to promote political reform and democratization in the People's Republic of China. It was published on 10 December 2008, the 60th anniversary of the Universal Declaration of Human Rights, named after Charter 77 issued by dissidents in Czechoslovakia. Since its release, more than 8,100 people inside and outside of China have signed the charter.

Demands

Many of the original signatories were prominent citizens inside and outside the government, including lawyers; a Tibetan blogger, Woeser; and Bao Tong, a former senior Communist Party official, who all faced a risk of arrest and jail. The Charter calls for 19 changes to improve human rights in China, including an independent legal system, freedom of association and the elimination of one-party rule. "All kinds of social conflicts have constantly accumulated and feelings of discontent have risen consistently," it reads. "The current system has become backward to the point that change cannot be avoided." China remains the only large world power to still retain an authoritarian system that so infringes on human rights, it states. "This situation must change! Political democratic reforms cannot be delayed any longer!"

Specific demands are:

1. Amending the Constitution.
2. Separation of powers.
3. Legislative democracy.
4. An independent judiciary.
5. Public control of public servants.
6. Guarantee of human rights.

7. Election of public officials.
8. Rural–urban equality.
9. Freedom of association.
10. Freedom of assembly.
11. Freedom of expression.
12. Freedom of religion.
13. Civic education.
14. Protection of private property.
15. Financial and tax reform.
16. Social security.
17. Protection of the environment.
18. A federated republic.
19. Truth in reconciliation.

The opening paragraph of the charter states:

"This year is the 100th year of China's Constitution, the 60th anniversary of the Universal Declaration of Human Rights, the 30th anniversary of the birth of the Democracy Wall, and the 10th year since China signed the International Covenant on Civil and Political Rights. After experiencing a prolonged period of human rights disasters and a tortuous struggle and resistance, the awakening Chinese citizens are increasingly and more clearly recognizing that freedom, equality, and human rights are universal common values shared by all humankind, and that democracy, a republic, and constitutionalism constitute the basic structural framework of modern governance. A "modernization" bereft of these universal values and this basic political framework is a disastrous process that deprives humans of their rights, corrodes human nature, and destroys human dignity. Where will China head in the 21st century? Continue a "modernization" under this kind of authoritarian rule? Or recognize universal values, assimilate into the mainstream civilization, and build a democratic political system? This is a major decision that cannot be avoided".

Response

China

The Chinese government has said little publicly on the Charter. On 8 December 2008, two days before the 60th anniversary of the United Nations General Assembly's adoption of the Universal Declaration of Human Rights, Liu Xiaobo was detained by police, hours before the online release of the Charter. He was detained and later arrested on June 23, 2009, on charges of "suspicion of inciting the subversion of state power." Several Nobel Laureates have written a letter to President Hu

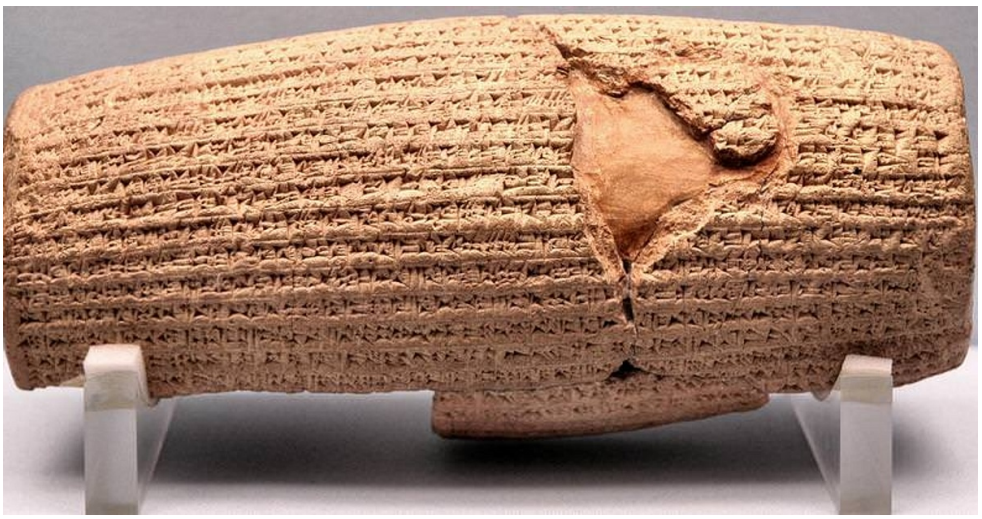
Jintao asking for his release. In response, the Chinese government is trying to crush the dissidents: at least 70 of its 303 original signatories have been summoned or interrogated by police while domestic media have been forbidden to interview anyone who has signed the document. Police have also searched for or questioned a journalist, Li Datong, and two lawyers, though none have been arrested. State media has been banned from reporting on the manifesto. A blogging website popular with activists, bullog.cn, which may have had ties to the Charter, has been shut down. On 25 December 2009 Liu Xiaobo was sentenced to 11 years in prison for "inciting subversion of state power" activities by the court.

International Response

A number of foreign governments, including the United States, Germany, and Taiwan have condemned the harassment of supporters of Charter 08 as well as hailed the Charter. International press has generally covered the Charter positively, and international NGOs have supported its message. Other international figures, including the Dalai Lama, have also voiced their support and admiration of the Charter. Artist ShawNshawN depicted a 90 x 30 inch painting of the 19 demands of the Charter.

Cyrus Cylinder

The Cyrus Cylinder is a Babylonian document of the 6th century BC, discovered in the ruins of Babylon in 1879 and now in the British Museum. It is a clay cylinder, broken into several fragments, on which is written a declaration in Akkadian cuneiform script. The text is in the name of the Achaemenid Persian king Cyrus the Great.



The cylinder was created following the Persian conquest of Babylon in 539 BC, when the Persian army under Cyrus invaded the Neo-Babylonian Empire and incorporated it into the Persian Empire. The Babylonian king Nabonidus was defeated in battle by the Persians and was deposed by Cyrus, who replaced him as ruler of Babylonia. The text on the cylinder commemorates the Persian victory and praises Cyrus's kingly virtues, listing his genealogy as a king from a line of kings, in contrast with the low-born Nabonidus. The deposed king is denounced as an impious oppressor of the people of Babylonia. The victorious Cyrus is portrayed as having been chosen by the chief Babylonian god Marduk to restore peace and order to the Babylonians. The text says that Cyrus was welcomed by the people of Babylon as their new ruler and entered the city in peace. It appeals to Marduk to protect and to help Cyrus and his son Cambyses. It exalts Cyrus's efforts as a benefactor of the citizens of Babylonia who improved their lives, repatriated displaced peoples and restored temples and cult sanctuaries across Mesopotamia. It concludes with a description of the work of Cyrus in repairing the city wall of Babylon, in which he found a similar inscription by an earlier Babylonian king.

The Assyro-British archaeologist Hormuzd Rassam discovered the cylinder during an excavation carried out for the British Museum. It had been placed as a foundation deposit in the foundations of the Esagila, the city's main temple. The British Museum, the cylinder reflects a long tradition in Mesopotamia where, from as early as the third millennium BC, kings began their reigns with declarations of reforms. Cyrus's declaration shows how he sought to obtain the loyalty of his new

Babylonian subjects by stressing his legitimacy as king, and showing his respect for the religious and political traditions of Babylonia. It has widely been regarded as an instrument of ancient Mesopotamian propaganda, most likely created by the Babylonian priests of Marduk working at the behest of Cyrus.

The tradition of royal propaganda represented by the cylinder was revived in the late 1960s when the last Shah of Iran called it "the world's first charter of human rights". That interpretation has been disputed by many historians and has been characterised as anachronistic and tendentious, reflecting a misunderstanding of the cylinder's status as a generic foundation deposit. Nonetheless it became a key symbol of the Shah's political ideology and has since come to be regarded as part of Iran's cultural identity. The cylinder has also been linked to the repatriation of the Jews following their Babylonian captivity, a deed which the Book of Ezra attributes to Cyrus. A passage referring to the restoration of cult sanctuaries and repatriation of deported peoples has been widely interpreted as evidence of a general policy under which the Jews were allowed to return home, although it identifies only Mesopotamian sanctuaries, and makes no mention of Jews, Jerusalem or Judea.

Human Rights

Iranian Governmental View

The Cyrus Cylinder was dubbed the "first declaration of human rights" by the pre-1979 Iranian government, a reading first advanced by its Shah, Mohammed Reza Pahlavi, in 1967, The White Revolution of Iran. Pahlavi made Cyrus the Great a key figure in government ideology and associated himself personally with the Achaemenids. He wrote that "the history of our empire began with the famous declaration of Cyrus, which, for its advocacy of humane principles, justice and liberty, must be considered one of the most remarkable documents in the history of mankind." The Shah described Cyrus as the first ruler in history to give his subjects "freedom of opinion and other basic rights" – although the text of the cylinder itself says nothing about citizens' rights. In 1968, the Shah opened the first United Nations Conference on Human Rights in Tehran by saying that the Cyrus Cylinder was the precursor to the modern Universal Declaration of Human Rights.

In his 1971 Nowruz speech, the Shah declared that 1971 would be Cyrus the Great Year, during which a grand commemoration would be held to celebrate 2,500 years of Persian monarchy. It would serve as a showcase for a modern Iran in which the contributions that Iran had made to world civilization would be recognized. The main theme of the commemoration was the centrality of the monarchy within Iran's political system, identifying the Shah with the famous monarchs of Persia's past, and with Cyrus the Great in particular. The Shah looked to the Achaemenid period as "a moment from the national past that could best serve as a model and a slogan for the imperial society he hoped to create."

The Cyrus Cylinder was adopted as the symbol for the commemoration. The British Museum loaned the original cylinder to the Iranian government for the duration of the festivities; it was put on display at the Shahyad Monument in Tehran, where a replica of the cylinder is still on display. The 2,500 year celebrations commenced on October 12, 1971 and culminated a week later with a spectacular parade at the tomb of Cyrus in Pasargadae. On October 14, the shah's sister, Princess Ashraf Pahlavi, presented the United Nations Secretary General U Thant with a replica of the cylinder. The princess asserted that "the heritage of Cyrus was the heritage of human understanding, tolerance, courage, compassion and human liberty". The Secretary General accepted the gift, linking the cylinder with the efforts of the United Nations General Assembly to address "the question of Respect for Human Rights in Armed Conflict". Since then the replica cylinder has been kept at the United Nations Headquarters in New York City on the second floor hallway, and the text has been translated into all six official U.N. languages.

Scholarly Views

The interpretation of the cylinder as a "charter of human rights" has been criticized by many scholars and characterized as political propaganda on the part of the Pahlavi regime. The German historian Josef Wiesehöfer comments that the image of "Cyrus as a champion of the UN human rights policy ... is just as much a phantom as the humane and enlightened Shah of Persia." Neil MacGregor, the Director of the British Museum, wrote that the cylinder was used by the Shah as "a mantra of his newly constructed national identity" that "must have startled many who had tried to assert their human rights under his regime."

Writing in the immediate aftermath of the Shah's commemorations, the British Museum's C.B.F. Walker comments that the "essential character of the Cyrus Cylinder [is not] a general declaration of human rights or religious toleration but simply a building inscription, in the Babylonian and Assyrian tradition, commemorating Cyrus's restoration of the city of Babylon and the worship of Marduk previously neglected by Nabonidus." Two linguists of the ancient Near East, Bill T. Arnold and Piotr Michalowski, comment: "Generically, it belongs with other foundation deposit inscriptions; it is not an edict of any kind, nor does it provide any unusual human rights proclamation as is sometimes claimed."

Cyrus's policies toward subjugated nations have been contrasted to those of the Assyrians and Babylonians, who had treated subject peoples harshly; he permitted the resettling of those who had been previously deported and sponsored the reconstruction of religious buildings. While the Shah cited this as evidence of respect for human rights, the Iranologist Elton L. Daniel has described such an interpretation as "rather anachronistic" and tendentious. T.C. Mitchell, a former Keeper of Western Asiatic Antiquities at the British Museum, takes the view that interpreting the cylinder as the first charter of human rights "reflects a misunderstanding." Curtis, Tallis, and Salvini note that despite the cylinder's reference to a just and peaceful rule, and repatriation of deported peoples, the modern concept of human rights would have been quite alien to Cyrus's

contemporaries and is not mentioned by the cylinder. Neil MacGregor, the British Museum's Director, comments:

Comparison by scholars in the British Museum with other similar texts, however, showed that rulers in ancient Iraq had been making comparable declarations upon succeeding to the [Babylonian] throne for two millennia before Cyrus it is one of the museum's tasks to resist the narrowing of the object's meaning and its appropriation to one political agenda.

He cautions that while the cylinder is "clearly linked with the history of Iran", it is "in no real sense an Iranian document: it is part of a much larger history of the ancient Near East, of Mesopotamian kingship, and of the Jewish diaspora."

Cyrus has often been depicted as a particularly humane ruler, based on his characterization by ancient sources such as Persian texts, the Old Testament of the Bible and Herodotus,. M.A. Dandamaev, the leading Russian scholar of the neo-Babylonian and Persian periods, has written that "almost all the texts ... which praise Cyrus have the character of propagandistic writings and demand a very critical approach ... by accepting everything said in the texts which were composed by Babylonian priests, we ourselves become the victims of Cyrus's propaganda."

Nonetheless, some scholars have supported the Shah's interpretation of the cylinder as a human rights charter. Neil MacGregor has written "the Cylinder may indeed be a document of human rights". The Iranian lawyer Hirad Abtahi argues that viewing the cylinder as merely "an instrument of legitimizing royal rule" is unjustified, as Cyrus issued the document and granted those rights when he was at the height of his power, with neither popular opposition nor visible external threat to force his hand. The former Iranian prime minister Hassan Pirnia describes the cylinder as "discuss human rights in a way unique for the era, dealing with ways to protect the honor, prestige, and religious beliefs of all the nations dependent to Iran in those days."

Declaration of the Rights of Man and Citizen of 1793

The Declaration of the Rights of Man and Citizen of 1793 is a French political document. It was written by the commission that included Louis Antoine Léon de Saint-Just and Marie-Jean Hérault de Séchelles during the period of the French Revolution. The main distinction between the Declaration of 1793 and the Declaration of the Rights of Man and of the Citizen of 1789 is its egalitarian tendency: equality is the prevailing right in this declaration.

The text is often said to have been mainly written by Hérault de Séchelle, whose style and writing can be found on most of the documents of the commission that also wrote the French Constitution of 1793 that was never applied, but whose application was steadfastly demanded by the French left until the beginning of the 20th century.

The first project of the Constitution of the French Fourth Republic also referred to this version of the Declaration of the Rights of Man and Citizen.

Equality as the First Natural Right of Man

Equality is the most important aspect of the Declaration of 1793. Equality is the first right mentioned. "All men are equal by nature and before the law". As such, for the authors of this declaration equality is not only before the law but it is also a natural right, that is to say, a fact of nature.

There was already at that time a school of thought that stated that liberty and equality can quickly become contradictory: indeed liberty doesn't solve social inequalities since there exist some natural inequalities. That school of thought considered that the government had only to protect liberty and to only proclaim natural equality, and eventually liberty would prevail over social equality since all people have different talents and abilities and are free to exercise them. The question raised by this declaration is how to solve social inequalities. Article 21 states that every citizen has a right to public help, that society is indebted to each citizen and therefore has the duty to help them. Citizens have there a right to work and society has a duty to provide relief to those who cannot work. Article 22 declares a right to education.

These rights are considered "2nd generation rights of Man", economical and social rights. These rights entail a greater government intervention in order to reach society's goal, stated in article 1: common welfare.

The Protections of Liberty

Individual liberty is still a primary right and some aspects are more precisely defined than in Declaration of 1789. The declaration explicitly states the freedom of religion, of assembly and of the press, of commerce, of petition. It also prohibits slavery "Every man can contract his services and his time, but he cannot sell himself nor be sold: his person is not an alienable property."

The Protections of the Citizens Against their Own Government

If in a way, this declaration has a more liberal bend in the modern American sense since it states that there ought to be public policies for the general welfare, it also contains some very strong libertarian aspects.

Article 7 states "The necessity of enunciating these rights supposes either the presence or the fresh recollection of despotism." Article 9: "The law ought to protect public and personal liberty against the oppression of those who govern." Article 33 states that resisting tyranny is a logical consequence of the rights of man: "Resistance to oppression is the consequence of the other rights of man. Article 34 states that if one is oppressed, everyone is. Article 27 states "Let any person who

may usurp the sovereignty be instantly put to death by free men." Though the usurpation of sovereignty is not detailed, sovereignty is explained in article 25 as residing "in the people". There is no doubt that this way of thinking deeply influenced the revolutionary government during the Terror.

Finally, article 35 states "When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties." Though this declaration was never enforced, History has shown that the French people has followed this advice with many successful and unsuccessful revolutions throughout the 19th century.

Drafting of the Universal Declaration of Human Rights

The Universal Declaration of Human Rights was drafted from early 1947 to late 1948 by Canadian John Peters Humphrey of the United Nations Secretariat and representatives of countries which were members of the first United Nations Commission on Human Rights, which was until 2006, when it was replaced by the United Nations Human Rights Council, a standing body of the United Nations.

Well known members of the Commission who contributed significantly to the creation of the Declaration included Eleanor Roosevelt of the United States, who was Chairman, Jacques Maritain and René Cassin of France, Charles Malik of Lebanon, and P. C. Chang of China, among others.

Membership of the Commission

The membership of the Commission was designed to be broadly representative of the global community with representatives of the following countries serving: Australia, Belgium, Byelorussian Soviet Socialist Republic, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, United Kingdom, United States, Union of Soviet Socialist Republics, Uruguay and Yugoslavia.

The Humphrey Draft

Humphrey was newly appointed as Director of the Division of Human Rights within the United Nations Secretariat. In this role he produced the first draft of a list of rights that were to form the basis of the Declaration.

The Cassin Draft

The underlying structure of the Universal Declaration was introduced in its second draft which was prepared by Rene Cassin. Cassin worked from a first draft prepared by John Peters Humphrey. The structure was influenced by the Code Napoleon, including a preamble and introductory general principles. Cassin compared the Declaration to the portico of a Greek temple, with a foundation, steps, four columns and a pediment. Articles 1 and 2 are the foundation blocks, with their principles of dignity, liberty, equality and brotherhood. The seven paragraphs of the preamble, setting out the

reasons for the Declaration, are represented by the steps. The main body of the Declaration forms the four columns. The first column constitutes rights of the individual, such as the right to life and the prohibition of slavery. The second column constitutes the rights of the individual in civil and political society. The third column is concerned with spiritual, public and political freedoms such as freedom of religion and freedom of association. The fourth column sets out social, economic and cultural rights. In Cassin's model, the last three articles of the Declaration provide the pediment which binds the structure together. These articles are concerned with the duty of the individual to society and the prohibition of use of rights in contravention of the purposes of the United Nations.

Subsequent Drafting

The Cassin draft was submitted to the Commission on Human Rights and was to undergo editing in the Commission, then in further drafts considered by the Third Committee of the United Nations, and finally in a draft before the General Assembly of the United Nations, which ultimately adopted the Declaration on 10 December 1948.

UDHR Chronology

1945:

- United Nations Conference on International Organization, San Francisco.

1946:

- 15 February, Establishment of "Nuclear Committee" of Commission on Human Rights.
- 29 April - 20 May 1946 - First Meeting of the Nuclear Committee.
- 21 June 1946 - ECOSOC adopts terms of reference of permanent Commission on Human Rights.

1947:

- 27 January - 10 February - First Meeting of the Commission on Human Rights, Lake Success, New York. Drafting Committee established.
- 9 June - 25 June - First Meeting of the Drafting Committee, Lake Success, New York. Draft outline of an International Bill of Human Rights prepared by the UN Secretariat. Drafting Committee splits work into two documents: preparation of a declaration of human rights and a working paper on a draft international convention on human rights.
- 2 December - 17 December - Second Session of the Commission on Human Rights, Geneva. Commission begins to consider work on three projects: a declaration on human rights, and international convention on human rights and measures for implementation and enforcement.

1948:

- 3 May - 21 May, Second Session of the Drafting Committee, Lake Success, New York.
- 24 May - 18 June, Third Session of the Commission on Human Rights, Lake Success, New York. Commission adopts a draft Declaration and transmits it to the Economic and Social Council.
- 26 August, Economic and Social Council transmits draft to the General Assembly.
- 30 September - 7 December, Third Committee of General Assembly spends 81 meetings considering the Declaration. 168 resolutions for amendments to the draft, submitted and considered.
- 1-4 December, Sub-committee of Third Committee charged with cross checking 5 official language versions.
- 10 December, Universal Declaration of Human Rights adopted by the United Nations General Assembly.

Ex Officio Oath

The ex-officio oath was an English ecclesiastical and judicial weapon developed in the first half of the 17th century, and used as a form of coercion, persecution, and forcible self-incrimination in the religious trials of that era. The format was a religious oath imposed upon the accused prior to questioning, to answer truthfully all questions that might be asked. It gave rise to what became known as the "cruel trilemma" where the accused would find themselves trapped between a breach of religious oath, contempt of court for silence, or self-incrimination. The name derives from the questioner putting the accused on oath ex officio, meaning by virtue of his office or position.

Outcry against this practice led to the establishment of the right to not incriminate oneself in common-law. This was the direct precursor of similar rights in modern law, including the right to silence and non-self-incrimination in the Fifth Amendment to the United States Constitution. The right itself appears as item 16 in the Levellers Agreement of the Free People of England and first appeared in US law in the Massachusetts Body of Liberties and the Connecticut Code of the same era. The Star Chamber itself, as a judicial body, was abolished by Parliament as part of the Habeas Corpus Act 1640.

Early examples of a codified right appears in the Levellers manifesto Agreement of the Free People of England: "t shall not be in the power of any Representative, to punish, or cause to be punished, any person or persons for refusing to answer questions against themselves in Criminall cases",

The right first appeared in US law in the Massachusetts Body of Liberties and the Connecticut Code of the same era.

The United States Supreme Court summarized the events of the time as part of the historical background in the landmark case Miranda v. Arizona:

- Perhaps the critical historical event shedding light on its [ie, the privilege against self-incrimination] origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. He resisted the oath and declaimed the proceedings, stating: "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so."
- On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.

Four Freedoms

The Four Freedoms were goals articulated by US President Franklin D. Roosevelt on January 6, 1941. In an address known as the Four Freedoms speech, he proposed four fundamental freedoms that people "everywhere in the world" ought to enjoy:

1. Freedom of speech and expression
2. Freedom of religion
3. Freedom from want
4. Freedom from fear

His inclusion of the latter two freedoms went beyond the traditional US Constitutional values protected by its First Amendment, and endorsed a right to economic security and an internationalist view of foreign policy that have come to be central tenets of modern American liberalism. They also anticipated what would become known decades later as the "human security" paradigm in social science and economic development.

The Declarations

The speech delivered by President Roosevelt incorporated the following

"In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression--everywhere in the world.

The second is freedom of every person to worship God in his own way--everywhere in the world.

The third is freedom from want--which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants--everywhere in the world.

The fourth is freedom from fear--which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor--anywhere in the world.

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb".

Four Freedoms Monument

The Four Freedoms Monument was commissioned by President Franklin D. Roosevelt following his articulation of the "Four Freedoms" in his 1941 State of the Union Address. Roosevelt felt that, through the medium of the arts, a far greater number of people could be inspired to appreciate the concept of the Four Freedoms.

The statue was created by sculptor Walter Russell later that year, and was dedicated in 1943 before a crowd of 60,000 people at Madison Square Garden in New York City. It was dedicated to Colin P. Kelly, the first recognized American hero of World War II. On June 14, 1944 the monument was re-dedicated in Kelly's hometown of Madison, Florida, with a speech by Governor Spessard Holland.

Another American artist, Norman Rockwell, was inspired by Roosevelt's vision to create his own visual depiction of the Four Freedoms — in his case, through a series of four paintings completed in early 1943.

In Evansville, Indiana there is another Four Freedoms monument designed by Rupert Condict built in 1976, four Indiana Limestone columns. It has become the defacto photo image of the city.

Another monument to the Four Freedoms stands in the Tremont neighborhood of Cleveland, Ohio. It is a single column, with one of the Freedoms printed on each side. On top of the column is a sculpture of two hands holding a globe of the Earth.

Magna Carta

Magna Carta is an English charter, originally issued in the year 1215, and reissued later in the 13th century in modified versions which omit certain temporary provisions, including the most direct

challenges to the monarch's authority. The charter first passed into law in 1225. The 1297 version, described as The Great Charter of the Liberties of England, and of the Liberties of the Forest, still remains on the statute books of England and Wales.

The 1215 Charter required King John of England to proclaim certain liberties, and accept that his will was not arbitrary, for example by explicitly accepting that no "freeman" could be punished except through the law of the land, a right which is still in existence today.

Magna Carta was the first document forced onto an English King by a group of his subjects in an attempt to limit his powers by law and protect their privileges. It was preceded and directly influenced by the 1100 Charter of Liberties, when King Henry I had specified particular areas where his powers would be limited.

Despite its recognised importance, by the second half of the 19th century nearly all of its clauses had been repealed in their original form. Three clauses remain part of the law of England and Wales, however, and it is generally considered part of the uncodified constitution. In a recent ruling Lord Laws used Magna Carta as an example of a constitutional statute, one which could only be repealed by a later statute with that clear intention.

The charter was an important part of the extensive historical process that led to the rule of constitutional law in the English speaking world, although it was "far from unique, either in content or form" . In practice, Magna Carta in the medieval period did not in general limit the power of kings, but by the time of the English Civil War it had become an important symbol for those who wished to show that the King was bound by the law. It influenced the early settlers in New England and inspired later constitutional documents, including the United States Constitution.

Human Rights

Magna Carta was originally written in Latin. A large part of Magna Carta was copied, nearly word for word, from the Charter of Liberties of Henry I, issued when Henry became king in 1100, in which he said he would respect certain rights of the Church and the barons, for example not forcing heirs to pay a fee when they inherited.

Rights Still in Force Today

Magna Carta supports the right which became known as habeas corpus through clauses 36, 38, 39, and 40 of the 1215 Charter. Similar rights had existed before Magna Carta, and writs with the same effect had been issued as early as the 12th century, but Magna Carta was the first recording in writing of royal recognition of these rights.

As the most recent version, it is the 1297 Charter which remains in legal force in England and Wales. In the 1297 charter: Clause 1 guarantees the freedom of the English Church. Although this

originally meant freedom from the King, later in history it was interpreted differently. Clause 9 guarantees the "ancient liberties" of the City of London. Clause 29 guarantees a right to due process.

Feudal Rights Still in Place in 1225

Several clauses were present in the 1225 charter but are no longer in force and would have no real place in the post-feudal world. Clauses 2 to 7 refer to feudal death duties, defining their amounts and the provisions that applied if an heir to a fiefdom was under age or was a widow. Clause 23 provides that no town or person should be forced to build a bridge across a river. Clause 33 requires the removal of all fish weirs. Clause 43 gives special provision for tax on reverted estates and Clause 44 states that forest law should only apply to those in the king's forest.

Feudal Rights not in the 1225 Charter

Some provisions have no bearing in the world today, since they are feudal rights and were not even included in the 1225 charter. Clauses 9 to 12, 14 to 16, and 25 to 26 deal with debt and taxes and Clause 27 with intestacy.

The other clauses state that no one may seize land in debt except as a last resort; that under age heirs and widows should not pay interest on inherited loans; that county rents will stay at their ancient amounts; and that the crown may only seize the value owed in payment of a debt, that aid must be reasonable, and that scutage may only be sought with the consent of the kingdom.

Clause 14 states that the common consent of the kingdom was to be sought from a council of the archbishops, bishops, earls and greater Barons. This later became the great council, which led to the first parliament.

Judicial Rights

Clauses 17 to 22 allows for a fixed law court, which became the chancellery, and defines the scope and frequency of county assizes. They also state that fines should be proportionate to the offence, that they should not be influenced by ecclesiastical property in clergy trials, and that people should be tried by their peers. Many think that this gave rise to jury and magistrate trial, but its only manifestation in the modern world was the right of a lord to a criminal trial in the House of Lords at first instance.

Clause 24 states that crown officials may not try a crime in place of a judge. Clause 34 forbids repossession without a writ precipe. Clauses 36 to 38 state that writs for loss of life or limb are to be free, that one may use reasonable force to secure one's own land, and that no one can be tried on their own testimony alone.

Clauses 36, 38, 39 and 40 collectively define the right of Habeas Corpus. Clause 36 requires courts to make inquiries as to the whereabouts of a prisoner, and to do so without charging any fee. Clause 38 provides that a person could not be put on trial by the mere word of an official. Clause 39 gives the courts exclusive rights to punish anyone. Clause 40 disallows the selling of or delay to justice. Clauses 36 and 38 were removed from the 1225 version, but were reinstated in later versions. The right of Habeas Corpus as such was first invoked in court in the year 1305.

Clause 54 says that no man may be imprisoned on the testimony of a woman except on the death of her husband.

Anti-corruption and Fair Trade

Clauses 28 to 32 state that no royal officer may take any commodity such as grain, wood or transport without payment or consent or force a knight to pay for something the knight could do himself, and that the king must return any lands confiscated from a felon within a year and a day.

Clause 35 sets out a list of standard measures, and Clauses 41 and 42 guarantee the safety and right of entry and exit of foreign merchants.

Clause 45 says that the King should only appoint royal officers suitable for the post. In the United States, the Supreme Court of California interpreted clause 45 in 1974 as establishing a requirement at common law that a defendant faced with the potential of incarceration is entitled to a trial overseen by a legally trained judge. Clause 46 provides for the guardianship of monasteries.

Temporary Provisions

Some provisions were for immediate effect and were not in any later charter. Clauses 47 and 48 abolish most of Forest Law. Clauses 49, 52 to 53 and 55 to 59 provide for the return of hostages, land and fines taken in John's reign.

Article 50 states that no member of the d'Athée family may be a royal officer. Article 51 calls for all foreign knights and mercenaries to leave the realm.

Articles 60, 62 and 63 provide for the application and observation of the Charter and say that the Charter is binding on the King and his heirs forever, but this was soon deemed dependent on each succeeding king reaffirming the Charter under his own seal.

Jews in England

Magna Carta contained two articles related to money lending and Jews in England. Jewish involvement with money lending caused Christian resentment, because the Church forbade usury; it was

seen as vice and was punishable by excommunication, although Jews, as non-Christians, could not be excommunicated and were thus in a legal grey area. Secular leaders, unlike the Church, tolerated the practice of Jewish usury because it gave the leaders an opportunity for personal enrichment. This resulted in a complicated legal situation: debtors were frequently trying to bring their Jewish creditors before Church courts, where debts would be absolved as illegal, while the Jews were trying to get their debtors tried in secular courts, where they would be able to collect both principal and interest. The relations between the debtors and creditors would often become very nasty. There were many attempts over centuries to resolve this problem, and Magna Carta contains one example of the legal code of the time on this issue:

> If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, as suggested, not take anything except the principal sum contained in the bond. And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews.

After the Pope annulled the 1215 Magna Carta, future versions contained no mention of Jews.

Great Council

The first long-term constitutional effect arose from Clauses 14 and 61, which permitted a council composed of the most powerful men in the country to exist for the benefit of the state rather than in allegiance to the monarch. Members of the council were also allowed to renounce their oath of allegiance to the King in pressing circumstances and to pledge allegiance to the council and not to the King in certain instances. The common council was responsible for taxation, and although it was not representative, its members were bound by decisions made in their absence. The common council, later called the Great Council, was England's proto-parliament.

The Great Council only existed to give input on the opinion of the kingdom as a whole, and it only had power to control scutage until 1258 when Henry III got into debt fighting in Sicily for the Pope. The barons agreed to a tax in exchange for reform, leading to the Provisions of Oxford. But Henry obtained a papal bull allowing him to set aside these provisions and in 1262 commanded royal officers to ignore the provisions and only to obey Magna Carta. The barons revolted and seized the Tower of London, the Cinque ports and Gloucester. Initially the King surrendered, but when Louis IX of France arbitrated in favour of Henry, Henry crushed the rebellion. Later he made some concessions, passing the Statute of Marlborough in 1267, which allowed writs for breaches of Magna Carta to be free of charge, enabling anyone to have standing to apply the Charter.

This secured the position of the Great Council forever, but its powers were still very limited. The council originally only met three times per year and so was subservient to the King's council, Curiae Regis, which, unlike the Great Council, followed the king wherever he went.

Still, in some ways the council was an early form of parliament. It had the power to meet outside the authority of the King and was not appointed by him. While executive government descends from the Curiae Regis, parliament descends from the Great Council, which was later called the parliamentum. However, the Great Council was very different from modern parliament. There were no knights, let alone commons, and it was composed of the most powerful men, rather than elected citizens.

Magna Carta had little effect on subsequent development of parliament until the Tudor period. Knights and county representatives attended the Great Council, and the council became far more representative under the model parliament of Edward I which included two knights from each county, two burgesses from each borough and two citizens from each city. The Commons separated from the Lords in 1341. The exclusive right of the Commons to sanction taxes was re-asserted in 1407, although it was not in force in this period. The power vested in the Great Council by, albeit withdrawn, Clause 14 of Magna Carta became vested in the House of Commons but Magna Carta was all but forgotten for about a century, until the Tudors.

UN Declaration on Sexual Orientation and Gender Identity

The proposed United Nations declaration on sexual orientation and gender identity is a Dutch/French-initiated, European Union-backed statement presented to the United Nations General Assembly on 18 December 2008. The statement, originally intended to be adopted as resolution, prompted an Arab League-backed statement opposing it. Both statements remain open for signatures and none of them has been officially adopted by the United Nations General Assembly.

The proposed declaration includes a condemnation of violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity. It also includes condemnation of killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights on those grounds.

The proposed declaration was praised as a breakthrough for human rights, breaking the taboo against speaking about LGBT rights in the United Nations. Opponents criticized it as an attempt to legitimize same-sex civil partnerships or marriage, adoption by same sex couples, pedophilia and other "deplorable acts" and curtail freedom of religious expression against homosexual behavior.

As of December 2008, homosexuality is illegal in 77 countries and punishable by death in seven. In its 1994 decision in Toonen v. Australia, The UN Human Rights Committee, which is responsible for the International Covenant on Civil and Political Rights, declared that such laws are in violation of human rights law.

In 2003 a number of predominantly European countries put forward the Brazilian Resolution at the UN Human Rights Commission stating the intention that lesbian and gay rights be considered as fundamental as the rights of all human beings.

In 2006, with the effort of its founder, Louis George Tin, International Day Against Homophobia launched a worldwide campaign to end the criminalisation of same-sex relationships. The campaign was supported by dozens of international public figures including Nobel laureates, academics, clergy and celebrities.

In 2008, the 34 member countries of the Organization of American States unanimously approved a declaration affirming that human rights protections extend to sexual orientation and gender identity.

Following meetings between Tin and French Minister of Human Rights and Foreign Affairs Rama Yade in early 2008, Yade announced that she would appeal at the UN for the universal decriminalization of homosexuality; the appeal was quickly taken up as an international concern.

Co-sponsored by France, which then held the rotating presidency of the European Union, and The Netherlands on behalf of the European Union, the declaration had been intended as a resolution; it was decided to use the format of a declaration of a limited group of States because there was not enough support for the adoption of an official resolution by the General Assembly as a whole. The declaration was read out by Ambassador Jorge Argüello of Argentina on 18 December 2008, and was the first declaration concerning gay rights read in the General Assembly.

Support

Several speakers addressing a conference on the declaration noted that in many countries laws against homosexuality stemmed as much from the British colonial past as from religion or tradition.

Voicing France's support for the draft declaration, Rama Yade asked: "How can we tolerate the fact that people are stoned, hanged, decapitated and tortured only because of their sexual orientation?"

UK-based activist Peter Tatchell said of the declaration:

"This was history in the making… Securing this statement at the UN is the result of an inspiring collective global effort by many LGBT and human rights organisations. Our collaboration, unity and solidarity have won us this success. As well as IDAHO, I pay tribute to the contribution and lobbying of Amnesty International; ARC International; Center for Women's Global Leadership; COC Netherlands; Global Rights; Human Rights Watch; International Committee for IDAHO; International Gay and Lesbian Human Rights Commission; International Lesbian and Gay Association; International Service for Human Rights; Pan Africa ILGA; and Public Services International."

Signatories

67 of the United Nations' 192 member countries have sponsored the declaration, including every member of the European Union and most Western nations:

Africa:

- Cape Verde
- Central African Republic
- Gabon
- Guinea-Bissau
- Mauritius
- São Tomé and Príncipe

Americas:

- Argentina
- Bolivia
- Brazil
- Canada
- Chile
- Colombia
- Cuba
- Ecuador
- Mexico
- Nicaragua
- Paraguay
- United States
- Uruguay
- Venezuela

Asia:

- Israel
- Japan
- Nepal
- Timor-Leste

Europe:

- Albania
- Andorra
- Armenia
- Austria
- Belgium
- Bosnia and Herzegovina
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France initiative
- Georgia
- Germany
- Greece
- Hungary
- Iceland

- Ireland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Macedonia
- Malta
- Montenegro
- Netherlands initiative
- Norway
- Poland
- Portugal
- Romania
- San Marino
- Serbia
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- United Kingdom

Oceania:

- Australia
- New Zealand

Opposition

Among the first to voice opposition for the declaration, in early December, 2008, was the Holy See's Permanent Observer at the United Nations, Archbishop Celestino Migliore, who claimed that the declaration could be used to force countries to recognise same-sex marriage:

> "If adopted, they would create new and implacable discriminations. For example, states which do not recognise same-sex unions as 'matrimony' will be pilloried and made an object of pressure."

A key part of the Vatican opposition to the draft Declaration relates to the concept of gender identity. In a statement on 19 December, Archbishop Migliore noted:

"In particular, the categories 'sexual orientation' and 'gender identity', used in the text, find no recognition or clear and agreed definition in international law. If they had to be taken into consideration in the proclaiming and implementing of fundamental rights, these would create serious uncertainty in the law as well as undermine the ability of States to enter into and enforce new and existing human rights conventions and standards."

However, Archbishop Migliore also made clear the Vatican's opposition to legal discrimination against homosexuals: "The Holy See continues to advocate that every sign of unjust discrimination towards homosexual persons should be avoided and urges States to do away with criminal penalties against them."

In an editorial response, Italy's La Stampa newspaper called the Vatican's reasoning "grotesque", claiming that the Vatican feared a "chain reaction in favour of legally recognised homosexual unions in countries, like Italy, where there is currently no legislation."

The United States, citing conflicts with US law, originally opposed the adoption of the nonbinding measure, as did Russia, China, the Holy See, and members of the Organization of the Islamic Conference. The Holy See's Permanent Observer Mission issued a statement saying that the draft declaration "challenges existing human rights norms." The Obama administration changed the US position to support the measure in February 2009.

An alternative statement, supported by 57 member nations, was read by the Syrian representative in the General Assembly. The statement, led by the Organization of the Islamic Conference, rejected the idea that sexual orientation is a matter of genetic coding and claimed that the declaration threatened to undermine the international framework of human rights, adding that the statement "delves into matters which fall essentially within the domestic jurisdiction of states" and could lead to "the social normalization, and possibly the legitimization, of many deplorable acts including pedophilia." The Organization failed in a related attempt to delete the phrase "sexual orientation" from a Swedish-backed formal resolution condemning summary executions.

Signatories

57 UN member nations have co-sponsored the opposing statement:

Africa:

- Algeria
- Benin
- Cameroon
- Chad
- Comoros
- Côte d'Ivoire
- Djibouti
- Egypt
- Eritrea
- Ethiopia
- Gambia
- Guinea
- Kenya
- Libya
- Malawi
- Mali
- Mauritania
- Morocco
- Niger
- Nigeria
- Rwanda
- Senegal
- Sierra Leone

- Somalia
- Sudan
- Swaziland
- Tanzania
- Togo
- Tunisia
- Uganda
- Zimbabwe

Americas:

- Saint Lucia

Asia”

- Afghanistan
- Bahrain
- Bangladesh
- Brunei
- Indonesia
- Iran
- Iraq
- Jordan
- Kazakhstan
- Kuwait
- Lebanon
- Malaysia
- Maldives
- North Korea
- Oman

- Pakistan
- Qatar
- Saudi Arabia
- Syria initiative
- Tajikistan
- Turkmenistan
- United Arab Emirates
- Yemen

Oceania:

- Fiji
- Solomon Islands

Virginia Declaration of Rights

The Virginia Declaration of Rights is a document drafted in 1776 to proclaim the inherent natural rights of men, including the right to rebel against "inadequate" government. It influenced a number of later documents, including the United States Declaration of Independence, the United States Bill of Rights, and the French Revolution's Declaration of the Rights of Man and of the Citizen. The Declaration was adopted unanimously by the Virginia Convention of Delegates on June 12, 1776 as a separate document from the Constitution of Virginia adopted on June 29, 1776. It was later incorporated within the Virginia State Constitution as Article I, and a slightly updated version may still be seen in Virginia's Constitution, making it legally in effect to this day.

It was initially drafted by George Mason ca. March 22, 1765; James Madison assisted him with the section on religious freedom. It was later amended by Thomas Ludwell Lee and the Convention to add Section 14 on the Right to uniform government. Mason based his document on the rights of citizens described in earlier works such as the English Bill of Rights, and the Declaration can be considered the first modern Constitutional protection of individual rights for citizens of North America. It rejected the notion of privileged political classes or hereditary offices such as the members of Parliament and House of Lords described in the English Bill of Rights.

The Declaration consists of sixteen articles on the subject of which rights "pertain to [the people of Virginia]...as the basis and foundation of Government." In addition to affirming the inherent nature of natural rights to life, liberty, and property, the Declaration both describes a view of Government as the servant of the people, and enumerates various restrictions on governmental power. Thus, the

document is unusual in that it not only prescribes legal rights, but it also describes moral principles upon which a government should be run.

Articles 1-3 address the subject of rights and the relationship between government and the governed. Article 1 states that "all men are by nature equally free and independent, and have certain inherent rights of which...[they cannot divest;] namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety," a statement later made internationally famous in the first paragraph of the U.S. Declaration of Independence, as "we hold these truths to be self-evident, that all men are created equal, and are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

Articles 2 and 3 note the revolutionary concept that "all power is vested in, and consequently derived from, the people..." and that "whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." This latter concept effectively asserted the right of the people of Virginia to revolt against the British Empire.

Article 4 asserts the equality of all citizens, rejecting the notion of privileged political classes or hereditary offices - another criticism of British institutions such as the House of Lords and the privileges of the peerage: "no set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary."

Articles 5 and 6 recommend the principles of separation of powers and free elections, "frequent, certain, and regular" of executives and legislators: "That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first... should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken...by frequent, certain, and regular elections."

Articles 7-16 propose restrictions on the powers of the government, declaring the government should not have the power of suspending or executing laws, "without consent of the representatives of the people,"; establishing the legal rights to be "confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage," and to prevent a citizen from being "compelled to give evidence against himself." protections against "cruel and unusual punishments", baseless search and seizure, and the guarantees of a trial by jury, freedom of the press, freedom of religion "all men are equally entitled to the free exercise of religion,", and "the proper, natural, and safe defence of a free state" rested in a well regulated militia composed of the body of the people, trained to arms, that standing armies in time of peace, should be avoided as dangerous to liberty.

The following is the complete text of the Virginia Declaration of Rights:

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration; and that, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judicative; and, that the members of the two first may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people in assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people is injurious to their rights and ought not to be exercised.

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence

against himself; that no man be deprived of his liberty except by the law of the land or the judgement of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.
11. That in controversies respecting property and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.
12. That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.
13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and be governed by, the civil power.
14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.
15. That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.
16. That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

Influence

The Virginia Declaration of Rights heavily influenced later documents. Thomas Jefferson is thought to have drawn on it when he drafted the United States Declaration of Independence one month later. James Madison was also influenced by the Declaration while drafting the Bill of Rights as was the Marquis de Lafayette in voting the French Revolution's Declaration of the Rights of Man and of the Citizen.

The importance of the Virginia Declaration of Rights is that it was the first constitutional protection of individual rights, rather than protecting just members of Parliament or consisting of simple laws that can be changed as easily as passed.

Quotations Derived from the Declaration

- "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed" — United States Declaration of Independence.
- "Men are born and remain free and equal in rights. Social distinctions can be founded only on the common utility." — Declaration of the Rights of Man and of the Citizen.

Yogyakarta Principles

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity is a set of international principles relating to sexual orientation and gender identity, intended to address documented evidence of abuse of rights of lesbian, gay, bisexual, and transgender people, and further of intersexuality requested by Louise Arbour The International Human Rights Law. The outline of the Principles was drawn at a meeting of International Commission of Jurists and human rights experts from around the world at Gadjah Mada University on Java from 6 to 9 November in 2006. "It contains 29 Principles adopted unanimously by the experts, along with recommendations to governments, regional intergovernmental institutions, civil society, and the UN itself". The principles are named after Yogyakarta, the smallest province of Indonesia located on the island of Java. Among 29 signatories of the principles, there are Mary Robinson, Manfred Nowak and Martin Scheinin. The principles are intended to be and have become a universal guide to human rights.

In alignment with the movement towards establishing basic human rights for all people, the Principles specifically address sexual orientation and gender identity. The Principles were developed in response to patterns of abuse reported from around the world. These included examples of rape, torture, extrajudicial executions, medical abuse, denial of free speech and assembly as well as a range of discriminations in work, health, education, housing, access to justice and immigration. These are estimated to affect millions of people targeted on the basis of perceived or actual sexual orientation or gender identity.

It is noted on the website carrying the principles that concerns have been voiced about a trend of people's human rights being violated because of their sexual orientation or gender identity. Extrajudicial killing, torture and ill-treatment, sexual assault and rape, invasion of privacy, arbitrary arrest

and imprisonment, denial of employment and education opportunities are cited. It is explained that the United Nations human rights instruments detail the obligations States are under to ensure people are protected from discrimination, which includes people's expression of sexual orientation or gender identity. it is pointed out that implementation of these rights has been fragmented and inconsistent internationally. It is set out how the Principles provide a consistent understanding about application of international human rights law in relation to sexual orientation and gender identity.From 6 to 9 November 2006, an international seminar of legal experts on human rights took place at Yogyakarta, Indonesia. The seminar clarified the nature, scope and implementation of States' human rights obligations under existing human rights treaties and law, in relation to sexual orientation and gender identity. The Principles that developed out of this meeting were adopted by human rights experts from around the world, and included judges, academics, a former UN High Commissioner for Human Rights, NGOs and others. Michael O'Flaherty was rapporteur responsible for drafting and development of the Yogyakarta Principles produced from the meeting. At the meeting, Vitit Muntarbhorn and Sonia Onufer Corrêa were the co-chairpersons.

The compilers explain that the Principles detail how international human rights law can be applied to sexual orientation and gender identity issues, in a way that affirms international law and to which all States can be bound to. They suggest that the motivation is so that where ever people are recognised as being born free and equal in dignity and rights, this should include LGBT people as well. They argue that human rights standards also cover issues of sexual orientation and gender identity touch on issues of torture and violence, extrajudicial execution, access to justice, privacy, freedom from discrimination, freedom of expression and assembly, access to employment, healthcare, education, and immigration and refugee issues. The intention outlined is for the Principles to explain that States are obliged to ensure human rights, and each principle recommends how to achieve this, highlighting international agencies' responsibilities to promote and maintain human rights.

The Principles are based on the recognition of the right against non-discrimination. The Committee on Economic, Social and Cultural Rights has dealt with the matter in its General Comments, the i nterpretative texts it issues to explicate the f ull meani ng of the provisions of the Covenant on Economic, Social and Cultural Rights. In General Comments Nos 18 of Nos 18 of 2005, 15 of 2002 and 14 of 2000, it has indicated that the Covenant proscribes any discrimination on the basis of, inter-alia, sex and sexual orientation 'that has the intention or effect of null ifying or impairing the equal enjoyment or exercise of [the right at issue]'.

The Committee on the Elimination of Discrimination against Women, notwithstanding that it has not addressed the matter in a General Comment or otherwise specified the applicable provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, on a number of occasions has criticised States for discrimination on the basis of sexual orientation. For example, it also addressed the situation in Kyrgyzstan and recommended that, 'lesbianism be reconceptualised as a sexual orientation and that penalties for its practice be abolished'.

The finalised Yogyakarta Principles was launched as a global charter for gay rights on 26 March 2007 in Geneva. Michael O'Flaherty, spoke at the International Lesbian and Gay Association Conference in Lithuania on 27 October 2007; he explained that "All human rights belong to all of us. We have human rights because we exist – not because we are gay or straight and irrespective of our gender identities", but that in many situations these human rights are not respected or realised, and that "the Yogyakarta Principles is to redress that situation".

The Yogyakarta Principles was presented at a United Nations event in New York on November 7, 2007, co-sponsored by Argentina, Brazil and Uruguay. Human Rights Watch explain that the first step towards this would be the de-criminalisation of homosexuality in 77 countries that still carry legal penalties for people in same-sex relationships, and repeal of the death penalty in the seven countries that still have the death penalty for such sexual practice.

Human and LGBT Rights groups took up the Principles, and discussion has featured in the gay press, as well as academic papers and text books.

The Principles, while explaining the way existing Human Rights Statutes need to be applied in specific situations relevant to LGBT people's experience, influenced the proposed UN declaration on sexual orientation and gender identity in 2008.

Piero A. Tozzi, of the The Catholic Family and Human Rights Institute, issued a briefing paper 'Six Problems with the Yogyakarta Principles'. He argues that where Principle 24 seeks to recognize the diversity of family forms, this could devalue the concept of the family by including any grouping of two people. He also argues that Principles 20 and 21 could be used to restrict freedom of speech.

The Council of Europe states in "Human Rights and Gender Identity" that Principle 3 of the Yogyakarta Principles is of "of particular relevance": Because same sex marriage is possible only in five member states of the Council of Europe, transgender persons who are already married usually have to divorce prior to their new gender being officially recognised, although in many cases they would prefer to remain a legally recognised family unit, especially if they have children. Such enforced divorces may have a negative impact on the children of the marriage. They recommend that member states "abolish sterilisation and other compulsory medical treatment as a necessary legal requirement to recognise a person's gender identity in laws regulating the process for name and sex change." As well as to "make gender reassignment procedures, such as hormone treatment, surgery and psycological support, accessible for transgender person, and ensure that they are reimbursed by public health insurance schemes."

Chapter 3

Various Aspects of Human Rights

Adequate Housing

"The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity".

This definition is in line with the core elements of the right to adequate housing as defined by General Comment No. 4 of the United Nations Committee on Economic, Social and Cultural Rights. The Committee, while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following: a) Legal security of tenure; b) Availability of services, materials, facilities and infrastructure; c) Affordability; d) Habitability; e) Accessibility; f) Location; and g) Cultural adequacy.

The Obligations of States

The legal obligations of Governments concerning the right to housing consist of (i) the duties found in article 2.1 of the Covenant; and (ii) the more specific obligations to recognize, respect, protect and fulfil this and other rights.

Three phrases in article 2.1 are particularly important for understanding the obligations of Governments to realize fully the rights recognized in the Covenant, including the right to adequate housing:

(a) "undertakes to take steps . . . by all appropriate means"

In addition to legislative measures, administrative, judicial, economic, social and educational steps must also be taken. States parties are also obliged to develop policies and set priorities consistent with the Covenant. They are also required to evaluate the progress of such measures and to provide effective legal or other remedies for violations. With specific reference to the right to adequate housing, States parties are required to adopt a national housing strategy.

(b) "to the maximum of its available resources"

The obligation of States is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right to adequate housing for every individual in the shortest possible time using the maximum available resources.

(c) "to achieve progressively"

This obligation "to achieve progressively" must be read in the light of article 11.1 of the Covenant, in particular the reference to the right to the "continuous improvement of living conditions". The obligation of progressive realization, moreover, exists independently of any increase in resources.

The four additional obligations that Governments have to fulfill in order to implement the right to adequate housing are:

The obligation to recognize the human right dimensions of housing and to ensure that no measures are taken with the intention of eroding the legal status of this right. The adoption of measures and appropriate policies geared towards progressive realization of housing rights form part of this obligation.

The obligation to respect the right to adequate housing means that Governments must abstain from carrying out or otherwise advocating the forced or arbitrary eviction of persons and groups. States must respect people's rights to build their own dwellings and order their environments in a manner which most effectively suits their culture, skills, needs and wishes.

The obligation to protect effectively the housing rights of a population means that Governments must ensure that any possible violations of these rights by "third parties" such as landlords or property developers are prevented. Where such infringements do occur, the relevant public authorities should act to prevent any further deprivations and guarantee to affected persons access to legal remedies of redress for any infringement caused.

The obligation to fulfil the right to adequate housing is both positive and interventionary. The Committee on Economic, Social and Cultural Rights has asserted that identifiable governmental strategies aimed at securing the right of all persons to live in peace and dignity should be developed.

Children's Rights

Children's rights are the human rights of children with particular attention to the rights of special protection and care afforded to the young, including their right to association with both biological parents, human identity as well as the basic needs for food, universal state-paid education, health care and criminal laws appropriate for the age and development of the child. Interpretations of children's rights range from allowing children the capacity for autonomous action to the enforcement of children being physically, mentally and emotionally free from abuse, though what constitutes "abuse" is a matter of debate. Other definitions include the rights to care and nurturing.

"A child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier." Cornell University, a child is a person, not a subperson, and the parent has absolute interest and possession of the child, but this is very much an American view.

The term "child" does not necessarily mean minor but can include adult children as well as adult nondependent children. There are no definitions of other terms used to describe young people such as "adolescents", "teenagers," or "youth" in international law, but the children's rights movement is considered distinct from the youth rights movement. The field of children's rights spans the fields of law, politics, religion, and morality.

Rationale

As minors by law children do not have autonomy or the right to make decisions on their own for themselves in any known jurisdiction of the world. Instead their adult caregivers, including parents, social workers, teachers, youth workers and others, are vested with that authority, depending on the circumstances. Some believe that this state of affairs gives children insufficient control over their own lives and causes them to be vulnerable. Louis Althusser has gone so far as describe this legal machinery, as it applies to children, as "repressive state apparatuses".

Structures such as government policy have been held by some commentators to mask the ways adults abuse and exploit children, resulting in child poverty, lack of educational opportunities, and child labor. On this view, children are to be regarded as a minority group towards whom society needs to reconsider the way it behaves. However, there is no evidence that such views are widely shared in society.

Researchers have identified children as needing to be recognized as participants in society whose rights and responsibilities need to be recognized at all ages.

Historic Definitions of Children's Rights

Consensus on defining children's rights has become clearer in the last fifty years. A 1973 publication by Hillary Clinton stated that children's rights were a "slogan in need of a definition". Some researchers, the notion of children's rights is still not well defined, with at least one proposing that there is no singularly accepted definition or theory of the rights held by children.

Children's rights law is defined as the point where the law intersects with a child's life. That includes juvenile delinquency, due process for children involved in the criminal justice system, appropriate representation, and effective rehabilitative services; care and protection for children in state care; ensuring education for all children regardless of their origin, race, gender, disabilities, or abilities, and; health care and advocacy.

Types of Rights

Children's rights are defined in numerous ways, including a wide spectrum of civil, cultural, economic, social and political rights. Rights tend to be of two general types: those advocating for

children as autonomous persons under the law and those placing a claim on society for protection from harms perpetrated on children because of their dependency. These have been labeled as the right of empowerment and as the right to protection. One Canadian organization categorizes children's rights into three categories:

- Provision: Children have the right to an adequate standard of living, health care, education and services, and to play. These include a balanced diet, a warm bed to sleep in, and access to schooling.
- Protection: Children have the right to protection from abuse, neglect, exploitation and discrimination. This includes the right to safe places for children to play; constructive child rearing behavior, and acknowledgment of the evolving capacities of children.
- Participation: Children have the right to participate in communities and have programs and services for themselves. This includes children's involvement in libraries and community programs, youth voice activities, and involving children as decision-makers.

In a similar fashion, the Child Rights Information Network, or CRIN for short, categorizes rights into two groups:

- Economic, social and cultural rights, related to the conditions necessary to meet basic human needs such as food, shelter, education, health care, and gainful employment. Included are rights to education, adequate housing, food, water, the highest attainable standard of health, the right to work and rights at work, as well as the cultural rights of minorities and indigenous peoples.
- Environmental, cultural and developmental rights, which are sometimes called "third generation rights," and including the right to live in safe and healthy environments and that groups of people have the right to cultural, political, and economic development.

Amnesty International openly advocates four particular children's rights, including the end to juvenile incarceration without parole, an end to the recruitment of military use of children, ending the death penalty for people under 21, and raising awareness of human rights in the classroom. Human Rights Watch, an international advocacy organization, includes child labor, juvenile justice, orphans and abandoned children, refugees, street children and corporal punishment.

Scholarly study generally focuses children's rights by identifying individual rights. The following rights "allow children to grow up healthy and free":

- Freedom of speech.
- Freedom of thought.
- Freedom from fear.

- Freedom of choice and the right to make decisions.
- Ownership over one's body.

Other issues affecting children's rights include the sale of children, child prostitution and child pornography.

Difference Between Children's Rights and Youth Rights

"In the majority of jurisdictions, for instance, children are not allowed to vote, to marry, to buy alcohol, to have sex, or to engage in paid employment." Within the youth rights movement, it is believed that the key difference between children's rights and youth rights is that children's rights supporters generally advocate the establishment and enforcement of protection for children and youths, while youth rights generally advocates the expansion of freedom for children and/or youths and of rights such as suffrage. Also, many people who support youth rights, are concerned with adolescents and not children.

Parental Rights

Parents affect the lives of children in a unique way, and as such their role in children's rights has to be distinguished in a particular way. Particular issues in the child-parent relationship include child neglect, child abuse, freedom of choice, corporal punishment and child custody. There have been theories offered that provide parents with rights-based practices that resolve the tension between "commonsense parenting" and children's rights. The issue is particularly relevant in legal proceedings that affect the potential emancipation of minors, and in cases where children sue their parents.

A child's rights to a relationship with both their parents is increasingly recognized as an important factor for determining the best interests of the child in divorce and child custody proceedings. Some governments have enacted laws creating a rebuttable presumption that shared parenting is in the best interests of children.

Movement

The Children's Rights Movement is a historical and modern movement committed to the acknowledgment, expansion, and/or regression of the rights of children around the world. While the historical definition of child has varied, the United Nations Convention on the Rights of the Child explains, "A child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier." There are no definitions of other terms used to describe young people such as "adolescents", "teenagers" or "youth" in international law.

Thomas Spence's The Rights of Infants is an early English-language assertion of the natural rights of children.

In the USA, the Children's Rights Movement was born in the 1800s with the orphan train. In the big cities, when a child's parents died or were extremely poor, the child frequently had to go to work to support himself and/or his family. Boys generally became factory or coal workers, and girls became prostitutes or saloon girls, or else went to work in a sweat shop. All of these jobs paid only starvation wages.

In 1852, Massachusetts required children to attend school. In 1853, Charles Brace founded the Children's Aid Society, which worked hard to take street children in. The following year, the children were placed on a train headed for the West, where they were adopted, and often given work. By 1929, the orphan train stopped running altogether, but its principles lived on.

The National Child Labor Committee, an organization dedicated to the abolition of all child labor, was formed in the 1890s. It managed to pass one law, which was struck down by the Supreme Court two years later for violating a child's right to contract his work. In 1924, Congress attempted to pass a constitutional amendment that would authorize a national child labor law. This measure was blocked, and the bill was eventually dropped. It took the Great Depression to end child labor nationwide; adults had become so desperate for jobs that they would work for the same wage as children. In 1938, President Franklin D. Roosevelt signed the Fair Labor Standards Act which, amongst other things, placed limits on many forms of child labor.

Now that child labor had been effectively eradicated in parts of the world, the movement turned to other things, but it again stalled when World War II broke out and children and women began to enter the work force once more. With millions of adults at war, the children were needed to help keep the country running. In Europe, children served as couriers, intelligence collectors, and other underground resistance workers in opposition to Hitler's regime.

In the early twentieth century, moves began to promote the idea of children's rights as distinct from those of adults and as requiring explicit recognition. The Polish educationalist Janusz Korczak wrote of the rights of children in his book How to Love a Child; a later book was entitled The Child's Right to Respect. In 1917, following the Russian Revolution, the Moscow branch of the organization Proletkult produced a Declaration of Children's Rights. However, the first effective attempt to promote children's rights was the Declaration of the Rights of the Child, drafted by Eglantyne Jebb in 1923 and adopted by the League of Nations in 1924. This was accepted by the United Nations on its formation and updated in 1959, and replaced with a more extensive UN Convention on the Rights of the Child in 1989.

From the formation of the United Nations in the 1940s and extending to present day, the Children's Rights Movement has become global in focus. While the situation of children in the United States has become grave, children around the world have increasingly become engaged in illegal, forced child labor, genital mutilation, military service, and sex trafficking. Several international organizations have rallied to the assistance of children. They include Save the Children, Free the Children, and the Children's Defense Fund.

The Child Rights Information Network, or CRIN, formed in 1983, is the group of 1,600 non-governmental organizations from around the world which advocate for the implementation of the Convention on the Rights of the Child. Organization's report on their countries' progress towards implementation, as do governments that have ratified the Convention. Every 5 years reporting to the United Nations Committee on the Rights of the Child is required for governments.

While there is a long history of children's rights in the U.S., scholars contend that there is no "golden age". Many children's rights advocates in the U.S. today advocate for a smaller agenda than their international peers. Groups predominately focus on child abuse and neglect, child fatalities, foster care, youth aging out of foster care, preventing foster care placement, and adoption. A longstanding movement promoting youth rights in the United States has made substantial gains in the past.Anti-Children's Rights propagandists often raise the spectre of Rights without Responsibilities. The Children's Rights Movement assert that it is rather the case that children have rights which adults, states and government have a responsibility to uphold. The UK maintains a position that UNCRC is not legally enforceable and is hence 'aspirational' only - albeit a 2003 ECHR ruling states: "The human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the Rights of the Child.". 18 years after ratification, the four Children's Commissioners in the devolved administrations have united in calling for adoption of the Convention into domestic legislation, making children's rights legally enforceable.Several countries have created an institute of children's rights ombudsman, most notably Sweden, Finland and Ukraine, which is first country worldwide to install children at that post. In Ukraine Ivan Cherevko and Julia Kruk became first children's rights ombudsmen in late 2005.The United Nations Convention on the Rights of the Child has outlined a standard premise for the children's rights movement and has been ratified by all but two nations - the United States and Somalia. Somalia's inability to sign the Convention is attributed to their lack of governmental structure. The US administration under Bush has opposed ratifying the Convention because of "serious political and legal concerns that it conflicts with U.S. policies on the central role of parents, sovereignty, and state and local law." However, the new administration may be taking another look at it.

International Law

The Universal Declaration of Human Rights is seen as a basis for all international legal standards for children's rights today. There are several conventions and laws that address children's rights around the world. A number of current and historical documents affect those rights, including the 1923 Declaration of the Rights of the Child, drafted by Eglantyne Jebb and her sister Dorothy Buxton in London, England in 1919, endorsed by the League of Nations and adopted by the United Nations in 1946. It later served as the basis for the Convention on the Rights of the Child.

Convention on the Rights of the Child

The United Nations' 1989 Convention on the Rights of the Child, or CRC, is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights. Its implementation is monitored by the Committee on the Rights of the Child. National governments that ratify it commit themselves to protecting and ensuring children's rights, and agree to hold themselves accountable for this commitment before the international community. The CRC is the most widely ratified human rights treaty with 190 ratifications. Somalia and USA are the only two countries which have not agreed to the CRC. The CRC is based on four core principles, namely the principle of non discrimination, the best interests of the child, the right to life, survival and development, and considering the views of the child in decisions which affect them. The CRC, along with international criminal accountability mechanisms such as the International Criminal Court, the Yugoslavia and Rwanda Tribunals, and the Special Court for Sierra Leone, is said to have significantly increased the profile of children's rights worldwide.

Enforcement

A variety of enforcement organizations and mechanisms exist to ensure children's rights and the successful implementation of the Union. They include the Child Rights Caucus for the United Nations General Assembly Special Session on Children. It was set up to promote full implementation and compliance with the Convention on the Rights of the Child, and to ensure that child rights were given priority during the UN General Assembly Special Session on Children and its Preparatory process. The United Nations Human Rights Council was created "with the hope that it could be more objective, credible and efficient in denouncing human rights violations worldwide than the highly politicised Commission on Human Rights." The NGO Group for the Convention on the Rights of the Child is a coalition of international non-governmental organisations originally formed in 1983 to facilitate the implementation of the United Nations Convention on the Rights of the Child.

Many countries around the world have children's rights ombudspeople or children's commissioners whose official, governmental duty is to represent the interests of the public by investigating and addressing complaints reported by individual citizens regarding children's rights. Children's ombudspeople can also work for a corporation, a newspaper, an NGO, or even for the general public.

United States law

Children are generally afforded the basic rights embodied by the Constitution, as enshrined by the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause of that amendment is to apply to children, born within a marriage or not, but excludes children not yet born. This was reinforced by the landmark US Supreme Court decision of In re Gault. In this trial 15-year-old Gerald Gault of Arizona was taken into custody by local police after being accused of making an obscene telephone call. He was detained and committed to the Arizona State Industrial

School until he reached the age of 21 for making an obscene phone call to an adult neighbor. In an 8–1 decision, the Court ruled that in hearings which could result in commitment to an institution, people under the age of 18 have the right to notice and counsel, to question witnesses, and to protection against self-incrimination. The Court found that the procedures used in Gault's hearing met none of these requirements.

There are other concerns in the United States regarding children's rights. The American Academy of Adoption Attorneys is concerned with children's rights to a safe, supportive and stable family structure. Their position on children's rights in adoption cases states that, "children have a constitutionally based liberty interest in the protection of their established families, rights which are at least equal to, and we believe outweigh, the rights of others who would claim a 'possessory' interest in these children." Other issues raised in American children's rights advocacy include children's rights to inheritance in same-sex marriages and particular rights for youth.

Civil Rights

In contemporary political thought, the term 'civil rights' is indissolubly linked to the struggle for equality of American blacks during the 1950s and 60s. The aim of that struggle was to secure the status of equal citizenship in a liberal democratic state. Civil rights are the basic legal rights a person must possess in order to have such a status. They are the rights that constitute free and equal citizenship and include personal, political, and economic rights. No contemporary thinker of significance holds that such rights can be legitimately denied to a person on the basis of race, color, sex, religion, national origin, or disability. Antidiscrimination principles are thus a common ground in contemporary political discussion. However, there is much disagreement in the scholarly literature over the basis and scope of these principles and the ways in which they ought to be implemented in law and policy. In addition, debate exists over the legitimacy of including sexual orientation among the other categories traditionally protected by civil rights law, and there is an emerging literature examining issues of how best to understand discrimination based on disability.

Rights

The Civil-Political Distinction

Until the middle of the 20th century, civil rights were usually distinguished from 'political rights'. The former included the rights to own property, make and enforce contracts, receive due process of law, and worship one's religion. Civil rights also covered freedom of speech and the press. But they did not include the right to hold public office, vote, or to testify in court. The latter were political rights, reserved to adult males.

The civil-political distinction was conceptually and morally unstable insofar as it was used to sort citizens into different categories. It was part of an ideology that classified women as citizens who

were entitled to certain rights but not to the full panoply to which men were entitled. As that ideology broke down, the civil-political distinction began to unravel. The idea that a certain segment of the adult citizenry could legitimately possess one bundle of rights, while another segment would have to make do with an inferior bundle, became increasingly implausible. In the end, the civil-political distinction could not survive the cogency of the principle that all citizens of a liberal democracy were entitled, in Rawls's words, to "a fully adequate scheme of equal basic liberties".

It may be possible to retain the distinction strictly as one for sorting rights, rather than sorting citizens. But it is difficult to give a convincing account of the principles by which the sorting is done. It seems neater and cleaner simply to think of civil rights as the general category of basic rights needed for free and equal citizenship. Yet, it remains a matter of contention which claims are properly conceived as belonging to the category of civil rights. Analysts have distinguished among "three generations" of civil rights claims and have argued over which claims ought to be treated as true matters of civil rights.

Three Generations of Rights

The claims for which the American civil rights movement initially fought belong to the first generation of civil rights claims. Those claims included the pre-20th century set of civil rights — such as the rights to receive due process and to make and enforce contracts — but covered political rights as well. However, many thinkers and activists argued that these first-generation claims were too narrow to define the scope of free and equal citizenship. They contended that such citizenship could be realized only by honoring an additional set of claims, including rights to food, shelter, medical care, and employment. This second generation of economic "welfare rights," the argument went, helped to ensure that the political, economic, and legal rights belonging to the first generation could be made effective in protecting the vital interests of citizens and were not simply paper guarantees.

Yet, some scholars have argued that these second-generation rights should not be subsumed under the category of civil rights. Thus, Cranston writes, "The traditional 'political and civil rights' can… be readily secured by legislation. Since the rights are for the most part rights against government interference…the legislation needed had to do no more than restrain the executive's own arm. This is no longer the case when we turn to the 'right to work', the 'right to social security' and so forth".

However, Cranston fails to recognize that such first-generation rights as due process and the right to vote also require substantial government action and the investment of considerable public resources. Holmes and Sunstein have made the case that all of the first-generation civil rights require government to do more than simply "restrain the executive's own arm." It seems problematic to think that a significant distinction can be drawn between first and second-generation rights on the ground that the former, but not the latter, simply require that government refrain from interfering with the actions of persons. Moreover, even if some viable distinction could be drawn along those lines, it would not follow that second-generation rights should be excluded from the category of

civil rights. The reason is that the relevant standard for inclusion as a civil right is whether a claim is part of the package of rights constitutive of free and equal citizenship. There is no reason to think that only those claims that can be "readily secured by legislation" belong to that package. And the increasingly dominant view is that welfare rights are essential to adequately satisfying the conditions of free and equal citizenship.

In the United States, however, the law does not treat issues of economic well-being per se as civil rights matters. Only insofar as economic inequality or deprivation is linked to race, gender or some other traditional category of antidiscrimination law is it considered to be a question of civil rights. In legal terms, poverty is not a "suspect classification." On the other hand, welfare rights are protected as a matter of constitutional principle in other democracies. For example, section 75 of the Danish Constitution provides that "any person unable to support himself or his dependents shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance." And the International Covenant on Economic, Social, and Cultural Rights provides that the state parties to the agreement "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

A third generation of claims has received considerable attention in recent years, what may be broadly termed "rights of cultural membership." These include language rights for members of cultural minorities and the rights of indigenous peoples to preserve their cultural institutions and practices and to exercise some measure of political autonomy. There is some overlap with the first-generation rights, such as that of religious liberty, but rights of cultural membership are broader and more controversial.

Article 27 of the International Covenant on Civil and Political Rights declares that third-generation rights ought to be protected:

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

Similarly, the Canadian Charter of Rights and Freedoms protects the language rights of minorities and section 27 provides that "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." In the United States, there is no analogous protection of language rights or multiculturalism, although constitutional doctrine does recognize native Indian tribes as "domestic dependent nations" with some attributes of political self-rule, such as sovereign immunity.

There is substantial philosophical controversy over the legitimacy and scope of rights of cultural membership. Kymlicka has argued that the liberal commitment to protect the equal rights of individuals requires society to protect such rights. He argues that "granting special representational

rights, land claims, or language rights to a minority….can be seen as putting the various groups on a more equal footing, by reducing the extent to which the smaller group is vulnerable to the larger". Such special rights do not amount to "group rights," in the sense of granting the group any power or priority over the individual. Rather, the rights "compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the cultural marketplace".

Waldron criticizes Kymlicka for exaggerating the importance for the individual of membership in her particular culture and for underestimating the mutability and interpenetration of cultures. Individual freedom requires some cultural context of choice, but it does not require the preservation of the particular context in which the individual finds herself. Liberal individuals must be free to evaluate their culture and to distance themselves from it.

Kukathas criticizes Kymlicka for implying that the liberal commitment to the protection of individual rights is insufficient to treat the interests of minorities with equal consideration. Kukathas contends that "we need to reassert the importance of individual liberty or individual rights and question the idea that cultural minorities have collective rights". But the system of uniform legal rules that he endorses would keep the state from intervening even when a minority culture inflicts significant harm on its more vulnerable members, e.g., when cultural norms strongly discourage females from seeking the same educational and career opportunities as males.

Barry asserts that "there are certain rights against oppression, exploitation, and injury, to which every single human being is entitled to lay claim, and…appeals to cultural diversity and pluralism under no circumstances trump the value of basic liberal rights". The legal system should protect those rights by impartially imposing the same rules on all persons, regardless of their cultural or religious membership. Barry allows for a few exceptions, such as the accommodation of a Sikh boy whose turban violated school dress regulations, but thinks that the conditions under which such exceptions will be justified "are rarely satisfied". Barry's position reflects and elaborates Gitlin's earlier condemnation of views advocating distinctive rights for cultural and ethnic minorities. Gitlin condemned such views on the ground that they represent a "swerve from civil rights, emphasizing a universal condition and universalizable rights, to cultural separatism, emphasizing difference and distinct needs".

At the other end of the spectrum, Taylor argues for a form of communitarianism that attaches intrinsic importance to the survival of cultures. In his view, differential treatment under the law for certain practices is sometimes justifiable on the ground that such treatment is important for keeping a culture alive. Taylor goes as far as to claim that cultural survival can sometimes trump basic individual rights, such as freedom of speech. He defends legal restrictions on the use of English in Quebec, invoking the survival of Quebec's French culture.

However, it is unclear why intrinsic value should attach to cultural survival as such. Following John Dewey, Kymlicka rightly emphasizes that liberty would have little or no value to the individual

apart from the life-options and meaningful choices provided by culture. But both thinkers also reasonably contend that human interests are ultimately the interests of individual human beings. In light of that contention, it would seem that a culture that could not gain the uncoerced and undeceived adherence of enough individuals to survive would have no moral claim to its continuation. Legal restrictions on basic liberties that are designed to perpetuate a given culture have the cart before the horse: persons should have their basic liberties protected first, as those protections serve the most important human interests. Only when those interests are protected can we then say that a culture should survive, not because the culture is intrinsically valuable, but rather because it has the uncoerced adherence of a sufficient number of persons.

Blacks and Native Americans

The treatment of blacks under slavery and Jim Crow presents a history of injustice and cultural annihilation that is similar in some respects to the treatment of Native Americans. However, civil rights principles played a very different role in the struggle of Native Americans against the injustices perpetrated against them by whites.

Civil rights principles demand inclusion of the individuals from a disadvantaged group in the major institutions of society on an equal basis with the individuals who are already treated as full citizens. The principles do not require that the disadvantaged group be given a right to govern its own affairs. A right of political self-determination, in contrast, demands that a group have the freedom to order its affairs at it sees fit and, to that extent, political self-determination has a separatist aspect, even if something less than complete sovereignty is involved.

The pursuit of civil rights by American blacks overshadowed the pursuit of political self-determination. The fact that American blacks lacked any territory of their own on which they could rule themselves favored the civil rights strategy. Moreover, the civil war amendments, and the civil rights laws that accompanied them, were meant to incorporate black Americans into the body politic as free and equal citizens. Although this effort was defeated by Jim Crow, the principle of citizenship for blacks had been enshrined in law. And so, in their struggle to defeat Jim Crow, blacks could and did repeatedly demand that white Americans live up to their constitutional promise of equality.

In contrast, for Native Americans, the pursuit of political-self-determination, in the form of tribal sovereignty, overshadowed the pursuit of civil rights. Even after the coerced tribal removals and federal efforts to impose regimes of individual land ownership, tribes still retained some territorial basis on which a measure of self-rule was possible. Moreover, a line of Supreme Court decisions dating to the early 1800's held that Indian tribes possessed some — albeit very limited — inherent powers of sovereignty. Pursuit of political self-determination rather than civil-rights protections seemed, in the eyes of many Indians, to be the most reasonable strategy for counteracting white oppression.

During the civil rights movement of the 1950's and 60's, there was some tension between Native Americans and blacks due to their different attitudes toward self-determination and civil rights. Some Native Americans looked askance at the desire of blacks for inclusion and thought the desire hopelessly naïve. And activists emerged from the black power movement who had a similar view of the effort at racial inclusion and who called for a form of political self-determination. Such a call was part of a tradition of black nationalism that can still be found today in the United States. Nonetheless, in the United States, unlike civil rights principles, black nationalist principles have not become part of the law.

In 1968, Congress enacted an Indian Civil Rights Act. The act extended the reach of certain individual constitutional rights against government to intratribal affairs. Tribal governments would for the first time be bound by constitutional principles concerning free speech, due process, cruel and unusual punishment, and equal protection, among others. Freedom of religion was omitted from the law as a result of the protests of the Pueblo, whose political arrangements were theocratic, but the law was a major incursion on tribal self-determination, nonetheless.

A married pueblo woman brought suit in federal court, claiming that the tribe's marriage ordinances constituted sex discrimination against her and other women of the tribe, thus violating the ICRA. The ordinances excluded from tribal membership the children of a Pueblo woman who married outside of the tribe, while the children of men who married outsiders were counted as members. Martinez had initially sought relief in tribal forums, to no avail, before turning to the federal courts. The Supreme Court held that federal courts did not have jurisdiction to hear the case: the substantive provisions of the ICRA did apply to the Pueblo, but the inherent sovereign powers of the tribe meant that the tribal government had exclusive jurisdiction in the case. The ruling has been both questioned and defended by feminist legal scholars.

In contrast to the United States, the Canadian Indian Act provides that men and women are to be treated equally when it comes to the band membership of their children. This law and the Santa Clara case raise the general issue of whether and when it is justifiable for a liberal state to impose liberal principles on illiberal political communities that had been involuntary incorporated into the larger state. Addressing this issue, Kymlicka argues that "there is relatively little scope for legitimate coercive interference" because efforts to impose liberal principles tend to be counterproductive, provoking the charge that they amount to "paternalistic colonialism." Moreover, "liberal institutions can only really work if liberal beliefs have been internalized." Kymlicka concludes, then, that liberals on the outside of an illiberal culture should support the efforts of those insiders who seek reform but should generally stop short of coercively imposing liberal principles. At the same time, Kymlicka acknowledges that there are cases in which a liberal state is clearly permitted to impose its laws, citing with approval the decision in a case that involved the application of Canadian law to a tribe that had kidnapped a member and forced him to undergo an initiation ceremony.

Applying Kymlicka's general line of thinking might prove contentious in many cases. Consider Santa Clara. His arguments could be used to support the decision in that case: the exercise of jurisdiction might be deemed "paternalistic colonialism." But one might argue, instead, that jurisdiction is needed to vindicate the basic liberal right of gender equality. However, it does seem that, if a wrong akin to kidnapping or worse is required before federal courts can legitimately step in, then the Santa Clara case falls short of meeting such a requirement. The argument might then shift to whether the requirement imposes an excessively high hurdle for the exercise of federal jurisdiction. Kymlicka's approach might not settle the disagreement over Santa Clara, but it does provide a very reasonable normative framework in terms of which liberal thought can address the difficult issues presented by the case and, more generally, by the problem of extending liberal principles to Native American tribes.

Free and Equal Citizenship

Civil rights are those rights that constitute free and equal citizenship in a liberal democracy. Such citizenship has two main dimensions, both tied to the idea of autonomy. Civil rights are essentially connected to securing the autonomy of the citizen.

Public and Private Autonomy

To be a free and equal citizen is, in part, to have those legal guarantees that are essential to fully adequate participation in public discussion and decisionmaking. A citizen has a right to an equal voice and an equal vote. In addition, she has the rights needed to protect her "moral independence," that is, her ability to decide for herself what gives meaning and value to her life and to take responsibility for living in conformity with her values. Equal citizenship has two main dimensions: "public autonomy," i.e., the individual's freedom to participate in the formation of public opinion and society's collective decisions; and "private autonomy," i.e., the individual's freedom to decide what way of life is most worth pursuing. The importance of these two dimensions of citizenship stem from what Rawls calls the "two moral powers" of personhood: the capacity for a sense of justice and the capacity for a conception of the good. A person stands as an equal citizen when society and its political system give equal and due weight to the interest each citizen has in the development and exercise of those capacities.

Ancient and Modern Citizenship

The idea of equal citizenship can be traced back to Aristotle's political philosophy and his claim that true citizens take turns ruling and being ruled. In modern society, the idea has been transformed, in part by the development of representative government and its system of elections. For modern liberal thought, by contrast, citizenship is no longer a matter of having a direct and equal share in governance, but rather consists in a legal status that confers a certain package of rights

that guarantee to an individual a voice, a vote, and a zone of private autonomy. The other crucial differences between modern liberalism and earlier political theories concern the range of human beings who are regarded as having the capacity for citizenship and the scope of private autonomy to which each citizen is entitled as a matter of basic right. Modern liberal theory is more expansive on both counts than its ancient and medieval forerunners.

It is true that racist and sexist assumptions plagued liberal theory well into the twentieth-century. However, two crucial liberal ideas have made possible an internal critique of racism, sexism, and other illegitimate forms of hierarchy. The first is that society is constructed by humans, a product of human will, and not some preordained natural or God-given order. The second is that social arrangements need to be justified before the court of reason to each individual who lives under them and who is capable of reasoning. The conjunction of these ideas made possible an egalitarianism that was not available to ancient and medieval political thought, although this liberal egalitarianism emerged slowly out of the racist and sexist presuppositions that infused much liberal thinking until recent decades.

Many contemporary theorists have argued that taking liberal egalitarianism to its logical cease requires the liberal state to pursue a program of deliberately reconstructing informal social norms and cultural meanings. They contend that social stigma and denigration still operate powerfully to deny equal citizenship to groups such as blacks, women, and gays. Kernohan has argued that "the egalitarian liberal state should play an activist role in cultural reform", and Koppelman has taken a similar position: "the antidiscrimination project seeks to reconstruct social reality to eliminate or marginalize the shared meanings, practices and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage". This position is deeply at odds with at least some of the ideas that lie behind the advocacy of third-generation civil rights. Those rights ground claims of cultural survival, whether or not a culture's meanings, practices and institutions stigmatize and disadvantage the members of some ascriptively-defined group. The egalitarian proponents of cultural reconstruction can be understood as advocating a different kind of "third-generation" for the civil rights movement: one in which the state, having attacked legal, political and economic barriers to equal citizenship, now takes on cultural obstacles.

A cultural-reconstruction phase of the civil rights movement would run contrary to Kukathas's argument that it is too dangerous to license the state to intervene against cultures that engage in social tyranny. It also raises questions about whether state-supported cultural reconstruction would violate basic liberties, such as freedom of private association. The efforts of New Jersey to apply antidiscrimination law to the Boy Scouts, a group which discriminates against gays, emphasizes the potential problems. The Supreme Court invalidated those efforts on grounds of free association. Nonetheless, it may be necessary to reconceive the scope and limits of some basic liberties if the principle of free and equal citizenship is followed through to its logical ceases.

Discrimination

In liberal democracies, civil rights claims are typically conceptualized in terms of the idea of discrimination. Persons who make such claims assert that they are the victims of discrimination. In order to gain an understanding of current discussion and debate regarding civil rights, it is important to disentangle the various descriptive and normative senses of 'discrimination'.

The Idea of Discrimination

In one of its central descriptive senses, 'discrimination' means the differential treatment of persons, however justifiable or unjustifiable the treatment may be. In a distinct but still primarily descriptive sense, it means the disadvantageous treatment of some persons relative to others. This sense is not purely descriptive in that an evaluative judgment is involved in determining what counts as a disadvantage. But the sense is descriptive insofar as no evaluative judgment is made regarding the justifiability of the disadvantageous treatment.

In addition to its descriptive senses, there are two normative senses of 'discrimination'. In the first, it means any differential treatment of the individual that is morally objectionable. In the second sense, 'discrimination' means the wrongful denial or abridgement of the civil rights of some persons in a context where others enjoy their full set of rights. The two normative senses are distinct because there can be morally objectionable forms of differential treatment that do not involve the wrongful denial or abridgement of civil rights. If I treat one waiter rudely and another nicely, because one is a New York Yankees fan and the other is a Boston Red Sox fan, then I have acted in a morally objectionable way but have not violated anyone's civil rights.

Discrimination that does deny civil rights is a double wrong against its victims. The denial of civil rights is by itself a wrong, whether or not others have such rights. When others do have such rights, the denial of civil rights to persons who are entitled to them involves the additional wrong of unjustified differential treatment. On the other hand, if everyone is denied his civil rights, then the idea of discrimination would be misapplied to the situation. A despot who oppresses everyone equally is not guilty of discrimination in any of its senses. In contrast, discrimination is a kind of wrong that is found in systems that are liberal democratic but imperfectly so: it is the characteristic injustice of liberal democracy.

The first civil rights law, enacted in 1866, embodied the idea of discrimination as wrongful denial of civil rights to some while others enjoyed their full set of rights. It declared that "all persons" in the United States were to have "the same right…to make and enforce contracts…and to the full and equal benefit of all laws…as is enjoyed by white citizens". The premise was that whites enjoyed a fully adequate scheme of civil rights and that everyone else who was entitled to citizenship was to be legally guaranteed that same set of rights.

It is a notable feature of civil rights law that its prohibitions do not protect only citizens. Any person within a given jurisdiction, citizen or not, can claim the protection of the law, at least within certain

limits. Thus, noncitizens are protected by fair housing and equal employment statutes, among other antidiscrimination laws. Noncitizens can also claim the legal protections of due process if charged with a crime. Even illegal aliens have limited due process rights if they are within the legal jurisdiction of the country. On the other hand, noncitizens cannot claim under U.S. law that the denial of political rights amounts to wrongful discrimination. Noncitizens can vote in local and regional elections in certain countries, but the denial of equal political rights would seem to be central to the very status of noncitizen.

The application of much of civil rights law to noncitizens indicates that many of the rights in question are deeper than simply the rights that constitute citizenship. They are genuine human rights to which every person is entitled, whether she is in a location where she has a right to citizenship or not. And civil rights issues are, for that reason, regarded as broader in scope than issues regarding the treatment of citizens.

Why Discrimination is Unjust

Given the principle of equal citizenship, discrimination in the sense of the denial of civil rights is an injustice that denies certain citizens the rights to which they are entitled. But it is not obvious that the principle entails that discrimination in the sense of differential treatment is unjust, even if the differential treatment disadvantages persons based on their race, sex, or another paradigmatic civil rights category. The common view is that such differential treatment is an injustice that violates the basic rights of the individual. In other words, the view is that it is a civil right to not be treated disadvantageously on account of one's race or sex.

An argument for the soundness of the common view cannot simply invoke existing laws that ban discrimination based on race, sex, and similar categories. The point of the common view is that the injustice of racial and gender discrimination explains why there ought to be those laws. What is required is an account that shows why such discrimination is an injustice.

There are two main approaches to providing an account of the injustice of discrimination based on race and sex. The first is "individualistic" in that it seeks to explain the injustice in a way that abstracts from the broader social and political context in which the differential treatment occurs. The second is "systemic" in that it seeks to explain the injustice in a way that links the differential treatment to social patterns that reduce, or threaten to reduce, the members of certain groups to second-class citizenship.

Individualistic Accounts

Kahlenberg asserts the popular view that race discrimination is unjust because it treats a person on the basis of a characteristic that is immutable or beyond her control. But Boxill rejects such a view, arguing that there are many instances in which it is justifiable to treat persons based on features

that are beyond their control. Denying blind people a driver's license or persons with little athletic ability a place on the basketball team is not an injustice to such individuals. Moreover, Boxill notes that, if scientists developed a drug that could change a person's skin color, it would still be unjust to discriminate against people because of their skin color.

Flew argues that racism is unjust because it treats differently persons who "are in all relevant respects the same". The defining characteristics of a race "are strictly superficial and properly irrelevant to all, or almost all, questions of social status and employability". But if 'relevant' means 'rationally related', then it does not appear to be a requirement of justice that a person always treat others only on the basis of relevant characteristics. The idea that it is such a requirement rests on the false premise that all morally bad treatment is a violation of justice and rights. If I give a waiter a poor tip because he is not a fan of my favorite sports team, then I have behaved badly but have not violated the waiter's rights or committed an injustice against him. And it is unclear, on Flew's account, why giving a poor tip because of a waiter's race is any different than doing so because of his preferences in sports.

Often people will insist that the injustice of racial or sex discrimination stems from the connection between those forms of discrimination and the reliance on stereotypes. It is not just that race is irrelevant but that those who act on race-based grounds are using inaccurate stereotypes instead of treating a person "as an individual," as the phrase goes. However, if "being treated as an individual" means that others must take into account all of the potentially relevant information about the person in their behavior toward her, then there is no plausibility to the claim that anyone has a right to such treatment. Life's scarcity of time and resources undermines the idea that there is such a right.

Moreover, in some cases, stereotypical beliefs reflect reliable generalizations about a group. The term 'statistical discrimination' refers to the use of such reliable generalizations. Consider the case of a pregnant job applicant: as a statistical matter, there is a higher antecedent likelihood that she will take more sick days than a nonpregnant applicant during the first year of employment. Yet, an employer who relies on statistical discrimination in excluding the pregnant applicant is acting illegally under the Pregnancy Discrimination Act. The act was passed because many people quite reasonably thought that it was unjust for a pregnant applicant to be treated in that way. But if the treatment is unjust, then one cannot explain why that is so by invoking the unreliability of the generalization on which the treatment is based.

Garcia provides an account of racial discrimination that loosens the link between it and injustice, but still preserves some connection. On his account, such discrimination against others expresses a character defect, viz., the failure to care enough, or in the right way, for their interests. Such discrimination is a matter of what is "in the heart" of the racist individual: "racially focused ill-will or disregard. This echoes the claim made by Gunnar Myrdal in his classic work, An American Dilemma, that "the American Negro problem is a problem in the heart of Americans".

Garcia's account weakens the link between racial discrimination and injustice because not every act expressing racial ill-will or disregard will be an injustice. Garcia writes that racial discrimination against a person "will often offend against justice," but he does not argue that it always so offends. He points out that discrimination against a person based on race may amount to a failure of benevolence, rather than a violation of rights. For example, racial disregard may lead a person to refuse to contribute to a charity organization that works with inner-city youth. In such a case, the person has failed to show benevolence for morally discreditable reasons, and so has behaved badly. But no injustice has been committed.

On the other hand racial ill-will is often expressed in violations of the rights of persons: hate crimes that harm the property or person of an individual on account of race; efforts to prevent members of certain racial groups from voting; charging racial minorities higher prices for the same product than the prices charged to similarly situated whites; denying persons equality of opportunity in the job and housing markets on account of their race. Such actions would count as injustices, not simply failures of benevolence. Thus, Garcia's approach preserves some link between discrimination and injustice, but it is much more attenuated than the link posited by the popular view that disadvantageous treatment on the basis of race is ipso facto an injustice to the person so treated.

Systemic Accounts

Many thinkers reject the idea that the injustice of discrimination stems fundamentally from what is in the mind or heart of the individual. Crespi criticized Myrdal on the ground that the latter's individualistic understanding of racial discrimination entailed that "ethical exhortation" was the remedy for racial injustice. Crespi argued that what really needed remedy were the social and economic structures that advantage whites. More recently, Steinberg and Bonilla-Silva, among others, have argued that racial discrimination should not be understood as a "moral problem," i.e., as a problem with individual attitudes or actions, but rather as a problem of persistent structural inequality. And MacKinnon has made a parallel argument when it comes to sex discrimination. For example, she contends that pornography is "not a moral problem" but rather a political one, meaning that it does not pose a problem of the virtue and vice of individuals and their behavior but rather one concerning relations of power that subordinate women to men.

On the systemic account of racial and sex discrimination, the injustice of discriminatory acts lies in their connection to broader patterns in society that reduce the members of certain groups to second-class citizenship, or worse. Considered in abstraction from these broader patterns, refusing employment to someone on account of her race might be morally objectionable insofar as it treated a person arbitrarily when some important interest of hers was at stake. But the objectionable treatment amounts to an injustice because such acts are not sporadic but rather systemic and add up to a system in which persons have their entire lives substantially diminished on account of their race or sex. And such a system is what violates the right to equality — the basic civil right. Individual acts of racial or gender discrimination do so only derivatively, by reinforcing the systemic violation.

There are different ways in which a systemic account can be elaborated. For example, in MacKinnon's account of sex discrimination, the system of gender inequality revolves around the sexual subordination of women. Butler, Brown and other feminists provide accounts which do not share MacKinnon's focus on sexual subordination. On the matter of racial discrimination, Cox focuses on the ways in which racial conflict is rooted in class conflict, while Omi and Winant emphasize "the specificity of race as an autonomous field of social conflict, political organization, and cultural/ideological meaning".

All systemic accounts rest on the premise that women, racial minorities, and other groups are second-class citizens and that they are so because of their group membership. The advocates of systemic accounts typically represent their views as incompatible with individualistic ones. They do so by insisting that discrimination is "not a moral problem" of the individual's heart or mind, but one concerning group power relations and social patterns of disadvantage. But their insistence rests on a false dichotomy. Discrimination based on race, sex and other categories can be a problem of the individual's heart and mind, as well as an issue that concerns systemic patterns of disadvantage in society. As Wasserstrom pointed out, discrimination can operate at both the individual and systemic levels. It is not necessary to deny the existence of patterns of discriminatory treatment that reduce, or threaten to reduce, some persons to second-class citizenship in order to affirm that it is an injustice to deny a person a job because of her sex. And it is not necessary to deny that, apart from social patterns of disadvantage, the individual who is denied a job for such reasons has been treated in an unjust way, in order to affirm that there are such patterns that reduce some to second-class status.

Justifying Anti-discrimination Law

Anti-discrimination laws typically pick out certain categories such as race and sex for legal protec-tion, define certain spheres such as employment and public accommodations in which discrimi-nation based on the protected categories is prohibited, and establish special government agencies, such as the Equal Employment Opportunity Commission, to assist in the laws' enforcement. There are many questions that can be raised concerning the justifiability of such laws. Some of the central philosophical questions derive from the fact that the laws restrict freedom of association, including the liberty of employers to decide whom they will hire. Some have argued that the liberal commit-ment to free association requires the rejection of antidiscrimination laws, including those that ban employment discrimination such as the Civil Rights Act of 1964. Most liberals thinkers reject this view, but any liberal defense of antidiscrimination laws must cite considerations sufficiently strong to override the infringements on freedom of association that the laws involve.

There are two different approaches within liberal thought to the justification of antidiscrimination laws. Both approaches regard as very important the interests people have in the areas protected by the laws, such as employment and public accommodations. And both approaches agree that the disadvantageous treatment of a person in those areas on the basis of race, sex, and the other traditional civil rights categories is morally arbitrary. However, on the first approach, the key to the

justification of antidiscrimination laws rests squarely on the fact that the conduct prohibited by the laws is morally arbitrary. In contrast, the second approach holds that it is not the morally arbitrary conduct as such that justifies the laws but rather the fact that conduct based on those categories has had systemic effects reducing the members of certain groups to second-class citizenship. Thus, the difference between the two approaches tracks the distinction between the individualistic and systemic accounts of why discrimination is wrong. Although many legal theorists endorse the systemic approach to the justification of antidiscrimination law, the U.S. Supreme Court seems to have adopted the individualistic one.

The Existence of Discrimination

Many debates over civil rights issues turn on assumptions about the scope and effects of existing discrimination against particular groups. For example, some thinkers hold that systemic discrimination based on race and gender is largely a thing of the past in contemporary liberal democracies and that the current situation allows persons to participate in society as free and equal citizens, regardless of race or gender. Many others reject that view, arguing that white skin privilege and patriarchy persist and operate to substantially and unjustifiably diminish the life-prospects of nonwhites and women. These differences drive debates over affirmative action, race-conscious electoral districting, and pornography, among other issues.

Questions about the scope and effects of discrimination are largely but not entirely empirical in character. Such questions concern the degree to which participation in society as a free and equal citizen is hampered by one's race or sex. And addressing that concern presupposes some normative criteria for determining what is needed to possess the status of such a citizen.

Moreover, there are subtle aspects of discrimination that are not captured by thinking strictly in terms of categories such as race, sex, religion, sexual orientation, and so on. Piper analyzes "higher-order" forms of discrimination in which certain traits, such as speaking style, come to be arbitrarily disvalued on account of their association with a disvalued race or sex. Determining the presence and effects of such forms of discrimination in society at large would be a very complicated conceptual and empirical task. Additional complications stem from the fact that different categories of discrimination might intersect in ways that produce distinctive forms of unjust disadvantage. Thus, some thinkers have asserted that the intersection of race and sex creates a form of discrimination against black women which has not been adequately recognized or addressed by judges or liberal legal theorists. And other thinkers have begun to argue that our understanding of discrimination must be expanded beyond the white-black paradigm to include the distinctive ways in which Asian-Americans and other minority groups are subjected to discriminatory attitudes and treatment.

Among the most careful empirical studies of discrimination have been those conducted by Ayers. He found evidence of "pervasive discrimination" in several types of markets, including retail car

sales, bail-bonding, and kidney-transplantation. Yet, his assessment is that "we still do not know the current ambit of race and gender discrimination in America".

Sexual Orientation

Some civil rights laws in the United States include the category of sexual orientation, but many people contest the legitimacy of the laws. The state of Colorado went so far as to ratify an amendment to its constitution that would prohibit any jurisdiction within the state from enacting a civil rights law that would protect homosexuals. The amendment was eventually invalidated by the U.S. Supreme Court on the ground that it was the product of simple prejudice and served no legitimate state purpose, thus violating the Equal Protection Clause. But federal courts have upheld the military's "don't ask, don't tell" policy and the U.S. Congress enacted the Defense of Marriage Act, which prohibits courts from ruling that same-sex marriages must be recognized on equal protection grounds. On the other hand, same-sex marriages are legally recognized in Massachusetts, though there are efforts to rescind the recognition, and marriage laws have also been extended to same-sex couples in the Netherlands, Belgium, Canada and Spain. In addition, several jurisdictions have recognized same-sex partnerships with many, though not all, of the legal rights of marriage. Opponents of same-sex marriage have claimed that it would weaken the commitment of heterosexuals to marriage, but some advocates have presented empirical data that appears to undercut any such claim.

Much of the discussion of "gay rights" involves the question of whether sexual orientation is genetically determined, socially determined, or the product of individual choice. However, it is not clear why the question is relevant. The discussion appears to assume that genetic determination would vindicate the civil rights claims of gays, because sexual orientation would then be like race or sex insofar as it would be biologically fixed and immutable. But it is a mistake to think that racial or sex discrimination is morally objectionable because of the biological fixity or unchosen nature of race and sex. It is objectionable because it expresses ill-will or indifference, and it is unjust because it treats an individual in a morally arbitrary manner and, under current conditions, reinforces social patterns of disadvantage that seriously diminish the life prospects of many persons. The view that sexual orientation is like race or sex in a morally relevant way should focus on the analogous features of discrimination based on sexual orientation.

Wintermute and Koppelman assert that discrimination based on sexual orientation is not just analogous to sex discrimination but that it is a form of sex discrimination. If it is legally permissible for Jane to have sex with John, then banning Joe's having sex with John would seem to amount to discrimination against Joe on grounds of his sex. If Joe were a woman, his having sex with John would be permitted, so he is being treated differently because of his sex. However, Koppelman contends that this formal argument should be supplemented by more substantive ones referring to the systemic patterns of social disadvantage from which gays and lesbians suffer. In fact, one can argue that the treatment of gays and lesbians is an injustice to them as individuals and amounts to

a systemic pattern of unjust disadvantage. The individual injustice arises from the arbitrary nature of denying persons valuable life-opportunities, such as employment and marriage, on the basis of their sexual orientation. The systemic injustice arises from the repeated and widespread acts of individual injustice.

The most controversial civil rights issues regarding sexual orientation concern the principle of equal treatment for same-sex and heterosexual couples. Most scholars endorse such a principle and argue that equal treatment requires that same-sex marriages be legalized. Moreover, it is often argued in the literature that a person's choice of sex partner is central to her life and protected under a right of privacy. In Bowers v. Hardwick, the United States Supreme Court rejected this argument, upholding the criminalization of homosexual sodomy. The decision was condemned by legal and political thinkers and was overturned by the Court in Lawrence v. Texas. The Court invoked the right of privacy in declaring the state's criminal ban on sodomy between same-sex partners. Nonetheless, some scholars who argue for the equal legal treatment of same-sex relations contend that privacy-based arguments are inadequate. They point out that one can hold the view that adults have a right to engage in same-sex intimacies even as one contends that such intimacies are morally abominable and ought not to receive any encouragement from government. Such a view would reject equal legal treatment for those in intimate same-sex relationships.

Finnis takes such a view, arguing that same-sex relations are "manifestly unworthy of the human being and immoral" and should not be encouraged by the state, but finding that criminalizing same-sex relations violates rights of individual privacy. Lee and George also find such relations to be morally defective and unworthy of equal treatment by the state; though George does not think that any sound a priori principle prohibits criminalization.

Finnis, Lee and George argue for their condemnation of same-sex relations on the ground of natural law theory. However, unlike traditional versions of natural law theory, their version does not rest on any explicit theological or metaphysical claims. Rather, it invokes independent principles of practical reasoning that articulate the basic reasons for action. Such reasons are the fundamental goods that action is capable of realizing and, for Finnis, Lee and George, include "marriage, the conjuntio of man and woman". Homosexual conduct, masturbation, and all extra-marital sex aim strictly at "individual gratification" and can be no part of any "common good." Such actions "harm the character" of those voluntarily choosing them. In taking the actions, a person becomes a slave to his passions, allowing his reason to be overridden by his raw desire for sensuous pleasure.

On Finnis's account, when consensual sexual conduct is private, government may not outlaw it, but government "can rightly judge that it has a compelling interest in denying that 'gay lifestyles' are a valid and humanly acceptable choice and form of life". And for Finnis, Lee and George, equal treatment of same-sex and heterosexual relations is out of the question due to the morally defective character of same-sex relations.

Macedo responds to Finnis by arguing that "all of the goods that can be shared by sterile heterosexual couples can also be shared by committed homosexual couples". Macedo points out that Finnis does not condemn sexual intercourse by sterile heterosexual couples. But Finnis replies that there is a relevant difference between homosexual couples and sterile heterosexual ones: the latter but not the former are united "biologically" when they have intercourse. Lee and George make essentially the same point: only heterosexual couples can "truly become one body, one organism". But Macedo points out that, biologically, it is not the man and woman who unite but the sperm and the egg. It can be added that the "biological unity" argument seems to run contrary to Finnis's claim that his position "does not seek to infer normative ceases from non-normative premises". More importantly, Macedo and Koppelman make the key point that the human good possible through intimate relations is a function of "mutual commitment and stable engagement" and that same-sex couples can achieve "the precise kind of human good" that is available to heterosexual ones. Equal treatment under the law for same-sex couples, including the recognition of same-sex marriage, would remove unjustifiable obstacles faced by same-sex couples to the achievement of that human good.

Disability

During the 1970's and 80's, persons with disabilities increasingly argued that they were second-class citizens. They organized into a civil rights movement that pressed for legislation that would help secure for them the status of equal citizens. Protection against discrimination based on disability was written into the Canadian Charter of Rights and Freedoms and The Charter of Fundamental Rights of the European Union. The disability rights movement in the U.S. culminated with the passage of the Americans With Disabilities Act of 1990. The ADA has served as a model for legislation in countries such as Australia, India and Israel.

The Medical and Social Models

The traditional model for understanding disability is called the "medical model." It is reflected in many pre-ADA laws and in some philosophical discussions of disability which treat it as an issue of the just distribution of health care. The medical model, a disabled person is one who falls below some baseline level that defines normal human functioning. That level is a natural one, on this view, in that it is determined by biological facts about the human species. Thus, the medical model supposes that the question of who counts as disabled can be answered in a way that is value-free and that abstracts from existing social practices and the physical environment those practices have constructed. It also gives the medical profession a privileged position in determining who is disabled, as the study and treatment of normal and subnormal human functioning is the specialty of that profession.

The consensus among current disability theorists is that the medical model should be rejected. Any determination that a certain level of function is normal for the species will presuppose judgments

that do not simply describe biological reality but impose on them some system of evaluation. Moreover, the level of functioning a person can achieve does not depend solely on her own individual abilities: it depends as well on the social practices and the physical environment those practices have shaped.

Disability theorists thus posit an important analogy between the categories of 'race' and 'disability'. As they understand it, neither category refers to any real distinctions in nature. Just as there is variation in skin color, there is variation in acuity of vision, physical strength, ability to walk and run and so on. And just as there is no natural line dividing one "race" from another, there is no natural line dividing those who are functionally "abnormal" from those who are not so.

The rejection of the medical model has led to a "social model," according to which certain physical or biological properties are turned into dysfunctions by social practices and the socially-constructed physical environment. For example, lack of mobility for those who are unable to walk is not simply a function of their physical characteristics: it is also a function of building practices that employ stairs instead of ramps and by automotive design practices that require the use of one's legs to drive a car. There is nothing necessary about such practices. The social model conceives of disability as socially-imposed dysfunction.

The social model brings attention to how engineering and design practices can work to the disadvantage of persons with certain physical characteristics. And the idea of dysfunction is certainly a value-laden one. But it seems no more accurate to think that dysfunction is entirely imposed by society than it is to think that it is entirely the product of an individual's physical or mental characteristics. Individual characteristics in the context of the socially-constructed environment determine the level of functioning that a person can achieve. And some individual characteristics would impair a person's functioning under all or almost all practicable alternatives to current social practices. Moreover, despite the fact that "normal human functioning" is a value-laden concept, it does not follow that it is entirely subjective or that reasonable efforts to specify the elements of some morally acceptable level of human functioning are misguided. Indeed, some defensible understanding of what counts as better or worse human functioning would seem to be necessary to determine when some social practice has turned a physical characteristic into a significant disadvantage for a person.

In addition, the social model's conception of what it is to be a disabled person seems overbroad. The social practice of requiring students to pass courses in order to receive a degree creates a barrier that some persons cannot surmount. It does not seem that such people are, ipso facto, disabled. Such examples of "exclusionary" social practices could be multiplied indefinitely. Some thinkers may not be troubled by the implication that everyone is disabled in every respect in which she is excluded or otherwise disadvantaged by some social practice. But it is difficult to see how the idea of disability would then be of much use.

Race, Disability, and Discrimination

The disability rights movement began with the idea that discrimination on the basis of disability was not different in any morally important way from discrimination based on race. The aim of the movement was to enshrine in law the same kind of antidiscrimination principle that protected persons based on their race. But some theorists have questioned how well the analogy holds. They point out that applying the antidiscrimination norm to disability requires taking account of physical or mental differences among people. This seems to be treatment based on a person's physical features, apparently the exact opposite of the ideal of "colorblindness" behind the traditional antidiscrimination principle.

Even race-based affirmative action does not really seem to be parallel to antidiscrimination policies that take account of disability. Advocates of affirmative action assert that the social ideal is for persons not to be treated on the basis of their race or color at all. Race-conscious policies are seen as instruments that will move society toward that ideal.

In contrast, policies designed to counter discrimination based on disability are not sensibly understood as temporary measures or steps toward a goal in which people are not treated based on their disabilities. The policies permanently enshrine the idea that in designing buildings or buses or constructing some other aspect of our physical-social environment, we must be responsive to the disabilities people have in order for the disabled to have "fair equality of opportunity". The need for a permanent "accommodation" of persons with disabilities seems to mark an important difference in how the antidiscrimination norm should be understood in the context of disability, as opposed to the context of race.

However, it is important to recognize that, at the level of fundamental principle, the reasons why disability-based discrimination is morally objectionable and even unjust are essentially the same as the reasons why racial discrimination is so. At the individual level, disadvantageous treatment of the disabled is often rooted in ill-will, disregard, and moral arbitrariness. At the systemic level, such treatment creates a social pattern of disadvantage that reduces the disabled to second-class status. In those two respects, the grounds of civil rights law are no different when it comes to the disabled.

Another way in which disability is thought to be fundamentally different from race concerns the special needs that the disabled often have that make life more costly for them. These extra costs would exist even if the socially-constructed physical environment were built to provide the disabled with fair equality of opportunity and their basic civil and political liberties were secured. In order to function effectively, disabled persons may need to buy medications or therapies or other forms of assistance that the able-bodied do not need for their functioning. And there does not seem to be any parallel in matters of race to the special needs of some of those who are disabled. The driving idea of the civil rights movement was that blacks did not have any special needs: all they needed was to have the burdens of racism lifted from them and, once that was accomplished, they would flourish or fail like everyone else in society.

However, Silvers argues that the parallel between race and disability still holds: all the disabled may claim from society as a matter of justice is that they have fair equality of opportunity and the same basic civil rights as everyone else. Any special needs that the disabled may have do not provide the grounds of any legitimate claims of justice. On the other hand, Kittay argues that the special needs of the disabled are a matter of basic justice. She focuses on the severely mentally disabled, for whom fair opportunity in the labor markets and political rights in the public sphere will have no significance, and on the families which have the responsibility of caring for the severely disabled. Pogge also questions Silvers' view, suggesting that it is implausible to deny that justice requires that society provide resources for meeting the needs of the severely disabled. Still, it may be the case that some version of Silvers' approach may be justifiable when it comes to disabled persons who have the capacity "to participate fully in the political and civic institutions of the society and, more broadly, in its public life". In the case of such persons, the basic civil right to equal citizenship would require that they have the equal opportunity to participate in such institutions, regardless of their disability. Although there may be some aspects of the racial model that cannot be applied to persons with severe forms of mental disability, the principles behind the American civil rights struggles of the 1950's and 60's remain crucial normative resources for understanding and combating forms of unjust discrimination that have only more recently been addressed by philosophers and by society more broadly.

Contractarianism and the Disabled

The emergence of the issue of disability rights has posed an important challenge for versions of liberalism inspired by the social contract tradition. One of the putative advantages of such forms of liberalism is that they better reflect strong and widely held intuitions about justice and individual rights than does utilitarianism. As Rawls famously wrote, "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override". However, several thinkers have argued that Rawls's own contractarian theory does not make adequate room for the severely disabled. These arguments are not about the rights of the severely disabled, but rather begin from the assumption that those who are so disabled do have robust moral rights and then proceed to the question whether contractarianism can account for those rights.

The problem for Rawls derives from the conception of personhood that accompanies his idea that society should be conceived as a fair system of cooperation among free and equal persons, extending over generations. On that conception, "a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life." Additionally, persons are represented as having two "moral powers," the capacities for a sense of justice and for a conception of the good. The parties to Rawls's original position choose principles of justice with such a conception of the person in mind.

Critics have argued that Rawls's principles of justice fail to take adequate account of the legitimate claims of the severely disabled and that the heart of the problem is Rawls's contractarianism.

Nussbaum claims that Rawls goes astray in following traditional contractarianism and conceiving of society as a scheme of cooperation for mutual advantage. Yet, Becker defends mutual-advantage theories, arguing that they can incorporate a conception of reciprocity sufficiently rich to underwrite principles that truly do justice to the disabled. Stark and Brighouse argue that Rawls's theory, in particular, can be extended or modified to take account of disabled, without repudiating its contractarian core.

Kittay agrees with the liberal idea that justice must not be sacrificed for other values, but she doubts that any form of liberalism can make adequate room for the claims of justice made on behalf of the severely disabled. In contrast, Silvers and Francis defend a form of contract theory in which the parties seek to build mutual trust. They argue that the interests of disabled would not be discounted in such a contract.

Legal Cases and Statutes

- Americans With Disabilities Act. 42 U.S.C. §§12101-12213.
- Bowers v. Hardwick 478 U.S. 186.
- Boy Scouts v. Dale, No. 99-699.
- Civil Rights Act of 1866. 42 U.S.C §1981.
- Civil Rights Act of 1964. 42 U.S.C. §§2000e et seq.
- Defense of Marriage Act 28 U.S.C. §1738c.
- Ex Parte Crow Dog 109 U.S. 556.
- Indian Civil Rights Act of 1968. 28 U.S.C. §§1301-1303.
- Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe 498 U.S. 505.
- Pregnancy Discrimination Act 42 U.S.C. §2000 (e)(k).
- Romer v. Evans 517 U.S. 620.
- Santa Clara Pueblo v. Martinez 436 U.S. 49.
- Thomasson v. Perry 80 F.3d 915.

Civil Liberties

Civil liberties are rights and freedoms that protect an individual from the state. Civil liberties set limits on the government so that its agents cannot abuse their power and interfere unduly with the lives of private citizens.

Common civil liberties include the rights of people, freedom of religion, and freedom of speech, and additionally, the right to due process, to a trial, to own property, and to privacy.

The formal concept of civil liberties dates back to the English legal charter the Magna Carta 1215, which in turn was based on pre-existing documents namely the English Charter of Liberties, a landmark document in English legal history.

Many contemporary states have a constitution, a bill of rights, or similar constitutional documents that enumerate and seek to guarantee civil liberties. Other states have enacted similar laws through a variety of legal means, including signing and ratifying or otherwise giving effect to key conventions such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

It might be said that the protection of civil liberties is a key responsibility of all citizens of free states, as distinct from authoritarian states.

The existence of some claimed civil liberties is a matter of dispute, as are the extent of most civil rights. Controversial examples include property rights, reproductive rights, civil marriage, and the right to keep and bear arms. Whether the existence of victimless crimes infringes upon civil liberties is a matter of dispute. Another matter of debate is the suspension or alteration of certain civil liberties in times of war or state of emergency, including whether and to what extent this should occur.

An individual who "actively supports or works for the protection or expansion of civil liberties" is called a civil libertarian.

United States

The United States Constitution, especially its Bill of Rights, protects civil liberties. Human rights within the United States are often called civil rights, which are those rights, privileges and immunities held by all Americans, in distinction to political rights, which are the rights that inhere to those who are entitled to participate in elections, as candidates or voters. Before universal suffrage, this distinction was important, since many people were ineligible to vote but still were considered to have the fundamental freedoms derived from the rights to life, liberty and the pursuit of happiness. This distinction is less important now that Americans enjoy near universal suffrage, and civil liberties are now taken to include the political rights to vote and participate in elections.

Canada

The Constitution of Canada includes the Canadian Charter of Rights and Freedoms which guarantees many of the same rights as the U.S. constitution, with the notable exceptions of protection against establishment of religion. However, the Charter does protect freedom of religion. The Charter also omits any mention of, or protection for, property.

European Convention on Human Rights

The European Convention on Human Rights, to which most European countries, including all of the European Union, belong, enumerates a number of civil liberties and is of varying constitutional force in different European states.

United Kingdom

While the United Kingdom has no codified constitution, relying on a number of legal conventions and pieces of legislation, it is a signatory to the European Convention on Human Rights which covers both human rights and civil liberties. The Human Rights Act 1998 incorporates the great majority of Convention rights directly into UK law. Britain has what is called an unwritten constitution: centuries of legislation and legal precedent dating back to before the Magna Carta guarantee the rights of her subjects. Recently Shadow Home Secretary David Davies resigned his parliamentary seat over what he described as the "erosion of civil liberties" by the current government, and successfully won re-election on a civil liberties platform. This was in reference to the recent anti-terrorism laws and in particular the extension to pre-trial detention, that is perceived by many to be an infringement of Habeas Corpus established in the Magna Carta in 1215.

China

The Constitution of People's Republic of China, especially its Fundamental Rights and Duties of Citizens, claims to protect many civil liberties, although in practice dissidents may find themselves without the protection of the rule of law.

India

The Fundamental Rights — embodied in Part III of the constitution — guarantee civil liberties such that all Indians can lead their lives in peace as citizens of India. The six fundamental rights are right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies.

These include individual rights common to most liberal democracies, incorporated in the fundamental law of the land and are enforceable in a court of law. Violations of these rights result in punishments as prescribed in the Indian Penal Code, subject to discretion of the judiciary. These rights are neither absolute nor immune from constitutional amendments. They have been aimed at overturning the inequalities of pre-independence social practises. Specifically, they resulted in abolishment of untouchability and prohibit discrimination on the grounds of religion, race, caste, sex, or place of birth. They forbid human trafficking and unfree labour. They protect cultural and educational rights of ethnic and religious minorities by allowing them to preserve their languages and administer their own educational institutions.

All people, irrespective of race, religion, caste or sex, have the right to approach the High Courts or the Supreme Court for the enforcement of their fundamental rights. It is not necessary that the aggrieved party has to be the one to do so. In public interest, anyone can initiate litigation in the court on their behalf. This is known as "Public interest litigation". High Court and Supreme Court judges can also act on their own on the basis of media reports.

The Fundamental Rights emphasise equality by guaranteeing to all citizens the access and use of public institutions and protections, irrespective of their background. The rights to life and personal liberty apply for persons of any nationality, while others, such as the freedom of speech and expression are applicable only to the citizens of India. The right to equality in matters of public employment cannot be conferred to overseas citizens of India.

Fundamental Rights primarily protect individuals from any arbitrary State actions, but some rights are enforceable against private individuals too. For instance, the constitution abolishes untouchability and prohibits begar. These provisions act as a check both on State action and actions of private individuals. Fundamental Rights are not absolute and are subject to reasonable restrictions as necessary for the protection of national interest. In the Kesavananda Bharati vs. state of Kerala case, the Supreme Court ruled that all provisions of the constitution, including Fundamental Rights can be amended. However, the Parliament cannot alter the basic structure of the constitution like secularism, democracy, federalism, separation of powers. Often called the "Basic structure doctrine", this decision is widely regarded as an important part of Indian history. In the 1978 Maneka Gandhi v. Union of India case, the Supreme Court extended the doctrine's importance as superior to any parliamentary legislation. The verdict, no act of parliament can be considered a law if it violated the basic structure of the constitution. This landmark guarantee of Fundamental Rights was regarded as a unique example of judicial independence in preserving the sanctity of Fundamental Rights. The Fundamental Rights can only be altered by a constitutional amendment, hence their inclusion is a check not only on the executive branch, but also on the Parliament and state legislatures. The imposition of a state of emergency may lead to a temporary suspension of the rights conferred by Article 19 to preserve national security and public order. The President can, by order, suspend the right to constitutional remedies as well.

Russia

The Constitution of Russian Federation guarantees in theory many of the same rights and civil liberties as the U.S. except to bear arms, i.e.: freedom of speech, freedom of religion, freedom of association and assembly, freedom to choose language, to due process, to a fair trial, privacy, freedom to vote, right for education, etc. However, human rights groups like Amnesty International have warned that Putin has seriously curtailed freedom of expression, freedom of assembly and freedom of association amidst growing authoritarianism.

Business and Human Rights

Non-state actors, particularly multinational or trans-national corporations have become important players throughout the world. As the influence and reach of corporations has grown as a result of globalization and other global developments, there is an increasing debate about the roles and responsibilities of corporate actors with regard to human rights.

International human rights standards have traditionally been the responsibility of governments, aimed at regulating relations between the state and individuals/groups. In view of the increased role played by corporate actors at both the national and international level, the United Nations human rights machinery is considering the scope of business' human rights responsibilities and exploring ways for corporate actors to be accountable for the impact of their activities on human rights. However, the practical meaning of the link between business and human rights remains unclear for many and substantial debates over which human rights can and should apply to business, and in what way are ongoing.

OHCHR's work on the issue of business and human rights is focused on three areas:

- Advocacy by the High Commissioner;
- Support to the Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises;
- Active involvement in the United Nations Global Compact;

The High Commissioners has expressed support for the development of human right standards applicable to the business sector, while at the same time advocating the implementation of voluntary initiatives towards corporate social responsibility.

OHCHR is providing ongoing support and advice to the work of the Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises with regard to human rights. The mandate was established by the United Nations Commission on Human Rights in 2005 by resolution 2005/69 and was extended by the Human Rights Council.

In resolution 2005/69, the Commission on Human Rights mandated the High Commissioner, in collaboration with the SRSG, to convene annually a consultation with executives from a particular business sector to discuss the human rights challenges faced by that sector. In November 2005, the High Commissioner convened a consultation with representatives from the extractive sector. In January 2007, the High Commissioner convened a consultation with representatives from the finance sector.

The UN Global Compact is certainly the most prominent voluntary initiative in the field of business and human rights. It is a personal initiative of the United Nations Secretary-General dating from 2000, aimed at getting business leaders to voluntarily promote and apply within their corporate

domains 10 principles relating to human rights, labor standards, the environment, and anti-corruption. At present, thousands of companies, many of them large trans-national companies, from all continents have signed on to the Global Compact.

OHCHR is one of now 6 UN agencies which work in partnership with the Secretary-General's Global Compact office. Since the launch of the Global Compact, OHCHR has been requested by the United Nations Secretary-General to serve as "guardian" of the human rights principles and to contribute to efforts made to encourage companies to implement these principles in their core operations and business model. OHCHR activities have been grouped around the themes of learning and dialogue. OHCHR is involved in Global Compact governance through its membership of the Global Compact Inter-Agency Team which is responsible for ensuring coherent support for the internalization of the principles within the United Nations and among all participants.

The 18th of June 2008 the Human Rights Council was unanimous in "welcoming" the policy framework for business and human rights the SRSG proposed in his final report under the 2005 mandate. The policy framework comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies.

The Human Rights Council has renewed the mandate for a period of 3 years with the new resolution A/HRC/8/L.8 that requests the Special Representative of the Secretary General to operationalize the framework elaborated and specifically:

a. To provide views and recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by transnational corporations and other business enterprises, including through international cooperation;

b. To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;

c. To explore options and make recommendations, at the national, regional and international levels, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;

d. To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;

e. To liaise closely with the efforts of the human rights working group of the Global Compact in order to identify, exchange and promote best practices and sessions learned on the issue of transnational corporations and other business enterprises;

f. To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council;

g. To continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organizations, transnational corporations and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings;

h. To report annually to the Council and the General Assembly.

In Resolution 2005/69 The Commission on Human Rights requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years, with the following mandate:

a. To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

b. To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

c. To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";

d. To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

e. To compile a compendium of best practices of States and transnational corporations and other business enterprises.

Human Rights and Climate Change

It is becoming apparent that climate change will have implications for the enjoyment of human rights. The United Nations Human Rights Council recognized this in its resolution 7/23 "Human rights and climate change", expressing concern that climate change "poses an immediate and far-reaching threat to people and communities around the word" and requesting the Office of the United Nations High Commissioner to prepare a study on the relationship between climate change and human rights.

The Fourth Assessment Report of the Intergovernmental Panel on Climate Change put it beyond doubt that the global climate system is warming and doing so mainly because of man-made greenhouse gas emissions. IPCC reports and other studies document how global warming will affect, and already is affecting, the basic elements of life for millions of people around the world. Effects include an increasing frequency of extreme weather events, rising sea levels, droughts, increasing water shortages, and the spread of tropical and vector born diseases.

Viewing the data through a human rights lens, it is clear that projected climate change-related effects threaten the effective enjoyment of a range of human rights, such as the right to safe and adequate water and food, the right to health and adequate housing. Equally, the human rights perspective brings into focus that climate change is set to hit the poorest countries and communities the hardest.

The international human rights standards serve as a guide for measures to tackle climate change, underscoring the fundamental moral and legal obligations to protect and promote full enjoyment of the rights enshrined in the Universal Declaration of Human Rights and in the core universal human rights treaties.

Action by the Human Rights Council

On 28 March 2008, the Human Rights Council adopted its first resolution on "human rights and climate change". In implementation of that resolution, OHCHR prepared and submitted a study on the relationship between climate change and human rights to the tenth session of the Council held in March 2009. On 25 March 2009, the Council adopted resolution 10/4 "Human rights and climate change" in which it, inter alia, notes that "climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights …"; recognizes that the effects of climate change "will be felt most acutely by those segments of the population who are already in a vulnerable situation …", recognizes that "effective international cooperation to enable the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change … is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts", and affirms that "human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change".

In resolution 10/4, the Council decided to hold a panel discussion on the relationship between climate change and human rights at its eleventh session in order to contribute to the realization of the goals set out in the Bali Action Plan.

In implementation of resolutions 7/23 and 10/4, the OHCHR study and a summary of the Council's discussions will be made available to the Conference of Parties to the United Nations Framework Convention on Climate Change for its consideration.

Cultural Rights

The cultural rights movement has provoked attention to protect the rights of groups of people, or their culture, in similar fashion to the manner in which the human rights movement has brought attention to the needs of individuals throughout the world. Cultural rights are different from human rights specifically because they are vested in groups of people, whereas human rights deal with individuals.

Protecting a Culture

Cultural rights focus on groups such as religious and ethnic minorities and indigenous societies that are in danger of disappearing. Cultural rights include a group's ability to preserve its way of life, such as child rearing, continuation of language, and security of its economic base in the nation, which it is located. The related notion of indigenous intellectual property rights has arisen in attempt to conserve each society's culture base and essentially prevent ethnocide.

The cultural rights movement has been popularized because much traditional cultural knowledge has commercial value, like ethno-medicine, cosmetics, cultivated plants, foods, folklore, arts, crafts, songs, dances, costumes, and rituals. Studying ancient cultures may reveal evidence about the history of the human race and shed more light on our origin and successive cultural development. However, the study, sharing and commercialization of such cultural aspects can be hard to achieve without infringing upon the cultural rights of those who are a part of that culture.

Cultural Bigotry

The notion of cultural rights is not too cultural. Cultural rights has many ways that it can be looked upon. "Cultural rights are vested not in individuals but in groups, such as religious and ethnic minorities and indigenous societies." All cultures are brought up differently, therefore cultural rights include a group's ability to preserve its culture, to raise its children in the ways its forebears, to continue its language, and to not be deprived of its economic base by the nation in which it is located." Anthropologist sometimes choose not to study some cultures beliefs and rights, because they believe that it may cause misbehavior, and they choose not to turn against different diversities of cultures. Although anthropologist sometimes do turn away from studying different cultures they still depend a lot on what they study at different archaeological sites.

Democracy

Human rights and democracy have historically been viewed as separate, albeit parallel, concepts. However, understandings of both human rights and democracy are dynamic and varied, and recent re-conceptualizations of both ideas have led to the emergence of a discourse that recognizes their interdependence. Specifically, definitions of democracy have expanded from the traditional procedural democracy to encompass the ideals of a substantive, liberal democracy. Likewise, the human rights framework has begun to further develop conceptions of social, economic, and cultural rights, in addition to civil and political rights, thus expanding the notion of human rights to include human security, and extending human rights to the collective as well as the individual level. These renewed definitions present opportunities for recognizing the convergence of the theories and fields related to human rights and democracy.

The necessity of acknowledging the interdependence of democracy and human rights is becoming especially important in emerging democracies such as Palestine. In these cases, in which the development and reform of democratic institutions is starting to take place, it is imperative to ensure that such institutions are built on foundations of both human rights and democracy if they are to be sustainable. To be sure, previous attempts at democracy by the Palestinian Authority in the 1990s proved to be ephemeral, largely due to the absence of protection for human rights. Likewise, human rights advocates have found it difficult to affect systemic change in the absence of a legitimate democracy. Thus, as Palestine looks ahead to new opportunities for democracy in the future, it is necessary to integrate the broadened human rights framework, including human security, with the ideals and institutions of a liberal, participatory democracy.

This text begins with a theoretical discussion of the principles of democracy, distinguishing between substantive and procedural democracy and identifying key elements and institutions inherent in a liberal democracy. The emerging re-conceptualization of the human rights framework, including the human security perspective, which has enhanced the complementarity between human rights and democracy. The following part discusses the convergence of the democracy and human rights fields and theories, and concludes that the two concepts are not only complementary, but are indeed interdependent. The second half of the text focuses on the application of this theory in the case of Palestine by analyzing past and present experiences with democracy and human rights in the Occupied Territories, including obstacles and points of progress, and discussing recommendations for future implementation.

Theoretical Analysis

Defining Democracy: Principles & Institutions

The idea of democracy has been understood and applied in different ways, both temporally and culturally, with democracy taking various forms in different societies. From a historical perspective, the direct democracy of ancient Athens has been transformed into the representative democracy that is common today. Likewise, former restrictions on the political participation of women and other marginalized groups have been challenged in modern times to allow for more inclusive democracies. Most recently, both theorists and practitioners of democracy are starting to further articulate differences between procedural democracies and substantive, liberal democracies. However, all of these forms of democracy are based to some extent on the original Greek notion of demokratia, that is, "government by the people," from the words demos and kratos. This core concept still forms the crux of modern definitions of democracy, including the 1993 Vienna Declaration's statement that "democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives." From this starting point, it is possible to identify several key principles and institutions that are inherent to a sustainable democracy.

While historically there has been more emphasis on the political institutions and procedures that comprise democracy, namely elections, political parties, and governmental bodies, increased attention has recently been given to the ideals and principles that underscore those mechanisms. As stated by David Beetham, Director of the Centre for Democratization Studies at the University of Leeds, "to define democracy simply in institutional terms is to elevate means into ends, and to concentrate on the forms without the substance." Jack Donnelly, International Studies at the University of Denver, agrees, noting that "pure procedural democracy can easily denigrate into non-democratic or even anti-democratic formalism," thus, "substantive conceptions rightly insist that we not lose sight of the core values of popular authority and control over government." However, Donnelly also notes that purely substantive approaches fail to recognize the "idea of the people ruling rather than just benefiting… The term 'democratic' easily slides into an essentially superfluous synonym for 'egalitarian.'" That is, government for the people is not synonymous with government by the people, and therefore may or may not be democratic. To be sure, substantive conceptions risk being susceptible to normative associations that identify any positive sociopolitical elements as indicators of democracy.

This text takes the position that neither "substantive" nor "procedural" conceptions of democracy should be considered more important than the other; indeed, it is questionable if the two notions can even be separated. Instead, substantive and procedural elements should be viewed as complementary and in fact essential to each other. The principles that underscore substantive democracy will only remain theoretical ideals unless mechanisms are present for translating those ideals into reality, while procedural institutions, however democratic in form, are meaningless if they do not yield ends that reflect democratic values. For the remainder of this text, the term "substantive democracy" will refer to democracies that embody both the principles and the institutions that form the foundation of democracy, in contrast to "electoral democracies," which may be democratic in name and form but not in practice.

The basic elements of a substantive democracy, Beetham, "are that the people have a right to a controlling influence over public decisions and decision makers, and that they should be treated with equal respect and as of equal worth in the context of such decisions." Beetham refers to these concepts as popular control and popular equality, both of which contribute to the foundation of the principles and institutions that inform democracy. These primary elements, in conjunction with the rule of law, open government, and public participation, form the core of substantive democracies, as reflected in their mechanisms and institutions, and the presence of civil society and citizen rights.

Mechanisms

The primary indicator of democracy is the presence of popular elections. Beetham, "popular authorization is achieved through regular competitive elections according to universal secret ballot, which ensures voters a choice of candidates and policies and gives them the opportunity to dismiss

politicians who no longer command their confidence." As Shadrack Gutto, Director of the Centre for Applied Legal Studies at the University of Witwatersrand in Johannesburg, states however, "for elections to be substantially 'free and fair,' it is imperative that enabling principles and rights be observed," including "the rights to or freedom of association, opinion, expression, and assembly." Gutto also notes the importance of available and adequate material and human resources to educate voters, register voters, monitor the voting process, count election results, and reconcile disputes. Indeed, the democratic nature of an electoral process should be assessed by "the reach, inclusiveness, independence, integrity, and impartiality of elections, as well as how equally the electoral process treats citizens, how much effective choice it offers them, how far the government actually fulfills the electoral choices made, and how many people in practice exercise the right to vote." In addition, political parties function as a mechanism within electoral systems by organizing different policies into cohesive programs, nominating appropriate candidates, and advocating for the implementation of decisions supported by the electorate.

Institutions

As Beetham articulates, "although elections form a key mechanism for the popular control of government, they are of limited effectiveness on their own without institutions that secure a government's continuous accountability to the public." Gutto agrees, noting how "elected representatives can play a democratic role only to the extent that enabling institutions of governance with clear systems and procedures that are secured by a normative framework and laws exist." Open and accountable political institutions depend primarily on the decentralization of governance and the separation of powers between the executive, legislative, and judiciary spheres. These branches should be monitored through a system of checks and balances by each other, through horizontal accountability, and also be answerable to the people as a whole through vertical accountability. These institutions' specific roles and functions can be best understood and implemented when articulated in a constitution or equivalent "rule of law." The constitution should also articulate the financial responsibilities of the legislature, as well as allow for a system of regional and local government.

Civil Society

As Gutto notes, "however effective public institutions and accountability processes may be in any society aspiring to democracy, their effectiveness and impact would nevertheless be diminished in the absence of a vibrant and activist civil society." Civil society, sometimes referred to as "democratic society," creates opportunities for active citizenship and direct involvement in the functioning of a democracy. The key elements of civil society include an independent media, sources of policy expertise independent of the state, and associations that may include organizations dedicated to social services, development, health, education, human rights, women's empowerment, or other issues. An active civil society has the additional benefit of fostering respect for the rights of other citizens by creating environments of diversity and dialogue.

Citizen Rights

Democracy also includes the presence of political and civil rights for citizens, especially freedom of expression, association, and assembly, which require the guarantee of due legal process and liberty and security of person to be effective. There has been recent debate on the necessity of economic, social, and cultural rights as conditions of democracy, however, it is becoming more widely accepted that "for civil and political rights and freedoms to have any value, citizens must possess the capacity to exercise them." The majority of political, civil, economic, social, and cultural rights at the national level relate directly or indirectly to the international human rights framework, as will be discussed further.

The Dynamism of Democracy

It should be noted that, despite these common elements, democracy can take a variety of forms; there is no "one size fits all" democracy. As Beetham explains, "different societies and diverse circumstances require different arrangements if democratic principles are to be effectively realized." Abdul Aziz Said, International Peace and Conflict Resolution at American University, agrees, noting that "the form of democracy is always cast in the mold of the culture of a people;" he thus urges a "more democratic theory of democracy" that recognizes its potential for variation and dynamism. Relatedly, Said specifically emphasizes that "democracy is not a western product." The principles and institutions that inform substantive democracy are based on tenets that transcend national and political ideologies; thus, democracy is not exclusive to the West. This point has several implications. First, it implies that there is no fundamental incompatibility between democracy and the Arab world, nor between democracy and Islam. As Said notes, "the lack of democracy in the Middle East is due more to a lack of preparation for it than to a lack of religious and cultural foundations." Secondly, the idea that democracy is not exclusive to the West can serve to caution superpowers to avoid imposing their models of democracy on other societies, and encourage them to instead assume a supportive role in developing democracy in local contexts. Likewise, superpowers should be cautious of pursuing national interests under the guise of democracy to prevent the association of democracy with western imperialism. At the same time, local democracy advocates are called upon to consider how their social mechanisms, values, and contexts can inform culturally sustainable democracies.

Defining Human Rights: The Human Security Perspective

As Donnelly summarizes, "human rights are, literally, the rights that one has simply as a human being. As such they are equal rights, because we are all equally human beings. They are also inalienable rights, because no matter how inhumanely we act or are treated we cannot become other than human beings." Human rights are defined in several key documents, namely, the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948; the International

Covenant on Civil and Political Rights, adopted in 1966; and the International Covenant on Economic, Social, and Cultural Rights, also adopted in 1966. The Vienna Declaration, adopted at the World Conference on Human Rights in 1993, further expanded the meaning of human rights.

Originally, human rights were developed to outline a set of individual rights that states were required to respect or provide for their citizens. The framework not only included the prohibition of certain acts, but also the "imposition of the duty to perform certain obligations in order to promote and protect the enjoyment of certain rights." In other words, abuse of human rights can take the form of both violations and denials. While the full realization of human rights is still an ideal, much has been achieved in the name of human rights. Anthony Langlois, International Relations at Flinders University in Adelaide, Australia, achievements include "international recognition of human rights as the basic set of norms of human behavior, the internationalization of human rights institutions of various types, and the development of International Human Rights Law."

The notion of human rights has begun to be broadened in recent years. First, the responsibility of ensuring human rights has been expanded beyond only state governments to include individuals, groups of people, and other non-state actors. Secondly, the common association of human rights law with peacetime has given way to the widespread recognition that human rights law applies in conflict situations, just as it does in periods of stability. Finally the past ten years have seen increased acknowledgment of the interdependence and indivisibility of human rights. While this has always been true in theory, in the past the two separate Covenants suggested divisions between political and civil rights and economic, social, and cultural rights. While some divisions still exist, the gaps between the two fields of rights were largely bridged in 1993 at Vienna, where it was declared that "human rights are universal, indivisible and interdependent and interrelated" and that the international community "must treat human rights globally in a fair and equal manner."

In other words, the notion of human rights is expanding to include the concept of human security in a more conscious and deliberate manner. The United Nations Development Report of 1994, "human security can be said to have two main aspects. It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs or in communities." This renewed interest in human security and development has accordingly placed increased emphasis on economic and social rights, thus contributing to the re-conceptualization of the human rights framework. As Beetham summarizes:

The idea of economic and social rights as human rights expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these are victims of a fundamental injustice. Expressing this intuition in the form of human rights both gives the deprived the strongest possible claim to that of which they are deprived and emphasizes the duty of responsible parties to uphold or help them meet their entitlement.

Democracy and Human Rights

Democracy and human rights are clearly different notions; "they are distinct enough for them to be viewed as discreet and differentiated political concepts." Whereas democracy aims to empower "the people" collectively, human rights aims to empower individuals. Similarly, human rights is directly associated with the how of ruling, and not just the who, which may be the case in an electoral democracy, though not in a substantive democracy. Thus, "democracies" exist that do not necessarily protect human rights, while some non-democratic states are able to ensure some, though not all, human rights.

These distinctions have influenced the traditional separation of the theories and fields of human rights and democracy. From the human rights perspective, many have adhered to the separationist theory, which argues that "democracy is not immediately needed for the observation of human rights and that the maintenance of an essential link between human rights and democracy may well have the effect of delaying the implementation of human rights norms in various states." A recent corollary of the separationist theory is the "democracy as neo-imperialism" notion that charges that "democracy is a 'Western-centric' approach to government that is not found indigenously in all societies and is not desirable for all peoples."

These arguments are subject to several key counter arguments that emphasize the interdependence of human rights and democracy. First, in terms of the neo-imperialist argument, it is certainly true that Western superpowers should not impose their particular forms of democracy on other societies and expect them to be accepted and sustainable. However, it is equally culturally insensitive to claim that democracy is only an option in the West, or that it is incompatible with other cultures. Secondly, in reference to the separationist theory, while it would be unwise to "wait" for democracy to start promoting human rights, it must also be recognized that some human rights are intrinsically linked with institutions and principles of democracy. Furthermore, separating human rights from democracy undermines opportunities for implementation, in that it reduces human rights to standards or norms; as Langlois states, "human rights amount to little more than charity if they are not functioning in a democratic framework."

Essentially, the inclination to separate human rights from democracy is rooted in the acceptance of their traditional definitions. An electoral democracy that lacks the other institutions and principles of a substantive democracy can function without necessarily guaranteeing human rights, just as some narrowly defined human rights can still be realized in the absence of democracy. However, the re-conceptualization of democracy as substantive, and of human rights as being more far-reaching and inclusive, underscores the necessity of linking the two. This interdependence occurs on the levels of principle, enforcement, and specific rights.

On the conceptual level, as Langlois notes, "both contemporary liberal democracy and human rights are derived from and express the assumptions of liberalism," which include individualism,

egalitarianism, and universalism. Furthermore, both democracy and human rights pursue a common agenda, and it is "only within a democracy [that] human rights standards or norms transcended such that the values articulated by these norms or standards are genuine rights." In addition, it is only in a well-functioning democracy that individual citizens have access to mechanisms to ensure the implementation of their rights.

The relationship between human rights and democracy is perhaps most clear through an examination of civil and political rights, especially those articulated in Article 21 of the UDHR and Article 25 of the ICCPR, both of which ensure citizen participation in government through free and fair elections and through direct service and participation. These rights are related to the rights of expression, association, assembly, and movement, which are also interdependent with democracy, as well as the rights to liberty, security of person, and the guarantee of due process of the law.

Economic, social, and cultural rights are also being increasingly recognized as being mutually dependent, if not integral, with democracy. As Gutto writes, "the pursuit of the right to development and socio-economic rights is strongly associated with the social democracy vision of poverty eradication and the equitable distribution of ownership, control, and the benefits of wealth." Indeed, political and civil rights can best be realized by citizens who meet a basic level of physical security in terms of access to shelter, water, sanitation, and food, as well as education, healthcare, and employment or income. Socially, democracy is interrelated with rights to equality and non-discrimination, especially for marginalized groups including women and minorities. Culturally, the respect for diversity and pluralism inherent to democracy is linked to the protection of rights related to language, religion, or ethnicity.

It is thus clear that human rights and democracy are interdependent, especially when defined in the broader conceptualizations of democracy as substantive democracy, and human rights as civil, political, economic, social, and cultural rights. These different kinds of rights cannot be realized in a non-democratic system, and likewise, no democracy is sustainable without the presence of these rights. While this relationship is evident in theory, it is perhaps more useful to consider the interdependence of human rights and democracy through the case study of an emerging democracy.

Human Rights and Democracy in Palestine

The status of democracy in Palestine is somewhat open to interpretation. Many democracy advocates agree that Palestine is moving in the direction of becoming a substantive democracy, but that it still has ways to go. Specifically, the will of the people reflects a keen desire for democracy, but that has yet to translate into viable democratic institutions and principles. As Nathan J. Brown of the Carnegie Endowment for International Peace states, "Palestine is… a model liberal democracy. Its most significant flaw is that it does not exist." That is, democracy in Palestine is evident in theory, but it has not been able to fully manifest itself in practice.

Obstacles to realizing both human rights and democracy are rooted in both external and internal factors. In terms of external factors, the Israeli occupation and the protracted Israeli-Palestinian conflict have posed obvious challenges to the development of democracy and human rights in Palestine. To start with democracy, political reform is difficult in the midst of any ongoing violent conflict. In the case of Israel-Palestine, the challenge of political reform is further exacerbated by the nature of the occupation, which creates a complicated system of dual authority between Israel and the PA. Indeed, according to democracy advocates interviewed for this report, the occupation remains the most prominent obstacle to Palestinian democracy.

Challenges resulting from the external influence of the occupation are interrelated with internal factors as well, most notably corruption in the executive branch of the PA under Arafat and the failure of the security services to be effective. Indeed, the Oslo Accords "were predicated on the ability of the PA to enhance Israeli security and thus focused on enabling the executive and placing few fetters on the security services in internal matters." In addition to, and perhaps, because of the fact that the PA lacked sovereignty, it also lacked legitimacy. This problem emerged not only from the external fact of the occupation however, but also from internal shortcomings such as centralization of power, lack of accountability and transparency, corruption, and human rights violations.

To be sure, human rights, like democracy, have suffered from both internal and external factors. On the one hand, numerous human rights violations by Israel against Palestinians have been cited, including targeted assassinations, restrictions on movement, collective punishment, and home demolitions. On the other hand, Palestinian security forces under the PA have also been guilty of numerous human rights violations, including detention without trial and/or specific charges, improper trials, torture, maltreatment, and use of the death penalty.

Both human rights and democracy have also been hindered by poverty and the lack of human security in many communities in Palestine. As George Giacaman of Muwatin stated, "the democratic system is not sustainable with rampant poverty. Democracy requires a more equitable economic system based on a fair distribution of wealth." Khalid Nassif of the Civic Forum Institute agreed, noting that democracy regresses in the absence of economic and social rights that ensure human security. Nassif, "when the economy improves, people have a greater sense of freedom and safety, and they can give more time and attention to joining parties and organizations and taking an interest in democracy."

Clearly then, both human rights and democracy in Palestine have been hindered by both internal and external factors, primarily, the conflict with Israel and the limitations of the PA, and also by regional and international influences. Nevertheless, the will for both democracy and human rights in Palestine is strong on both individual and collective levels, and in fact, both exist to some extent in theory and on paper. The current key issue before Palestinians at this time is to translate those conceptualizations into realized practices and institutions, which can only be possible through an integrative approach that recognizes the interdependence of human rights and democracy. At the

same time, Israel and the international community must acknowledge that a democratic state in Palestine requires the existence of a state, as well as democracy.

Elections

The presidential elections of January 2005 were a major step towards procedural democracy. The elections followed the death of president Yasser Arafat, who had been elected in January 1996, and provided an opportunity for new leaders and parties to emerge. Though the election of Mahmoud Abbas was predicted, the elections saw widespread participation, with 71 percent of registered voters casting ballots, and were declared free and fair by local and international monitors. To refer to Beetham's standards for democratic electoral processes, the January elections were deemed successful in terms of their reach, inclusiveness, independence, integrity, and impartiality. The Central Elections Commission was credited with making laudable efforts in registering voters, coordinating the monitoring of the voting process, and counting and implementing results. While the process was far from flawless, it was considered to be an overall success, and resulted in a smooth transfer of power and authority. The success of the election was largely made possible by pressure on both Israeli and Palestinian officials to protect rights to association, assembly, and expression, and the process itself underscored the procedural rights defined in Article 21 of the UDHR and Article 25 of the ICCPR.

The municipal elections of May 2005 were likewise considered to be successful overall. In addition to being another step towards procedural democracy, these elections also affirmed support in the electoral system and thus contributed to the strengthening of substantive democracy. As journalist Bakr Abu Bakr wrote in the Palestinian daily Al-Hayat Al-Jadidah:

It is important…to point out what these elections represent to a Palestinian people still struggling to be free, still fighting Israeli occupation, and exercising democracy… They represent: first, an assertion of a course and a way of life chosen by the Palestinian people exemplified by freedom, dignity, dialogue, responsibility, and respect for the will of the people; second, the will and aspiration of many popular leaderships to serve the people…; third, a demonstration of Palestinian solidarity…; fourth, the continuity of Palestinian political struggle towards common goals; fifth, a renewal of societal leaderships.

Clearly, the elections represented more than simply a procedure; they were a tangible expression of democratic ideals and principles. These ideals were intertwined with human rights, including the rights to dignity, freedom, and political participation. Furthermore, the electoral process, while reflecting human rights, also served to facilitate human rights by functioning as an expression of Palestinian unity.

The next phase of elections, for the Palestinian Legislative Council, were originally scheduled for July 2005 but were postponed to allow more time to formalize amendments to the proposed new

electoral law. While most democracy advocates support the adoption of the new law and recognize the need for giving ample time for its passage, most view the indefinite postponement as a setback to democratic processes and momentum. Furthermore, the postponement was interpreted by many as an attempt by Fatah to consolidate its support to secure a victory over Hamas in particular. This widely accepted theory, regardless of its veracity, has unfortunately undermined the apparent commitment to democratic procedures established in the presidential and municipal elections.

Political Parties

Political parties are a mechanism that can facilitate free and fair elections, and thus contribute significantly to a sustainable procedural democracy. Likewise they provide opportunities for citizen participation and expression, and thus contribute to the development of a substantive, liberal democracy as well. As Giacaman stated, "a multi-party system is essential for establishing a sustainable democracy."

In Palestine, there exists some foundation for a pluralist party structure. Although Fatah has remained the dominant party for some time, and has at times been difficult to distinguish from the PLO and the PA, other political parties have always remained in existence, and Islamist parties like Hamas in particular have gained considerable support in the past ten years. Thus, it is clear that "there is a plurality of parties; the parties are based on ideological differences but still operate within a national consensus; and they generally accept one another's legitimacy. Missing, of course, are the democratic institutions that would induce existing parties to channel their energies toward electioneering and governance." That is, while various groups have long existed in Palestine, until recently they have lacked the electoral processes within which to operate.

To be sure, the majority of parties in Palestine have traditionally considered themselves "movements" or "fronts," and thus focus their attention on activities not necessarily related to electoral processes. In addition, the historical dominance of Fatah, and more recently, Hamas, have created challenges for the development of electoral parties in that "Fatah is too indistinguishable from the PA and Hamas too removed from it." Indeed, while Fatah has traditionally identified itself as the primary force for Palestinian liberation, its loose cohesion has suffered from various fractions, due both to its position as the central party of the PA and to its handling of the second intifada. In contrast, Hamas has distanced itself from the PA, identifying itself as an "alternative to the status quo" and "the main opposition to Fatah and the PA." This contrast was not only established on the conceptual level but on the direct level as well, as Hamas provided numerous social services to communities that Fatah and the PA had been unable to supply. Also, Hamas has distinguished itself from Fatah by intentionally using religious rhetoric, in contrast to Fatah's secular nature. In the past six months however, the nature of Hamas's political involvement has been shifting from that of an independent movement to a perhaps viable party in that members participated for the first time in municipal elections and plan to participate in PLC elections.

Many democracy advocates are now calling for a "third movement" that would provide an alternative to the so-called "old guard" of Fatah and the PA, and to fundamentalist groups like Hamas. As Mustafa Barghouthi, Director of the Health, Development, Information, and Policy Institute on Palestine commented, "Palestinians do not have to choose between autocracy and fundamentalism. There is a democratic alternative. Palestine could be a state that is independent and sovereign." Dr. Lily Feidy of MIFTAH agreed, advocating for a third movement that is secular and democratic. Nassif, who has observed numerous town meetings through the work of the Civic Forum Institute, it is evident that "people want change, and want more participation by political parties. They want real democracy, and they want political parties to function as a fundamental part of that democracy."

It should be noted that electoral party systems can take many forms, and in fact, a strictly organized party system could actually be detrimental in Palestine since many active reformists in the PLC have functioned essentially as independents, in practice at least if not in name. However, it is clear that the development of institutions to support electoral parties is becoming a necessity. Brown suggests three minimal steps to further democratic transition in the area of electoral parties. First, Fatah must be disentangled from the PA, for "when politicization of official positions runs deeply throughout the bureaucracy, and where there is a conflation of roles and ruling bodies… mechanisms of horizontal and vertical accountability begin to break down." Secondly, parties need to develop clear structures of internal governance and take "significant organizational steps, such as determining their membership, internal procedures, selection of candidates, and decision-making structures." Third, organizations need to re-orient themselves to function in electoral competition, that is, groups need to consciously decide if they are primarily violent movements or if they are electoral parties.

In order for these steps to take place, certain human rights must be ensured. The rights to assembly and movement are inherent to political party organization, and the rights to opinion and expression are necessary for allowing diverse parties to develop and mature. These rights must be protected by both the PA and by Israel. As Barghouthi stated, "[Israeli] suppression of secular democratic forces in Palestine will lead to a polarization… between Hamas fundamentalists and the PA." Indeed, the protection of human rights are essential for the emergence of a third movement.

Separation of Powers

As Hussein Sirriyeh, Arabic and Middle Eastern Studies at the University of Leeds, writes, "the definition of democracy should not merely be restricted to the narrower sense of free elections and a multi-party system. It should also encompass a broader spectrum of ingredients, including government by consent and accountability…" To be sure, in order for political parties to function in effective institutions, especially the legislature, there needs to be a clear separation of power between the executive, legislative, and judiciary branches, with a viable system of checks and balances between them, articulated in a Constitution. This is necessary for ensuring transparency and accountability, and for enabling the different branches to fulfill their respective duties.

In Palestine, power was largely concentrated in the executive branch under the leadership of Arafat, who developed a highly personalized system of authority. Under this system, Arafat managed to bypass the majority of institutions to extend his personal influence. While this strategy was arguably motivated by Arafat's attempt to unite various factions of Palestinians with different opinions and interests, and to bolster his status as the unifying symbol of Palestine, the centralization of power proved detrimental and only further crippled the already limited legitimacy of the PA.

This centralization manifested itself in various ways. The most measurable indication was evident in the PA budget, in which over one quarter of the PA revenues were placed under the direct and unaccountable control of Arafat by 1997. The executive's domination was also felt strongly by the legislative and judiciary branches. While the PLC had the authority to draft and pass laws, it had no mechanism to ensure that the president would approve them. Thus, numerous bills and laws that were passed by the PLC, including the Basic Law, were subject to interminable waiting for Arafat's approval. Similarly, the executive responded to many court orders from the judiciary by simply ignoring them.

Sirriyeh proposes several theses to explain the authoritarian nature of the PA under Arafat. Some of these reasons include the desire of the PA to make an impression on the Israelis by suppressing anti-Oslo opposition, the issue of internalized PNA insecurity, the "outsider" status of the original PA leadership, the lack of political experience of the PA, and the desire to promote national unity by subordinating divisions within Palestine. Whatever the reason, the failure to separate powers, compounded by widespread corruption within the PA, resulted in a system that lacked transparency, accountability, and ultimately, legitimacy. This crippled the development of democratic institutions in their early stages, and it is only recently that the new PA leadership under Abu Mazen has begun to confront the process of de-centralizing authority.

Judiciary

The branch of government that perhaps requires the most immediate attention is the judiciary. The judiciary was virtually nonexistent during the majority of the post-Oslo period, and it was only in 2002 with the passing of the judicial organizational law that the judiciary began to be managed by an independent judicial council. However, to date the council has consisted of judges who, while inexperienced in administrative matters, are intent on preserving their autonomy, thus causing them to lose the support of the bar association. The judiciary has also been embroiled in rivalries with the PLC and the executive branch's Ministry of Justice, with disputes occurring most recently over a draft judicial law for reform introduced by a special committee under Abu Mazen and currently referred to the legislature. Despite these challenges, the fact that an independent judiciary council does exist provides a foundation for starting judicial reform.

Although building a strong judiciary is a long, complex process, it is imperative for several reasons. On the conceptual level, judicial reform is symbolically significant because it can address

the general lawlessness that directly affected many Palestinian communities during the second intifada and can thus restore confidence in the PA. To be sure, an effective court system has the potential to restore order and thus serve as an indicator to Palestinians of the authenticity of reforms.

Furthermore, "judicial reform is a logical priority because it can be a genuine tool—not simply a symbolic one—in addressing the corruption that is perhaps one of the most corrosive issues for Palestinian governance." Although laws exist regarding hiring for government positions, disclosing personal finances, and monitoring public funds, there have been no mechanisms for implementing them or prosecuting corrupt officials. This problem can be addressed by focusing initial reform efforts on the office of public prosecution.

A strong judiciary can serve other important functions as well, including being a leading force in constitutional reform and the development and application of the Basic Law. It also can function as a key body for placing checks and balances on the executive and legislative branches. Indeed, Hamdi Shaqqura of the Palestinian Centre for Human Rights, the empowerment of a strong and independent judiciary can alleviate current debates regarding concern over the popularity of Hamas as a political party. Shaqqura suggests that any hypothetical attempts by elected Hamas officials to "Islamicize" the system or re-introduce violence as an acceptable policy would be countered by the judiciary.

Finally, a strong, independent judiciary is necessary for preserving human rights. First, it would provide a legitimate institution for prosecuting cases of human rights abuses. Lamis Alami of the Palestinian Independent Commission for Citizens' Rights, ombudsmen and monitoring groups like PICCR can document human rights violations, but they currently lack effective institutions for addressing them. Furthermore, an effective judiciary branch is necessary for protecting rights to fair and public hearings and trials, as articulated in Articles 10 and 11 of the UDHR.

Security

Closely related to the topic of judicial reform is the issue of security. Indeed, in order to ensure due process and avoid violations such as arbitrary arrests or torture, it is necessary that an effective security apparatus, including a police force, operates with legitimacy. Viable security services are necessary for preserving the rule of law, which is essential in a sustainable democracy. The issue of security is particularly important in Palestine, as security continues to play a vital role in many aspects of the Israeli-Palestinian conflict. To be sure, "for some external actors—especially Israel—security forms the basic logic of the reform process," and many of Israel's actions and policies are justified by concern for security. In the post-Oslo period however, many Palestinians perceived that the thrust of the so-called security reforms in the Occupied Territories was to protect Israeli security at the expense of Palestinian security. Inside Palestine, security concerns were not only associated with Israel but with internal elements as well, as the security services came to be associated with

authoritarianism, corruption, and human rights violations against fellow Palestinians, including illegal detentions, improper trials, torture, and executions.

The failure of the Palestinian security services after Oslo is largely attributable to other flaws within the PA. Primarily, "the absence of an effective control by an identifiable institution led to the excessive manipulation of responsibilities by members and leaders of these organizations." To be sure, "the security services effectively answered to the president regardless of the content of the Basic Law. When Arafat was president, he encouraged multiple security services but declined to draw clear divisions of responsibilities among them." This resulted in a lack of order and organization, lack of mandate, lack of professionalism, and consequently, lack of legitimacy. Indeed, over a dozen security organizations were operating under Arafat, and none of them proved effective in providing either internal or external security.

As Brown suggests, "the myriad layers of overlapping forces and command structures need to be replaced with a consolidated and transparent organization with clear lines of command to a democratically accountable official or set of officials." The president should still have some involvement, but other executive branch officials should include members of the Ministry of the Interior. Furthermore, the PLC should be involved by finishing the draft of the legal framework for the security services' operation, as well as by examining the security budget.

In addition to these top-down measures, reforms need to occur directly within the security services, first through consolidation and re-organization, and also through improved trainings. Specifically, security personnel trainings should be infused with human rights training, and ideally, should take place in conjunction with local human rights organizations. This model is helpful for facilitating a professional ethos within the security services; that is, "their training should focus not only on developing technical expertise but also on fostering a sense of what security services should not do." Steps should also be taken to establish a multi-level system of monitoring and accountability, including:

- A system for security personnel and officers to report human rights abuses and violations;
- A procedure for families to appeal for investigations;
- A joint investigative body at the local level consisting of senior and junior security officers, human rights activists, and jurists to review cases of abuse allegations;
- A stronger Committee on Human Rights within the PLC;
- A stronger PICCR or similar ombudsman institution. Some reforms have already taken place under Abu Mazen, but the process of security reform will inevitably be long and complex. Nevertheless, "Palestinian reform will clearly be moving forward if the Ministry of Interior exercises real oversight, if the PLC passes a set of laws governing security forces, and if the regular reporting of human rights groups and other NGOs suggests that the security forces are more respectful of the limits to their authority."

Civil Society

Democracy depends largely on the presence of a vibrant civil society. In Palestine, the presence of a strong civil society can be considered one of the most promising assets for the development of a sustainable democracy. Numerous civil organizations have existed since the early years of the occupation, essentially "keeping the country going before the PA, and still very active" after Oslo and during the present period. Dajani notes that, in Palestine, "in the absence of a state and central government, and without any formal, centrally organized political socialization via schools, the media, religion, friends or family, people began to organize themselves in civil groups--which subsequently became known as NGOs—and took over the role of a government." These organizations have assumed a variety of roles and duties, including the provision of social services, political activism, human rights monitoring, education and advocacy, media and outreach, and others. Civil society groups have thus taken a number of forms, such as women's groups, media outlets, trade unions, human rights groups, religious groups, etc. While duplication, and at times, competition, are inevitable, many civil society organizations collaborate with each other and complement each others' work, and over 90 organizations belong to the Palestinian NGO Network, an umbrella group that seeks to support, strengthen, and consolidate Palestinian civil society.

Organizations that focus on women's rights and empowerment are especially important for ensuring the viability of a sustainable democracy. As Feidy explains, a strong Palestinian women's movement has existed since the 1920s, and women have been active in civil society throughout Palestinian history. However, women have been largely marginalized under the PA, with the old guard seeking to limit the participation of both women and youth. Alami, the women's agenda has lagged at times because many active women believe that political activism against the occupation deserves more attention than the women's movement, although one cannot really separate one agenda from the other. Indeed, if women are to have an impact politically, they need to have the rights and access to participation. As Giacaman stated, "Equality is central to democracy."

In addition to political marginalization, women also face challenges related to employment, education, violence, early marriage, and inheritance rights. Many Palestinian Muslim women also confront unique issues related to certain interpretations of Islam. The range of challenges related to women has resulted in a variety of responses by different civil society groups. Some focus on advocating for legal reform, such as the establishment of a quota to ensure a certain percentage of local or PLC seats are reserved for women, while others focus more on assisting female candidates and encouraging women to run for office or to vote for candidates who are female or who support women's rights. Other groups focus on making women aware of their civil and political rights through trainings, workshops, and conferences. As Mu'alim explains of his work with PCPD, "We are not speaking for people; rather, we empower people to speak on behalf of themselves. People have listened too long. They need to use their own voices now." This approach is especially important for women's empowerment.

An obvious institution for channeling these voices is the media, and indeed, newspapers and media outlets are important institutions within Palestinian civil society. A strong foundation exists in Palestine for a free press; according to Brown, "the basis for independent media that can facilitate reform [in Palestine] is solid." To be sure, the majority of media outlets in Palestine are privately owned, in contrast to the state-controlled media that dominates in some other parts of the Arab world and elsewhere. Similarly, despite noted attempts by some PA officials to constrict discourse on certain topics such as Islamist parties, or certain stories, such as internal discord, the PA never fully stifled public expression. Nevertheless, there is still much room for improvement. Palestinian journalists should thus continue to build on their sound foundation of free media institutions to ensure that the media can function as a viable institution in a substantive democracy.

Journalists and media outlets are not the only groups focusing on media concerns. Many organizations that advocate for democracy and reform are embracing media issues, as well as women's rights, as key areas of concentration for their work, under the larger goal of promoting democracy and working towards the development of sustainable institutions. Some of the leading democracy organizations include MIFTAH, which focuses on democracy, human rights, gender equity, and participatory governance; Muwatin, which initiates intellectual debate on democratic issues and options; PCPD, which promotes human rights, tolerance, participation, accountability, empowerment, and rule of law; and Civic Forum Institute, which aims to increase citizens' awareness of democratic concepts and institutions and develop civil society institutions. This list is not intended to be exhaustive, but rather is meant to provide brief insight into the types of organizations that currently exist in the area of democracy advocacy.

Civil society is just one vital aspect of a participatory democracy, in which citizens are active participants in their government and communities, rather than just passive recipients. It should be noted that democratic participation can take many forms, including voting, holding public office, volunteering a service, writing letters to officials and/or newspapers, participating in marches, protests, and other forms of direct activism, and countless others. It is not the objective of this paper to evaluate the impact of various forms of participation; rather, it is to recognize the importance of citizen agency. Perhaps the best indication of the potential for participatory democracy in Palestine was the early years of the first intifada, which saw widespread popular participation of different forms. Though the nonviolent "people power" strategies employed during that time have yet to be duplicated on the same scale, the spirit of that period is evident in the willingness of the people to express their opinions and voice their criticisms of both the PA and Israel.

Participatory democracy, and thus civil society, are both inputs and outputs of human rights. First of all, as an output, the emergence of civil society depends on the rights to freedom of thought, opinion, and expression, the right to assembly and association, and the right to participation and service in government or country. As an input, many civil society groups adopt missions that help to ensure economic, social, and cultural rights such as access to social services like food, clothing, housing, and medical care, education, and human security and others focus on securing civil and

political rights. In addition, human rights organizations in particular, as a part of civil society, play an important role in monitoring and documenting human rights violations and advocating for the protection of rights.

Assessment of Democracy & Human Rights in Palestine

Foundations clearly exist in Palestine for the emergence of a substantive democracy, but the process still has far to go. A helpful way of conceptualizing Palestine's current level of democracy is the transition theory, advocated by Dankwart Rustow. This theory, democratic development occurs in four main stages: "a stage when a national unity is being established; a preparatory phase of prolonged and inconclusive political struggle; a decision phase when a historical movement of choosing a democratic path is taken; and a habituation phase witnessing a consolidation of democracy." In the case of Palestine, a national unity has long been established, and one might consider the post-Oslo period and second intifada to be periods of prolonged struggle. It is possible that, at present, Palestine is transitioning into the third stage, embarking upon a path of decision to work deliberately towards democracy. Most democracy advocates interviewed agreed, suggesting that Palestine is in a middle stage, on the way to democracy.

It is thus important at this stage to identify obstacles that prevent Palestine from fully realizing a substantive democracy. First, it should be noted that any transition to democracy is a long, slow process. In the case of Palestine, there have also been additional setbacks in the form of clashes in reform visions, both internally and between internal and external actors. Another obstacle is the persistence of the old guard, who continue to occupy many key positions. The past six months have seen hope for progress in both of these areas however, with the election of Abu Mazen. The new president has committed himself to reform, and in doing so has reconciled differences between international and domestic agendas, and has opened up the PA and Fatah to be more transparent and accountable.

As Brown notes however, "the primary obstacle to further Palestinian reform lies in the international context: Political reform is difficult in the midst of an ongoing conflict." Specifically, it is not possible to establish a substantive democracy under occupation. Unfortunately, international actors like the United States have to date have "approached diplomacy and reform as sequential rather than interdependent… [though] it is precisely the mutual dependence of reform and peace that make both so difficult achieve." To be sure, the "peace now, democracy later" philosophy of Oslo proved to be ineffectual and perhaps even detrimental, and it is doubtful that the current logic of "democracy now, peace later" will be any different. As Brown notes, it is futile to build "public institutions that are expected to establish authority and accountability while placing them in a context of extremely limited autonomy."

Perhaps a better way to conceptualize the peace and democracy equation is to integrate the variable of human rights. Democracy is necessary for human rights, and human rights are necessary for

democracy. Likewise, a real just peace cannot exist unless peace is integrated with the protection of human rights. Because human rights is thus a common variable to both peace and democracy, it makes sense to focus on the human rights framework when pursuing both diplomacy and institution-building. Only when human rights and democracy are pursued simultaneously will either be achieved, and it is only then that a just peace will be possible.

Cease

Human rights and liberal democracy are not merely complementary, rather, they are interdependent. A democracy that is substantive as well as procedural cannot function without human rights, just as human rights, meaning civil, political, economic, social, and cultural rights, cannot be ensured in the absence of democracy.

In the case of Palestine, a foundation exists for both the realization of human rights and the development of a substantive democracy, but both internal and external factors have hindered the building of viable institutions to actualize those ideals. Greater attention thus needs to be given to the development of mechanisms such as elections, political parties, and separation of powers, and the restructuring of institutions including the judiciary branch and security sector.

Despite the absence of these institutions to date, the will and perseverance of the Palestinian people, through both civil society and direct participation, has continued to push forward the democracy and human rights movements. Thus, attention must be given to these bottom-up efforts of popular participation, in addition to the top-down efforts of institution-building, if a liberal democracy is to be established. To be sure, no amount of institutional reform will be sustainable if it does not develop in tandem with popular will and public participation. For this reason, it is necessary for civil society organizations and actors to continue to facilitate political participation and raise public awareness, and it is imperative that individuals and communities seize opportunities to demonstrate their will. Media institutions in particular can play a key role in this process by serving as a means of popular communication, education, and mobilization. The human rights framework can be helpful for developing direction and coordination for these efforts, and can integrate the distinct yet interdependent ideals of peace and justice, and human rights and democracy.

Human Rights and Disability

Until recently, the disabled have constituted a minority in obscurity. Unlike certain other groups that fall victim to discrimination, the disabled do not comprise a self-contained, close-knit social community. Instead, they populate every social sector, every class, every age group, every ethnic and religious community. And at every level, society has tended to ignore them, believing them incapable of participating in the community, or avoiding them as unpleasant reminders of the fragility of our existence.

Fortunately, this situation is beginning to change. Nations and localities are devoting steadily more attention to improving the plight of the disabled. Mr. Despouy's excellent interim report demonstrates the seriousness with which the international community too is finally addressing this important issue. The Bahá'í International Community welcomes the Special Rapporteur's study and would like to take a few minutes to comment on his report and on some of the issues it raises.

The plight of the disabled is a mirror reflecting the shortcomings of society. This fundamental observation holds true with respect to three major topics that the Special Rapporteur plans to treat at length in his final report: first, the causes of disability; second, prejudice and discrimination directed towards the disabled; and third, measures to ensure the equal enjoyment of human rights for the disabled.

First, with respect to the causes of disability, the list of injurious practices resulting in disability that the Special Rapporteur has compiled is thought provoking, ranging from amputations to civil war. Disability can be caused by the gamut of inhuman conduct perpetrated by human beings against one another. For that very reason, the international community must take aim at all human rights violations, for they can all result in the permanent mental or physical handicap of human beings. We fully agree with the Special Rapporteur's observation, in paragraph 14 of his report, that any acts contrary to international law and violative of mental or physical integrity should be proscribed, not only those acts that rise to the level of torture or other cruel, inhuman or degrading treatment or punishment.

Secondly, the prejudice and discrimination that disabled people suffer is the product of the more general human tendency to label as "inferior" those who are somehow different. But the ostracism that disabled persons often experience can be even more intense, for it is founded on fear -- fear on the part of the ostracizer that he, too, may someday become the victim of disability. The only way to eradicate this fear is to educate every member of society to see disability for what it really is -- a mental or physical condition that may make everyday life more challenging, but that cannot affect the disabled person's soul, spirit, creativity, imagination or determination -- in short, some of the most valuable aspects of life. At the same time, such an appreciation will enable individuals to see through the outward handicaps of disabled persons, to their inner reality.

As we pointed out in our statements to the Sub-Commission last year, the reformation of social stereotypes and prejudices against the disabled requires education aimed at helping individuals to see the disabled as real people and to share in their triumphs. As Bahá'ís, we are working to implement this kind of education in our schools and in Bahá'í homes. We are pleased to learn from the Special Rapporteur's report that a number of governments have reported that they are pursuing educational programmes with this goal directed towards young persons, teachers and the society as a whole. We hope that the Special Rapporteur will be in a position to elaborate Parts III and V of his final report, and to make specific recommendations on the form and content of educational programmes designed to combat prejudice against the disabled.

We now turn to our third topic; ensuring equal rights for the disabled. Like many other groups, the disabled have been stigmatized and victimized by prejudice, preventing them from assuming their rightful places in society. As pointed out by the Special Rapporteur, the elimination of traditional stereotypes and prejudices against the disabled is a sine qua non for their full enjoyment of fundamental human rights. We agree wholeheartedly with the Special Rapporteur that all sectors of society must work to integrate disabled persons into the life of society and give them equal opportunities in schools, the workplace and the community at large. Society will be the loser if it fails to benefit from the talents of disabled persons. Their resolute determination to overcome problems that most of us will never be forced to deal with should be a shining torch for us all. We would only suggest that the Special Rapporteur emphasize the ideal of rehabilitation in the family as well as in the community. Family members should be trained, where possible, to help provide the support and encouragement that the disabled person requires to surmount his impairment. Moreover, we would add the right to freedom of religion to the list of those rights especially important for the disabled person. Disabled persons must be free to partake of the inspiration that religious beliefs can provide. We have described in more detail our views on these topics, and on the broad economic, social and cultural rights to which disabled persons are entitled, in our written statementto the current session of the Sub-Commission.

Finally, we welcome discussions on the possibility of drafting a convention on disabled persons' rights. Every effort to specify more clearly disabled persons' rights and entrench these rights in the legal order deserves to be commended. But the problem of finding the proper method for developing and entrenching these standards requires careful study. For this reason, we approve of the suggestion by the Secretary-General that the General Assembly consider forming a Working Group to examine the possibility of elaborating a convention and the steps involved in its preparation.

Thanks in part to the devoted efforts of the Special Rapporteur, disabled persons will no longer have to cope with their handicaps in isolation, hidden behind a veil of intentional ignorance on the part of the society around them. We applaud efforts worldwide to help them surmount their disabilities and become fully-functioning members of their communities. Indeed, we all have much to learn from the disabled persons. Theirs is often an example worthy of emulation.

Education

The right to education is recognized as a human right by the United Nations and is understood to establish an entitlement to free, compulsory primary education for all children, an obligation to develop secondary education accessible to all children, as well as equitable access to higher education, and a responsibility to provide basic education for individuals who have not completed primary education. In addition to these access to education provisions the right to education encompasses also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality.

The right to education is enshrined in Article 26 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Economic, Social and Cultural Rights. The right to education has also been reaffirmed in the 1960 UNESCO Convention against Discrimination in Education, 1st Protocol of ECHR and the 1981 Convention on the Elimination of All Forms of Discrimination Against Women.

The right to education may also include the right to freedom of education.

Education narrowly refers to formal institutional instructions. Generally, international instruments use the term in this sense and the right to education, as protected by international human rights instruments, refers primarily to education in a narrow sense. The 1960 UNESCO Convention against Discrimination in Education defines education in Article 1(2) as: "all types and levels of education, (including) access to education, the standard and quality of education, and the conditions under which it is given."

In a wider sense education may describe "all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable the group to subsist". In this sense education refers to the transmission to a subsequent generation of those skills needed to perform tasks of daily living, and further passing on the social, cultural, spiritual and philosophical values of the particular community. The wider meaning of education has been recognised in Article 1(a) of UNESCO's 1974 Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms. The article states that education implies:

> "the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge."

The European Court of Human Rights has defined education in a narrow sense as "teaching or instructions... in particular to the transmission of knowledge and to intellectual development" and in a wider sense as "the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young."

Fulfilling the Right to Education

The fulfilment of the right to education can be assessed using the 4 As framework, which asserts that for education to be a meaningful right it must be available, accessible, acceptable and adaptable. The 4 As framework was developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski, but is not necessarily the standard used in every international human rights instrument and hence not a generic guide to how the right to education is treated under national law.

The 4 As framework proposes that governments, as the prime duty-bearer, has to respect, protect and fulfil the right to education by making education available, accessible, acceptable and adaptable. The framework also places duties on other stakeholders in the education process: the child, which as the privileged subject of the right to education has the duty to comply with compulsory education requirements, the parents as the 'first educators', and professional educators, namely teachers.

The 4 As have been further elaborated as follows:

- Availability – education is free and government-funded and there is adequate infrastructure and trained teachers able to support education delivery.
- Accessibility – the system is non-discriminatory and accessible to all, and positive steps are taken to include the most marginalised.
- Acceptability – the content of education is relevant, non-discriminatory and culturally appropriate, and of quality. The school itself is safe and teachers are professional.
- Adaptability – education can evolve with the changing needs of society and contribute to challenging inequalities, such as gender discrimination, and can be adapted locally to suit specific contexts.

A number of international NGOs and charities work to realise the right to education using a rights-based approach to development.

Development of the Right to Education

In Europe, before the Enlightenment of the eighteenth and nineteenth century, education was the responsibility of parents and the church. With the French and American Revolution education was established also as a public function. It was thought that the state, by assuming a more active role in the sphere of education, could help to make education available and accessible to all. Education had thus far been primarily available to the upper social classes and public education was perceived as a means of realising the egalitarian ideals underlining both revolutions.

However, neither the American Declaration of Independence (1776) nor the French Declaration of the Rights of Man (1789) protected the right to education as the liberal concepts of human rights in the nineteenth century envisaged that parents retained the primary duty for providing education to their children. It was the states obligation to ensure that parents complied with this duty, and many states enacted legislation making school attendance compulsory. Furthermore child labour laws were enacted to limit the number of hours per day children could be employed, to ensure children would attend school. States also became involved in the legal regulation of curricula and established minimum educational standards.

In On Liberty John Stuart Mill wrote that an "education established and controlled by the State should only exist, if it exists at all, as one among many competing experiments, carried on for the purpose of example and stimulus to keep the others up to a certain standard of excellence." Liberal thinkers of the nineteenth century pointed to the dangers to too much state involvement in the sphere of education, but relied on state intervention to reduce the dominance of the church, and to protect the right to education of children against their own parents. In the latter half of the nineteenth century, educational rights were included in domestic bills of rights. The 1849 Paulskirchenverfassung, the constitution of the German Empire, strongly influenced subsequent European constitutions and devoted Article 152 to 158 of its bill of rights to education. The constitution recognised education as a function of the state, independent of the church. Remarkable at the time, the constitution proclaimed the right to free education for the poor, but the constitution did not explicitly require the state to set up educational institutions. Instead the constitution protected the rights of citizens to found and operate schools and to provide home education. The constitution also provided for freedom of science and teaching, and it guaranteed the right of everybody to choose a vocation and train for it.

The nineteenth century also saw the development of socialist theory, which held that the primary task of the state was to ensure the economic and social well-being of the community through government intervention and regulation. Socialist theory recognised that individuals had claims to basic welfare services against the state and education was viewed as one of these welfare entitlements. This was in contrast to liberal theory at the time, which regarded non-state actors as the prime providers of education. Socialist ideals were enshrined in the 1936 Soviet Constitution, which was the first constitution to recognise the right to education with a corresponding obligation of the state to provide such education. The constitution guaranteed free and compulsory education at all levels, a system of state scholarships and vocational training in state enterprises. Subsequently the right to education featured strongly in the constitutions of socialist states. As a political goal, right to education was declared in F. D. Roosevelt's 1944 speech on the Second Bill of Rights.

Implementation

International law does not protect the right to pre-primary education and international documents generally omit references to education at this level. The Universal Declaration of Human Rights states that "everybody" has the right to education, hence the right accures to all individuals, although children are understood as the main beneficiaries.

The rights to education are separated into three levels:

- Primary (Elemental or Fundamental) Education. This shall be compulsory and free for any child regardless of their nationality, gender, place of birth, or any other discrimination. Upon ratifying the International Covenant on Economic, Social and Cultural Rights States must provide free primary education within two years.

- Secondary (or Elementary, Technical and Professional in the UDHR) Education must be generally available and accessible.
- Higher Education (at the University Level) should be provided according to capacity. That is, anyone who meets the necessary education standards should be able to go to university.

Both secondary and higher education shall be made accessible "by every appropriate means, and in particular by the progressive introduction of free education". The only country that has declared reservations about introducing free secondary or higher education is Japan.

Role of the State

Today education is considered an important public function and the state is seen as the chief provider of education through the allocation of substantial budgetary resources and regulating the provision of education. The pre-eminent role of the state in fulfilling the right to education is enshrined in the 1966 International Covenant on Economic, Social and Cultural Rights. Traditionally, education has been the duty of a child's parents, however with the rise of systems of education, the role of parents has diminished. With regards to realising the right to education the World Declaration on Education for All, adopted at the 1990 World Conference on Education for All states that "partnerships between government and non-governmental organisations, the private sector, local communities, religious groups, and families" are necessary.

Compulsory Education

The realisation of the right to education on a national level may be achieved through compulsory education, or more specifically free compulsory primary education, as stated in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

Freedom of Speech

Freedom of expression is a cornerstone of democratic rights and freedoms. In its very first session in 1946, before any human rights declarations or treaties had been adopted, the UN General Assembly adopted resolution 59(I) stating "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."

Freedom of expression is essential in enabling democracy to work and public participation in decision-making. Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely. Freedom of expression is thus not only important for individual dignity but also to participation, accountability and democracy. Violations of freedom of expression often go hand in hand with other violations, in particular the right to freedom of association and assembly.

Progress has been made in recent years in terms of securing respect for the right to freedom of expression. Efforts have been made to implement this right through specially constructed regional mechanisms. New opportunities are emerging for greater freedom of expression with the internet and worldwide satellite broadcasting. New threats are emerging too, for example with global media monopolies and pressures on independent media outlets.

Concepts of freedom of speech can be found in early human rights documents and the modern concept of freedom of speech emerged gradually during the European Enlightenment. England's Bill of Rights 1689 granted 'freedom of speech in Parliament' and the Declaration of the Rights of Man and of the Citizen, adopted during the French Revolution in 1789, specifically affirmed freedom of speech as an inalienable right. The Declaration provides for freedom of expression in Article 11, which states that:

> "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."

Article 19 of the Universal Declaration of Human Rights, adopted in 1948, states that:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Today freedom of speech, or the freedom of expression, is recognized in international and regional human rights law. The right is enshrined in Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights. Based on John Stuart Mill's arguments, freedom of speech is understood as a multi-faceted right that includes not only the right to express, or disseminate, information and ideas, but three further distinct aspects:

- the right to seek information and ideas;
- the right to receive information and ideas;
- the right to impart information and ideas.

International, regional and national standards also recognize that freedom of speech, as the freedom of expression, includes any medium, be it orally, in written, in print, through the Internet or through art forms. This means that the protection of freedom of speech as a right includes not only the content, but also the means of expression.

Relationship to Other Rights

The right to freedom of speech and expression is closely related to other rights, and may be limited when conflicting with other rights. The right to freedom of expression is also related to the right to a

fair trial and court proceeding which may limit access to the search for information or determine the opportunity and means in which freedom of expression is manifested within court proceedings. As a general principle freedom of expression may not limit the right to privacy, as well as the honor and reputation of others. However greater latitude is given when criticism of public figures is involved. The right to freedom of expression is particularly important for media, which plays a special role as the bearer of the general right to freedom of expression for all. However, freedom of the press is not necessarily enabling freedom of speech. Judith Lichtenberg has outlined conditions in which freedom of the press may constrain freedom of speech, for example where the media suppresses information or stifles the diversity of voices inherent in freedom of speech. Lichtenberg argues that freedom of the press is simply a form of property right summed up by the principle "no money, no voice".

Origins and Academic Freedom

Freedom of speech and expression has a long history that predates modern international human rights instruments. It is thought that ancient Athens' democratic ideology of free speech may have emerged in the late 6th or early 5th century BC. In Islamic ethics, freedom of speech was first declared in the Rashidun period by the caliph Umar in the 7th century AD. In the Abbasid Caliphate period, freedom of speech was also declared by al-Hashimi in a letter to one of the religious opponents he was attempting to convert through reason. George Makdisi and Hugh Goddard, "the idea of academic freedom" in universities was "modelled on Islamic custom" as practiced in the medieval Madrasah system from the 9th century. Islamic influence was "certainly discernible in the foundation of the first deliberately-planned university" in Europe, the University of Naples Federico II founded by Frederick II, Holy Roman Emperor in 1224.

Freedom of Speech, Dissent and Truth

Before the invention of the printing press a writing, once created, could only be physically multiplied by the highly laborious and error-prone process of manual copying out and an elaborate system of censorship and control over scribes existed. Printing allowed for multiple exact copies of a work, leading to a more rapid and widespread circulation of ideas and information. The origins of copyright law in most European countries lie in efforts by the church and governments to regulate and control the output of printers. In 1501 Pope Alexander VI issued a bull against the unlicensed printing of books and in 1559 the Index Expurgatorius, or List of Prohibited Books, was issued for the first time. While governments and church encouraged printing in many ways, which allowed the dissemination of Bibles and government information, works of dissent and criticism could also circulate rapidly. As a consequence, governments established controls over printers across Europe, requiring them to have official licences to trade and produce books.

The notion that the expression of dissent or subversive views should be tolerated, not censured or punished by law, developed alongside the rise of printing and the press. Areopagitica, published in

1644, was John Milton's response to the Parliament of England's re-introduction of government licensing of printers, hence publishers. Milton made an impassioned plea for freedom of expression and toleration of falsehood, stating:

- "Give me the liberty to know, to utter, and to argue freely according to conscience."

Milton's defence of freedom of expression was grounded in a Protestant worldview and he thought that the English people had the mission to work out the truth of the Reformation, which would lead to the enlightenment of all people. But Milton also articulated the main strands of future discussions about freedom of expression. By defining the scope of freedom of expression and of "harmful" speech Milton argued against the principle of pre-censorship and in favour of tolerance for a wide range of views.

As the "menace" of printing spread governments established centralised control mechanism. The French crown repressed printing and the printer Etienne Dolet was burned at the stake in 1546. In 1557 the British Crown thought to stem the flow of seditious and heretical books by chartering the Stationers' Company. The right to print was limited to the members of that guild, and thirty years later the Star Chamber was chartered to curtail the "greate enormities and abuses" of "dyvers contentyous and disorderlye persons professinge the arte or mystere of pryntinge or selling of books." The right to print was restricted to two universities and to the 21 existing printers in the city of London, which had 53 printing presses. As the British crown took control of type founding in 1637 printers fled to the Netherlands. Confrontation with authority made printers radical and rebellious, with 800 authors, printers and book dealers being incarcerated in the Bastille in Paris before it was stormed in 1789.

A succession of English thinkers developed the idea of a right to freedom of expression, starting with John Milton, then John Locke and culminating in John Stuart Mill. Locke established the individual as the unit of value and the bearer of rights to life, liberty, property and the pursuit of happiness. It was the role of Government to protect these rights and this belief was first en-shrined in the US Constitution, with the First Amendment adding the guarantee that "Congress shall make no law... abridging the freedom of speech, or of the press". John Stuart Mill argued that human freedom is good and without it there can be no progress in science, law or politics, which according to Mill required free discussion of opinion. Mill's On Liberty, published in 1859 became a classic defence of the right to freedom of expression. Mill argued that truth drives out falsity, therefore the free expression of ideas, true or false, should not be feared. Truth is not stable or fixed, but evolves with time. Mill argued that much of what we once considered true has turned out false. Therefore views should not be prohibited for their apparent falsity. Mill also argued that free discussion is necessary to prevent the "deep slumber of a decided opinion". Discussion would drive the onwards march of truth and by considering false views the basis of true views could be re-affirmed.

In Evelyn Beatrice Hall's biography of Voltaire, she coined the following phrase to emphasize Voltaire's beliefs: "I disapprove of what you say, but I will defend to the death your right to say it." Hall's quote is frequently cited to describe the principle of freedom of speech. In the 20th Century Noam Chomsky states that: "If you believe in freedom of speech, you believe in freedom of speech for views you don't like. Stalin and Hitler, for example, were dictators in favor of freedom of speech for views they liked only. If you're in favor of freedom of speech, that means you're in favor of freedom of speech precisely for views you despise." Lee Bollinger argues that "the free speech principle involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters." Bollinger argues that tolerance is a desirable value, if not essential. However, critics argue that society should be concerned by those who directly deny or advocate, for example, genocide.

Democracy

The notion of freedom of expression is intimately linked to political debate and the concept of democracy. The norms on limiting freedom of expression mean that public debate may not be completely suppressed even in times of emergency. One of the most notable proponents of the link between freedom of speech and democracy is Alexander Meiklejohn. He argues that the concept of democracy is that of self-government by the people. For such a system to work an informed electorate is necessary. In order to be appropriately knowledgeable, there must be no constraints on the free flow of information and ideas. Meiklejohn, democracy will not be true to its essential ideal if those in power are able to manipulate the electorate by withholding information and stifling criticism. Meiklejohn acknowledges that the desire to manipulate opinion can stem from the motive of seeking to benefit society. However, he argues, choosing manipulation negates, in its means, the democratic ideal.

Eric Barendt has called this defence of free speech on the grounds of democracy "probably the most attractive and certainly the most fashionable free speech theory in modern Western democracies". Thomas I. Emerson expanded on this defence when he argued that freedom of speech helps to provide a balance between stability and change. Freedom of speech acts as a "safety valve" to let off steam when people might otherwise be bent on revolution. He argues that "The principle of open discussion is a method of achieving a moral adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." Emerson furthermore maintains that "Opposition serves a vital social function in offsetting or ameliorating (the) normal process of bureaucratic decay."

Research undertaken by the Worldwide Governance Indicators project at the World Bank, indicates that freedom of speech, and the process of accountability that follows it, have a significant impact in the quality of governance of a country. "Voice and Accountability" within a country, defined as "the extent to which a country's citizens are able to participate in selecting their government, as

well as freedom of expression, freedom of association, and free media" is one of the six dimensions of governance that the Worldwide Governance Indicators measure for more than 200 countries.

Social Interaction and Community

Richard Moon has developed the argument that the value of freedom of speech and freedom of expression lies with social interactions. Moon writes that "by communicating an individual forms relationships and associations with others – family, friends, co-workers, church congregation, and countrymen. By entering into discussion with others an individual participates in the development of knowledge and in the direction of the community."

Limitations on Freedom of Speech

The Freedom Forum Organization, legal systems, and society at large, recognize limits on the freedom of speech, particularly when freedom of speech conflicts with other values or rights. Limitations to freedom of speech may follow the "harm principle" or the "offense principle", for example in the case of pornography or "hate speech". Limitations to freedom of speech may occur through legal sanction or social disapprobation, or both.

In "On Liberty" John Stuart Mill argued that "...there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered." Mill argues that the fullest liberty of expression is required to push arguments to their logical limits, rather than the limits of social embarrassment. However, Mill also introduced what is known as the harm principle, in placing the following limitation on free expression: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

In 1985 Joel Feinberg introduced what is known as the "offence principle", arguing that Mill's harm principle does not provide sufficient protection against the wrongful behaviours of others. Feinberg wrote "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense to persons other than the actor, and that it is probably a necessary means to that end." Hence Feinberg argues that the harm principle sets the bar too high and that some forms of expression can be legitimately prohibited by law because they are very offensive. But, as offending someone is less serious than harming someone, the penalties imposed should be higher for causing harm. In contrast Mill does not support legal penalties unless they are based on the harm principle. Because the degree to which people may take offense varies, or may be the result of unjustified prejudice, Feinberg suggests that a number of factors need to be taken into account when applying the offense principle, including: the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended, the intensity of the offense, and the general interest of the community at large.

Freedom of Religion or Belief

Introduction

Defining Religion or Belief

The word "religion," meaning to bind fast, comes from the Western Latin word religare. It is commonly, but not always, associated with traditional majority, minority or new religious beliefs in a transcendent deity or deities. In human rights discourse, however, the use of the term usually also includes support for the right to non-religious beliefs. In 1993 the Human Rights Committee, an independent body of 18 experts selected through a UN process, described religion or belief as "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."

Religions and other beliefs bring hope and consolation to billions of people, and hold great potential for peace and reconciliation. They have also, however, been the source of tension and conflict. This complexity, and the difficulty of defining "religion" and "belief," are emphasized by the still developing history of the protection of freedom of religion or belief in the context of international human rights.

A Complex and Contentious Issue

The struggle for religious liberty has been ongoing for centuries, and has led to innumerable, tragic conflicts. The twentieth century has seen the codification of common values related to freedom of religion and belief, though the struggle has not abated. The United Nations recognized the importance of freedom of religion or belief in the 1948 Universal Declaration of Human Rights, in which Article 18 states that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice." Since the Universal Declaration, the attempt to develop an enforceable human rights instrument related to freedom of religion and belief has been unsuccessful.

In 1966 the UN passed the International Covenant on Civil and Political Rights, expanding its prior statement to address the manifestation of religion or belief. Article 18 of this Covenant includes four paragraphs related to this issue:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are

prescribed by law and are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

Some of the articles of the Covenant on Civil and Political Rights regarding fundamental freedoms have become international conventions, which are legally binding treaties. In contrast, however, because of the complexity of the topic and the political issues involved, Article 18 of the Covenant on Civil and Political Rights has not been elaborated and codified in the same way that more detailed treaties have codified prohibitions against torture, discrimination against women, and race discrimination. After twenty years of debate, intense struggle and hard work, the General Assembly in 1981 adopted without a vote the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. While the 1981 Declaration lacks any enforcement procedures, it remains the most important contemporary codification of the principle of freedom of religion and belief.

Rights at Stake

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief contains eight articles, three of which define specific rights. The remaining articles act in a supportive role by outlining measures to promote tolerance or prevent discrimination. Taken together, the eight articles constitute a paradigm, an overall concept, to advocate for tolerance and to prevent discrimination based on religion or belief. While human rights are individual rights, the 1981 UN Declaration also identifies certain rights related to states, religious institutions, parents, legal guardians, children, and groups of persons.

Article 1: Legal Definition.

This article repeats several rights from the Covenant on Civil and Political Rights's Article 18:

- Right to thought, conscience, and religion or belief;
- Right to have a religion or whatever belief of your choice;
- Right either individually or in community with others, in private or public, to manifest a religion or belief through worship, observance, practice and teaching;
- Right not to suffer coercion that impairs the freedom to choose a religion or belief;
- Right of the State to limit the manifestation of a religion or belief if based in law, and only as necessary to protect public safety, order, health, morals and the fundamental rights and freedoms of others.

Article 2: Classification of Discrimination.

This article identifies categories of potential discriminators, affirming the right not to be subject to discrimination on the grounds of religion or belief by:

- States;
- Institutions;
- Groups of persons;
- Persons.

Article 3: Link to Other Rights.

This article links the 1981 UN Declaration to other international documents. Article 3 declares that discrimination based on religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and enunciated in detail in:

- The International Covenant on Civil and Political Rights;
- The International Covenant on Economic, Social and Cultural Rights.

Article 4: Possible Solutions.

Article 4 declares that all States [including all sectors of civil society] shall take effective measures to prevent and eliminate discrimination based on religion or belief through:

- Actions in all fields of civil, economic, political, social, cultural life;
- Enacting or rescinding legislation where necessary to prohibit such discrimination;
- Taking all appropriate measures to combat intolerance based on religion or belief.

Article 5: Parents, Guardians, Children.

At stake in the implementation of this article are the following rights:

- Right of parents or legal guardians to bring the child up in their religion or belief;
- Right of the child to education in religion or belief, in accordance with the wishes of parents, and the right not to be compelled to receive education against their wishes;
- Right of the child to protection from discrimination and to education for tolerance;

- Right of the child's wishes when not under the care of parents or legal guardians;
- Right of the State to limit practices injurious to child›s development or health.

Article 6: Manifesting Religion or Belief.

At stake in the implementation of this article are the following rights:

- Right to worship and assemble, and to establish and maintain places of worship;
- Right to establish and maintain appropriate charitable or humanitarian institutions;
- Right to make, acquire and use materials related to rites and customs;
- Right to write, issue and disseminate relevant publications in these areas;
- Right to teach a religion or belief in places suitable for these purposes;
- Right to solicit and receive voluntary financial and other contributions;
- Right to train, appoint, elect or designate appropriate leaders;
- Right to observe days of rest and celebrate holidays and ceremonies;
- Right to establish and maintain communication with individuals and communities at national and international levels.

Article 7: National Legislation.

This article declares that all of the rights at stake in the 1981 UN Declaration need to be accorded in national legislation in such a manner that everyone shall be able to avail themselves of such rights and freedoms in practice.

Article 8: Existing Protections.

This article specifies that the 1981 UN Declaration is non-binding on States so as to ensure that the Declaration does not negate existing legal protections on freedom of religion or belief. Article 8 states that nothing in the Declaration shall be construed as restricting or negating any right defined in the Universal Declaration of Human Rights and International Covenants on Human Rights.

The 1981 UN Declaration is a compromise between states after twenty years of complex discussion and debate, and after final passage by the General Assembly. Several sensitive issues are still in need of further clarification, including:

- Religious or national law versus international law;
- Proselytism;

- Conscientious objection to military service;
- Status of women in religion or belief;
- Claims of superiority or inferiority of religions and beliefs;
- Choosing and changing a religious commitment;
- Religious registration and association laws;
- Public media and religion or belief, and the relationship of religion or belief to the state.

International and Regional Instruments of Protection

International legal instruments take the form of a treaty which may be binding on the contracting states. When negotiations are completed, the text of a treaty is established as authentic and definitive and is signed by the representatives of states. There are various means by which a state expresses its consent to be bound by a treaty, with the most common being ratification or accession. A new treaty is ratified by those states that have negotiated the instrument, while a state that has not participated in the negotiations may, at a later stage, accede to the treaty. The treaty enters into force when a pre-determined number of states have ratified or acceded to the treaty.

When a state ratifies or accedes to a treaty, that state may make reservations to one or more articles of the treaty, unless the treaty prohibits this actions. Reservations are exceptions that a state makes to a treaty—provisions that it does not agree to follow—and may normally be withdrawn at any time. In some countries, international treaties take precedence over national law. In others, a specific law may be required to give an international treaty, although ratified or acceded to, the force of law. Almost all states that have ratified or acceded to an international treaty may issue decrees, amend existing laws or introduce new legislation in order for the treaty to be fully effective on the national territory.

While the 1981 Declaration was adopted as a non-binding human rights instrument, several states had reservations. Romania, Poland, Bulgaria, Czechoslovakia and the then U.S.S.R. said that the 1981 UN Declaration did not take sufficient account of atheistic beliefs. Romania, Syria, Czechoslovakia, and the U.S.S.R. made a general reservation regarding provisions not in accordance with their national legislation. Iraq entered a collective reservation on behalf of the Organization of the Islamic Conference as to the applicability of any provision or wording in the Declaration which might be contrary to Shari'a law or to legislation or acts based on Islamic law, and Syria and Iran endorsed this reservation.

Monitoring Freedom of Religion or Belief

Many international treaties have a mechanism to monitor their implementation. As part of the Covenant on Civil and Political Rights, Article 18 is legally-binding and is monitored by the Human

Rights Committee. As of 2002, there were 149 States Parties to this Covenant. Under an Optional Protocol, 102 States Parties recognize the authority of the Human Rights Committee to consider confidential communications from individuals claiming to be victims of violations of any rights proclaimed under the treaty.

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is a non-binding declaration, and does not, therefore, have a treaty mechanism. Instead, in what is called an extra-conventional mechanism, the UN Commission on Human Rights appointed a Special Rapporteur for the 1981 UN Declaration. The Special Rapporteur is mandated to report annually to the Commission on the status of freedom of religion or belief worldwide.

Chapter 4

Human Rights in India

Introduction

Emergence of Civil Liberties Movements

In India, the last quarter of the 20th century has been witness to a growing recognition of the place and relevance of human rights. It is axiomatic that this interest in human rights is rooted in the denial of life and liberty that was a pervasive aspect of the Emergency (1975-77). The mass arrests of the leaders of the opposition, and the targeted apprehension of those who could present a challenge to an authoritarian state, are one of the dominant images that have survived. The involuntary disappearance of Rajan in Kerala is more than a symbol of the excesses of unbridled power. Forced evictions carried out in Delhi in what is known as 'Turkman Gate' conjures up visions of large scale razing of dwellings of those without economic clout, and of their displacement into what were the outlying areas of the city. The catastrophic programme of mass sterilisation is an indelible part of emergency memory. The civil liberties movement was a product of the emergency. Arbitrary detention, custodial violence, prisons and the use of the judicial process were on the agenda of the civil liberties movement.

Women's Movement

The same period also saw the emergence of a nascent women's movement. In December 1974, the Committee on the Status of Women in India submitted its report to the Government of India preceding the heralding in of the International Women's Year in 1975. The Status Report, in defiance of standard expectations

- set out almost the entire range of issues and contexts as they affected women. Basing their findings, and revising their assumptions about how women live, on the experiences of women and communities that they met, the Committee redrew the contours of women's position, problems and priorities.
- gave a fillip to the re-nascent women's movement.

The women's movement has been among the most articulate, and heard, in the public arena. The woman as a victim of dowry, domestic violence, liquor, rape and custodial violence has constituted one discourse. Located partly in the women's rights movement, and partly in the campaign against AIDS, women in prostitution have acquired visibility. The question of the practice of prostitution being considered as 'sex work' has been variously raised, while there has been a gathering unanimity on protecting the women in prostitution from harassment by the law. The Uniform Civil Code

debate, contesting the inequality imposed on women by 'personal' laws has been resurrected, diverted and re-started. Representation, through reservation, of women in parliament and state legislatures has followed the mandated presence of women in panchayats. Population policies have been contested terrain, with the experience of the emergency acting as a constant backdrop. 'Women's rights are human rights' has demanded a re-construction of the understanding of human rights as being directed against action and inaction of the state and agents of the state. Patriarchy has entered the domain of human rights as nurturing the offender.

Public Interest Litigation

In the late '70s, but more definitively in the early '80s, the Supreme Court devised an institutional mechanism in public interest litigation (PIL). PIL opened up the court to issues concerning violations of rights, and nonrealisation of even bare non-negotiables by diluting the rule of locus standi; any person could move the court on behalf of a class of persons who, due to indigence, illiteracy or incapacity of any other kind were unable to reach out for their rights. In its attempt to make the court process less intimidating, the procedure was simplified, and even a letter to the court could be converted into a petition. In its early years, PIL was a process which recognised rights and their denial which had been invisibilised in the public domain. Prisoners, for instance, hidden amidst high walls which confined them, found a space to speak the language of fundamental and human rights. • led to 'juristic' activism, which expanded the territory of rights of persons. The fundamental rights were elaborated to find within them the right to dignity, to livelihood, to a clean environment, to health, to education, to safety at the workplace….The potential for reading a range of rights into the fundamental rights was explored. Individuals, groups and movements have since used the court as a situs for struggle and contest, with varying effect on the defining of what constitutes human rights, and prioritising when rights appear to be in conflict.

Struggle Against Pervasive Discrimination

Dalit movements have kept caste oppression, and the oppression of caste, in public view. Moving beyond untouchability, which persists in virulent forms, the movement has had to contend with increasing violence against dalits even as dalits refuse to suffer in silence, or as they move beyond the roles allotted to them in traditional caste hierarchy. The growth of caste armies in Bihar, for instance, is one manifestation. The assassination of dalit panchayat leaders in Melmazhuvur in Tamil Nadu is another. The firing on dalits by the police forces when they were seen to be rising their oppression in the southern tip of Tamil Nadu is a third. The scourge of manual scavenging has been brought into policy and the law campaigns; there have been efforts to break through public obduracy in acknowledging that untouchability exists. In the meantime, there are efforts by groups working on dalit issues to internationalise deep discrimination of caste by influencing the agenda of the World Conference Against Racism.

Resisting Displacement Induced By 'Development' Projects

There has been widespread contestation of project-induced displacement. The recognition of inequity, and of violation of the basic rights of the affected people, has resulted in growing interaction between local communities and activists from beyond the affected region, and the articulation of the rights and the injuries has been moulded in the process of this interaction. Resource rights were agitated in the early years of protest in the matter of forests; conservation and the right of the people to access forest produce for their subsistence and in acknowledgment of the traditional relationship between forests and dwellers in and around forests. Environmentalists and those espousing the dwellers' and forest users' causes have spoken together, parted company and found meeting points again, over the years. The right to resources is vigorously contested terrain.

Communalism

The 1980s, but more stridently in the 1990s, communalism has become a part of the fabric of politics. The anti- Sikh riots following Indira Gandhi's assassination was a ghastly reminder that communalism could well lurk just beneath the surface. The Bhagalpur massacres in 1989 represent another extreme communal manifestation. The demolition of the Babri Masjid on December 6, 1992 is an acknowledged turning point in majoritarian communalism, and impunity. The complicity of the state is undeniable. The killing of Graham Staines and his sons in Orissa was another gruesome aspect of communalism. The questioning of conversions in this climate is inevitably seen as infected with the communal virus. The forcible 're-conversion' in the Dangs area in Gujarat too has communal overtones. Attacks on Christians are regularly reported in the press, and the theme of impunity is being developed in these contexts.

New Movements and Campaigns

The professionalising of the non-governmental sector has had an impact on finding public space for certain issues and in making work on the issues sustainable. Child labour, AIDS-related work, the area of devolution and aiding women's participation in panchayat institutions, and battling violence against women have found support and sustainability in funding infrastructure development and support. These have existed alongside civil liberties groups and initiatives, grassroots campaigns such as the Campaign for the Right to Information based in Rajasthan, the development struggle which has the Narmada Bachao Andolan at its helm, or the fishworkers' forum that has combated, sometimes successfully, the encroachments by the large-scale and capital-intensive into the livelihoods of traditional fishing communities.

Movements for self-determination, militancy, dissent and the naxalite movement have provoked various extraordinary measures which have, in turn, prompted human rights groups into protest and challenge. The Terrorist and Disruptive Activities (Prevention) Act (TADA) is an instance. The Armed Forces Special Powers Act (AFSPA) continues. Encounter killings, disappearances and the ineffectiveness of

the judicial system in places where 'extraordinary' situations of conflict prevail, characterise the human rights-related scenario. A jurisprudence of human rights has emerged in these contexts.

Networking, and supporting each other through conflicts and campaigns, is not infrequent. There are glimmerings of the emergence of, or existence of a human rights community in this. This has had groups and movements working on tourism, forest dwellers rights, civil liberties, displacement, women's rights and environment, for instance, finding a common voice in protesting the nuclear blasts in May 1999, or in condemning the attacks on the filming of 'Water' which had undisguised communal overtones. There has also been a building of bridges across causes and the emergence of an inter-woven community of interests. As the vista of rights has expanded, conflicts between rights have begun to surface. There has been a consequent prioritisation of rights. The determination of priorities has often depended on the agency which engages in setting them- sometimes this has been environmental groups, at others workers, and yet other times, it has been the court, for instance. In this general setting, we embarked on a mapping of,

- human rights issues,
- responses – state and non-state – to human rights situations,
- conflicts between rights and prioritisation of rights,
- a miscellany of issues including the treatment, and the place of state and non-state violence, and the question of who speaks for whom, and the relationship between the advocate of an interest and the persons or classes of persons affected by the advocacy.

The Study

The mapping exercise involved travel to the states of Maharashtra, Andhra Pradesh, Kerala, Karnataka, Rajasthan, West Bengal, Orissa, Tamil Nadu, Uttaranchal and Delhi. We travelled to Mumbai in Maharashtra, Calcutta in West Bengal, Bhubaneshwar and Konarak in Orissa; Ernakulam, Neyyali, Thrissur, Kottayam, Tiruvananthapuram and Calicut in Kerala; Bangalore in Karnataka; Ajmer District in Rajasthan; Hyderabad, Nalgonda District, Puttur, Chittoor and Tirupati in Andhra Pradesh; Chennai, Poonamallee District, Tuticorin, Tiruchendur (Nadunaalumoolai Kinaru village), Madurai and Chingleput in Tamil Nadu; Dehradun, Almora and Nainital in Uttaranchal. The work done in documenting a human rights network in Orissa in July 1999 by one of us, and visits to Bhopal and Chattisgarh while researching common property resources in Madhya Pradesh in 1998-99 were also drawn upon. On a visit to Dhaka, human rights groups, lawyers and affected people were met with in May 2000, as part of a regional study on human rights. That experience too has been inducted into interpreting the human rights arena in India. In an attempt to understand the role, and influence, of the courts in the context of human rights, the law reports covering cases from all the High Courts and from the Supreme Court were comprehensively researched from 1994 to 2000. The Annual Reports of the NHRC have also been analysed.

We met movement people, campaigners, persons from NGOs, community based groups, civil libertarians, political activists, journalists, academics, government functionaries, panchayat leaders, bureaucrats and lawyers, among others. We also met victims of human rights violations. As far as possible, we did not predetermine the people we would meet in the states we visited, but allowed a flexibility which would take us from lead to lead. We also attended workshops and conferences which would give us insights into issues, as well as what people thought about them. In Konarak, therefore, one of us attended a Dialogue Among Activists, where arrest, detention and firing on protesters was under discussion among activists working among communities who were resisting their displacement from areas being taken over for projects, particularly mining. Within a week of the meeting, in December 2000, firing claimed the lives of three tribals in Koraput district when they were protesting mining incursions into their area, standing testimony to the legitimacy of the concern of the activists at the meeting. Again, one of us attending a planning meeting for conducting a census of the practice of untouchability; this was in January 2001, in Hyderabad, where dalit activists helped a funding agency set the terms of the study. We attended a workshop to discuss how to stall the changes being proposed in the bureaucratic circles, to Schedule V of the Constitution - which would deprive tribal areas of protection from alienation of land to non-tribals. One of us attended the meeting of the Campaign against Death Penalty where campaigners from across the country participated. There were, further, meetings on slums and demolitions, the women's movement in the last 25 years, the International Criminal Court (in Mumbai, and in Dhaka, after Bangladesh had signed on to the statute), juvenile justice, proposed changes in labour law and on strategising for participating in the World Conference against racism. We also organised a discussion-meeting on a Code of Conduct for Corporations, which is in a draft form before a committee set up by the Office of the High Commissioner for Human Rights in Geneva. In the succeeding parts in this report, it will be our endeavour to set out the issues, responses and conflicts that we encountered, especially during the period of enquiry, viz. May 2000 to February 2001.

A Mapping of Human Rights Issues

This part sets out the issues which inhabit the human rights landscape in areas of ordinary governance.

Custodial Violence

Custody death, torture in custody and custodial rape have been subjects of much concern. Custodial violence has been on the agenda of civil rights groups for over two decades, and reports documenting instances of violence and its systemic occurrence, have been instrumental in the campaigns against custodial violence. Although custody deaths have found an acknowledgment from the state, and the NHRC has issued directions to the states

- To report of the NHRC any death in custody within 24 hours of the occurrence,
- To videotape the post-mortem proceedings, it is difficult to assess if this has resulted in any

reduction in the incidence of custody deaths. NHRC reports show a marked increase in the reported cases of custody deaths each year. This is attributed, by the NHRC, to increased reporting and not to increased incidence of the crime; this, however, needs to be further investigated.

The incidence of custody deaths demonstrates more undeniably the brutalisation of the processes of law enforcement by the police and armed forces. However, custodial torture (not resulting in death) is not at the focus of campaigns to reduce custodial violence. There are few places which have taken up the treatment of the victims of torture as victims of torture. The Indian state, in the meantime, has resisted attempts (including that of the NHRC) to have it ratify the Torture Convention. In recent reported cases from the Gauhati High Court, it is 15 and 16-year olds who are found to have been victims of state violence, and the defence of the state has been that they were hardened militants. Custodial rape has found an expanded definition - in terms of power rape - in the Penal Code, 1860. However, these provisions have hardly been invoked. In the meantime, most often, judicial perceptions of the victim of custodial rape have in significant measure, discredited the victim's version, and blamed the victim resulting in reduction of sentence for policemen convicted of rape to less than the minimum prescribed in law. From Mathura to Rameeza Bi to Maya Tyagi to Suman Rani - these women have become symbols of patriarchal prejudices. Campaigns in the matter of custodial rape have invoked their name, and they are now names that are etched into the history and legend of the women's movement. In the meantime, the legal dictum that the identity of a victim of rape be not disclosed to protect her privacy has been set in place.

Project Displacement

Project displacement, for the construction of large dams or for power projects, for instance, have led to protest movements directly involving the affected people. The NBA has utilised strategies and tactics of protest - including jal samarpan, human chains, working on the funders and the contractors to withdraw, participating in the proceedings before, and surrounding, the World Commission on Dams - which have refused to let the issue be drowned out. This has also seen the manufacturing of conflicting forces, such as the pro-dam lobby which is believed to be largely state-sponsored. Human rights issues that arise include:

- Displacement, per se
- The poverty of rehabilitation, and often, the impossibility of rehabilitation
- The impoverishment that results from displacement
- The non-reckoning of cultural and community identity and of rights

What constitutes development has come into severe question in this arena. The Land Acquisition Act 1894 has been at the centre of protests. Among the strategies adopted to deal with the coercive

nature of the law has been the drafting of alternative legislation. The obduracy of the state in not approving a policy for rehabilitation of the displaced has also been cause for protest.

The Internally Displaced Due to Conflicts

The large-scale internal migration caused by political violence has created classes of internal refugees. During the years of militancy in the Punjab, after the anti-Sikh riots in 1984, and the movement of Kashmiri Pandits out of the valley have provided visible evidence of such migration. While the violence that preceded the migration has been squarely addressed in human rights terms, the rehabilitation and return of the migrants after displacement appears to have been only on the margins of the human rights movement.

Refugees

India has not ratified the 1951 UN Convention on Refugees, nor has it signed the 1967 protocol. The Indian state has generally resisted visits from the UNHCR to camps where refugees are housed. Activists say that the Indian state has been relatively benign towards refugees. One non-governmental source, in 1999, India hosted more than 2,92,000 refugees; which includes more than 16,000 persons from Afghanistan, 65,000 Chakmas from Bangladesh, 30,000 Bhutanese of Nepali origin, 50,000 Chin indigenous people from Myanmar and about 39,000 pro-democracy student activists from Rangoon and the Mandalay region, 1,10,000 Sri Lankan Tamils of whom 70,000 are in camps and 40,000 outside, 1,10,000 Tibetans and around 7000 persons from other countries. The assassination of Rajiv Gandhi in 1991 has reportedly altered the treatment meted out to the Sri Lankan refugees. A fact-finding report of a civil liberties organisation in Tamil Nadu, Sri Lankan refugees fall into three categories: those who are in the 133 refugee camps; refugees who maintain themselves outside the camps; and those who have been identified as belonging to militant groups who were kept in virtual rigorous confinement in the three special camps. In August 1995, 43 inmates of the Special Camp at Tippu Mahal, Vellore escaped and a one-man commission set up by the state describes the structure and administration of the camps. The refugees were found to be prisoners in these camps and, as even the state appointed commission had remarked, 'admittedly these inmates or most of them are in rigorous confinement in the special camps for five or six years continuously.' The testimony of the two inmates to the fact-finding team also revealed that the camp in Vellore had among its inmates at least 12 disabled persons. The Government of India does not appear to have any policy on how to deal with refugee-prisoners in their camps. The protection of Chakma refugees in the state of Arunachal Pradesh, and their right to have their claim for citizenship considered, was canvassed by a civil liberties group before the NHRC. The Supreme Court, approached by the NHRC, directed that the threats held out to the Chakmas by the local citizens be dealt with by the state. It also asserted that their applications for being granted citizenship be considered under the Citizenship Act. The difficulties besetting refugees even after long years of residence in a state, with state acquiescence, were in evidence here.

Land Alienation

The loss to communities of right over land is widespread, and various movements to recover control over land and related resources have been active particularly in the past decade and a half, though some movements go back many decades. The issue of tribal land alienation was linked with that of displacement, and the judicial system was used to get an order declaring unconstitutional the transfer of land from a tribal to a non-tribal through the medium of the state (in its land acquisition capacity). Recent efforts to delete this constitutional protection given in Schedule V of the Constitution are being resisted as a denial of basic protection given to tribals, paving the way for their displacement and impoverishment. The issue of land alienation was one of the primary issues in the struggle for separate statehood for Uttaranchal, and till today is identified as one of the main rights violations occurring in the state. In Kerala, the issue is differently positioned. While the loss of land to the tribal is viewed as a violation of their rights and protection of those rights, the settlers are largely people who are themselves on the economic margins. While groups from within the tribal communities have been demanding restoration of alienated land, and the High Court has supported their stand, other human rights advocates maintain an uneasy silence since the contest appears to be between two vulnerable communities.

Right Over Resources

The right of the forest dwellers to reside in forests, and for those dependent on forest produce to have access to forests, is contested terrain. Till recently, there were conservation groups which demanded that removing tribals from within forest areas was necessary in the interest of conservation. This stand has softened somewhat, and a more symbiotic relationship between the forest and the dweller recognised as possible. The problems are now spoken of in terms of overpopulation, and over-grazing, in the forest area. State policy is, however, widely perceived as being inimical to the continuance of the forest dweller within the forest. 'Settling' of rights and interests is therefore met with deep suspicion, as is happening in Madhya Pradesh. Activists have therefore been mobilising the grassroots - in MP, it was through a padayatra over a period of six months - to resist the conservation projects which may end up pauperising the dwellers, and, further, may denude the forest too. There have been attempts in the early '90s to prepare a new Forest Bill that will contain within it the interests of conservation, and of the people. Efforts such as this have stalled the legislation proposed by the state which groups and movements see as being opposed to rights - including the right to livelihood, to culture, to security, to shelter, among others - even while the alternative bills have hardly ever been adopted. An activist identified the problem of land and resources being related to how possession and ownership of land are perceived. There are three kinds of property he said:

- Private property
- Public property
- Common property

What is held as 'public property' by the state, he said, has been treated as property owned by the state, and not held in trust by the state. It is the notion of common property that has to be resurrected and advanced. The entry of mining interests into Orissa has, for instance, brought into the open the problem that is inherent in globalisation when it comes into conflict with local interest. The unequal, triangular contest between multinational mining interests, the state which binds itself to protecting the multinational interest on Indian territory, and the local dwellers - in the case of mining, it is often tribals - manifests itself as a human rights issue. Aquaculture, which brings in corporations to exploit resources through prawn culture, for instance, has been resisted on grounds of loss of livelihood, long-term destruction of marine life and consequent degradation of the environment. Corporatised aquaculture and shrimp farms have been banned. Deep-sea trawlers have also been banned, and the livelihood and lives of fisher communities salvaged. So, too, with prawn culture. Human rights activists see setbacks to these efforts at preservation of community livelihoods and of the environment in the Aquaculture Bill that has been presented to the Parliament in 2000. The Aruvari Sansad (Water Parliament) in Ajmer district in Rajasthan, which, with the help of the Tarun Bharat Sangh, an NGO, has wrested control over the river, the check dams it has built along it, the revived rivers and the fish that have sprung into being in the river is an uncommon assertion over water and water resources to the exclusion of agencies of the state. The issue of land reforms and the redistribution of land was encountered in Andhra Pradesh. The Peoples War Group, for instance, avers that land reform is at the root of their attacks against the state. The problem of professional land grabbers, and the response of land invasion to take possession of land which should rightly belong to the invading community, was also seen in Andhra Pradesh. State response has been to treat the attacks, and invasion, as public order, or law and order, problems.

The loss of tribal land through land alienation - something that the law limits - has raised other issues in Kerala, for instance. The land had been bought from the tribals by settlers who are themselves economically and socially marginalised. A prolonged legal battle, where the court had directed the return of the land to the tribals, has not seen a solution to the contending interests of two communities, each in need of protection from expropriation.

Urban Shelter and Demolition

There has been a routinising of the emergency visible in the matter of cleaning up of the cities. In 2000-2001, Delhi has seen a spate of demolitions of 'slums'. The slum dwellers have been divided up into eligibles and ineligibles, with the eligibles being given very small plots of land on which they are required to construct houses within six months on a licence basis. The size of the plot ensures that it is only a 'slum' that develops. The 'ineligibles' are not thereafter considered by state policy. Housing rights activists too do not appear to have been able to identify what happens to the ineligibles when demolition occurs. In Bangalore, housing rights groups have been attempting to demonstrate the effort and money that 'encroachers' expend on the land on which they settle; and that they have worked for their entitlement to alternative plots. In Bombay, and to a lesser extent

elsewhere, there have been attempts to involve the slum dwellers in reconstructing the area in a manner which will let the slum disappear, while they are given places in high-rise tenements in the same area with the rest of the space to be used commercially. In Patna, an order of the High Court in a PIL, requiring the municipal corporation to demolish encroachments, resulted in a demolition spree that an embarrassed court had to step in to stop. The illegal status of the urban dweller who cannot afford to purchase legality has been aggravated by B.N. Kirpal, J saying: 'Establishing or creating slums, it seems, appears to be good business and is well organised…Large areas of public land, in this way, are usurped for private use free of cost… The promise of free land, at the tax-payers' cost, in place of a jhuggi, is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket.' Unlike South Africa, where the state's obligation to provide shelter before destroying even an illegal habitat was recognised, drawing upon international law, there is no such recognition in Indian law or judicial decisions. Activists and campaigners therefore face an unenviable, if unavoidable, task of combating the anti-poor stand of the state. Pavement dwelling, and houselessness, was raised in the '80s and, though it may never really have disappeared, it has resurfaced more rigorously since the demolitions have begun in Delhi. Migrant workers living on pavements have been particularly vulnerable to random attacks in areas of militant violence. Newspapers have reported such occurrences in the '90s. This issue affecting migrant labour particularly needs to be addressed. The 'clearing' of pavements by removing hawkers has been a phenomenon visible in most cities. Eviction of hawkers, and of dwellers, is a significant issue, and the demands include recognition not only of shelter, land and monetary compensation, but of livelihood too.

Livelihood

Apart from issues of rights over resources, and in the context of displacement and relocation, the death of cotton farmers has, for instance, raised questions about protection of livelihood. Liberalisation has resulted in loss of jobs to large numbers in the workforce, and we hear of deaths among the working classes. This is an area that seems to demand closer attention. The withdrawing of protective labour legislation, which is proposed, such as the 'abolition' part of the Contract Labour (Prohibition and Regulation) Act 1970, or the prohibition of night work for women except where specifically attempted, it is feared, is likely to shrink the rights of workers to a great degree. Freedom of association is also being re-cast in a new Trade Unions Bill, which labour leaders and activists believe is meant to stifle the powers of labour to group together and be heard. The casualisation of labour which the changes portend are expected to drastically reduce the bargaining power of labour. In 1989, a PIL filed by two social/political activists from Orissa, led to the express recognition of starvation as a violation of fundamental rights. In 1994, the NHRC acknowledged that starvation is a violation of human rights and ordered the state to pay compensation to the families of victims of starvation in Kalahandi in Orissa. In March/April 2001, academics/researchers from the Delhi School of Economics and the Madras Institute of Development Studies have asked for distribution of buffer stocks that the government has stored in its godowns, to stem the tide of hunger among

those with low purchasing power. The juggling with the public distribution system, and the defining and re-defining of the poverty line and consequently of 'below poverty line' is causing particular concern. The death of protesters chased by the police into the Tamaraparani river, and over 200 injured in the incident has been compared to the killing of innocent persons by the British at Jallianwallabagh 80 years ago. On July 23, 1999, a solidarity procession organised by several political parties proceeded to the Collectorate in Tirunelveli Town in South Tamil Nadu, demanding an early solution of the wage dispute that had been the cause of discontent and agitation among tea workers in the Manjolai Tea Estate. The also demanded the immediate and unconditional release of 652 tea estate workers who had been kept in the Tiruchi jail for six weeks following a demonstration before the same Collectorate on June 7 and 8, 1999. Talks on the labour dispute having failed, the political parties decided to present a charter of demands to the Collector. As the processionists neared the Collectorate, the police attempted to prevent the jeep which had the leaders of the agitation in it from proceeding further. As the crowd milled around, the events that ensued included a lathi charge by the police, the lobbing of tear gas and the police also opened fire. A video footage shows an injured person, bleeding, being carried away by four policemen. This injured person remains unaccounted for. The police then chased the people down the banks of the river Tamaraparani forcing the people to jump into the water to save themselves from the police force. Photographs graphically reveal the pursuit of the people by the police into the river, even pushing the people back into the water. 17 people drowned. There were injuries on the person of the drowned victims, testifying to ante-mortem police brutality. This episode constitutes a new threshold to police violence and brutality in labour related agitation and protest. The 'clearing' of pavements by removing hawkers has been a phenomenon visible in most cities. Eviction of hawkers, and of dwellers, is a significant issue, and the demands include recognition not only of shelter, land and monetary compensation, but of livelihood too.

Sexual Harassment at the Workplace

This issue acquired visibility with the decision of the Supreme Court in Vishaka. Earlier efforts at having the problem addressed, as, for instance, in the Delhi University, has drawn strength from the guidelines set out in the judgment. It was widely reported, however, that it was still proving difficult to get institutions to adopt the guidelines and act upon it. The Madras High Court, for instance, was reportedly averring that the guidelines did not apply to the court; and allegations of sexual harassment by a senior member of the Registry were given short shrift. The process of setting up a credible grievance redressal mechanism was reportedly being watered down in the recommendation of a committee to the Delhi University. In Kerala, a Commission of Inquiry was set up after Nalini Netto, a senior official of the Indian Administrative Service, pursued her complaint of sexual harassment against a serving minister of the state cabinet - which is seen as a diversion from a representative investigative and redressal forum. P E Usha, in Kerala, faced hostility in her university when she followed up on her complaint of sexual harassment. There have been allegations of sexual harassment of women employees by senior persons within institutions working on

human rights, and in progressive publications, which too have shown up the inadequacy of the redressal mechanisms.

- Translating the guidelines into norms in different institutions and workplaces;
- Finding support systems for women who are sexually harassed;
- Breaking through thick walls of disbelief are reckoned to be the priorities. This has also been introduced into programmes on gender sensitisation for judicial officers.

Sexual harassment accompanied by violence has become a common feature with cases of acid throwing where there is unrequited love, and harassment which has culminated in the murder of a hounded girl.

Rape

In the '80s and into the early '90s,

- The definition of rape;
- The meaning of consent in the context of rape;
- Marital rape was widely discussed, and alternative drafts and definitions essayed. While following Tukaram and Ganpat's case, 'power' rape was partially introduced into the law. The definition of rape, consent and the status of marital rape in law has however not been altered. Again, while the campaign's gains are witnessed in the Supreme Court holding that, as a rule, the victim's version should not require corroboration and that it should be given credence;
- The trauma of the trial continues;
- The law's sanction to delving into character evidence concerning the victim remains in the Evidence Act despite the flood of criticism and protest it has provoked.

In Uttaranchal, an issue not uncommon in investigations into, and trial of, rape surfaced. It was reported that women who were raped at Muzaffarnagar are being pressurised not to testify in the criminal cases not only by the police but also by their own community and political leaders, particularly since monetary compensation has been paid. In 1994, the National Commission for Women (NCW) was asked by the Supreme Court to propose a scheme for establishing Rape Crisis Centres, and for a Criminal Injuries Compensation Board, which could care for victims of crime. This is yet to materialise. In the meantime, the women's movement in Rajasthan has got the administration to provide monetary relief to victims of rape, unconnected with trial and conviction. Though this has, at least occasionally, resulted in the veracity of the accusation being challenged as having been made so as to obtain the sum in compensation, it is seen as a move to helping the woman recover.

Rape as reprisal was symbolised in Bhanwari Devi's experience. Bhanwari Devi, a saathin working in Rajasthan in and around her village, was part of a wider network of women who were involved in a state-sponsored programme of empowerment particularly of women and girls. Her intervention to thwart the practice of child marriage in the community around her is commonly acknowledged as having resulted in the gang rape that was inflicted on her - as punishment, by men of the dominant community who were outraged by her intervention. The acquittal of the alleged rapists, more especially the reasoning of the court, based on caste and hierarchies of belief, accentuates the re-victimising of the woman. The low rate of conviction for rape, and the protest from women's groups, were held out to justify a proposed amendment to criminal law to provide death penalty for the offence of rape. The conflict between provisions of the death penalty and human rights has surfaced, even if gradually, and the groups we met, as well as the National Commission for Women, have rejected the proposal for death penalty for the offence of rape.

Death Penalty

The civil liberties movement has been consistent in its opposition to the death penalty. For a brief while, there were some parts in the women's movement who supported - either vocally, or by their silence - the imposition of death penalty for rape. This too has been retracted, and death penalty for rape opposed. After the period in the early '80s, when the Supreme Court drew up the `rarest of rare' rule, there has been a downward slide, particularly discernible in the 1990s.

- Multiple death sentences,
- Death penalty to minors,
- Death sentence while reversing acquittal are not uncommon.

The campaign against execution of two youths in Andhra Pradesh who had been convicted of burning a bus which killed passengers saw concerted action, which resulted in their sentence being commuted by the President. The confirmation of the sentence of death on women is a relatively recent phenomenon. Ramashri's sentence was reduced to life by the Supreme Court, even as the court rejected the right of the NCW to intervene. The sentence of death imposed upon Nalini, convicted in the Rajiv Gandhi assassination case, has been opposed by human rights groups, along with the sentence of death meted out to three others in the same matter. Death sentence confirmed despite dissent among judges of benches of the Supreme Court on the sentence that should be imposed is another, disturbing, occurrence. Even doubts about the age of the accused - whether he had been less than 16 years of age and therefore a juvenile - were not sufficient to dispense with death sentence where death was awarded by a majority of judges. That the young accused was defended by legal aid lawyers and that 'It is reasonable to presume, in such circumstances, that the amicus curiae or advocate appointed on State brief, would not have been able even to see the petitioner, much less collect instructions from him, during the second and third tiers' was noticed only by the minority judge. Dearth of data, and difficulty of access to data is one obstacle

to effectively countering the retentionists. In the meantime, the proliferation of death penalty in recent statutes, viz.,

- The Narcotic Drugs & Psychotropic Substances Act 1985 (and as amended in 1988).
- National Security Guards Act 1986.
- TADA 1987 (which lapsed in 1995, but trials under which continue).
- Arms Act 1950 (as amended in 1988).
- Indo-Tibetan Border Police Act 1992.
- The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.
- Commission of Sati (Prevention) Act 1987.
- S.364 A IPC as introduced in 1993 - 'kidnapping for ransom, etc.

There has been a deafening silence from the NHRC on the issue of the death penalty.

Fake Encounters (Extra-judicial killings)

In India, extra-judicial killings by the police or the security forces are called 'encounter killings', meaning that the killing occurred during an armed encounter between the police or security forces and the victim. The killing by the state forces is most often declared to be defensive, cases of attempted murder and other related offences are registered against the victims, and the cases closed without further investigation since criminal cases come to an end upon the death of the accused. Despite being 'unnatural deaths', and the victim having being killed, no investigation ensues to determine whether the death was in fact in an actual encounter, nor whether the use, and the extent of use, of force was justified. This is an acknowledged strategy of the state for eliminating certain kinds of opposition to the state and the established order. In Andhra Pradesh, for instance, the naxalites have been the targets; in Punjab, it was the militant; in Mumbai, it is those who are alleged to be part of the underworld. Civil liberties groups, journalists and lawyers have consistently challenged this practice over the past two decades. The demand as it has been articulated after recent episodes has been

- For doing away with state violence in the form of killings in fake encounters.
- That all cases of encounter killings ought to be registered as first information reports (FIRs) and investigated before the case is closed. The practice of registering cases against the deceased and terminating the proceedings even before it begins is being vigorously challenged. The NHRC too has issued directions endorsing this recommended practice, but to little effect. These court, and out-of-court, battles have carried on throughout the '80s and the '90s to the present.

The Committee of Concerned Citizens (CCC), a group of individuals in Andhra Pradesh, has approached encounter killings differently. Addressing both naxalite groups and the state, the CCC has been working at de-escalation of violence. While the naxalite response has taken the CCC to the issue of land reforms as being fundamental in understanding violence of the opposition, the state, it is widely believed, is pursuing the path of unbridled unleashing of the use of encounters. The numbers killed in encounters have increased in the two years when the process of reconciliation was being negotiated by the CCC, making some of them ask if intervention by the human rights actors was actually prompting the state to escalate the violence. The human rights community has had to contend with the issue of impunity which is immediately seen as arising from thee non-registration and the non-investigation of cases.

Involuntary Disappearances

The Punjab disappearances were brought into the open by two human rights defenders, Khalra and Kumar. Khalra was himself thereafter 'disappeared'. Investigations into these disappearances - which were uncovered when mortuary records in three districts of the Punjab were scrutinised and 'unidentified' and partially identified persons were found to have been cremated without informing the families of the deceased - was handed over by the Supreme Court to the NHRC. The manner in which the matter was reduced to a point where the State of Punjab agreed to pay compensation of Rs. 1 lakh (without admitting liability) to the families of persons who had been disappeared and the NHRC's tolerance of this stand of the state, is striking in the general denial of the phenomenon of disappearances. This was after the CBI had found that bodies of several persons had been cremated surreptitiously in the late '80s and early '90s - 585 persons who had been subsequently identified had been cremated after being labelled as unidentified. Around 330 of them had been partially identified and over 1200 remained to be identified. The deficiency of compensation as a measure of reconciliation is also evident. Disappearances appear to be a pattern where there is militant resistance to the state. Case law speaks of this phenomenon in the Northeast. In fact, the first major case of compensation for disappearance after being picked up by the armed forces was from the Northeast. On February 27, 2001, newspapers reported that it was alleged in the Lok Sabha, without being effectively countered, that the number of persons missing from the custody of the security forces and the police has risen to 2174 in Jammu and Kashmir; 76 cases had been registered and only one person had been challaned so far.

- Acknowledgment of involuntary disappearances.
- Investigation, and seeking to establish what happened to the disappeared so that families and the community can finally know.
- Prosecution and punishment, for reasons of deterrence too.
- Compensation as a measure of atonement are being sought to be worked into the system. It was also reiterated that reconciliation would be impossible to achieve without such acknowledgment, identification of the disappeared and reparation.

That Khalra disappeared even while the matter was being taken to the Supreme Court is a statement on impunity. The theme of impunity was laid out when K.P.S. Gill, the policeman in-charge in Punjab through the waning years of militancy, lashed out in protest when a policeman, Sandhu, committed suicide while facing multiple charges of excesses committed during the years of militancy. The schizophrenic attitude of the process which rewarded him when he killed 'terrorists', and later sought to prosecute him for abuse of power even amounting to murder, stood exposed. Gill

- Blamed the judiciary for having been inactive, or of playing safe, when captured terrorists were brought before it.
- Held out the threat that if pursued by prosecution, the police would be unavailable to deal with militancy another time.

Extraordinary Laws

These have been one of the means of routinising the enactment of laws that are normally promulgated in an emergency or in extraordinary situations.

The Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) was contested for:

- Its denial of fair trial standards - e.g., it reduced the tiers of appeal.
- The provision regarding making confessions to a police officer admissible in evidence.
- The broad contours of the law on what constitutes terrorism.
- Potential and proven abuse - for e.g., the largest number of TADA detenues were in Gujarat, where militant activity was not present.

The public condemnation of TADA, political opposition to it, the NHRC's spirited intervention and the state's assessment that it was no longer necessary, led to the law not being reenacted when it lapsed in 1995. There have, however, been further attempts to revive the law - as in the Prevention of Terrorism Act recommended in 1999 by the Law Commission, for instance. Further, state laws in Maharashtra, Andhra Pradesh and, more recently, in Madhya Pradesh and Karnataka - as a measure against organised crime- have brought the TADA back into their states under a hardly disguised identity. Tamil Nadu has also proposed a Prevention of Terrorism Bill along similar lines. The Armed Forces Special Powers Act 1958 (AFSPA) is another law which provides extraordinary powers. It has been in force in the Northeast for these years. The TADA and the AFSPA survived challenge before the Supreme Court in the '90s. This has caused a serious rethink on the courts as a situs for testing the legitimacy of such extraordinary laws that deny fundamental rights, and breach human rights principles. It is evident that it is only vigilance, and resistance, which is keeping the proliferation of these laws in check.

The arrest and detention of civilians under extraordinary laws, like the TADA, also appears to be routine. It has been alleged, for instance, that villagers in the vicinity of Veerappan, the sandalwood smuggler's

beat are routinely subjected to harassment, search and detention. In the negotiations for the release of actor Rajkumar who was taken hostage by Veerappan on July 30, 2000, the release of 51 detainees being held under TADA since 1992 on suspicion of having participated in the murder of policemen was in issue. Human rights activists claim that many of them were local people who had been roped in as being 'associates' of Veerappan. When a civil liberties organisation moved the court for release of those so incarcerated, the petition was not entertained. But during the negotiations, the government of Karnataka showed a readiness to release them in the interests of law and order, and also, significantly, since others released on bail earlier 'have not repeated the offences and they have not involved themselves in any similar offences and terrorist activity have not been noticed recently in the area.'

Preventive Detention

When the Constitution came into being in 1950, preventive detention laws were avowedly intended to be a transient measure. During the emergency, the Maintenance of Internal Security Act 1971 (MISA) was among the more infamous laws which allowed for preventive detention of persons in the avowed interest of maintenance of internal security. There are now a number of legislations which permit preventive detention, in the states and at the centre. The National Security Act 1980 (NSA) is an instance of the latter. The A.P Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders & Land Grabbers Act 1986 is an example of the former.

Public protest against the continuance of these laws is almost inaudible despite:

- The long periods, sometimes up to two years, that a person may be kept in preventive detention.
- The tardiness of the procedure prescribed - e.g., the executive may be given up to three months to get the opinion of the Advisory Board which may effectively have a person in custody under executive order up to ninety days.
- The range of activities that are allowed to be covered by preventive detention laws that are unconnected with public order or law and order.

Unlike the challenge to the TADA, preventive detention laws have not engaged the human rights community in any sustained manner.

Detention

A range of detentions including those that were plainly illegal came to light during the course of our work:

- The incarceration of persons deemed to be 'non-criminal lunatics' (NCLs) or the wandering mentally ill in jails was investigated in a PIL before the Supreme Court. These are

persons picked up under the Police Acts of the states, or under police powers in other laws such as the Indian Lunacy Act 1912, or its successor law, the Mental Health Act 1987. They are treated as `nuisances', or bracketed as being dangerous, this providing the rationale for putting them away. The term NCL is in contradistinction to `criminal lunatics', that is, those accused of crime but found to be mentally ill or suffering from mental disorder. For years NCLs were received in jails as places of `safe custody' under the Indian Lunacy Act 1912 and later under the Mental Health Act 1987. In the states of West Bengal and Assam, where the Supreme Court sent Commissioners to investigate, it was found that many of those in jails as NCLs were in fact not mentally ill at all, but had been placed there deviously, to serve some completely unrelated purpose. For instance, a 70-year woman was found to have been put away as an NCL apparently because her landlord was using it as a means of evicting her. We heard resonances of this reasoning from a lawyer-activist in Chennai.

- The Supreme Court declared, in August 1993, that using jails as places of safe custody to house non-criminal mentally ill persons (NCMI) is unconstitutional.36 Apart from the state of Assam, which admitted in an affidavit in the Supreme Court to continuing the practice, the NHRC has intermittently reiterated that NCMI should be housed in places other than jails. It is plain that the practice continues.

- This is an area that has not been widely addressed within the human rights community. NHRC's recognition of the issue too has been desultory.

- There is evidence in law reports, and activists have admitted to have knowledge of, the practice of hostage taking by the police where the person to be apprehended is not within reach of the police. Relatives of the person sought are then picked up and kept in custody till he surrenders. This appears to have happened with some regularity in Punjab, but we also heard of it in Delhi and Andhra Pradesh, for instance. This breach of the law needs further investigation and response.

- There have been reports of people spending long years in jail, which could have been averted if prisons were not as inaccessible as they are. Rudul Sah,37 the man who spent fourteen years in jail because he had been considered unfit to stand trial, and continued to remain untried despite having been declared fit, is one wellknown instance. Recent instances from Bihar38 and West Bengal39 reveal that the neglect that occasions such illegal incarceration continues. The incapacity of a person to follow up on his trial and sentence, and to procure orders in time has been known to keep him in prison long after he was due to have been released.40 The inability to furnish bail or sureties was reportedly one such reason for the large undertrial population.

- It is evident that systemic changes are imperative if these questions of personal liberty are to be addressed.

- In custodial institutions other than prisons - in 'protective homes' for women, for instance, the problem of custody versus shelter has been raised. Protective homes are established under the Immoral Traffic (Prevention) Act 1956 (ITPA). Since they are the only statutory institutions that can house women for 'protection' as also for 'correction',41 they act as places of custody, operating within the executive-magistracy system. We met women in 'protective custody' in the Agra Protective Home, who were witnesses in a case to be tried in Jhansi; they desired to leave and they had been in the institution for nearly two years. But the law would not let them. 'Rescued' women were placed in these institutions, but the purpose of 'rehabilitation' was found to be too inadequate to make the difference.

- Prison jurisprudence since the late '60s recognises that prisoners do not lose all their rights because of imprisonment. Yet, there is a loss of rights within custodial institutions which continue to occur. For instance, it was found that the HIV status of all the women in the Agra Protective Home was public knowledge, and there was no confidentiality attaching to this information. There was segregation within the institutions of those found to be HIV positive, and, for a while, the Supreme Court too endorsed this. The rules governing women in these institutions uncannily resemble prison rules - such as those concerning visitors, letters, and even punishment for conduct within the institutions.

- Persons working in this area said that this was an area which called for an injection of human rights experience and perspectives. • The non-release of persons cured of mental illness from institutions was also reported to be a problem. We repeatedly met the need for halfway homes and support services which could help a person be restored to liberty.

- In Delhi, we heard of persons who had been picked up as being persons of Bangladeshi origin, who were kept in custody in a night shelter till they could be repatriated if they were, in fact, found to belong to Bangladesh and the Foreigners Act 1946 could be invoked to effect this move.42 There was concern that even the basis of identifying them as possible foreigners was not clear and that dispelling suspicion of nationality could well be more difficult for the poor and the dispossessed. It is also found that it is common practice to pick up people for questioning, and not record their presence in the police station till the police is ready to present them before a magistrate - a way of thwarting the constitutional requirement that every person taken into custody be produced before a magistrate within 24 hours. Apart from the illegality of such detention, it also makes difficult proving torture in custody during the period of illegal, unrecorded, detention. Human rights activists suggest that telegrams be dispatched to the Chief Minister, the Director General of Police, the Superintendent of Police, and the Governor for instance, when information about such illegal detention is obtained, to establish the time of detention.

The conditions of persons with mental illness in institutions have been cause for human rights concern. In Gwalior Mental hospital, for instance, it was found that persons with mental illness were

left in nakedness; the explanation was that they tore their clothes if they were given them. The press raised the issue. Chaining of mentally ill patients was also a practice, and this was outlawed by an order of the court.43 One difficulty in ensuring that such violations do not occur, and in getting the law implemented, is access. The human rights community has not engaged with the problems faced within the walls of custodial institutions. Imaginative answers which will make open institutions of what are now bureaucratic, and closed, institutions is an imperative. The hysterectomy controversy in the early 1990s in Pune represents another aspect of the control and decisionmaking within custodial institutions. The hysterectomy of girls below 18 years of age, who were mentally retarded, raised controversy about the decision made by the professionals. The professionals involved in making the decision neither denied that the hysterectomy was being done, nor did they did see it as a violation. It was justified as being in the best interests of the hygiene of the mentally retarded girl, as making practicable the care of the mentally retarded. The response did not rule out the possibility of sexual abuse when within the institutions, but said it would protect the girls from pregnancy in the event of such an encounter. The persons responsible for the decision responded angrily to the charges of human rights violations. The Medical Council of India, however, distanced itself from this position, and declared the practice as being against their norms. The intervention of the media and the human rights community precluded further hysterectomies from being done.

Missing Women

There are various situations which throw up the issue of 'missing' women. The lopsided sex ratio in many states, and the juvenile sex ratio in even a state such as Kerala (which is held out by planners and economists as the model performer on the population front), is one area where women, and girls, go `missing'. In Orissa, we heard of the phenomenon of 'Jhansi' marriages and 'Gwalior' marriages. Girls from very poor homes were escorted by a 'broker' to be married to men in Jhansi or Gwalior, and he would bring back a bride price of Rs.10,000 to Rs.25,000 to be given to the girl's family. While some of these marriages had been found to be genuine, the possibility of some of these women being trafficked was not ruled out. Also, what a girl/woman did if deserted or ill-treated was not clear. There was therefore an attempt by activists to keep track of women who had not been heard from for over a period of three months, so that their whereabouts could be verified and their safety ascertained. In July 1999, activists had begun the process of documenting the 'missing' woman. In Delhi, we were informed that missing persons reports when women go missing from their marital homes were hardly ever related with unidentified bodies of women who were declared to have committed suicide by drowning, for instance. The paucity of information, and the difficulties in follow up, has kept this issue in the margins of human rights concerns.

Homicide in the Matrimonial Home

Often identified as being dowry-related deaths, unnatural deaths of women in their marital home has acquired prominence. Like encounter killings, acknowledgment has not led to a reduction in

the incidence of such homicide. In Andhra Pradesh in 1990 a civil liberties organisation raised the issue of violation of women's rights as a human rights issue by comparing the number of dowry deaths and the number of encounter killings during one time period - about 2000 dowry deaths, and 300 deaths in encounters. In Bangalore, a women's group keeps a watch in the Burns Ward of the leading government hospital, and also scrutinises newspapers for reports of deaths of young women, which they then follow up. They also had a 'Truth Commission' where a tribunal heard the narratives of the families of girls/women who had been the victims of dowry deaths. The inadequacies of investigation, and the many slips in the judicial process which results in a low rate of prosecution and a lower rate still of conviction, was observed everywhere. The definition of 'dowry death' in the Penal Code, based on preponderance of probability and a shifting of onus represents a significant shift in criminal law and jurisprudence. In the meantime, the Dowry Prohibition Act has been hardly at all implemented. Most states still have no Dowry Prohibition Officers. The maintenance of list of things given and received is still not mandatory. S.498 A, which was brought in to deal with cruelty in the matrimonial home, has suffered criticism as being abused, sending the family of the man to prison till bail is procured. Some women's groups, however, contended that the abuse was only marginal, and that this was the only provision in law which could hold the perpetrator of domestic cruelty accountable. Some also spoke of bringing into law the notions of right to matrimonial home and matrimonial property as other approaches of protecting women on whom cruelty is practised.

Domestic Violence

In locating domestic violence in the terrain of human rights, one point of view was that it is not the identity of the perpetrator alone which can be allowed to determine whether a victim has been subjected to a human right violation or not: that it is a man or his family who exercises their power to harass, assault and injure a woman, and not the state which is the perpetrator, should then make no difference to the place for this violence in human rights discourse. Also, it is state practice, and endorsement, of patriarchy that keeps such violence in the home, we were told. • Crime against women cells in police stations

- Counselling centres.
- Help lines.
- Short stay homes - which, though, are few in number have been set up in many cities. There has also been a concerted effort to bring in a law to deal with domestic violence. A Bill prepared, debated and presented to the government by a women's organisation has been adopted by Parliament for discussion, which is a significant step in a non-governmental role in law making. S.498 A was introduced into the Penal Code in 1983. It makes cruelty to a woman within the matrimonial home punishable with imprisonment up to three years and fine. It is a cognisable, non-bailable, offence. Widespread violence against women, and

increasing evidence of women dying unnatural deaths in the matrimonial homes provoked the women's movement to demand a change in the criminal law.

The offence is non-bailable, that is a complaint under s.498 A, once registered as an FIR, would result in the arrest of the members of the matrimonial family of the woman. They would have to be granted bail by a court before release, and this could keep them in custody for varying periods of time. In matters of remission of sentence, too, offenders convicted under s.498 A may be excluded. On the one hand, there have been complaints of the misuse of this provision, and the consequent harassment, often incarceration, of many members of the family complained against. On the other, there is little scope to deny that the incidence of cruelty, including physical cruelty, which leads even to death, is extraordinarily high. This is an issue yet unresolved; the Domestic Violence Bill may have some impact on it. In the meantime, an activist lawyer asserts that the phenomenon of violence and death in the matrimonial home should not need to be linked invariably with the phenomenon of dowry; violence and cruelty are independent entities within many homes. An activist also told us: when a man beats his wife regularly, and the wife gets him soundly thrashed by the police, civil liberties groups are sometimes confused on what stand to take.

Sati

The burning of Roop Kanwar on the pyre of her husband in Rajasthan in 1986, has reintroduced sati into mainstream discourse. Questions of volition, custom and communal pride have been raised justifying the practice. State inaction has been at issue. In 1987, the Commission of Sati (Prevention) Act was enacted making abetment of sati an offence; and the death penalty was introduced as an alternative sentence. The attempt to commit sati was made punishable with imprisonment for a term up to six months or with fine, or both; this has been contested ever since its inception as punishing the victim. The 'glorification' of sati, where a temple is constructed and a dead woman worshipped bringing in money to the family, has also been made punishable. This last is constantly under contest - as denying the right to practise a religion. Women's groups in Rajasthan see this as a particularly important provision in taking away the material incitement in the commission of sati. The communal violence of much of the protest against this law, and of the practice itself, is a telling statement of the capacity of patriarchy to deny a place for human rights.

Child Marriage

Though a law prohibiting child marriage has been in the statute books since 1929, it is still performed in many parts of India. For instance, the practice of performing child marriages on Akas Teej, it is reported, has not stopped in Rajasthan. It is widely believed that the gang rape of Bhanwari Devi was intended as a session, since she was active in preventing child marriages. Another aspect of child marriage was revealed when Ameena, a girl of about 12 years, was married to an old man from Saudi Arabia who was to take her out of the country as his bride.

Child Labour

Apart from the employment of children in work, including those classified as hazardous, it was reported that:

- Children continue to be sold into labour. The parents of a young girl from Assam were paid a sum of money for the girl to be brought to Delhi as a domestic worker. Her plight came to light when she ran away from the ill-treatment she suffered, and she was given shelter by a social activist.
- Child workers employed in homes and in commercial workplaces, were subjected to ill-treatment. The chaining of bonded child labour in the carpet industry near Varanasi so that they could not escape was reported. Injuries on the person of domestic child workers in Delhi sometimes resulting in death, have been reported intermittently in the press. In Maharashtra, a civil liberties organisation took the state and a contractor to court when the latter ill-treated, resulting in death, one of the young boys he had brought with him from Tamil Nadu.

These manifestations of violence against the child disguised as child labour calls to be addressed. The vulnerability of the child has also been seen in Delhi, for instance, where child domestic workers have been accused of killing their employers, or in being accomplices to outsiders. The 'social clause' on child labour does not result in doing away with child labour, we were told, but causes segregation. There were dissenting voices on the ILO Convention on the Elimination of the Worst Forms of Child Labour. The provisions which speak of child prostitution and child pornography as labour are unacceptable, they said. 'These are crimes, not labour,' we were told. Further, when Indian law is so strict that it says that non-payment of minimum wages amounts to bonded labour - a provision that is not found in any international convention - what use is one more convention, we were asked.

In 1993, the Supreme Court declared that education is a fundamental right till a child reaches the age of 14 years. Education for the child has got tangled with the issue of child labour; sending the child to school is projected as a necessary step to ending the practice of child labour. In Andhra Pradesh, an organisation working in the area of education for children has done away with the uncertainties of definition by working on the premise that every child out of school is child labour. They have therefore arrived at a non-negotiable: that every child must belong in a school. In this view, NFE (non-formal education) centres, for instance, would be a means of perpetuating child labour. So, too, with the adjusting of school timings to accommodate the working child. In the meantime, this 1999 Convention is being canvassed for signature, and ratification by the Indian State. The convention defines 'the worst forms of child labour' as comprising: '(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, forced or compulsory labour, debt bondage and serfdom; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in

the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to jeopardize the health, safety or morals of children.'

This is in consonance with the recent trend among UN organizations (e.g., WHO) to directly involve human rights in standard-setting, and the creating of binding obligations of states in their area of operation.

The 'Neglected' Child

Street children have their peculiar vulnerability. In Bangalore, a study reveals that almost every street child has been sexually violated at some time or another. They are also specially susceptible to drugs. Street children, however, take care of themselves, and often of each other. It does not appear that institutionalising them is an answer to their needs, nor do they seem willing to trade their liberty for a life off the streets. In Bangalore, Bombay and Delhi, we heard of drop-in centres: places where children could drop in for a wash, some sessions, to keep their savings and to discuss their problems with others, if they so chose. They were, however, reported to be vulnerable to being 'rounded up' and sent periodically into state institutions from where they would need help to emerge, or from where they would 'escape'. Women in prostitution have faced the possibility of their children being forcibly separated from them, following an order of the Supreme Court in Gaurav Jain v. Union of India. A 'raid' conducted by Delhi Police in 1990 (a year after the first Gaurav Jain order), in which 112 'children' were picked up from the GB Road area was an indication of what such a power being given to the police could mean to the women and their children. The recent changed law on 'children in need of care and protection' even prescribes adoption as an option that may be enforced by the state.

Child Abuse

There has been increasing evidence of child abuse, and more particularly child sexual abuse, being pervasive. The perpetrator is often a near relative or someone close to the family. This adds to the vulnerability of the abused child, and, apart from the confusion and sense of shame which the child experiences, it is also that there is a problem with a refuge which the child can access. The dependence on the family as a support structure in times of abuse breaks down when the offending event occurs in the home. Following what is widely considered as a useful intervention in the Supreme Court in the Vishaka guidelines regarding sexual harassment in the workplace, the matter of child abuse has also been taken to the court, and the Law Commission has been inducted into setting the parameters for care and action in cases of child sexual abuse.

The 'Unwanted' Girl Child

The declining sex ratio, particularly the declining juvenile sex ratio, even in Kerala which is celebrated in economic writings and in state policy for having achieved a high rate of literacy and

negative population growth, has begun to seriously engage, among others, researchers and women activists. The low status of women continues to be reflected in:

- The practice of infanticide including in some parts of tamil nadu,
- Foeticide,
- Sex-selective abortion which the amniocentesis technology has made common,
- Mal-nourishment among girl children.

In Usilampatti Taluk, reportedly, the ratio of female: male is 879:1000. Since 1986, the issue of female infanticide has been in focus in this area. More recently, scanning centres have mushroomed in the area, and female foeticide is rampant among those who are able to afford it. We were told that, in Tamil Nadu, there are around 2000 scan centres, most of which are unregistered. A researcher reported his encounter with the sale of girl children by communities in Andhra Pradesh to persons who then placed them for adoption. He drew attention to the astonishing fact that there is, as of now, no law to control, or punish, the sale of children. The involvement of adoption agencies in A.P. in what is allegedly the sale of children has since come to public attention, in April 2001.

Prostitution

The fear of AIDS, it is perceived, has given the issue of prostitution a visibility. This has, however, led to attributing to women in prostitution the trait of being a 'high risk group', even as it has been contended that it is high risk behaviour and not high risk groups that should be targeted. It appears that patterns of funding have impacted on this identification of the prostitute woman as belonging to a high-risk group. The demand for prostitution to be recognised as 'sex work' has been raised, with dignity of the woman in prostitution as its basis. There are differing perceptions about prostitution - one which sees it as exploitative of women, and another that views it as representing the 'agency' of the women in the profession. There are various shades of meaning given to 'exploitation' and 'agency' which lies in the spaces between these two positions. Decriminalisation is also proposed, and disputed, on differing understandings of what decriminalising will mean, and do. Most of the people we spoke to on the issue of prostitution, however, felt after a discussion emphasising the difference, that the practice of prostitution should be delinked from the issue of trafficking. In this context, trafficking is seen to be the sale and purchase of women and girls, and, more recently, boys, into prostitution. While 'voluntariness' is a term with graded meanings, especially since economic compulsions and social exclusion are not uncommon causes for entering into the practice of prostitution, it is the distinctly involuntary nature of trading in human beings that is at the hub of trafficking. Trafficking in minors is a scourge that is commonly referred to as a crime to be curbed.

We encountered the issue of organising women in prostitution in two different ways. In Calcutta, a 'samiti' of sex workers are articulating their position, and taking a pro-active lead in matters of

preventing the entry of minors into the profession in their area of operation. They also said that, if trafficking be seriously dealt with, they be allowed to, legally, participate in curtailing trafficking - for who else was more likely than the people already in the profession to know when women and girls were bought and sold, they asked. In Mumbai, a respondent working among prostitute women for over a decade, advocated 'collectivisation' but had a problem with adopting the norm of forming unions of women in prostitution. While she did find that the state was doing very little about trafficking, she was convinced that if sex work were seen as 'real work' under the law, all efforts to curb trafficking would cease. It was also suggested that 'sex work is real work' is a funderdriven agenda, and, that those who do not adopt this line were being deliberately excluded. In Kerala, however, a different perspective emerged where a distinction was drawn between the demand that persons in sex work should get all labour rights and the rights based approach. As a feminist, our respondent espoused the rights based approach. There was a recognition that most feminist ideologies oppose commercial sex workers coming together; the commercialisation of the body was identified as the problem. Also, most people do not believe in the agency of commercial sex workers, it was explained. There was an opposition to licensing since that would only lead to further exploitation. The issue has been invisibilised over the years, and with people in high places being involved, it has helped to send it further underground. The Surinelli and Vidhura cases have however increased confidence to complain; and people are now listening differently. Another women's activist opposed the use of the term 'commercial sex worker': prostitution is not productive work, she said. But her main problem was that she saw prostitution as reinforcing patriarchy, and that endorsing prostitution as work would fall into the snare patriarchy has set for the women's movement. In the matter of trafficking, it was pointed out that proposals for checking all women travelling on their own, particularly across borders was a move detrimental to the interests of women and could end up curbing their right to free movement and achieve little else.

Prisons

The conditions in jails; solitary confinement; the refusal to make condoms available in Tihar jail on the ground that homosexuality is an offence in law, and this would be seen as fostering an illegality; the inhuman treatment of prisoners, including their being kept in leg irons, for instance; overcrowding of prisons; the right of prisoners, including undertrials, to vote are issues that have been raised repeatedly over the years. The courts have been the arena of contest. The inadequacy of medical services in prisons, often resulting in the death of prisoners has been much in evidence. Apart from the inconclusive enquiry into the death of Rajan Pillai, when he was in jail, High Courts and the NHRC have been confronted repeatedly with this issue. Statistics in the Annual Reports of the NHRC reveal that there are a much larger number of deaths in judicial custody than there is in police custody. Given the frequency and seriousness of the complaints about medical services in prisons, it would bear investigation to find out how many of the deaths in judicial custody are, in fact, occasioned by medical negligence. The condition of persons on death row does not appear to have been investigated so far. Nor the effect that execution of prisoners has on their families.

The inaccessibility to legal services that is endemic in most prisons, has been identified as a human rights issue, but has not been resolved yet. There are reports of prison riots which were allegedly caused by the poor conditions in prisons including insufficient provision of food, and the maltreatment, including the brutalising, of prisoners. On November 17, 1999, for instance, a riot broke out in Chennai Central Prison. It left at least nine persons dead, and one more succumbed to injuries on November 19, 1999. There were at least seven prisoners with bullet injuries who were referred to the government general hospital. The figures of those injured and dead in the riots varies, but it appears to be around 100 prisoners. The deputy jailor was killed in the riots. The simmering discontent seems to have had to do with inadequate food, the meagre water supplied to the prisoners, and the torture meted out to them by the prison staff. The death of a prisoner tortured and killed in the Central Prison in July 1999, which was explained away without an enquiry as being a suicide, seems to have caused resentment and anger among the prisoners. It was the death of Boxer Vadivel, a prisoner believed to have been tortured for over three days between 12th and 15th of November, and the torture of two other prisoners by the Deputy Jailor which sparked off the riots. Jeyakumar was burned alive. The prisoners claimed to a fact-finding team that the rebellion had already come under control when antiriot police were brought in and prisoners were indiscriminately targeted. For instance, a prisoner who was physically disabled, and could not have posed any threat to the police, was shot at point blank range. The anatomy of a prison riot, and what it means in the context of human rights, and of punishment, calls to be investigated in full, and addressed. Prison riots have been erupting sporadically, leaving little reason to doubt that they are symptomatic of a systemic malaise.

The condition of medical care in prisons is woeful, and cases before the High Courts and the NHRC testify to this fact. The inordinately large number of deaths in judicial custody, as reflected in the figures set out in the Annual Reports of the NHRC, is also an indicator. That prisons are death traps becomes apparent. Overcrowding of prisons, with a large population of undertrial prisoners spending extended periods in jail - a recent press report cites a survey conducted by the State (Jail) Department in Bihar which shows 154 undertrial prisoners in Bhagalpur jail for over 20 years awaiting trial and they are now over 70 years old - only strains the system further. Systemic changes and bold initiatives are imperative. So far, the Supreme Court's directive in 1979 to release undertrial prisoners on personal recognisance bonds, and periodic intervention thereafter by the Supreme Court, has provided ad hoc relief. There is little to indicate that there has been any fundamental re-thinking on this matter. On the other hand, recent legislation is severe in matters of bail, and persons arrested under the NDPS Act 1985, for instance, regardless of the nature of their participation in the offence, are not entitled to bail. In Mumbai, social workers reported that they have been allowed access to prisoners to help them re-establish, and maintain, contact with their families, and to provide related support services to the prisoners. They admitted to shutting their eyes to human rights violations in prisons (and in lock-ups) since any intervention of that nature would jeopardise even the services they are now able to provide. In Chennai and in Mumbai, the '80s and a part of the '90s saw active provision of legal aid to prisoners; in Chennai, the High Court legal aid board was engaged in this

process. In Delhi, legal literacy, literacy, meditation and yoga and legal aid has reached Tihar jail. The setting up of the NHRC appears to have had some impact on the accessibility of prisons, as have the many PILs which challenged the conditions within.

Wages to Prisoners

The work that prisoners do has been devalued in a decision of the Supreme Court in State of Gujarat v. High Court of Gujarat. A judge in the case has held that:

- Prisoners are not entitled to minimum wages, particularly where they have been sentenced to rigorous imprisonment, and it is part of their sentence to do hard labour.
- The non-payment of wages in prison will not amount to a violation of the constitutional dictum on the right against exploitation.
- Where they do earn a wage, apart from deductions for their maintenance in the prison, monies may be taken from it to pay to the victim as compensation.

There is a complete negation of the rehabilitative potential of work and wages, and a re-introduction of the purely punitive in this judgment of the court that human rights advocates and activists will have to contest.

Sexuality

Discrimination against, and harassment of, those with a sexual orientation different from the heterosexual is being more openly addressed in the past ten years than it was earlier. Yet, coming out openly is still an act of courage. And we were told how homosexual couples were susceptible to arrest and extortion. Just the knowledge that a person is a homosexual would render him vulnerable, they said. The lesbian groups that we met spoke about the difficulty of coming out, and the support services that were needed to help resist, principally, the families. One of the ways of providing that support is in the initiation of 'help lines'.

Freedom of Expression

The rise of communalism has been accompanied by an assault on free expression. The vandalising of M.F. Hussain's paintings because he had painted a nude Saraswati many years ago; the destruction of the exhibition organised by SAHMAT in Varanasi because it depicted Rama differently from how the vandals believed he should be depicted; the protests, and their vulgarisation when the protesters paraded in their underwear in front of Dilip Kumar's house, against the film 'Fire'; the concerted attacks on the filming of 'Water' - all these are instances of intolerance, which have denied free expression, with the implicit - sometimes explicit - support of the state. The banning of the play on Nathuram Godse following protests and disturbances are part of a pattern. More recently,

there have been reports of a government circular that conferences, seminars, workshops…which include participants from abroad require clearance from the government, including the External Affairs Ministry. Human rights are specifically in the list. And it is particularly applicable to people from Pakistan, China, Bangladesh, Sri Lanka and Afghanistan.

Dalits

The practice of untouchability has persisted, and dalit activists and unions have been making efforts to demonstrate its pervasiveness and variety, even while they contest its practice. In Andhra Pradesh, in a study done by dalit activists, ways of practising untouchability have been documented. In Kerala, there was collaboration underway between caste groups and dalits in combating caste and brahmanism. In Gujarat, a study of the practice of untouchability has been recently done. Some groups working among dalits, and including some dalit groups, have been lobbying to place caste as an agenda in the World Conference against Racism. The definition evolving in the conference, which includes discrimination based on descent and occupation is seen as an acknowledgment of caste discrimination. This is an avowed effort to internationalise the issue of caste-based discrimination and oppression. This issue permits an exploration into the relationship between a movement - in this case, the dalit movement - and groups working with dalits and/or dalit issues in terms of their respective politics and priorities. Police firing on a group of dalit villagers in Nadunalumoolaikkinaru in Tamil Nadu in 1991 is believed to have occurred to put down a young leadership that was emerging in the village. A chain of circumstances from the support given to the villagers by activists, to filing the matter as a case in the Supreme Court, to three committees which investigated the matter, to the awarding and disbursement of compensation to the injured villagers and the court order which prohibited the indicted policemen from being posted in the vicinity appears to have empowered the village. It has also bolstered their confidence that help could well come from beyond the village. In Melavalavur it was a different story. This is a panchayat which is reserved for dalit leadership within the panchayat system. When elections were first to be held.

- The dalits were chastised, subjected to a community fine of Rs.2000 and warned to withdraw their nominations.
- In the second round, the administration urged the dalits to file nominations, which they did. The ballot boxes were taken away by the non-dalit villagers.
- The third time around, the administration promised protection and conducted the elections amidst threats and tight security. About a month after the elections, the dalit panchayat leader, Murugesan, and five of his comrades were waylaid when they were travelling in a public bus, and brutally hacked to death on the highway.

This was in June 1997. Since then, another election has nominally installed a dalit as panchayat head. But the village lives in a state of permanent terror. A police outpost has been set up, but in that part of the village from where the threat to the dalits emanates.

A memorial has been constructed to the memory of the six dead men. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been on the statute books since 1989. There are however hardly any convictions under this Act. Dalit activists say that there are many loopholes in the law which help offenders slip out of both the Atrocities Act as well as the Penal Code. An activist made particular mention of s. (iv) and (v) of the Act in illustrating the non-user of this law. Studies on the working of this Act have been started in some states.

Manual scavenging, and the disinterest of the state in putting an end to this inhuman practice which involves the carrying of excreta manually, and which additionally aggravates caste-based exclusion has been identified as a priority for action in Andhra Pradesh and Tamil Nadu.

Medical Research

The connection between abortion, in vitro fertilisation and gene manipulation was drawn to ask how the question of human rights could be considered in this context. The poser was: ought it not to be the primary question whether neo-eugenics through gene manipulation should be resisted, or was it to be asked in terms of the mother's choice to have a 'blue-eyed baby girl'? Depo Provera, a contraceptive drug, was introduced into the Indian market without conducting Phase IV trials, which meant that the Indian state conducted no research specific to Indian users before deciding to introduce the drug in the market. The issue in Phase IV trials of Net-oen was of informed consent. In the pre-liberalisation phase, we were informed, all research was to be undertaken by the ICMR. But post-liberalisation, there has been a dramatic change, and the trend has been for pharmaceutical companies, or the NGOs funded for the purpose, to conduct research; their agenda is not beyond suspicion.

Pharmaceutical companies have been attempting to dilute the guidelines for scientific research on human subjects. The Nuremberg Code was very strict. The later Helsinki declaration, we were told, relaxed these rules. And efforts are underway to further relax the notion of informed consent for the greater common good. These efforts have been stalled at the international level. But ICMR's 'Ethical Guidelines for Biomedical Research on Human Subjects' has been amended in 2000 to allow proxy consent in some cases, such as in epidemiological situations or in the larger public good. In 1997, the Indian government signed an agreement with the USA that would allow Indian citizens to be used as research subjects in an international research project on human genome for furthering 'international good'. Since this became known, there have been protests - that the bodies of Indian citizens do not belong to the state that it can sign them away. Court battles around banned drugs being sold in the Indian market have sometimes resulted in prospective banning. But the plea of the pharmaceutical company that the stocks be not destroyed, but that they be allowed to transport it to another jurisdiction outside India has been allowed. Sharing information with other potential markets becomes of importance, and ways of doing this may have to be established.

Population Policies

There has been a deliberate re-introduction of 'incentives' and 'disincentives', and of punitive measures into state policy.

- The birth of a third child beyond a period of gestation from the commencement of state laws on the subject (including Himachal Pradesh, Rajasthan and Haryana) will disqualify a person from standing for elections to the panchayat, or to continue in office.
- Medical termination of pregnancy and tubectomy has been included in the Maternity Benefit Act 1961 (in 1995) for 'benefit' under the law. The threatened denial of 'maternity benefit' for the birth of the third child and thereafter was, however, shelved after concerted protest, The new provision puts an onus on the woman to keep the size of her family low.
- There are private proposals pending in various state legislatures including Delhi and Andhra Pradesh to disentitle the third child to ration under the Public Distribution System, and for the parent to be penalised in their jobs if they hold a government job. The Delhi proposal even included provisions that the family could not be allowed to procure a house if there was a third child! These have not yet become law, but they have not disappeared from the public debate altogether.
- 'Social marketing' of contraceptive drugs, supported in Uttar Pradesh by large grants from funders, has been the subject of protest from, particularly, women activists. Social marketing, which includes across-the-counter sales, would inevitably lead to ill-informed use of the contraceptives, without an understanding of the sideeffects, or of the meaning of symptoms that may manifest upon use. The prioritising of reducing population at the cost of women's health is being stoutly resisted.

Organ Transplant

A racket in the sale of kidneys was exposed in Karnataka in the late 1980s and early '90s. There were allegations that the 'donor' was duped and his kidneys were removed and 'donated'; or that the donor had sold his kidneys as a commodity may be sold to raise resources - poverty was the characteristic that distinguished the donor. A series of exposés confirmed that there was a pattern to the sale and purchase of kidneys, which implicated, among others, doctors and hospitals. The dust refused to settle, and in 1994, Parliament enacted the Transplantation of Human Organs Act 1994, which allowed organ donation either only after death, or where the receiver was a near relative of the donor, or it is actuated by 'affection, or attachment towards the recipient.' In the last-mentioned case, an Authorisation Committee has to approve the donation. The Act, in its prefatory text, says it is 'to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs.' The issue seems to have acquired a subterranean residence since. This may be an area which must be

regularly revisited to prevent exploitation, and worse. In a different context, the issue of surrogacy has entered Indian parlance; but the human rights, and legal, implications have not been pursued with much rigour.

Trafficking

While trafficking in women is rampant in many parts of the country, and also across borders, it is Kerala that the sexual exploitation of women and trafficking has been exposed, and the accused brought to trial and conviction. The Surinelli case, the Ice Cream Parlour case and the Vidhura case are undiluted narratives of sexual exploitation. In the Surinelli case, forty persons, including prominent political figures and persons from the establishment among them, were convicted after a prolonged trial in 2000. They are now on bail while their appeal is pending. Some women's activists have been studying the issue of migration and trafficking - whether for prostitution, labour in sweat shops, domestic work which is often ill-paid and oppressive, or as mail order brides — while recognising that while migration makes women vulnerable to exploitation - and violence, migration is often not wholly involuntary. Women, for instance, migrate to escape violent domestic situations too. Shorn of its moral content, activists say, the law regarding trafficking could actually help women trafficked into situations for which they did not bargain.

Bonded Labour

Though the Bonded Labour Act is of 1976 vintage, it was not till the Supreme Court's judgment in December 1983 that the recognition of bonded labour acquired a national reach. As the champion of the bonded labour said it, it is that needs to be dealt with to get people an experience of human rights.

- Minimum wages
- Minimum guarantees of employment
- Child labour
- Land rights
- Alcohol

Identification, release and rehabilitation of bonded labour have happened essentially by court supervision. In Tamil Nadu, there is a separate ministry that has been set up to deal with bonded labour; this was following a report given to the Supreme Court of the extent of bonded labour prevalent in the state. The issue of bonded labour has been handed over by the court to the NHRC, which has set up a committee including activists, advocates and bureaucrats with experience, to find a means of dealing with the issue. We watched while a political activist working among bonded labour discoursed with a body of bonded labourers from Rajasthan. They were seeking his help in

getting free, and getting land which could help them retain their liberty. The advice was that they get together a mass of similarly positioned people before launching a campaign in their district. The confidence they exuded that bringing together 25,000 people in the district would not be an unmanageable task was an indication of the dimensions of the problem of bonded labour.

Anti-liquor Movements

There is a connection that seems to exist between liquor and violence, particularly domestic violence. Many parts of the country have witnessed anti-liquor movements in assertion of the women's right to be free of violence. This includes Andhra Pradesh, Himachal Pradesh and Orissa. Apart from the factor of state interest - particularly in terms of revenue - in the proliferation of liquor, the liquor mafia also has a long reach. There have been reports of women leading anti-liquor movements being killed, in an apparent attempt to stifle protest and resistance. Illicit liquor and the deaths of those who drink the brew – the 'hooch tragedy', as it is termed – is oft-experienced, and it is common to find people wielding state power, including ministers, being implicated. Last year, for instance, Kerala reverberated with reports of deaths in just such a hooch tragedy. In Uttarakhand, the demand for prohibition was closely linked to the struggle for statehood and is a challenge before the new government.

HIV and AIDS

The right have been issues that have been raised in the context of AIDS, particularly since the AIDS Bill which was in circulation in the mid-1980s.

- To privacy
- To confidentiality between doctor and patient
- To informed consent
- Against discrimination

The identification as 'high risk groups' or as 'high risk activity' has been considered both in pragmatic and rights-related terms. While categorising people as 'high risk' on the basis of the class to which they belong has been rejected by rights activists, it has in fact been adopted in practice. The question of confidentiality has been adjudicated in the 'right to marry' case in which the Supreme Court held that the right to marry is not an absolute right. Referring to the provisions in the Penal Code,the court held that, apart from making a person punishable under the law if he marries and transmits AIDS to a woman, there was duty upon him not to marry. And the doctor, aware of the HIV status of the patient had not disclosed it to persons he knew were likely to be affected by it, he would be a participant in the crime,' the court said. Till a disease/ condition is cured,the right to marry will be 'suspended', the court has held. There are two points of view in this position of the

court on the 'right to marry'. A rights group advocating the cause of people with HIV/AIDS, and of persons with a positive status, contend that the right to marry is part of the right to life. A woman activist lawyer has taken the stand that the disclosure mandated by the court is necessary to protect the interests of women. The former group contests this expectation, and holds that this will result in denial of rights to positive people without empowering women. A respondent further located it in the context of 'personhood' - that even while conceding that there may be no right to marry, there would be a violation of the rights of the HIV+ person where there is disclosure without any of the protections that an HIV+ person may need, and to which they would be entitled - particularly given the rejection and discrimination that is known to ensue. The right to treatment, and discrimination - in the workplace, in custodial institutions and in places like hospitals - of positive people are centrally in the human rights arena.

Denotified Tribes

British India notified specified tribes as 'criminal tribes', with all members of the tribe tarred by the same brush, and all of them classed as criminals or potential criminals. The Indian Parliament passed a law in the early years after independence repealing this categorisation of tribes. The 'ex-criminal tribes' are now referred to as 'denotified tribes'. While the status of these tribes has changed in law, the prejudices attaching to treatment of these tribes seems relatively unchanged. The attribution of criminal characteristics to a tribe has not abated. That they continue to be called `denotified tribes' freezes their status. Rampant discrimination, and criminalisation (different from criminality) was reported. The neglect of land reforms, and of improving their conditions of life, was reportedly allowing for the perpetuation of stereotypes about these communities. The very construction of identity was said to be responsible for the human rights violations that they faced, and was acknowledged as a violation on its own.

Tourism

Tourism's contribution to the violation of human rights has become an area of increasing concern.

- The growth of the sex industry, including the use of children for sexual pleasure, is associated by activists with tourism.
- The displacement and exclusion of people from forest areas, and the introduction of elite tourism is said to be passed off as 'eco-tourism'; activists find this contradictory.
- The taking over of agricultural land to create hotel resorts, as is happening in the Diamond Harbour area in West Bengal, is opposed as being inherently unjust and environmentally unfriendly.
- The images of the reservoir in the Tehri and at the Sardar Sarovar being converted into lake resorts, militates particularly against equity.

These instances merely emphasize a point. Destruction of culture, sometimes through showcasing culture, is another issue. An instance is the Todas in Tamil Nadu. The non-involvement of local communities in making choices about whether, and what kind of, tourism would be brought into their midst was also reported.

Right to Information

A concerted, and effective, campaign for the right to information has been underway in Rajasthan, spearheaded by the Mazdoor Kisan Sangharsh Samiti (MKSS). It has caught the imagination of activists and groups across the country, particularly as a tool for preventing and challenging violations as well as asserting the right to development. A norm of transparency has been given prominence, including transparency of the government as well as the group working in the area. The irresistible force it has generated has moved the government, albeit reluctantly, to table a Freedom of Information Bill 2000. Meanwhile, the right to information has been introduced into the law following the Bhopal Gas disaster. Among the persons now entitled to receive information about potential hazards in a factory are:

- The workers.
- The local authority.
- People living in the vicinity of the factory as also the Inspector appointed under the Factories Act 1948.

The information is to include the means of disposal of hazardous substances, and the arrangements for their storage or transportation. Information on what should be done to limit damage in the event of a disaster is also to be disseminated; the onus is on those running the factory. We did not, however, hear of anyone having used these provisions. The rights inherent in these provisions demand to be asserted.

Bhopal Gas Disaster

Sixteen years after the Bhopal Gas disaster occurred, and Methyl Isocyanate (MIC) leaked from the Union Carbide plant in Bhopal on 2/3rd December 1984, the victims still wait for justice.

- The payments of pitifully small amounts as compensation
- The shrinking of their remedies, including the way the appeals system has been worked to reduce the entitlement of the victims
- The difficulties in access to medical care
- The disbelief, even all these years later, that they were indeed victims of the disaster
- The absence of a legal aid system

- The immobility of the state in the matter of the extradition of Warren Anderson of the UCC; the reduced gravity of the charges against the Indian accused; and the snail's pace progress of the trial
- The vanishing corporation, where mergers result in the original corporation pretending to a civil death, and the vanishing liability. The recent takeover of UCC by Dow Chemicals is an instance
- The absolving of liability which has been introduced into the law and which is reportedly being used by MNCs coming into the country in the liberalised era

The difficulties in bringing an MNC before Indian courts have not yet found answers. Neither has the problem posed by the state often being a tort-feasor itself. There are also reports of continuing harm to the people in the vicinity, and to water sources, emanating from the plant site, where chemicals continue to be stored in vats.

- Continued care of the victims of Bhopal.
- Access to the information gathered by ICMR.
- Monitoring and research connected with the Bhopal Gas disaster, at least over a period of fifty years have been set out as priorities owed to the victims of the disaster.

A Draft Code of Conduct for Corporations was discussed by a group of persons brought together in Geneva by the Office of the High Commissioner for Human Rights on March 30- 31, 2001. The First Draft Code envisages

- Social responsibility of corporations.
- Corporations as human rights watchdogs.

These could be difficult roles to reconcile with the experience of Union Carbide in Bhopal, Enron in Maharashtra and with the shadow of corruption and the unviability of the Power Purchase Agreement, Cogentrix in Karnataka and the allegations of corruption and the anxieties about environmental degradation, in Kashipur in Orissa and the dominance given to mining interests, to name a few instances. The introduction of genetically modified cotton where corporations experiment on Indian soil, and take no responsibility for the consequences of use of genetically modified (GM) technology, is another instance. The resistance to the 'terminator' seeds reflects the concern of farmers and others about the destructive power of corporate profit-seeking on their autonomy and self-sustenance. The various, even if failed, attempts to use the international patenting regime to appropriate the use of haldi, neem and basmati, for instance, to serve multinational corporate interest has raised questions of rights of people over resources in contest with the profit motive. Issues of liability are weak in the Draft Code's first version. The importance of involving persons from jurisdictions of corporate conduct which may have to be accounted for in a code may have to be

recognised, and participation in the settling of international standards and making of international law facilitated.

Environment and Pollution

Environmental litigation has been among the visible aspects of contending with pollution. The courts, particularly the Supreme Court, have been accorded primacy in the matters concerning the environment, by environmentalists as well as the state. The court has used as reparative and sanctioning measures.

- Closure.
- Relocation.
- Clean-up technology as remedial tools.
- The polluter pays principle.
- Pollution fine.

There has also been an induction of the precautionary principle, and a statement of the acceptance of the norm of sustainable development, including within it the concept of inter-generational equity. The preventive principle does not find similar spaces in judicial dicta. The loss of livelihood, and the denudation of the resources of land and water, were witnessed, for instance, in Conservation of forest resources and the right of the tribal to live in, and live off, the forest is set out elsewhere in this report:

- Limestone quarrying in Dehradun, where the court ordered closure of the mines, rehabilitation of mine owners, and afforestation and restoration of the land (1980s).
- Tanneries in Kanpur (1980), Vellore and Calcutta (1990s) which were located along rivers, and where the court ordered closure, and the establishment of effluent treatment plants before reopening the units.
- A complex of industries in Andhra Pradesh, where the court ordered clean-up technology, and compensation to affected farmers (1990s).
- The Bichhri (Rajasthan) case of hazardous waste negligently disposed on premises of four industries which had been closed down and left after being in operation without requisite environmental clearances; the court set out the polluter pays principle. But the difficulties besetting restoration where toxic damage has occurred was also evident in this matter.

The relocation of industries from within Delhi, and the consequent closure and loss of employment of large numbers in the workforce has emerged from within an environmental context. It is related later in this report while dealing with conflicts and the prioritising of rights. The locating of a

nuclear power plant in the Sunderbans is another instance of the anomalies that 'development' is imposing on a people and on the environment.

Political Violence by Non-State Actors

Variously termed as 'militancy', 'terrorism', 'non-state violence', the use of violence in pursuing political ends has been in existence for over a couple of decades at least, in a number of states. The state response has been varied including:

- The enactment of the TADA, and other extraordinary laws, including the treatment of political violence as 'organised crime' as has happened in Andhra Pradesh, Madhya Pradesh and Maharashtra.
- The identification of such political activists as 'enemy' of military forces - as in the ITBP Act which defines 'enemy' as including 'all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to this Act to take action.'
- The unleashing of state violence, as happened in the Punjab particularly in the late '80s, and the beginning of the '90s. Or, again, as being witnessed in the encounter killings in Andhra Pradesh.
- The implicit equation of state violence with non-state violence in placing both in the agenda of the NHRC, while yet leaving violations by the Armed Forces beyond the NHRC's direct reach.

The question of political violence has gone through phases in the civil liberties movement. In the 1970s, a political journalist told us, he had walked out of a civil liberties organisation because they had taken a decision to focus on state violence, and not speak to condemn violence by non-state actors. In the 1980s, silence about the violence of the militants in Punjab, which included the deliberate and often indiscriminate killing of civilian targets, was held out as evidence of the partial and one-sided image that the civil liberties movement conjured up; there was an uncertainty that crept in among civil liberties groups too. In the 1990s, there was an open debate, most specifically in the context of Andhra Pradesh, where one point of view held that political violence to overpower and alter systemic violence could not be condemned; and another point of view emerged that revolutionary violence was not equal to, or the same as, people's response, and that sustained violence over decades injured the weak and the vulnerable the most. 'Systematic and calculated violence begins with the enemy, ' a civil liberties activist says, 'but soon turns to agents of the enemy within and among one's friends.' There is also the question of congruence between means and ends, he adds.

The abduction and disappearance of Sanjay Ghosh at the hands of the ULFA in 1997 did lead to re-appraisal of the presumptions about revolutionary violence and the latitude that should be

permitted it. A civil liberties group, for instance, spoke of its position as opposition to 'systematic, significant and sensitive killing by armed opposition groups.' An activist said: 'unless a revolutionary movement develops a tradition of human rights, there is a problem.'

The ranks of 'surrendered' militants (SULFA in Assam, Surrendered PWG in AP) has raised human rights issues - not only in terms of their rehabilitation but also for how they are used by the state. Caught between the cadres that they have walked away from, and the police or security forces who are now their protectors, it has been noticed that an inordinately large number of 'surrendered' militants die violent deaths. It also appeared evident to civil liberties groups that the surrendered militants are set up as stooges to carry out 'executions, which would then be passed off as a clash between the cadres and the deserters. Their position is plainly vulnerable. In Andhra Pradesh, we heard that cases against surrendered naxalites are never dropped, leaving them open to blackmail and to being manipulated. Recent brutal killings of civil liberties activists, often in broad daylight and open to public gaze, are suspected to have been engineered on order of the state government, using surrendered naxalites. Political violence in North Kerala and West Bengal seems to claim victims with regularity. It is an occurrence about which activists in both states spoke. In West Bengal, activists spoke of 140 CPM workers having died in 1999-2000 (over one and half years). This is concentrated mainly in the Hooghly, they said, but had spread to Calcutta too. It has percolated to the grassroots and, they said, it has ceased to have ideological basis. Peace talks, and mediation, seem to be ways in which intervention has been attempted by human rights activists.

Clamping Down on Protest

Protest, dissent and resistance are most often treated as 'law and order' problems and the state responds accordingly. This not merely reduces matters of development choices, economic and physical displacement and political difference into a case of law and order, but, in the process, it results in employment of aggression in putting down protestors or those who challenge the decision or the authority of the state. The protests against reservation in educational institutions, and the demand for a separate state in the hill areas of Uttar Pradesh came to a close with the formation of a new state - Uttaranchal. The 'Uttaranchal' movement was accompanied by violence when the state attempted to quell the protests and agitations that took place. The crackdown on the protestors on their way to holding a public rally in Delhi on October 2, 1994 'resulted in a lot of bloodshed including loss of many lives, infliction of injuries on persons belonging to both sides, outraging the modesty of women ranging to ravishments.' Activists in Uttarakhand refer to it as the 'Muzaffarnagar' happenings (Kaand). Approached, the Allahabad High Court had the CBI enquire into the allegations of violations. Prosecution was launched, but the accused officers subsequently discharged. In the meantime, the High Court had given directions for payment of damages and compensation. On appeal, the Supreme Court set aside this order in May 1999. While castigating the High Court for stepping beyond its brief, the Supreme Court made no observation on the excesses committed by the police. The clamping down takes many forms.

- The imposition of prohibitory order under s.144 Cr.P.C.
- The refusal to grant permissions to take out processions.
- The arrest of protesters.
- Implicating protestors in criminal cases.
- Tear gas, lathi charge, firing on protesters.
- The branding of speech and action of protesters as seditious, or as obstructing development and therefore being against the national interest.
- The forcible removal of protesters from the site of protest.
- Forcible breaking of hunger strikes.

The disappearance of Khalra who, along with Kumar, investigated mass cremations in three districts in Punjab is one of the startling instances of attacks on human rights defenders. Lawyers appearing for naxalites are regularly intimidated and threats held out to them. Anti-liquor activists have been killed, and there is little doubt that the liquor mafia is behind the killings. Organising or supporting people in resisting displacement, and the taking away of land or water resources for mineral exploitation or prawn culture, has led to cases being lodged against activists. The killing of Shankar Guha Niyogi by assassins paid by industry is another attempt at killing the leader to weaken a movement. The contempt jurisdiction of courts, which has been used liberally particularly in recent years, constitutes a potent threat to free speech, expression and to protest. The conflict between the Supreme Court and the Narmada Bachao Andolan and its members and allies in the matter of contempt has resurfaced after the judgment of the court allowing the raising of the height of the dam. Truth, incidentally, is no defence in a matter of contempt. The device of 'subjudice' is also often used to still discussion, and to refuse to share information with those seeking access to it. In the more extreme manifestations of clamping down, there is custodial violence and encounter killings. It is also evident that civilians often get caught in the crossfire. They may be subjected to harassment including body searches, detention, rough questioning by security forces and routinely treated with suspicion. Search and seizure of private dwellings, even of whole villages are common. Reports of fact-finding teams in Kashmir record this in graphic detail. Caught between militants and the security forces, civilians face the dual threat of either being punished by the former for being 'informers', or punished by the latter for harbouring or aiding militants.

Disability

The 1990s has seen a visibility, and position for the disabled in public spaces. The emergence of disability groups seems definitely to have made a difference. The enactment of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which was received by law persons with a certain scepticism as soft law, has acquired a significance with

disability groups activating the law. The 'disability audit' of public buildings and spaces undertaken by the physically disabled in Delhi in April 2001, is an illustration of the potential of the law to help those who can use it. The introduction of 'disability' into the census is seen as another step ahead for the disabled. A disability activist in Hyderabad spoke of the trauma that those disabled by accidents experience. He said it was not uncommon that accident victims would call, seeking help from depression and the push to commit suicide caused by the loss of limb or faculty. Those physically disabled from birth would use their experience with disability to help the recently disabled to cope, he said. Even when the First Citizen's Report was produced in 1985, the effect of fluorosis on the people in parts of Nalgonda in Andhra Pradesh was described. In the intervening years, it appears some efforts have been made by a non-state agency to provide 'filters' to the people living in the fluoride-affected areas; a cursory visit was sufficient to reveal that most people have, but don't often use, these filters. The visit was to Mada Yedevelly at Narkatpalli Mandal in Nalgonda district. A school teacher who led the way said that it is known to have the highest fluorosis rate in India. There are about 1600 people in the village now, said our respondents. 200 or so have moved out, they said. Till ten years ago, they used to drink the water, they said. Then, when they realised its devastating effects, they started getting water from other areas, where they go to work, for instance. There is a tank where water from another village, Puthurenipalli, is brought, but that is not free of fluoride either; only less so than their village water. There is a defluoridation plant established by the Dutch government in Yellareddigudam gram panchayat, but that is a little way away. The connection between the plant and the village water supply was not evident. And there are still distended limbs, prematurely aged bodies and a range of milder signs of the persistence of fluorosis.

These illustrations of the causing of disability, as a result of accidents or by inadequate attention to public health issues, is accompanied by the absence of state policy to take preventive or reparative steps. There have been some attempts at making easier the securing of an amount in compensation, but there is very little in evidence to deal with the post-accident trauma, or rehabilitation of these victims.

Corruption and Criminalisation of Politics

Corruption has been at the centre of attention in various arenas in public life. The harassment of prostitute women for the policeman's 'hafta', and the endemic problems in filing FIRs and having investigations done are instances of one manner of human rights violations represented in corruption. The Enron issue, which had allegations of corruption at its centre is an instance of distorted priorities which can deepen debt, even while re-ordering the priorities in decision-making - the local people's voices were not even heard by those in power, and it is presumed that money exchanging hands had a lot to do with it. Largesse and abuse of public office was much in evidence. In the Supreme Court, it was seen in the cases of allotment of petrol pumps and gas retail outlets under the charge of one central minister, and the allotment of commercial plots and shops by another. These serve to emphasize. The criminalisation of politics brought out in the Vohra Committee report (1997), only confirmed what is commonly known to be a fact. The everyday corruption of

the petty potentate will have to be understood in this larger context of institutionalised corruption and crime. The extent to which such corruption leads to every day violations of rights is popular knowledge; documenting instances, and the effect of such corruption, would help understand the human rights dimension of corruption as it affects the everyday person.

'Natural' Disasters

Earthquakes, floods and droughts have recurred with rigorous frequency. While some of these happenings have indeed been 'acts of God' or 'force majeure', a relationship between land and water use and droughts, for instance, has been drawn by activists and researchers. The post-disaster treatment of the affected population has given rise to rights issues. The relative neglect of those devastated by the Orissa cyclone in October 1999 is contrasted by development workers with the relatively improved treatment of those afflicted by the Gujarat earthquake in January 2001. The victims of the Uttarkashi earthquake in 1991, in the meantime, have said that they were yet to see anything beyond aid in the immediate aftermath of the earthquake reach them. The development of a rights perspective in the context of such disasters may shift the emphasis from welfare to rights.

Conflict Among Rights

The expanded assertion and recognition of rights, and the dimensions to rights that are emerging, have given rise to situations of conflicts among rights, and consequently, among rights activists. Choices are being made, and a prioritisation of rights occurring in a range of areas. The neglect of women's rights in the human rights arena for decades after the Universal Declaration on Human Rights (UDHR), and the Constitution of India, has had the women's movement demanding, and acquiring even if partially, recognition of women's rights as human rights. There were some among our respondents who held that human rights are those which are asserted against state action and inaction. A human rights lawyer, on the other hand, saw human rights as a strategy which ought not to be confined within an inflexible definition. For people in the women's movement, however, human rights are about patriarchy and systemic oppression and violence; domestic violence and death in the matrimonial home could not, clearly, be excluded from the universe of human rights issues. As a civil liberties' activist told us, in a pamphlet they prepared in 1990 (when the debate about whether violence and death in the home should be on their agenda), she compared statistics in dowry deaths with encounter killings: it was 2000:300. Though it stoked a lot of controversy, the women members of the organisation were very happy that the issue had been raised, she said. The emergence of women's rights in the human rights universe has also brought with it some contradictions which demand to be addressed.

A More Just Deal for Women and Fair Trial Standards

In cases of violence against women: registering a case; getting effective investigation underway; the ordeal of trial for the victim, particularly in situations of rape; the difficulty in obtaining evidence

in offences within the home, as also in cases of rape; and the low rate of convictions had women's groups, and on occasion, the National Commission for Women, demanding changes in the law to deal with these issues. Over the years the demand has been for -

- The recognition of certain actions/practices as actionable offences - domestic violence, cruelty in the matrimonial home and 'dowry death'. While the first is under consideration of Parliament, the latter two now find a place in the law. S. 498-A IPC, which makes punishable a 'husband or relative of husband of a woman subjecting her to cruelty' has become contentious. On the one hand the extent of violence in the matrimonial home is undeniable, and restraining the perpetrators and protecting the victim-woman is imperative. On the other hand, the experience of abuses of this provision which defines an offence that is cognisable and nonbailable, which may land families in prison pending bail, is said to have caused resentment against, and distrust of, this provision. Those who would not drop the provision because of the occasional misuse, point out that there are hardly any other protective measures to help a woman battered in her marital home, nor any other deterrent provision to add caution to offending members of the matrimonial family.

- Enhanced punishment for certain offences against women. The introduction into the law of 'minimum sentences', and higher sentences has also happened. Implicit in the demand for prescription of higher penalties is the need to secure deterrence - if the low rate of conviction takes away the possibility of deterrence, it is sought to be reintroduced through a higher penalty where conviction does result. It has also been a measure of the state's, and popular, perception of the seriousness of the offence. The conflict lies in this, that it comes at a time when the virtues of imprisonment are in serious question. It is not evident that the conditions in prisons, and the violations of the rights of prisoners which is now common knowledge, has been reckoned with while asking for enhanced sentences. But the conflict became most apparent when death penalty for the offence of rape was mooted. When it was first suggested in the mid-1990s, there was very little by way of audible objections from women's groups; some women's groups extended it support. It was when the issue was raised again in 1998, that there was an avalanche of protest from women's groups. The NCW too released a report of a study it had done which showed that most of their respondents opposed the prescription of death penalty for rape. For some in the women's movement, the opposition to death penalty for rape appears to have been a pragmatic position - since it would only make the women more vulnerable if the penalty were so severe. For others, the pragmatic argument was a means of opposing the spread of death penalty into areas where it is not, already. What is disturbing is the persistence of the Home Minister in holding out the death penalty as a promise to women, as a statement of seriousness about the problem. In this context the failure to challenge the prescription of the death penalty for offences in the Commission of Sati (Prevention) Act 1987 also becomes an area that needs to be re-visited.

- Shifting the onus of proof. This has already been introduced into the Evidence Act 1872 in 1983 and 1986. S. 113 A raises a presumption as to abetment of suicide by a married woman where she commits suicide within seven years of her marriage, and it is shown that her husband or in-laws or a relative of her husband had subjected her to cruelty. S.113 B raises a presumption of dowry death where it is shown that soon before her death she had been subjected to cruelty or harassment by the accused for, or in connection with, any demand for dowry. S.114 A presumes absence of consent in certain prosecutions for rape. A respondent reasoned that she had opposed this shifting of onus of proof because it would open the gates for the state to extend the shifting of onus to other areas; see what has happened in TADA and such laws, she said. Also, while the violations are certainly heinous, the criminal justice system is structured to require the prosecution to prove guilt; it is often not possible for an accused to rebut an accusation, she said, even where the accused may be innocent. Further it is a dilution of fair trial standards. The contrary position is that there are offences where such a presumption is not necessary if justice is to be done to the woman.
- A separate criminal code for women. This was a proposal that emanated from the NCW and was widely discussed in 1995-96. This was intended to make the trial less traumatic for women, speed up the criminal judicial process, and it was expected to raise the conviction rate. There were discussions of making some inroads into the rights given to an accused under the law. This proposal, however, appears to have been shelved. It was suggested to us that child sexual abuse being of an extraordinary nature, there should be a relaxation of fair trial standards in dealing with it.

HIV, AIDS and Disclosure

The two conflicting positions on disclosure by a hospital/doctor about the HIV+ status of a person has been set out supra while mapping human rights issues. To that discussion of the issue may be added that the view on disclosure seems to have been influenced by the context of the proposed marriage of the petitioner in that case. It may be appropriate to consider the reach of the principle of disclosure while weighing the rights content of the court's decision.

AIDS and High Risk Groups

The AIDS campaign has given visibility to women in prostitution who had so far been unable to requisition public spaces. There are few who deny that women in prostitution need to be empowered to prevent their becoming ready victims of HIV transmission, as also of passing the virus on. However, the programme of intervention to protect from AIDS has re-introduced the idea of high risk groups, and women in prostitution as constituting such a group - a notion that was contested in the 1980s as discriminatory, and with the potential of leading to victimisation of targetted groups.

Abortion in the context of Women's Health and Sex Selective Abortion

When Parliament passed the 1971 law legalising abortion under certain conditions, the statement of objects and reasons listed three reasons for passing the law:

- As a health measure - when there is danger to the life or risk to the physical or mental health of the woman;
- On humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.;
- Eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities and diseases.' By 1995, when the Maternity Benefit Act 1961 was amended, the insertion of population control provisions into the law was being acknowledged, and resisted. The 1995 amendment, however, did give a renewed emphasis to placing the onus for family size on the woman when it incorporated 'leave with wages for tubectomy operation' as a 'maternity benefit', even as it gave medical termination of pregnancy the same position in law as miscarriage.

This is a statement of the adoption of abortion as state supported policy. The question of abortion as a right, and abortion as a population control measure may need to be re-visited. There was also a proposal to limit the provision of maternity benefit under the Act to women workers up to the second child; this however seems to have been dropped, perhaps because of the protest that met the proposal at almost every turn.

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994, which was modelled on an earlier Maharashtra law, was enacted expressly 'to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women.' The punishment for transgressing the prohibition of the law is intended to be deterrent. Yet, in the seven years since the law was enacted, there have been no prosecutions of which any of our respondents made mention.

The conflict inherent in asking for abortion as a matter of right, and believing that sex selective abortion needs to be curbed requires to be squarely addressed.

Sexual Harassment in the Workplace

After the Supreme Court's Vishaka guidelines, demands for translating them into policy and practice are being made. The allegations of sexual harassment by persons in positions of leadership within the human rights community, and the lack of procedures prescribed in Vishaka even within the human rights community, has been raised as an area of conflict in the context of human rights.

Freedom of Expression, Privacy and Censorship

The depiction of women, as also of violence against women, has raised difficult questions of censorship and of free speech and expression. The control that capital has over the media has been recognised, and it is not the free speech rights of corporations that is in issue here. Feminists worry that the power to determine what is 'obscene' or 'indecent' could curtail the use of media to interrogate, for instance, rape: for the depiction of rape could be viewed as 'obscene' and explicitly addressing the issue proscribed. Even as feminists, and women, find public spaces for their speech and expression, the space could get restricted and reconstructed by censorship. The Miss World contest organised in Bangalore in 1996 gave rise to similar, uneasily quietened questions. The responsibility of the researcher, and the impact of publishing research findings, has been in issue in the Almora case, where research published in September 1999 became a subject of singular controversy in April 2000. The research, on AIDS and the local community, used the responses from a sample of respondents who spoke about the sexual practices in the area, from where male migration for work is very high. Promiscuity and adultery were spoken of. The protesters were angry at the depiction of the community in the report. That the research was funded by a foreign donor agency added a dimension to the protest. The NGO later apologised, and withdrew the report. By then, three activists had spent 45 days in jail. In the meantime the state had moved in to impose the NSA on them. This last deed was roundly condemned, and much of the human rights community spoke as one to attack the state action. The questions raised by the research and the report, however, continue to hang in the air.

Prostitution

There has been considerable movement in public perception. Most significant though has been the openness with which the practice, proliferation and problems of prostitution are now discussed. Inevitably, perhaps, there have been conflicts that have surfaced in this area of women's rights. On the one hand is the demand that sex work be recognised as real work. In the mid-'90s this was articulated as sex work being seen as labour. There was also a demand that labour laws be applied to sex work. That appears to have been gradually amended to the demand that sex work be accepted as labour in terms of the dignity that labour commands. A collective of women in prostitution identified three R's - Respect, Recognition and Reliance. The women in the collective also spoke about the right to say 'No' in the course practice of their profession, and said they had to be given the right of 'self-determination'. While there was no demurring about the need to protect women from exploitation - from the police, the pimp, the madam and the client - there were dissenting voices on recognising prostitution as sexual labour. As one respondent said it: 'Feminists are being included in a much larger agenda. They are giving patriarchy and sexual exploitation a sugar coating by calling it work. Earlier patriarchy oppressed women by calling them 'mother goddess' and curbing her freedom. Today patriarchy oppresses her by calling her the 'bread winner'. She continued: 'I accept that today the state is doing little to stop trafficking. But the day sex work is seen as work under

law, that will be the end of all efforts to stop trafficking.' A woman from the collective, however, said: 'Trafficking can only be stopped by us. Only we know what is happening in our areas. We are telling the government they should give us the right to act.' She however conceded that not all areas where prostitution is practised and trafficking occurs were yet capable of being so monitored. We see ourselves as workers, she said, and we want a union that will give us a base.

A 'mela' which was organised by the collective in Calcutta in March 2001 reportedly met with stiff resistance from some women activists, while others stood up for the rights of the women to organise themselves. It is sometimes depicted as an issue of 'agency' of the woman as against those who see women in prostitution as victims, and subjects of exploitation. Six aspects which a woman in the collective adverted to if they were to be considered to be 'labour', and their association recognised, were:

- Police raids would not happen.
- Mental torture in the rescue homes would cease. Also, when the girls are released by pimps, they say they have paid huge amounts when they actually pay far less in bond. Bonded labour is therefore rampant in the present dispensation, she said.
- A self-regulatory examination board, with a multi-sectoral member composition would be able to prevent the entry of minors into prostitution. The two criteria of age and willingness would be applied by them. Now, we don't have even the right to stay where we are, she said.
- The right to say 'No' would get established.
- Teasing to demean women in prostitution would reduce.
- When they retire, they are not even able to go back home; once they are declared to be labour, that will change. That would be real rehabilitation, she said.

There was some conceptual confusion about 'decriminalising' and 'legalising' prostitution. While most of our respondents saw a need to decriminalise to prevent them from being a vulnerable group, the mix up with legalising prostitution - which many among our respondents were unable to accept - dogged our discussion. A proposal that the travel of single women across political borders be controlled, which was under discussion with the NCW, was dismissed by some respondents as being a prescription for obstructing freedom of movement of women and as likely to serve no other end. The children of women in prostitution are seen by the law as being potentially in 'moral danger'. The Juvenile Justice Act 1986 and its successor legislation - the Children in Need of Care and Protection Act 2000 - allow for their children to be taken over by the state. A judge of the Supreme Court had even said that the women should be 'coaxed, cajoled or coerced' to give up their children. This clash of a complex of rights and of perceptions needs to be more fully understood.

Environment

In the past fifteen years, environmental concerns have acquired a dominance which, it seems, have re-prioritised, and sometimes dislodged, rights.

Reduced Pollution and Hazards Vs. Workers' Livelihood

The issue was most starkly represented in the Delhi Relocation case. When 168 industries in the first instance, and thereafter all 'hazardous' industry in Delhi, were ordered to be closed or relocated, the conflict between the right to reduced pollution and hazards, and workers' jobs exploded into prominence. The matter arose out of a PIL filed by an environmental lawyer. The condition in which such an order would leave the workers - whether the industries closed down or relocated - was not considered till after the decision was made. The order, coming from the Supreme Court, has had an effect of finality and narrow negotiability which has pushed workers' rights very low in the hierarchy of rights into a residuary position. In Kerala, the Grasim industries pollution case has engaged the environmentalists since the 1970s, and the workers from even earlier. Between 1985 and 1988, the industry closed down for reasons unconnected with the pollution. Environmentalists and workers then fought on the same side to have the industry re-started; the loss of jobs was then the primary concern. Since it re-started in 1988, the environmentalists have been gradually moving away from an appreciation of labour's concerns, since they do not see that environmental concerns and workers' jobs can be accommodated in a single solution. The environmentalists have voted for battling the pollution at all costs, even as they are chagrined at having to leave labour out of the reckoning. In Trivandrum, we heard of people whose livelihoods had been dislocated by the pollution of the coastal waters demanding that either the industry close down, or they be absorbed into the industry in replacement of livelihood lost due to the pollution. In Tuticorin in Tamil Nadu, among the salt pans is located a chemical industry. A drying pond stands mute testimony to the potent pollution being caused by the industry. The salt workers' cooperative is maintaining a stoical silence about the pollution, since any protest from them may result in loss of jobs for about 1800 workers employed in the industry. In Vellore in Tamil Nadu, when the Supreme Court ordered that tanneries be closed, around 8000 workers were reportedly laid off. On the one hand, a labour activist said that it is time that workers developed a position which takes public health, pollution and environmental issues into account. On the other, the practice of using the court system, in PIL, to project a uni-dimensional view of the issue by environmentalists was attacked. The present priority accorded to environmental issues was seen as allowing the environmentalists to get away without having to reconcile conflicting concerns.

Shelter Vs. Conservation

The displacement, by court order, of residents of slums bordering, and encroaching in some measure, into the Borivili National Park in Mumbai has raised similar concerns. The clash between environmentalists and those espousing the cause of the slum dwellers has been violent, and the positions apparently irreconcilable.

Shelter Vs. Beautification

A petition asking for garbage disposal in Delhi has allowed the Supreme Court to order demolition of slum dwellings. While doing so, the court has likened giving land for rehabilitation to 'an encroacher' to 'rewarding a pickpocket'. In this vein, there has been a mass-scale illegalising of structures which house the poor. In the same order, the court has directed that garbage disposal being a public purpose, land should be released to the municipal corporation, free of cost. The court has been re-working priorities, and groups approaching the court increasingly recognise that environment, as expansively defined, is likely to take precedence over other rights such as shelter and workers' livelihood. There has been greater scope for negotiation, however, when the survival of an industry is concerned - clean-up technology (particularly ETPs and CETPs) which, at best, is recognised to be a partial answer, have been accepted as an answer to the charge of pollution.

Tribals Vs. Forests

The presenting of the conflict in these terms, i.e., tribals vs. forests, has tended to marginalise the tribal communities. There has been denudation of the rights of tribals who habitually reside in forests and live off forest produce. The creation of national parks and sanctuaries has led to installing the concept in law of exclusion of the tribal from the forest. Where they are being allowed access, their rights are severely circumscribed - by identity cards, timings, numerous checkpoints and a very limited range of permitted activity - leaving them often at the mercy of the forest officer. A distinct school of thought has emerged which advocates against the exclusion of tribals, and which sees a role for tribal and forest dependent communities in the conservation of forests. The reconstructing of the rights of tribal communities is, largely, except for the rare exception, being done without the participation of the affected communities.

Anti-smoking Law Vs. Workers

The workers in the tobacco industry have found their jobs threatened by the anti-smoking legislation that has been introduced in some states. Trade unions find themselves impelled to oppose the ban because it will cause reduced sale of beedis and, consequently, reduced employment. They also argued that it was a ploy by large tobacco companies to snuff out the beedi industry since it is the class which smokes beedis which will have difficulty in finding spaces which are not public and where they may smoke legally. Yet, this would present workers as selfcentred and anti-health. The conflict defies easy solution.

Tribal Land Alienation

The law, generally prohibits the transfer of land from a tribal to a non-tribal in agency areas, or scheduled areas, except for reasons recognised by law, and by procedure prescribed therein. While this is usually respected as fair and legitimate protection extended to scheduled tribes, and to prevent

exploitation of the tribal by the non-tribal, the situation in Kerala has been somewhat complicated. In 1975, the state legislature enacted the Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act 1975. The law has had a chequered career, with the government attempting to dilute the effect of the law, by amendment, and the courts demanding its implementation in its 1975 guise. The question of alternative land rather than restoration has also been mooted - but it is not clear that such alternative land exists. While tribal activists have been campaigning for enforcing the 1975 law, others have been muted in their reactions. The reason, our respondents say, is because the land appears to have been transferred for a price to settlers who are themselves only marginalised populations. It would be unjust and iniquitous to dislodge them from lands for which they have paid as much as they can afford, it was said. This was represented as a case of conflicting interests, but of two equally, if differently, affected communities. Rehabilitation of the already displaced adivasi community appears to be one way of resolving the issue - a view with which tribal activists do not concur, considering it as an erosion, even a denial of the right against alienation of land.

Dalit Movement and the Caste as Race Representation

The effort by NGOs to get caste on the race agenda at the Conference for the Elimination of Racial Discrimination has been an attempt to internationalise the issue of caste. Some activists and leaders in the dalit movement have also been involved. While some of them have got on board as in Gujarat, the dalit activists/leaders in Andhra Pradesh and Tamil Nadu have been consulted but have chosen not to enter the arena themselves. This is how a dalit activist leader explained it: 'We need international pressure. So far we have treated it as an internal matter. This will help the issue get focus…. This has been raised by NGOs, not by the movement. I don't know about donor politics. We only tried to get some control by putting some of our academicians in it. But we are not sure what it means.' A Dalit leader who had not heard of this move objected to the caste-as- race representation. Race is not our politics, he said. Our fight is against brahmanism and casteism, he said. Even if it were to be considered that NGOs may not be able to consult with all affected or concerned persons, groups, organizations or movements before espousing causes, the conflict that could exist where the NGO position and that of movement politics do not converge has to be addressed.

Speedy Disposal of Cases Vs. Open Criminal Justice Process

Overcrowding in prisons has been partly attributed to the problem of transporting undertrials to the courts, and of finding police escort to perform this task. In response there is an emerging practice of magistrates holding court within prison premises. This reportedly happens in Delhi and in Bangalore, for instance. The prison is patently a closed premise, as also beyond the beat of the persons who make the judicial process an open system, including lawyers, reporters and observers. In a different context, the virtues of in camera trials in cases of rape to protect the interests of the victim of rape has also been debated, inconclusively.

Human Rights Lawyering

In approaching the court, or when an activist is drawn into the judicial process, a question of representation of a political or an ideological position often rises. Illustratively, a feminist litigating for getting custody of her child may be faced with two choices: either to assert the stereotype - the mother as the primary carer of the child, and the child needing the care and attention that only the mother can give - and increase the probability of getting custody, or staying within the politics of feminism and reject such stereotyping which, in turn, may drastically reduce the chances of getting a favourable order from the court. An instance, again, is in matters of contempt of court, where activists may be advised to tone down their honest opposition to a court order which is patently unjust, even unconstitutional, or perhaps to tender an apology which would serve the requirement of the court, but which may compromise the politics of the contemnor. Difficulties abound where activists are picked up by the police, and there are apprehensions that they may be subjected to torture, or even be killed in a fake encounter - does politics stop at the doorstep of the courtroom? Is it necessary to get the consent of the activist before taking a position in court, in a habeas corpus petition, for instance? And what is to be done where the activist is unreachable?

Strategies and Responses

A listing of strategies and responses of state and non-state actors is attempted. Those attempted by non-state actors is inevitably more exhaustive, since a large proportion of our respondents belong to this description of person. Organising People: This may be for effective and informed protest, as has been done by the NBA, for instance. Or in getting people to re-capturing control over their resources, as in the Aruvari Sansad in Alwar District in Rajasthan. Or to form collectives, as with the Durbar Mahila Sammanvaya Committee.

Working on the Right to Information: Led by the MKSS in Rajasthan, it has caught the imagination of activists across states, and fields of activity. It has also resulted in bureaucratic and political acknowledgment of the right/freedom. One aspect of this right is explored by activists who gain access to ‘top secret’ documents and share them with grassroot level workers as also with the rest of the interested community. This happened with the Land Acquisition (Amendment) Bill, for instance, exploding thereby the unsustainable position that proposed legislation of this kind may need to be kept secret from the people it is likely to affect. The use of information technology to gather facts about offending enterprises, for instance, and disseminating them is another facet of the interpretation of this right.

Iconisation: The changing of a victim into a symbol, as in Mathura (custodial rape), Bhanwari Devi (in defiance of rape and oppression), Dominic D’Souza (AIDS), Budhan (denotified tribes) are some instances. Some places where the violations occurred also lend their names to a construction beyond immediate incident: Muzaffarnagar - the scene of killing and molestation of the Uttarakhand agitators; to activists it appears to epitomise the struggle against odds, but also of an isolation

of the struggle from the human rights communities in other parts of the country. Or the 'Stchundur' treatment in Andhra Pradesh, where landlord retaliation against dalit assertion, inadvertent in this case, took place amidst police protection; this is now referred to as a phenomenon. 'Broken People' researched and written by Smita Narula for Human Rights Watch is said to have catalysed dalits into forming a national organisation. There were references to Masanabu Fukuoka's One Star Revolution having helped shape perspective.

Bringing in the Media: While press briefings are frequent, taking the press along to witness an event is not unknown, e.g., the Disability Rights Group being accompanied by press persons while doing a disability audit of public buildings in Delhi in April 2001. The presence of empathetic persons within the press establishment was also said to make a difference, as when dalits were professional journalists.

Fact-finding, People's Tribunals and People's Commissions: This is a process by which a state tactic has been co-opted by non-state actors. Previously human rights activists would demand judicial enquiry into incidents of violations of human rights. The use of judicial inquiry sometimes in the form of Commissions of Inquiry, to diffuse situations, or the inconclusive, or, sometimes, unfairly exculpatory, nature of the findings where judicial enquiry culminated in a report, discredited this state response. There is also the capacity of the state to scuttle such inquiry once the immediate need to set them up is past. The Srikrishna Commission is a rare instance of a report which commanded credibility, and it too had to go through the vicissitudes of winding up and re-starting.

Peoples' Tribunals and Peoples' Commissions of Inquiry have made the shift from legality to legitimacy. With the state privileging retired judges in appointment to commissions of inquiry, People's Tribunals and People's Commissions too have on their panel retired judges, who, in addition, carry the aura of integrity and competence. The panels may also have other public figures including among them journalists, lawyers, academics and activists. There were two instances of attempts to thwart the functioning of People's Tribunals/Commissions which we encountered. The first was when a panel was constituted to hold public hearings on disappearances in Punjab. In keeping with the demands of 'natural justice', notices were issued to policemen, among others. The state contested the right of the people's tribunal to hold hearings, contending that that is a judicial function which the Tribunal cannot usurp. The activists' position was that this was a process in which participation was voluntary, and this was not an alternative to the judicial process. The High Court, and later, the Supreme Court, upheld the state view, and the tribunal was not allowed to function. The enquiry into the Srikrishna Commission was similarly threatened by the judge who issued notices for contempt to the People's Tribunal. Extra-mural intervention led him to set aside the notices. The People's Tribunal also explained that their inquiry was intended to facilitate the official inquiry, and was not an act of defiance. Fact-finding missions, which generally follow soon after an episode of violation, are also increasingly used where human rights defenders are subjected to harassment. The issuing of a statement by persons with credibility in the activist universe and generally after a visit to the site, and after meeting with as many of the actors as is possible, is meant to provide an

alternative to self-serving versions that may emerge from the state or its agencies. It is also intended to highlight an event to prevent further violations. It is important to ensure that the accusation of prejudgment which discredits state reports do not taint such non-governmental fact-finding missions. The report of a lawyer who visited Coimbatore to investigate the anti-Sikh riots in 1984 was the basis of a significant petition in the Madras High Court. This constitutes a turning point when 'culpable inaction' by the state was recognised, where injury to person or property could have been anticipated, but the state did not act to prevent such injury.

Visiting Zones of Conflict and Violence: The cutting off of a free flow of people between areas of conflict and violence and the rest of the country also cuts off the possibility of understanding what the people experience, of information being shared, of extending solidarity and support. The report of the Women's Initiative in 1994, 'Women's Testimonies from Kashmir: The Green of the Valley is Khaki' is testimony and photographic depiction of the women in Kashmir. Uma Chakravarthi and Nandita Haksar's `Delhi Riots' is a testimony collected even while curfew made it difficult to reach the victims and witnesses of the anti-Sikh riots in Delhi.

People to People Dialogue: This has been held, for instance, in the North East to break the barriers of distance and incomprehension. This also helps in exploring, in areas where the issue is of self-determination or autonomy, after the conflict, what is to follow. The meeting of Naga women and Kashmiri women, both caught in situations of conflict, organised in Delhi in April 2001 is another instance.

Negotiating Conflict: The efforts of the Committee of Concerned Citizens in Andhra Pradesh to reduce the violence practised by the state and the naxalites is documented in 'Report of the Committee of Concerned Citizens (1997-2000)'. Comprising persons with whom both the state and the PWG would not be unwilling to speak, the CCC started its correspondence with asking the state for a cessation of 'encounter' killings, and asking the PWG to desist from killing its adversaries. While the state response has been more formal than substantive, the PWG has had the CCC recognise the fundamental nature of land reforms and land re-distribution before violence ceases. The openness of this process of talks and dialogue, and the establishing of credible persons as dialogists, is a significant aspect of this process.

Truth Commission: This was organised in the context of deaths of young women in their matrimonial home in Karnataka. A panel heard the parents and relatives of the murdered woman, giving the victim's version a space that it is not able to find in the systems of the state.

Dissemination: A group of disabled persons working among the disabled in Andhra Pradesh, and producing a newspaper and running a press, said they had printed and disseminated 3000 copies of the 1995 Disabilities Act. The response, they said, was excellent. They also spoke of sending out 10,000 letters to motivate handicapped people.

The CEDAW too has been widely discussed, disseminated and translated and training modules developed for understanding, and using, the CEDAW The widespread use of posters setting out

the rights of the accused as ordered in D.K. Basu's case and in Joginder Kumar has been taken into police stations too. This has also been translated into the local language in many states. Use of information technology, films, reports, magazines and newsletters, both to gather and to share information. Video films and documentaries which assert facts with a perspective - e.g., An Unfinished War on population policies and women's perception of their bodies, Kaise Jeebo Re on the Narmada struggle, Hamara Shehar on demolitions in Bombay.

Peace Committees: This was particularly spoken of where political violence is widespread and routine, especially in West Bengal and Kerala and was also found in Tamil Nadu in the context of caste violence. Human rights groups send out peace committees to bring warring groups to negotiate peace.

Census: The use of 'census' on the practice of untouchability is seen as a way of squarely placing the issue on the table. Disability having been brought on board as a factor to record in the 2001 census, disability groups have been motivating persons with disability to enter their data in the Census as a step towards recognition of their rights in state policy.

Setting the non-negotiable: This establishes the base lines in an issue. For instance, regarding child labour, a non-governmental organisation has set them out like this: All children must attend full-time formal day schools; Any child out of school is child labour; All work/labour is hazardous, and harms the overall growth and development of the child; Any justification perpetuating the existence of child labour must be condemned.

Legislation: Monitoring changes proposed in law, and in policy, which may affect people's rights. This may also involve the critiquing of proposed drafts and preparing alternative drafts which would be people friendly. The forest laws and the laws relating to land acquisition, as well as the rehabilitation policy went through this process. The Bill on domestic violence was prepared by non-governmental effort and has found its way into parliament. The Women's Reservation Bill has survived disinterest and active antagonism in Parliament because of the activists who have battled to keep it on the agenda. In the 1980s, the changes to criminal law which dealt with crimes against women were the result of demand from the women's movement. Participating in state processes, as in presenting memoranda to the Committee to review the working of the Constitution, or intervening with the Law Commission is also practised.

Campaigns: The Campaign against Death Penalty is one instance. Campaigns often accompany other modes of intervention, legislation or recognition of rights (or wrongs), for instance. Campaigns may also take on issues such as opposition to the WTO, or to the manner of opening up of the Indian economy to multinational power companies, for instance.

Resistance and Protest: This may take the form of rallies, padayatras, cycle rallies, processions, dharna, bandh, hartal and roadblocks. Apart from the 23 conditions that the Madras High Court has imposed on processions, the Kerala High Court has declared that bandhs are unconstitutional since

they deny freedom of movement and the right to carry on one's avocation. This stands affirmed by the Supreme Court. Bandh seems to have got devalued as a means of protest because of the indiscriminate use of protest because of the indiscriminate use to which it has been subjected by political parties. This is particularly true in Kerala, where activists broadly supported the court's decision. This appropriation of non-governmental methods by governments - in power or in the opposition - appears to have robbed it of its legitimacy and meaning.

- Land invasion.
- Seminars, workshops, lectures, preparing of manuals, holding state and national level consultations and conventions, training of activists and grassroot workers and getting a dialogue going among them, pamphlets and posters are usually used.
- The formation of networks has become frequent, as has the induction of issues and the broadening of agenda to accommodate such issues. This has also helped to move towards an understanding of the indivisibility of rights.
- Signature campaigns.
- Alternative election manifesto.
- Participatory methods of decision-making and policy making. The 'Van Gujjars proposal for the Rajaji area' published in 1997 where, through an overtly consultative process among forest-dwelling Van Gujjars, a scheme for community forest management in Protected Areas was drawn up.
- Budget analysis from a range of perspectives, including analysis of what it does for women, children and health.
- Social Development Report.
- Use of PIL in the Supreme Court and the High Court, using the NHRC and the State HRCs and human rights courts. In some states, either the SHRC has not been established, or the SHRC is not a credible institution, and the NHRC is more regularly approached. The National Commission for Women (NCW) has also been used and, in a certain period of its functioning, it was seen as an institution which provided solidarity, by the unqualified acknowledgment of the justness of women's claims.
- Training of judges and police personnel. This has been most commonly on gender sensitisation and or human rights.
- Advocacy on rights of people with the state and agencies of the state.

Help lines: This has been established for street children, lesbians and gays, and for women in distress. While the first and the last mentioned have endorsement in state policy and practice, help

lines for lesbians and gays is denied legalised spaces for operation. Help lines have also existed for some years now for those with suicide on their minds.

Trial Observers: This appears to be an underused method of demanding accountability in judicial and quasi-judicial processes. Yet we did hear of its use in two situations: at the Justice Mohan Commission of Inquiry into the Manjolai tea estate incident where 17 people drowned in the Tamaraparani river - 6-7 persons attended the hearings each day of its sitting. And, the Kerala State Commission for women had two lawyers attending as trial observers in the Vidhura case.

The state has adopted strategies, and measures, dealing with human rights violations, and for pre-empting the occurrence of such violations. While some of these strategies and measures are perceived by activists as having supportive potential, others are seen as providing spaces for human rights violations with impunity; this is particularly so in the case of extraordinary laws. The establishing of 'Commissions' including: the NHRC (by Act of 1993), the NCW (by Act of 1990), the National Commission for Backward Classes (by Act of 1992), the National Commission for Safai Karamcharis (by Act of 1993). It is a widely held opinion that the NHRC was established in response to international pressure. Though the Protection of Human Rights Act says that there shall be 'two members having knowledge, or practical experience in, matters relating to human rights' there has been no person from the human rights community in the NHRC; nor does there seem to be enthusiasm among the members of the human rights community to be appointed to the NHRC. The NHRC has standardised compensation as a response to human rights violations. It does recommend disciplinary action and prosecution of errant officers, but this is not invariable. There has been an acknowledgment of custody deaths, and there is a direction that all cases of custody deaths be reported to the NHRC within 24 hours of its occurrence. The numbers have been seen to be increasing each year; the NHRC puts it down to increased reporting. There is a direction that post-mortem of persons who have died in custody be videotaped; it is not apparent that this has made a difference. The NHRC was at one with the human rights community in demanding that TADA be not re-enacted. It also recommended ratification of the Torture Convention, but the government does not have to heed the NHRC, since its opinion is only recommendatory; and the Torture Convention remains not ratified. The exclusion of the armed forces from the purview of the NHRC is identified by activists as a grave lacuna in the Act that establishes the institution. This is especially so since human rights violations by the armed forces is a matter of concern and contention in the conflict-torn regions of the country. It is also that this exclusion is viewed in the context of the NHRC's reach over 'terrorism', and, therefore, found anomalous. In defending its human rights record before the Human Rights Committee, the state has used the NHRC, along with PIL, as reason to believe that all human rights violations have avenues for redressal within the state.

The Supreme Court, too, has passed on the burden of PIL cases which deal with human rights issues, included bonded labour, mentally ill in institutions and women in 'protective' homes, to the NHRC. This shift from a binding fundamental rights jurisdiction to an institution with recommendatory powers has been viewed with growing concern by activist lawyers. The judge-heavy

composition of the NHRC has influenced the procedure of 'hearing', setting out of a 'case', and even 'affidavits' and 'arguments'. The Annual Report of the NHRC is to be placed before Parliament, making it a public document. The government is to give an Action Taken Report along with it. In the Annual Report of 1998-99, the NHRC refers to the nontabling of the report of the previous year; the more significant recommendations from the previous year have been reiterated in 1998-99. There has been no challenge to this governmental neglect. The soft approach, sometimes amounting to a clear negation of rights, as in the Punjab Disappearances case, has been castigated by activists. The impact of directives issuing from the NHRC, on custody deaths for instance, is unclear. Documentation of cases, and the reports of investigations, is not easy of access, and no system has been devised for ensuring such transparency. State Human Rights Commissions (SHRCs) have been set up only in some states. Andhra Pradesh, with its escalating record of encounter killings, has not established a SHRC. In West Bengal, activists do approach the SHRC, but they explained that they were confronted with popular prejudices - such as judging a victim of custodial torture as not worthy of the energies of human rights activists; and their concern being 'misplaced'. An orientation to human rights was found missing when such poses were struck, they contended. Activists in other states, such Tamil Nadu, seemed to prefer approaching the NHRC rather than the SHRC; a question of competence and demonstrated seriousness of purpose at the state level, they explained.

Courts

The setting up of human rights courts at the district level has begun, and activists have engaged with the process of establishing rules and guidelines in terms of the procedure to be adopted by these courts. These don't seem to have become functional yet, and they remain sidelined and hazily constructed within the dominant judicial system. Also, activists in Tamil Nadu said that human rights courts were restricting themselves to civil and political rights; it will lead to a defining of what constitutes human rights in this lexicon, they said. Mahila Courts, or courts for women, have been set up in some states, including Karnataka. The appointment of women as judges to person Mahila Courts, and the setting up of all women police stations, are measures that are expected to make the system more accessible, and sympathetic, to women. Some respondents said that conscientisation of judges on women's issues was of importance; appointing women as judges was no guarantee that the necessary sensibilities would enter the system, they said.

Compensation

Like the NHRC, the state too uses compensation as a remedial tool. Ex gratia payments made to victims is a response that has got standardised especially in areas of conflict. The state generally provides compensation for victims of 'terrorist violence'. Victims of violence practised by the security forces, or state violence, is not accorded this recognition.

Extraordinary Laws

While using the language of 'law and order', 'public order' and of 'terrorism', the state, at the centre and the states, has enacted extraordinary laws. These represent an assumption of extraordinary powers premised on security and safety of the state and of the population at large. The Indian state is also in the vanguard in negotiating an international law on terrorism. Cross-border terrorism is identified by the state as a major threat to human rights, and more prominently, to the security of the state.

Other Laws

The state has enacted, re-enacted, or amended, laws which deal with rights of populations considered vulnerable. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 is one instance. More recently, the Juvenile Justice Act 1986 was replaced by the Juvenile Justice (Care and Protection of Children) Act 2000. Both these laws have been through the process of consultation. In the case of the Persons with Disabilities Act, in 1998, the government set up a committee to review the legislation. The Committee held regional consultations where interested persons could state their position before the committee. No changes have, however, been brought into the legislation since then. Consultations were sponsored by the government and other agencies when changes to the JJ Act were being considered. A division of opinion on children in conflict with the law was discernible at a stage in the consultation. This was not investigated further, nor resolved. The government instead consulted with a closer group of professionals and the Juvenile Justice (Care and Protection of Children) Act 2000 was enacted as a result.

Counselling

The setting up of Crimes Against Women cells in Delhi, for instance, is intended to provide a place for registering complaints seeking help, providing counselling and, where relevant, reconciliation. Violence in the home has been the primary target. We also heard of the counselling of the families of naxalites by the police, though we did not get insights into the intent, and techniques employed in counselling.

Census

The inclusion of the category of 'disability' in the 2001 census has been a statement of recognition of persons with disability being persons requiring specific state attention. Apart from providing a basis for asserting their rights, it has also placed persons with disability within the agenda of the Planning Commission. Women in prostitution have, however, been agitated by their profession being classed with beggars and the unemployed, particularly since it is being done at a time when they are asserting that prostitution be recognised as work.

Samathuvapuram (A Place of Equality)

This is a state-sponsored scheme in Tamil Nadu, expressly intended as an intervention to reduce caste clashes in the state. Envisioned in 1997-98, the scheme is to create a settlement of 100 houses as part of, but some distance from, a village, where contiguous houses will house persons belonging to different castes/religions, even as a large proportion of the houses are allotted to scheduled caste families. The beneficiaries are selected at the gram sabha, and they are only to be people from the villages immediately in the vicinity of the new settlement. 150 samathuvapurams are planned. The second and the 77th samathuvapuram were visited. There was a case of a caste clash that broke out in the 2nd samathuvapuram where a dispute over filling water from a common tap resulted in a dalit woman being assaulted by a family belonging to a higher caste. Local political activists explained that the issue had been resolved with the withdrawal of allotment of the house to the higher caste woman and her family, and their being sent back to their abode in the original village. This is an experiment that calls for long term follow up.

National Commission for Women

Established by statute in 1990, this was one of the consequences of the demand of women's groups that women be given a space in intervening on their own behalf.

The NCW has over the years:

- Intervened where women's rights have been violated, as in the case of custodial rape, or where young women have been kept confined by their families to prevent them from going away with a man they choose to marry and live with;
- Constructed laws, with regard to domestic violence for instance, to be lobbied for acceptance by parliament;
- Held public hearings into the treatment of oustee-women affected by the Maheshwar dam, for instance;
- Conducted surveys, of women's views on the imposition of death penalty for rape, for instance;
- Held consultations on a separate criminal code for women, for instance, or on the issue of cross-border trafficking;
- Organised meetings to mount pressure on issues such as the reservation of seats for women in parliament and the legislatures;
- Intervened in court cases, as where a woman was awarded the death penalty by the Allahabad High Court, and an appeal was made to the Supreme Court.

The Supreme Court has on occasion, asked the NCW to prepare a scheme for the care of victims of rape. Some states, such as Kerala, have also set up a State Commission for Women.

Public Interest Litigation (PIL)

This is a jurisdiction that was sponsored by the court, but which developed with the participation and enterprise of activists and the press. The 1990s have, however, seen an appropriation of this jurisdiction by judges and by lawyers, often acting at cross-purposes with activist concerns. At its inception, the PIL jurisdiction of the High Courts and the Supreme Court, with a relaxed rule of standing and simplified procedure, where even a postcard sent to the court highlighting human rights violations could be converted into a petition was a means of asserting the court's relevance in the human rights arena. The court has used:

- Commissioners to do fact finding.
- Expert agencies to assist in deciding upon a course of action.
- The issuance of directions, and the monitoring of their implementation by the court through report-back methods.
- The involvement of all governments, at the state and the centre, since many of the issues have been systemic, and widespread, e.g., the condition of undertrial populations, or the cleaning up of cities. PIL was conceived as a 'non-adversarial' process, though located within an adversarial judicial system.

In 1988, the Supreme Court asserted its hold over a case, and the cause, even where a public interest petitioner may seek to withdraw the case from the court. The power of the court to reach issues has expanded with PIL, as has the Supreme Court's exercise of its constitutional power to do what it considers necessary in the 'interests of complete justice'. The rights orientation of the court has therefore acquired significance. Conflicts among rights have manifested over time. The use of the courts, and the PIL jurisdiction, by activists, and other public interest petitioners, has come into contention particularly since the Delhi Industries Relocation case, Almitra Patel and the proceedings in the Bombay High Court in the Borivili National Park case. The cradle scheme in Tamil Nadu was initiated by the state government to prevent female infanticide. The midday meal scheme has been a means of reducing malnourishment among children, while bringing them into the schoolroom. Among schemes to improve the status of the girl child, we heard of a government scheme where if a girl child studies up to standard X, the government will pay Rs.10,000 on marriage. In the nature of 'help lines', which are sometimes located within the offices of high-ranking police personnel, we heard of a 'Crime Stopper Control Bureau' in Tamil Nadu. The coopting of NGOs in monitoring and implementing laws, policies and schemes has been routinised in the last decade. It may take the form of

- membership of a commission, such as the Rehabilitation Council of India

- membership of committees set up by the government to make policies, e.g., in the making of a population policy
- appointing NGOs as monitoring agencies, e.g. under the Equal Remuneration Act 1976.
- empowering NGOs to take action under the law, e.g., s. 13 of the JJ Act 1986
- funding NGOs carrying out programmes devised by state agencies, e.g., providing child care facilities for children of women in prostitution
- participating in training of judicial officers and policemen, for instance, in gender issues, matters of human rights, and child rights

In the Janmabhoomi programme of the Andhra Pradesh government, one example of the process of involvement of the people in reviving, or creating, resources - in desilting tanks lying long in disuse, for instance - is achieved through giving work contracts to collectives such as Mahila Mandals. This, however, is not accompanied by a transfer of rights to the local people. The impact this has on the panchayat system may need to be studied. The changes in the role, and autonomy, of the NGOs in relation to the state was adverted to by many respondents, and may need a more systematic appraisal.

Commissions of Inquiry

The appointment of judges to constitute commissions of inquiry under the Commissions of Inquiry Act 1952 is a commonly used device to quell immediate protest and agitation, and to provide a veneer of impartiality to the investigation. This process has lost quite significantly in terms of credibility, since most commission reports come long after the event, and all too often gives a clean chit to the government. The Srikrishna Commission of Inquiry into the Bombay riots of 1992-93 following the demolition of the Babri Masjid is held out by activists as an exception. There is an appropriation by human rights activists of the device of 'Commissions of Inquiry', and this device has been resorted to regularly in the past decade. The legal aid system, now established under the Legal Services Authorities Act 1987, is one potential intervention in the arena of human rights. It however remains litigation-dominated, and is unavailable at the points in the system where human rights violations may occur. The dearth, near-absence, of legal aid available for the victims of the Union Carbide disaster in Bhopal has been represented as one instance of the incapacity, or neglect, of the legal aid system in responding to counselling, litigative and consultative needs of a victim-population.

Press Freedom

The estimates of Reporters Without Borders, India ranks 105th worldwide in press freedom index (press freedom index for India is 29.33 for 2009). The Indian Constitution, while not mentioning the word "press", provides for "the right to freedom of speech and expression" (Article 19(1) a).

However this right is subject to restrictions under subclause (2), whereby this freedom can be restricted for reasons of "sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, preserving decency, preserving morality, in relation to contempt of court, defamation, or incitement to an offence". Laws such as the Official Secrets Act and Prevention of Terrorism Act (POTA) have been used to limit press freedom. Under POTA, person could be detained for up to six months before the police were required to bring charges on allegations for terrorism-related offenses. POTA was repealed in 2004, but was replaced by amendments to UAPA. The Official Secrets Act 1923 remains in effect.

For the first half-century of independence, media control by the state was the major constraint on press freedom. Indira Gandhi famously stated in 1975 that All India Radio is "a Government organ, it is going to remain a Government organ..." With the liberalization starting in the 1990s, private control of media has burgeoned, leading to increasing independence and greater scrutiny of government. Organizations like Tehelka and NDTV have been particularly influential, e.g. in bringing about the resignation of powerful Haryana minister Venod Sharma. In addition, laws like Prasar Bharati act passed in recent years contribute significantly to reducing the control of the press by the government.

Chronology of events regarding human rights in India:

- 1829 - The practice of sati was formally abolished by Governor General William Bentick after years of campaigning by Hindu reform movements such as the Brahmo Samaj of Ram Mohan Roy against this orthodox Hindu funeral custom of self-immolation of widows after the death of their husbands.
- 1929 - Child Marriage Restraint Act, prohibiting marriage of minors under 14 years of age is passed.
- 1947 - India achieves political independence from the British Raj.
- 1950 - The Constitution of India establishes a sovereign democratic republic with universal adult franchise. Part 3 of the Constitution contains a Bill of Fundamental Rights enforceable by the Supreme Court and the High Courts. It also provides for reservations for previously disadvantaged parts in education, employment and political representation.
- 1952 - Criminal Tribes Acts repealed by government, former "criminal tribes" categorized as "denotified" and Habitual Offenders Act (1952) enacted.
- 1955 - Reform of family law concerning Hindus gives more rights to Hindu women.
- 1958 -Armed Forces (Special Powers) Act, 1958-
- 1973 - Supreme Court of India rules in Kesavananda Bharati case that the basic structure of the Constitution (including many fundamental rights) is unalterable by a constitutional amendment.

- 1975-77 - State of Emergency in India - extensive rights violations take place.
- 1978 - SC rules in Menaka Gandhi v. Union of India that the right to life under Article 21 of the Constitution cannot be suspended even in an emergency.
- 1978-Jammu and Kashmir Public Safety Act, 1978.
- 1984 - Operation Blue Star and the subsequent 1984 Anti-Sikh riots.
- 1985-6 - The Shah Bano case, where the Supreme Court recognised the Muslim woman's right to maintenance upon divorce, sparks protests from Muslim clergy. To nullify the decision of the Supreme Court, the Rajiv Gandhi government enacted The Muslim Women (Protection of Rights on Divorce) Act 1986.
- 1989 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 is passed.
- 1989–present - Kashmiri insurgency sees ethnic cleansing of Kashmiri Pandits, desecrating Hindu temples, killing of Hindus and Sikhs, and abductions of foreign tourists and government functionaries.
- 1992 - A constitutional amendment establishes Local Self-Government (Panchayati Raj) as a third tier of governance at the village level, with one-third of the seats reserved for women. Reservations were provided for scheduled castes and tribes as well.
- 1992 - Babri Masjid demolished by Hindu mobs, resulting in riots across the country.
- 1993 - National Human Rights Commission is established under the Protection of Human Rights Act.
- 2001 - Supreme Court passes extensive orders to implement the right to food.
- 2002 - Violence in Gujarat, chiefly targeting its Muslim minority, claims many lives.
- 2005 - A powerful Right to Information Act is passed to give citizen's access to information held by public authorities.
- 2005 - National Rural Employment Guarantee Act (NREGA) guarantees universal right to employment.
- 2006 - Supreme Court orders police reforms in response to the poor human rights record of Indian police.
- 2009 - Delhi High Court delcares that Section 377 of the Indian Penal Code, which outlaws a range of unspecified "unnatural" sex acts, is unconstitutional when applied to homosexual acts between private consenting individuals, effectively decriminalising homosexual relationships in India.