

## **The State of Human Rights and the Limits of Jurisprudence**

Ladies and gentlemen,

At the outset, may I congratulate CHRI on completing 25 years of yeoman service on human rights issues and reforms needed in the human rights discourse. Human rights must be understood in the correct perspective and I believe that CHRI has achieved remarkable success over the last 25 years of its endeavours in contributing significantly to appreciating and understanding human rights. Coincidentally, it was around the same time (1993) that the Protection of Human Rights Act was enacted by Parliament and while the National Human Rights Commission (NHRC) provided a wonderful platform for redressing grievances of violation of human rights and laying down standard operating procedures for dealing with human rights issues, somehow, over the years, the NHRC has floundered a bit and it was recently submitted in the Supreme Court that it is now in the nature of a toothless tiger<sup>1</sup>.

On the other hand, CHRI has grown from strength to strength and has not only debated and discussed human rights issues but has also conducted important and informative studies on human rights, including on prison reforms. This is a traditional area of human rights violations, but very often no one ever comes to know of such violations. In that sense CHRI's venture into these areas and

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<sup>1</sup>Extra-Judicial Execution Victim Families Association v. Union of India, (2016) 14 SCC 536

digging out useful information has made all of us open our eyes and look at human rights violations in not only obvious areas, but also in non-obvious areas.

May I also express my gratitude to CHRI for conferring on me the honour and privilege of delivering the First Annual Lecture, particularly on a subject close to my heart. Thank you CHRI and all those associated with this event. I hope and pray for your continued success.

Continuing on the path laid down by CHRI, I would like to look at human rights in the broad context of violation of rights that we have accepted and acknowledged through the Universal Declaration of Human Rights and some human rights that have been given life through decisions rendered by the Supreme Court.

Broadly speaking, there are four categories of persons, if I may call them so, who benefit from and deserve the benefit of any discussion on human rights. These categories are individuals, communities and groups, victims of crime and finally, society as a victim of human rights violations.

### **Human Rights of Individuals**

Taking the category of individuals, I would include within this category children who are invisible, generally, and are voiceless and silent spectators of violations of their human rights. All of us know that India is a signatory to the Convention on the Rights of the Child, but to what extent are we actually

recognising and implementing the rights of children under this Convention. There are issues pertaining to children that we see all around us almost every day and these include their right to education, their right to nutrition and their right to decent living conditions and so on. I am not talking only about street children or abandoned children, but also children who are wards of the State in that they are accused of having committed a crime and are placed in an Observation Home.

My first visit to an Observation Home in Delhi in 2005/2006 left me completely dumbfounded. During my visit, I found that the Observation Home, which had a capacity of a hundred children actually had more than 250 children living there in conditions that I can only describe as abysmal. I requested the Juvenile Justice Board to review the case of each child and to take a view on how many of them actually deserved to be in the Observation Home. Upon conducting a scrutiny of all children, the number of children living there was reduced to about 48 or so. In other words, more than 200 children who should not have remained in the Observation Home had been living there without anybody giving a thought to their presence, with some of them 5 years out of a possible maximum of 3 years of 'imprisonment'.

Similarly, trafficking of children is an extremely painful topic to discuss. Quite often, children are trafficked by their parents due to poverty and sometimes they are unwittingly trafficked by the parents due to the influence of some relative or friend who is perhaps better off. I had occasion to visit a home where about 20

young girls had been trafficked and were being looked after by the State. One 13-year-old girl had been brought from Calcutta by a relative who had promised her a job but instead she was put in a brothel. She did not know any language other than Bangla and was unable to convey her distress to anybody. She was rescued after several years of confinement in a brothel. Unfortunately, all efforts to restore her to her family have failed. There are hundreds of such instances occurring on an everyday basis and it is time that we paid attention to the human rights of children.

Recently, the Supreme Court had to deal with the issue of child brides and whether sexual intercourse with such a minor would amount to the punishable offence of rape.<sup>2</sup> The question was answered in the affirmative by harmonizing the provisions of the Indian Penal Code and the Prevention of Children from Sexual Offences Act, 2012 and protecting the human rights of minor girls.

### **Rights of women**

We often discuss gender justice and the rights of women. Cases of domestic violence surface every day, and many of these women have no recourse to any judicial remedy. Sexual harassment at the workplace is another area where there is a gross violation of the human rights of women and the #MeToo movement indicates that the violations are widespread. Sexual harassment at the workplace was recognised by the Supreme Court, way back in 1997, in the Vishaka

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<sup>2</sup>Independent Thought v. Union of India, (2017) 10 SCC 800

judgment<sup>3</sup> but it took Parliament more than 15 years to wake up to the problem and enact the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The response has been too little and too late. Indeed, there are still hundreds of enterprises that have not yet set up prevention of sexual harassment committees.

Surprisingly, even at the level of the Supreme Court, the Gender Sensitization Committee was constituted only after the law was enacted by Parliament. I was nominated to be a member of this Committee by the Chief Justice of India and had occasion to deal with complaints of stalking and harassment of female advocates and to recommend the punishment of an offender.

Demands for dowry have not decreased despite stringent laws having been passed by Parliament and convictions are few and far between. It is only when a bride is burnt or otherwise killed that society wakes up and the criminal investigation system wakes up, but again a conviction takes many years. We also have cases of acid attacks, which again are a gross violation of the human rights of women; we have cases of honour killings and many other issues concerning women. I have had occasion to deal with the case of a young bride from Punjab, who was killed at the instance of her mother and her maternal uncle, both of whom are residents of Canada. Therefore, it is not as if such crimes are committed

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<sup>3</sup>Vishaka v. State of Rajasthan, (1997) 6 SCC 241

locally - they can even be masterminded from outside India. I may add that the Internet informs that the extradition of the mother and the maternal uncle has still not taken place.

Speaking of the Internet, it seems to me that women are now being targeted and their human rights violated through cybercrimes such as cyber-stalking, malicious posts on social media platforms and circulation of #highly objectionable videos. The Government of India has taken up the issue of cyber-security as a result of a letter petition sent by an NGO called Prajwala of which cognizance was taken by the Supreme Court. But the question to be asked is, is this enough? Is it not possible for the Government to wake up in time and be prepared for the worst rather than be reactive?

### **Rights of widows**

The human rights of widows are another subject where the Supreme Court has had to intervene. An article in a newspaper had highlighted the dismal living conditions of widows in Vrindavan. Nobody seems to have cared for them and it was reported that many of them were either found begging or chanting prayers in temples, so that they could get some food to eat. The State Government did not seem to be particularly bothered about this violation of human rights and unfortunately even statutory bodies established to protect the rights of women showed little or no concern. Ultimately, the Supreme Court had to rely upon NGOs, the District Legal Services Authority and a handful of dedicated officers

who appreciated the magnitude of the violations and felt it appropriate to intervene and make life better for the widows.<sup>4</sup>I am glad to say that a short film on the widows of Vrindavan was broadcast on Holi last week which showed that the living conditions of these widows has considerably improved and I have been given to understand that they are now far better placed than they were a few years ago when their plight was brought to the notice of the Supreme Court. A large number of people have spent their time and energy on a voluntary basis to help these widows, not only in Vrindavan, but also in some other cities such as Varanasi and they need to be congratulated.

### **Rights of others**

There are several other categories of individuals whose human rights are being violated on a day-to-day basis and which need attention not only from the State, but support from the State.NGOs and other civil society organisations are doing a wonderful job in restoring their dignity to a variety of such individuals, including senior citizens falling within the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and persons with disabilities, falling within the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

### **Rights of communities and groups**

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<sup>4</sup>Environment and Consumer Protection Foundation v. Union of India, 2017 SCC on Line SC 916

The second category of persons who need the protection of human rights are vulnerable communities and groups. Within this category, I would include tribal communities and particularly vulnerable tribal groups. There are provisions in our Constitution that protect the rights, social practices and customs of tribal communities and their system of administration through Schedule 5 and Schedule 6 of the Constitution. But what is of concern is the human rights of particularly vulnerable tribal groups. There are 78 such communities in 18 different States of the country. There are some tribal communities that are fairly close to extinction and even though Tribal Research Centres across the country are documenting their lifestyle, their language and carrying out anthropological studies, we have to, very sadly admit that some of these particularly vulnerable tribal groups will no longer be a part of us in the next few years and certainly in the next few decades. Of course, members of these particularly vulnerable tribal groups individually have human rights too, but what is more important is that as a community, they have rights which need to be recognised.

I have had occasion to interact with one such particularly vulnerable tribal group who suffered tremendously at the hands of the colonial power, who took away their lands. Their number is gradually shrinking due to problems faced by the younger members of this community who are unable to adjust to the new environment, get employment and therefore tend to turn to alcohol and substance abuse. I have in mind the Todas of Tamil Nadu but there are several such groups



particularly in the Andaman Islands. The question of access to justice for these tribal groups is something that does not arise and even if they do have access to justice, I am not very sure whether the State would go to any great length to protect their culture, their way of living, and indeed their society.

Community rights are also recognised by the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Some of these community rights include grazing rights, rights over water bodies, including fishing rights and the right to take advantage of minor forest produce. However, again, there is the question of the recognition of these rights. Several years ago, I was informed by the then Chief Justice of the Madhya Pradesh High Court that as many as 50,000 cases were pending against traditional forest dwellers only because they had collected fallen sticks and branches for cooking purposes. Alarmed at this extraordinarily large number of cases, it was realised that there was a lack of understanding and education of the rights of the original forest dwellers amongst the forest guards and even the district administration. Fortunately, the Chief Justice was proactive and took up the matter with the concerned authorities, including the Director-General of Police and they were persuaded to withdraw all the prosecutions. It is these vulnerable groups and communities that are most neglected and perhaps the most exploited, but it is occasional proactive intervention that makes a difference in the understanding of the human rights of such communities who have no idea about

laws enacted by Parliament and who innocently violate the law as per the understanding of more civilised officials.

## **Rights of Prisoners**

Prisoners are another vulnerable group whose human rights are consistently trampled upon by prison authorities and the State. It took two persons convicted of serious crimes to bring to the notice of the Supreme Court that even prisoners have fundamental rights though the exercise of those rights is limited due to the situation they are in. Sunil Batra and Charles Sobhraj were instrumental in highlighting the plight of prisoners, both convicts and under trials in Tihar Jail. The Supreme Court intervened on their behalf and set off a chain of events that led to the recognition of the human rights of prisoners by abolishing bar fetters and solitary confinement. CHRI has carried out extensive studies on prison reforms and has itself been instrumental in bringing about a change for the better. Unfortunately, there is still a long way to go for more meaningful reforms.

A few years ago, a former Chief Justice of India Justice Lahoti, sent a letter to the Chief Justice of India highlighting the extremely sorry state of living conditions of prisoners. Among the issues highlighted by Justice Lahoti were those of overcrowding and custodial deaths. Directions have been given by the Supreme Court after hearing all parties and it does appear that some progress has

been made, but there are still so many prisons in the country where the capacity has crossed more than 150% and, in some cases, more than 200%.<sup>5</sup>

Custodial deaths in prisons are by the dozen. There are several reasons for such custodial deaths, including natural causes, but there are a large number of suicides, which are caused by depression, intimidation and browbeating by fellow prisoners, lack of adequate medical care and attention and a few other factors. It is necessary to appreciate that even the most hardened criminal has human rights and as pointed out by the Supreme Court, some fundamental rights are restricted and some are not available, but that does not mean that the basic right to live a life of dignity, even in a prison is not available to a prisoner. What is worse is that under trial prisoners who have not yet been convicted of an offence and are only accused of an offence or are suspects also have their human rights trampled upon. Under trial review committees are said to be operational in every district of the country, but I have reservations about their efficacy and the effectiveness of their deliberations. There is no doubt a humongous task ahead of all of us, but merely because the task of preserving and protecting the human rights of incarcerated individuals, who, in a sense, form a vulnerable group, does not mean that we should overlook their rights. Among the more vulnerable prisoners are women prisoners, many of whom have perforce to bring their children to prison so that they can be given some motherly care. These children have not committed

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<sup>5</sup>Inhuman conditions in 1382 prisons, (2016) 3 SCC 700

any offence except perhaps the offence of being born to a woman who is in custody, but they too have to suffer incarceration, at least for a few years, if not more. Do these women and children not have any human rights? Are we not expected to show some concern for them as well?

As far as the rights of communities or groups being vulnerable sections of society are concerned, I would also place within that category the LGBTQ community and particularly the transgender community. The Supreme Court took a great leap forward when it recognised the rights of transgenders in a petition filed by the National Legal Services Authority.<sup>6</sup> The Supreme Court recognised members of the transgender community as persons who have the same rights as anyone else. Fortunately, the State has taken some steps to recognise their rights and has added a box called third gender in some application forms, but I am not sure whether society has fully accepted the rights of transgenders or has recognised them as persons. In any event, there is some recognition of their human rights. I may mention that transgenders were classified as criminal tribe through a colonial era legislation, which continued till about 1949 and it is perhaps this long period that has made acceptance by society a little slow.

However, when it came to the rights of gays and the interpretation of section 377 of the Indian Penal Code, the Supreme Court took a backward step. The issue is now very much alive thanks to a curative petition having been filed

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<sup>6</sup>NALSA v. Union of India, (2014) 5 SCC 438

and entertained by the Supreme Court. However, it would not be proper for me to make any comment with regard to the earlier decision of the Supreme Court and its impact on the human rights of members of the gay community.

There are other disadvantaged sections of society, as communities and groups, who have human rights that are not only individual but also collective and I believe that the time has come for all of us to recognise and appreciate community and group rights which have so far been relegated to the background, but which need to be recognised through the justice system and not through morchas and bandhs organised by members of that group or community. Such activities only lead to disorder in society and occasionally to violence. It is my view that the human rights of communities and groups need an open discussion and they cannot be resolved through a march to India Gate or a dharna at Jantar Mantar. We need a constructive reaction and not a passive understanding. Of course, this is easier said than done, but the success of the human rights movement is itself a challenge that must be addressed head on.

### **Rights of victims of crime**

The third category of persons whose human rights need to be addressed are victims of crime or victims of circumstances, not of their making. Our jurisprudence has not sufficiently developed in regard to the rights of victims and some of the decisions of the Supreme Court are quite ad hoc and a little uncertain. For example, a Bangladeshi woman was raped in railway guesthouse in Calcutta

and in the case of Chandrima Das,<sup>7</sup> the Supreme Court upheld an award of Rs. 10 lakhs as damages to her as a public law remedy. This was in 2000. Much later, in 2014, a woman was gang raped on the orders of a village kangaroo court and the Supreme Court thought it appropriate to award her Rs. 5 lakhs as damages in addition to an amount of Rs. 50,000 given to her by the State Government.<sup>8</sup> It is this ad hoc jurisprudence that is a little worrying, particularly when it comes to issues of human rights and adequate compensation for violation of human rights.

If a deliberate action, such as a rape results in the invocation of a public law remedy and grant of compensation to the victim, should this principle be extended to other crimes which have equally serious, if not more serious consequences, such as murder? In the case of a murder the victim sometimes leaves behind a widow and children. Do they deserve some compensation from the State? How are the widow and her children expected to manage their affairs when the breadwinner has been murdered due to some rivalry over land or due to some other cause? Are they in any way better placed than a raped woman? All such cases relate to the right to life and livelihood. If everyone is compensated for a crime is it not possible that the country would go bankrupt? Is a working social security system a better option? It is for finding out appropriate answers to questions like these that there is a need to have an informed discussion on

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<sup>7</sup>Railway Board v. Chandrima Das, (2000) 2 SCC 465

<sup>8</sup> Gang Rape ordered by Village Kangaroo Court, (2014) 4 SCC 786

human rights and compensation for violations of human rights, rather than develop an ad hoc jurisprudence.

At this stage, I may mention that there have been allegations of a large number of extra-judicial killings or encounter killings that have taken place over the years in different parts of the country, and some more recently. There are allegations of encounter killings in the State of Manipur which are being investigated by the CBI, but what is more important for our consideration is that in most of such alleged encounter killings, compensation has been awarded to the family of the victim to the tune of Rs. 3 lakhs and in some cases Rs. 5 lakhs and perhaps slightly more. How does one balance the compensation and arrive at some sort of an equitable solution?

Victims of some other crimes such as acid attacks are duly compensated and they should be, but the view that I would like the canvas is that reparations for violations of human rights need to be discussed from a jurisprudential point of view and knee jerk decisions should be avoided. Case to case decisions do not develop the law but could in some situations cause heartburn and a loss of confidence in the justice delivery system.

Recently in a public interest litigation, the amicus curiae, along with NALSA has framed some guidelines for award of compensation to victims.<sup>9</sup> These are up for comments, suggestions and consideration on the website

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<sup>9</sup>Nipum Saxena v. Union of India

ofNALSA and I would urge the august audience to consider these guidelines so that some meaningful and rational steps are taken for compensating victims of crime. It is only when we arrive at some system of award of compensation for violations of human rights that there will be some progress in victimology and a sense of justice as far as the victims or their representatives are concerned.

### **Rights of society**

The fourth category that I would like to draw attention to is the human rights of society as a whole. Society has certain defensive rights, such as protection against crime, protection against abuse of power and generally issues of safety. These defensive rights are of course available to every individual but are also available to society as a whole. For example, society is entitled to believe that it will be protected against crime and if a crime is committed against any member of society, it will be fairly investigated and prosecuted. Quite often this expectation is belied when, despite a decision of the Constitution Bench of the Supreme Court, a first information report is not registered or is registered after considerable delay and persuasion.<sup>10</sup>The right to have a fair investigation, therefore is completely defeated by the inaction of the police, much to the detriment of society as a whole. Sometimes the police do not register cases such as rape, only to give the impression that society within the jurisdiction of the

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<sup>10</sup>Lalita Kumari v. Government of U.P. (2014) 2 SCC 1



police station is quite safe. Clearly, this is impermissible, but nevertheless it happens, and we all know it.

Abuse of power and consequent violation of the human rights of society is usually the result of the high-handedness of influential members of society - persons having political clout or financial clout or plain and simple muscle power. It is the brazen abuse of power that society has to watch out for because some individuals may be the victims of abuse of power but the larger impact is felt by society as a whole and if the State does not recognise such defensive rights of society and enforce the Rule of Law, we will slip back into the era of jungle raj.

On the other hand, there are certain human rights that society as a whole, asserts even though they may not be written in any Constitution or in the Universal Declaration of Human Rights. I am referring to the right to a clean environment where air and water is unpolluted and each one of us in society can breathe such air without contracting any infection in the lungs and drink water that does not cause any gastric disorders. Environmental jurisprudence in India has developed through orders passed by the Supreme Court, way back in the 1980s, giving an expansive interpretation to environment. Among the first few cases that set the trend for environment-based litigation was a petition initiated at the instance of the Rural Litigation Entitlement Kendra.<sup>11</sup>In this case, it was pointed out by the petitioner that there was indiscriminate quarrying of limestone

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<sup>11</sup> 1986 Supp. SCC 517

in the Mussoorie hills and that caused the air in Dehra Doon to become polluted. The Supreme Court verified the allegations through the appointment of a series of committees and eventually directed the stoppage of limestone quarrying in the Mussoorie hills.

But the tussle between development and environment continues without any end in the near future. What is forgotten by the State is that development must be sustainable and not development in such a manner that inter-generational equity is forgotten. Development as a goal is certainly welcome and is not intended only for one generation, but for several generations. Therefore, it is necessary to give a thought to issues of inter-generational equity so that future generations are thankful for the sustainable development that has taken place. Undoubtedly, a developed welfare society is tied up with the human right of livelihood and dignity and must be encouraged, but at the same time, thought must be given to the human rights of those that follow.

There are other human rights that are asserted by society as a whole. For example, there is the right to food or the right of every employee to get a living wage or the right to adequate and affordable medical treatment or the right to a home or shelter. We often talk about roti, kapdaaurmakan, but these do not find any mention in the chapter on fundamental rights in our Constitution, nor do they find any mention in the Universal Declaration of Human Rights, but they are nevertheless human rights that are a part of social justice and equity.

## **Access to justice**

Having acknowledged some defensive rights and some rights that need to be asserted, the question that stares us in the face is access to justice. How can we enforce these rights? As mentioned above, the jurisprudence in this regard is still evolving and is unfortunately ad hoc in some respects. There is some jurisprudence of recognition of the human rights of vulnerable sections of society, there is some recognition of social justice issues, and more recently of recognition of some rights that do not form part of conventional jurisprudence, such as the right to privacy and euthanasia. There are also certain customs or practices that infringe upon human rights and which need a rethink and to some extent, the Supreme Court has dealt with some of them, particularly in the case of triple talaq and the Bombay High Court has dealt with it in the case of entry of women in a dargah and in a temple. There are however some so-called historical rights that have not yet been addressed by the Supreme Court as, for example, the right to celebrate a cockfight or jallikattu. I am sure these will be addressed in due course of time, but until then the debate on whether these are in fact rights or privileges enjoyed by some people in society will continue.

The jurisprudence of rights has taken the shape of public interest litigation in India but this has often been criticised as judicial activism. In my view, the criticism is totally unjustified and the reason is that if the State does not recognise certain human rights or statutory rights, surely someone has to intervene on behalf

of the citizens. If the judiciary remains a silent spectator and does not devise or innovate some methodology for intervention, it will be failing in its constitutional obligation to preserve and protect the rights of the citizens of India. The evolution of our democracy and constitutional jurisprudence is interlinked and if there is a failure in performance of its duties by the State, the judiciary must intervene and this is often pejoratively referred to as judicial activism. In fact, it is a judicial necessity caused by inactivity of the State.

For effective justice delivery and a constitutional mechanism to provide justice to everybody, there are three vital ingredients that must be in place. The first is an independent judiciary. If the judiciary is not independent, there is no check on the Legislature or the Executive and that is why the struggle throughout our history has been one for maintaining independence from these two pillars of democracy. Constitutional limits have been transgressed by Parliament as well as State Legislatures and such legislations have been struck down by the courts. This is not something new, but goes back to more than 200 years when the Supreme Court of the United States explained the scope of judicial review and constitutional theory in *Marbury versus Madison* decided in 1803.<sup>12</sup> Our Supreme Court has gone a step further and has evolved the theory of the basic structure of the Constitution whereby even an amendment to the Constitution can be struck down as being violative of the basic structure, thereby preserving the essentials

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<sup>12</sup> 5 U.S. (1 Cranch) 137

of a sovereign democratic republic. It is not necessary to dilate on the need for an independent judiciary, as long as it is appreciated that an independent judiciary is one of the pillars of democracy.

What is equally important is transparency in the judiciary and by this, I mean not only transparency in the appointment process, but also in the everyday functioning of the justice delivery system. An attempt to take away the independence of the judiciary through an amendment to the Constitution by bringing in a national judicial appointments committee was struck down by the Supreme Court, since it violated the basic structure of the Constitution. The Supreme Court was candid enough to admit that the existing collegium system needed some changes, including establishing a Secretariat that would provide necessary inputs to the collegium, and even otherwise bring in some openness in judicial appointments. I do not wish to go into the details of why an effective Secretariat has not been established or its duties and responsibilities – but the fact remains that there is no Secretariat worth the name to assist the collegium.

As far as the day-to-day functioning of the Supreme Court is concerned, or for that matter, the functioning of High Courts is concerned, all hearings are open to the public and there is no secrecy involved in this decision-making process. There are views expressed about telecasting court proceedings, but that may perhaps have to wait for sustainable technological changes.

Finally, apart from independence and transparency what is necessary for effective justice delivery is accountability of the judges hearing a case, which is to say that the judge should be unbiased and impartial and there should not be any conflict of interest. In the recent past we have had some allegations of unfairness in the appointment procedure as well as some allegations relating to erratic decisions rendered by some judges, but these are few and far between. I believe that any system which opens up in a transparent manner and makes itself accountable to society will certainly find itself on the back foot on a couple of occasions, but that should not deter our justice delivery system from carrying the trishul of independence, transparency and accountability.<sup>13</sup>

What are the obstacles that our justice delivery system faces in the evolution and sustenance of human rights jurisprudence? Some of the more common criticisms of justice delivery are delays in disposal of cases and it is often said that expeditious delivery of justice is a human right. I do not doubt that, nor do I wish to proffer any excuse for delays in justice delivery. However, it is necessary to point out certain challenges faced by the judiciary, particularly in cases relating to human rights and social justice. The primary challenge is that of implementation of laws enacted by Parliament. There are instances where there have been unconscionable delays in implementing parliamentary statutes. For example, Child Welfare Committees have not been established in some districts

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<sup>13</sup>I acknowledge the thought provoking article 'The Judicial Trilemma' by Jeffrey L. Dunoff and Mark A. Pollock in the April 2017 edition of the American Journal of International Law.

in the country, even though that was the mandate of the Juvenile Justice Act, way back in 2000 and reiterated in 2015. Similarly, State Food Commissions have not been constituted in some States, despite the mandate of the National Food Security Act, 2013. Yet another example is the failure of State Governments to set up institutions under the Building and Other Construction Workers (Regulation of Employment and Other Conditions of Service) Act, 1996. The non-implementation of welfare statutes directly impinges upon the human rights of the beneficiaries. Our constitutional jurisprudence does not permit the courts to sit with folded hands and in a helpless manner when there is a violation of human rights. There is yet another challenge and which I have adverted to above is the non-registration of first information reports. What is a citizen to do if the police decline to register a first information report in the case of a heinous crime such as rape? The failure to set the criminal investigation machinery by the State is itself a violation of human rights and yet there is enough anecdotal evidence to suggest that non-registration of first information reports is quite frequent.

Yet another obstacle in access to justice is the recent phenomenon of keeping recommendations to judicial and quasi-judicial positions pending indefinitely. Appointment of judges to Courts and Tribunals are not being addressed with the promptitude they deserve. It is easy to blame the judiciary or the collegium system but we need to be clear that you certainly cannot clap with one hand.

Even though we have theoretical access to justice and a developing human rights jurisprudence, there is a need to address accessibility to justice. By this I mean to ask: are we providing justice-oriented procedures and support systems such as infrastructure and good quality representation? Times are changing and we need to change with the times and our jurisprudence must not be limited by the past. There is a dire need to look at some of the modern facilities that are available to us, such as advanced technology and improved infrastructure in the form of video-conferencing. Today there is considerable discussion on child friendly courts so that juveniles in conflict with law and child victims, particularly victims of child sexual abuse are kept away from a hostile court environment. Similarly, there are women and children who have been victims of sexual crimes and will need to testify in courts. For them, vulnerable witness courts are necessary and in fact, in some places that I am aware of, child friendly courts double up as vulnerable witness courts. These are some changes that may not directly impact on the development of jurisprudence, but they do have a long-term in direct impact on justice delivery which in turn can make for better justice, particularly in respect of vulnerable persons.

Accessibility to justice also includes physical access. How many of our courts are disabled friendly and how many of our courts can be easily accessed by illiterate or semi-literate litigants? While access to justice is certainly a human right, accessibility to justice is equally a human right that must be addressed,



recognised and appreciated. Changes brought about in accessibility to justice will certainly bring in some degree of timeliness in disposal of cases and expeditious justice to the litigants, which are recognized human rights.

We also need to look at the quality of representation that is made available to litigants. Sometimes it is said that legal aid for the poor is actually poor legal aid. As the person in charge of the Supreme Court Legal Services Committee, I am willing to confess that there are several changes that need to be brought about to make access to justice a reality. CHRI is assisting the Committee on some aspects of software development and hopefully things will improve in due course of time. Nevertheless, the concern remains one of providing effective access through effective representation.

What is the way forward in the recognition and implementation of the human right to expeditious justice? We need to seriously consider case management, a topic that has been discussed for more than a decade but with no effective result. We also need to discuss issues of judicial impact assessment through the introduction of new statutes. There was a time when the justice delivery system was virtually crippled by hundreds and thousands of cases relating to check bounce, due to the introduction of the Negotiable Instruments Act. The wounds inflicted on justice delivery as a result of this particular statute have not yet healed. Stringent laws such as the Narcotic Drugs and Psychotropic Substances Act have resulted in the loss of personal liberty of a large number of

persons through denial of bail and this has also complicated issues of human rights and justice delivery. There is therefore a clear need for introducing a judicial impact assessment whenever a law is tabled in Parliament.

Judicial reforms must be sustained and institutionalisation of procedures, including process re-engineering, with the introduction of technology and computers in the justice delivery system need serious consideration. Profound and systemic changes are required to be made so that violations of human rights, particularly in cases of personal liberty, such as grant or denial of bail, the release of under trial prisoners and cases relating to the provision of social justice to vulnerable sections of society are addressed. Our jurisprudence and constitutionalism can develop only if the pillars of democracy work towards a common goal and do not work towards damaging or destroying one another. The time has come for us to stand up and be counted.

Thank you and God bless.