FROM PROCLAIMING TO REALIZING HUMAN RIGHTS -- AN INDIAN PERSPECTIVE

Rishabh Jogani, Government Law College, Mumbai
Human rights, or droits de l’homme, dechos humanos, menschenrechte, and the rights of man, are, literally, the rights one has because one is human. There are two sets of rights - civil and political rights, and social and economic rights, each as important as the other. Deprivation of either set would defeat the very essence and purpose of the concept of human rights. Man is not provided with these rights. Rather, he possesses them since birth. To have a right to something means to be entitled to it - it is owed to you, belongs to you in particular. If it is denied, then you are allowed to make a claim for its protection. The State, in turn, must do what is necessary to ensure that a man can freely enjoy his own rights. This article explains how the world has moved from proclaiming to realizing basic human rights, and then examines India’s efforts to live up to its own constitutional human rights mandates, taking into consideration India’s practical and economic realities.

A New Dawn in Human Rights

Any discourse on human rights would be incomplete without mention of the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. The Universal Declaration of Human Rights was the first global effort for the actual realization of human rights and, thus, represented a new dawn in the discourse of human rights. It enumerated rights that are fundamental to all human beings, such as the right to life, liberty, security of person, equality and dignity, a fair trial, a nationality, freedom of thought, conscience and religion, freedom of opinion and expression, to work, to free choice of employment, to just and favorable conditions of work and protection against unemployment, and to education. These rights were declared to be an inalienable part of every person.

The Declaration, however, only proclaims human rights in theory. Those rights may not be realized unless a mechanism is put in place for their protection. Many believe that a proclamation is the first step towards actual realization. According to B.R. Munro, “The Universal Declaration could be proclaimed by a body representative of most of the world’s states is a remarkable achievement and worthy of celebration.” According to M. Faghfoory, “The moral appeal of the declaration is its greatest achievement.” The Declaration has inspired many nations to include human rights in their constitutions and domestic laws. Different regional organizations also have adopted the Declaration as part of their charters.

Enforcement and Protection of Rights Around the World

Before we look at how human rights are protected in India it would be meaningful to know how these rights are enforced the world over. There exist many international agreements, treaties, covenants, and conventions concerning human rights. They provide for certain remedies for the enforcement of human rights. The remedies may be legal, extra-legal, charter-based, treaty-based, or pursuant to customary international law. As an example, one may seek redress before the International Court of Justice ("ICJ") established under the United Nations Charter. The ICJ may provide advisory opinions regarding human rights issues or "address human rights issues by interpreting conventions incumbent upon states or by evaluating state conduct implicating human rights concerns.”
ICJ also can order a State to desist from a particular action that in its opinion violates human rights as enshrined in the Declaration. In addition to the ICJ, one may seek redress before the International Criminal Court ("ICC") established by the Rome Statute. “The Court has jurisdiction in accordance with the Statute with respect to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.” The ICC has the power to summon a violator and to bring him before it.

Along with the ICJ and the ICC, certain countries have their own domestic courts that are competent to try cases for human rights violations. The domestic courts in fact have been the best and most successful enforcers of human rights because their orders have the force of law in their respective nations and territories, and local governments and agencies are bound by their constitutional provisions to obey and enforce them. Domestic courts of many countries have played an instrumental part in enforcing human rights provisions and upholding them for decades.

Besides judicial methods for enforcement of human rights, there exist extralegal measures for the protection of the same, such as the Security Council of the United Nations. “The Security Council may react to gross human rights abuse through a number of non-coercive measures,” such as non-binding resolutions and “peace keeping operations.” As a coercive measure, the Security Council is authorized to order economic sanctions, as well as military action, against a state. Before 1986, the United Nations Commission on Human Rights, which reported to the United Nations Economic and Social Council ("ECOSOC"), considered human rights complaints through its sub-commission, and appointed special rapporteurs to several countries to investigate human rights abuses. If substantial human rights abuses were found, then it would make a recommendation to the ECOSOC. On March 15, 2006, the Human Rights Commission was replaced by the United Nations Human Rights Council ("UNHRC"), which reports directly to the General Assembly. The UNHRC may only make recommendations to the General Assembly. Additionally, through General Assembly Resolution 48/141, 1993, the Office of the High Commissioner of Human Rights ("OHCHR") was established. “As the principal United Nations office mandated to promote and protect human rights for all,” the OHCHR leads global human rights efforts and speaks out objectively in the face of human rights violations worldwide.

Most international human rights agreements establish their own enforcement systems, albeit subject to state governance. A state may choose what part of an international agreement it agrees with or accepts to be bound by and what part it does not submit itself to, keeping with the notion of state sovereignty. The enforcement bodies are committees of independent experts that monitor implementation of the core international human rights treaties and are created by the treaty that they monitor. The expert committees serve different functions: doing justice in individual cases, creating a deterrent and encouraging behavior modification, and interpreting and explaining human rights law beyond the individual case or particular set of state actors. The treaty bodies may ask for periodic state reports on human rights issues, entertain interstate and even individual complaints, and conduct inquiries. The effectiveness of treaty bodies can ultimately be measured in relation to the different purposes they set out to achieve.” There exist many treaty bodies that have done substantial work in the field of human rights, such as the Commission on the Elimination of Racial Discrimination, the Commission on the Elimination of Discrimination Against
Women, and the Committee Against Torture.

Customary international law is another international system that protects human rights. It is accepted by the ICJ and the ICC, and is binding on all nations except a state that is a persistent objector. There also exist certain high standards of norms called “jus cogens.” Even a persistent objector is bound by them, as they aim to protect basic human dignity.

The Indian Perspective on Human Rights Enforcement

India has staked out its own position in the world of human rights. India’s Constitution guarantees the civil and political rights enshrined in international agreements and declarations such as the United Nations Declaration of Human Rights, and mandates the State to enforce and protect such rights. However, it does not bind the State to protect economic and social rights; rather, it lists them as a Directive Principle of State Policy, which the State cannot be forced to obey but is only guided to follow. One of the possible reasons for this distinction is that civil and political rights are what the people need to be assured of now to participate in a liberal constitutional democracy. On the other hand, it is impracticable for a developing nation like India to immediately guarantee economic and social rights. The framers of India’s Constitution have chosen the middle path between the ideal and the practicable. Sadly, the Constitution (Article 37) does not precisely define how and when the State must provide economic and social rights to the populace; rather, it provides ideals (see, the Chapter on Directive Principles of State Policy) and states that it shall be the duty of the State to apply these principles in making law.

The average citizen, the poor man on the street, and the debt ridden farmer is most interested in economic rights such as the right to work, education, public assistance, or a living wage and conditions of work ensuring a decent standard of life. However, a mere constitutional guarantee is ineffective if the State is not in the financial position to provide such rights. The poor and hungry remain poor and hungry irrespective of a Constitutional right to basic economic security because the State is practically unable to provide for them. India’s situation as far as economic and social rights are concerned can only improve once the governance of the country has the machinery and ability to truly do something. That would require a focused government with strong and effective administration. The Government has taken some steps in the right direction to ensure economic and social rights, such as passing the Workmen’s Compensation Act, which protects the rights of workmen and provides compensation for disability arising out of employment, and providing for a public distribution system for food-grains and other essential commodities to indigent persons at subsidized rates. However, much more remains to be done.


The courts have exercised this power on many occasions. In Minerva Mills v. Union of India AIR, 1980 S.C. 1789, the Supreme Court struck down a Constitutional Amendment by which Parliament had given itself an absolute power to amend the Constitution, including fundamental rights, without any limitations, and any law made by Parliament for the furtherance of fundamental rights could not be challenged in any Court of India. The Court held that Parliament had limited amending power.
and it could not in exercise of that limited power give itself unlimited power. In *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, Mrs. Gandhi’s passport was impounded without any reason or justification. Mrs. Gandhi sought relief in the court, arguing that her right to life and personal liberty (under Article 21) and her right to free speech (under article 19) were violated because she was being prevented from traveling outside the country without a reason. The Court agreed. In *Keshavan v. State of Bombay*, AIR 1951 S.C. 228, the Supreme Court held that anything done under an unconstitutional law was wholly illegal and the Government could not claim immunity and privilege from such a law. Recently, in the *Naz Foundation* case [WP(C) No.7455/2001], the Delhi High Court considered whether sexual intercourse between two consenting adults could be punishable under Section 377 of the Indian Penal Code which criminalizes ‘unnatural sex,’ which it defines as [provide definition provided in Indian Penal Code]. The Court held that such a provision would violate the fundamental rights of the people under articles 14 (equality before the law), 15(prohibition of discrimination based on religion, race, caste, sex, or place of birth) and 21 (protection of life and personal liberty) of the Constitution of India.

The Supreme Court (under Article 32 of the Constitution) and the various High Courts of the States (under Article 226 of the Constitution) may issue writs, or orders, to mandate the State either to take steps to protect a particular right or to desist from engaging in an act that would abridge a fundamental right of the Constitution.

In 1993, the Indian Parliament enacted the ‘Protection of Human Rights Act’ for the establishment of human rights commissions at the national, state and district levels. This Act does not necessarily provide for the protection of rights, but merely establishes commissions and their jurisdictional limits. The commissions are given hardly any power by the Act; they can simply issue recommendations to the concerned governmental agencies against which there exists a complaint. The recommendations, however, are not as powerful or binding as an order of a Court. The states have created commissions but have not given them any power or authority to force the government to protect human rights. State level commissions are established by state governments, many of which have dragged their feet. For instance, the State of Maharashtra only formed its own Human Rights Commission after the Bombay High Court directed it “to constitute the Maharashtra State Human Rights Commission immediately to perform its pronounced duties in the Act” in the case of *People’s Union for Civil Liberties & others v. The State of Maharashtra & others*, 1999(4)Bom CR 608. In the State of Uttar Pradesh, as observed by the High Court of Allahabad in 2000 (1) AWC 729, it was only pursuant to the orders passed by the High Court in C.M.W.P. No. 32984 of 1994, *Uttarakhand Sangharsh Samiti, Mussoorie v. State of U. P.*, State Human Rights Commission was constituted. However, no members were appointed to the Commission and it existed merely on paper, until the Allahabad High Courts’ subsequent decision in the People’s Union for Civil Liberties Case.

The Government of India also has created schemes like the National Rural Employment Guarantee Scheme, which provides employment to one member of a rural household helping the masses of India’s rural villages, and the Mid-day Meal Scheme, which provides one free cooked meal everyday to children going to government schools throughout the county, ensuring that they receive nutrition and attend school. These two schemes have been very widely implemented and have been very helpful in helping the people obtain their economic rights. The Government of India also decided to write
off the interest on loans taken by farmers for agricultural purposes in the State of Maharashtra, largely in response to recent suicides by debt ridden farmers in that state.

India has ratified most international treaties, but has refused to submit itself to international inspection. The Constitution of India mandates that the State protect the same rights listed in the Universal Declaration or International Covenant on Civil and Political Rights. Although the State is bound by its own domestic law to protect the fundamental rights of its people, India has chosen not to ratify an optional protocol to the Covenant, which would make it answerable to an international court.

There exist many international organizations, mechanisms, treaties, and courts for the enforcement of human rights. It can be safely said that a lot has been done in the field of human rights but there is still a very long way to go and the path from proclaiming to realizing human rights, for the world and for India in particular, can be only forged through an honest and whole hearted approach by the State, which must relinquish its own protective stance and provide its people their fundamental and inalienable human rights.

*Rishabh Jogani is a third year student at the Government Law College, Mumbai and may be contacted by email at rishabhjogani@gmail.com.*