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Comment: Political Din Eclipses Human Rights Concerns in India

COMMENT: POLITICAL DIN ECLIPSES HUMAN RIGHTS CONCERNS IN INDIA

by

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The office of the OHCHR (Office of the United Nations High Commissioner for Human Rights) mandated to promote and protect human rights, released a report on the situation of human rights in Jammu and Kashmir¹. It was a first of its kind report on assessment of human rights violations on both sides of the Line of Control albeit the primary focus was on the Indian side in the period from July 2016 to April 2018. The Report, with its scathing attack on various Indian laws and policies that it held responsible for human rights abuses in Jammu and Kashmir, did not go down too well with the Indian political dispensation. In keeping with the brusque rejection of the report by the Indian Government, most of the Indian media also limited itself to faulting the report on its methodology and the terminology.² And in the political din, which invariably always surrounds Kashmir, human rights dimensions of the seventeen recommendations, made by the report to the Indian Authorities were conveniently ignored. This may eventually have a debilitating impact on the human rights discourse across India, more so in the times we live in. The report in fact gave India a crucial opportunity to rethink its past stand on some of the important human rights centric issues and bring them in tune with contemporary developments. And to that end India's knee jerk response, may be a significant opportunity lost.



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INDIA'S ANACHRONISTIC STAND ON SELF DETERMINATION

One of the recommendations in the report prompts India to fully respect the right of self-determination of the people of Kashmir. Now the term self-determination for majority of Indians, who take their cue from political rhetoric and the prime time televisions news, reeks only of anti-national stench. What is oft ignored is the inviolable nature of self-determination as the most empowering of all human rights for it allows communities to freely determine their political status and participate actively in their social, cultural and economic development.³ Considered as the ground norm of human rights, the right has special significance as its realization is necessary prerequisite for effective observance of Individual human rights and the major international human rights instruments reflect this centrality of the right to human rights discourse. Article 1 of UN Charter and Common Article 1 of International Rights Covenants (International Covenant on Civil and Political Rights (I Human CCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)) mandate the countries of the world to promote the realization of the right of self-determination. International Court of Justice has time and again reiterated that right of self-determination is one of the essential principles of international law and has an *erga omnes* character.⁴

The right essentially protects all human beings from alien subjugation, domination and exploitation and embodies the precept 'Nothing shall justify the domination of a

people by another'. Quite clearly, the right is a valuable weapon of protection for all human beings in colonial subjugation. However the application of the rights is not limited to colonial situations and covers non colonial situations as well. In fact since 1960 all the international instruments dealing with the right have extended its application to non-colonial situations. Common Article One of International Human Rights Covenants gives the rights to 'all peoples' without any restriction. African Charter of Human and people's Rights confers the right on both colonized and oppressed people.⁵

India, however, limits the right only to colonial situations. Though bound by International Human Rights Covenants, India has specifically made a declaration to Article 1 of ICCPR stating that right of self-determination



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applies only to 'peoples' under foreign domination. Of 172 State parties to ICCPR, only Bangladesh, Indonesia and Myanmar have made the same declaration while Lao People's Democratic limits the application of the right to the extent of consistency with its Constitution and relevant laws.⁶ India has faced objections to its declaration from a number of countries on the grounds of its inconsistency with UN Charter and the object and purpose of the Covenants.⁷ The declaration however continues to exist.

Limiting self determination to colonial context in contemporary times strips the right of any substantive content for colonialism, though not completely a thing of the past, is mostly a residual phenomenon in today's world. Thus, an open dialogue on perimeters and parameters of self-determination is the need of the hour in India for it is too important a right to be ignored. This is particularly important for even the Indian Constitution and other legislations do not expressly mention or discuss it.⁸ While the Constitution with its thrust on decentralization does, indeed implicitly recognizes the internal aspect of self-determination, same cannot be said about external aspect of the right.

CONTINUED INDIFFERENCE TO MAJOR HUMAN RIGHTS CONVENTIONS

The report also urges India to ratify the International Convention for the Protection of All Persons from Enforced Disappearance (CEPD) and the Convention against Torture and other cruel, Inhuman or Degrading Treatment or Punishment (CAT). While the report's recommendation is Kashmir centric, the importance of ratification of these conventions for upholding human rights across India has time and again been reiterated albeit to no avail. Just last year the Supreme Court of the Country had described torture as an instrument of human degradation in a Writ Petition (Civil) which pressed the Supreme Court to intervene and mandate enactment of a legislation on torture. While the Court refrained, the government sought a report from the Law Commission on the issue.⁹ The Commission submitted its report in October last year recommending ratification of CAT and a standalone legislation on Torture.¹⁰ The legislation however is yet to fructify despite the Commission appending a draft legislation titled



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"The Prevention of Torture Bill, 2017" in its Report. Earlier also The Prevention of Torture Bill, 2010 was passed by the Lok Sabha but lapsed in 2014 on dissolution of 15th Lok Sabha. Having signed the Convention in 1997, India has still managed to

earn the dubious distinction of belonging to the list of eight countries that have not ratified CAT while 163 countries have done so. United Nations Human Rights Council has constantly recommended ratification of CAT in India's Universal Periodic reviews, an advice that has successively gone unheeded.¹¹ Similarly, CEPD which India signed the day it opened for signature on 6th February, 2007 is yet to be ratified.¹² In fact, Enforced disappearance is not even codified as a criminal offence in the domestic laws of India. While both The Prevention of Torture Bill, 2017 and The Prevention of Enforced Disappearance Bill, 2017 have been introduced in the Rajya Sabha as Private Members' Bill, in December, 2017, their fate, at best, remains uncertain.¹³

India's reluctance to ratify Human Rights Conventions is not limited to these two conventions alone. In fact, there are many other Human Right Conventions that the Country has not signed or signed and conveniently forgot to ratify.¹⁴ Also, eventually the purpose of human rights is to grant individuals the rights that are theirs by dint of being born as humans. The international rights instruments do not create these rights; they pronounce it unequivocally and also provide a mechanism to remedy the instances of their violations. Thus, for these instruments to be meaningful to human beings, its importance that they are given access to approach a neutral body in case their guaranteed rights are violated. In many instances, countries may themselves be the violators and the domestic legal system may not have the necessary wherewithal to ensure justice. To that end, giving individuals the locus to bring complaint before the authorities established by international human rights instruments, wear the cloak of cynicism that often surrounds these rights. However, India does not allow individuals this access under any of the human rights conventions it has ratified



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so far making international human rights treaties mostly illusory for Indian nationals.

India needs to discuss and encourage open dialogue on these and other human rights issues and challenges before it so that its approach reflects commitment to upholding human rights. Belittling human rights concerns with knee jerk responses will only be counterproductive as narratives of those who continue to suffer would be drowned out in the process. Political compulsions notwithstanding, it's about time India initiates an open dialogue on human rights concerns plaguing the country.

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¹ Office of the United Nations High Commissioner for Human Rights, Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan (United Nations Human Rights, 2018) available at: <https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf> (accessed July 29, 2018).

² Barkha Dutt, "The Government's Kashmir Policy Needs a Reboot", *Hindustan Times*, June 16, 2018 available at <https://www.hindustantimes.com/columns/the-government-s-kashmir-policy-needs-a-reboot/story-OiNKreAryBxnvluKTilySI.html> (accessed July 27, 2018).

³ Robert McCorquodale, "Self-Determination: A Human Rights Approach", *The International and Comparative Law Quarterly*, vol. 43, (October 1994).

⁴ East Timor (*Portugal v. Australia*), ICJ, judgment of June 30, 1995, para 29. See Matthew Saul, "The Normative

Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right", Human Rights Law Review, vol. 11 (December 2011).

⁵ Art. 20(2), The African Charter on Humans and Peoples' Rights.

⁶ United Nations Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (accessed August 5, 2018).

⁷ Countries such as France, Germany, Netherlands and Pakistan have objected to India's reservation on Self-Determination.

⁸ Srinivas Burra, "Where Does India Stand on the Right to Self-Determination" Economic and Political Weekly, vol. 52 (January 2017).

⁹ *Ashwini Kumar v. Union of India*, WP(C) No. 738 of 2016, order dated 27-11-2017 (SC).

¹⁰ Law Commission of India, 273rd Report on Implementation of United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment through Legislation (October 2017).

¹¹ Universal Periodic Review (UPR) is a mechanism for assessment of the human rights conditions of all the UN member countries. Done under the auspices of the Human Rights Council, UPR Process is essentially a State driven process and accordingly the country under review submits a report to the Council. The Report includes country's implementation of human rights treaties and the measures taken by the country to improve human rights situations in its territory. UPR Process also allows other countries to ask questions and raise concerns about human rights in the country under review. Non-governmental organizations and civil society may also become part of the review process and taking all this into consonance UN Human Rights Councils makes specific recommendations. Recommendation to ratify CAT and CEPD were made in India very first UPR in 2008 but hitherto has gone unheeded.

¹² CEPD has been ratified by 58 countries currently.

¹³ The Prevention of Enforced Disappearance Bill, 2017 and Prevention of Torture Bill, 2017 were introduced by Shri V. Vijayasai Reddy in the Rajya Sabha on December 15, 2017.

¹⁴ For instance, India has neither signed nor ratified the 1951 United Nations Refugee Convention and has also not enacted any domestic legislation despite being a major refugee receiving country.

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