Issue(s) of the European Yearbook on Minority Issues with special focus on South Asia

In memory of Cristina Boglia (1965-2010)
Beloved and outstanding friend and colleague
Issue(s) of the European Yearbook on Minority Issues with special focus on South Asia

Special Focus: Contemporary Challenges of Globalization
Special Focus: Minority and Human Rights Issues in South Asia

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I. Special Focus: Contemporary Challenges of Globalization
‘Globalisation’ and Its Impact on Minorities in South Asia

I. INTRODUCTION

Despite the atrocities committed during World War Two against minorities and other vulnerable groups, the United Nations Charter, signed by 51 States in San Francisco on the 26th of June 1945, makes no specific reference to minorities. This has been attributed to many reasons, including the debate of whether lex specialis was required for the protection of minorities and vulnerable groups. Others argue that the United Nations sought to construct a new world order that put the promotion of peace and security above all other values, in the hope that international co-operation in pursuit of this objective would foster better and friendlier relations between States.

The overt emphasis on the maintenance of peace and security, and the nature of the problems associated with its breakdown has dominated world attention. By contrast, the other purposes of the United Nations have received little attention. The main focus of this paper stems from the purpose identified in article 1(3) of the United Nations Charter, namely the attempt to ‘achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’.

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4 The phrase ‘international peace and security occurs 32 times in the United Nations Charter.
5 This is reflected in newspaper coverage and the significant academic literature in public international law on ethnic conflict compared with the relative paucity in issues concerning international co-operation and development which tends to be dominated by social scientists rather than lawyers.
The notion of international co-operation has been slow to develop outside the realm of the maintenance of peace and security, despite attempts made as early as the 1940s to build an ‘International Trade Organisation’ (ITO) that could oversee global trade and focus on the need for development. Thus while the early aspirations for a global body regulating trade was driven by the need to ease unfair trade practices, the notion of using trade to raise living standards of peoples all over the world was a significant driver.

In explaining the global architecture envisioned in the aftermath of World War Two, Wilkinson highlighted the goal of creating a ‘trinity of organisations’ with the ITO sitting alongside the IMF and the World Bank in a ‘coherent ensemble’. He stresses an important caveat that \textit{laissez-faire} policies had to be tempered with a commitment to ‘a modicum of national intervention’, intended to enable states to constrain market forces.

Despite this vision, the failure of the ITO to get started was exacerbated by the rupture of the link between trade and development, with these two areas separated into segments within the United Nations system. While the mandate for the United Nations Conference on Trade and Development (UNCTAD) was clearly articulated to include trade and development, the creation of the United Nations Development Fund, ensured that the focus on development gradually became de-linked from trade.

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8 For an early vision of how world trade was envisaged see Clair Wilcox, \textit{A Charter for World Trade}, (London: Macmillan, 1949).


10 The \textit{United Nations Conference on Trade and Development} (UNCTAD) was established in 1964 through the action of developing countries concerned over the disparity between themselves and developed countries in terms of access to international markets and the role of trans-national corporations. It is a permanent intergovernmental body that meets as a Conference, comes under the mandate of the General Assembly and is the principal organ dealing with trade, investment, and development issues. Its mandate is identified as the maximization of trade, investment and development opportunities of developing countries. It is also envisaged as playing a role in providing opportunities for these countries to integrate into the world economy on an equitable basis. For its mandate and activities see: \url{www.unctad.org} [last consulted July 14, 2009]. For general reading on UNCTAD, including a historical perspective see \textit{Development Co-Operation and Third World Development} [Pradip K. Ghosh ed.] (Westport CT: Greenwood Press 1984).

11 As stated on its website: UNDP is the UN’s global development network, an organization advocating for change and connecting countries to knowledge, experience and resources to help people build a better life’. It operates in 166 countries, seeking solutions to developmental challenges while building
Another key aspect of the distinction between trade and development was the further distinction between development and human rights.\textsuperscript{12} While the regimes attached to human rights grew from their origins in the Charter and the Universal Declaration for Human Rights, the debate was restricted to an emphasis on (a) individual rather than collective rights; (b) civil and political rather than socio-economic and cultural rights; and (c) contained within national contexts rather than understood in transnational contexts. As a result issues such as development, poverty eradication, provision of basic economic rights and minority and indigenous peoples’ rights were relatively constrained.\textsuperscript{13}

Several factors towards the end of the twentieth century and the commencement of the twenty-first century contributed to a re-framing of this debate. Among these milestones are:

(a) The creation of the WTO in 1995;\textsuperscript{14}

(b) The articulation of the \textit{Millennium Promise} by States in 2000;\textsuperscript{15}

(c) A Re-articulation of Human Security in the aftermath of the events of September 11.\textsuperscript{16}

Central to these developments is the suggestion, driven by economists who point to the importance of global trade as a panacea that could resolve growing inequality within as well as between states. They highlight the importance of the following key facts:


\textsuperscript{13} These issues have been explored by four authors in the context of the MDGs and Human Rights, from different perspectives in a Special Issue of the \textit{International Journal of Human Rights}. See especially Magdalena Sepúlveda Carmona ‘The Obligations of ‘International Assistance and Cooperation’ under the International Covenant for Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8’ in 13(1) \textit{International Journal of Human Rights} (February 2009) pp.86-109.


a. Global trade is up from US $ 58 billion per year (1948) to US$ 12 trillion (2006);

b. Exports as a percentage of GDP, as a global average are up from 8 per cent (1950) to 24.6 per cent (2000).\(^{17}\)

The facts also indicate that developing countries have, as a group, increased the ratio of their exports to GDP.\(^{18}\) However the market share indicators show winners and losers with North America, Latin America and Africa recording drops in global market share, while Europe and Asia show big increases.\(^{19}\) In support of Collier’s argument, the facts also reveal that that the 50 least developed countries (LDCs) account for a market share of 0.5 per cent, a sharp decline from the 1970s.\(^{20}\) While it is clear that increased globalisation could have increased benefits for south-south trading,\(^{21}\) it is equally clear that this benefit is not accessed widely across the range of southern countries. Rather, as the drop in the figures for LDCs indicate, some States in the south are significant net losers from the widening of global trade and the ease of acquiring trading partners. What ought to be of further concern is that minorities and indigenous peoples are regularly becoming identified as the losers in this context, as will be demonstrated in the context of South Asian minorities in the second half of this paper.

The purpose of this paper is to demonstrate that while globalisation may be benefitting millions across the world, its impact on minorities and indigenous peoples’ may be questionable in certain national contexts. Thus while it may be true there are ‘losers’ among certain LDCs in terms of globalisation it may also be true that even within countries that appear to be benefitting from globalisation, minorities and indigenous groups within, are not seeing a material improvement in their circumstances. To examine this proposition this paper studies the extent to which the WTO’s trade review mechanism and the IMF’s poverty reduction strategy pay adequate attention to minorities, through the lens of South Asia, in keeping with the special focus of this volume. The argument presented here suggests that despite its

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18 Ibid.
19 Ibid. p.6-7
20 Ibid. p.7
aspirations, the international community is not adequately engaging in issues concerning minorities, and that while trade and development lie at the heart of global rhetoric on poverty eradication, in reality the overt focus on trade has meant that important social capital gained through the re-articulation of values is being lost. This article also seeks to partially challenge the ‘bottom billion’ hypothesis put forward by Paul Collier, not necessarily on the basis that a bottom billion is being left behind, but more in the context of where that bottom billion is located. The argument made here is that minorities and indigenous peoples are most likely to form that bottom billion, irrespective of their location within rapidly developing countries. To fulfil these aims this paper is divided into two main sections. Chapter II will trace the ‘humanitarian’ or development mission that underpins the push for greater globalisation and trade. Chapter III examines the manner in which the review mechanism set up by the World Trade Organisation (WTO), and the International Monetary Fund’s (IMF) Policy Reduction Strategies to focus on global poverty are failing to address the situation of minorities. This analysis is offered in the context of five South Asian countries all of which are seeing an upward trend in their broad economic outlooks, but that nonetheless are not being translated to minorities and other vulnerable groups who continue to cleave to the bottom, beyond the reach of policy makers.

II. FREE TRADE, FOREIGN DIRECT INVESTMENT AND THE BATTLE AGAINST INEQUALITY

The push for the WTO and economic globalisation has been premised on the belief that trade, based on the comparative advantages that exist within countries, is part of the solution to global inequality. This argument posits that economic globalisation, through the proliferation of international trade and foreign direct investment offers an unprecedented opportunity to reduce global poverty.\(^{22}\) One source of evidence for this position is often cited as the World Bank study entitled *Adjusting to Trade Liberalization: The Role of Policy, Institutions and WTO Disciplines*.\(^{23}\) The report estimated that the abolishment of all trade barriers would increase global income by US$ 28 trillion and lift 320 million people out of poverty by 2015. The impetus for

\(^{22}\) Van Den Bossche *op.cit.* 17, p.2

those who work to achieve this aim is in focussing energies to ensure that economic
globalisation is managed and regulated in such a manner that it will not aggravate
inequality, social justice, environmental degradation and cultural dispossession.\textsuperscript{24}
Thus the WTO is envisioned as a global institutional effort to regulate international
trade in a manner that will build on the premise of the increase in global income,
while mindful of the trap that such income could fall into the hands of a select few,
accentuating social problems.
A key question that arises in seeking to understand these issues is what we mean by
‘economic globalisation’. While there is a range of definitions and literature on this
subject, two key definitions may enable us to understand the nuances involved for our
purposes. Noble-Prize winning Economist Joseph Stiglitz suggests that globalisation is:
\begin{quote}
…the closer integration of the countries and peoples of the world which
has been brought about by the enormous reduction of costs of
transportation and communication, and the breaking down of artificial
barriers to the flow of goods, services, capital, knowledge, and (to a lesser
extent) peoples across borders.\textsuperscript{25}
\end{quote}
Friedman focuses on the effects of the phenomenon:
\begin{quote}
…it is the inexorable integration of markets, nation-states and technologies
to a degree never witnessed before – in a way that is enabling individuals,
corporations and nation-states to reach around the world farther, faster,
deeper and cheaper than ever before, and in a way that is enabling the
world to reach into individuals, corporations and nation-states farther,
faster, deeper and cheaper than ever before.\textsuperscript{26}
\end{quote}
Both definitions highlight that globalisation is concerned with (a) free international
trade and (b) unrestricted foreign direct investment. It is generally accepted that these
activities are driven by (i) improvements in technology; and (ii) the liberalisation of
trade and foreign direct investment. Basic text books on the subject of global trade
cite the classic example of the dropping prices of commercial air travel as a useful

\textsuperscript{24} Van Den Bossche \textit{op.cit.} 17, p.3
\textsuperscript{26} T. Friedman, \textit{The Lexus and the Olive Tree: Understanding Globalisation}, 2\textsuperscript{nd} edition (First Anchor Books, 2000) p.9
indicator of the impact of globalisation. Thus de-regulation of the sector to open competition has resulted in enabling a greater number of people to travel than could previously have been imagined. Of course, the positive impact of greater freedoms for individuals to travel has to be offset by the increase in the carbon footprint attributed to the increased air traffic volume. Thus already with the most classical example of ‘benefit’ comes a ‘cost’ that was either not envisaged, or not deemed important against the stated benefit. Another classically cited example is how public patients in the United Kingdom are being sent by its National Health Service (NHS) to India for heart surgery, since the cost of surgery, after-care, airfare and related costs, at US$ 7,000 is roughly one quarter of what it would cost in the UK. From the perspective of the NHS this means smaller waiting lists for expensive services at home and less need to invest in the domestic health service. From the perspective of the patient this signals timely and high quality medical intervention. From the perspective of the Indian economy and its highly paid private sector doctors, this signifies income, an opportunity to invest further in medical facilities and an immediate international reputation that could act as a beacon for further opportunities of this nature. However the opportunity cost of ‘squeezing out’ domestic heart patients does not feature high in the balance sheet measuring this opportunity, nor does the differentiated treatment that is likely to result when the same well paid medics perform the same duties for a fraction of the reward in the public sector. This is particularly relevant in the context of this paper since minorities and indigenous peoples, often without the ability to pay, are squeezed out constitutionally guaranteed health-oriented rights.

Many question how positive the impact of globalization is. Rodrick, concerned that globalization has ‘gone too far’ suggests its advance has come with other associated costs:

Globalization is not occurring in a vacuum. It is part of a broader trend that we may call marketization. Receding government, deregulation, and the shrinking of social obligations are the domestic counterparts of the

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28 Van Den Bossche *op.cit.* 17, p.9
The intertwining of national economies. Globalization could not have advanced this far without these complementary forces.29

From the perspective of scholars concerned with minority and indigenous peoples’ rights this shrinking of the public sector is cause for serious concern for the development of communities that may not be in positions to benefit from increased marketization. Marketization clearly draws on economist Adam Smith’s ‘Invisible Hand’ of the market, to determine the provision and price of goods and services. However if the ability to marketize is based on the factor of economic preparedness and comparative advantage, many minorities and indigenous people, currently in the bottom quarter of their respective states’ hierarchy of economic endowments, may be particularly disadvantaged. In the context of the WTO, there is an admission that ‘market failure’ could occur with the regime identifying various safeguard measures that could be put in place in the breach. The latest trade report of the WTO on the state of world trade focuses on these contingency measures and how they sit vis-à-vis trade policy commitments.30 The Report, framed in the context of the financial crisis and the need for contingency measures, states:

In general, the case for government intervention rests on the emergence of market failures. When markets do not function well, an increase in trade barriers can be justified on the grounds of a second-best argument.31

However despite this admission the report points to external and internal occurrences rather than the obvious structural inequalities within the domestic policy that impact on the failure of minorities and indigenous people to benefit from marketization.32 The failure to focus on such structural inequality in the context of irreversible globalisation suggests that minorities and indigenous peoples are likely to be consistent losers of such globalisation.

In addition to free trade a second, Foreign Direct Investment (FDI) into developing countries is posited as a second panacea for tackling global inequality. Economists like Jeffrey Sachs argue that States are caught in a poverty trap that can only be

31 Ibid. p.30.
32 Ibid. pp.30-46.
33 Van Den Bossche op.cit. 17, pp.38-45.
escaped through outside intervention. With no significant rate or culture of generating savings, he argues that many economies are consigned to living in subsistence. Breaking this cycle of subsistence requires an injection of capital.

While this view represents mainstream thinking on the subject, and has also been an ideological driver for the *Millennium Promise* and the Millennium Development Goals, there are those who question whether such an assessment is accurate. Irrespective of this critique, having articulated the problem, Sachs suggests where the remedy may lie:

> Since September 11, 2001, the United States has launched a war on terror, but it has neglected the deeper causes of global instability. The $450 billion that the United States will spend [in 2005] on the military will never buy peace if it continues to spend around one thirtieth of that, just $15 billion, to address the plight of the world’s poorest of the poor, whose societies are destabilized by extreme poverty and thereby become havens of unrest, violence, and even global terrorism.

Sachs was not the first to suggest that increased global co-operation could resolve global socio-economic challenges. Susan George and Gro Harlem Bruntland, whose contributions on the issue of world hunger and sustainable development respectively in the 1970s and 1980s, are among key policy makers that have shaped this debate. Figures suggest that FDI has risen sharply from US$ 59 billion in 1982 to US$ 1,306 billion by 2006. While the data shows significant rises for developing

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34 For a controversial counter-argument to this position see Dambisa Moyo, *Dead Aid: Why Aid is not Working and How There is Another Way for Africa* (London: Allen Lane, 2009).
37 Particularly Dambisa Moyo *op.cit.* 34, who argues that aid is part of the problem rather than the solution for the development of Africa.
38 Sachs *op.cit.*35, p.1
countries and economies in transition,\textsuperscript{42} it is also clear that the investment is distributed unequally. To many it is clear that economic globalisation whether driven by free trade or FDI is causing more harm than good on the battle against inequality. The most vocal of these criticisms are manifest in the street protests that accompany major trade fora, often met with the full force of law enforcement agencies’ brutal responses, as in the course of the G20 meeting in London in April 2009.\textsuperscript{43}

Speaking in 2007, Pascal Lamy, WTO Director-General stated:

[P]ublic opinion has become considerably more anxious about the effects of globalization. We have thus seen concerns, for instance, about the impact on socioeconomic fabrics of increased competition or about outsourcing labour-intensive services. The issue of global trade imbalances has also been taken up in similar terms. Some people are no longer convinced that a rising tide of trade will lift all boats. Many countries today are at a crossroads, whether to continue to support more open trade or erect new walls to imported goods and services or foreign investment.\textsuperscript{44}

As pointed out by several commentators the debate is highly polarized with little room for manoeuvre in between those basically for globalization and those against it.\textsuperscript{45} Among the standard critiques of globalization coming from the south, are the following arguments:

(a) Developing markets are being forced open too fast;

(b) Rich countries continue to erect protection measures to protect their economies;

(c) Developing countries lack the resources to negotiate effectively and as a result are being bullied out of the process.\textsuperscript{46}

It is interesting to note however that the impact on minorities and indigenous peoples does not occupy a central role in the critique often levelled by these commentators.

\textsuperscript{42} Ibid. p.10

\textsuperscript{43} See the Guardian newspaper’s ‘A Guide to the G20 Protests in London’ available online at: http://www.guardian.co.uk/business/blog/2009/mar/23/online-guide-to-g20-protests [last accessed September 9, 2009]. The protests the protestors’ underlying concerns were drowned out by the sharp reaction to the policing methods used to control them.

\textsuperscript{44} P. Lamy Trends and Issues Facing Global Trade’ delivered at Kuala Lumpur, 17 August 2007. As quoted by Van Den Bossche op.cit.17, p. 10.


\textsuperscript{46} Among the writers who see the critique are Stiglitz himself, and Bhagwati J., ‘Globalization in Your Face’ Foreign Affairs (July/August 2000), 137. Pascal Lamy and Rodrik are also others that have written critically about the process.
A notable critique comes from Rodrik who states:

…the more I observed the system of globalization at work, the more obvious it was that it had unleashed forest-crushing forces of development and Disney-round-the-clock homogenization, which if left unchecked, had the potential to destroy the environment and uproot cultures at a pace never before seen in human history'.

The argument that free trade is the panacea to solve issues of global inequality, bringing prosperity to all, draws heavily on Adam Smith’s seminal work *The Wealth of Nations*. This can be attributed to the push for pastoralism as reflected upon by key economists and jurists. In *Two Treatise on Government* John Locke articulates labour theory as justification for private property. He posits that with the emphasis on the need to use land to produce, it may even be justifiable to appropriate land in use. This envisages a clear subordination of hunter-gatherer activities to those concerned with agriculture, with inevitably negative consequences for indigenous peoples’ beliefs and value systems. Thus agriculture formed the basis for the appropriation of property from the commons, a feature backed by Adam Smith’s call that ‘…to cultivate the grounds was the original destination of man’. Among jurists this discussion, between Francesco de Vitoria (1480-1546) and Bartolome de Las Casas (1474-1566), has had serious impact on indigenous peoples’ rights. Las Casas believed that indigenous peoples had the title to the territory that subsequently came under Spanish conquest, a title they held to uninhabited lands through discovery.

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53 Vitoria stated: ‘The whole of this controversy and discussion [on the rights of the Indians] was started on account of the aborigines of the New World, commonly called Indians, who came forty years ago into the power of the Spaniards, not having previously been known to our world’ F de Vitoria *De Indis et De Iure Belli Relectiones*, Classics of International Law (1917) p.116
However by the middle of the 1700s the rights of indigenous peoples began to reflect a clear decline as international law emphasized the superiority of the State, and the distinction between the ‘civilised’ and ‘uncivilised’ societies on the basis of Christianity, with the added contribution of an emphasis on a system of cultivation that can be attributed directly to the writings of Emerich Vattel (1714-1767). This is reflected in Droit des Gens ou Principles de la Loi naturelle appliqués aux affaires des Nations et des Souverains in 1758. Labelling this the most important contribution to international law in the nineteenth century, Dorsett quotes Vattel to the effect that:

Every nation is… bound by natural law to cultivate land which has fallen to its share, and it has no right to extend its boundaries or to obtain help from other nations except in so far as the land it inhabits can not supply its needs.

Reflecting on how the overt focus on agriculture privileged certain groups of people over indigenous peoples in Australia, Dorsett concludes that the intrusion of agriculture into law was due to the influential writers of the time, who were essentially theorizing on the basis of what they knew, but were determined to generate theories that could be applied elsewhere. Thus Locke’s view could be traced to a utilitarian argument over the economic importance of agriculture, and Vattel’s in necessity. While neither was maliciously driven, the overt focus on their constituency and interests failed to realise the impact of their grand unifying theories on indigenous peoples. It could be argued by analogy that some of the contemporary attempts made to eradicate global poverty may suffer from similar drawbacks, with arguably similar effects on minorities and indigenous peoples.

Even the notion of ‘comparative advantage’ that is a significant economic driver for free trade was developed by David Ricardo in Principles of Political Economy and

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Taxation as early as 1817.\textsuperscript{59} It could be argued that these ideas concerning the need for cultivation or the generation of an economic good have been central to the manner in which society has viewed those that are perceived as not ‘contributing’ in this pre-designated manner. In the context of global trade and the free trade argument these arguments were enhanced and integrated into theory such as the Hecksher-Ohlin model, to suggest that there are net gains to be had from trade based on comparative advantages that countries possess.\textsuperscript{60} A more strident vision of the impact of free trade can also be gleaned from Nobel Prize winning economist Paul Samuelson (1970) who confidently asserted that:

Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.\textsuperscript{61}

However the fundamental problem with relying on Smith’s ‘invisible hand of the market theory’ is that, besides ignoring the fact that all may not be equally well prepared for marketization as discussed above, they also assume that the market works perfectly well. This, as we shall see in the context of minorities and indigenous peoples in South Asia, but is equally true of many minorities and indigenous peoples across the globe, is simply fallacious. As Bhagwati notes:

The case of free trade rests on the extension to an open economy of the case for market-determined allocation of resources. If market prices reflect ‘true’ or social costs, then clearly Adam Smith’s invisible hand can be trusted to guide us to efficiency; and free trade can correspondingly be shown to be the optimal way to choose trade (and associated domestic production). But if markets do not work well, or are absent or incomplete, then the invisible hand may point in the wrong direction: free trade cannot be asserted to be the best policy’.\textsuperscript{62}

When looking at the global picture from different national contexts, there appear to be clear winners and losers at globalisation. India and China are the most recent macro-level winners from the process, both achieved through governments that have adapted

\textsuperscript{60} For a contemporary explanation see Edward E. Leamer, \textit{The Heckscher-Ohlin Model in Theory and Practice} (Princeton, NJ: Princeton University Press, 1995).
\textsuperscript{61} P. Samuelson \textit{Economics} 10\textsuperscript{th} edition (1976) 692.
domestic policies and created specific institutions designed to take advantage of global markets.63 Other countries, within the focus of this paper, such as Bangladesh, Pakistan, Sri Lanka and Nepal all appear to have taken positive steps towards poverty eradication as we shall see in the following section. The result of the steady if unspectacular growth for these states with significant populations, (notwithstanding the skewing of data due to the impact of the global financial crisis in the last year), is that many can confidently assert that free trade is now benefitting more than 3 billion people worldwide. However the macro-level analysis of States is a dangerous way to study impact. It is clear that many populations within these States remain as vulnerable if not more so now, than they did before. This for the following reasons:

(a) Land rights – territory previously inhabited by communities are coming under increasing pressure as market-driven demand raises land value. In some instances land is forcibly acquired by government and sold to the highest bidder. A corollary to this is that the poor are seen as ‘getting in the way’ of national development;

(b) Displacement – remote areas are coming under increasing pressure as the need for infrastructure expands. The building of national road networks is seen as fundamental to sustain market delivery, however the construction boom impacts minorities and indigenous peoples in isolated regions;

(c) Inequality – while there is a growing middle class in these States, the trickle down impact on poorer communities is negligible. Instead inequality is growing as the poor can afford less. The fact that prices may be dropping is of little solace when livelihoods that used to generate income are lost.

(d) Growing privatization – with the expanding middle classes demanding better products, usually from abroad, the influence of the private sector is growing. The ‘invisible hand’ of the market is not mindful of the fact that the poor are priced out of essential services. The cited example of heart transplant services in India are a case in point: as countries gain hard currency for services, hospitals are being taken over to provide these services, leaving a vacuum for the treatment of the less affluent.

(e) The Laws of Big Numbers – the influence of the growing numbers of middle class consumers in South Asia is in and of itself bigger than the populations of the European Union and the United States of America as a whole. It could thus be argued that the affluent have doubled in numbers. However these numbers are not as relatively significant in their own national contexts.

The evidence about the downside of economic globalisation is contained in some noteworthy institutional reports. The World Bank report entitled *Globalization, Growth and Poverty: Building an Inclusive World Economy*, authored by Collier and Dollar, suggest that as many as 2 billion people in Sub-Saharan Africa, the Middle East and former Soviet Union countries were being left behind.\(^6^4\) The WTO study entitled *Trade, Income Disparity and Poverty*, concluded that while trade liberalisation generally made a positive contribution to poverty alleviation, by assisting economic growth, curtailing policy interventions and insulating domestic economies against local shocks, it includes an admission of the creation of new types of losers.\(^6^5\)

Another belief in the importance of free trade can be ascribed to its perceived indirect effect on peace, security and the prevention of war. One of the first articulations of this is by Baron de Montesquieu, who writing in 1748, stated:

> Peace is the natural effect of trade. Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling, and thus their union is founded on their mutual necessities.\(^6^6\)

This theory of mutual interdependence has been explored in some detail by authors such as Keohane and Nye\(^6^7\) and is echoed in attempts to build and protect the mandates of global institutions seeking such co-operation. However few attempts are made to track the results of policy activities on whole population of States, and as a result the overtly negative impact on some groups, usually minorities and indigenous


\(^6^6\) Baron C. de Montesquieu, *De l’Espirit des Lois* as translated by Thomas Nugent, available at [http://www.constitution.org/cm/sol.htm](http://www.constitution.org/cm/sol.htm) [Last consulted July 10, 2009].

peoples, who already face multiple discrimination within States, is neglected. Stiglitz identifies the central subject of this paper’s concern:

The political force behind the resistance to free trade is a simple one: although the country as a whole may be better off under free trade, some special interests will actually be worse off. And although policy could in principle rectify this situation (by using redistribution to make everybody better off), in actuality, the required compensations are seldom paid. 68

As the subsequent section seeks to demonstrate in the context of South Asian States, as elsewhere, the ‘special interests’ that are often worse off can be identified in terms of their ethnic, linguistic or religious identity, or through their membership of an indigenous group.

III. GLOBALIZATION, MULTILATERAL FINANCIAL INSTITUTIONS AND MINORITIES IN SOUTH ASIA

The Millennium Declaration emphasizes the importance of articulating the domestic equality agenda in the context of national growth and prosperity:

We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.69


It is instructive to note how the countries of South Asia have been faring vis-à-vis the poverty eradication strategies that currently seek to operationalize the international community’s promises on these issues. One lens through which to study these is the Trade Review Mechanism for each Member State of the WTO. In keeping with the mandate of the organisation, countries are required to report on measures they have undertaken, paying special attention to the impact of these on the entirety of their population. The WTO Secretariat then reviews these reports and compiles a commentary based on a number of indicators. Another interesting and more directly relevant mechanism are the Poverty Eradication Strategies required by the International Monetary Fund of certain States. Under this mechanism States provide detailed analyses of the occurrence of poverty within their State and the measures taken to eradicate this. The purpose of these papers is clearly articulated:

Poverty Reduction Strategy Papers (PRSPs) are prepared by member countries in broad consultation with stakeholders and development partners, including the staffs of the World Bank and the IMF. Updated every three years with annual progress reports, they describe the country's macroeconomic, structural, and social policies in support of growth and poverty reduction, as well as associated external financing needs and major sources of financing.

1. **Bangladesh**

For Bangladesh, the Report of the Secretariat in the context of its Trade Policy Review Mechanism summarises:

Since its previous Trade Policy Review in 2000, Bangladesh ...has pursued prudent macroeconomic policies, structural reform in some priority areas,
and trade liberalization aimed at raising export competitiveness. The adoption and implementation of a comprehensive poverty reduction strategy as well as the deepening of preferential treatment and regional integration ties are among the most notable developments during the period under review (2000-06). Developmental constraints, such as infrastructure bottlenecks, institutional and other policy limitations, persist, but are receiving attention.\(^{72}\)

In commenting on its outlook the Trade Policy Review body stated:

Bangladesh's economic performance ...together with the authorities' commitment to reform, should lead it toward sustained growth and poverty alleviation.\(^{73}\)

Bangladesh’s PRSP of November 2005 consists of 370 pages wherein the Executive summary, consisting of 25 pages is full of high praise:

Bangladesh has established a credible record of sustained growth within a stable macroeconomic framework. At a comparatively low level of development, it has also earned the distinctions of a major decline in population growth rate and of graduating to the medium human development group of countries by UNDP’s ranking.\(^{74}\)

Among the significant improvements highlighted are: the halving of child mortality, the increase in life expectancy, better educational access for women, better social forestry, greater infrastructural commitments, and improved micro-credit access. Despite this positive glaze the report admits that aggregate poverty rates remain dauntingly high with pockets of extreme poverty and rising inequality.\(^{75}\) The report lays down strategic priorities for economic growth and suggests eight specific avenues through which such growth can be achieved.\(^{76}\)


\(^{73}\) Ibid., para.31.


\(^{75}\) Bangladesh PSRP Report, paragraph ii

\(^{76}\) Among these are: (i) higher private investment and FDI; (ii) technological progress especially in information and communication technologies and biotechnology; (iii) expanded growth of industry
The report suggests the need for prioritization of the following in the medium term:

(i) stable macroeconomic balances; (ii) strong institutions and improved governance; (iii) outward oriented growth with strong private sector role; (iv) Government-private sector (including NGOs) partnership; and (v) gender sensitive macro and policy framework and the national budget.  

Mindful of the need to promote pro-poor policies the report identified four priority areas:

(i) accelerated growth in rural areas and development of agriculture and non-farm economic activities; (ii) small and medium manufacturing enterprises; (iii) rural electrification, roads, water supply and sanitation, and supportive infrastructure including measures to reduce natural and human induced shocks; and (iv) information and communication technologies.

It emphasizes a two prong attempt in terms of pro-poor growth suggesting that these would be along the parallel axes of export, alongside the stimulation of domestic demand.

Of the eight avenues identified for growth one pertains directly to minorities and indigenous peoples, and is labelled ‘participation and empowerment’ where the need for social inclusion is emphasized. In the specific context of minorities and adivasis, the report states:

Bangladesh has about forty-five adivasi/ethnic minority communities living both in the hill regions and in the plain lands. The largest concentration is in the Chittagong Hill Tracts but other areas in which these communities live include Chittagong, greater Mymensingh, greater Rajshahi, greater Sylhet, Patuakhali and Barguna. Chakma, Garo, Manipuri, Marma, Munda, Oraon, Santal, Khasi, Kuki, Tripura, Mro, Hajong and Rakhain are some of the well-known adivasi/ethnic minority communities of Bangladesh. Though firm figures are not available, the

\[(\text{particularly SMEs) and service sectors; (iv) diversification in crop production and non-farm sector growth; and (v) expansion and diversification of the export sector. See Bangladesh PSRP Report, para.xxx.}\]

\[\text{\cite{Bangladesh PSRP Report, para.xxx}}\]

\[\text{\cite{Ibid. para.xxxi}}\]

\[\text{\cite{Ibid. para.xxxi}}\]

\[\text{\cite{Ibid. para.xxix}}\]

\[\text{\cite{Ibid. p. 149}}\]
number of adivasi/ethnic minority population at present is estimated to be around 2 million.\textsuperscript{82}

The existence of political tensions between the government and indigenous peoples in the Chittagong hill Tracts is given as one reason for the poorer socio-cultural environment of minorities, though the report asserts that since the end of signature of the Peace Agreement between the Government and the Parbatyo Chattagram Jana Sanghati Samity, in December 1997, ‘a relatively congenial atmosphere’ has developed allowing greater emphasis on socio-economic and development work in the region.\textsuperscript{83} Among the issues identified for minorities in the context of poverty eradication in Bangladesh are:

(a) That they have been ignored by mainstream development efforts;
(b) Their lack of representation in macro-economic decisions affecting them;
(c) Mass re-location of non-ethnic minorities and adivasis within their traditional areas;
(d) Displacement of ethnic minorities and adivasi as a consequence of such immigration;
(e) Threat and destruction of cultural identities and language
(f) Deprivation of basic socio-economic rights.
(g) Deprivation of educational facilities\textsuperscript{84}

In identifying the actions to be taken the following are given prominence:

(a) Effective recognition of adivasi/ethnic minority communities’ specific socio-economic needs;
(b) Full implementation of the \textit{Chittagong Hill Tracts Peace Accord (1997)};
(c) Full operationalization of the ‘Land Disputes Resolution Commission’ and ‘CHT Refugees Task Force’ and other legal regimes to protect land rights;
(d) Provide adequate educational facilities for ethnic minorities/ adivasis;
(e) Increase efforts to provide health care, clean water and sanitation facilities to adivasi/ethnic minority areas in general and to the more disadvantaged groups among them in particular will have to be undertaken.
(f) Encourage the involvement of ethnic minority/ adivasi focussed NGOs in collaboration with the government;

\textsuperscript{82} \textit{Ibid.} Section 5.402 at p.155
\textsuperscript{83} \textit{Ibid.} Section 5.403 at p.155
\textsuperscript{84} Extrapolated from Bangladesh PSRP Report, \textit{Ibid.} Section 5.403 at p.156
(g) Earmark resources for use of ethnic minorities/ adivasi development;

(h) Increase the development of substantial infrastructural advances in ethnic minority/adyadasi areas;

(i) Seek models of protection from other countries such as China, India, Denmark, Norway, New Zealand, and Australia can be reviewed for appropriate application in Bangladesh. 85

Reference is also made to other vulnerable groups that could fit within the definition of minorities:

In Bangladesh there are some small groups of extremely disadvantaged poor people with very distinct characteristics. They belong to some specific occupation, and are a community isolated and disconnected from the mainstream population. Although in Bangladesh there is no caste system per se, these groups are treated the way lower castes are treated as untouchables in a caste system. Some of these communities are Bawalies (those who live of the resources of the Sunderban forest areas) and mawalies (honey collectors in Sunderban areas) Bede or river gypsy (engaged in snake charming and small trade in the rural areas); Methor, Dalich (sweepers, sewerage cleaners and scavengers); Mymal (fisherman on the big water bodies); Muchis (cobbler and shoe makers); Nagarchi (Traditional folk singers); Kulies (tea garden worker originally brought to Bangladesh from various parts of India). These communities have been living a segregated life, parallel with the mainstream population, for many years. People from these communities are spread all over the country. They constitute parts of extreme poor and live in totally sub-human physical and social environments. 86

Thus in the context of Bangladesh the PRSP process has highlighted not only a distinct programme of actions that directly pertains to minorities and indigenous peoples, but has also raised important questions about the extent to which the current scope of minorities and indigenous peoples needs to be refined. This degree of scrutiny is unfortunately not as visible in the other countries of South Asia.

85 Ibid. Section 5.404 at p.157
86 Ibid. Section 5.420 at p.160.
2. **India**

For India the Trade Policy Review Mechanism report yielded a very progressive report card of improvements, driven by a robust 7% growth rate between 2001-2 and 2006-7. This has translated, in terms of social indicators to declining mortality rates, reduction of numbers of those living under the poverty line, and improvements in literacy, sanitation and access to clean water, The reasons for this growth are attributed to:

...unilateral trade and structural reforms, which have been continued during the period. ...[However] ...agricultural growth continues to be slow and erratic and dependent on the weather, causing considerable distress, especially among small and marginal farmers.

In terms of outlook the report yields four paragraphs under the sub-heading prospects where it highlights the ‘significant’ need structural reform including trade liberalization if India’s high growth rates are to be maintained. The need for reform is then identified as:

...infrastructure bottlenecks, which continue to constrain growth. In particular, urgent attention is required for transport, and especially electricity, where supply continues to be deficient and loss-making public sector suppliers remain a drain on public finances. Deeper reforms are also required in agriculture, where, despite increased public sector spending in recent years and reduced controls on agricultural markets, further efforts are needed to address the sector's relatively low productivity and the problems of marginal farmers, reflected in social indicators, such as poverty and infant mortality.

It also stresses that such reform would need to be accompanied by suitable macroeconomic policies, but then specifies that these include monetary policies to contain inflationary pressures and fiscal policies to generate financing of India’s developmental needs. It highlights vis-à-vis India’s declining fiscal deficit, that:

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87 India, like China, does not participate in the IMF’s programme on Poverty Reduction Strategies and as a result does not file a comparable report on this subject.
[it] remains significant, and public expenditure on infrastructure and human capital development is constrained by the relatively low level of taxes to GDP as well as by spending on subsidies.\textsuperscript{92}

There is no direct mention of minorities or indigenous peoples in the Secretariat’s report on India. It could be argued that the recent growth rate and growing wealth among certain pockets of urbanized Indians has led to a dilution of the minority rights agenda. Indian history and its constitution is particularly noteworthy for the provisions it makes in law for the protection and promotion of the rights of minorities and indigenous peoples.\textsuperscript{93} Much of this could be attributed to the significant historical antecedents concerning minority questions both in the context of the birth of the State\textsuperscript{94} and its bifurcation at independence, as well as in the pressing questions over caste-based discrimination that formed a backdrop to some of the constitutional debates.\textsuperscript{95} The result of this history has been a concerted focus on the need to embed principles concerning equality, non-discrimination and affirmative action at the very heart of the Indian State.\textsuperscript{96} This focus has survived different epochs in India’s post-colonial history and has been a constant source of political manoeuvring among India’s aspiring political parties as they sought to jostle for the best strategic vote base.\textsuperscript{97} In recent years however with the focus shifting to dramatic economic growth the attitude seems to be changing to one where the immense resources that are now available are contested among different groups of élites, many who have ascended to that position from India’s significant middle classes. The result appears to be a collective belief in the Indian polity that minorities and indigenous peoples are the beneficiaries of undue hand-outs that are slowing down the State’s economic progress. There are several manifestations of this attitude from the attempts by city councils to

\textsuperscript{92} Ibid. para.27.
\textsuperscript{93} The provisions for this are contained especially in article 29 and 30 of the Indian Constitution.
\textsuperscript{95} For a particularly minority focussed version of these events see B.R. Ambedkar Pakistan or Partition of India (Bombay: Thackers, 1946).
\textsuperscript{96} For more on India’s affirmative action measures, especially in the area of caste-based discrimination see David P. Keane Caste Based Discrimination in International Human Rights Law (Dartmouth: Ashgate, 2007).
‘clean-and green’ the principle metropolitan centres in India,\(^98\) to the mass clearing of communities to build highways linking these commercial centres,\(^99\) to the internecine warfare that is ongoing between police forces across different regions and Maoist-inspired groups many of whom are from minority/indigenous background.\(^100\) Some may argue that these tensions have always existed in an Indian context, and there exists a body of evidence that backs this argument.\(^101\) However what appears to have changed is that the financial stakes have been raised, and this has had a contributing factor on the weakening of India’s traditionally strong socio-economic agenda.

One of the most prominent manifestations of this trend was seen in the elections of 2003 when the then ruling party, the Bhatratiya Janata Party (BJP) adopted the motto ‘India is Shining’, expecting to sweep the elections on the basis of their pro-market policies which opened the way for the dramatic economic growths that have been witnessed recently. Recent history documents their miscalculation as their nearest national rivals the Congress (I) swept to a surprise electoral victory, on the basis of their socio-economic agenda.\(^102\) However on getting to power the Congress (I) has made similar concessions to sustain economic growth, and these are inevitably viewed as anti-poor and anti-minority positions. As a result the Communist Parties of India,\(^103\) for long a political force focussed exclusively on the socio-economic agenda, have been distancing themselves from the coalition that they had formed with the Congress in the previous election. In the Indian context it therefore seems clear that, as at

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\(^98\) See Hari Sud ‘Poverty & Slums in India: Impact of Changing Economic Landscape’ South Asia Analysis Group Paper No. 1769 available in full text at: [http://www.southasiaanalysis.org/5papers18%5Cpaper1769.html](http://www.southasiaanalysis.org/5papers18%5Cpaper1769.html) [last accessed September 9, 2009]


\(^101\) See Venkateswar Subramanian, Cultural Integration in India: A Socio-Historical Analysis (New Delhi: APH Publisher, 1979).


\(^103\) There are several different versions of these parties, but the principles ones are the Communist Party of India (CPI) the Communist Party of India, Marxist, CPI(M) and the Forward Block. For more on the genesis of Indian communism see Gene R. Overstreet and Marshall Windmiller Communism in India (Berkeley: University of California Press, 1959).
international level, the socio-economic developmental agenda has come unstuck from the trade agenda. While the Indian electorate has the ability to influence this rupture, that opportunity only comes by once every five years, and even then, despite articulations of pro-poor strategies, political parties are ever ready to compromise basic principles in return for sustained growth that is likely to lure the growing numbers of affluent urbanized Indians. The focus on minorities and indigenous peoples is thus likely to vane in future years unless drastic steps are taken to maintain their prominence on the Indian policy agenda. Worse, the emphasis on addressing ‘infrastructural bottlenecks’ highlighted above, is likely to hurt minorities and indigenous people who are often viewed as collateral in extending road networks and ‘cleaning and greening’ access to burgeoning cities. More significantly the institutional processes in place to review India’s economic growth appear relatively unconcerned about the extent to which this growth is impacting social inequality within the State.

3. Nepal

At the time of writing data was unavailable for Nepal vis-à-vis its Trade Review Policy Report. However in submitting its 10th Plan in the context of the PRSP, the government reflected on its goal of poverty eradication. In a frank report that showed the extent to which Nepal continued to face challenges the government admitted:

The study has shown that poverty in Nepal ascribes to a combination of many factors, such as high illiteracy, poor health and sanitation, low productivity of food grains, high child malnutrition, poor access to basic services and a feudal social structure. The lower caste and the ethnic groups, as well as women in the remote areas, bear the major brunt of this high poverty profile. The levels of improvement would not only have sustained but also would have had spiralling effects on other spheres had the political/ security situation in the country been normal. The insurgency and the political uncertainty have obviously negated some gains. Further achievements would, thus, depend very much upon the resolution of the conflict and improvements in the political scenario.104

In discussing the delivery of services in the agricultural sector the government does provide disaggregated data on the basis of minority status. The data is collected by the Ministry of Agriculture and the Co-operatives in the context of a decentralised delivery system in 20 remote districts, governed. The agricultural delivery is funded through significant governmental funds and is aimed at generating impact among the poor. The table below contains figures collected over 3,000 projects, benefitting 124,311 households over three years.

Beneficiary Households by Social Group (August 2003-August 2006)

<table>
<thead>
<tr>
<th>Social Groups</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dalit</td>
<td>21100</td>
<td>20057</td>
<td>41157</td>
<td>33</td>
</tr>
<tr>
<td>Disadvantaged Janajati</td>
<td>13333</td>
<td>11166</td>
<td>24499</td>
<td>20</td>
</tr>
<tr>
<td>Disadvantaged Non-Dalit Groups</td>
<td>4334</td>
<td>3828</td>
<td>8162</td>
<td>7</td>
</tr>
<tr>
<td>Advantaged Janajati</td>
<td>1416</td>
<td>839</td>
<td>2255</td>
<td>2</td>
</tr>
<tr>
<td>Religious Minorities</td>
<td>549</td>
<td>524</td>
<td>1073</td>
<td>1</td>
</tr>
<tr>
<td>Non-disadvantaged castes</td>
<td>24288</td>
<td>22877</td>
<td>47165</td>
<td>37</td>
</tr>
<tr>
<td>Total</td>
<td>65020</td>
<td>59291</td>
<td>124311</td>
<td>100</td>
</tr>
</tbody>
</table>


In a separate Table (8.1 Human Development by Caste and Ethnicity) the government provides additional data that shows the preponderance of poverty along ethnic cleavages:

Table 8: Human Development by Caste and Ethnicity, 1996

<table>
<thead>
<tr>
<th>Human Dev. Indicators</th>
<th>Nepal</th>
<th>Bahun</th>
<th>Chehtri</th>
<th>Newar</th>
<th>Hill Janajati</th>
<th>Madhise</th>
<th>Hill Dalit</th>
<th>Muslim</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life Expectancy (yes)</td>
<td>55.0</td>
<td>60.8</td>
<td>56.3</td>
<td>62.2</td>
<td>53.0</td>
<td>58.4</td>
<td>50.3</td>
<td>48.7</td>
<td>54.4</td>
</tr>
<tr>
<td>Adult Literacy (%)</td>
<td>36.7</td>
<td>58.0</td>
<td>42.0</td>
<td>54.8</td>
<td>35.2</td>
<td>27.5</td>
<td>23.8</td>
<td>22.1</td>
<td>27.6</td>
</tr>
<tr>
<td>Mean yrs Schooling</td>
<td>2.3</td>
<td>4.7</td>
<td>2.8</td>
<td>4.4</td>
<td>2.0</td>
<td>1.7</td>
<td>1.2</td>
<td>1.4</td>
<td>1.9</td>
</tr>
<tr>
<td>Per Capita Income (NR)</td>
<td>7573</td>
<td>9021</td>
<td>7744</td>
<td>11953</td>
<td>6607</td>
<td>6911</td>
<td>4940</td>
<td>6336</td>
<td>7312</td>
</tr>
<tr>
<td>HDI Indices</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Life Expectancy Index</td>
<td>0.500</td>
<td>0.597</td>
<td>0.522</td>
<td>0.620</td>
<td>0.467</td>
<td>0.557</td>
<td>0.422</td>
<td>0.365</td>
<td>0.450</td>
</tr>
<tr>
<td>Educational</td>
<td>0.295</td>
<td>0.450</td>
<td>0.342</td>
<td>0.462</td>
<td>0.280</td>
<td>0.221</td>
<td>0.186</td>
<td>0.178</td>
<td>0.226</td>
</tr>
<tr>
<td>Attainment Index</td>
<td>0.179</td>
<td>0.237</td>
<td>0.181</td>
<td>0.209</td>
<td>0.152</td>
<td>0.160</td>
<td>0.110</td>
<td>0.145</td>
<td>0.170</td>
</tr>
<tr>
<td>Income Index</td>
<td>0.325</td>
<td>0.441</td>
<td>0.348</td>
<td>0.457</td>
<td>0.299</td>
<td>0.313</td>
<td>0.239</td>
<td>0.229</td>
<td>0.265</td>
</tr>
<tr>
<td>Human Dev. Index</td>
<td>100</td>
<td>135.9</td>
<td>107.3</td>
<td>140.7</td>
<td>92.2</td>
<td>96.3</td>
<td>73.6</td>
<td>73.7</td>
<td>90.9</td>
</tr>
</tbody>
</table>


105 Reproduced from Nepal PSRP Report p.29 Table 8.
This data reveals the ethnic cleavages of poverty among the rural Nepali population, and also suggests that the economy is structured to reiterate these divisions, probably due to the strong urban-rural dive that is visible in the State. Against this, the attitude of the new government appears to show a willingness to tackle these issues through institutional and other policy reform. Certainly in the context of the information provided by the governments of South Asia to the inter-governmental institutional processes attendant to economic development, this data is by far the best aggregated. This reflects, if nothing else a sound analysis on which to base and analyse the impacts of policies designed to generate economic growth.

4. Pakistan

In reviewing Pakistan the Trade Policy Review Mechanism report makes the following general observation:

Pakistan's economic growth has been impressive since its previous Trade Policy Review in 2002, mainly as a result of its relatively open trade and investment regimes, generally accommodative macroeconomic policies and structural reforms. Moreover, Pakistan's ranking on the UN human development index has risen from "low" to "medium". Poverty has fallen in line with the Government's 2003 poverty reduction strategy, although income inequality has widened slightly and rural poverty remains high.106

And like its South Asian neighbours, the macro-economic prospect for Pakistan is relatively good. The report highlights that, with the economic fundamentals being relatively strong ‘...sustained growth rests upon macroeconomic stability and micro-economic reforms to improve efficiency, promote diversification, and sustain export-led growth. While much progress has been made to establish the necessary pre-conditions for such growth, more must be accomplished to further reduce downside risks to Pakistan's growth. 107

And further that:

Future economic performance will also depend on world economic growth. Pakistan stands to gain from this provided it can improve domestic efficiency, and thus its international competitiveness. Improved efficiency

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107 Ibid. para. 34.
depends on domestic policy reforms, as well as on Pakistan's capacity to benefit from market openings and other opportunities abroad. Successfully concluding the Doha Round could help stem Pakistan's drift to increasing export assistance and preferential trade liberalization, thereby potentially strengthening the multilateral system and facilitating its unilateral reforms. The Doha Round negotiations could also help improve the predictability and stability of Pakistan's trade and investment regime (e.g. by reducing the gap between its bound and applied tariff rates and expanding its GATS commitments).\textsuperscript{108}

It is interesting to note that Pakistan’s PRSP makes no mention of ethnic or religious minorities.\textsuperscript{109} While the report is detailed and well framed, and does provide disaggregated data, this is only presented on grounds of gender, urban-rural and by province. As a result it is not possible to track the incidence of poverty among ethnic and religious minority groups. This is a serious concern and suggests that the issues of minorities and indigenous peoples are not high on the government’s agenda, nor has this been particularly important in the scrutiny of the State through WTO processes. In the context of the centrality of Pakistan to the continue struggle against terrorism in the region, there remains a danger of wealth becoming diverted away from minorities and indigenous peoples, in tandem with an overarching emphasis on security-related industries, which have tended to be dominated by Pakistan’s more powerful ethno-linguistic groups.

5. Sri Lanka

In the case of Sri Lanka, a slightly more dated Trade Policy Review report reveals a summary finding suggesting a steady if unspectacular growth of 4% between 1996 and 2003, despite ‘political uncertainty’ mainly caused by the Tamil situation. The report found that poverty remained widespread in rural areas, with ‘major macroeconomic and structural reforms required to redress imbalances.’\textsuperscript{110} Sri Lanka’s

\textsuperscript{108} Ibid. para.35.
PRSP also reflects on the effect of the long drawn-out war, pointing to a clear economic disadvantage for households in the North and East of the State. While this is attributed to the difficulties caused by the war for the obtaining of secure livelihoods there is no analysis as to whether the socio-economic factors are the reasons for the unrest, or whether the unrest has contributed to the lowering of socio-economic attainments. In any case it is clear that the households within this area are the most severely affected with a loss of productive as well as social capital. While highlighting the impact of the conflict on the youth and the poor, the PRSP also states:

Ethnic minorities face discrimination, both real and perceived, making conflict resolution and ethnic reconciliation central to poverty reduction in the decade to come.\textsuperscript{111}

Naturally in addition to the effects on the population, the continuing war (at the time of the report) also made disaggregated ethnic minority data collection difficult, especially in terms of the prevalence of poverty.\textsuperscript{112} Despite these difficulties the report does contain significant reporting on some minority issues across the country, notably in the provision of universal education.\textsuperscript{113} Against this World Bank data indicates homogeneity across the communities, though once again, with the caveat of the difficulty of data collection. An authoritative study undertaken by the World Bank had found that the incidence of poverty does not coincide with ethnic identity except in the case of Indian Tamils. The latter, referred to as ‘estate Tamils’ live off the plantation estates and suffer significant socio-economic isolation, language barriers and social stigma. Their situation is reflected in the comparative table below:

\textit{Annex 2, Table 9 titled ‘GINI Coefficient of Consumption Inequality in Sri Lanka’ (Disaggregated by Ethnicity, 1995-1996 and 1999-2000) shows the following data:\textsuperscript{114}

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sinhalese</td>
<td>.327</td>
<td>.325</td>
</tr>
<tr>
<td>Lankan Tamil</td>
<td>.344</td>
<td>.265</td>
</tr>
<tr>
<td>Indian Tamil</td>
<td>.219</td>
<td>.249</td>
</tr>
<tr>
<td>Moor</td>
<td>.312</td>
<td>.291</td>
</tr>
</tbody>
</table>

\textsuperscript{111} Ibid. p.47

\textsuperscript{112} Ibid. p.113-114. Also see the section entitled ‘Poverty in the North and East’ at pp.122-123.

\textsuperscript{113} Ibid. especially Section IV ‘Investing in Social Harmony’ pp. 52 – 53.

\textsuperscript{114} Ibid. p.135. This table is attributed to Gunawardena 2000, based on 1996/96 Household Income and Expenditure Survey; World Bank 2000, based on 1999/2000 Sri Lanka Integrated Survey
Once again the numbers reveal their limitation in understanding the minority situation. While despite the difficulty of data collection these figures do present a snap-shot of the Sri Lankan population, they cannot unearth the reasons for this other than the disruption of the lives of the whole population by a war lasting in excess of twenty-five years. From the perspective of the minorities it would be important to understand the extent to which the socio-economic situations of the different groups were push factors towards the conflict. In any case the prominence given to the Tamil conflict would indicate that the reportage on Sri Lanka reflects considerable minority content: however rather than an attempt to comment or highlight the situation of minorities this is mainly to reveal the context to which the economy has suffered as a result of war.

IV. CONCLUSION

Globalisation in and of itself has had a positive effect: in many parts of the world it has resulted in increased prosperity, with corresponding rises in income levels. A cost-benefit analysis of the impact of globalisation on the countries in South Asia would probably show considerable benefits and relatively few costs. The five States briefly reviewed here all show upward trends in income level rises, with India clearly one of the biggest economic winners: whether that can be fully attributed to globalization is a moot point. However among the hype of income level rises several fears that have remained unchecked. Prime among these has been the concern that processes attendant to globalization are changing the social fabric of States and creating greater income disparities. It was believed that greater global interaction through trade would reduce global inequality. The WTO mandate reflected this assumption in the core of its mandate. In addition the IMF was charged with ensuring that poverty reduction remained a key feature of the national policy of LDCs in particular. In response to the growing domination of world affairs by the discourse of ‘security’, interpreted as the fight against terrorism, the international community came together through a panel of experts to emphasize the concept of ‘human security’ as encompassing the need for adequate socio-economic rights, access to resources, development and the right to an environment. This was intended to present a more holistic view of human security than previously accepted in the UN era. The Millennium Promise could be seen as a
practical way of ensuring that notions of human security were particularly respected among the poorest countries in the world.

Despite the conceptual positives that have emerged from the MDGs and the greater focus on poverty eradication, it seems that groups are being left behind. These groups are often historically identifiable through their differences in ethnicity, language or religion. Indigenous peoples among these groups face the greater threat of a risk to their territory and livelihoods, and for this particular segment of global population the destruction of their environment and way of life automatically removes the comparative advantage they may have had in an increasingly marketized world. The right to work is often seen as a secondary socio-economic right, trumped by the rights to food, clothing and shelter. In the context of many minorities and indigenous peoples however, even were the State to witness rising income levels that would see greater provision rights, the cost at which they would potentially come often involves the loss of livelihoods among minorities and indigenous peoples. This has the perverse effect of reducing these segments of States’ populations to being recipients of hand-outs, rather than full participants in their national economy. Increased privatization correspondingly results in cuts to vital services heightening vulnerability among these populations.

The crisis over the rise in food prices over the last two years is a good example of a significant drawback of globalization.\textsuperscript{115} Rising income levels in South Asia has changed dietary patterns, further affected by the impact of exchanging food-producing land for cash crops. The significant shortfall in basic food production has fuelled continuous hikes in food prices: the highest seen for forty years.\textsuperscript{116} Minorities and indigenous peoples, often living in more isolated regions of the South Asian States have been left without the means of income generation as the agricultural sector shrinks, and in addition, stand deprived of the means to buy food at the substantially higher prices.

\textsuperscript{115} While the response to the recent crisis was muted in the media, the Human Rights Council took the unprecedented step of holding an emergency session to tackle this issue. Emergency sessions were usually conducted in response to particular crises occurring within States. This session constituted the first time that a thematic issue merited such consideration. It was held on the 23\textsuperscript{rd} of May, 2008 in Geneva. Unfortunately it merited inadequate attention on the plight of minorities.

\textsuperscript{116} For a detailed analysis of the rise of food prices and especially their impact in South Asia see the BBC’s Factfile on the crisis, entitled ‘The Cost of Food: Facts and Figures’ published 16 October 2008, and available at \url{http://news.bbc.co.uk/1/hi/7284196.stm} [last accessed September 9, 2009]. Also see the report filed by Karishma Vaswani, ‘Pakistan’s poor hit as food prices soar’ 30\textsuperscript{th} June 2008 available online at: \url{http://news.bbc.co.uk/1/hi/business/7481882.stm} [last accessed September 9, 2009].
While the international community continues to be concerned about the importance of poverty eradication, a macro-level approach to this issue is unlikely to address significant capacity issues that exist at the bottom of national socio-economic hierarchies. While the rising tide of economic prosperity could lift all boats, minorities and indigenous peoples are particularly hindered from benefitting from the rising tide owing to inherited structural disadvantages through years of discriminatory practice and exclusion. It is thus fundamental that States make particular provision to ensure that minorities and indigenous peoples are equipped to make a bid for economic prosperity: focussing on a holistic appreciation of a range of socio-economic rights rather than solely on basic rights. Without serious attempts to unravel ingrained structural inequalities, the best possible poverty eradication plans are unlikely impact minorities and indigenous people who cleave to the bottom of national socio-economic indicators.

In this context it is also important to reiterate that while globalisation may indicate positive directions of travel for many, unless it provides opportunities for all to realise this promise, it would fail to adequately reflect a human rights based approach. The basic feature of such an approach requires the objective of putting every individual in a position where the gamut of their social, economic, cultural, civil and political rights could be realised.

With regards to the WTO and its promise of seeking to tackle the issue of global inequality, Oxfam’s critique is worth recalling:

> Behind the façade of ‘membership-driven’ organisation is a governance system based on a dictatorship of wealth. Rich countries have a disproportionate influence. This is partly because of representational democracy. Each WTO country may have one vote, but eleven of its members among the least-developed countries are not even represented at the WTO based in Geneva.\(^\text{117}\)

It is instructive to Wolfensohn’s suggestion for: (a) better governance among developing countries; (b) reduction of trade barriers – rich and poor; (c) an increase in development aid and (d) increase international cooperation to act as a global

community to tackle these issues. However this approach still fails to tackle domestic structural inequality. Pascal Lamy, suggested that there were two elements to the question: a) ensuring better sharing of trade benefits; and b) ensuring better distribution of trade benefits. He suggests that a) can be tackled through fairer multilateral trade rules and the building of capacities in developing countries. However the second needs to be tackled at domestic level through a human-rights based approach (also known as ‘the Geneva Consensus’). While this sounds like a firmer footing towards tackling the issue, special attention needs to be paid to vulnerable groups such as minorities and indigenous peoples, to ensure they can be full participants in the process.

Leaving the market’s ‘invisible hand’ to decide these issues is doomed to failure. Even noted free trade and open market specialist Peter Sutherland admits:

> I have been personally and deeply committed to promoting the market system through my entire career. Yet it is quite obvious to me that the market will never provide all of the answers to the problems of poverty and inequality. The fact is that there are those who will not be able to develop their economies simply because market access has been provided. I do not believe that we in the global community will adequately live up to our responsibility if we have done no more than provide the poorest people and the poorest countries with an opportunity to succeed. We must also provide them with a foundation from which they have a reasonable chance of seizing that opportunity – decent health care, primary education, basic infrastructure.

The statement that perhaps best sums up the situation of minorities and indigenous peoples in the context of globalization can be extrapolated from the statement of Muhammad Yunus of the *Grameen Bank*, Dhaka, Bangladesh, on receipt of his Nobel Prize:

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118 See ‘Responding to the Challenges of Globalization’, Statement of Mr. James D. Wolfensohn, (President, World Bank Group) to the G-20 Finance Ministers and Central Bank Governors, Ottawa, 17th November 2001. As quoted by Peter Van Den Bossche *op.cit.* 17, pp.27-28


120 P. Sutherland, ‘Beyond the Market, A Different Kind of Equity’ *International Herald Tribune*, 20 February, 1997.
I support globalization and believe it can bring more benefits to the poor than its alternative. But it must be the right kind of globalization. To me, globalization is like a hundred land highway criss-crossing the world. If it is a free-for-all highway its lanes will be taken over by the giant trucks from powerful economies. Bangladeshi rickshaws will be thrown off the highway. In order to have a win-win globalization we must have traffic rules, traffic police, and traffic authority for this global highway. Rule of “strongest takes all” must be replaced by rules that the poorest have a place and piece of the action, without being elbowed out by the strong.121

121 Nobel Lecture, Oslo, 10 December 2006.
Between Fear and Integration: Islamophobia in Contemporary Italy

I. SUMMARY AND OVERVIEW

Can Italy manage to accommodate greater social diversity? Or will Muslim immigration deepen cultural tensions, instability, and local conflict, especially under conditions of economic recession and joblessness?

This question does not concern Italy alone. On the contrary, it is a problem for Europe all together. The results of the June 2009 elections to the European Parliament have shown the relevance of the anti-immigrant vote. The events of recent years have layered a security dimension over preexisting concerns about immigrant integration frequently posed in the past with respect to Muslim communities in liberal democracies. The resurgence of far-right groups intensifies the feeling of an anti-Muslim wind blowing across European countries. Their warnings focus primarily on three elements: the terrorist threat posed by radical Muslim European populations, a cultural "invasion", and some demographic "swamping" by Muslim communities (with higher fertility rates).

Moreover, Muslim groups raise a distinct set of problems such as protecting women and the role of religion in the public sphere. Often, there is the tendency to exaggerate the degree of conflict between the norms of mainstream practices and the practices of religious minorities such as Muslims. Nevertheless, it remains true that traditional Muslim norms and attitudes can sometimes conflict with the liberal principles of equality, freedom, and nondiscrimination.

The main thesis of this article posits that, under high levels of institutional insecurity, *islamophobia* (prejudice about Islam and Muslims) will be more intense and will likely lead to violence. Islamophobia and intolerance are at risk to become widespread sentiments in Italy (and in Europe). According to the author’s thesis, these sentiments cannot be adequately faced or contrasted without appropriate legal reform.

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Recently in Italy, the accommodation of Muslim norms has occurred along two ways: collective and individual. Each way follows a different logic. The collective way follows the logic of institutional corporatism. By institutional corporatism, I mean the attempt to integrate Islam as a corporate actor into an already established state–church regime. The individual way follows the logic of individual rights. All modern constitutions include religious liberty clauses that legally do not stop short of Muslim believers. The two ways allow for diverging paths. The individual way immediately applies whenever constitutional religious liberties are violated. Accordingly, the integration of Islam has been, first and foremost, promoted by higher courts. Courts have given space to religious practices in various part of daily life.¹

By contrast, accommodation on the collective way has been much slower because of the historical inertia of established state–church regimes. Various Muslim organizations in Italy have attempted to stipulate “intese” (special agreements) with the Italian state since the early 1990s. Unfortunately, Muslims efforts to achieve full legal recognition so far have not been successful. Apart from presenting requests for intese, Muslims have articulated claims regarding the right to an appropriate practice of their religion. These demands concern two spheres: the informal public space peculiar to civil society (such as founding of associations, opening of places of worships, and cultural and social initiatives) and the formal public space subject to the direct control of central and local institutions (cemeteries, specific food in school, Islamic slaughtering, teaching religion at school, and recognition of Islamic religious holidays).

In this article, the author suggests adopting a model of legal intervention for integrating Muslims into Italian liberal democracy. This model is called “pluralistic institutional approach to integration”, based on a “power sharing approach”. It requires a conceptual break with absolute, unlimited and undivided sovereignty and jurisdiction. Such a pluralistic institutional approach to integration is defined by two core aspects. First, on a collective level, an agreement with Islam and the subsequent recognition of a legal status of Islam, now the second largest religion in Italy, must be achieved. The existing pluralism of minorities, especially Muslims, in Italy must be integrated into the

institutional framework. Muslim representation should not be based, as it is actually foreseen in the Italian legal system, on a corporatist form that can be led or even imposed by the state in a “top-down” way, but instead should be based on an institutional integration of civil society. Civil society should play a greater role because they are more comfortable with a variety of Muslim voices, groups and representatives.

On the individual level, a pluralistic institutional approach to integration encourages the accommodation of some of the most pressing minority demands in limited areas of family law, for example in cases of marriage and divorce. It would allow Muslims to follow their cultural and religious norms, while safeguarding key liberal values.

In this article, I will not use the generic term *sharia* (Islamic law) but the term *Muslim norms*, because I want to underline that some Muslims are calling for accommodation of norms that derive from their understanding of their religion, including not only standards based or derived from *sharia* or *fiqh* (jurisprudence), but also general ethical principles derived from Islamic religious culture. The focus on religious norms or values makes it clear that the main motivation for the accommodation of Muslim norms would be to maximize individual autonomy and minority protection. In this sense, the accommodation of Muslim norms is subject to the ultimate regulation of the Italian constitutional and legal system.

The article is structured in the following way: Section II presents a general discussion about the term *Islamophobia* connected with a cursory genealogy of it in Italy. Notwithstanding its controversial semantic meaning, the term shows staying power and has increasingly become standard in the discussion of the situation of Muslims in Europe. Recently, in Italy, anti-Muslim attitudes are tied with a more general Islamophobia that intensified worldwide after 9/11. However, even if this widespread sentiment is related to the “war on terror”, which stigmatises as violent and dangerous all Muslims on account of a few extremists, the Italian Islamophobia has three trends that interact and feed into each other. Section III provides a brief overview of the most important regulations concerning immigrants’ right in Italy and its difficult relationship with EU law. The author argues that the adoption of legislation, based mainly on concerns about security, cannot be the only basis for immigration policy, because it, as will be shown by cases the

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European Court of Human Rights decided, undermines the fundamental principle of the rule of law in the EU.

Section IV presents a general overview of the empirical situation created by the troublesome Muslim integration. The first part of the section provides some quantitative data on Muslim immigration in Italy. Because “Muslim” is a broad category, it needs to be given as much specificity as possible to avoid producing images of a monolithic and undifferentiated religious community. In the second part of this section, the author analyzes the representation of Muslims in Italy. Special focus is given to the institution of the Consulta Islamica (Council of Islam) and its results.

Section V sets out the model of what has been labelled “a pluralistic institutional approach to integration”. The substantive claim is that this pluralistic institutional approach to integration provides promising options for the incorporation of cultural and religious minorities.

II. ISLAMOPHOBIA

One significant obstacle to any policy discussion accommodating Muslim norms in the Italian public sphere and for the legal recognition of Islam is the problem of prejudice about Islam and Muslims, often labelled as Islamophobia.

There is currently neither an agreed legal definition of Islamophobia, nor has social science developed a common definition. Academics are still debating the legitimacy of the term, because it is often imprecisely applied to diverse phenomena, ranging from

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xenophobia to antiterrorism. In its report on Discrimination and Islamophobia in 2006, the European Monitoring Centre on Racism and Xenophobia (EUMC), which became the European Union Agency for Fundamental Rights (FRA) in March 2007, specifically states that the definition, application, and use of the term Islamophobia “remains a contested issue”.

However, the term Islamophobia can no longer be discarded from the European lexicon, having found a resonance or presence in the increasingly mediatized societies that we inhabit. Anti-immigrant xenophobic nativism, secularist antireligious prejudices, liberal-feminist critiques of Muslim patriarchal fundamentalism and the fear of Islamist terrorist networks are being fused indiscriminately throughout Europe into a uniform anti-Muslim discourse. Thus, Islamophobia designates the stigmatization of all Muslims and is defined as a widespread mindset and fear laden discourse in which people make blanket judgements of Islam as the enemy, as the “other”, as a dangerous, monolithic bloc that is the natural subject of deserved hostility.

Islamophobia in Italy shows three trends that interact and feed into each other: first, media bear a heavy responsibility in their representation of minority groups and may be considered a principal agent behind the evident rise of Islamophobia. Intellectuals have contributed to fostering a neocolonialist and neoorientalist image of Muslims as the

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Islamophobia, and other similar terms such as xenophobia, the fear of strangers, are often favoured over the term racism in European discourse. See Commission on British Muslims and Islamophobia, *Islamophobia: A challenge for US All* (The Runnymede Trust, London, 1997).

“other” par excellence\(^8\) or have chosen to emphasise Muslim “distinctness” as a way of suggesting that Muslims “cannot” be integrated into the Italian society.\(^9\)

The Catholic conversion of Magdi Allam, a laic Muslim intellectual, deputy editor for an important newspaper and a controversialist who, in recent years, has assumed an increasingly harsh stance on radical Islam and Islam tout-court, has caused a wave of protests from Italy and worldwide. Baptised by Pope Benedict XVI during the Easter Vigil and at St. Peters in 2008, the conversion of Magdi Allam has created a stir, but it is the “spectacular” approach of the conversion from Islam to Catholicism, rather than the conversion itself which has aroused debate.

Second, consider the role of the Lega Nord (Northern League),\(^10\) which has taken the anti-immigrant rhetoric role that usually far-right parties play in the political arena of other European countries.\(^11\) The Lega was born as a regionalist movement, which had as a negative target not immigrants, but the South of Italy generally. The original message of the Lega focused on the economic differences between Italian regions and how the State managed or mismanaged them. Only in the late 1990s did the focus shift to include immigrants. In such terms, the Lega, redefined the concept of territory, which acquires a particularly profound resonance in contemporary immigration politics.\(^12\) The Lega associates immigration with fear, crime, and a threat to the local way of life. In particular, the highly controversial Celtic, Christian, and Calvinist identity of “Padania”, loosely based on the geographical boundaries of Northern Italy, is supposedly threatened by an

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\(^8\) See Ornella Fallaci, *La rabbia e l’orgoglio* (Milano, Rizzoli, 2001), i.e., The “Rage and the Pride”, which attacks Muslims as members of a warlike religion bent on destroying Italy’s Christian society.


\(^11\) Alleanza Nazionale is the successor of the Movimento Sociale Italiano (Italian Social Movement, MSI), which was in practice the neo-fascist party in post-WWII Italy, Italy’s nationalistic party, has taken a much softer tone on immigration than the Lega Nord, proposing itself as a “law-and-order” party but never proposing xenophobic stances in its political positions. See Ignazi, *op.cit.* note 11.

Italian immigration policy decided in Rome. The party argues that the homogeneity of this ethnic community must be preserved by a stricter control of immigration and asylum claims. Using Zincone’s typology, the Lega can be said to have taken a mixture of repressive-legalitarian (stressing the need to combat illegal immigration and strictly control legal immigration) and identitarian positions (expressing concern about the threat to national and cultural identity posed by immigration).13

The Lega’s Islamophobia has become increasingly virulent since 2001. Prominent Lega representatives have been involved in a number of notorious episodes: in February 2006 a minister of the Lega Nord had one of the controversial Danish Muhammad cartoons printed on a t-shirt and displayed it provocatively in front of television cameras. This prompted protests in front of the Italian consulate in Libya that left 11 people dead. The same provocative Lega Nord politician threatened to take “a pig for a walk” on the land allocated for the new Bologna mosque to deconsecrate this piece of Italian soil for Muslims.14 The ever-widening concerns related to matters concerning the protection and advancement of regional identities and interests, as well as concerns about “security” and “antiterror” are forming the backdrop against which a greater receptivity of the party is grounded.

Finally, consider the role of the Catholic Church in Italy, which promoted a culture of welcome and comprehension for immigrants in general and for Muslims specifically; however, some of its components are supporting anti-Muslim ideas.15 Most prominent among these voices of the church in Italy have been Bishop Biffi of Bologna and Bishop Maggiolini of Como whose rhetoric parallels that of the Lega in portraying Muslims as undesirable aliens whose way of life represents a grave threat to Christian European identity and whose beliefs are wholly incompatible with Christianity. Pope John Paul II evinced certain empathy toward the Islamic world that attenuated the influence of these harsher voices in the Catholic hierarchy. However, according to some observers, under

15 See Guolo, op.cit. note 8.
the new leadership of Pope Benedict, these voices might have freer reign, although there are numerous initiatives for fostering interreligious dialogue.\(^{16}\)

According to the results of recent surveys,\(^{17}\) the attitude of the Italian population toward immigration is ambiguous. On one hand, Italians are convinced that immigrants are necessary for the Italian economy, an attitude which is in line with the overall acceptance of economic migration and regularization processes. On the other hand, a sizeable part of the Italian population has developed the perception that illegality and criminality are deeply interrelated.\(^{18}\) A prestigious Italian scholar has proposed that the negative image of Muslims in Italian society could be connected to the long history of raids along the coast of Italy carried out by “Saracens” (Muslims) that left an indelible impression of fear in the “collective unconscious” of Italians.\(^{19}\) This long-standing association of Muslims with danger and terror in the Italian psyche was, of course, only confirmed and deepened by the events of 9/11. The more general problem is the increasing clash with the “other” or its image. The “other” par excellence, for historical, symbolic, cultural, and numerical reasons has become the Islamic “other”. The confrontation and affirmation of identities is assuming specific forms and greater importance than in the past. The best examples are the many controversies over symbolism: the headscarf, the crucifix, the slaughter, but also the symbolism at school, such as the Christmas play, cribs, and hymns.\(^{20}\) In addition, the issue of Mosque building has been the subject of great conflict in Italy, which has led to assuming of political positions and virulent quarrelling whether they had already been built or were only planned.\(^{21}\) The Lega Nord has built a violent and insistent campaign on

\(^{16}\)See James Toronto, Islam Italiano: Prospects for Integration of Muslims in Italy’s Religious Landscape”, 28 Journal of Muslim Minority Affairs (2008), 61-82.
\(^{20}\) For an good overview see Osservatorio delle Libertà ed Istituzioni Religiose at <http://www.olir.it> and <http://www.forumcostituzionale.it>.
Mosques and some Catholic religious exponents have let themselves go in dubious declarations. Mosque construction means, first and foremost, visibility in the public space, of which Muslims are fully aware, and which also affects a non-Muslim audience. The problem resides in the progression from semiclandestineness and an initial decision to remain socially invisible, to receiving the right (guaranteed to all religions by the Italian Constitution) of practicing Islam “in the open”. Although the question of Mosque building is often merely a pretext that provides an opportunity for political infighting, the population focuses on the danger presented by the “other” on the use of space and proximity of groups whose cultural codes are a often mystery. The conflicts that frequently arise are also the expression of previously unresolved conflicts and ambiguities specific to Italian society. The issue is tied in with the complex and often contradictory relationship between the public authorities at the local level and the national government, including, but not limited to the management of immigration policies and religious or cultural pluralism and the Catholic Church’s monopoly on cultural values versus the premises of secular society and the issue of regional and European identities. We have to consider also that this process is taking place in a country rightly or wrongly outwardly and self-perceived as relatively homogenous, at least at the religious level, in which the actors dealing with collective identity are still little accustomed to plurality.

At the same time, numerous legislative measures, political debates, policy recommendations and cultural awareness programmes have sought to challenge and

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23 In Italy there are about 660 prayer halls. Of these, only three are mosques in the truest sense: that of Catania, the oldest one (1980); Milan Segrate, built in 1988, which is one of most influential in the organization of Italian Islam; and the large Italian Islamic Cultural Centre in Rome, officially inaugurated in 1995 and linked to the Saudi Muslim World League. See Stefano Allievi Conflicts over Mosques in Europe: Policy issues and trends–NEF Initiative on Religion and Democracy in Europe, Network of European Foundations (2009).

24 The growing concern with security was registered by the second survey of the Social Observatory on Immigration, carried out in 2008, the results of which shows an increase in mistrust toward immigrants. In particular, the study contains an ad hoc section on the opinions and attitudes of Italians and immigrants toward immigrants of the Muslim faith. At least one out of three Italians and almost half the non-Muslim immigrants were against the construction of mosques on Italian territory. See Osservatorio sociale sulle immigrazioni in Italia 2008 at <http://www.interno.it>.
potentially halt such negative discourses on Muslims.\textsuperscript{25} The situation is, therefore, far from one-sided. Some Muslim communities have also begun to respond: for some, a shift toward a greater radicalization of Muslim youths has occurred; conversely, some Muslim communities have begun to respond positively and directly to Islamophobia.\textsuperscript{26}

III. ISLAMOPHOBIA AND IMMIGRATION POLICIES IN ITALY

Islamophobia often overlaps with other forms of discrimination (such as racial or class)\textsuperscript{27} and becomes a sometimes indistinguishable part of broader phenomena such as xenophobia, anti-immigration policies, and antiterrorist measures. In Italy, relevant policies aimed at regulating inflows and the legal treatment of foreigners as potential immigrants started only in the late 1980s.\textsuperscript{28} Until 2008, the most important regulations concerning immigrants’ rights and immigration flows in Italy were the result of three main Acts, the \textit{1992 Nationality Law} (No. 91, 5 February), the \textit{1998 On the Regulation of Immigration and the Legal Status of Foreigners in Italy} (No. 40, 6 March; then Consolidated Act No. 286, 25 July), and the 2002 centre–right reform, namely \textit{Norms Concerning Immigration and Asylum} (No.189, 30 July), known as “Bossi-Fini law”.

The main changes introduced by the 2002 Bossi-Fini law represented the point of departure in the development of a more restrictive immigration policy in Italy and a drift

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\bibitem{Nascimbene} The fundamental features of the legal framework on the acquisition and loss of nationality—however, they changed over time—date back to the period immediately following the unification of the country. Measures concerning immigration and those defining immigrants’ rights are usually included in the same provisions, whereas measures regulating access to nationality are embodied in different acts. See Bruno Nascimbene (ed.), \textit{Immigration law}, (CEDAM, Padova, 2004).
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toward securitization.\textsuperscript{29} In 2005, legislation was further developed because of the issuance of so-called \textit{Pisanu-Law},\textsuperscript{30} which improved the instruments to fight the threat of terrorist organizations.

In July 2009, the Italian Parliament approved Law No. 94/2009,\textsuperscript{31} on “\textit{Provisions Relating to Public Safety}”. The legal measures contained in this law, with other laws approved by Italian Government and Parliament in 2008,\textsuperscript{32} become part of the so-called “\textit{Security Package}”, containing amendments to the criminal code and to the special laws, to the Code of Criminal Procedure, to laws regarding preventive measures, imprisonment, immigration, the highway code, and relating to the powers of law enforcement.\textsuperscript{33}

Among the most important rules implemented by Law No. 94/2009 is the introduction in the Italian Criminal Code of a provision making illegal immigration a crime. Indeed, Article 1 (s.16, lett. a) of Law No. 94/2009 amended Article 10bis of Legislative Decree 286/1998 (Immigration Law), qualifying as a penal offence—punished with a fine from 5,000 to 10,000 Euros—the entrance and stay in the state territory of a foreign national, performed in violation of the Italian Immigration Law’s provisions on lawful entry and stay requirements.\textsuperscript{34} The newly introduced Article 61, (s.1, num. 11bis) of Italian Criminal Code (introduced by Article 1, s.1, Law No. 94 and applicable to all crimes in the Criminal Code) provides that a sentence will be increased in case a crime is committed by an illegal immigrant on the Italian soil. This rule applies only with regard to extra EU citizens and stateless people. The offence is accompanied by a series of additional sanctions: expulsion, discontinuance of the crime once the “irregular”


\textsuperscript{34} Making irregular immigration a criminal offence has other implications. Under the Penal Code, civil servants are required to inform security authorities of all criminal offences that they become aware of during their activities (Article 361 and 362).
foreigner is outside Italian territory, the possibility of expelling the “illegal immigrant” even when there is no authorization for expulsion from the legal authorities.

The legal measures adopted have generated widespread concern among institutional and civil society actors at the national\(^35\), European\(^36\) and international levels.\(^37\) The Council of Europe, in the Hammaberg Memorandum,\(^38\) stressed that “concern about security cannot be the only basis for immigration policy. Measures now being taken in Italy lack human rights and humanitarian principles and may spur further xenophobia”.

The approval of the “security package” calls for “striking a new balance” between security and rights while human rights are still recognized as fundamental values on which the Italian society is built. New rules are said to apply to the unprecedented era of post-9/11 international terrorism: “balancing” is not the only challenge to the full application of fundamental human rights norms in that context, including the prohibition against torture and other inhuman treatment. Another aspect is exclusion from the application of human rights norms, for instance by reference to their essentially territorial nature and many other constructions, with the result of excluding certain categories of persons from the scope of application of human rights law or international humanitarian law.

The *Ben Khemais v. Italy*\(^39\) case is particularly noteworthy in this regard. In the decision issued by the Second Chamber of the European Court of Human Rights (hereinafter ECtHR or court) on 24 February 2009, the court unanimously found Italy in violation of

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38 Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe (Strasbourg: COE, 2008).

Articles 3 ("Prohibition of torture") and 34 ("Right of individual application") of the European Convention on Human Rights (ECHR), in a case involving deportation of a Tunisian citizen to his home country by the Italian Government. The court took into account, inter alia, that neither the applicant’s Italian lawyer nor the Italian Ambassador to Tunis had the possibility to visit the applicant in prison to examine whether his physical integrity and human dignity were respected. The court also found a violation by Italy, in this case, of Article 34 (individual applications) of the Convention considering Italy’s nonabidance of the court’s interim measure indicated under court rule 39. The court noted, inter alia, that the government, before the deportation, had not requested the removal of the interim measure that had been adopted under court rule 39 which was still valid and that it proceeded to the forced return even before receiving diplomatic assurances from Tunisia. Italy’s disregard for its international human rights obligation is particularly disturbing in light of the 2008 European Court’s decision in the case of Saadi v. Italy.\(^{40}\) In this similar case, the ECtHR had to decide whether it should change its interpretation of Article 3 of the ECHR regarding the prohibition of torture and inhuman or degrading treatment in view of the changing international climate. Italy, joined by the United Kingdom as a third-party intervenor,\(^{41}\) claimed that the ECHR’s standard as outlined in Chahal v. United Kingdom\(^{42}\) ought to be amended and recast in the context of individuals who pose a particular danger to the community as a whole. The ECHR, in its decision of 28 February 2008, held that the enforcement of deportation to Tunisia of the alien concerned would constitute a breach of Italy’s positive obligations under Article 3 of the ECHR,\(^{43}\) despite the diplomatic assurances that had been obtained by the respondent states.\(^{44}\) Under such circumstances, the accession of Italy to international human rights treaties may not be considered to be in itself, or in combination with diplomatic assurances, a sufficient, reliable guarantee against the real risk of torture or


\(^{41}\) Art. 36 of the European Convention provides that the ECtHR may permit member states to intervene when one of its nationals is an applicant (Art. 36(1)) or whether it would be in the interest of the proper administration of justice (Art. 36(2)). In Saadi the United Kingdom intervened under Art. 36(2).

\(^{42}\) 1996-V 1831; (1997) 23 EHRR 413.


\(^{44}\) For more details see Daniel Moeckli, “Saadi v. Italy: The rules of the game have not changed”, 8 Human Rights Law Review (2008), 534-548.
other forms of ill-treatment which are proscribed by Article 3 of the European Convention on Human Rights.\textsuperscript{45} In such cases, member states are urged to use existing measures alternative to forced return, such as, under Italian law, compulsory residence and special police supervision. In cases of enforced return, the deporting state has a duty to effectively monitor the reception of the returnee and ensure full protection of his or her safety and dignity.\textsuperscript{46}

In the current climate, in which the consensus against torture seems to be challenged, the unequivocal reaffirmation of the absolute nature of the prohibition of torture, inhuman treatment, degrading treatment, or punishment of every person by the most influential regional human rights body is indeed welcome and timely. This prohibition includes facilitating torture or inhuman or degrading treatment or punishment by deporting someone to a country in which he or she faces a real risk of such treatment. As the ECtHR has stressed, freedom from torture and ill-treatment corresponds to one of the fundamental values of European democratic societies. Regarding Italy, it is particularly concerning that 11 similar cases\textsuperscript{47} as noted in the aforementioned, have not been resolved domestically and have resulted into applications against Italy before the ECtHR, thus burdening and straining even further its docket.

IV. STATUS OF MUSLIMS IN ITALY

On 31 December 2008, there were 3,891,295 foreign residents in Italy against a total population of 60 million according to the national statistics institute ISTAT. Muslims make up the largest religious community on Italian territory after Christians. Accurate estimates of the number of Muslims in Italy are difficult to obtain, but currently it is estimated that there are about 1,600,000 Muslims living in Italy, including about 273,000 unregistered immigrants.\textsuperscript{48}

\textsuperscript{45} See also Grand Chamber of the European Court of Human Rights, judgment in the case of \textit{Saadi v. Italy} 28/02/2008, para. 147.

\textsuperscript{46} See Council of Europe Committee of Ministers’ \textit{Guidelines on Human Rights and the Fight against Terrorism} (2002), especially Guidelines XII (on asylum, return (“refoulement”) and expulsion) and XIII (on extradition) at <http://www.coe.int/t/cm>.

\textsuperscript{47} The Application numbers and names of these cases are: 37336/06 (Soltana), 11549/05 (Darraj), 46792/06 (Bouyahia), 2638/07 (Abdelhed), 37257/06 (O.), 38128/06 (Ben Salah), 44006/06 (C.B.Z.), 16201/07 (Hamraoui), 12584/07 (Selm), 44448/08 (Drissi), 50163/08 (Trabelsi).

Although Italy has a long and fascinating history of Muslim presence, the steady influx and permanent status of Islamic immigration began only 15–20 years ago and arrived “unexpectedly”: in fact, there was no tradition of a colonial or neocolonial relationship between Italy and Islamic countries.\(^4^9\) Only a small percentage of Muslims living in Italy come from former Italian colonies in the Muslim world (Libya, Somalia, and Eritrea). The two countries that have contributed the largest number of Muslim immigrants to Italy are Morocco (35%) and Albania (16%). Most other Muslims living in Italy come from Tunisia, Senegal, Egypt, Bangladesh, Pakistan, Algeria, Bosnia and Nigeria, contributing to the image of an extremely diverse community. It was in the 1990s that Muslim migration became meaningful for the Italian society and the related issues forced to the forefront of debate in Italian public life represent a relatively new phenomenon with an overlapping of the categories of “immigrant” and Muslims. Previous waves of Muslim migrants, 40, 30 or even 20 years ago, occurred when cultural and political priorities were Arab nationalism or socialism and when political leaders were not openly religious. In a nutshell, the political climate of many of these countries veered toward Islam, and recent immigrants reflect that changed cultural and political reality. Italy, therefore, is hosting much more pious immigrants than it would have a few decades ago. We should also remember that Islamic-inspired terrorism has been in the forefront of the news only in the last 10-20 years, and the fears of the European, especially the Italian public, reflect this development. Therefore, on one hand, we see immigrants who are much more likely to be observantly religious than a few decades ago and, on the other hand, we have a public that is much more sensitive to the “Islamic issue” no matter whether those fears are justified.

The vast majority of Muslims in Italy are first-generation, who retain strong linguistic, economic, and emotional ties to their country of origin, although a second generation is just beginning to appear and to play a significant role.\(^5^0\) The various sources of Islam (Middle East, North Africa, sub-Saharan Africa, India, Eastern Europe, Southeast Asia) are amply represented. From the variety of countries represented every major sect of


\(^{5^0}\) Caritas/Migrantes, *op.cit.* note 18.
Islam—Sunni, Shiite, and Sufi—and many derivative orders, movements, ideologies and schools of thought can be found in the tapestry of Italian Islam.51

In contrast to other European countries like Germany or France, the diversity of the Muslim population has resulted in dispersion of Islamic presence around the country and fragmentation of purpose and activity.52 Thus, one finds Islam well-represented not only at the national level, but also at the regional and local levels in urban and rural settings.53

This geographical distribution of Muslims in Italy and their ethnic, national, and ideological diversity inhibit efforts to mobilize and unify the Islamic community to achieve common political and social goals. Above all, the fact that the religion lacks a hierarchical structure, especially in Italy where the Muslim presence is, as already mentioned, rather recent, makes it difficult for the state to find representatives. Today, pending the approval of a comprehensive bill on freedom of worship like the one put forth in Parliament on 28 April 2006 during the last Prodi government,54 one of the greatest obstacles to official recognition of Islam by the Italian state is this intrinsic fragmentation.55

The first Muslim organization dates back to 1937 (Associazione Musulmana del Littorio - Fascist Muslim Association); however, only in 1971 did Muslims begin to organize, founding the Unione degli Studenti Musulmani in Italia (Union of Muslim Students in Italy), which was, unlike in other European countries, promoted by immigrant students. By the 1990s, there were a number of rivaling Muslim organizations in Italy that are becoming increasingly active in articulating their concerns and the demands of their

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51 On the nonmonolithic aspect of Islam see Massimo Campanini and Karim Mezran, Arcipelago Islam. Tradizione, riforma e militanza in età contemporanea (Laterza, 2007); see also Paolo Branca, Il Corano-Il libro sacro della civiltà islamica (Il Mulino, Bologna, 2001).
54 Bill No. 1576 on Freedom of Worship and Abrogation of the legislation on admitted cults retabled proposals first put forward by the “Maselli” Bill presented during the Prodi government in 1997 and later also taken up in a bill tabled by the Berlusconi government. Although repeatedly tabled, the bill has not been passed because of opposition from the right-wing National Alliance and Northern League parties.
communities. They are usually established as associations, without a public legal status. One exception is the Centro Islamico Culturale d’Italia (Islamic Cultural Centre, CICI) which has been awarded public legal status by D.P.R., No. 712 of 21 December 1974. The CICI is based in Rome and runs the most important Mosque in Italy, the Grand Mosque of Rome, opened in 1995 with the support of the Muslim World League, in particular the backing of Saudi Arabia and Morocco. The CICI views itself as the most viable representative of Muslims in Italy because of its official high-level contacts in Rome. Its board is largely composed of the ambassadors of Islamic states to the Holy Sea. Besides serving as a spiritual and social focal point, organizing celebrations of religious holidays and observance of other religious rites, the CICI claims an important educational role. It provides Arabic language classes and religious instruction and has an extensive library on Islamic history, culture and contemporary affairs.

The largest Muslim organization in Italy is the “Unione delle Comunità e Organizzazioni Islamiche in Italia” (Union of Islamic Communities in Italy, UCOII), a federation of mosques across the country that claims to control 80% of the mosques and prayer rooms in the country. UCOII does not have public legal status but is part of a network which stretches across Europe and is allegedly in contact with the “International Muslim Brotherhood”. UCOII seeks to use its virtual monopoly over mosques to spread its ideology and exercise what Italian expert on Islam, R. Guolo has defined as a “diffuse cultural hegemony over the country’s Muslim community”. UCOII has sought recognition from the European Parliament as a confessional minority in Europe that supports not individual but collective integration.

Other smaller organizations are the Comunità religiosa islamica (Muslim Religious Community, COREIS), made up of Italian citizens converted to Islam, which claims to

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56 For detailed accounts of the rivalries and alliances of the main Italian Muslim associations and their relations with sympathizers and with the Italian state, see Stefano Allievi, “Organizzazione e potere nel mondo musulmano: il caso della comunità di Milano”, in Jacques Waardenburg et al., I musulmani nella società europea (Torino, Edizioni della Fondazione Giovanni Agnelli, 1994); Roberta Aluffi Beck-Peccoz, “The Legal Treatment of the Muslim Minority in Italy”, in Silvio Ferrari, Roberta Aluffi Beck-Peccoz, and G. Zincone, The Legal Treatment of Islamic Minorities in Europe (Leuven, Peeters, 2004).

57 UCOII is a sister organization of the French Union des Organizations Islamiques de France (UCOIF) which claims to represent one-third of French Islam and is also believed to be close to the “International Muslim Brotherhood” (IMB). On UCOIF, see Caroline Fourest, "Où en est l’"Islam de France", Le Monde, 1 February 2007, 1-4.

58 Guolo, op.cit. note 56.
represent moderate Islam, arguing that all other organizations lack the language and cultural skills necessary to counteract Islamophobic attitudes in Italian society and to negotiate effectively through the Italian political system; the Giovani Musulmani in Italia (Young Muslims in Italy, GMI) representing second generation Muslims born in Italy who see Italy as their only benchmark; women’s associations, in particular the Associazione donne musulmane in Italia (Association of Muslim Women in Italy, ADMI), which plays a leading role in the increasingly widespread but not yet incisive panorama of women’s associations; the Associazione musulmani italiani (Association of Italian Muslims, AMI), which has a rather low profile and addresses only Italian citizens (foreigners can become members but are not entitled to vote or hold executive positions); the Unione musulmani d’Italia (Union of Muslims of Italy, UMI) which does not play a significant role at the moment.

A. An Officially Unrecognised Reality

Thus far, a federation of the rivalling Muslim organizations in Italy, as happened Spain, is not viable. The Italian government is, therefore, faced with a dilemma: once it recognizes one of the faith groups as representing the entire Islamic community, with powers to appoint imams, administer and receive public funding, and contribute to religious denominations, other Muslim groups may refuse to recognize that group on the basis that it lacks legitimacy ("representation"). Therefore, the Italian government has argued that it is too early to conclude an official agreement with Islam.

As is well-known, Italy, like Spain and Portugal, operates under a “concordat” legal system based on the signing of agreements that govern relations between the state and religious groups. Their relationship with the Italian state is regulated by laws on the basis of covenants, so-called “intesa”. An intesa with the Italian state can only be requested by those faith communities which have been officially recognized and awarded public legal personality according to law No. 1159 of 24 June 1929 (the law of admitted cults).


60 Ferrari, op.cit. note 2; Enzo Pace, L'Islam in Europa: modelli di integrazione (Roma, Carocci, 2004); Silvio Ferrari, “The Legal Dimension”, in B. Marechal et al. (eds.), Muslims in the Enlarged Europe: Religion and Society (Leiden, Brill, 2003).
The Italian Constitution recognized the previous privileged concordat signed in 1929 with the Italian Catholic Church, but also abolished vestiges of religious discrimination and stipulated that other religions and faith communities would have equal legal standing and might organize themselves freely as long as their practices did not violate Italian law. In 1984, the concordat with the Catholic Church was renegotiated, removing Catholic clergy from the state payroll, requiring that all Italian citizens pay 0.8% of their taxes (otto per mille) either to the state or to a religious or cultural organization of their choice, and opening the way for the official agreements (intesa) with other cults than the Roman Catholic. They can be awarded public legal personality by presidential decree on the basis of a recommendation from the Ministry of the Interior, which also has to approve the nomination of ministers of religions other than the catholic.

The first intesa was signed after 8 years of negotiations with the Valdese Methodist Church (Valdese Table) on 21 February 1984 and was endorsed as a law on 11 August 1984 (Law No. 449/1984). Other agreements have been signed (but have not yet entered into force) with the Apostolic Church of Italy, the Church of Jesus Christ of the Latter Day Saints, the Christian Congregation of Jehovah’s Witnesses, the Sacred Archdiocese of Italy and Exarchate for Southern Europe, the Italian Buddhist Union (UBI) and the Italian Hinduist Union. Another milestone in the liberalization of Italy’s religious economy occurred in 1994 when the first national elections were held following the collapse of the long-dominant Christian Democratic Party, allied closely with the Catholic Church. These political and legal developments, together with the heavy influx of immigration from non-Catholic countries began to sway public attitudes toward religion in Italy.

Symbolically, signing an intesa is a public affirmation that the religious community has attained an equal standing in Italy’s public space. This also involves a significant psychological aspect for the religious community: the achievement of official recognition increases the self-esteem and prestige of a religious minority, while lack of this legal recognition brands the group as second-class citizens in the religious economy. Practically speaking, a religious community with an intesa enjoys important material advantages, for example, benefiting financially from annual taxpayer contributions and teaching its religious precepts in the public schools during religion class. In addition, a
formal agreement helps facilitate access to rights already provided under general Italian law: having the right to observe religious holidays and prayer times; providing chaplains in prisons, hospitals and the military; conducting funerals and marriages with full civil recognition.

Since the early 1990s, various Muslim organizations in Italy have attempted to stipulate “intesa” with the Italian state, but so far Muslims efforts to achieve full legal recognition have not been successful. Several factors have contributed to the Islamic community’s failure to reach an agreement with the Italian state: as was already noted, the disunity in the Muslim community, characterized by a lack of a hierarchical organization and institutional leadership, which has also prevented official recognition as public legal personalities according to law No. 1159 of 24 June 1929 in all but one case; and the internal competition among Muslim associations (between them and Muslim countries of origin) for the social and political hegemony over Italy’s heterogeneous Muslim communities. Researchers also argue that the institute of the intesa as such—being part of a corporatist tradition—privileges the “traditional” Judeo-Christian faith communities. The intesa system is based primarily on an ambiguous political process and public opinion heavily influences government decisions about which religious groups will be allowed to sign an intesa.

B. The Experience of the Council of Islam

Despite the political, social and academic anti–Islamic discourse, efforts to combat discrimination against Muslims and claims for accommodations for Muslim norms are underway in Italy. These plans concern not only the economic and social arena, but also cultural and religious matters. A number of political bodies have been set up to discuss the question of multiculturalism and religious freedom. Among then are the Consulta islamica (Council of Islam), the Consulta giovanile per il pluralismo religioso e culturale (Youth Consultative Council for Religious and Cultural Pluralism), the Osservatorio sulle politiche religiose (Observatory on Religious Policies), and a number of commissions set

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61 A first draft for an intesa with the state was presented in 1992 by the UCOII, in 1993 by the CICI, in 1994 by AMI, and in 1996 by COREIS. For a detailed account, see Guolo, op.cit. note 56.
up under the Prime Minister’s Office. The Consulta Islamica was established by the Ministry of the Interior taken in September 2005.62

Already in 2003, the Italian EU Presidency actively promoted and encouraged interfaith dialogue on the EU level. They brokered a “Declaration on interfaith dialogue and social cohesion,” adopted by EU Ministers of Justice and Home Affairs in Rome, which was later endorsed by the European Council held in Brussels on 12 December 2003.63 The Council for Italian Islam is composed of 16 members (half of whom are Italian citizens) from various professional and ethnic backgrounds, nationalities and confessions. According to the Ministerial Decree, the role of the council is defined as a consultative body to which the Italian Minister of the Interior can refer to gain a more comprehensive knowledge of the Islamic community in Italy.

The council is not an elected and representative organ with decision-making powers. Rather, it is the result of a unilateral top-down process promoted and run by the state. Still today, no important initiatives concerning Muslim integration and the legal status of Islam can be mentioned. The only significant exception is the Carta dei valori della cittadinanza e dell’integrazione (Charter of Values of Citizenship and Integration), drawn up with the technical support of the Consulta in 2007.64 The charter lays out the principles of the Italian Constitution and the fundamentals on human rights found in European and international instruments, in addition to focusing on the problems a multicultural society has to address, such as respect for and acceptance of religious and cultural diversities. Yet, even the charter has not been particularly effective. On the contrary, it has contributed to increasing tension between the various components of the Consulta and some of the members, including the UCOII representatives who refused to sign it. Regarding this experience in the last several years, one might conclude that the Consulta does not have the right qualities to foster an integration that requires a body able to represent the multifaceted panorama of Muslims in Italy. The role of the Consulta has

63 EC-Doc. 15983/03 JAI 373.
64 Gazzetta Ufficiale, 15 June 2007. Already in March 2006, 11 of the 16 Muslim members of the Consulta presented a "Manifesto of Islam of Italy". This manifesto emphasizes the desire to integrate into Italian society. They underline their wish to respect the constitution, condemn fundamentalism and terrorism, and live together in the framework of a secular and pluralistic society.
been reduced by widespread mistrust on the part of many Muslims by a government-run body meant to represent them and the Consulta’s ability to represent the fragmented Muslim panorama is still in doubt. The institution of the council has been welcomed by all political parties except the populist Lega Nord, and it is not surprising that since the last Berlusconi government the council has been “frozen”.

V. COMING TO TERMS WITH ISLAM WITHOUT ISLAMOPHOBIA

Whether reislamization or Islamic revival or something else (and this is partly a matter of ideology, partly an empirical question), there is no doubt that the public visibility of Islam in Italy and its significance for Muslims and non-Muslims has increased considerably. The changing nature of the Islamic presence, which is now predominantly a family one, with many implications for housing, health, the education system and the economy, coupled with global changes, explain why we now observe not just a cautious probing for a “place” for Islam, but more fundamental demands for recognition.

On one hand, these new conditions had a considerable impact on Muslim’s everyday religiosity and on the doctrinal articulations of Islam, on the ways which they raise common demands and claims, and the ways in which they identified, associated and acted collectively to change existing administrative practices, legal rules, predominant policies and institutional structures and collective identities of the society. On the other hand, in addition to the diversity that results from “increasing cultural and religious pluralism”, there has also been a political shift in the claims for a “politics of recognition” that are made by Muslims. Individuals claim that their status as political bearer is no longer a sufficient guarantee of freedom and equality. They now want their personal identity to be more substantially recognized by the state. Muslims are no longer willing for their differences to be a matter of “tolerance” in the private realm.\(^{65}\) They now demand

\(^{65}\) In Thomas Scanlon’s definition “tolerance requires us to accept people and permit their practices even when we strongly disapprove of them”. This makes it a “puzzling attitude”, an intermediate between “wholehearted acceptance and unrestrained opposition”. Furthermore, Scanlon calls it a “risky policy with high stakes”, not so much because of the threat to formal laws and institutions which the intolerant present as for their formal powers “constantly” to “redefine” the “nature of the society”. See Thomas Scanlon, “The Difficulty of Tolerance”, in David Heyd (ed.), Tolerance. An Elusive Virtue (Princeton University Press, Princeton, 1996). For John Rawls, toleration of the intolerant should go very far, for the sake of equal citizenship, but it should stop where a society’s “security and institutions of liberty” are put in danger. See John Rawls, A Theory of Justice (Harvard University Press, Cambridge, 1971). For Tariq Ramadam, Europe’s leading Muslim intellectual, Muslims expect more than a simple discourse of
political rights, accommodation and recognition in the public sphere. This new politics raises an urgent demand: how should liberal-democratic states in Europe, in particular Italy, respond to claims by its citizens that their religion should move from its designated places in the private realm toward positive accommodation in the public sphere?

To answer this question, it is important to take into account contemporary developments in the European public sphere. The emergence of European human rights instruments such as the European Charter of Fundamental Right and the ECHR, particularly its increasingly sophisticated jurisprudence on nondiscrimination, means that European Muslims are increasingly required to integrate into European, as well national, paradigms of rights, responsibilities and citizenship.

According to the judgment of the Grand Chamber of the European Court of Human Rights in the Refah case it is difficult to declare one’s respect for democracy and human rights while supporting a regime based on sharia, which clearly diverged from convention values, particularly regarding (i) its criminal law, (ii) its criminal procedure, (iii) its rules on the legal status of women, and (iv) the way it intervened in all spheres of private and public life in accordance with religious precepts. According to the court, democracy is the only political model foreseen by the ECHR and accordingly the only one compatible with it; therefore, sharia is incompatible with the fundamental principles of the ECHR. It could be argued, that the court’s decision was specific to Turkey given its strategic and political importance to Europe and its overwhelmingly Muslim population. However, on the basis of the court’s judgment, one can assert that any general adoption of a sharia law system would raise concerns of the court relating to a plurality of legal systems, indeterminacy, divergence from ECHR values, and compatibility with the fundamental principles of democracy as foreseen in the ECHR.

integration, which is presumably liberal toleration: “real integration for them would require respect and mutual knowledge”, which is more than Scanlon’s acceptance. See Tariq Ramadam, Western Muslims and the future of Europe (Oxford University Press, Oxford, 2004).

Refah Partisi (Welfare Party) v. Turkey 2003-II; 37 EHRR 1 (GC).

See, for example, the following rules or practices are in harsh contrast with the ECHR: death penalty executions or limb amputations; stoning or imprisoning women for adultery; the criminalization of sexual activities outside of marriage as well as homosexual or lesbian activities; nonrecognition of the transgendered; polygamy, honour killings or attacks; Talaq, i.e., unilateral divorce by men, without the consent of the wife; allowing women divorce with their husband’s consent but only on the basis of foregoing financial benefits; child custody only for fathers; lack of succession rights for women, illegitimate children and female children; penalties for apostasy. See Dominic McGoldrick,
If one accepts the European Court’s general concerns about an “Islam system” in Europe, then an alternative approach to the aforementioned question might be to argue that the principles, the institutional and juridical arrangements of recognition and accommodation of difference should be revisited. This is not equivalent to saying that Muslim claims have priority or are authoritative. Rather, it means that their perspective is one additional aspect that legal analysis needs to keep in mind to perform well its regulatory functions and to generate a deeper form of integration of Muslims.

To achieve this, the author suggests a “pluralistic institutional approach to integration”. As already mentioned in the introductory remarks, this is a “power sharing approach” requiring a conceptual break with absolute, unlimited and undivided sovereignty and jurisdiction. Such a pluralistic institutional approach to integration is defined by two core aspects. First, on a collective level, the existing pluralism of minorities, especially Muslims, must be integrated into the political process, achieving an agreement leading to state recognition of the Muslim faith in Italy. In particular, the establishment of a Muslim representative organization with legal status can be seen as a fundamental step toward the development of an Islamic community that is able to establish a fruitful relationship of cooperation with the political and socioeconomic institutions of the Italian state.68

Furthermore, a greater cooperation between the state and Islamic communities is necessary also because of the fear of Muslim communities drifting toward fundamentalism.69

Second, on the individual level, it encourages the accommodation of some of the most pressing minority demands to follow their cultural and religious norms. It is argued that in limited situations, Italy can legitimately accommodate Muslim norms in some areas of family and private life as a requirement of the commitment to freedom and equality for minorities. According to this approach, individuals who view themselves as simultaneously belonging to more than one community can be subject to more than one legal authority to empower their multiple affiliations. In family law, as we will see, there

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68 Silvio Ferrari, “The secularity of the state and the shaping of Muslim representative organizations in Western Europe”, in Jocelyn Cesari and Sèan McLoughlin (eds.), European Muslims and the secular state (Ashgate, Aldershot, 2005).
69 Ibid.
can be different possible solutions available to conduct their private relationship compatible with their understanding of Islam. However, any policy of accommodation needs to pay special attention to the fact that traditional religious Muslim norms contain practices that may cause harm to vulnerable subjects. Therefore, the advocacy and introduction of a plural legal order must be based on three fundamental conditions: First, individuals must have to choose whether to be bound by the norms of the distinctive communities or by state law on the same topic. Second, the scope of law-making authority vested in the legal orders nested in a state must be limited in range and effect. Third, a plural legal order must respect and retain the state’s role as a democratic guarantor of individual rights and freedoms. This approach must be complemented by other measures that contribute to a sense of belonging, loyalty and trust. In this sense, it is clear that the accommodation of Muslim norms is subject to the ultimate regulation of the national constitutional and legal system.

The “pluralistic institutional approach to integration” is based on liberal principles guaranteeing a minimum of tolerance for minorities in the private sphere through safeguarding individual rights. It includes the right of nondiscrimination, which ensures the right of minorities to key public goods such as education and employment. Respect and participation for minorities underlines the increased participation of minorities along with majorities in mainstream economic, political and social institutions, as well as involvement in associational life and the participation in public hearings and forums, in advisory councils, standard-setting and supervisory bodies.70

A. Integration at the Collective Level

Regarding the collective aspect of Muslim accommodation claims, the pluralistic institutional approach to integration proposes to include Muslim representation with an official recognition of a legal status of Islam into the institutional framework of the Italian state. This request has a specific cultural and legal background: in the secular state the two different institutions placed in charge of disciplining the temporal and spiritual

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profiles of human life, the church and the state should interact through dialogue and cooperation.

The focus of traditional debates about minority representation,\textsuperscript{71} with national minorities and indigenous people as exemplary cases, has been the political arena in which that process is understood as decision-making, implementation and adjudication in the state, that is, as “voice” (with guaranteed seats in legislative chambers) and as part of political “power” (power sharing in executive and juridical bodies). However decision-making involves also definition, information and the elaboration of decision-making alternatives. In this regard, according to the pluralistic institutional approach to integration, Muslims (and other ethnoreligious groups) may claim a legitimate role.

According to our model, representation should not be based, like the actual “\textit{intesa model}”, on a corporatist form that can be led or even imposed by the state in a “top-down” way. A corporativist inclusion would require Muslims and their representatives to speak in one voice and to create a unified, hierarchical structure when this seems impossible for Muslims in Italy. It reflects also a reductionist approach that essentializes all Muslim religious practice into one authorised form of “Islam”, likely distorting the daily practice of individual Muslims.

The pluralistic institutional approach to integration is based on a concern that it is essential to protect the rights of Muslim communities to maintain their community organizations and representatives as part of a commitment to the collective aspect of religious freedom. Civil society should play a greater role, being more comfortable with the variety of Muslim voices, groups and representatives. Different institutions, organizations and associations could accommodate Muslims in ways that worked for them best at a particular time, knowing that these ways might be modified over time and that Muslims and other pressure groups and civic actors could be continually evolving their claims and agendas.

Election procedures seem to be the best method for selecting representatives to form a body that is actually representative of the multifaceted Muslim reality in Italy. This procedure could be made accessible to the community by following the Belgian

example. A Muslim representative body could be democratically elected through a proportional electoral system by the Italian Muslim community. As in the Belgian case, the elected assembly and integrated members co-opted by the government to bridge gender gaps and age gaps could be entitled to elect an executive committee—the “new” Consulta Islamica—from among its members, which would then be able to negotiate an agreement with the Italian government (provided this new identity is a registered body with legal personality). Direct election of such a Consulta would potentially involve a variety of Muslim voices, groups and representatives, even those that are not part of any of the numerous associations that exist in Italy. In this sense, a representative, recognized organization at the national level would be capable of functioning as an interlocutor and establish effective cooperation. Furthermore, the advantage of this strategy is that this would increase the sense of belonging of the Muslim community and favour its social and political integration.

B. Integration at the Individual Level

One of the key demands of Italian Muslims has been that there should be public accommodation of their normative practices when they follow Islamic law in daily lives. The main demands of Italian Muslims regarding exemptions from generally applicable laws are for Friday to be recognised as the weekly holiday, for allowances to be made for prayer in the traditional hours in private and public facilities, for a reduction of working hours during Ramadan, for the right to holidays to allow for participation in the pilgrimage to Mecca or other relevant religious feasts.

As many scholars have pointed out, such demands are just a part of the demands put forward by Muslims in Europe, from the freedom of dress for women in public places, schools and the workplace, to the right to open private schools and regulate family relationships by Koranic law (marriage, divorce or repudiation, worship of children, inheritance rights).

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72 For details, see Pace, op.cit. note 61.
All these demands concern two broad spheres: the informal public space peculiar to civil society and the formal public space subject to the direct control of central and local institutions. The founding of associations, the opening of places of worship, cultural and social initiatives belong to the former, whereas cemeteries, specific foods in schools cafeterias, Islamic slaughtering, the teaching of religion at school and the recognition of Islamic religious holidays, among others, belong to the latter. EU law and Italian law already contain a number of exemptions from generally applicable laws that are either religiously based or would cover religious reasons.

For other exemptions from generally applicable laws according to the author’s approach, the following aspects have to be considered: first, to have a guarantee for a relative seriousness of conscience-related claims and to distinguish purely cultural habits from seriously rooted matters of faith and discipline it would be necessary to establish a recognized authority acting for a religious group. In this regard, the “new” Consulta Islamica, as envisaged above, could play an important role. Second, individuals must have to choose whether to be bound by the norms of the distinctive communities or by state law on the same topic. Third, exemptions from generally applicable laws would have to be tested for compliance with the Italian constitution, specific laws and norms governing the civic relations in the Italian society, and European human rights instruments, such as the European Charter of Fundamental Right and the ECHR, particularly its increasingly sophisticated jurisprudence on nondiscrimination. Nondiscrimination does not require identical treatment. Indeed, the European Court has made it clear that discrimination may also arise when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

However, there may be conflict between the prohibition of discrimination on grounds of religion or belief and the prohibition of discrimination on other grounds, such as protected groups like women. It is worth observing that this conflict will raise special difficulties in delineating the scope, nature and extent of the public accommodation of

75 For an overview, see Ferrari op.cit. note 2; Ferrari, Islam in Europa, op.cit. note 2.
76 Thlimmenos v. Greece 2000-IV; 31 EHRR 411 (GC) at para. 44. T.
religious difference. This problem becomes obvious in the area of family law and especially regarding the debate of the recognition of the “Muslim Sharia Arbitration Councils”. Many Muslims in Europe\textsuperscript{77} are using traditional community organizations for advise, consultation and conflict resolution especially on family law issues. These “Sharia Councils” are alternative forums in which a hybrid range of sources—religious norms and values as well as state law—for decision-making are applied. Sharia Council focus on three main aspects: reconciliation and mediation, issuing Muslim divorce certificates, producing expert opinion reports on family law and practices.

At first sight, the grant of separate jurisdiction to traditional groups in areas of family law seems unproblematic. The response of some liberal democracies, Italy excluded, has been to make this concession to its religious minorities. In Great Britain, these alternative councils for dispute resolution are recognized under the Arbitration Act of 1996 and in Canada under the Ontario’s Arbitration Act 1991.\textsuperscript{78} If all persons freely choose to be governed by a traditional justice system, then there is no reason a state should not respect these choices. However, granting control over family law to a traditional culture or religion has the potential to cause harm to vulnerable members, such as woman.\textsuperscript{79} Many women choose to remain members of a group despite the fact that traditional rules and practices undermine their interest; in addition, the option of a “right to exit” is not a realistic solution.\textsuperscript{80} A recent study of the Sharia councils in the UK stressed that the present approach to allow these tribunals to operate as another form of arbitration is not ideal because it does not, for example, take into consideration the specific risk to women to be “conciliated” back into violent or coercive relationships.\textsuperscript{81} Similar concerns arose in

\textsuperscript{78} In 2009, a report by The Institute for Civil Society (CIVITAS) claimed that as many as 85 sharia courts are now operating in the UK.
\textsuperscript{80} For a discussion on the right to exit, see Ch. Kukathas, “Are there any cultural rights?”, 20 Political Theory (1992), 105-139.
Canada. In 2006, Ontario legislated against the use of arbitration by religious courts in family matters. The prevention of the proposed Muslim use of the Arbitration Act 1991 also had the effect of preventing its continued use by the Beth Din (the rabbinical court of Judais) and Christians, which had already been established.

However, two leading researchers on Muslim family arbitration have recently concluded that the “Sharia Councils” fulfil an important need for Muslim women, although they want to see important reforms. If it is true, as suggested by the research, that women are using the councils because of a pressing need and out of choice, this suggests that a strategy of prohibition is unlikely to be successful and stresses a need for recognition, reform and training.

How should Italy respond to the claim to grant separate jurisdiction to Muslims in family law? There may be several options in this context. One option could be the nonrecognition and prohibition of these forms of alternative dispute resolution. However, nonrecognition and prohibition is likely to result in the (continuing) informal use of these councils, thereby increasing women’s vulnerability. A second option—which is in line with my approach—is to recognize these councils, propose that human rights law bind all the parties and justify state interventions to secure women’s rights. Furthermore, the training of staff, inspections and procedures that ensure complete information for women regarding the nature and consequences of their choices have to be guaranteed.

Compared with other “joint governance approaches”, the pluralistic institutional approach to integration is similar to Shachar’s transformational accommodation model, in which “the state yields jurisdictional autonomy to nomoi groups in certain well defined legal arenas, but only so long as there exercise of this autonomy meets certain minimal state-defined standards. If a group fails to meet these minimal standards, the state may
intervene in the group’s affairs”. 86 Faced with a conflict between the accommodation of minority cultures and vulnerable groups within minorities, such as women, 87 according to the pluralistic institutional approach to integration, the state must act positively to enforce rights of equality and freedom from discrimination. The state must be held accountable for women’s equality and ensure compliance with constitutional guarantees. The author places the minimal required state intervention in the pluralistic institutional integration approach and this enables her to resolve some of the main difficulties Shachar mentioned. Who defines minimal standards? How are they interpreted and applied? The author’s approach provides opportunities for institutionalized voices—the Consulta—and relevant stakeholders to be included in negotiations and deliberations. Democratic government should impose minimal requirements of even-handed representation to prevent illegitimate exclusions.

VI. Conclusion

Based on a concern with the accommodation of difference as a requirement of the core values of liberal constitutionalism, the pluralistic institutional approach to integration corrects majority bias hiding behind neutrality and the “benign neglect of differences”. 88 This strategy presupposes clearly a dialogical perspective and assumes the possibility of mutual accommodation, which involves the adaptation of the inserted group to existing conditions, as well as a change in the structure of the larger society and a redefinition of its criteria of cohesion. This necessitates an acceptance and affirmation of the fluidity of the national identity which, in any case, continues to change through the process of globalization and the interaction of cultures at the local level. Only with an acceptance of a multidimensionality of the national identity we can establish a process of mutual accommodation and a “sense of belonging”.

The proposed pluralistic institutional approach to integration favours the national Italian scale and subnational units of government, but neglects the transnational institutional

86 Shachar, op.cit. note 86, 109.
87 See Okin, op.cit. note 80; Shachar, op.cit. note 86.
environments. This is relevant because Muslims (more so than other religious communities in Europe) live their religious practices in a transnational context “in the triple meaning of demographic migration, of diasporas and of increasingly global public spaces”.

Actually, we see a huge diversity of contradictory constitutional, legal, administrative and cultural arrangements and policies in states, all sharing the same principles of liberal democracy. This institutional diversity does not converge into one optimal or even predominant regime of diversity governance. However, it is already apparent that the specific features of the national organizational models of Muslim communities in Europe are now being reshaped by the “Islam in crisis”, being experienced across the whole of Europe and pushing public authorities to move toward common approaches in search of solutions. The author’s first proposal of “pluralistic institutional approach to integration”, which needs further elaboration, will be a contribution to a systematic understanding of Islamophobia and some remedial strategies against it.

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Indigenous Peoples and Globalization: From “Development Aggression” to “Self-Determined Development”

I. INTRODUCTION

In June 2009, in what had been referred to as the “Amazon’s Tiananmen”\(^1\), armed police engaged in a bloody conflict with what had been a peaceful indigenous protest in Bagua, northern Peru. Several people were shot dead, and at least 200 injured.\(^2\) The protest was against the granting of concessions for the exploration and exploitation of gas, oil and gold to transnational companies in the Amazon region. The concerned communities protested against the adoption of national decrees allowing these concessions on indigenous territories as elements of a free trade agreement with the United States of America. These events in Bagua constitute one of the most recent and widely publicized confrontations in a series of similar and ongoing conflicts between indigenous communities and governments and/or corporations over exploitation of natural resources in their territories in countries throughout the world.\(^3\)

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\(^1\) See Guy Adams, “Peru Accused of Cover-Up after Indigenous Protest Ends in Death at Devil's Bend”, *The Independent*, 19 June 2009.

\(^2\) Exact figures are still unclear and controversial with the government claiming that 32 people were killed in the incident while human rights lawyers and news reports put the number of confirmed deaths at closer to 60, and say hundreds are still missing. See <http://www.hrw.org/en/news/2009/06/10/peru-investigate-violence-bagua>.

\(^3\) Complaints to the UN Human Rights Treaty Bodies, to the International Labour Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and other international and regional mechanisms as well as national ombudsmen and national human rights institutions are all indicative of this trend. See for example cases currently under consideration by these bodies in relation to hydroelectric and extractive projects on indigenous peoples’ lands in Brazil, Canada, the Philippines, Peru, India, Columbia and Ecuador. See Early Warning Urgent Action procedures case of Committee on the Elimination of Racial Discrimination (Brazil, Canada, the Philippines, Peru and India) at <http://www2.ohchr.org/english/bodies/cerd/early-warming.htm>; OECD complaints (India and the Philippines), at <http://oecdwatch.org/cases/Case_165> and <http://oecdwatch.org/cases/Case_164/?searchterm=mindoro>; and ILO representations alleging non-observance of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), (Columbia and Ecuador), at <http://www.ilo.org/iollex/english/iquery.htm>.
This emerging pattern of conflicts in indigenous territories is indicative of three interrelated trends: first, indigenous peoples are increasingly the victims of systematic abuse associated with imposed forms of economical development; second, indigenous peoples are organizing at the global, regional, national and local levels to resist these externally imposed development models; third, these models of development and the process by which they are imposed on indigenous peoples are a function of the manner in which economic globalization is managed and controlled. Jerry Mander, an academic who has worked on the topic of indigenous peoples and globalization, touched on these trends when he noted: “[n]o communities of peoples on this earth have been more negatively impacted by the current global economic system than the world’s remaining 350 million indigenous peoples. And no peoples are so strenuously and, lately, successfully resisting these invasions and inroads.”

There are as many definitions of globalization as there are strongly held positions on it. Economic Nobel Prize winner, Joseph Stiglitz, observed “the differences in views are so great that one wonders, are the protestors and policy makers talking about the same phenomena”? For some it represents the solution to world poverty, facilitating flows of resources and levelling the economic playing field for all; for others it is the latest means to maintain unequal power balances that serve to ferment the growing divide between rich and poor. Indeed there is no consensus on when globalization commenced. Many argue that since the emergence of mankind some form of globalization has been taking place. Others point to its origin in the emergence of states and the establishment of the law of nations “as a framework for managing the globalizing of power and trade” and associated conflicts that erupted between colonial powers. For the purposes of this article globalization, in its current manifestation, is taken to refer to the emergence of a globalized commercial market premised on the

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free movement of capital and increasing levels of consumerism with reductions on controls in relation to the movement of goods while simultaneously maintaining a highly restricted movement of labour. The model of globalization emerged immediately after the end of the Cold War and is a function of a hegemonic capitalist global economy and the associated expansion in the sphere of influence and activities of transnational or multinational corporations. Associated with the free and largely unregulated movement of capital is the potential for speculation on a scale greater than the total value of goods traded in the global economy. The objective and outcome of this speculation is not necessarily to increase general living standards or productivity but rather to maximize individual financial gains. As recent experience has shown in the context of the global financial crisis, this speculation has the potential to destabilize the entire global economy.

The existence of many of the world’s indigenous peoples can be attributed to their resistance to prior waves of globalization. Their territories and cultures remain the final and most sought-after frontier in its latest expansion and their resistance its final obstacle. They stand, both physically and ideologically, at the frontlines of the struggle to transform the globalization model. If unsuccessful, they stand to be the most profoundly impacted by it. For many, the threats it poses to their cultures and territories puts their very existence as a people at stake. As with previous waves of globalization that occurred during the colonial era, the current model of economic globalization is based on the exploitation of natural resources predominantly located in indigenous territories. What differentiates this latest phase of economic globalization is embodied in globalization. As noted by Daes: “In many ways, indigenous peoples challenge the fundamental assumptions of globalization. They do not accept the assumption that humanity will benefit from the construction of a world culture of consumerism.” Daes, *op.cit.* note 8, at 75. In many indigenous communities throughout the world, the only effective means that is available to prevent the territorial expansion of development projects driven by globalization is the use of physical barricades. Examples of this in indigenous communities in countries including India, the Philippines, Peru, Ecuador, Russia, New Caledonia, Canada and Guatemala were presented at the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines (presentations on file with the authors). See also Shin Imai, “Indigenous Self-Determination and the State”, in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds.), *Indigenous Peoples and the Law* (Hart Publishing, Oxford, 2009), 285.

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9 Jose Luis Sampedro, *El Mercado y la globalizacion* (Mateu Cromo Artes Graficas, SA, Madrid, 2002), 59: “Esa libertad financiera es decisiva para el sistema, pues fomenta sus operaciones especulativas por cuantías muy superiores al valor total del las mercancías intercambiadas mundialmente”.

10 Ibid.

11 Ideologically many indigenous peoples are opposed to the principles of consumerism which are embodied in globalization. As noted by Daes: “In many ways, indigenous peoples challenge the fundamental assumptions of globalization. They do not accept the assumption that humanity will benefit from the construction of a world culture of consumerism.” Daes, *op.cit.* note 8, at 75. In many indigenous communities throughout the world, the only effective means that is available to prevent the territorial expansion of development projects driven by globalization is the use of physical barricades. Examples of this in indigenous communities in countries including India, the Philippines, Peru, Ecuador, Russia, New Caledonia, Canada and Guatemala were presented at the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines (presentations on file with the authors). See also Shin Imai, “Indigenous Self-Determination and the State”, in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds.), *Indigenous Peoples and the Law* (Hart Publishing, Oxford, 2009), 285.
globalization from phases past is the rate at which it is occurring and the geographic and physical extent of its impacts. Unprecedented demands for the world’s remaining resources including oil, gas, minerals, forests, freshwaters and arable lands, combined with new technological methods of harvesting what were, in many cases, hitherto inaccessible resources, and speculation on the future value of these resources have created a new development paradigm in which even the remotest and most isolated indigenous community in the world cannot avoid globalization’s extended reach.12

One of the key concepts associated with this recent form of economic globalization is the notion of development. Economic globalization with its quest for natural resources has been facilitated by development policies and associated trade and investment agreements implemented at the national and international level. Development has become the mantra and justification of the current globalization phenomena, if not its heart.13 As with the concept of ‘globalization’, ‘development’ has many layers of meaning, with the battle over its definition in many ways reflecting the battle of interests that are at stake in its realization.14 The evolution of these definitions, which

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12 Large scale projects such as those in the extractive and hydroelectric sectors have disproportionate impacts on indigenous peoples. Given that much of the world’s remaining mineral resources are located in indigenous territories and that many of the world’s major dams continue to be built in indigenous territories this trend looks set to continue in the future. See Roger Moody, Rocks and Hard Places (Zed Books, London, 2007), 10; and Antonio A. Tujan Jr. and Rosaria Bella Guzman, Globalizing Philippine Mining (IBON Foundation Databank and Research Centre, IBON Books, Manila, 2002), 153. See also World Commission on Dams, Dams and Development: A New Framework for Decision Making The World Commission on Dams (Earthscan Publications, London, 2001), 110-112. For case studies addressing the impacts of globalization on indigenous peoples see Emily Caruso and Marcus Colchester (eds.), Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank (Tebtebba Foundation, Manila, 2005); and Geoff Evans, James Goodman and Nina Lansbury (eds.), Moving Mountains Communities Confront Mining and Globalization (London, Zed Books, 2002).


14 The traditional definition of development which originated in Western Europe viewed development as primarily a macroeconomic phenomenon. Development was generally regarded as a linear process consisting of the transformation of a society as a result of “economic liberalism and scientific and technological progress, the latter being regarded as its systematic application and most remarkable product” (UNESCO 1995). This model of development was given new impetus following World War II in what has been described as the “age of development”. Wolfgang Sachs, The Development Dictionary: A Guide to Knowledge as Power (Witwatersrand University Press, Johannesburg, 1993). The cultural dimension of development has come to the fore in recent decades. This has been the result of a reconceptualization of development though the use of anthropological, sociological and political science perspectives, methodologies and models. This new conception of development sees culture as constituting “a fundamental dimension of the development process” and the “aim of genuine development [being] the continuing well-being and fulfilment of each and every individual” (Mexico City Declaration 1982). However, transmitting this conception of development from theory into practice has been slow as a result of a lack of political will on the part of States and conflicts with their economic and political strategies. UNESCO, The Cultural Dimension of Development Towards a
have addressed the determination of whom development empowers and what outcomes it generates, and their implications for indigenous peoples, are the subject of this article.

The article seeks to examine indigenous peoples’ issues and aspirations associated with globalization and development. It will trace concepts of development that range from a rights-violating process and concept, referred to by indigenous peoples as “development aggression”, to a rights-driven and enabling concept which indigenous peoples are increasingly referring to as “self-determined development”. Since their active engagement with international mechanisms commenced in the 1970s, indigenous peoples have sought to achieve their aspirations and address their issues through engagement with the human rights debate. Premising their entitlements as indigenous peoples on their self-determination and land rights, indigenous peoples are attempting to make use of the international legal framework as a means to challenge the undesirable impacts of globalization and transform ‘development’ into a process that is compatible with their right to self-determination. The article will argue that self-determined development can be operationalized through a culturally sensitive human rights-based approach to development which is premised on obtaining indigenous peoples free prior informed consent, acknowledging their ownership rights to lands and resources, and respecting their right to self-determination. It approaches these issues from the perspective of individuals engaged with indigenous peoples attempting to assert their rights in the context of large-scale development projects on their land. Its aim is to stimulate further discussion and debate in relation to the


concept of self-determined development and the manner in which it can be operationalized.16

II. FROM “DEVELOPMENT AGGRESSION” TO SUSTAINABLE AND HUMAN DEVELOPMENT

The popular conception of development associates it with achieving positive outcomes or ends, primarily in relation to improved living conditions and reductions in poverty levels. In the history of mankind this conception of development has served as an important and influential ideology, with some arguing that today it has even reached the level of a “global faith”.17 How these development ends are defined and measured and the means by which they are, or can be, achieved is however the subject of intense debate. In his book, Development as Freedom, Amartya Sen refers to two general visions of the process of development. The first, which he describes as ‘the hard knocks attitude’, sees development as something that requires great sacrifices, including at times denying people enjoyment of their civil and political rights. Sen then contrasts this approach to development with what he refers to as a “friendly” development process, premised on some principles advocated by Adam Smith and further developed by Sen himself in his conception of development as a “process that expands real freedoms that people enjoy”.18 This latter and other “friendly” development discourses will be addressed in the next section. The final section of the article will address the issue of self-determined development. As a brief introduction to this important and evolving concept it is interesting to note that the Oxford Dictionary defines development as “a gradual unfolding”, evolution, growth from within.19 In defining “economy” it refers to Adam Smith’s conception of political

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16 Many of the examples used in the article are taken from the experiences of indigenous communities in the Philippines where the authors have assisted them in bringing issues regarding extractive industry operations in their lands to the attention of international human rights mechanisms. These experiences are considered relevant for indigenous peoples in other states in light of the fact that the Philippines 1997 Indigenous Peoples Rights Act (IPRA) was modelled on the then draft UN DRIP.


19 This point is also raised by Alastair McIntosh in discussing a Scottish highlands communities’ right to decide its own development priorities. He notes that: “The etymology of ‘development’ derives from de—(to undo) and the Old French, ‘voloper’—to envelop, as in our word, ‘envelope’. To develop is therefore ‘to unfold, unroll to unfurl.’ The biological application, as in ‘foetal development’, accurately captures correct usage. Accordingly, ‘development’ is ‘a gradual unfolding; a fuller working out of the details of anything; growth from within’ (OED).” Alastair McIntosh, Soil and Soul: People versus Corporate Power (Aurum Press, London, 2001), 151.
economy (as opposed to household economy) as “the art of managing the resources of a people and of its government”. Viewed from this perspective the concept of “economic development” implies that a people should manage their own resources in a manner that gradually unfolds, or evolves, from within their own governing structures. This notion is embodied in and consistent with indigenous peoples’ concept of a right to self-determined development.

A. Development and Aggression

The latest process of economic globalization driven by powerful states, transnational corporations and international financial institutions has been greatly influenced by the first conception of the development process noted above. The ends associated with this process, and the indicators for determining its success, have frequently been increases in national economic growth and individual income levels. Closely linked to this manner of measuring development ends is the notion of “trickle-down economics”. This term describes policies popularized during the Reagan era. These policies were premised on reduction of tax rates for businesses and wealthy individuals with the objective of increasing investment levels. Indigenous peoples have frequently been the “sacrificial lambs” in enabling states to achieve these investment objectives. Encouraging investments in the exploitation of natural resources became a common policy of developing countries in achieving their narrowly-defined development ends. As a disproportionate percentage of these resources are located in indigenous peoples’ territories the continued abrogation of their rights was seen as a necessary evil if these development ends were to be achieved. For indigenous peoples globally, the term development therefore often equated to dispossession of their lands and resources, increased deprivation and destruction and loss of traditional livelihoods. These outcomes of a rights-denying

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20 For an economist perspective advocating ‘trickle-down economics’ see Philippe Aghion and Patrick Bolton, “A Theory of Trickle-Down Growth and Development”, 64(2) Review of Economic Studies (1997), 151-172. For a more sceptical perspective on the concept of ‘trickle down economics’ see Joseph Stiglitz, Globalization and its Discontents (Penguin Politics, New York, 2002), 78, where Stiglitz states that “trickle down economic was never much more than just a belief, an article of faith”.
developmental process that was imposed on them gave rise to what indigenous peoples refer to as “development aggression”.21

For indigenous peoples development has come to be equated with aggression for three principal reasons. These can be classified as ‘the three Ps’:

1) Philosophies and perspectives that ignore their world views and visions;
2) Process and policies imposed on them without meaningful consultation and in the absence of consent;
3) Pervasiveness and profoundness of impacts that result from these.

1. Philosophy

The failure to acknowledge and respect indigenous peoples’ world views and visions is at the root of development aggression. Indigenous philosophies of development stand in stark contrast to the philosophy underpinning economic globalization. Ideologically, under the dominant model of economic globalization, development has become synonymous with catching up with the most industrialized ‘developed’ countries. The underlying assumption that development means that all members of a society wish to emulate the economic model and practice of these countries is highly arrogant and extremely detrimental, ultimately fatal, to indigenous peoples’ own forms of traditional economy and practices, and indeed to their very existence. This interpretation of development is premised on the idea that traditional economies and ways of life, such as nomadic hunter-gathering or subsistence farming, are outdated forms of development, which should give way to more ‘advanced’ industrialized approaches to development. The economic and social systems developed and practised by indigenous peoples for centuries are obstacles to development and are categorized as ‘primitive’ and outdated. This philosophy underpinned and was used to justify the colonial enterprise, especially during the new imperialist period (1880-1914). One of the primary goals of colonization was to gain control over the African continent’s rich natural resources. Agreements between the colonial powers in the 1885 Berlin Conference saw the division of the African continent between them in a

The necessary moral vindication for their actions came in the form of an equation known as ‘the three Cs’ in which ‘commerce plus Christianity equals civilization’. Notably absent from this trilogy were indigenous peoples’ philosophies, world views and practices. Instead they were seen as backward peoples who needed to be ‘enlightened’ by civilization, with commerce being the tool to achieve this. The signing of protectorate treaties with local chiefs served as justification for colonial possession of their lands. For many indigenous peoples little, apart from the language, has changed in the intervening century. The term ‘civilization’ has been replaced by ‘development’ as justification for appropriating their lands and resources with devastating impacts to their cultures. Colonization has been internalized, protectorate treaties with colonial states have been replaced by ‘agreements’ with transnational corporate entities which are facilitated by the new post-colonial states. The outcome is the same: indigenous philosophies continue to be subordinated to externally imposed ‘superior’ ones, this time in the name of development. As pointed out by the then UN Special Rapporteur on land rights for indigenous peoples, Madame Erica Deas,

[the legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every part of the globe, indigenous peoples are being

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22 The emergence of this trend whereby the colonial concept of civilization was replaced by the more acceptable notion of development is evident in Art. 22 of the Covent of the League of Nations. It states, in the context of the post war decolonization:

[…] to those colonies and territories, which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation […] The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations […] as Mandatories on behalf of the League. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances […] peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory […] and will also secure equal opportunities for the trade and commerce of other Members of the League. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

The post-World War II inaugural speech by President Truman, echoed some of these sentiments when he announced “a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. The old imperialism—exploitation for foreign profit—has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair dealing. See Sachs, op.cit. note 14, 6.
impeded from proceedings with their own forms of development consistent with their own values, perspectives and interests.  

2. **Process**

From the perspectives of indigenous peoples the noble objectives of development as a means of poverty reduction and improved wellbeing have been hijacked by individuals, corporate entities and states that have vested interests in exploiting resources in their territories. In many states where indigenous peoples live, industry and powerful political elites are perceived as having colluded to establish regulatory frameworks in which denial of indigenous rights to their lands and resources are systematized. The term “regulatory capture” has been coined to describe this process whereby legislators have effectively become stenographers for industry. This is particularly the case in the context of natural resource exploitation where states have declared mining to be in the national or public interest, in the absence of sound economic models proving this to be the case and despite its disproportionate impact on indigenous peoples. Even in those cases where states attempt to take proactive steps to address the discriminatory underpinnings and impacts of mining legislation on human rights and the environment in line with their obligations under international human rights law, they find themselves constrained from doing so as a result of a

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23 Preliminary working paper prepared by Erica-Irene Daes, Special Rapporteur, Indigenous People and their Relationship to Land, E/CN.4/Sub.2/1997/17, 49


25 This process is widespread and extends from colonial laws to recently enacted legislation and jurisprudence. Examples include the United States where under the 1872 Mining Law mining is deemed to be highest use of the land and overwrites indigenous peoples’ rights. The Philippines in the Supreme Court case Didipio Earth-Savers’ Multi-Purpose Association [DESAMA] Inc. et al. vs. Elisea Gozun et al., G.R. No. 157882, 30 March 2006, which reaffirms a decree issued by the Dictator President Marcos declaring mining to be in the public interest. Art. 13 of the Columbian Mining Code (Law 685, 15 August 2001) declares mining to be of “public interest”. The law firm responsible for drafting the Code represented both Santa Fe, an oil and gas drilling company at the time owned by the Columbian President, and Semax, a Mexican cement company. See Valbuena Wouriyu, “Columbia: License to Plunder”, in Marcus Colchester and Emily Caruso (eds.), Extracting Promises Indigenous Peoples, Extractive Industries and the World Bank (Tebtebba Foundation and Forest Peoples Programme, Baguio and Moreton-on-Marsh, 2005), 157-158.
parallel international legal architecture.\textsuperscript{26} This international legal architecture, that has been constructed to maintain the globalized economic model, consists of a multitude of bilateral and multilateral trade agreements and associated arbitration mechanisms. Many of these trade agreements provide access to resources located in indigenous peoples’ territories. However, despite the profound impact they have on them, indigenous peoples are not even consulted in relation to their content and are often denied access to information in the contracts that they facilitate on the basis of confidentiality. The result is that “major development projects”\textsuperscript{27} such as large-scale strip mining, the construction of mega-hydroelectric dams, monocrop agriculture—all of which require extensive access to indigenous territories and resources—can be and are imposed on indigenous peoples in the name of national development, regardless of their impact on them. From the perspective of indigenous peoples attempting to assert their rights, national development, rather than benefiting them, has been transformed into a weapon to be used against them.

Rodolfo Stavenhagen, the former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples reported that in the context of development projects “the concerns of indigenous peoples who are seldom consulted on the matter, take a back seat to an overriding ‘national interest’, or to market-driven business objectives aimed at developing new economic activities, and maximizing productivity and profits”.\textsuperscript{28} Following his official visit to the Philippines in 2002, he noted that indigenous peoples aptly designated various development projects, which

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} The current international arbitration case against South Africa in relation to its proposed mining act which includes including ‘Black Economic Empowerment’ measures is being challenged by European mining investors as being contrary to the protections in South Africa’s bilateral investment treaties. See Petition for Limited Participation as Non-Disputing Parties, Arts. 41(3), 27, 39, and 35 of the additional facility rules, International Centre for Settlement of Investment Disputes, Case No. ARB(AF)/07/01 between Piero Foresti, Laura De Carli & others and the Republic of South Africa Petitioners: The Centre for Applied Legal Studies (CALS); The Center for International Environmental Law (CIEL), The International Centre for the Legal Protection of Human Rights (INTERIGHTS), The Legal Resources Centre (LRC), available at <http://ita.law.uvic.ca/documents/ForestivSAPetition.pdf>. See also Legal Resource Centre South Africa, “South Africa’s Investment Treaties Must Meet its Human Rights Obligations”, 27 July 2009, at <http://www.lrc.org.za/documents>.
\item \textsuperscript{27} Professor Stavenhagen, the former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, defined “major development projects” as a process of “investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining and extraction plants, tourist developments, port facilities, military bases and similar undertakings”. Report of the Special Rapporteur, UN Doc. E/CN.4/2003/90, 2.
\item \textsuperscript{28} \textit{Ibid.} at para. 8, 5
\end{itemize}
\end{footnotesize}
were proceeding without adequate consultation or community consent, as “development aggression”.  

29 The current UN Special Rapporteur James Anaya reported to the 2009 session of the Human Rights Council that he had received widespread complaints from indigenous peoples, with problems existing in almost all countries where indigenous peoples live, in relation to the lack of meaningful consultation in the context of development projects in their lands. According to the Special Rapporteur in many of these cases there was a “flagrant disregard for the rights of indigenous peoples”.  

30 The International Labour Organization (ILO) has also observed that the lack of adequate consultation and participation of indigenous peoples in decision-making processes in relation to development projects, and in particular the extractive industry, is the major source of complaints under ILO Convention 169.  

Under international human rights law the participation of indigenous peoples in decision-making processes, and their associated rights to meaningful good faith consultations and free prior informed consent (FPIC), are of fundamental importance in the context of development projects, polices, legislation and agreements that impact on them. Their FPIC is required in relation to development projects under Article 32 of the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) and in relation to polices and legislation under Article 19. This is in line with the guidance given by the Human Rights Committee, the Committee on Economic Social and Cultural Rights and the Committee on the Elimination of All Forms of Racial Discrimination which stress that state party adherence to their obligations under the respective treaties requires that they obtain indigenous peoples’ FPIC in relation to proposed development projects in their lands or any decisions that impact directly on indigenous peoples’ rights or interests.  

31 For an overview of developments in relation to the respect for FPIC up to the end of 2008, see “Free Prior Informed Consent (FPIC)—A Universal Norm and Framework for Consultation and Benefit Sharing in Relation to Indigenous Peoples and the Extractive Sector, paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights Moscow, 3-4 December 2008, Cathal Doyle, University of Middlesex, at
and the impact of globalization on indigenous peoples is further elaborated in Part 3 of this article.

3. Pervasiveness and Profoundness of Impacts—from the three Cs to the three Ds

Due to increased demand for minerals and energy, fuelled by the globalized market, major development projects, such as large-scale strip mining, are now seeking to operate in areas that previously were neither economically nor technically feasible. It has been estimated that, in the context of mineral resources, in the region of 60% of these targeted areas are located in indigenous peoples’ territories. Indigenous peoples throughout the world are disproportionately impacted by large-scale development projects. In many cases the harm to their physical and cultural wellbeing has been irreversible. Displacement, destruction of sacred areas, damage to environment resulting in denial of traditional livelihood options, undermining of indigenous institutions and customary practices, the creation of division within communities are commonly accounted experiences. These combined effects—the deprivation of land, the degradation of biosphere resources, and the denial of self-determination—have come to be referred to as ‘the three Ds’ of development, the modern-day equivalent of colonialism’s ‘three C’s’. Not surprisingly, given this history and the fact that indigenous peoples’ development philosophies continue to be ignored in policy-making, and their consultation and consent rights in relation to projects denied, these attempts to enter into, or expand operations, in indigenous peoples’ lands are being met with strong resistance. Rather than address indigenous peoples’ complaints and the underlying issues pertaining to the denial of rights, states are responding by criminalizing opposition to development projects and by using force to suppress it. This is resulting in injuries and killings of indigenous peoples and their leaders. The cumulative effects of these development projects, if they continue


35 In addition to the case of Bagua mentioned in the introduction, a recent example of peaceful protests resulting in deaths and injuries occurred in Ecuador. See “Indígenas y Gobierno logran seis acuerdos
to be imposed in this manner, have the potential to threaten the very survival of many of the worlds’ indigenous peoples.

B. “Sustainable Development” and “Human Development”

Two important and somewhat interrelated processes in the area of development came to the fore in the late 1980s and 1990s. These two processes flowed from an examination of the relationship between development and the environment (“sustainable development”) and between development and the human subject (“human development”). This following section looks briefly at these two discourses and what their implications for indigenous peoples were.

In 1987, following the World Commission on Environment and Development (commonly referred to as the Brundtland Commission), the concept of “sustainable development” gained prominence. Under this concept development took on the extra dimension of having to meet “the needs of the present without compromising the ability of future generations to meet their own needs”. Sustainability was described as “the term chosen to bridge the gulf between development and the environment.” While the notion of achieving a right balance between the exploitation of natural resources and the capacity of the earth to deal with such exploitation opened doors for a renewed approach to development, in practical terms there were significant difficulties in defining what sustainability is and how to operationalize it.

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36 The seeds for these developments were sown in the 1970s and early 1980s when it was recognized during the second UN development decade that economic and social development were necessary for a human-centred focus to development. See Victoria Tauli-Corpuz, “The Concept of Indigenous Peoples’ Self-Determined Development or Development with Identity and Culture: Challenges and Trajectories”, Tebtebba Foundation, Baguio City, 2008, UN Doc. CLT/CPD/CPO/2008/IPS/02 2008, 14.


39 Ibid.
Nonetheless, the emergence of sustainability and environmental concerns into the arena of development provide the space for a reassessment of what development actually means. As a result of their engagement in fora such as the 1992 Earth Summit,\(^40\) and given their traditional environmental knowledge, indigenous peoples came to be seen as important partners in this new pursuit of sustainable development. Probably the clearest articulation of this recognition of the role of indigenous peoples is found in Agenda 21, which in its Chapter 26 states: “[i]n view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities”.

The concept of sustainable development influenced the policies of many international financial institutions, developmental and environmental agencies. For example, in 1994 the Inter-American Development Bank (IDB) established the “Indigenous Peoples and Community Development Unit” as part of its Sustainable Development Department. This resulted in the adoption of a policy and strategy paper on indigenous peoples which refers to “development with identity”, through “strengthening of indigenous peoples, harmony with their environment, sound management of territories and natural resources, the generation and exercise of authority, and respect for indigenous rights, including the cultural, economic, social and institutional rights and values of indigenous peoples in accordance with their own worldview and governance”.\(^41\) Likewise, the World Bank adopted Operational Policy 4.10 on Indigenous Peoples to contribute “to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of indigenous peoples”.\(^42\) Hence the emergence of the concept of sustainable development facilitated a connection between environmental sustainability and respect for the rights of indigenous peoples.

\(^40\) Tauli-Corpuz, op.cit. note 36, 19.
\(^41\) Operational Policy on Indigenous Peoples (OP-765), adopted by the Executive Board of Directors in February 2006.
Under the banner of sustainable development environmentalists and indigenous peoples appeared to have found common ground. However, there have been major limitations in using sustainable development as a platform for asserting indigenous peoples’ rights in the context of development. Firstly, despite increased commitments from conservationists to respect indigenous peoples’ rights in relation to protected areas, the translation of these commitments into practice has been slow and is still very much an ongoing process.\(^\text{43}\) While there have been developments at the policy level in many situations the primary concern of environmentalists appears to remain the protection of the natural environment, with consideration for the indigenous peoples living in it and their right to choose their own patterns of development being of a secondary nature. Secondly, the corporate sector and in particular the extractive industry, which many indigenous peoples perceived as one of the major obstacles to their realization of sustainable development, engaged with and in some cases dominated the sustainable development debate. The incorporation of the concept of “sustainable mining” into the action plan of the World Summit on Sustainable Development in 2002 by the mining sector\(^\text{44}\) and the practice by companies of portraying themselves as environmentally friendly while continuing with business as usual, commonly referred to as ‘greenwashing’, served to undermine indigenous peoples’ confidence in the notion of sustainable development, and contribute to their perception of it as ‘old wine in new bottles’.\(^\text{45}\) Third, despite their policies on indigenous peoples, international financial institutions continued to promote and finance projects that fail to respect indigenous peoples’ rights.\(^\text{46}\)


\(^{45}\) According to Daes, many of the indigenous peoples that she met during her extensive history of working with them “are opposed to the notion of ‘sustainable development’ which they regard as code of the illusory goal of continuous growth in human consumption”. Daes, op.cit. note 8, at 75

However, indigenous peoples have continued to actively engage in the debate around Sustainable Development, participating in negotiations in the context of the Article 8(j) of the Convention of Biological Diversity (CBD) and discussions related to climate change.⁴⁷ International environmental agencies also appear to be progressing in their thinking recognizing that protection of the natural environment cannot be viewed as distinct from upholding the rights of the people who are dependent upon it for their survival.⁴⁸ Sustainable development has therefore, at least on paper, provided for some increased empowerment of indigenous peoples over developments impacting upon them. However, its potential to deliver on this promise in practice remains to be seen. All too often development projects, which purportedly adhere to the principles of sustainable development but which in reality are premised on preconceived or distorted notions of indigenous peoples’ relationship with their environments, continue to be imposed on them against their will.

As touched on earlier in this article, in parallel to the emergence of a heavy-handed, rights-compromising approach to development focused exclusively on

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macroeconomic outcomes, an alternative broader understanding of development as a “process that expands real freedoms that people enjoy” has also emerged. This vision sees the human subject as the primary focus of development. The concept has been termed “human development” and holds that development, both in terms of its process and its ends, should serve to expand human freedoms, capacities and choices. This perspective was reflected in the 1990s with the redefinition of development by the United Nations Development Programme (UNDP) as a process of expanding peoples’ choices and its statement that “human development is the end—economic growth a means”. Likewise at the 1995 World Summit for Social Development in Copenhagen 117 states agreed that people must be at the centre of development.

Sen’s seminal work, Development as Freedom, expands on this concept. In it Sen posits that expansions in human freedoms are both “the primary end” and the “principle means” of development. The “human development” approach broadened indicators of development beyond Gross National Product (GNP) and increases in individual incomes. Under this model the need to address inequalities in income distribution, life expectancy, adult literacy, access to education and other factors influencing the participation of the human subject in growth and their opportunities to benefit from it were seen as essential for the sustainability of economic growth. While this indicates a significant shift in the way development was conceived and measured, the approach fails to adequately address the specific issues that indigenous peoples face and the principles that need to be respected for these challenges to be addressed in an equitable and just manner. While Sen briefly considers the threat of globalization to “indigenous cultural modes” his focus is on culture as it pertains to society as a whole, rather than the specificities of indigenous peoples’ cultures. Noting that the impact of globalization on these “modes” is serious and largely “inescapable”, he argues that, in the context of economic disparities and employment, the “appropriate response” may be to aim to achieve a “gradual transition” while ensuring that the model of globalization implemented is the least destructive possible to traditional livelihoods. To achieve this, and to address the

49 In 1991, the UNDP started referring to development as an expansion of choices. The statement “human development is the end—economic growth a means” was the opening sentence of the UNDP 1996 Report on Human Development.


51 Sen, op.cit. note 18, 240.
potential loss of cultures that come with globalization, Sen proposes that “it is up to society to determine, what, if anything it wants to do to preserve old forms of living”, with all sections of society participating freely in informed decision-making processes such as elections, referenda and through “the general use of civil rights”.52

Viewed from the perspective of indigenous peoples, this approach, which does not explicitly address their specific rights and experiences with globalization, still leaves a number of fundamental issues unaddressed. Firstly, leaving the determination of what elements of indigenous cultures should be preserved up to society as a whole would be incompatible with the right of indigenous peoples to self-determination. As with other models of development it essentially leaves them victim to the will of the majority. Under such circumstances laws and policies which are “facially neutral” could be adopted despite the fact that these can be “unjust and exploitative—even viciously repressive of particular groups in society”.53 Secondly, the role and importance of indigenous decision-making processes, their customary laws and practices and institutions is not addressed. In many traditional cultures instant democratic style decision-making may be alien to, and incompatible with, traditional consensus based decision-making models.54 Thirdly, the unique position of indigenous peoples who face the most profound impacts of globalization is not explicitly addressed—particularly in relation to the impacts of large-scale development projects that may be justified as being in the public interest. Finally, the focus of Sen’s argument is on individual freedom. As such, it does not address the issue of collective rights, which are fundamental to indigenous peoples’ philosophies and perspectives.55 This difference in perspectives is also found in the anthropocentric

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52 Ibid., 242.
53 Daes, op.cit. note 8, 85.
54 This point was raised in discussions at the International Workshop on Natural Resource Companies, “Indigenous Peoples and Human Rights: Setting a Framework for Consultation, Benefit-Sharing And Dispute Resolution”, Moscow, 3-4 December 2008. Notes on file with the author.
55 See Allen Buchanan, “The Role of Collective Rights in the Theory of Indigenous Peoples’ Rights”, 3 Transnational Law and Contemporary Problems (1993), 89-103, addressing the demands that indigenous peoples made for the recognition of their collective land rights. Indigenous peoples concepts of collective ownership of land has been recognized in ILO Convention 169 and in national legislation such as the 1997 Philippines Indigenous Peoples Rights Act which states that the “[i]ndigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the [indigenous peoples’] private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights.” For reading addressing indigenous peoples’ perspectives and philosophies, see Marie Battiste, Reclaiming Indigenous Voice and Vision (UBC Press, Tronto, 2000);
concept of “human development”, the philosophical underpinning of which differ from many indigenous peoples world views and cosmovisions in which man is merely part of a greater whole rather than its central element. This is not to say that the principles outlined by Sen are antithetical to indigenous peoples’ rights. In fact the opposite is the case. In discussing society’s determination of what aspects of culture should or should not be preserved, Sen also notes “human rights in their broadest sense are involved in this exercise as well”. This clearly must include respect for the contemporary recognition of the rights of indigenous peoples under the UN DRIP and international human rights law. His arguments therefore, if formulated within the specific context of indigenous peoples’ world views, their contemporary and historical realities, their collective identities and relationship with their lands and their inherent right to self-determination are highly relevant and applicable in the context of indigenous peoples’ right to development.

While the “sustainable development” and “human development” discourses both offered major improvements over prior development frameworks, fundamental problems remained with implementation practice vis-à-vis indigenous peoples’ rights. From the perspective of indigenous peoples both frameworks, unless conditioned on their right to self-determination, maintain elements of an integrationist model of development under which they can be treated as passive subjects of national development rather than actors controlling their own development. For indigenous peoples the next and long overdue phase in the history of development has to be one where development models are not imposed on, or designed for, them by external actors, be they international institutions, governments or multinational corporations. Instead it must be one that sees indigenous peoples themselves as having the determining say in the process to be followed and ends to be aimed for in their own development path. This new model of development is one to which indigenous peoples are increasingly referring as self-determined development. Before
addressing this it is first necessary to contextualize it within developments in the broader interplay of human rights and development.

C. Human Rights Based Approach to Development

In parallel with the emergence of a debate on sustainable development and the redefinition of development as an expansion of human freedoms, choices and capacities, a related debate on the relationship between human rights and development was taking place. While common Article 1 on the right to self-determination of the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights establishes the right of all peoples “to freely pursue their economic, social and cultural development” it was not until 1986, when the UN Declaration on the Right to Development was adopted, that the relationship between development and human rights was given serious and focused consideration by states. The right reaffirmed the indivisibility of human rights as it spanned the entire spectrum of civil, political, economic social and cultural rights. The content of the right was elaborated on in 2000 by the Independent Expert on the Right to Development, Arjun Sengupta, with reference to states’ obligations to ensure that indigenous peoples “have access to

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58 The right to development was addressed by the Commission on Human Rights in 1977 and 1979, but it was not until 1986 that a declaration was adopted by vote. The only state to vote against the adoption of the declaration was the United States, which is currently one of only three states that oppose the Declaration on the Rights of Indigenous Peoples.

59 UN Declaration on the Right to Development, A/RES/41/128, Art. 6.
productive assets such as land, credit and means of self-employment”. Following the reform of the UN system in 1997 and the Secretary-General’s call to mainstream human rights in its activities, UN agencies began promoting a Human Rights-Based Approach (HRBA) to development—based on the principles of universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law—in their projects and activities. Daes argues that the concept of “human development” is now accepted as being the means of development and that this includes the realization of human rights. However the degree to which the HRBA has been successfully infused into development projects both inside and outside of the UN system has varied. This is particularly the case in the context of development projects impacting on indigenous peoples where the operationalization and implementation of the HRBA has been described as ‘not happening in any significant manner. In many cases their specific rights and interests are not given due consideration or worse still continue to be negatively impacted as a result of these projects. A recent example of this is the Millennium Development Goals (MDG) project. In spite of the fact that the Millennium Declaration specifically mentions respect for all internationally recognized human rights and fundamental freedoms the need for a more integrated approach between the development and human rights agendas in its implementation has become evident. In the specific context of indigenous peoples, it has been pointed out that, due to the failure to incorporate their perspectives in its initial design and to ensure respect for their rights in its implementation, the MDG project may pose risks of negative impacts to their well-

62 Daes, op.cit. note 8, 102.  
63 Tauli-Corpuz, op.cit. note 57, 104.  
being rather than improvements in their poverty situation. The UN Permanent Forum on Indigenous Issues (PFII) has raised the issue to the attention of States and UN agencies and is actively promoting the implementation of the MDG projects in accordance with indigenous peoples’ rights. The following section will touch on recent evolutions in the HRBA as it pertains to indigenous peoples and the relevance of this to the realization of self-determined development.

III. TOWARDS “SELF-DETERMINED DEVELOPMENT”

As briefly outlined in the previous section recent decades have seen the emergence of the right to development as a fundamental human right followed by the adoption of a human rights based approach to development. This same timeframe has seen a significant evolution in the normative framework addressing the human rights of indigenous peoples. Fundamental to this development has been the recognition of indigenous peoples as “Peoples” with the inherent right to self-determination. These two evolutionary trends find their nexus in the concept of ‘self-determined development’. Other terms such as ‘development with identity and dignity’ and ‘development with identity’ have also emerged to address the right to development as it applies to indigenous peoples. These three terms are sometimes used interchangeably, although the term self-determined development has emerged as the one preferred by indigenous leaders and communities. Before addressing the concept of self-determined development, this article will look briefly at recent developments in the recognition of indigenous peoples’ rights.

We are now approaching the mid-point of the Second International Decade of the World’s Indigenous Peoples (2005-2015). The theme of the decade is ‘partnership in action and dignity’. Under this umbrella, the decade’s Programme of Action states that one of its aims is “redefining development policies that depart from a vision of equity and that are culturally appropriate including respect for cultural and linguistic diversity of indigenous peoples”. Implicit in the realization of this objective is the necessity to shift from the imposed forms of development to self-determined forms of development. The following section examines how international law is gradually but surely evolving towards the adoption of this new development paradigm under which indigenous peoples are no longer victims of, but actors in, development.

The recognition of indigenous peoples’ right to development with identity and the negative impacts of mainstream development on them, in particular extractive projects, was articulated in regional declarations in the late 1970s and early 1980s. At the level of international law, however, the first major step towards recognizing this right to self-determined development came with the revision of the assimilationist and integrationist ILO Convention 107. The entry into force in 1989 of ILO Convention 169, which remains the only international treaty dedicated to the rights of indigenous peoples, heralded the commencement of a new era in the recognition of the rights of indigenous peoples. Despite its relatively low ratification rate ILO Convention 169 is now regarded by many as reflecting norms of international law applicable to all indigenous peoples. Article 7(1) of ILO Convention 169 reads:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

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For the first time an international legal instrument articulated the right of indigenous peoples to determine their own development priorities and to exercise control over their implementation. Equally important the Convention instructs states to ensure indigenous participation in the entire lifespan of the national development process. However, despite its constructive approach the implementation and oversight of the ILO Convention are weakened due to both the aforementioned low levels of ratification, and to the fact that indigenous peoples cannot participate in tripartite discussion between states, employers, and employees.

The year 1993 also marked an important step in efforts to ensure indigenous peoples’ equal enjoyment of the right to development. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights that year specifically addressed indigenous peoples’ enjoyment of the right to sustainable development. It required states to “ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them…on the basis of equality and non-discrimination, and [to] recognize the value and diversity of their distinct identities, cultures and social organization”.71 In calling for the completion of the drafting of the Declaration on the Rights of Indigenous Peoples, the establishment of the UN Permanent Forum on Indigenous Issues (UN PFII) and the proclamation of an International Decade (1994-2005) of the World’s Indigenous Peoples, the declaration served as an important stepping stone from the practice of imposing external concepts of development on indigenous peoples towards a process of empowerment that enables the peoples concerned to formulate their own right to development.

The adoption of the UN Declaration on the Rights of Indigenous Peoples (UN DRIP) by the General Assembly in 2007, is a tangible reflection of the evolution that the last two decades have seen in the normative framework of indigenous peoples’ rights. UN bodies, including special rapporteurs, human rights treaty bodies and the ILO, have been active in strengthening and clarifying the international legal framework pertaining to indigenous peoples’ rights through their recommendations and

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jurisprudence. The focus of this body of law has spanned a broad range of issues from indigenous peoples’ land rights, traditional livelihoods, rights to culture, to participation and self-determination rights. Increasing attention is being given to obtaining indigenous peoples free prior informed consent in the context of externally initiated development activities in their lands. This is seen as an obligation that flows from the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights. It is particularly emphasized in the context of extractive operations, where complaints of violations of indigenous peoples’ rights are most common.

Similar developments in jurisprudence pertaining to indigenous rights have taken place at the level of regional systems, most notably the Inter-American system. At the national level an increasing number of states are formalizing their recognition of the rights of indigenous peoples, either through court rulings or constitutional or legislative protection. Emerging from this cumulative body of law addressing the rights of indigenous peoples is a series of obligations on states in relation to self-determined development. These include indigenous peoples’ rights to self-determination; to determine their own development priorities; to control development activities in their lands and to participate actively in them, to own, exploit, develop, control and use their, lands, territories and resources; to benefit directly from the use of their intellectual property and resources in their lands; to sustainable economic and social development compatible with their cultural characteristics; to maintain and develop their traditional culture, including traditional livelihoods, and way of life; and to full and effective participation in decisions at all levels that pertain to

development plans, polices or legislation impacting on their rights and interests.\textsuperscript{76} State obligations include ensuring that interpretations of national interest, modernization and economic and social development do not compromise the rights of indigenous peoples, including their right to development.\textsuperscript{77} This jurisprudence, much of which was developed during the drafting and negotiation of the UN DRIP, served to substantiate the positions of indigenous peoples during the declaration negotiations, and is reflected in its final content.

Some states and industry bodies have emphasised the fact that the UN DRIP, being a declaration rather than a treaty, is “soft law” of a “non-binding” nature.\textsuperscript{78} The UN Permanent Forum on Indigenous Issues (PFII) addressed this issue in its first General Comment in 2009 on the implementation of the UN DRIP, noting that fact that the UN DRIP is not a treaty does not imply that it does not have any legally binding effect.\textsuperscript{79} This position is consistent with the opinion of independent experts and academics who view over emphasis on classifying the UN DRIP as ‘binding’ or ‘non-binding’ as failing to contextualize it within the overall normative human rights framework, thereby potentially underestimating its importance as an interpretative guide for ‘hard law’ instruments.\textsuperscript{80}

\textsuperscript{76} CERD, Concluding Observations: Ethiopia, CERD/C/ETH/CO/15, 20 June 2007, para. 22.
\textsuperscript{77} CERD and CESCR Concluding Observations: Indonesia, CERD/C/IDN/CO/3, 15 August 2007, para. 16. See also CERD, General Recommendation XXIII. Other examples of situations where elements of self-determined development have been addressed include: “to maintain and develop their traditional culture and way of life”, Finland, CESCR E/C.12/CO/FIN/5, 16 January 2008, para 11; “to cultural development”, Costa Rica, CESCR E/C.12/CR/CO/4, 4 January 2008, para. 7; “not to be displaced from their lands as a result of development projects India”, CESCR E/C.12/IND/CO/5, 10 May 2008, para. 31; “to ensure that development measures and projects do not affect their rights of members of indigenous communities to take part in cultural life”, India, CESCR E/C.12/IND/CO/5, 10 May 2008, para. 44; “the right to the preservation, protection and development of their cultural heritage and identity”, Kenya, CESCR E/C.12/KEN/CO/1, 1 December 2008, para 35. For further examples of the UN treaty body jurisprudence see Fergus MacKay, \textit{Compilations of UN Treaty Body Jurisprudence Volumes I, II and III Covering the Years 1993-2008}, Forest Peoples Programme.
\textsuperscript{78} See “International Council of Mining and Metals Position Statement Mining and Indigenous Peoples”, May 2008, which places an emphasis on the non-binding nature of the declarations and qualifications made by states upon adopting it. This position of the New Zealand government that the treaty is “aspirational and is not legally binding” was stated in parliamentary questions following the announcement of the Australian government that it would support the Declaration. See <http://www.apc.org.nz/pma/dec0409.htm/>.
\textsuperscript{79} General Comment on Art. 42 of the UNPFII on the UN Declaration, UN Doc. E/C/19/2009/14, Annex to UN PFII Report of the 8th session, 12.
\textsuperscript{80} See comment of Professor Patrick Thornberry, CERD committee member, who raises the issue of whether the discussion of ‘soft law’ versus ‘hard law’ underestimates the future effect of the UN DRIP as a guide to the interpretation of other ‘hard law’ instruments. Briefing on the United Nations Declaration on the Rights of Indigenous Peoples, 22 February 2008, UN Doc. CERD/C/SR.1848/Add.1, para. 10. The Universal Declaration on Human Rights is an example of a ‘soft law’ instrument that has served to influence international law as well as national constitutions and
Victoria Tauli Corpuz, the current chair of the UN PFII, describes the UN DRIP as the “main framework to be used to further flesh out, elaborate and operationalize the concept and practice of indigenous peoples’ self-determined development”. The central place accorded to indigenous peoples’ right to development is evident from the preamble of the declaration, which includes seven references to it. The preamble clarifies that indigenous peoples’ current lack of enjoyment of their right to development, in accordance with their “own needs and interests”, is a result of the dispossession of their lands, territories and resources. The enjoyment of their rights to lands and resources is therefore seen as a prerequisite for the realization of their right to development. The preamble further emphasizes this relationship and the links with indigenous peoples’ governance and cultural rights by noting that: “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”.

In addition to its relationship with lands and resources the right to development, as it is framed in the UN DRIP, is also an integral component of a peoples’ right to self-determination. Indigenous peoples’ right to self-determination is regarded as the foundational right from which all other rights flow. This causal relationship is explicit in the context of the right to development with Article 3 of the UN DRIP stating: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

legislation since its adoption in 1948. Other academics such as Professor James Anaya, the current Special Rapporteur on Indigenous Peoples’ Issues, and Professor Siegfried Wiessner have argued that, while the UN DRIP is not a treaty, the rights articulated in it are reflective of contemporary international law as it pertains to indigenous peoples. S. James Anaya and Siegfried Wiessner, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment”, 3 JURIST (2007), at <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>. The citing of the UN DRIP by the Supreme Court of Belize in the case of the Mayan Village of Santa Cruz v. The Attorney General of Belize and the Minister of Natural Resources and Environment is an example of this. See Belize Supreme Court, Consolidated Claims Claim Nos. 171, 172, 2007, para. 131. The court stated that “General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them”, noting that articles of the declaration reflect “the growing consensus and the general principles of international law on indigenous peoples and their lands and resources”.

81 Tauli-Corpuz, op.cit. note 36, 3.
This article is replicated from Common Article 1(1) of the two international human rights covenants, in recognition of the fact that the right to self-determination applies to all peoples, including indigenous peoples. However, throughout the UN DRIP negotiations a number of states resisted indigenous peoples’ claims to a right to self-determination on the basis that it embodied the right of secession. As a result of this position Article 46(1) states that nothing in the declaration may be construed as authorizing the dismemberment of a state’s territorial integrity. The implications of this article on the exercise of the right to self-determination, when read in light of the preambular requirement that “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”, remain contested.

Given that for most indigenous peoples secession is not a realistic, or even desirable option, limiting the debate to this mode of self determination tended to detract from other important elements of the right. One element that has received insufficient attention to date is its developmental aspect. The adoption of the UN DRIP plays an important role in redirecting attention towards this central aspect of the right to self-

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82 UN Treaty bodies have clarified that the right to self-determination applies to all peoples including indigenous peoples, see HRC, Concluding Observations: Canada, 7 April 1999, UN Doc. CCPR/C/79/Add.105; and Martin Scheinin, “The Right to Self Determination under the Covenant on Civil and Political Rights”, in Aikio and Scheinin, op.cit. note 69, 179-202.

83 This issue was raised on a number of occasions by states in the negotiations surrounding the UN DRIP, and stands in contrast to the relatively uncontroversial inclusion of the right to self-determination for all peoples in Art. 1(2) of the UN Declaration on the Right to Development (A/RES/41/128). Attention has now shifted from recognition of indigenous peoples’ right to self-determination in the UN DRIP towards how to operationalize this right.

84 Claire Charters, “Indigenous Peoples and International Law and Policy”, in Benjamin J. Richardson, Shin Imai and Ken McNeil (eds.), Indigenous Peoples and the Law (Hart Publishing, Oxford, 2009), 164, arguing that in academics such as Professor James Anaya and Andrew Huff have made the case that in certain circumstances, where the criteria of international law have been met, indigenous peoples may be entitled to secede and create new states. On the other hand, authors such as Cassese have made the case for a limited form of self-determination and autonomy which has given rise to the concept of “internal self determination”. Under this interpretation secession is only an option in the context of “irremediably repressive and despotic” states. See Antonio Cassese, Self-Determination of Peoples (Cambridge University Press, 1995), 57-62. For additional reading on indigenous peoples’ right to self-determination, see Erica-Irene A. Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination”, 3 Transnational Law and Contemporary Problems (1993), 1-11; Imai, op.cit. note 11, 285.


determination. In doing so it highlights the indivisibility of indigenous peoples’ economic, social and cultural, and civil and political rights. Given the high degree of interdependence between the rights recognized in the UN DRIP it has been pointed out that it is essential that it be read as a whole rather than dissected and analysed in parts. This is particularly the case in the context of the right to development, elements of which are found throughout the declaration. While the term ‘self-determined development’ does not appear as such in the declaration, its spirit is clearly affirmed throughout the document.  

This central role of indigenous peoples’ right to self-determination, and its implications for the HRBA to development as it pertains to indigenous peoples, has been recognized by the UN Development Group (UNDG). In 2008, in line with the requirements of the UN DRIP that UN bodies and agencies contribute to the full realization of its provisions and promote respect for their full application, the UNDG issued guidelines on indigenous peoples’ issues. These guidelines, which are based on the normative framework of indigenous peoples’ rights, including the UN DRIP, start from the premise that indigenous peoples’ poverty and exclusion is to a large extent the result of the major challenges they face in realizing their own models of development. To address this issue the guidelines provide the UN system, and specifically UN country teams, with a framework for implementation of a “human rights-based and culturally sensitive approach to development for and with indigenous peoples”. This culturally sensitive HRBA to development is considered by

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86 One of the central topics addressed in the declaration that is closely correlated with self-determined development is the question of indigenous peoples’ identity and culture, which are essential elements of the right to self-determination. The declaration recognizes that identity and culture embody indigenous peoples’ relationship with their lands and resources, the maintenance and development of distinctive institutions, their continuation and revival of their customs, practices, judicial systems and traditional knowledge. These rights are elaborated in the context of participation and ownership rights. The declaration also addresses other important aspects of identity and culture in the context of development. These include the right to develop manifestations of indigenous cultures (Art. 11), the right to develop and teach spiritual and religious traditions (Art. 12), the right to develop oral traditions, philosophies and languages (Art. 13), and right to control and develop their cultural heritage, traditional knowledge and traditional cultural expressions (Art. 31).

87 Art. 41 of the UN DRIP specifically calls on UN organs and specialized agencies to contribute to the full realization of the provisions of the declaration. Art. 42 calls for the UN, its bodies, including the UN PFII; and specialized agencies, including at the country level to promote respect for the full application of its provisions.

indigenous peoples as being one of the key principles underpinning their self-determined development framework.89

Rather than attempting an exhaustive analysis of the components of the right to development that emerge from the declaration, the remainder of this article seeks to assess two significant, and in some contexts controversial, aspects of self-determined development that have come to the fore as priority topics in recent discussions on the operationalization of the UN DRIP. The context of the extractive sector has been chosen for analysis, as this is an area where much of the attention of indigenous peoples has been focused in relation to the operationalization of the UN DRIP, a fact reflected in the number of complaints made regarding the sector, and the conduct of a series of high-level meetings in relation to it that involved indigenous peoples, states, UN agencies and bodies, and industry. The first of these themes is indigenous peoples’ participation in decision-making through their own representative institutions and the associated requirement to obtain their free prior informed consent. The second theme relates to indigenous peoples’ rights over the natural resources found in their territories. Examples emerging from recent workshops, conferences and expert group meetings are provided to contextualize the discussion.

IV. THE OPERATIONALIZATION OF SELF-DETERMINED DEVELOPMENT

A. Self-Determined Development and Free, Prior and Informed Consent: Two Sides of the Same Coin

In his analysis of indigenous self-determination Shin Imai notes that “[s]elf-determination refers to a choice, not a particular institutional relationship”.90 This definition of self-determination finds resonance with that of the International Court of Justice, which defined the principle of self-determination “as the need to pay regard to the freely expressed will of peoples”.91

89 Tauli-Corpuz, op.cit. note 58, 97.
80 Imai, op.cit. note 11, 292. Imai also notes that self determination includes “the right of a people to decide how it wants to relate to a majoritarian population”.
91 ICJ, Western Sahara, Advisory Opinion, ICJ Reports (1975), 12, at 33.
The choice implicit in the right to self determination can result in a number of possible outcomes depending on the particular circumstances and aspirations of the indigenous peoples in question. These outcomes include, but are not limited to, autonomy and self government as guaranteed under Article 4 of the UN DRIP.\footnote{Imai discusses four possible outcomes: sovereignty and self government, self administration and self management, co-management and joint management, and participation in public government. Imai, \textit{op.cit.} note 11, 292. Art. 4 of the UN DRIP refers to autonomy and self-governance as rights that flow from the exercise of self determination. However, it does limit the outcome of self-determination to these rights. Henriksen, \textit{op.cit.} note 85, 27, a Saami lawyer and member of the UN Expert Mechanism on Indigenous Issues has noted that where the outcome of the exercise of self-determination is autonomy or self-government, mechanisms need to be in place to ensure that the arrangements have the free prior informed consent of the indigenous peoples concerned.} according to Imai, indigenous peoples and states tend to view self-determination from different perspectives. States tend to focus on jurisdiction and relative power issues in relation to indigenous peoples legislative capacity and their associated enforcement structures.\footnote{Ibid.} Indigenous peoples meanwhile tend to view self determination “in terms of ongoing resistance to the encroachment of non-Indigenous social, economic and political structures”.\footnote{Ibid.}

Indigenous peoples’ self governance and autonomy rights are closely related to other self determination rights such as participation in decision-making and maintenance and development of distinct indigenous institutions. These rights are in turn key enablers for indigenous peoples’ exercise of their right to development. The interrelationship between these self-determination rights and their right to development is reinforced in UN DRIP Articles 5, 18, 20, 23 and 34, and forms the basis of their demands for self-determined development.\footnote{Arts. 5 and 18 of the UN DRIP articulate the right of indigenous peoples to develop distinct indigenous decision-making institutions and to participate in decision-making “in all matters which would affect their rights” through their chosen representatives. Art. 34 also addresses the right to develop and maintain institutional structures and associated customs, practices and juridical systems. Art. 20 reaffirms the right to develop their political, economic and social systems or institutions and contextualizes this in relation to the enjoyment of the right to development, which includes being free to engage in “traditional and other economic activities”. Art. 23 expands indigenous peoples’ right to development to include “the right to determine and develop priorities and strategies for exercising their right to development”. It also envisages indigenous peoples actively participating in economic and social programmes affecting them.}

It is beyond the scope of this article to address the distinct and context-specific modes for exercising the right to self-determination and its potential outcomes. Rather, the article seeks to examine the self-determination aspect that implies a choice of
development options and the right to resist encroachment, particularly in the context of increased external demands for resources located in indigenous territories. This increased demand for access to their lands and resources has resulted in the requirement to conduct “meaningful consultation” with indigenous peoples – a requirement which is now regarded by many as representing a norm of customary international law. Imai notes that despite advances in requirements under international and national legislation to consult with indigenous peoples, they continue to face some of the greatest assimilation pressures as a result of development projects that deny them access to their lands and resources. It has therefore been argued in the context of resource extraction in indigenous peoples’ lands that mere consultation with indigenous peoples, without the requirement to obtain their consent, is inadequate. The right of indigenous peoples to say no to a proposed development is consequently seen by many as a natural extension, or a logical progression, of the established right to meaningful consultation. In order to ensure that consultations are ‘meaningful’, certain procedural rights have also evolved. These require that consultations be free from manipulation and coercion, respect traditional decision-making processes, be held in sufficient time in advance of project execution with adequate information provided to enable informed decisions to be taken. Collectively, these requirements have come to be termed ‘free prior informed consent’ or ‘FPIC’.

The right of indigenous peoples to determine and formulate their developmental priorities and strategies regarding their lands or territories and other resources is articulated in Article 32(1) of the UN DRIP. Article 32(2) then links this aspect of the

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97 Imai, op.cit. note 11, 301
98 Anaya, op.cit. note 97, 17: “Where property rights are affected by natural resource extraction, the international norm is developing to also require actual consent by the indigenous peoples concerned”. A similar argument was made by the World Commission on Dams with regard to indigenous peoples’ involvement in the decision-making process. See World Commission on Dams, Dams and Development, A New Framework for Decision Making: The Report of the World Commission on Dams (Earthscan, London, 2000).
right to development to the obligation of states to obtain FPIC in the context of development projects affecting these lands or resources.\textsuperscript{100}

In doing so the UN DRIP highlights the indivisibility of the concepts of FPIC and self-determined development and the fact that they are, in many regards, two sides of the same coin. On one side, self-determined development embodies the right of indigenous peoples to decide their own development priorities. FPIC protects this right in the face of projects, policies or legislation that could run counter to these priorities or render them unachievable. In light of the widespread imposition of development projects in indigenous territories and the implementation of enabling policies and legislation, non-recognition of the requirement to obtain FPIC implies that communities have no determining say in the developments that occur on their own lands.\textsuperscript{101} Implicit in this reality is the fact that they are no longer in a position to determine their own development priorities.\textsuperscript{102}

On the other side of the coin genuine, FPIC is only possible if the community has been afforded the possibility of deciding its development priorities in advance. The option to consider and evaluate alternative culturally appropriate development options that are available to a community, prior to having to make any decisions with regard to proposed developments is essential to making a free and fully informed choice.\textsuperscript{103} Communities therefore need to be given the space to decide their own development priorities.

\textsuperscript{100} UN DRIP Art. 19 also requires that FPIC be obtained through indigenous peoples own representative institutions in relation to legislative or administrative measures affecting them.

\textsuperscript{101} In practice many governments “remain loath to acknowledge that indigenous consent is required”, a fact which appears to be resulting in increasing number of physical confrontations between states and indigenous peoples, and leading to incarcerations, injuries and even deaths. Imai, op.cit. note 11, 301-302, notes that physical confrontations continue in Canada, United States, New Zealand and Australia with an aboriginal protestors shot dead by police in Canada in 2007. Similar confrontations resulting in the deaths of indigenous peoples occurred in 2009 in countries such as the Philippines, Peru and Ecuador (op.cit. notes 35 and 153).

\textsuperscript{102} Indigenous communities in the Philippines have lodged complaints that the imposition of mining and other large-scale development projects in their lands is transforming their Ancestral Domain Sustainable Development and Protection Plans (ADSDPPs) from their original intent as “culturally appropriate self-determined development plans” into “externally imposed investment roadmaps designed to suit the needs of corporations”, Philippines Indigenous Peoples CERD Shadow Report, op.cit. note 24, 10.

\textsuperscript{103} Consultation Workshop and Dialogue on “Indigenous Peoples’ Self-Determined Development or Development with Identity”, op.cit. note 58, 22. At the 2008 Tivoli consultation, it was pointed out that development should be an expression of self-determination. For that, indigenous peoples’ control over “the direction and process of development” was deemed necessary, as was the principle of genuine FPIC. For FPIC to be genuine, indigenous peoples’ awareness of alternatives to the development paradigms and options being proposed in the FPIC process was considered necessary.
priorities and formulate their own development plans prior to the conduct of FPIC processes. If they have not had the opportunity to do so, then sufficient time must be afforded to them when external development projects or policies are proposed before they can be expected to give their FPIC. Uncertainty is the enemy of community development projects. The denial of the right to FPIC consequently acts as a major inhibitor for indigenous peoples interested in investing in and developing their own territories.

As mentioned above the adoption of the UN DRIP has seen increased international attention on the impact of development projects on indigenous peoples, particularly in the extractive sector. A series of international conferences and workshops held between 2001 and 2009 addressed the relationship between indigenous peoples and the extractive sector. These meetings, which involved indigenous peoples, states, UN agencies and bodies and industry, all emphasized that development should only proceed in a manner that is consistent with the rights articulated in the UN DRIP. The inseparability and interdependence of the right to FPIC and the right to a self-determined development was addressed at all these meetings.

Recognizing this interdependence, the 2009 UN PFII initiated and facilitated an international expert group meeting on extractive industries, indigenous peoples’ rights and corporate social responsibility (henceforth UN PFII experts groups meeting), and pointed out that it was important that FPIC be conceived of within the context of the rights of communities to determine their own development paths. It also recommended that states should be clear “that the impacts of refusing to respect FPIC rights in one project can taint all future relationships and negotiations with Indigenous

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104 Communities are disincentivized from investing their time and resources in the development and management of their lands and resources when they are aware that large-scale development projects may be imposed on them in the future. This problem is compounded by the fact that external actors, including the state, generally place no value on the major intergenerational investments that indigenous peoples have already made in their territories. These significant investments for current and future generations are often destroyed with little or no compensation and no meaningful analysis of the long-term impacts to wellbeing. Examples in the Philippines include investments made by communities in citrus farms, vegetable farms and rice paddies that had been destroyed to make way for unwanted mining projects. See Philippines Indigenous Peoples CERD Shadow Report, op.cit. note 24.

communities”. Illustrative of this were the situations in the Philippines\textsuperscript{106} and Peru\textsuperscript{107}, presented at the 2009 indigenous peoples-organized International Conference on Extractive Industries and Indigenous Peoples\textsuperscript{108} (henceforth Indigenous Conference on Extractive Industries). In both countries the failure to uphold the rights to FPIC and self-determined development has led to widespread conflicts resulting in deaths, injuries, criminalization of indigenous leaders and a climate of fear, tension and mistrust.

The Office of the High Commissioner for Human Rights (OHCHR) held a workshop in 2001 on the subject of the private sector natural resource, energy and mining companies and human rights. The report states that “the workshop affirmed the

\textsuperscript{106} In the Philippines the 1997 Indigenous Peoples Rights Act (IPRA) recognizes the right of indigenous peoples to self-determination, ancestral domains, including all resources therein, and FPIC. Indigenous peoples are required to formulate their own Ancestral Domain Sustainable Development and Protection Plan (ADSDPP). These plans were envisaged as a means of providing communities with culturally appropriate self-determined development options. In practice, however, control over the funding and procedure for the formulation of these plans is reserved to a government agency responsible for upholding indigenous peoples’ rights but which lacks accountability to indigenous peoples and is perceived by many as actively promoting mining in their territories. The result is that instead of being an exercise in self-determination, there is a tendency to transform ADSDPP into investment roadmaps that facilitate extractive projects in indigenous territories. In parallel, this same government agency has implemented FPIC guidelines that go against the spirit and intent of the IPRA and provide little or no protection to indigenous peoples’ right to determine their own development path. The Indigenous Peoples Shadow Report submitted to the UN CERD documented about 20 cases where the legally recognized rights to FPIC and self-determined development had been violated. See Philippines Indigenous Peoples CERD Shadow Report, op.cit. note 24.

\textsuperscript{107} In Peru, indigenous peoples have started to formulate their own development alternatives to large-scale developments such as extractive projects in their lands. These alternative models embody indigenous concepts of development premised on the principle of “buen vivir” (good living) which is in keeping with their own philosophies, as opposed to the state-promoted concept of “vivir bien” (living well) which is premised on increased consumption. See Estados plurinacionales comunitarios el buen vivir para que otros mundos sean posibles, Coordinadora Andina de Organizaciones Indígenas (CAOI, Lima, 2008). A public forum is to be held in Lima, Peru, in January 2010 to further elaborate on these concepts. See also El Buen Vivir desde la visión de los pueblos indígenas de los Andes, at <http://www.minkandiña.org/index.php?news=257>. Respect for the right to FPIC is regarded as being fundamental to facilitating a context in which communities were given the space to formulate these plans. In the absence of Peru’s recognition for their right to FPIC a number of communities held their own referenda in relation to planned mining projects based on municipal ordinances and supporting articles recognizing freedom of expression, as well as consultation and participation rights, flowing from Peru’s human rights obligations. The outcome was an overwhelming rejection of the proposed mining projects. However, the state has in turn rejected these results. As a consequence of this state refusal to accept the decisions of indigenous communities or to hold meaningful consultations with them, conflicts over extractive projects were widespread throughout the country. The events that emerged in Bagua, in which 30 people were killed following conflicts between military police and indigenous communities in the Amazon region of Peru, attest to the seriousness of the situation. See submission made to CERD by Peruvian indigenous organizations in relation to the Bagua incident and the context in which it occurred: Observaciones al Informe Oficial del Estado Peruano, Coordinadora Andina de Organizaciones Indígenas and Confederación Nacional de Comunidades Afectadas por la Minería, 2009; Algunas Consideraciones Relativas al Informe Presentado al por el Gobierno de Perú al CERD, Comisión Jurídica Para el Autodesarrollo de los Pueblos Originarios Andinos, 2009.

\textsuperscript{108} The Indigenous Peoples Conference was held in Manila from 23-25 March 2009.
importance of economic and sustainable development for the survival and future of indigenous peoples. It also considered, in particular, that the right to development means that indigenous peoples have the right to determine their own pace of change, consistent with their own vision of development, and that this right should be respected, including the right to say ‘no’.”109

The authors concur with this position that obtaining indigenous peoples’ FPIC, in accordance with their right to self-determination and self-determined development, necessarily embodies their right to dissent. There exists an ongoing debate as to what limitations may legitimately be placed on the exercise of indigenous peoples’ right to self-determination, and in particular to the ‘veto’ aspects of its FPIC component.110 In this regard the Inter-American Court has ruled that states have a duty to obtain FPIC where “large-scale development or investment projects that would have a major impact within [indigenous peoples] territory”.111 The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, has also addressed this issue. While emphasizing the need to strive for mutual consent based on good-faith negotiations between indigenous peoples and the state, he is of the opinion that in certain contexts “a significant, direct impact on indigenous peoples’ lives or territories [...] may harden into a prohibition of the measure or project in the absence of indigenous consent”.112

Indigenous communities may already have, or wish to develop, alternative development plans and priorities for their own territories that are based on their own conceptions of wellbeing. These may be in keeping with their cultural characteristics, involve protecting their sacred areas, or be aimed at avoiding negative impacts on traditional livelihoods, health, environment, their lands and resources, and protecting the rights and interests of future generations to sustainable and culturally appropriate development. For indigenous peoples to be in a position to realize self-determined development within their territories they must be able to preclude externally imposed development projects that run contrary to these plans and priorities. While the article will not delve further into the issue at this point, it is interesting to note that in making

his arguments in relation to development as freedom, Sen approaches the issue of dissent in relation to development as follows:

Within narrower views of development (in terms of say, GNP growth or industrialization) it is often asked whether freedom of political participation or dissent is or is not ‘conducive to development’. In light of the foundational view of development as freedom, this question would seem to be defectively formulated, since it misses the crucial understanding that political participation and dissent are constitutive parts of development itself […] the relevance of the basic deprivation of basic political freedoms or civil rights, for an adequate understanding of development, does not have to be established through their indirect contribution to other features of development such as the growth of GNP or the promotion of industrialization). These features are part and parcel of enriching the process of development.\textsuperscript{113}

As with the right of any society or nation to dissent to proposed development policies impacting on them through the democratic process available, the right of indigenous peoples to dissent to proposed developments impacting on their territories should not be viewed as an obstacle to development, but as an intrinsic part of the development process and an end objective of development. The denial of this right to dissent is the denial of development itself.


\textsuperscript{112} The 2009 annual report of UN Special Rapporteur James Anaya addresses the subject of “veto power”, suggesting that this was not the appropriate lens through which to view the issue of FPIC. However, the report does not suggest that, if having followed good faith consultations indigenous peoples decide not to give their consent to a project in their territories (for example on the basis of its impacts to their physical or cultural wellbeing), then that project should be imposed on them against their will. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34, 15 July 2009, paras. 46-49.

\textsuperscript{113} Sen, \textit{op.cit.} note 18, 36-37, emphasis added. Sen also points out that “the significance of the instrumental role of political freedoms as a means to development does not in any way reduce the evaluative importance of freedom as an end to development”.

B. **Natural Resource Rights and Self-Determined Development**

A related topic, that has been receiving increased attention in international fora addressing the subject of indigenous peoples’ right to development and the implications of the adoption of the UN DRIP on the extractive sector, is the question of indigenous peoples’ rights to natural resources. Article 26 of the UN DRIP recognizes indigenous peoples’ rights to their lands and resources “which they have traditionally owned, occupied or otherwise used or acquired”. This represents a significant evolution from the right to resources recognized under ILO Convention 169, Article 15(1), which will be addressed below. As discussed earlier the effect of the UN DRIP as an interpretative source for national and international law remains to be seen. However, the UN DRIP’s recognition of resource ownership reflects a more meaningful interpretation of indigenous peoples’ land and resource rights as it:

1) is in accordance with their holistic world views and philosophies, which generally do not differentiate between ownership of resources that are above the earth’s surface and those that are below it;

2) reflects the reality that many indigenous communities have themselves made use of subsoil resources in the past and, as recognized under the doctrine of aboriginal title, in accordance with their indigenous laws and practices have ownership of these resources;\(^1\)

is consistent with the evolving recognition of indigenous peoples’ rights in international law as reflected in recent interpretation of the Inter-American Court on Human Rights of indigenous peoples property rights when it stated that […] the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land” and “that the natural resources found on and within indigenous and tribal people’s territories that are protected under Article 21 are those natural resources traditionally used and

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\(^1\) The Canadian Supreme Court, *Delgamuukw v. British Columbia* 3 S.C.R. 1010, 1997, also stated that “aboriginal title also encompasses mineral rights”. In other contexts, communities may have decided for cultural or spiritual reasons not to mine or use resources located in their territories but still to maintain ownership over these resource under their customary laws, something often evidenced by their denial of permission to others to exploit these resources.
necessary for the very survival, development and continuation of such people’s way of life;\textsuperscript{115}

3) is consistent with Article 1(2) of the UN Declaration on the Right to Development which provides that the right to development “implies the full realization of the right of peoples to self-determination which includes...the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”; and

4) is in keeping with developments pertaining to the recognition of the use and control of other resources located in indigenous lands such as interpretations of Article 10(c) of the Convention on Biological Diversity.\textsuperscript{116}

Indigenous peoples’ right to their resources and the relationship between this right and self-determined development is further affirmed in Article 25 and 29 of the UN DRIP.\textsuperscript{117} Commenting on indigenous peoples’ right to development, Daes, author of the report addressing indigenous peoples’ right to permanent sovereignty over their natural resources,\textsuperscript{118} notes that it is important to address the issue of dispossession and the “billions of dollars of resources that have been extracted from indigenous peoples’ territories”.\textsuperscript{119} Articles 20 and 32(3) address the related issue of redress where indigenous peoples have been deprived of their resources and their means of subsistence and development. Read together with Article 3, on the right to self-


\textsuperscript{116} Convention of Biological Diversity 1997, Art. 10(c), protects the “customary use of biological resources in accordance with traditional cultural practices” and has been interpreted as requiring the recognition of indigenous peoples control over natural resources that lay on their lands.

\textsuperscript{117} UN DRIP, Art. 25, recognizes the special spiritual and intergenerational aspects of the relationship indigenous peoples have with their resources. Art. 29 requirement that the “productive capacity of their lands or territories and resources” be protected and conserved has important implications for the enjoyment of their right to development. Their right to resources is implicit in Art. 20 when it recognizes indigenous peoples’ rights to “traditional and other economic activities” and their entitlement to “just and fair redress” where they are deprived of “their means of subsistence and development”. Art. 32(3) also addresses the need for redress in the event of indigenous peoples’ resources being exploited in the context of development projects. Combined, the aforementioned articles recognize the need to protect indigenous peoples’ means of subsistence and the fact that their lands and resources are fundamental elements of such subsistence.


\textsuperscript{119} Daes, \textit{op.cit.} note 8, 103.
determination, they reflect the principles outlined in common Article 1(2) on the right to self-determination of the two international human rights covenants.120

As referred to above, the UN DRIP represents an evolution from ILO Convention 169 with regard to the recognition of ownership rights to resources. Article 15(1) of ILO Convention 169 refers to a right to participate in the use of resources and does not recognize a right to ownership. It states that “[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”

Likewise Article 15(2) does not make explicit reference to indigenous peoples’ resource ownership rights. However, the recognition of indigenous peoples’ ownership rights is implicit in those cases where states do not retain ownership of subsurface resources or rights. This interpretation is in keeping with ILO Recommendation 104, which is based on a non-discriminative approach to resource ownership and recommends that indigenous populations “receive the same treatment as other members of the national population in relation to the ownership of underground wealth ”.121 Article 15(2) which recognizes the right to benefit from the exploitation of these resources, states that:

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

120 This article is which is referenced in the declaration’s preamble states that: “All peoples may, for their own ends, freely dispose of their natural wealth and resources […] based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”
121 ILO Recommendation 104, 40th Session, 5 June 1957.
An examination of the debates surrounding the drafting of ILO 169 sheds some light on the background to this more conservative and, from the perspective of the many impacted indigenous peoples, increasingly inadequate, position of the convention vis-à-vis their rights to resources in their lands.

This issue of the control over natural resources was the subject of significant debates during the revision of ILO Convention 107. The Meeting of Experts noted that serious damage to indigenous peoples’ lifestyle could occur when states retain exclusive control over the rights to subsoil, mineral and other natural resources. However, a number of states insisted that the ownership of natural resources should remain exclusively with states, pointing out that in most national legislation these resources could only be granted to private individuals on a concessionary basis. During the debates leading to the adoption of ILO 169, the employer’s group expressed its concerns over the eventual recognition of indigenous peoples’ rights to subsoil resources and fears that this could lead to a right of veto over exploration and exploitation of those resources, thereby affecting national interests. In response, a representative of the Indian Council of South America highlighted the discriminatory precepts upon which these state claims to subsoil resources were based, stating “with regard to natural resources, we believe that it is essential to include explicit reference in the revised Convention to both surface and subsurface resources. The claims of States to exclusive ownership of these resources have often been based on premises that ignored the pre-existing rights of indigenous peoples.”

However, given the fact that indigenous peoples had limited input and negotiating power in the drafting process, the position of the employers and those states opposing the explicit recognition of indigenous peoples’ rights to resources dominated. The argument made by the employers that exploitation of natural resources is in the national interest is strongly contested on a range of grounds. First, employers in the extractive industry are entities with a vested interest in maintaining the status quo vis-à-vis their access to resources. Second, the argument that recognizing indigenous

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124 See ILO, Provisional Record 36, 75th Session, Geneva 1988, 19.
125 Ibid., 23.
people’s rights to their resources and the associated right to decide what happens to these resources would negatively impact on the national interest is not substantiated in fact. Experience shows that where veto rights are recognized, such as in the Northern Territories of Australia, indigenous peoples have given their consent subject to certain conditions and mining has proceeded.\textsuperscript{126} Experience also shows that where indigenous peoples’ ownership rights to their resources are recognized, such as in the South African cases discussed below, mining has also been allowed to proceed.\textsuperscript{127} However, the concept of development must be expanded to embrace a meaning whereby some places may remain “under-developed” in the conventional sense of the term.\textsuperscript{128} In addition, the blanket assumption that mining is always in the national interest is highly questionable on economic and other grounds.\textsuperscript{129} Nor does the assumption address the potentially major and long-term impact to livelihoods of indigenous and non-indigenous peoples in other sectors such as agriculture, fishing and tourism, or the fact that the maintenance of indigenous cultures is also an important element of the national interest.\textsuperscript{130} The UN DRIP, by recognizing indigenous peoples’ resource ownership rights, provides a first step towards addressing discriminatory colonial doctrines that continue to inform national legislation—and the arguments of


\textsuperscript{127} The Richtersveld Community, the Royal Bafokeng Nation and the Bakubung Community are examples of cases where agreements were reached with mining companies and indigenous peoples in which indigenous ownership stakes were in excess of 20%.

\textsuperscript{128} Daes, \textit{op.cit.} note 8, 60, notes that “[n]early every ecological change therefore has some religious and cultural significance for indigenous peoples. Respect for religion and culture requires major changes in national laws governing the use of land and natural resources, as well as accepting that a large part of the national territory may remain ‘under developed’ for the foreseeable future.”


\textsuperscript{130} The long-term benefits of maintaining indigenous cultures and the impacts of widespread development projects on them are not considered in traditional economic concepts of national interest.
legislatures—in many countries and which impact negatively on indigenous peoples’ self-determined development.

This issue was raised at the International Conference of Indigenous Peoples where it was pointed out that in many countries, colonial doctrines such as the Regalian doctrine, under which the state claims ownership of all subsoil resources, undermine indigenous peoples “inherent and indivisible” rights. It was also noted in the UN PFII expert groups meeting that indigenous peoples’ rights to resources was an important subject to be addressed in the context of operationalizing their right to self-determination. The topic of rights to resources was one of the primary themes discussed in the 2008 UN OHCHR-organized international workshop on “Natural Resource Companies, Indigenous Peoples and Human Rights: Setting A Framework for Consultation, Benefit-Sharing and Dispute Resolution”. That workshop addressed the land restitution case of the Richtersveld community in South Africa. The South African Constitutional Court held in 2003 that the community had a “right to land”, which it referred to as “indigenous law ownership”. It required restitution of the right to exclusive beneficial occupation and use of the lands including its minerals and precious stones. This recognition of the community’s right to their resources was described as having pervaded all subsequent discussions and negotiations resulting in significant benefits to the community which acquired a 49% equity stake in the mining company. Similar examples were provided in relation to other indigenous communities in South Africa where ownership rights to resources were recognized. All of these projects were financially viable despite the significant

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113 The 2009 Manila Declaration, op.cit. note 33, called for these rights denying doctrines to be abandoned.
112 This point was raised by Windel Bolinget, Secretary General of Cordillera Peoples Alliance, Philippines. Notes of expert group meeting on file with authors.
115 Richtersveld Community v. Alexkor, 2003 (6) SA 104 (SCA) at paras. 29 and 111.
116 Other issues that arose in the ruling and discussion of the case included the role of customary law, representation of communities via their customary structures, timeframes for decision-making and intergenerational aspect of decisions to be taken by, and any agreements reached, with communities.
117 See op.cit. note 127.
ownership stakes held by the indigenous peoples. It was suggested that this recognition of rights to resources was necessary in order to build trust and ensure that parties entered into negotiations as equals, and that it simply reflected the reality that indigenous communities living on their communal lands constitute more than just stakeholders with an interest in their environment.\textsuperscript{138} Recognition of these time immemorial ownership rights is necessary if a vision of development based on equity is to be transformed into a reality.

V. CONCLUSIONS

Histories of unwanted and destructive projects in indigenous territories have resulted in development being associated with aggression, giving rise to what indigenous peoples aptly refer to as ‘development aggression’. Despite the emergence of ‘sustainable development’ and ‘human development’ discourses, the current wave of globalization has served to perpetuate the pattern of development aggression. Indigenous peoples who have long been the victims of this model of imposed development are now demanding that they be the ones to determine their own development priorities and control development on their own terms within their territories. In so doing, they are challenging the dominant development paradigm and demanding that they become actors in and contributors to development rather than subjects or victims of it. These demands are based on their right to self-determination and the associated development paradigm is increasingly referred to as ‘self-determined development’. Realization of indigenous peoples’ self-determined development is contingent on respect for their rights, governance structures and philosophies, all of which are premised on their core values of reciprocity, equity, solidarity and interconnectedness.\textsuperscript{139} For globalization and self-determined

\textsuperscript{138} Points made by former attorney for the community, Henk Smith, of Legal Resource Centre, South Africa, during discussions of the case at the Moscow workshop. Notes of meeting on file with authors.

\textsuperscript{139} The 2008 Tivoli consultation, \textit{op.cit.} note 57, 18-19, indigenous peoples, representatives of UN agencies and experts in the field of indigenous peoples’ rights addressed the subject of “self-determined development” or “development with identity”. The consultation identified a number of elements that are embodied in these concepts. The following is an attempt to broadly group some of these elements into the following categories rights, philosophies and practices, governance and methods for realization:

\begin{itemize}
  \item Rights: ensure respect for rights to self-determination, lands, territories and resources; participation and free, prior and informed consent, equality, non-discrimination, political
development to coexist, indigenous peoples hold that the former must be infused with the values of the latter. The UN DRIP is seen as the enabling framework in which this can occur, with self-determined development having emerged as one of the most significant objectives of its implementation.

Indigenous peoples are actively pursuing self-determined development paths at the local, national and international levels. While some examples of positive outcomes exist, significant obstacles remain to realizing self-determined development. This is particularly true in the context of major development projects which seek to exploit resources located in indigenous territories. The transformation of the development process into one that is compatible with indigenous peoples’ right to self-determination will require actions on the part of governments, international agencies, financial institutions, UN agencies, NGOs and, above all, indigenous peoples themselves.

In recognition of indigenous peoples’ right to self-determination governments must ensure their full and effective participation at all stages of national development

140 Examples of UN supported initiatives include IFAD’s support for self-determined development projects and its adoption of a policy on indigenous peoples which incorporates the principle of FPIC. See Victoria Tauli-Corpuz (ed.), Good Practices on Indigenous Peoples’ Development (Tebtebba and UN Permanent Forum on Indigenous Peoples Issues, Baguio and New York, 2006) which provides examples of IFAD funded projects in India, Brazil, Peru and Bolivia that have attempted to incorporate the principles of self-determined development. Dialogues at community, regional and global levels facilitated as part of the UNDP’s Regional Programme on Indigenous Peoples (RIPP) have also been supportive of the principles underlying self-determined development. Indigenous communities in a number of countries have, to varying degrees of success, in recent years formulated their own development plans such as Planes de Vida in Columbia and Ancestral Domain Sustainable Development and Protection Plans in the Philippines.
policy planning, formulation and implementation that impacts on them.\textsuperscript{141} National and local governments should respect the self-determined development plans produced by indigenous peoples and provide the necessary financial and technical assistance for their realization—the objective should be to facilitate culturally appropriate development models that emanate from the community itself, rather than to seek to impose externally designed investment roadmaps. For this to be achieved indigenous peoples’ involvement in the formulation of guidelines in relation to self-determined development plans and FPIC consultation processes must be guaranteed. Oversight mechanisms that are accountable to, and representative of, indigenous peoples have to be established to ensure that consultation and consent seeking processes are meaningful. The availability of legally binding grievance mechanisms in host states should be complemented by extraterritorial regulation in the home state of transnational corporations, providing indigenous peoples with access to alternative legal remedies where necessary. Ratification of ILO Convention 169 would also provide states and indigenous peoples with an additional avenue for resolution of disputes that arise in relation to the operationalization of self-determined development.

Corporations involved in pursuing projects in indigenous territories should adopt formal policies that respect indigenous peoples’ self determination rights as well as their rights to their lands and resources.\textsuperscript{142} These policies should be applicable regardless of the legislative framework in place in the host state. Similarly UN specialized agencies, including the World Bank Group, as well as international financial institutions and NGOs should revise their policies to comply with the UNDRIP, requiring indigenous peoples’ FPIC for the conduct or funding of projects. As UN country teams incorporate the UNDG guidelines on indigenous peoples into their operations, indigenous peoples’ self-determined development plans should

\textsuperscript{141} The UN Special Rapporteur on indigenous peoples’ issues has suggested that this duty to consult “applies whenever a State decision may affect indigenous peoples in ways not felt by others in society”, 2009 Report of UN Special Rapporteur on indigenous peoples, \textit{op.cit.} note 112, para. 43. An example could be indigenous peoples’ participation in the realization of the MDGs objectives or in the formulation of mining policies or legislation that impact on their territories.

\textsuperscript{142} The endorsement of the UN DRIP in corporate policies and incorporation of the principle of FPIC into their practices would represent an important step forward in this regard.
become important input into UN Common Country Assessments and UN Development Assistance Frameworks.143

At the local level, indigenous peoples face a variety of context-specific challenges in their efforts to achieve self-determined development. The following suggestions may therefore not be relevant in all contexts. Increasing levels of encroachment into their lands require indigenous communities to be proactive if they wish to avoid assimilation and loss of control over their resources. The formulation of community self-determined development plans which reflect their long-term aspirations may in some cases assist in protecting communities when faced with these external claims on their resources and lands. Another activity which may prove to be of some assistance to communities in regulating access to their knowledge and resources is the formulation of community protocols.144 These protocols are developed by communities following internal consultative processes held in accordance with their own traditional practices. They specify the terms and conditions, including FPIC protocols, that communities wish to use to regulate access to their resources. The formulation of these protocols can act as a catalyst for reviewing existing community development plans or preparing new ones that reflect the community’s development priorities and aspirations. Formulating such plans and protocols may also provide communities with the opportunity to address issues community members may have with the transparency or representativeness of their institutions.145 Governments need to provide the necessary time and space for communities to formalize these protocols, develop sustainable development plans and, where the community deems it necessary, to strengthen or restructure their institutions.

143 CCAs are the instruments used by the UN system to analyse the national development situations and identify key development issues while DAFs are the common strategic frameworks for the country level operational activities of the UN system. See <http://www.undg.org/?P=232>.


At the international level, indigenous peoples and the UN mechanisms with specific mandates regarding their human rights are currently collaborating to outline the elements of self-determined development and elaborate plans for its operationalization. Consultations have been held to outline its contours, indicators are being developed to monitor its implementation, and thematic studies are being conducted in relation to its realization. Indigenous representatives and communities are also addressing it in their submissions to UN treaty monitoring bodies, engagements with UN agencies and funds, in discussions in relation to corporate responsibility, and with states in the context of the debate on sustainable development. The focus on self-determined development by indigenous peoples is expected to increase in the coming years. The upcoming 2010 session of the UN PFII will address the theme “Indigenous Peoples: Development with Culture and Identity”, while the 2010 session of the UN Experts Mechanism on the Rights of Indigenous Peoples will address the right to participation in decision-making. In driving these initiatives indigenous peoples are redefining the context in which the development debate is being played out. This is in and of itself a necessary step towards the realization of self-determined development. Their ability to ensure the meaningful engagement of states, the UN system and private actors in this debate will be an important determinant of whether or not self-determined development can be transformed into a paradigm that empowers indigenous peoples throughout the world.

While progress has been, and continues to be, made in relation to indigenous peoples’ self-determined development, past experience shows that powerful vested political and economic interests, together with the inbuilt rigidities in the existing economic system, will act as major obstacles to its realization. Engagement in the development debate and the use of national and international legal mechanisms is necessary but

146 The 2009 Report of the UN Special Rapporteur, James Anaya, op.cit. note 112, addressed the state duty to consult. The 2010 of Experts Mechanism on the Rights of Indigenous Peoples will address the right to participation in decision-making. Cooperation between these two human rights mechanisms and the UN PFII is addressed in the Addendum 7 to the report of the UN Special Rapporteur, UN Doc. A/HRC/12/34/Add.7.
148 These initiatives should provide the potential to synthesize those aspects of sustainable development, human development and the HRBA to development that are consistent with their self-determined development objectives, and to identify challenges faced by indigenous communities as well as successes realized in their pursuit of self-determined development paths.
alone it will not be sufficient to shift the dominant development paradigm towards a self-determined development one. It took mass mobilization and marches of ordinary citizens throughout the world to put the need for reform of the globalization model on the agenda of developed states. The increasingly frequent mobilizations of indigenous peoples to prevent encroachments into their territories are similarly applying pressure on both developed and developing states, as well as on corporations, to adopt alternative methods of engaging with them. Unfortunately, in far too many cases, meaningful engagement on the part of states and corporations only occurs after manifestations have been suppressed through the use of force resulting in injuries, deaths and the criminalization of indigenous leaders.

Turning to the more positive dimensions of the interaction of self-determined development and globalization, it would be remiss not to address the major contribution that indigenous peoples can make to development at the national and global levels. As keepers of traditional knowledge, stewards of much of the earth’s remaining natural resources, and holders of world views and philosophies predating nation states, the more than 350 million indigenous people worldwide have enormous potential to enrich the physical, cultural and spiritual wellbeing of the global community. Given the opportunity to develop on their own terms and in accordance

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149 Indicative of this is the fact that where developing states have made attempts to legislate in line with indigenous peoples’ rights, they have found themselves constrained from doing so by legal challenges from transnational corporations claiming breaches of existing trade and/or investment agreements. Op. cit. note 26

150 Stiglitz, op. cit. note 5, noted that “it is the trade unionists, students, environmentalists—ordinary citizens—marching on the streets of Prague, Seattle, Washington, and Genoa who have put the need for reform on the agenda of the developed world”.

151 Globalization, through technologies such as the internet and mobile phones, has facilitated the interconnecting of indigenous peoples the world over. In so doing, it has facilitated collaboration in information access and sharing, enabled the formation of alliances and networks of indigenous peoples and their support groups, allowed for the development of joint strategies for addressing common issues, and provided the means to raise these issues to the attention of diverse audiences, including governments, investors, shareholders and the general public.

152 Examples include cases in 2009 in Peru and Ecuador where deaths resulted from state use of force to address indigenous peoples’ protests. In Ecuador this led to negotiations involving 130 indigenous leaders and government ministers that appear to have met some of the demands of indigenous communities. See <http://ci.forolacfr.org/index.php/?newsroom/nota/indigenas_y_gobierno_logran_seis_acuerdos/>. In Peru, the UN Special Rapporteur on Indigenous Peoples Issues recommended an independent investigation that ensured international involvement be conducted. However, to date the Peruvian government has not acted on this recommendation. See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, Additional Observations on the situation of the Indigenous People of the Amazon and the Events of 5 June and Subsequent Days in the Provinces of Bagua and Utcubamba, Peru, UN Doc. A/HRC/12/34/Add.8, 18 August 2009, 33.
with their values of reciprocity, equity, solidarity and interconnectedness indigenous peoples could generate a truly sustainable, intergenerational, equitable and consensus-driven, rights-based development model from which a global society facing major challenges such as climate change may have much to learn.
Countries in the South Asian region are characterized by a wide and rich diversity of peoples, languages, religions and cultures. Several of those countries have a range of constitutional and legal safeguards which protect minority rights and guarantee fundamental freedoms, and the majority have ratified international human rights instruments. Such provisions cover, for example, protection against discrimination, the recognition of identity, freedom of expression, freedom of association, promotion of the language and culture of minorities, the right to religious freedom and belief, and the prohibition of torture and ill treatment.

In 2007 four South Asian non-governmental organizations (NGOs) for human rights—International Centre for Ethnic Studies, Sri Lanka (ICES), Centre for Policy Alternatives, Sri Lanka (CPA), Human Rights and Democratic Forum, Kathmandu (FOHRID), Mahanirban Calcutta Research Group, Kolkata (MCRG) and the Human Rights Commission of Pakistan, Lahore (HRCP)—elaborated a draft South Asian Charter on Minority and Group Rights (hereinafter “Draft Charter”)1 on the basis of a previous Statement of Principles on Minority and Group Rights in South Asia.2 The final text was prepared in the first months of 2008 by ICES with input from a large number of human rights and minority rights experts from the region. The aim of the charter was to address cross-cutting regional minority rights issues and concerns effectively, and to enhance regional responses to some of the current weaknesses in the constitutional and legislative protection and promotion of minority and group

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rights. More specifically, as the authors put it, the charter was foreseen as a reference tool for governments, non-state actors, human rights institutions, NGOs, human rights advocates and policy-makers to draft national legislation, promote legislative reforms, undertake advocacy and influence decisions, policies and programmes that were focused on the promotion and protection of minority and group rights. The aim of drafting such a charter was to enhance national and regional networks, to have broad input for the charter and to promote it through advocacy for rights protection at local, national and regional levels by NGOs and other civil society organizations.

The preamble of the Draft Charter underlines the need for more effective implementation of international human rights instruments with regard to rights referring to racial or ethnic, religious or linguistic minorities. The authors further acknowledge that in the Social Charter of the South Asian Association for Regional Cooperation (SAARC), SAARC member states undertook “an obligation to promote universal respect for, and observance and protection of human rights and fundamental freedoms for all including every minority, section and group in society”. The authors of the Draft Charter then reiterate that, “the obligations of member States of SAARC under the Social Charter must be respected, protected and fulfilled without reservation and that the enforcement thereof at the national level must be continuously reviewed through agreed regional arrangements and mechanisms”.

In three quite complex articles the Draft Charter elaborates the fundamental legal issues with which it deals: non-discrimination (Art. 5), specific minority rights (Art. 6), remedies and implementation (Art. 7). The rest of the Draft Charter is devoted to the establishment, composition and working procedures of the South Asian Human Rights Committee.

At the outset the Draft Charter reaffirms the rights and obligations stemming from UN conventions already ratified by all SAARC member states (International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Elimination of All Forms of Racial Discrimination, SAARC Social Charter) and lays down some general principles, e.g. no person shall be exempt from legal responsibility, no person can call on immunities or special procedures or rules, and nobody shall be exempt from jurisdiction (Art. 2(a)).

Then the Draft Charter delegates responsibility for judicial remedies to competent domestic legal authorities in the respective states, through national tribunals and other institutions. The victims of violations of rights ensured by the Draft Charter may seek “just and adequate reparation and satisfaction for any damage suffered as a result of such discrimination” (Art. 2(d)). However, there is no international judicial institution charged with appeals cases in this respect, such as a South Asian Court of Human Rights.

Article 3 provides a general permission to limit the rights recognized and protected by the Draft Charter. Limitations, which necessarily have to assume the form of a law, can be applied by states only if “compatible with the nature of such rights and solely for promoting the general welfare in a democratic society”. This formulation leaves the door wide open for questionable flexibility and arbitrariness in interpretation.

Chapter IV embraces the list of minority and group rights enshrined in the Draft Charter starting with an overall statement on “Non-Discrimination and Minority Rights” (Art. 5), providing protection against any act of discrimination on the grounds of language, religion, race, caste, gender etc. Article 5(2)(b) states “[s]tate parties shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of their identity”. The subsequent provision 3(c) of Article 5 prohibits states parties from applying distinctions, exclusions, restrictions or preferences made by a state party between citizens and non-citizens or between residents and non-residents.

A major weakness of the Draft Charter can be found in Article 6 which, when defining minorities, refers to “all minorities and disadvantaged, underprivileged or vulnerable groups and sections”. By overstretching the scope of its beneficiaries the Draft Charter risks being barely applicable. In addition when affirming the right to identity and characteristics in Article 6(a), the Draft Charter rules out certain groups from the very beginning, taking up the formulation of the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Linguistic and Religious Minorities.4 While indigenous peoples were able to enshrine clear-cut group rights

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4 Full text available at <http://www2.ohchr.org/english/law/minorities.htm>. Art. 2 reads:

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
within the 2007 UN Declaration on the Rights of Indigenous Peoples, the South Asian Draft Charter, drafted not by UN experts or state diplomats but by human rights NGOs, voluntarily rules out group rights of any kind.

Article 6 enumerates the six minority rights that are protected, namely:
the right to identity and characteristics (Art. 6(A))
the right to diversity and intercultural education (Art. 6(B))
the right to use of language in private and public (Art. 6(C))
the right to be taught and have instruction in your own language (Art. 6(D))
the right to freedom of association (Art. 6(E))
the right to participate in public and political life (Art. 6(F))

The general implementation provisions of minority rights are contained in Article 7. States parties are required to make every effort to implement the above-listed rights through national policies and programmes, and through programmes of cooperation and assistance between states parties (Art.7(A)(1)). States are invited to conclude bilateral and multilateral agreements with other states, to ensure the protection of persons belonging to national minorities. However, this section contains a larger number of formulations such as “the State Parties should ensure”, “the State Parties should cooperate”, “the State Parties should promote”, etc. For instance, Article 7(F)(4)(a) on the right to be taught and have instruction in a minority language contains very flexible and vague formulations, such as: “In areas traditionally inhabited by substantial numbers of persons belonging to a minority, if there is sufficient demand, the State Parties to the present Charter shall endeavour to ensure, where resources permit, and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language”. These articles are

2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Art. 1: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms...”. Full text available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>.
very similar in both content and formulation to the wording of the respective articles in the European Framework Convention for the Protection of National Minorities (FCNM). 

Again it might come as a surprise that such a vague formulation was chosen by human rights NGO experts, and not by diplomats or politicians. For example:

Although persons belonging to minorities have the right to use their language in private and public, there is no mention of the precise obligations incumbent upon public authorities with regard to official use and recognition of minority languages. Children belonging to minorities “should be” taught their language: why do they not have a right to receive instruction in their family language, provided for free by public institutions?

Particularly restrictive is the formulation of the right to participate only “where appropriate”, in “a manner not incompatible with national legislation”. Attaching an overriding power to national domestic legislation means that minority rights are reduced from the very beginning to an option which may or may not be taken in consideration.

Of utmost importance is Article 7(A)(5), which addresses the establishment of institutions tasked with the implementation of the minority rights, responsible for addressing violations of minority rights and providing necessary redress. These may include national institutions such as human rights commissions, commissioners and ombudspersons: “These institutions should provide redress including effective remedies that allow for the implementation of minority rights, sanctioning of perpetrators of violations and compensation for the victims” (Art. 7(A)(5)(b)).

Considering the practice of the existing minority rights commissions in South Asia it is highly questionable whether such institutions—within the given legal context of South Asian states—are empowered to provide effective legal redress in cases where minority rights have been violated.

The remaining text of the Draft Charter deals with the establishment and working methods of the South Asian Human Rights Committee. As David Keane remarks, it is telling that the Draft Charter recommends a South Asian Human Rights Committee, rather than a South Asian Minority Rights Committee, although the Draft Charter

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itself is confined to minority rights realization. Again this committee has no powers either for ensuring legal remedy or of sanctioning violations and granting compensation for the victims.

The preceding remarks have not been meant as a detailed comment or critical analysis of the Draft Charter but rather as a brief introduction to its major provisions. The very effort of elaborating such a proposal among a group of international human rights experts is of great significance for all minority organizations and concerned minorities, and is an essential preparatory element in lobbying the South Asian national parliaments and institutions on the matter. However, the result of the effort as it now stands is in my view not sufficiently comprehensive and does not go far enough in attempting to cope with the political requirements of South Asia. Many passages of the Draft Charter read as if the drafters had anticipated possible objections by governments representatives, which will of course be widespread. Consequently, to some extent this approach resembles that adopted by the drafters of the FCNM, although without the comprehensiveness of that initiative. However, the FCNM is the result of a compromise by states parties, minority representatives and advocacy institutions; if such organizations had begun by submitting a paper that was from its inception the result of foreseen compromise, what would have been the final output?

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7 See David Keane, “Draft South Asian and South East Asian Charters on Minority and Group Rights: A Comparative Analysis”, in this volume.
David Keane∗

Draft South Asian Regional Charter on Minority and Group Rights: A Comparative Regional Analysis

I. INTRODUCTION

In May 2008, the Sri Lanka-based non-governmental organization (NGO) International Centre for Ethnic Studies (ICES) published a draft South Asian Charter on Minority and Group Rights (hereinafter “draft Minority Rights Charter”). ¹ It was elaborated on the basis of the Statement of Principles on Minority and Group Rights in South Asia, which had been prepared by ICES with contributions from a range of NGOs in the region.² According to the foreword, the aim of the draft Minority Rights Charter is to effectively raise minority issues which are common to the states of South Asia and address weaknesses in constitutional and legislative protection of minority and group rights. It is proposed that the draft Minority Rights Charter may be used as a reference document for governments, non-state actors, human rights institutions, NGOs and human rights advocates, and influence legislators and policy-makers. The initiative was funded by the United States-based National Endowment for Democracy.³

The draft Minority Rights Charter applies to members of the South Asian Association for Regional Cooperation (SAARC), which is referenced in the preamble and in particular in Article 26, which reads: “The present Charter is open for signature by any State which is a member of SAARC and any other State which has been invited by SAARC to become a member.”⁴ SAARC is a subregional intergovernmental organization with eight member

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² Draft South Asian Charter on Minority and Group Rights, “Foreword”.
states: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.\(^5\)

The UN General Assembly has been promoting efforts to establish regional human rights mechanisms since the 1970s.\(^6\) The 1993 Vienna Declaration affirms that “regional arrangements play a fundamental role in promoting and protecting human rights”, and reiterated the need to “consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights”. A persistent argument against new regional instruments is the idea that implementing existing human rights obligations should be the primary focus. A recent comment in *Human Rights Features*, which represents the Asia Pacific Human Rights Network, summarized the dangers associated with drafting and promoting regional instruments:

> Human rights organisations and activists, for their part, must be wary of calling for regional human rights instruments and mechanisms. These will allow states to set standards far below those available in international mechanisms, and will lay the ground for the whittling down of rights and protections available to the people of the region. SAARC has a regional agenda, but where human rights are concerned, its outlook must be universal.\(^7\)

This article aims to assess the role and contribution of the draft Minority Rights Charter through comparison with similar initiatives in Asia Pacific. The first section will explore attempts in the Pacific region to establish a human rights body.\(^8\) The Pacific region, including Australia, New Zealand and the Pacific Island Countries, has seen a nascent movement towards a regional instrument ultimately lose momentum. The second section by contrast will document the successful establishment of a human rights body by the Association of South-East Asian Nations (ASEAN) in October 2009, termed the ASEAN

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\(^5\) South Asian Association for Regional Cooperation, official website at <http://www.saarc-sec.org/>. There are nine observer status countries or bodies: China, the European Union, Iran, Japan, Korea, Mauritius, Myanmar (Burma), South Korea and the United States of America.


Intergovernmental Commission on Human Rights (AICHR), although this body is already being criticized for the weakness of its terms of reference. The third section will provide an overview of existing international, regional and domestic human rights standards in the SAARC region, in order to locate the need for a regional instrument in South Asia. The fourth section will assess whether the Council of Europe Framework Convention on National Minorities (FCNM), as the only binding regional or international instrument on minority rights, would make a suitable model for South Asia. Finally it will be asked whether NGO lobbying would be better concentrated on a regional human rights mechanism rather than a minority rights mechanism, as a more practical approach.

II. THE PACIFIC REGION

There is no consensus on the conceptual, institutional and geopolitical parameters of a Pacific regional system. Some have called for an ‘Asian’ or ‘Asia-Pacific’ approach (encompassing the broader Pacific), while others favour a more limited ‘South Pacific’ or ‘Pacific Island Countries’ system. The non-governmental organization LAWASIA, in its initial proposal for a Pacific Charter of Human Rights, divided the region into eight groupings on the basis of suitability for inclusion in its proposed regional body. For the purposes of this section, the Pacific region can be understood as Australia, New Zealand and the Pacific Island Countries.

In 1980 Patrick Downey, then human rights commissioner for New Zealand, mooted the idea of a human rights commission for the Pacific region, and various discussions and initiatives resulted. Following the example of the International Commission of Jurists in beginning the process which led to the African Charter of Human and Peoples’ Rights, the Human Rights Committee of LAWASIA conducted a conference in Fiji in 1985 entitled “Prospects for the Establishment of an Intergovernmental Human Rights

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10 Ibid., 157 note 10. Olowu notes that the phrases “South Pacific” and “Pacific Island Countries” have been used by various writers in different contexts with varying meanings.
12 Olowu, op.cit. note 9, 170.
Commission in the South Pacific”. The conference resulted in the formation of two working committees termed the Working Party, and in 1986 three recommendations were made: first, that the African ‘Banjul Charter’ be used as a model for the Pacific; second, that a human rights officer be attached to a regional organization as an interim measure; and third, that the Pacific region be defined.

By August 1986, a model treaty was proposed, which set down civil, political, economic, social, cultural and peoples’ rights based on the Banjul Charter, and suggested a supervisory body charged with compliance and technical assistance to governments. The recommendations called for a commission with the power to receive complaints, conduct investigations and issue recommendations, rather than a court that could issue binding decisions on states. On 15-17 May 1989, a seminar held in Apia, Western Samoa, of 20 delegates from Micronesia, Melanesia, Polynesia, New Zealand and Australia, considered the report of the Working Party, including the draft “Pacific Charter of Human Rights”. Draft Article 14A provided for the rights of minorities and was a reproduction of Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The seminar resolved to encourage governments of the Pacific to begin the process of drafting a treaty based on the proposed charter.

Van Dyke noted in 1988 that while these efforts were at the non-governmental level, they “can be expected ultimately to be successful”, reflecting the momentum generated by the 1985 conference and subsequent draft Pacific Charter. There was considerable optimism that the setting up of such a regional commission would be viewed as a positive first step towards the eventual establishment of a commission of human rights for the

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15 Hyndman, op.cit. note 13, Appendix 1.
17 Hyndman, op.cit. note 13, 100. This report gives the full text of the draft charter in its Appendix 1.
18 Ibid.
19 Van Dyke, op.cit. note 16, 33.
entire Asian region. However no state was willing to oversee the project, and Deklin complained in 1992 that minority rights issues were holding the project back:

There is a need for some country to take leadership in organizing the regional support for human rights, and it might naturally be expected that both Australia and New Zealand would rise to the occasion. But this seems unlikely, largely because both of these countries have human rights problems arising from their own respective minority groups.

Consequently:

[...] the task is to identify those Pacific Island Countries whose governments have a good human rights record and who support these rights, to take the lead in organizing the setting up of the proposed Pacific Human Rights Commission. If this can be done it will at least pave the way toward the establishment of a truly intergovernmental human rights commission which is what we all want to see for the peoples of the Pacific.

There was no concordance between Pacific governments and civil society in the pursuance of a regional mechanism, and no further advances were made. Wilde calls the draft Pacific Charter “an agreed text around which NGOs can campaign”, and surmises that until intergovernmental meetings seriously begin the task of considering regional machinery, such a regime remains “largely in the realm of human rights activism”. Nevertheless LAWASIA is currently considering the rejuvenation of the draft Pacific Charter of Human Rights, seeking the agreement of governments of all Pacific countries to adhere to a set of basic human rights principles. A University of the South Pacific and Fiji Human Rights Commission Working Group, which began its review in late 2005, is also pursuing the idea of a regional system for the Pacific.

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20 Hyndman, op.cit. note 13, 107.
21 Deklin, op.cit. note 14, 105. Deklin was a member of the working party.
22 Ibid., 105-106.
25 Ibid.
Commentators largely agree that a Pacific human rights commission would be a valuable regional mechanism. They are divided as to its possible role and whether pursuing it would be beneficial given the resources and diversion of energy that would be required. The Pacific region has by far the lowest ratification rates worldwide of the seven core international human rights treaties.26 Jalal supports the creation of a regional mechanism, but argues that such a body should be oriented towards providing technical and financial assistance to Pacific Island Countries for ratification, implementation and reporting under existing international human rights treaties.27 This ought not to be confused with a regional court, which she considers would be “a severe and further drain on Pacific resources.”28

The mechanism LAWASIA envisions also distinguishes itself from a regional court, but the role of its proposed commission is decidedly different to that supported by Jalal; clearly, the LAWASIA Pacific commission would oversee an agreed binding regional treaty and would monitor its implementation in a quasi-judicial manner. Jalal views the role of a regional commission as only providing technical assistance in ratifying and implementing the UN human rights treaties, which could come under an Office of the High Commissioner on Human Rights (OHCHR)-initiated and sponsored regional fund.29 Olowu calls the renewal of discussions on the prospects of a regional human rights treaty in the Pacific region “commendable”, but also asks whether these developments should come at the exclusion of the UN human rights treaty system.30 He writes:

[…] apart from being a desire that remains not immediately feasible, the prospect of a regional human rights system cannot be a tenable reason for South Pacific countries to shun well-established normative and institutional mechanisms of the UN human rights system.31

An important aspect of the proposal is its focus on collective rights as an essential aspect of the Pacific interpretation of human rights protection. For example, Deklin states that

27 Ibid., 42.
28 Ibid.
29 Ibid.
30 Olowu, op.cit. note 9, 171-172.
31 Ibid., 172.
the exclusion of the rights of groups from international human rights treaties “does not quite fit into the Pacific context”, as collective group rights “characterise the Pacific communities as a matter of social and cultural principle”. Wickliffe speculates that the reason Pacific governments have been slow to accede to international instruments is due to the lack of attention given to collective rights and duties, “concepts that fit easily within Pacific cultures”. He employs the term “Pacific Charter of Human and Peoples’ Rights and Duties” to describe a proposed regional mechanism, in a direct reference to the African system, with the view that it would invoke a regional philosophy of rights and responsibilities. LAWASIA believes the African process is a useful platform upon which to build a charter of rights for the Pacific region. Powles also focuses on the concept of ‘duties’ in the African Charter, and their relevance to the Pacific context. Oluwa is unconvinced by these parallels:

[W]hy should scholars writing on human rights in the Pacific be interested in strengthening the orientation of South Pacific human rights towards such conceptually problematic ideas? […] no appeal to cultural relativism must be allowed to insulate the South Pacific from the ever-widening promise of international human rights. Peebles accepts that the fear of “undue deference to regional norms” has been an obstacle to the development of a Pacific mechanism. This fear is considered a reaction to cultural relativists, and an expression of the belief that a regional interpretation of rights in the Pacific would “corrupt the global law”. He sketches a proposal for an “Oceania Human Rights Commission”, governed by an “Oceania Human Rights Charter”, and engendering a companion court. Fears of a relativist agenda would be assuaged by UN involvement in the process, which would ensure that the Oceania human rights order.

32 Deklin, op.cit. note 14, 95.
34 Ibid.
35 Hyndman, op.cit. note 13, 107.
37 Oluwo, op.cit. note 9, 168-169.
38 Dave Peebles, Pacific Regional Order (Australian National University, Canberra, 2005), 198.
39 Ibid.
would remain connected with, and responsive to, the global system.\textsuperscript{40} LAWASIA also emphasized that the UN needs to take an active role in encouraging the achievement of its policy objectives in the Pacific region by supporting the initiative to establish a regional human rights treaty.\textsuperscript{41}

The benefits to the Pacific are evident, and even Oluwo, perhaps the strongest critic of the process thus far, acknowledges that the proposed Pacific human rights system is a significant advancement that would strengthen the profile of human rights in the region.\textsuperscript{42}

The proposal must resolve two outstanding problems: the geopolitical understanding of the parameters of the Pacific region and the failure of Pacific states to engage with international human rights treaties. The second problem directly affects the proposed role of the Pacific regional mechanism. Should it principally be a facilitator for Pacific states to engage with the international process? Or should it be a \textit{sui generis} branch of international law akin to the African, European and Inter-American systems? Allied to this issue is the question of a Pacific interpretation of human rights standards, including collective rights, and the danger that a Pacific regional mechanism would just be a substitute for, rather than a complement to, the international system. These questions await a further specific initiative from the University of the South Pacific or some other source.

III. ASEAN

ASEAN was established in 1967 in Bangkok by the five original member states, Indonesia, Malaysia, Philippines, Singapore and Thailand. Brunei Darussalam joined in 1984, Vietnam in 1995, Lao People’s Democratic Republic and Myanmar in 1997, and Cambodia in 1999.\textsuperscript{43} The aims and purposes of the association are to accelerate economic growth, social progress and cultural development in the sub-region and promote peace

\textsuperscript{40} Ibid., 199.
\textsuperscript{41} Hyndman, \textit{op.cit.} note 13, 107.
\textsuperscript{42} Olowu, \textit{op.cit.} note 9, 183.
\textsuperscript{43} Association of South-East Asian Nations (ASEAN), “Overview”, at <http://www.aseansec.org/64.htm>
and stability through abiding respect for justice and the rule of law in the relationship among countries, and adherence to the principles of the United Nations Charter.\textsuperscript{44} The ASEAN Charter came into force on 15 December 2008, conferring legal personality on the association in its Article 3.\textsuperscript{45} It contained an enabling provision for the creation of a regional mechanism, Article 14, which states: “In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body… [which] shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.” In the 14th Summit held in Thailand in February 2009, the association announced the appointment of the panel to oversee the drafting of the terms of reference, “one of the most important undertakings to make ASEAN a genuinely people-oriented community.”\textsuperscript{46}

Subsequently in October 2009, at the 15th ASEAN Summit, the Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights (AICHR) was announced.\textsuperscript{47} The AICHR covers 570 million people across the ten member states.\textsuperscript{48} The commission is a consultative intergovernmental body, with a mandate inter alia to develop an ASEAN Human Rights Declaration as well as encourage ASEAN member states to ratify international human rights instruments.\textsuperscript{49} Guiding principles include “non-interference in the internal affairs of ASEAN member states”, as well as “respect for the right of every Member State to lead its national existence free from external interference”.\textsuperscript{50} The AICHR promises to adopt an “evolutionary approach” to the development of regional human rights norms and standards, with a review of the terms of reference every five years after its entry into force.\textsuperscript{51}

\textsuperscript{44} Ibid.
\textsuperscript{45} ASEAN Charter, full text available at <http://www.aseansec.org/21069.pdf>.
\textsuperscript{46} Chairman’s Statement of the 14th ASEAN Summit, “ASEAN Charter for ASEAN Peoples”, 28 February-1 March 2009, paragraph 5, at <http://www.aseansec.org/22328.htm>.
\textsuperscript{49} Ibid., paras. 4(2) and 4(5).
\textsuperscript{50} Ibid., para. 2(1)(b) and (c).
\textsuperscript{51} Ibid., para. 2.5, and Preamble, para. 7.
Thio charts the advancement of human rights within the institutional framework of ASEAN, and points to a 1993 Joint Communiqué issued at the 26th Annual Ministerial Meetings held a month after the Vienna Human Rights Conference.\footnote{Thio, op. cit. note 6, 4.} The Communiqué affirmed the Vienna Declaration and agreed that “ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights”.\footnote{Quoted in \textit{ibid.}} Furthermore there was agreement that ASEAN should consider establishing “an appropriate regional mechanism on human rights” in support of the Vienna Declaration.\footnote{\textit{Ibid.}, 5.} There was no significant further action taken for five years, when a review of the Vienna Declaration and Program of Action prompted a 1998 Joint Communiqué, in which ASEAN ministers recalled their 1993 decision to consider establishing a regional human rights body.\footnote{\textit{Ibid.}} In addition they recognized the work and contributions of a non-governmental initiative, the Working Group for an ASEAN Human Rights Mechanism, formed at the Ateneo Human Rights Center, Ateneo de Manila University in the Philippines, in 1996.\footnote{\textit{Ibid.} Working Group for an ASEAN Human Rights Mechanism, at <http://www.aseanhrmech.org/>.
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The Working Group was established after a series of meetings convened by LAWASIA, and involving governmental and non-governmental actors, beginning in Manila in 1995.\footnote{\textit{Ibid.}, 74 note 259.} The process included consolidation of links between ASEAN and civil society, organizing further regional conferences, promoting programmes and research on the status of women and children, and the consideration of a draft ASEAN Convention on Human Rights. The group held dialogues with ASEAN representatives in 1997 and 1998 and presented a concept paper to an annual meeting of foreign ministers, on the potential form of a regional human rights commission.\footnote{\textit{Ibid.}, 75.} Thus several options were presented,\footnote{See also Fifth Workshop on an ASEAN Regional Mechanism on Human Rights, Kuala Lumpur, Malaysia, 29-30 June 2006, Summary of Proceedings, para. 2, at <http://www.aseanhrmech.org/downloads/5th%20WS%20Summary%20of%20Proceedings.pdf>.
} concerning the steps ASEAN could take towards adopting a regional mechanism. They included: establishing an ASEAN Human Rights Commission with power to hear complaints from individuals or states, an ASEAN Human Rights Court with the ability to...
make binding decisions and rule on compensation, an ASEAN Human Rights Committee of Ministers which would act as a political forum of accountability, establishing subregional networks of national human rights commissions, and promoting human rights activities through training and education.\textsuperscript{60}

At a ministerial meeting in 2000, foreign ministers noted with appreciation the consultations between ASEAN senior officials and the Working Group. They also took note that national human rights institutions in some ASEAN countries had already been launched. The Working Group submitted, for ASEAN’s consideration, a Draft Agreement for the Establishment of the ASEAN Human Rights Commission. This contained the mandate, structure, powers, and functions of a proposed ASEAN Human Rights Commission.\textsuperscript{61} In July 2001, the first workshop on an ASEAN human rights mechanism took place in Jakarta, Indonesia, involving representatives of governments, national human rights institutions and civil society groups. Subsequent workshops were held in Manila (2002), Bangkok (2003), Jakarta (2004), Kuala Lumpur (2006), Manila (2007) and Singapore (2008). All these workshops were jointly organized by the Working Group, a host ASEAN state (through its foreign ministry) and its national human rights commission (if any).\textsuperscript{62} On 29 November 2004, at the 10th ASEAN Summit, the heads of state adopted the Vientiane Action Programme, which placed emphasis on human rights and obligations. A decision was taken to establish an ASEAN charter in the Vientiane Action Programme, the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter and the Cebu Declaration on the Blueprint of the ASEAN Charter.\textsuperscript{63} Amnesty International, among others, criticized the fact that the process to establish the ASEAN Charter was “largely opaque and non-participatory”, with consultation with civil society organizations severely limited.\textsuperscript{64}

In January 2007, the Eminent Persons Group, comprised of former heads of state and ministers, emphasized the need for a human rights mechanism as part of their recommendations for inclusion in the ASEAN charter. They noted that “the establishment

\textsuperscript{60} Thio, \textit{op.cit.} note 6, 75 note 262.
\textsuperscript{62} \textit{Ibid.}
\textsuperscript{63} Recalled in Preamble, ASEAN Charter, \textit{op.cit.} note 45.
of an ASEAN human rights mechanism is a worthy idea that should be pursued.” ASEAN heads of state then endorsed the Eminent Persons Group recommendations to the high level task force that was asked to draft the ASEAN Charter. In March 2007, ASEAN foreign ministers meeting in Cambodia decided that the high level task force would include a draft enabling provision in the charter to create a human rights commission as an organ of ASEAN. The Working Group actively engaged the members of the high level task force to ensure that human rights concerns were included and given full consideration in the charter.

Parallel to the specific elaboration of a regional mechanism, a series of ASEAN declarations on human rights themes provided support to the view that a regional human rights mechanism was possible. The conclusions of the 2007 Manila Workshop on an ASEAN Human Rights Mechanism highlighted “various human rights-related declarations of ASEAN which also serve as bases for the human rights mechanism”, in particular the following: Declaration of the Advancement of Women in the ASEAN Region (1988), Declaration on the Commitments for Children in ASEAN (2001), Declaration against Trafficking in Persons Particularly Women and Children (2004), Declaration on the Elimination of Violence Against Women in the ASEAN Region (2004), and Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007).

In addition, in June 2007 the ‘ASEAN Four’, or the national human rights commissions of Indonesia, Malaysia, Thailand and the Philippines, formally pledged to have a regional strategy in enforcing the promotion and protection of human rights in a Declaration of Cooperation. This included how to advise their respective governments on the steps that can be taken in establishing an ASEAN human rights mechanism. The Declaration of Cooperation also pledged the commissions to carry out joint programmes and activities in areas of human rights; develop common strategies for the promotion and protection of human rights, including advising their respective governments to take the necessary steps

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65 Working Group for an ASEAN Human Rights Mechanism, op.cit. note 56.
66 Ibid.
68 Working Group for an ASEAN Human Rights Mechanism, op.cit. note 56.
towards the establishment of an appropriate ASEAN human rights mechanism or any other human rights organ in the ASEAN Charter; further enhance their functional cooperation; and consider joint efforts with other like-minded organizations to pursue human rights commitments in their respective countries, in the region and in the international community.⁶⁹

Thio, writing in 1999, argued that it was unlikely that ASEAN member states would incorporate a judicial organ into a proposed regional mechanism. The structure of ASEAN is not based on the principle of supranationality or political union, and it has a minimal organizational structure.⁷⁰ No considerable powers have been delegated to ASEAN, with non-interference in the internal affairs of member states a founding principle of the association, reaffirmed in Article 2(e) of the ASEAN charter.⁷¹ An advanced mechanism with a judicial organ presupposed “a regional human rights culture”, which was not in existence.⁷² Consequently she advocated that a better strategy would be to promote the development of independent national human rights institutions in every ASEAN country, and to encourage consultations between these institutions,⁷³ as a first step towards regional consensus on human rights standards.

In the intervening ten-year period, it can be argued that a regional human rights culture has at least begun under the aegis of ASEAN. The AICHR’s purpose is “to promote human rights within the regional context”, however it is evidently the weakest regional instrument ever proposed. Indeed the express affirmation of non-interference in the internal affairs of ASEAN member states has an anachronistic feel in a contemporary human rights body, and it is possible that the AICHR sets back rather than advances the cause of human rights. The declaration promises a “non-confrontational approach”,⁷⁴ secured by the intergovernmental status of the proposed commission. Officials involved in the drafting counter that the body is a “work in progress”, and that its investigative

⁶⁹ Sixth Workshop on the ASEAN Regional Mechanism on Human Rights, op.cit. note 67.
⁷⁰ Thio, op.cit. note 6, 78. For example the secretariat in Jakarta, Indonesia, was established only in 1976, almost ten years after the formation of the association.
⁷¹ ASEAN Charter, op.cit. note 45.
⁷² Thio, op.cit. note 6, 6 and 78.
⁷³ Ibid., 78.
⁷⁴ Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights (AICHR), para. 2(4).
powers will evolve over time.\footnote{Jim Gomez, “ASEAN Human Rights Body Lacks Power to Punish”, The China Post, 27 February 2009, at <http://www.chinapost.com.tw/asia/regional-news/2009/02/27/198001/p1/ASEAN-human.htm> quoting Sihasak Phuangketkeow, Thailand’s chairman of the drafting committee. He added: “We have to go as far as we can but at the same time we have to be realistic.”}

In this regard, the most positive aspect of the terms of reference of the AICHR is the guarantee that they will be reviewed in five years’ time.

In March 2009, the ASEAN National Human Rights Institutions Forum issued a Position Paper on the terms of reference for the proposed human rights body, which included that it be named the ‘ASEAN Human Rights Commission’.\footnote{ASEAN National Human Rights Institutions Forum, “Position Paper on Terms of Reference of the ASEAN Human Rights Body”, Submitted at 2nd Consultative Meeting with the High Level Panel, Kuala Lumpur, Malaysia, 20 March 2009, at <http://www.aseannhriforum.org/attachments/028_posspaper_20March09.pdf> .} It called for the ASEAN Human Rights Commission to be granted a mandate to “receive, analyse, investigate and take action on complaints on alleged violations and abuse of human rights by any person or group of persons, any non-governmental entity legally recognized in one or more Member States of the Commission, or on its own initiative”.\footnote{Ibid., “Mandates and Functions”, (e).} It also called for the proposed body to develop an ASEAN Declaration on Human Rights and other ASEAN human rights instruments.\footnote{Ibid., “Mandates and Functions”, (b).}

The AICHR is similar to this idea only in its pledge to pursue a human rights declaration. Of the ten commissioners who comprise the AICHR, only two, Indonesia and Thailand, have allowed human rights bodies to nominate representatives.\footnote{See further Simon Roughneen, “ASEAN Human Rights Body Launched Amid Controversy”, Irrawaddy, 25 February 2010, available at <http://www.irrawaddy.org/article.php?art_id=17051&page=1>.} This fundamental lack of independence will jeopardize the drafting of a declaration, as well as hobble any attempt to provide effective regional oversight of human rights violations. There is a danger that the AICHR will make ASEAN “more shameful than impressive”.\footnote{Aung Din, quoted in Irrawaddy, ibid.}

The AICHR is a progressive step only in the sense that it is a regional instrument whose operational mandate and composition can be changed. Justiciability of human rights tends to develop over time, with early human rights instruments typically offering confidential monitoring before implementing greater oversight through mechanisms such as optional individual complaints procedures. Similarly NGOs were initially excluded from international treaty-monitoring but became gradually involved though shadow reports...
and other techniques. The intergovernmental nature of the AICHR could give way to a more independent composition; greater monitoring powers could be assigned; and a reporting procedure could be enacted to provide overview, leading to shadow reporting, individual complaints and the potential for sanctions against governments. This is all in the future and contingent on political rather than legal developments. It is hoped that the AICHR is a first step towards a more robust system, as outlined by the ASEAN national human rights institutions, and opens the door towards an incremental increase in monitoring procedures leading eventually to a fully independent regional complaints mechanism.

IV. INTERNATIONAL, REGIONAL AND NATIONAL HUMAN RIGHTS IN SOUTH ASIA

A. International Human Rights Treaties

Chapter I of the draft Minority Rights Charter calls on states parties to reaffirm and adopt the rights and obligations recognized by: the SAARC Social Charter, the ICCPR, Articles 6-27; the International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 6-15; the Convention on the Elimination of Discrimination against Women (CEDAW), Articles 6-16; and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5. Chapter I does not include a reference to the Convention on the Rights of the Child (CRC), although it is of evident importance to minority rights discourse. The following is a tour d’horizon of the SAARC member states in terms of their commitment to the realization of the rights set forth in the international treaties. The aim is to ascertain whether a proposed regional instrument could be accused of acting as a substitute for the international system.

Six out of the eight SAARC member states have signed and ratified the ICCPR, ICESCR, CEDAW and CERD, proposed as forming part of the draft Minority Rights Charter. Of the remaining two, in 2008, Pakistan signed the ICCPR, but it has not yet ratified the

81 Draft South Asian Charter on Minority and Group Rights, Ch. I, Art. 1.
treaty. It has ratified the ICESCR, CEDAW and CERD. Only Bhutan shows significant failure to engage with the international human rights treaty system, having failed to sign the ICCPR, the ICESCR and having signed but not ratified the CERD. It has ratified CEDAW.

In terms of fulfilling reporting obligations, the SAARC member states have been relatively forthcoming, although there are important gaps. Under the ICCPR, India reported in 1996, Nepal reported in 1994 and Sri Lanka in 2002. Excluding Bhutan which has not signed the instrument, the remaining four states have not submitted a report to the Human Rights Committee. Under the ICESCR, Afghanistan reported in 2009, India in 2007, Nepal in 2006 and Sri Lanka in 1997. The remaining four states that have ratified the instrument have not reported to the Committee on Economic, Social and Cultural Rights. Under the CERD, Afghanistan reported in 1984, Bangladesh in 2000, India in 2006, Maldives in 1992, Nepal in 2003, Pakistan in 2008 and Sri Lanka in 2000. Only Bhutan has not reported to the Committee on the Elimination of Racial Discrimination, although it has signed but not ratified the instrument. Under CEDAW, Bangladesh reported in 2003, Bhutan in 2003, India in 2005, Maldives in 2005, Nepal in 2003, Pakistan in 2005 and Sri Lanka in 1999.

The Convention on the Rights of the Child (CRC) and the Convention against Torture (CAT) are not referenced in Article 1 of the draft Minority Rights Charter. The CRC has been ratified by all eight SAARC member states. Bangladesh reported in 2008, Bhutan in 2007, India in 2003, Maldives in 2006, Nepal in 2004, Pakistan in 2009 and Sri Lanka in 2002. Only Afghanistan has not reported to the Committee on the Rights of the Child. Bhutan has not signed or ratified CAT. India and Pakistan have both signed CAT but have not ratified the instrument. Only Nepal and Sri Lanka have reported to the Committee against Torture, in 2005 and 2004. In terms of reporting, only Sri Lanka has ratified all six instruments and reported to the relevant monitoring bodies. It is also the only SAARC state to have ratified the International Convention on the Protection of the
Rights of All Migrant Workers and Members of their Families, and reported to the Committee on Migrant Workers in 2008. 89

The individual complaints remedy under the ICCPR is triggered when a state party accedes to ICCPR Optional Protocol I. Similarly individual complaints to CEDAW can be made if a state party recognizes the jurisdiction of the committee under CEDAW Option Protocol I. Individual complaints to the Committee on the Elimination of Racial Discrimination are allowed if a member state signs a declaration under Article 14 of the CERD recognizing the competence of the committee to assess such complaints. Three SAARC member states have signed the optional protocol to the ICCPR—Maldives, Nepal and Sri Lanka. Four SAARC member states have ratified the Optional Protocol to CEDAW—Bangladesh, Maldives, Nepal and Sri Lanka. No SAARC member state has made the relevant declaration under Article 14 CERD allowing for individual complaints. 90 Under CAT, only the Maldives has signed the Optional Protocol which aims to create a global system of inspection of places of detention as a way of preventing torture. 91

Overall there appears to be a medium level of engagement with the international treaty bodies from SAARC member states. Only Afghanistan and Bhutan illustrate little or no engagement with the UN treaty bodies, whether through failure to ratify instruments or failure to report. Three states have reported to the Human Rights Committee; similarly only four have reported to the Committee on Economic, Social and Cultural Rights. Under CERD, reporting practices appear to be relatively sustained although there is an absence of more recent reports, with half the states not having reported in the past ten years. There is consistent and up-to-date reporting before CEDAW and the CRC. Four out of eight states have signed at least one optional protocol, illustrating some willingness to be subjected to external scrutiny in cases of individual complaints. Nepal and Sri Lanka have signed optional protocols to both the ICCPR and CEDAW. A real concern is the failure of any SAARC member state to sign Article 14 CERD, arguably the most significant instrument in terms of minority rights protection.

89 Ibid. Bangladesh has signed the instrument.
91 Ibid.
An assessment of the practice of engagement with the UN treaty bodies is beyond the scope of this article. Some brief examples illustrate the gap between ratification or reporting and the effective realization of human rights standards in the region. India offers an example of a long-running refusal to accept a treaty-body ruling in its disagreement with CERD over the meaning of ‘descent’, and the consequent need to treat caste-based discrimination as a form of racial discrimination.\(^92\) The Maldives has ratified the optional protocol to CAT, yet it “routinely and blatantly flouts the provisions of CAT and has yet to adequately empower its national human rights commission or any other body to carry out anti-torture missions”.\(^93\) Sri Lanka has the best record in terms of ratification, reporting and allowing access to individual complaints mechanisms. Yet according to the Asian Human Rights Centre, Sri Lanka ranked as the SAARC region’s “number 1 human rights violator” in 2008.\(^94\) Finally SAARC member states have a variety of reservations and declarations to treaties which affect full implementation of international human rights standards.\(^95\)

\[B. \quad \textit{Regional Bodies: SAARC}\]

SAARC was established in 1985 and is the largest regional organization in the world in terms of population, affecting around 1.5 billion people. Its principal aim is to accelerate economic and social development, in particular the establishment of a South Asian free trade area. In 2004, SAARC adopted a social charter at its 12th summit in Islamabad, Pakistan, which commits the body to “[p]romote universal respect for and observance and protection of human rights and fundamental freedoms for all, in particular the right to development”.\(^96\) The SAARC Social Charter does not make any reference to ‘minorities’ or ‘minority rights’. The draft Minority Rights Charter in its preamble highlights the

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\(^92\) See further David Keane, \textit{Caste-Based Discrimination in International Human Rights Law} (Ashgate, Aldershot, 2007), Chapter 5.

\(^93\) Human Rights Features, \textit{op.cit.} note 7.


\(^95\) For brief examples of “unsustainable reservations” from SAARC member states, see Human Rights Features, \textit{op.cit.} note 7.

contribution of the SAARC Social Charter, but acknowledges that minority protection in
the document can only be read as a consequence of the realization of individual human
rights
in and by the SAARC Social Charter the Member States of SAARC have
undertaken an obligation to promote universal respect for, and observance
and protection of, human rights and fundamental freedoms for all including
every minority, section and group in society. 97
SAARC does not list human rights protection among its seven “areas of cooperation”,
identified regional targets stemming from the SAARC Social Charter. 98 According to
Human Rights Features, SAARC has remained “doggedly insular”, refusing to consider
any issue which would demand greater government accountability in terms of rights and
freedoms in South Asia. 99 One example given is the SAARC Trafficking Convention,
seen by member states as proof of the body’s acceptance of human rights protection as
part of its remit. Critics point out that it “lacks a human rights perspective… [and] was
primarily drawn up to protect the state party’s interest in clamping down on criminal
activity instead of upholding the rights of the individual”.100
The human rights records of the member states of SAARC are indexed on an annual basis
by the Asian Centre for Human Rights, the most recent report being 2008. 101 The South
Asia Human Rights Index has no affiliation to SAARC, except to use the name as a
means of identifying the relevant states for its assessment. The conclusion to the 2008
Report states that “SAARC has no meaning for the people of South Asia. And why
should it? It has delivered nothing.”102 Yet there is a need for regional cooperation and
SAARC remains the only South Asian forum. On 12-13 November 2005 at the 13th
SAARC Summit held in Dhaka, President Abdul Gayoom of Maldives asserted that:

97 Draft South Asian Charter on Minority and Group Rights, Foreword.
98 SAARC, Areas of Cooperation, at <http://www.saarc-sec.org/?t=2>. These are poverty eradication,
population stabilization, empowerment of women, youth mobilization, human resource development,
promotion of health and nutrition, and protection of children.
99 Human Rights Features, op. cit. note 7.
100 Human Rights Features, “Human Trafficking in South Asia: Need to Revise Priorities”, HRF/90/03, 6
January 2004, at <http://www.hrdc.net/sahrdc/hrfeatures/HRF90.htm> cited in Human Rights Features,
op. cit. note 7. The comment calls the convention “weak, inadequate and moralistic”.
101 Asian Centre for Human Rights, op. cit. note 94. The first report was 2006, and the 2007 report was not
published due to lack of funding.
102 Ibid., 183.
it is time that an autonomous SAARC Centre for Human Rights, based on civil society, is established. Such a Commission could promote international standards, facilitate cooperation among lawyers and jurists and share expertise and resources in the advocacy of human rights and democracy in the region.\textsuperscript{103}

The Asian Centre for Human Rights argues that it is time to move beyond this approach, which emphasizes promotion, cooperation and sharing, over supervision and enforcement. Regional machinery has the capacity to contextualize international standards and address human rights issues of shared concern in the region. It urges instead the establishment within SAARC of a working group to explore the possibility of drafting a ‘South Asia Human Rights Convention’ with full participation of civil society groups.\textsuperscript{104} The example of ASEAN is seen as evidence that “the rest of the world is leaving us behind”.\textsuperscript{105}

C. National Human Rights Institutions

The Asian Centre for Human Rights, in its 2008 Report, recommends that national human rights institutions in the region establish a common umbrella body similar to that formed in South-East Asia.\textsuperscript{106} According to the National Human Rights Institutions Forum, a global body, five of the SAARC member states have recognized national human rights institutions: the Afghan Independent Human Rights Commission, National Human Rights Commission of India, Human Rights Commission of the Maldives, National Human Rights Commission of Nepal and the Human Rights Commission of Sri

\textsuperscript{103} Quoted in Asian Centre for Human Rights, \textit{ibid.}, 184.
\textsuperscript{104} \textit{Ibid.}
\textsuperscript{105} \textit{Ibid.}
\textsuperscript{106} \textit{Ibid.}, 185.
Lanka. Bangladesh has recently set up a national human rights commission, a process begun in 1994, while Pakistan is in the process of establishing one. The creation of independent national human rights institutions is seen as “less threatening to territorial sovereignty” and an indication of good practice, reflecting a willingness to translate human rights rhetoric into action. It can also play a pivotal role in establishing regional mechanisms as a recognized means of coordinating human rights practice. Soon Bhutan will be the only state in the region without a national human rights commission. An umbrella body for the seven national human rights commissions in South Asia could provide impetus to the development of regional machinery, as well as acting as a focal point for discussions. Indeed the Asian Centre for Human Rights urges the existing national human rights commissions in South Asia to emulate the role of their counterparts in South-East Asia, who have contributed to the acceleration of the negotiations on the implementation of a regional system.

V. TOWARDS THE REGIONAL PROTECTION OF MINORITY RIGHTS IN SOUTH ASIA

A. FCNM: A Model for South Asia?

The Council of Europe’s Framework Convention for the Protection of National Minorities, opened for signature in February 1995, confirms in its Article 1 that the rights of national minorities forms an integral part of the international protection of human rights. It is the primary legal instrument for the protection of national minorities in Europe, and the only multilateral legally-binding instrument to address the protection of

107 National Human Rights Institutions Forum, Directory of National Human Rights Institutions, at <http://www.nhri.net/NationalDataList.asp?MODE=1&ID=2> The Forum runs an accreditation system in which each national commission is assessed in terms of its compliance with the “Paris Principles”, the international standard. Afghanistan, India and Nepal received an ‘A’ rating, indicating full compliance. Sri Lanka and the Maldives received a ‘B’, meaning they are not fully in compliance or there is insufficient information to determine compliance.


109 Thio, op.cit. note 6, 61.

110 Asian Centre for Human Rights, op.cit. note 94, 186.
minorities.111 Eide highlights the fact that “behind this achievement was a long and tumultuous European and world history”.112 Indeed the preamble points to the “upheavals of European history”,113 which have rendered the protection of national minorities vital to the maintenance of stability, democratic security and peace in the region.

Eide charts the development of minority rights protection under the UN system, explaining the absence of a minority rights provision in the Universal Declaration of Human Rights (UDHR). At the time of drafting of the UDHR in 1948, there were few Asian member states of the UN. Of these, only India appears to have taken an active part in promoting a minority rights provision, possibly with a view to the protection of Indian migrants in Europe and South Africa.114 However India would subsequently oppose the insertion of a minority rights provision on the basis of the protection already afforded by the non-discrimination clauses in the document. The influence of Article 27 ICCPR and the intervention of Capotorti are discussed, but the conclusion reached is that while international cooperation has expanded from a relatively small number of Asian and African states in 1948 to a universal system of human rights, the same cannot be said of minority rights protections. Indeed, “the focus of minority issues has remained predominantly centred on Central and Eastern Europe”.115

Similarly, according to Pejic, although the most important minority rights document at the universal level is the 1992 UN Declaration on Minorities, the other primary sources are texts adopted within the Conference on Security and Cooperation in European (CSCE)/Organization for Security and Cooperation in Europe (OSCE) framework.116 Parallels are drawn with the movement towards the protection of indigenous peoples, and Eide sees a dichotomy between minority rights, an essentially European concept, and indigenous peoples’ rights, an area that engages African, Asian and South American

113 Although according to Malloy, “for reasons not explained the reference to the upheavals of European history was taken out during drafting but reintroduced in the final stages.” See Tove H. Molloy, “Title and Preamble”, in Weller, ibid., 49-73, at 64.
114 Eide, op.cit. note 112, 39.
115 Ibid., 46.
states to a far greater extent. In this regard, “it could be argued that the approach to
minority protection remains essentially European, whereas the protection of indigenous
peoples focuses mainly on countries ‘beyond the blue line’, those that were settled by
European colonizers who marginalized the original inhabitants”. Nevertheless minority
rights discourse is being applied outside Europe, with the African Charter in particular
having been interpreted by the African Commission to cover minority issues to some
extent. According to Aukerman, existing definitions which seek to distinguish between
minorities and indigenous peoples fail because they reflect “Anglo-American
understandings of minority rights”, and because boundary lines are too inexact.

There is evidence to support the perceived Eurocentric nature of minority rights law at
the universal and regional level, with Thio for example pointing to a 1999 working paper
presented before the then UN Working Group on Minorities (WGM), reviewing
universal and regional mechanisms for minority protection, which did not refer at all to
existing American and African regional human rights organizations. A 2001 WGM
report recognized that there was a disproportionate emphasis on specifically European
minority issues. Thio accepts that this is understandable to a certain extent, given that
of the three regional systems, only the European system expresses minority issues in
terms of binding obligations. Within the other two regional systems in Africa and the
Americas, minority groups benefit from individual human rights norms and can receive
enhanced protection when considered as “peoples” under the Banjul Charter or as
“indigenous peoples” under the Inter-American system. Thus the Inter-American
system’s engagement relies largely on an understanding of minority rights as including
the notion of indigenous rights. The concept of collective or peoples’ rights under the

117 Eide, op.cit. note 112, 46.
118 Ibid., 46-47.
119 Miriam Aukerman, “Definitions and Justifications: Minority and Indigenous Rights in a Central/East
120 The Working Group on Minorities was replaced by the Forum on Minority Issues pursuant to Human
Rights Council Resolution 6/15 of 28 September 2007. The inaugural session of the forum took place on 15
for Minority Protection”, cited in Li-ann Thio, “Battling Balkanization: Regional Approaches toward
123 Thio, ibid., 467.
124 Ibid.
African system has not been a success, as articulated by Oluwa in the context of a Pacific regional system:

[S]ince the notion of ‘collective rights’ and ‘duties’ surfaced in the African Charter in 1981, there has been no pronouncement or definition of the scope of these concepts by the African Commission on Human and Peoples’ Rights […] In fact, the uncertainty over what constitutes ‘peoples’ within the context of ‘collective rights’ in the African Charter has ensured that the concept of collective rights remains one of the weakest aspects of that regional treaty […] time has proven that they are merely cosmetic moral code.125

Eide’s discussion of the development of minority protection in the UN points out that although the UDHR did not contain a minority rights provision, it offered an important base on which minority rights could evolve. He writes: “while subsequent developments have shown that the individual rights contained in the Declaration are not sufficient to protect minorities, those rights are nevertheless essential as part of the platform for their protection.”126 Under a system of universal human rights, minority rights have developed as an ancillary protection for groups who already enjoy individual human rights, from Article 27 ICCPR to the 1992 UN Declaration. In Europe, members of Council of Europe states enjoy individual human rights protection under the European Convention on Human Rights (ECHR). The link is stressed in Articles 22 and 23 FCNM, which hold that the Framework Convention must be interpreted in line with the ECHR, with Article 23 conferring primacy on corresponding ECHR provisions in the event of a conflict of rights.

Briefly, there were three elements conducive to the enactment of a legally-binding minority rights regime in Europe: a regional human rights mechanism; regional political institutions, notably the CSCE/OSCE, which broadened regional cooperation when the Council of Europe was a predominantly Western European organization; and the pressing need to resolve minority tensions in the former communist states. Initial assessments complained that the FCNM was “weakly worded”, with “vaguely defined objectives and

125 Olowu, op.cit. note 9, 169.
126 Eide, op.cit. note 112, 38.
principles”, considering it “the worst of all worlds”. This reflected disappointment at the failed initiative to adopt a Protocol to the European Convention on Human Rights on national minorities, proposed in 1993 by the Parliamentary Assembly of the Council of Europe. Such a protocol would have placed minority rights protection directly under the supervision of the European Court of Human Rights. However Marc Weller, concluding an assessment of over ten years of the FCNM, highlights that the initial pessimism was unfounded. Under the guidance of the Advisory Committee, the FCNM has overseen an acceleration in the development of standards on minorities with considerable influence on the growth of the concept of minority rights, from early protection of their existence, to toleration and promotion of their identity, to a deeper aim of achieving diversity within a democratic society through full and effective participation. This third phase involves a shift in the discourse beyond the traditional viewpoint of minority issues as security issues, with harmonious relations between minorities and majorities an essential part of governance. He describes this idea as one of cogovernance, whereby minorities have a positive entitlement to fully participate in public decision-making and have equal access to social provision, including economic opportunities and the cultural environment.

The Advisory Committee has not been constrained by definitional boundaries of national minorities, applying the provisions of the convention in an extensive way. The Eurocentric notion of a ‘national minority’ has not prevented the application of the convention to ‘new’ minorities, such as groups deprived of citizenship due to political upheaval. The result has been an apparent reduction in the ability of governments to exclude groups from the purview of the convention, through challenging exclusions which are based on arbitrary or unjustified distinctions. This is a result of approaching these issues in “legal rather than political terms”.

129 Ibid., 614.
130 Ibid., 623.
131 Ibid., 624.
132 Ibid., 631.
133 Ibid., 632.
134 Ibid., 633.
The focus on the provision of economic and social opportunities marks the FCNM as a delineation of minority issues as matters of human rights and good governance. It has fixed certain aspects of minority protection as non-negotiable, and is arguing for the expansion of the substance of other obligations, particularly in the sphere of diversity and full participation.\textsuperscript{135} The fact that the Advisory Committee regularly receives shadow reports prepared by established NGOs and conducts country visits has turned the monitoring procedures into “an almost continuous process of engagement on minority rights, through follow-up and other measures”, turning the soft law of the UN Declaration into hard law in the Council of Europe area.\textsuperscript{136} Despite initial criticism, the FCNM is becoming a global model for minority rights protection. It is furthering the discourse of minority rights, moving away from traditional concerns of security to questions of the realization of diversity and cogovernance. In this regard it would make an excellent model for other regions or subregions. Nevertheless whether it is realistic that governments in South Asia would accept such a model is a difficult question. However there does not seem to be any reason why NGOs in South Asia and other regions should not be asking their governments to do so.

\textbf{B. A Regional Human Rights Mechanism for South Asia?}

The difficulty in establishing a regional human rights mechanism in Asia was exacerbated by the UN’s failure to recognize that the Asia Pacific region was too large to support such a mechanism. From 1990, the UN held a series of workshops in attempts to provide an impetus towards the establishment of a regional commission for Asia Pacific, all of which failed. This approach defined the Asia Pacific region as an area which covered almost half the world,\textsuperscript{137} with states as diverse and removed as Afghanistan, Yemen, Bhutan, Fiji and Palestine attending the workshops.\textsuperscript{138} A subregional focus was needed to “cure the UN’s pursuit of inappropriate regional human rights organisations, covering countries from the Middle East to the Pacific, in an unsuitable definition of Asia

\textsuperscript{135} Ibid., 634-635.
\textsuperscript{136} Ibid., 636.
\textsuperscript{137} Peebles, \textit{op.cit.} note 38, 194. A common regional human rights policy covering the whole Asia Pacific region was articulated in the “Bangkok Declaration” prior to the 1993 Vienna Conference.
\textsuperscript{138} Ibid., 196.
Pacific which [added] little value to the global system’s efforts to promote human rights”. The OHCHR no longer includes Central Asian states or the Middle East in its definition of the Asia Pacific region.

The establishment of the AICHR by the ASEAN member states, despite its apparent flaws, represents some vindication of the need for a ‘subregional’ approach to establishing ‘regional’ human rights mechanisms in Asia Pacific. The Pacific region, comprising Australia, New Zealand and the Pacific Island Countries, can expect concerted lobbying to revive the lapsed movement towards a regional Pacific human rights commission. The review by the University of the South Pacific and Fiji Human Rights Commission Working Group, begun in late 2005, may provide a focal point, much as the Philippines Working Group has done in the ASEAN context. South Asia, comprising the SAARC member states, can also expect civil society efforts to concentrate on delivering a regional South Asian human rights mechanism, although it may wish to avoid the restrictive ASEAN model.

To a certain extent, South Asia is better positioned than the Pacific region to begin the process of establishing a human rights mechanism. Although important gaps remain in terms of ratification of human rights treaties, in general, the analysis above indicates that it is far more engaged with the international treaty system. In the Pacific, a consistent argument against a regional initiative is the failure of Pacific Island Countries to ratify international treaties. This has led to suspicion, echoed by commentators such as Jalal, that a regional mechanism would find support from governments eager to sidestep the international procedures. This is fuelled by rhetoric of ‘collective’ duties seemingly anathema to the concept of individual rights. The danger is that a regional mechanism would water down international standards.

The danger applies less to SAARC member states, which have a reasonable record in terms of ratification and reporting to international treaty bodies. A regional mechanism would enhance international standards, rather than acting as a substitute for them. Whether SAARC member states are sufficiently stable politically in order to embark on

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139 Ibid., 211.
140 Organization of the High Commissioner for Human Rights, Asia-Pacific Region, at <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AsiaRegionIndex.aspx>. Although the region includes Afghanistan and Iran.
such a project is beyond the scope of this paper. According to the 2009 Annual Report on South Asia of the International Federation of the Red Cross and Red Crescent:

   During 2008, South Asia was fraught with internal conflict, terrorist attacks and many other challenges, which hampered the smooth implementation of activities by the Red Cross–Red Crescent Societies in the region. Afghanistan faced a deteriorating security situation and increasing tension along the Pakistan–Afghan border. Pakistan was affected by political instability and the situation in Pakistan’s North West Frontier Province was volatile with Swat valley seeing a resurgence of Taliban militants. India was hit by a series of bomb blasts and militant attacks, especially on its major cities and the attack on the city of Mumbai led to a sharp rise in tensions between Pakistan and India. In Sri Lanka, the military […] advanced into Liberation Tigers of Tamil Eelam (LTTE)-controlled territory […] In Nepal, however, the political and security situation improved following elections which abolished the monarchy and declared Nepal a Republic […]

Nevertheless ASEAN member states faced similar challenges. The China Post, in heralding the “landmark step” that was the impending establishment of the AICHR, describes ASEAN as a “Cold War-era bloc made up of fledgling democracies, authoritarian states, a military dictatorship and a monarchy”. If ASEAN could overcome logistical and political barriers to form a regional body, however weak, SAARC must also be capable of doing so.

A regional mechanism in South Asia must be pursued. Indeed the Asian Centre for Human Rights, influenced by the model of the ASEAN Eminent Persons Group, has already called on SAARC to establish a Working Group of Eminent Persons of South Asia to explore the possibility of drafting a South Asia human rights convention, with full and active participation of civil society groups and other stakeholders The implications for minority rights of regional models of human rights are apparent. While a dedicated minority rights instrument would provide far more enhanced protection, a regional human

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142 Gomez, The China Post, op.cit. note 75.
143 Asian Centre for Human Rights, op.cit. note 94, 184.
rights system, provided it eschewed the ASEAN path by providing independent oversight with proper monitoring procedures, would have strong benefits for minorities and vulnerable groups in the region.

C. **A Regional Minority Rights Mechanism for South Asia?**

South Asia has seen little analysis on minority rights as a conceptual regime. In South-East Asia, there has been some evidence of the emergence of a minority rights discourse, although the ASEAN Charter has no mention of minority rights. As Thio notes, there has been sectoral emphasis on women and children’s rights, as well as rights of migrant workers, but no reference to minority rights. A regional seminar in 2002 by the former WGM on minority rights in South-East Asia found that governments of the region still paid insufficient attention to the implementation of the UN Declaration on Minorities. It was recognized that terms such as minorities, ethnic groups, ethnic minorities, or indigenous peoples, presented a “complexity of definitional issues within the sub-region”, with issues of concern including lack of respect for the principle of self-identification, the absence of recognition of minorities, the lack of respect for the principle of non-discrimination, and the lack of appreciation of a history reflecting the cultural diversity and plurality of communities in society. Some 87 recommendations were made to governments, national human rights institutions, international, regional and national development agencies and financial institutions, UN-affiliated bodies and NGOs. In 2008, the UN Independent Expert on Minority Issues, Gay MacDougall, attended a Regional Workshop on Minority Issues in South-East Asia. The workshop was said to be the first on the theme of minority issues to take place in the region, although this

144 Thio, *op.cit.* note 121, 418. See list of the declarations above, *op.cit.* note 67.
statement seems to ignore the WGM 2002 seminar. It considered minorities in the region in the context of numerous thematic issues and a range of key challenges were identified, including: non-recognition of the diversity of ethnic, racial, religious and other identities within states in the region; laws and policies that discriminate against persons belonging to ethnic, national, religious or linguistic minorities, combined with the imposition of exclusivist national identities by states, often based on the ethnicity and identity of the ethnic majority; disadvantaged situations—poverty, non-participation, exclusion, marginalization—generally being experienced by minorities and indigenous peoples; the continuing serious situation faced by many minority women who face multiple discrimination; and the need for effective state compliance with and domestic application of international human rights standards on minorities and indigenous peoples, including the Minorities Declaration.\footnote{150} Members of ASEAN were urged to develop effective terms of reference for the AICHR, “with full and meaningful participation by civil society and, in particular, representatives of minorities and indigenous peoples”, \footnote{151} a plea that was ignored.

There has been no international study or workshop on minority rights in South Asia as a region by the United Nations, and few by South Asian national human rights bodies or institutions which address minority rights in a regional context. Minority rights protection has been guaranteed through domestic legal instruments as well as international human rights treaties, with some South Asian states having an advanced discourse on minority rights including constitutional affirmative action or reservations programmes.\footnote{152} Regional cooperation is evident through crossborder, thematic promotion of certain minority issues. For example, Nepal’s reservations system which applies to caste-based discrimination, as presented in its 2007 Interim Constitution, will closely mirror India’s constitutional reservations system.\footnote{153} Thus a distinctive South Asian model of affirmative action through reservations is emerging, a remedy that applies to caste and other minority groups.

\footnote{150} Ibid. \\
\footnote{151} Ibid., para. 23. \\
\footnote{152} See further Joshua Castellino and Elvira Dominguez-Redondo, Minority Rights in Asia: A Comparative Legal Analysis (Oxford University Press, Oxford, 2006), in particular chs. 1-3. \\
\footnote{153} enabled through guiding provisions. India’s 1950 Constitution has the same system.
The ICES draft Minority Rights Charter has been produced in a context of emerging thematic minority rights issues in South Asia and it reflects this discourse to some extent. For example, ‘caste’ is among the list of grounds in its Chapter IV Article 5 on non-discrimination. However an important omission from the same list of grounds is ‘descent’, the key word in Article 1(1) CERD through which the concept of caste-based discrimination has entered international human rights law. The foreword to the draft Minority Rights Charter acknowledges that its aim is to be used as a “reference tool for governments, non-state actors, human rights institutions, NGOs” and “enhance regional responses to some of the current weaknesses in constitutional and legislative protection and promotion of minority and group rights”. It can be implied that it is not intended as a legally-binding instrument, although Article 26 contains provisions for ratification and entry into force. Yet some of the provisions are extraordinarily far-reaching; for example Article 2 on remedies removes head of state immunity for violations of the charter. This would probably require a constitutional amendment in every SAARC member state. Chapter V proposes the establishment of a South Asian human rights committee, with the recommendation of an “eminent persons group” to constitute the SAARC interim committee. The recommendation is for a South Asian human rights committee, rather than a South Asian minority rights committee, although the draft charter itself is confined to minority rights realization. Given that the SAARC region has not moved at all towards enacting a regional human rights mechanism, it is perhaps unlikely that a regional minority rights charter would be approved. It could be said to be more useful to orient civil society lobbying towards a SAARC human rights mechanism, as a means of promoting minority rights through the enhancement of individual human rights protection. Such a body would inevitably address pressing issues of common South Asian concern which impact minority rights, such as caste-based discrimination. In addition, advocates could campaign for a separate minority and indigenous rights provision within a more general human rights charter or mechanism.

154 Draft South Asian Charter on Minority and Group Rights, Art. 5.
155 See further David Keane, op.cit. note 92.
156 Draft South Asian Charter on Minority and Group Rights, “Foreword”.
157 Ibid., Art. 2.
158 Ibid., Ch. V, Art. 8.
ASEAN provides a ready example of how to achieve such a mechanism, and while there are serious concerns over the effectiveness of the terms of reference of the AICHR, the very existence of such a body is an achievement. South Asian civil society organizations need to emulate the South-East Asian example, although they should also be wary of the potential for manipulation, with some commentators arguing that the South-East Asian body is in fact a regressive step. Of critical importance to the establishment of the AICHR was the coordination of lobbying efforts within the Working Group for an ASEAN Human Rights Mechanism, formed at Manila University. South Asia needs a similar body, perhaps as an initiative of its existing national human rights institutions, in order to provide consistent pressure on SAARC governments. The future of regional machinery in South Asia probably lies first of all with a human rights mechanism, and this will be of immense benefit to minority groups in the region.

Nevertheless the draft Minority Rights Charter is an important reminder that minority rights are of common concern to the South Asian region. There are far too few studies of minority rights in Asia in general, and in South Asia in particular. The draft Minority Rights Charter can act as a guide towards further investigation of minority rights issues, including greater attention to constitutional and statutory provisions for group protection. It is not a legal document and will probably not become one, at least until some form of general human rights mechanism is in place in the SAARC region. Minority rights would be protected through a regional focus on human rights, and in this regard, it is recommended that energy is devoted to developing the SAARC Social Charter into a SAARC human rights charter with an enabling provision for a regional human rights body, akin to the ASEAN Charter. The potential for including a minority and indigenous rights clause within such a SAARC human rights charter should be explored.

While it seems unlikely at this point that South Asia would develop the world’s second binding minority rights regional instrument, this should not discourage advocates from demanding it of their governments. There seems to be no reason why the FCNM model should not be exported, given the expansive interpretation of its mandate by the Advisory Committee and its largely successful operation over the past 15 years. Minority rights are a global issue, and many of the groups whose rights have been protected and advanced under the FCNM have similar difficulties to groups in South Asia in accessing diversity
within a democratic society through full and effective participation. There is a universal need for enhanced protection of minorities beyond existing individual rights, through a process of cogovernance. The ICES initiative has at the very least pointed out what South Asian civil society expects of its governments in terms of a concerted focus on inclusion of minorities at the level of public decision-making.

VI. CONCLUSION

Section I of this article charted the unsuccessful attempts to enact a regional human rights mechanism in the Pacific. Commentators agree that there are two problems associated with a Pacific mechanism; the difficulty in identifying the states included in the Pacific region and the failure of Pacific Island Countries to engage with the international human rights system. Neither of these problems arise in the South Asian context. SAARC, although a political and development organization, provides a geographical boundary for the South Asian region which has been readily identified as a potential bloc for regional human rights machinery. Furthermore, Section III examined the engagement of SAARC member states with the international treaty process. While there are significant gaps, with some SAARC member states essentially opting out of the process, in general the same levels of disengagement found in the Pacific region are not evident in South Asia. It cannot be said that what is preventing regional machinery in South Asia is failure to ratify international treaties or report to treaty bodies.

There are barriers common to the Pacific region and South Asia. In the Pacific, states did not take responsibility for promoting a regional body. Similarly, in South Asia, governments have not given any encouragement to a regional mechanism. ASEAN provides an example of the successful enactment of a regional human rights body, examined in Section II, however great the shortcomings of its terms of reference. The 1993 and 1998 joint communiqués by ASEAN ministers signalled interest at the governmental level. The Working Group for an ASEAN Human Rights Mechanism effectively harnessed this interest, providing a united lobbying point for civil society organizations. The ‘ASEAN four’ national human rights institutions offered effective assistance and advice to their governments on the proposed body. There are five, soon to
be six, SAARC national human rights institutions, which can provide similar pressure. A working group for a SAARC human rights mechanism needs to be established in order to coordinate South Asian efforts.

ICES ought also to pursue a regional system on human rights. A pragmatic approach suggests that if there were to be a regional mechanism in South Asia, a human rights body would come before a minority rights body. Furthermore, a regional human rights body would provide a forum for minority rights issues. Following on from this, an instrument on minority rights could be achievable. Tactically the question is whether it would not be more logical to first of all pursue a general regional human rights instrument, or a minority and indigenous rights provision within a proposed regional human rights framework, or call for separate instruments. Whatever approach is decided, given present SAARC governmental indifference, coordination and consensus among NGOs in South Asia will be essential. The call by the Asian Centre for Human Rights to establish a working group to explore the possibility of drafting a South Asia human rights convention may prove to be the first step.
A South Asian Regional Charter on Minority and Group Rights

PREAMBLE

THE STATES PARTIES TO THE PRESENT CHARTER

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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, Recognizing that, these rights derive from the inherent dignity of the human person, and that one principal goal of SAARC is to provide all individuals the opportunity to live in dignity and realize their full potential, Recognizing that, in accordance with the Universal Declaration of Human Rights the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby every individual may enjoy his/her economic, social and cultural rights, as well as his/her civil and political rights,

Emphasizing that, the constant promotion and realization of the rights of persons belonging to national or ethnic, religious, linguistic and sexual minorities, as an integral part of development of society as a whole and within a democratic framework based on the rule of law would contribute to the strengthening of friendship and cooperation among peoples and states,

Recognizing the need to ensure even more effective implementation of international human rights instruments with regard to the rights of persons belonging to racial or ethnic, religious or linguistic minorities,

Acknowledging that, in and by the SAARC Social Charter the Member States of SAARC have undertaken an obligation to promote universal respect for, and observance and protection of, human rights and fundamental freedoms for all including every minority, section and group in society,

Reaffirming that, respect for human rights and fundamental freedoms is the foundation of justice which is the pre-condition for harmony and peace in society which in turn stimulates integrated development leading to progress and prosperity,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Reiterating that, the obligations of member States of SAARC under the Social Charter
must be respected, protected and fulfilled without reservation and that the enforcement thereof at the national level must be continuously reviewed through agreed regional arrangements and mechanisms.

CHAPTER I

Article 1, Human Rights
The States Parties to the present Charter re-affirm and adopt as part of the present Covenant:
(a) the rights and obligations recognized in the SAARC Social Charter;
(b) the rights and obligations recognized in the International Covenant on Civil and Political Rights (ICCPR) in Articles 6 to 27 thereof (reproduced in Annex 1);
(c) the rights and obligations recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Articles 6 to 15 thereof (reproduced in Annex 2);
(d) the rights and obligations recognized in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Articles 6 to 16 (reproduced in Annex 3);
(e) the rights and obligations recognized in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in Article 5 (reproduced in Annex 4).

CHAPTER II

Article 2, Remedies
Each State Party to the present Charter guarantees:
(a) that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting or purporting to act in an official capacity;
(i) It shall apply equally to all persons without any distinction based on the official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from liability under this Charter, nor shall it, in and of itself, constitute a ground for mitigation.
(ii) Immunities or special procedural rules which may attach to the Official capacity of a person, whether under national or international law, shall not bar from exercising jurisdiction over such a person.

(b) that any person claiming such a remedy shall have his/her rights thereto determined by competent judicial, executive, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) that such competent authorities shall enforce such remedies when granted;

(d) that States Parties to the present Charter shall assure to every individual within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of discrimination which violate his/her human rights and fundamental freedoms contrary to this convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

(e) that any individual/community may seek remedy if the restrictions (Article 3) are deemed detrimental for a particular community/individual.

(f) Any official who violates these rights set out and defined in this Charter will not be eligible for protection under the domestic law, including their respective constitution.

CHAPTER III

Article 3

The States Parties to the present Charter recognize that, in regard to the exercise and enjoyment of those rights provided by the State in conformity with the present Charter, the State may subject such rights only to such limitations as are determined by law, only in so far as such limitations may be compatible with the nature of such rights, and solely for the purpose of promoting the general welfare in a democratic society, without discrimination of the life and well-being of people.
Article 4
1. Nothing in the present Charter may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized in the present Charter or at their limitation to a greater extent than is provided for in the present Charter.
2. No restrictions upon or derogation from any of the human rights or fundamental freedoms recognized or existing in any country by virtue of law, conventions, regulations or customs shall be admitted or permitted on the pretext that the present Charter does not recognize such rights or freedoms, or that it recognizes them only to a lesser extent.

CHAPTER IV

Article 5, Non-discrimination and Minority Rights
1. The States Parties to the present Charter guarantee the exercise and enjoyment of the rights recognized in the present Charter without discrimination of any kind as to race, colour, language, religion, caste, gender, political or other opinion, national or social origin, property, birth or other status, and protection against any acts of such discrimination, and any incitement to such discrimination.
2. (a) The States Parties to the present Charter guarantee the equal right of all human beings to the exercise and enjoyment of all the rights recognized in the present Charter.
(b) The State Parties to the present Charter shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
3. Nothing in the present Charter will be interpreted:
(a) to prevent or to restrict affirmative action by a State Party to the present Charter in favour of a disadvantaged, underprivileged or vulnerable group or section;
(b) as affecting in any way the legal provisions met by a State Party concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular minority group;
(c) as applying to distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens or between residents and non-residents.
Article 6, Minority Rights
Each State Party to the present Charter recognizes and undertakes to ensure that the protection of the human rights and fundamental freedoms recognised in the present Charter extends to all minorities and disadvantaged, underprivileged or vulnerable groups and sections, including the rights set out in the succeeding Articles 6A to 6F (hereinafter referred to as “minority rights”).

Article 6A, Right to Identity and Characteristics
Persons belonging to minorities may exercise their rights, including those set forth from Article 6A-6F in the present Charter and enjoy and promote their own culture individually as well as in community with other members of their group.

Article 6B, Right to Diversity and Inter-cultural Education
Persons belonging to minorities should have the right to:
(a) adequate opportunities to gain knowledge of the society as a whole;
(b) freely participate in the cultural life of the community and to share in its benefits.

Article 6C, Right to Use Language in Private and in Public
Persons belonging to minorities have the right to use their own language, in private and in public, freely and without interference.

Article 6D, Right to be taught Language and have Instruction in Language
Children and young persons belonging to minorities should be taught their language and receive instruction in their language.

Article 6E, Right to freedom of Association
1. Persons belonging to minorities have the right to:
(a) establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties;
(b) to establish and manage their own non-governmental organisations, associations and institutions (hereafter referred to as entities) and to use the language(s) of their choice.
2. The State Parties should not:
   (a) discriminate against these entities on the basis of language;
   (b) unduly restrict the right of these entities to seek sources of funding from the State budget, international sources or the private sector.
3. No person belonging to a minority may be compelled to belong to an association.

**Article 6F, Right to Participate in Public and Political Life**

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

**Article 7, Implementation of Minority Rights**

Each State Party to the present Charter undertakes to ensure the implementation and protection of minority rights, inter alia, by the following:

**Article 7A, General Implementation Provisions**

1. The States Parties to the present Charter should make every effort to plan and implement, with due regard for the legitimate interests of persons belonging to minorities:
   (a) national policies and programmes;
   (b) programmes of co-operation and assistance among State Parties.
2. The State Parties to the present Charter should ensure that the national census is pluralized and that transparency is observed in relation to counting processes and the derivation of census categories.
3. The State Parties to the present Charter shall endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned.
4. The State Parties to the present Charter should cooperate on questions relating to persons belonging to minorities, inter alia, exchanging information and experiences, in order to promote mutual understanding and confidence.
5. (a) The State Parties to the present Charter should promote the establishment of Institutions and where they exist, strengthen them, with the mandate to effectively
implement minority rights as set in Article 6A-6F and other rights relevant to minorities, address violations of minority rights and provide the necessary redress. These may include national institutions such as human rights commissions, commissioners, and ombudspersons.

(b) In particular, these institutions should be accessible to all and their procedures facilitated to provide easy access for minorities, be independent and autonomous and dedicated to upholding democracy, human rights, the rule of law, and diversity and provide redress including effective remedies that allow for the implementation of minority rights, sanctioning of perpetrators of violations, and compensation for the victims.

(c) Where necessary, these institutions should use the language of the minorities or an interpreter should be provided.

Article 7B, Implementing Right to Identity and Characteristics
1. (a) The State Parties to the present Charter shall protect the existence and the national or ethnic, cultural, religious, linguistic and sexual identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

(b) The State Parties to the present Charter shall take measures to ensure that such protection is constitutionally guaranteed. If such guarantee is not presently afforded, the parties agree to provide the same, within 3yrs of signing this Charter.

2. The State Parties to the present Charter shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to maintain and develop their culture and to preserve the essential elements of their identity, namely their language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

3. Without prejudice to measures taken in pursuance of their general integration policy, the State Parties to the present Charter shall refrain from policies or practices aimed at assimilation of persons belonging to minorities against their will and shall protect these persons from any action aimed at such assimilation.
Article 7C, Implementing Right to Diversity and Inter-Cultural Education

1. The State Parties to the present Charter agree:
(a) to have a positive attitude towards cultural pluralism and respect the distinctive characteristics and contributions of minorities to the life of the national society as a whole;
(b) to encourage a spirit of tolerance, inter-cultural and inter-faith dialogue.

2. The State Parties shall take effective measures, in the framework of their legal systems, to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic, sexual or religious identity, in particular in the fields of education, culture, sports and the media.

3. The State Parties to the present Charter shall, wherever possible and where resources permit:
(a) take measures in the fields of education and research, to foster knowledge of the culture, history, traditions, language and religion of the minorities and of the majority existing within their territory;
(b) inter alia, provide adequate opportunities for teacher training, provide access to textbooks and facilitate contacts among students and teachers of different communities.

3. The State Parties to the present Charter agree that, wherever possible, State educational authorities should ensure that the general compulsory curriculum includes the teaching of the histories, cultures and traditions of their respective national minorities.

Article 7D, Implementing Right to Freedom of Opinion and Expression

1. The State Parties to the present Charter undertake to recognise that the right to freedom of expression of every person belonging to a minority includes freedom to hold opinions and to receive and impart information and ideas in the minority languages, without interference by public authorities.

2. (a) The State Parties to the present Charter shall ensure, within the framework of their legal systems, that persons belonging to minorities are not discriminated against in their access to the media.
(b) Sub-Paragraph (a) shall not prevent State Parties to the present Charter from requiring the licensing, without discrimination and based on objective criteria, of
sound radio and television broadcasting, or cinema enterprises.

3. The State Parties to the present Charter shall not hinder the creation and the use of printed media by persons belonging to minorities.

4. (a) In the legal framework of sound radio and television broadcasting, the State Parties to the present Charter shall ensure, as far as possible, that persons belonging to national minorities are granted the possibility of creating and using their own minority language media.

(b) The State Parties to the present Charter shall guarantee that State regulation of broadcast and other media shall be based on objective and non-discriminatory criteria and shall not be used to restrict enjoyment of minority rights.

Article 7E, Implementing Right to Use Language in Private and in Public

1. The State Parties to the present Charter undertake to recognise that persons belonging to minorities have the right to use freely and without interference their minority language, in private and in public, in all forms.

2. The State Parties to the present Charter undertake, wherever possible, to eliminate, any unjustified distinction, exclusion, restriction or preference relating to the use of a language by persons belonging minorities and intended to discourage or endanger the maintenance or development of it.

3. In areas traditionally inhabited by substantial numbers of persons belonging to a minority, the State Parties to the present Charter shall endeavour to ensure, as far as possible:

(a) the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities, if those persons so request and where such a request corresponds to a real need;

(b) Within the framework of their legal system including, where appropriate, agreements with other States, and taking into account their specific conditions) the display of traditional local names, street names and other topographical indications intended for the public also in the minority language, when there is a sufficient demand for such indications.

(c) the right to acquire civil documents and certificates both in the official language or languages of the State and in the language of the minority in question from regional and/or local public institutions, where the desire for it has been expressed. Similarly regional and/or local public institutions shall keep the appropriate civil registers also
in the language of the minority.

4. The right to receive and convey information in one’s native language.

**Article 7F, Implementing Right to be taught Language and have instruction in Language**

1. The State Parties to the present Charter undertake to recognise that every person belonging to a minority has the right to learn his or her minority language.

2. The State Parties to the present Charter should take appropriate measures, wherever possible, to ensure that persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

3. The state shall take all measures to help communities develop their languages in written form where the communities do not possess the written forms of their languages.

4. (a) In areas traditionally inhabited by substantial numbers of persons belonging to a minority, If there is sufficient demand, the State Parties to the present Charter shall endeavour to ensure, where resources permit and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

   (b) Sub-paragraph (a) shall be implemented without prejudice to the learning of the official language or the teaching in this language.

5. Wherever possible, the State Parties to the present Charter should create conditions enabling:

4. (a) children and young persons belonging to minorities to be taught through the medium of their minority language and their parents to avail themselves of the option of having their children educated in their own language;

   (b) the incorporation of the minority languages into the school curriculum and taught as subjects on a regular basis;

   (c) children and young persons belonging to minorities to be taught the State language(s) as a subject on a regular basis, preferably by bilingual teachers who have a good understanding of their cultural and linguistic background.

6. (a) Within the framework of their education systems, the State Parties to the present Charter shall recognise that persons belonging to minorities have the right to set up
and to manage their own private educational and training establishments.
(b) The exercise of this right shall not entail any financial obligation for the State Parties to the present Charter

**Article 7G, Implementing Right to Participate in Public and Political Life**

1. The State Parties to the present Charter shall:

(a) consider appropriate measures to enable persons belonging to minorities to participate fully in the economic progress and development in their country;

(b) create the conditions necessary for the effective participation of persons belonging to national minorities:

(i) in public affairs, in particular those affecting them.

(ii) in the formulation of national economic policy and allocation of resources, including both national and provincial budgets

3. The State Parties to the present charter undertake not to unduly cite national/public safety and restrict the right of minorities to participation in public and political forums.

**CHAPTER V**

**SOUTH ASIAN HUMAN RIGHTS COMMITTEE**

**Article 8**

1. There shall be established a South Asian Human Rights Committee (hereafter referred to, in the present Covenant, as the Committee). It shall consist of not less than seven and not more than fifteen members and shall carry out the functions hereinafter provided.

2. (a) The Committee shall be composed of nationals of the States Parties to the present Charter who shall be persons of high moral character and recognized competence in the field of human rights and or legal matters.

(b) The drafting committee recommends an eminent persons group to constitute the SAARC interim committee, which will work with SAARC.

(c) A person shall be disqualified for election to the Committee if such person is, or has been at any time during the preceding ten years, engaged in active politics, or if such person has been guilty of misconduct involving moral turpitude or if a credible complaint of such misconduct is pending.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

**Article 9**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if re-nominated.

2. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 8 and nominated for the purpose by the States Parties to the present Covenant.

3. The initial election shall be held no later than six months from the date of the entry into force of the present Charter. The Procedure to be agreed and prescribed, on agreement between the parties.

4. Each State Party to the present Charter may nominate not more than two persons. These persons shall be nationals of the nominating State.

5. Elections at the expiry of office shall be held in accordance with the provisions of Articles 8 and 9.

6. Provision should be made for a Chairperson or Deputy Chairperson from among the members of the elected committee.

7. A person shall be eligible for re-nomination. However, not exceeding more than two terms serving in the committee.

**Article 10 Vacancies**

Proposals expected from the Working Committee.

**Article 11 Emoluments**

Proposals expected from the Working Committee.

**Article 12 Staff**

Proposals expected from the Working Committee.

**Article 13**

1. Rules:

Proposals expected from the Working Committee.

2. Meetings/procedure for determination:
First Meeting
Proposals expected from the Working Committee.

3. Oral hearings should be the exception, otherwise costs will be prohibitive for Complainants.

Proposals expected from the Working Committee.

Article 14
Every member of the Committee shall before taking up duties, make a solemn declaration in open committee to perform his/her functions impartially and conscientiously.

CHAPTER VI

Article 15
1. A State Party to the present Charter may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Charter. Communications under this Article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this Article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Charter considers that another State Party is not giving effect to the provisions of the present Charter, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given
to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this Article;

(e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution on the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b) to supply any relevant information;

(g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under sub-paragraph (b), submit a report.

(i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to its report.

In every matter, the report shall be communicated to the States Parties concerned.

The provisions of this Article shall come into force when four States Parties to the present Charter have made declaration under paragraph I of this Article. Such declarations shall be deposited by the States Parties with [the Secretary-General of the United Nations], who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the [Secretary-General]. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article; no further communications by any State Party shall be received after the notification of withdrawal of the declaration has been received by the [Secretary-General], unless the
State Party concerned had made a new declaration.

**Article 16, Conciliation Commission**-
Proposals expected from the Working Committee.

**Article 17**
The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under Article 19, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant section of the Convention on the Privileges and Immunities of the United Nations.

**Article 18**
The provisions for the implementation of the present Charter shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Charter from having recourse to the procedures for settling a dispute in accordance with general or special international agreements in force between them.

**Article 19, Annual Reports**
Proposals expected from the Working Committee.

**Article 20**
A State Party to the present Charter may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party (or by its legislative, judicial, executive or administrative organs) of any of the rights set forth in the Charter. No communication shall be received by the Committee if it concerns a State Party to the Charter which has not made a declaration under this Article.
Article 21
Subject to the provisions of Article 21, individuals who claim that any of their rights enumerated in the Charter have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Article 22
The Committee shall consider inadmissible any communication which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Charter.

Article 23
1. Subject to the provisions of Article 22, the Committee shall bring any communication submitted to it to the attention of the State Party which has made a declaration under Article 18 alleged to be violating any provision of the Covenant.
2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 24
1. The Committee shall consider communications received in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:
   (a) The same matter is not being examined under another procedure of international investigation or settlement;
   (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.
3. The Committee shall hold closed meetings when examining a communication.
4. The Committee shall forward its views to the State Party concerned and to the individual.
   OR The Committee shall forward its decision to the State Party concerned and to the individual.
5. Decisions of the Committee shall, when deposited with the highest Court of the
State Party concerned, be binding on the State Party and the individual concerned as if it were a judgement of such Court.

**Article 25**
The Committee shall include in its annual report under Article 19 of the Charter, a summary of its activities under Articles 22-26

**CHAPTER VII**

**Article 26, Entry in force, Accession, Ratification, Amendment, Denunciation etc.**
1. The present Charter is open for signature by any State which is a member of SAARC and any other State which has been invited by SAARC to become a member of SAARC, which will be deposited with the United Nations.

**Article 27**
1. Any State Party may denounce the present Charter at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Covenant to any communication submitted under Article 22 before the effective date of denunciation.

**CHAPTER VIII**

**Article 28**
1. (a) The present Covenant, of which the English text is authentic, shall be deposited in the archives of the United Nations.

(b) The governments of the SAARC countries shall translate the present Charter, from English text, in their respective national languages and these translated texts will be equally authentic at the domestic level. National translation will be considered as adaptations.
II. Special Focus: 
Minority and Human Rights Issues in South Asia
Werner Menski*

Assessing Communal Conflicts and Hindu Fascism in India

I. INTRODUCTION: THE PROBLEM OF SELECTIVE BRANDING

Although Hindu fundamentalism, also referred to as Hindu nationalism or hindutva (‘Hinduness’), remains a somewhat threatening and violent element, it is probably today no longer the most centrally relevant issue for discussion of minority protection issues and human rights in South Asia. Hindu fascism is today a bit dated as a label and is probably less relevant in 2010 for understanding minority conflicts in the South Asian region than many scholars and activists, including prominent anti-Brahminical polemicists, like to allege.¹

I am saying this not to excuse Hindu nationalist fascism, which certainly continues to raise its ugly head in South Asia and in the South Asian diasporas worldwide, but it is not a rising movement, although the main nationalist body, the RSS (Rashtriya Swayamsevak Sangh) might like to think otherwise. Thus, it is necessary to put this particular issue immediately into the wider perspective of an ongoing global debate and a notable battle of several fascisms, fundamentalisms, and competing visions of globalisation.² I am conscious of the risk that in efforts to engage in global debates about such hotly contested issues, Eurocentric post-Enlightenment observers all too easily end up branding all Hindus as fascists and all Muslims as terrorists. The serious methodological error committed by this approach is to take everything ‘Hindu’ or ‘Muslim’ as religious, although it is a fact that since ancient times religious and cultural traditions have known the coexistence and connectedness of the religious and the secular.³ Hindu fundamentalism as it exists today clearly misuses and distorts its ‘religious’ roots for

¹ Professor of South Asian Laws at the School of Law, SOAS, University of London.

² H. Patrick Glenn, Legal traditions of the world: Sustainable diversity in law (Oxford University Press, Oxford, 2004), 51: notes that ‘[g]lobalization, or world domination, is usually thought of as a single process’, but warns that ‘there are a number of globalizations going on’, including Islamization.

³ For Hindu law, religion and culture, the relevant key concepts are the much underrated distinction of religious/invisible Truth (rita) and the secular/visible Truth of satya. For Islamic law, religion and culture, the distinction of ibadat (relationship to God) and muamalat (one’s links with other people) is the relevant binary pair.
political purposes. This is objectionable and counterproductive because it tarnishes the global image of India, the largest democracy of the world.

Evidently, in today’s world, too, ‘religion’ and its relationship with ‘law’ and ‘politics’ remains deeply contested. The recent Swiss referendum against the construction of minarets, which has given rise to accusations of fascism as well, should make us even more aware that one group’s self-defence strategy is often another group’s terrorism. The symbolic and actual effects of assertions of ethnic identity and religious ‘otherness’ are certainly in today’s interconnected world a hotly debated subject. I see parallels between the Swiss referendum and Indian efforts to manage religious diversity that of course have not been thought through yet, but would warn against self-serving, shrill labelling of certain ‘others’ as terrorists or fascists and prefer to draw attention in such scenarios to the necessary examination of mind-boggling complexities.

In this article, the author first enlarges the discussion on the complexities of the subject covered, including issues of minority protection in a vast composite nation such as India and then outlines specifically what the main disagreeable elements are regarding Hindu fundamentalism in India. We shall see that the Constitution of India is aware of such risks and constitutes an intricate compromise. In the next section, the author then addresses obfuscations about concepts of secularism as they apply to the region. Finally, there will be some room for discussing counteracting positive developments and exploring the scope for further empowering developments because it is now so manifestly clear for all to see that disrespect for diversity in the various states of South Asia leads to self-destruction.

II. THE CHALLENGES OF COMPLEXITY

Finding a national identity in postcolonial states continues to be a fierce struggle in many cases, visible all over South Asia. Although this process is certainly relevant also for states that were never directly colonised, such as Nepal, the handling of diversity management appears to be a particularly critical element in the huge Indian nation state. Evidently, there will never be total agreement on techniques of plurality management or the handling of such multiple diversities. Irrespective of whether one chooses to use a
discourse of legal pluralism,\textsuperscript{4} or of fuzziness and diversity,\textsuperscript{5} blaming only selected parties and not all participants in these intense struggles becomes rather too easily an exercise in taking sides and, more dangerously, an arbitrary silencing strategy that is itself dangerous and violence producing and, therefore, counter-productive.

In a global context, issues other than the lurking pernicious influence of Hindu fundamentalism also arise for debate, including Western-dominated, Christian-based post-Enlightenment claims to ‘the truth’ and their deeply questionable consequences and impacts in Asia, Africa, and elsewhere. Upendra Baxi has sharply characterized such now often market-driven postcolonial manipulations as hegemonic, drifting toward ‘righticidal practice’.\textsuperscript{6} Various other forms of religiously-grounded fundamentalisms cannot be left out of the equation either, in particular, the impact of global war on terror strategies on the region, especially in Afghanistan and Pakistan, and the pernicious claims of radical or creeping (re-)Islamization in countries around India and in India.

There is certainly much pressure on South Asia today to fall in line with purportedly global norms and, thus, to abandon certain and ancient local patterns of managing various diversities. Such patterns are difficult to locate and to convey because they were documented in an ancient language, Sanskrit, that hardly anyone today can fully understand. They tend to be informal and, thus, less tangible than formal positive laws and their related processes, tend to be sidelined by members of supposedly educated elites that often do not value their heritage and are frequently more than a little resentful of being brown and ashamed of being Indian. As a legal realist, with one foot in the East and one foot in the West, the author has tended to focus as much on what he now calls ‘slumdog law’,\textsuperscript{7} the legal scenarios directly faced by India’s massive impoverished population and resulting distribution problems,\textsuperscript{8} as on formal declarations about human

\textsuperscript{4} On this see Werner Menski, \textit{Comparative law in a global context: The legal systems of Asia and Africa} (Cambridge University Press, Cambridge, 2006).

\textsuperscript{5} For this concept and strategy, see T. T. Arvind and Lindsay Stirton, “Explaining the reception of the Code Napoleon in Germany: a fuzzy-set qualitative comparative analysis”, 30(1) \textit{Legal Studies} (2010), 1-29.

\textsuperscript{6} Upendra Baxi, \textit{The future of human rights} (Oxford University Press, New Delhi, 2002), 143.

\textsuperscript{7} See Werner Menski, “Slumdog law, colonial tummy ache and the redefinition of family law in India. Review Article”, 30(1) \textit{South Asia Research} (2010), 67-80.

\textsuperscript{8} Unsurprisingly, the author has found that middle class Indians, in particular, deeply resent this terminology, reflecting thereby unwillingness to admit that the country has problems with handling the distribution of even basic necessities.
rights guarantees that are brought to the subcontinent in the form of suggestions for bettering one’s records.

Therefore, the author highlights prominently the wider context of the grave contradictions of legal and socioeconomic reality and the fundamental rights declaration in Article 14 of the Indian Constitution of 1950 on equality before the law, which incidentally comes from the Irish Constitution.\(^9\) Although no one can deny, therefore, that India is a state faced with massive challenges over safeguarding basic justice, and is part of a deeply troubled region of the world, simply transplanting Western models of thought and practice cannot quite be the right solution, despite much outward Westernisation. India is not Switzerland or Singapore, it has had to develop its own methods of governance and diversity management. This is why the Indian Constitution of 1950 is marked by the uneasy coexistence of well-sounding fundamental rights guarantees (Article 12 to 35) and a huge range of Directive Principles of State Policy (Articles 36-51A). Originally treated as two separate entities, today, these sets of legal provisions are increasingly read together in constitutional interpretation. Apparently from the start, even the suggestion that Western models should or could be followed and that South Asian ‘traditional’ concepts are defunct and irrelevant has been deeply resented in many ways and for many decades, first in fierce debates between the founding fathers of the nation and now among successor generations.

It is evident that the ongoing internal struggles over basic justice and the Indian nation’s identity have contributed to a strengthening of hindutva forces on the one hand, and increased emphasis on Islamic identity on the other hand, with India’s peculiar secularist ambitions squeezed in between. As counter-reactive elements in the larger ideological and global battle, emphasis on Hinduness and Islamic identity, respectively, create potentially deadly animosities at the national level as well as in interpersonal relations, while leaving room for harmonious coexistence—truly an extremely complex, ambiguous and ambivalent scenario. Many human rights authors overlook this and see only grave tensions between the national and the global level. Baxi has noted explicitly that human rights realism must be careful not to lose sight of the fact that “[t]he local, not the global

\(^9\) Art. 14 provides: “The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.
I would go further: at the end of the day, we need to ask why certain individuals go as far as they do in killing their neighbours in the name of an ideology or ‘ism’ that they may not even properly understand, but a few days later do business with someone of the same persuasion again.

What appears as Hindu fascism or fundamentalism to outsiders may have many other dimensions than simply religious traditionalism and deadly desires to exterminate the religious ‘other’. It is certainly partly concerned with protection of an imagined and actual motherland against neighbouring others that claimed their territory in the horrible struggles of 1947, a troubled memory that haunts India and Pakistan. It is certainly connected to political manipulation of religious identities—many RSS activists are educated middle-class people. It could also be about protection of intensely crowded space in physical reality, leading to claustrophobic feelings and a siege mentality that erupts from time to time in violence. It certainly also has to do with multidimensional competition over resources and even physical space on crowded roads and in densely populated localities, explored further in the following. The whole field of violence, its emergence as much as its control, requires critical reexamination, specifically when it comes to South Asia.

Considering the complexity of the past and present struggles specifically in India, there is no realistic scope for simple transplant dreams of ‘Western’ or global models. The Indian Constitution of 1950, above all, documents that neither the supposedly neat laïstic French-style segregation of law and religion, nor wholesale abandonment of local cultures in favour of some cosmopolitan pattern was adopted. Today, in the hybrid realities of postmodern India, what precisely is the scope for the development of localized arrangements remains deeply contested in every respect. Simply blaming ‘tradition’ and ‘religion’ or insistence on local values hides the difficult central message that pluralistic compromises have to be made all the time. Pluralism is, after all, a fact of life. The risk in demanding uniformity of whatever description is that everyone will be unhappy and will

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10 Baxi, op.cit. note 89.
11 See Veena Das (ed.), Mirrors of violence. Communities, riots and survivors in South Asia (Oxford University Press, Delhi, 1990). This study brought out that communalism, including political Hinduism, had acquired space in the political centre stage and called for a positive commitment to secularism. It also highlighted the role of ‘diabolical myths’ (p. 64).
lash out at ‘the others’, fearful of losing identity and control over even the most intimate spheres, accusing others of pushing for troublesome arrangements which will never be satisfactory for all concerned. Blaming either side for the lack of globally desirable standards of human rights protection is an adversarial technique that is all too familiar to the ‘new subalterns’ of Asia and Africa. The author suggests, however, that the picture is much more complex than scholars have been able to verbalise.

III. THE GENERAL MINORITY RIGHTS SITUATION

The minority rights scenario in the region as a whole has been continuously changing, rather rapidly in recent years, but often unnoticed by members of the scholarly and activist communities. Various human rights violations continue to exist of course, like almost everywhere on the globe. Regarding South Asia, however, certain remarkable stereotypes continue to cloud the official and dominant perceptions. Largely based on older sources, with far too few scholars able and ready to provide up-to-date assessments on recent trends, there is still far too much prejudiced talk and teaching about (hi)stories of the Hindu caste system, violent abuses like sati practices and exclusion of low-caste people. In a remarkable synergy, secularist or modernist trends of opposing religion per se, and thus of blacklisting anything ‘Hindu’, have been combined with the increasingly powerful agenda of dalitization in India. Additionally, Muslims as a disadvantaged minority in a Hindu-dominated state have added their voice to the chorus of criticisms of the Indian state and its handling of diversity. The notable result of this synergy has been an almost vitriolic badmouthing of ‘Hindu’ cultural elements, even a denial of Hindu roots as some oddly constructed and entirely negative heritage that many Indians today seem to reject. Although this kind of ideological positioning is certainly consistent with the basic approaches adopted by human rights bodies, which also have an increasing

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13 The so-called Sachar Report, discussed further in the following, is probably today the most prominent document of Muslim disadvantage in India. See Rajindar Sachar, Social, economic and educational status of the Muslim community of India. A report. New Delhi, Prime Minister’s High Level Committee, Cabinet Secretariat, Government of India, 2006.

14 Ilaiah, op.cit. note 1.
presence in India, ground realities are often much more complex than these many critical
voices indicate. Substantial criticism and insight on violations of rights of minorities,
indigenous peoples, and women have been noted and recorded in abundance. There are,
conversely, deliberate silences and an increasingly stubborn refusal on the part of
feminists and activists to debate significant advances in Indian diversity management
which go against the grain of modernist prescriptions. Clearly, a lot remains deeply
unsatisfactory when it comes to assessing what actually goes on in the field of human
rights in India.

Of course there is no absolute objectivity and there are many biases that continue to
interfere. However, it seems intellectually dishonest to pick up only one side of the
ancient stick of debates, for example, that birth among Hindus determines a person’s
place in society forever, or that women always have to be dependent on men. The other
perspective is always also found in the same scriptural sources that are cited to us all the
time, but one often does not present a balance because that complicates the argument; it is
simpler to allege that things are just as stated by one side. Persistent use of such one-
sided rhetoric causes serious damage to global scholarship, given that there were always
other perspectives, often a cultural subtext of some kind of subalternity that analysts,
whether from the region or not, ignore at their peril. Pluralism and diversity is not a
postmodern phenomenon, it has ancient roots in the most distant layers of Indian
cultures.

Although Hindus (if we include the Schedules Castes and Tribes) remain a large
demographic majority of Indians (between 80-85%), especially the general suppression
of females constitutes a thorny issue for human rights lawyers. But here, too, there is
much more than meets the eye because recent fieldwork-based research has begun to find
that many women, Hindus, Muslims, and others can and do access divorce procedures,

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15 See, for example, the views of the concluding observations in CERD/C/IND/CO/19 (5 May 2007) at
   <http://www2.ohchr.org/english/bodies/cerd/cerds70.htm>.
16 This is clearly obvious in Archana Parashar and Amita Dhanda (eds.), Redefining family law in India.
17 See Werner Menski, “Ancient boundary crossings and defective memories: Lessons from pluralistic
   interactions between personal laws and civil law in composite India”, in Joel A. Nichols (ed.), Marriage
   and divorce in a multicultural context: Reconsidering the boundaries of civil law and religion (Cambridge
for example, and may be adept at managing their lives in situations of adversity.\textsuperscript{18} Of course, highlighting such findings here cannot and does not deny the serious and unacceptable violations which especially women from Scheduled Castes and Tribes continually face in India. Few observers realize, however, that all over South Asia, women leader figures are not unusual, and even female Dalit leader figures are now increasingly prominent. In India, apart from past and present leaders by the name of Mrs. Gandhi (a heavily loaded name itself), India presently has a low-key but apparently not entirely ineffective female President who is more than a decorative figurehead in the Indian constitutional set-up. Although this is also true of other South Asian countries, for example, Pakistan and Bangladesh, it does of course not alter the reality of substantial and systematic discrimination against women. However, the picture is never as one-sided and simple as much human rights critique indicates.

Regarding caste issues, too, the first thing that comes to many minds when the word ‘India’ flashes up, there is not one singular story line either. For example, the current Chief Justice of India for several years now (and until May 2010) has been a Dalit, who was strategically nurtured during the mid-1980s and proved his mettle, of course not without much opposition. Protective discrimination policies all over India are biting so hard that some observers are beginning to consider India as a Dalit country. Certainly, many high-caste Hindus are feeling the pinch, for example, if their children cannot access educational facilities because of widespread quota arrangements for Scheduled Castes and Tribes and Other Backward Classes. Furthermore, the current government is again, to the surprise of many observers, a Congress-led coalition, with Dr. Manmohan Singh, a Sikh, as the Prime Minister. The main Hindu nationalist party, the BJP, continues to be in disarray and has not managed to capture a Hindu votebank. All of this points to a weakening of Hindu fascist tendencies and increasing strength of, and commitment to, India’s deliberate long-standing ‘secular’ strategy to include all Indians and not just high-

caste Hindus, although there would still be many statistics telling us that most judges are Brahmins or members of other higher castes and that most poor people belong to the Scheduled Castes and Scheduled Tribes. Remarkably, however, hardly anyone (not even most lawyers) seems to know about several deeply telling post-9/11 developments in Indian family law which have significantly shifted the gender balance. This tells us also much more than most people wish to know about how postmodern India seeks to achieve better justice in a legal system by continuing to value a personal law system rather than enforcing a Uniform Civil Code. India is manifestly not Europe; one often wonders why this even needs to be stressed.

Justice itself, of course, remains everywhere just within reach. Derrida famously told us the same. Although there is continuing evidence in India of fundamentalism-driven violence against minorities, equally worrying topics should be the militancy of Islamic terrorist activities and widespread local Naxalite uprisings which reflect interlinked economic and political problems rather than religious ideology or fundamentalism. In addition, there are continuing atrocious human rights violations by all parties in the ongoing Kashmir conflict, with complex reverberations which now extend into British cities. Growing levels of violence throughout the whole of South Asia cannot simply be put down to any single factor. Much heated aggression is caused by anger and multiple frustrations over unsatisfactory and often deeply inhuman life conditions, including additional unredressed state violence, rather than religious fundamentalisms.

Millions of citizens, technically deprived of property rights because the father–mother state claims to own everything, have to live precariously in public spaces and use facilities they do not own, whether they be streets and parks for defecation or forests for basic commodities and food. When they then face police atrocities as encroachers, fundamental rights and concepts like ‘unity in diversity’ are shown to be just unfulfilled promises and nice slogans. If for example in a road rage scenario a Hindu and a Muslim driver have a violent clash, is this a religious issue, given the tense competition of competing claims

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19 See Gurjeet Singh, Consumer protection in India: Justice within reach (Deep and Deep, New Delhi, 1996).

20 Britain is only just beginning to realize, with much reluctance, that most Pakistanis in Britain are actually Kashmiris. Ongoing litigation has unearthed evidence that Pakistan has, since 1973, silently offered its citizenship to all Indian Kashmiris so that many ‘Pakistanis’ in Britain are in fact Indian Muslims, whereas many ‘Indians’ actually trace their roots to pre-1947 areas of British India that are now in Pakistan.
over too much space being taken up by ‘others’? Where does religious fundamentalism or communalism begin and how do we distinguish this from bare-bones survival of the fittest?

Most Europeans cannot even imagine the levels of poverty and deprivation suffered by millions of Indians because our realities of life are fortunately very different. Of course, one could claim that having to live in such circumstances is in itself a human rights violation. However, that does not address the key issue that this article addresses, namely the assertion that Hinduism or Hindu culture is to blame for the ills and injustices of India. Ivory tower elitists belittle and even romanticise such struggles for survival and prefer to philosophize over principles of human rights. They might lecture on international conventions, but none of this feeds or educates hungry children or creates clean drinking water, critically important issues which some Indian activists are seeking to address by suggesting that the right to life guarantees in Article 21 of the Indian Constitution should be strengthened through adding additional elements, such as a right to food.

Focusing on the supposedly bad elements of ‘tradition’, ‘religion’, and ‘culture’ as evils, let alone Hinduism and Islam, certain relevant-looking studies tell us more about the predilections of the author than about developments in the region that one purports to discuss. Instead of offering practical and realistic advice, scholars still often engage in shadow boxing, labelling everything ‘Hindu’ or ‘Muslim’ as religious, whereas many Indians presume that the official death of Hindu law occurred during the 1950s. Much academic coverage of South Asian ‘problems’, often breathlessly and somewhat

21 This reverberates rather closely with current European sentiments over too many immigrants and new ‘others’ who are then routinely blamed for changes to the established landscapes and townscapes of ‘our’ territories. What share of such sentiments accounts for plain Islamophobia or relates to a desire to preserve traditional identities is notoriously difficult to ascertain.

22 See “Commissioners to the Supreme Court on the right to food: A brief introduction” (Centre for Equity Studies, New Delhi, 2009).

23 An amazingly audacious example is Rajeshwari Sunder Rajan, The scandal of the state. Women, law and citizenship in postcolonial India (Duke University Press, Durham and London, 2003), a political manifesto rather than factually reliable legal analysis.


25 Even practicing lawyers fall into such traps of ignorance, which is truly amazing.
desperately, tries to keep track of new signal events, paying insufficient attention to
deep analysis and monitoring of subsequent developments.26

IV. COMPLEXITIES OF THE SUBJECT MATTER IN TERMS OF HANDLING DIVERSITIES

Overall, I observe as a South Asian area specialist that the level of analytical coverage of
the complexities of themes like secularism, communalism, and minority rights in the
South Asian region remains rather low and often seriously deficient. Simply citing
international conventions as desirable tools for development in the region leads of course
to critical conclusions and generates further frustrations over matters that are virtually
‘lost in translation’. Many Indian judges are telling me that they get increasingly irritated
about ‘foreign’ interventions in their legal system’s management. They are not, I think,
speaking as Hindu fundamentalists; they are putting their finger on deficiencies in cross-
cultural communication when it comes to value judgments about matters such as human
rights. Intercultural communication is not a skill that lawyers, whether they are more
domestically oriented or internationally focused, have cultivated well.

Protection of minority rights, thus, remains one of the most deeply contested issues in
South Asia and a complex subject of study, not only because it involves emotional
engagement in human methods of coexistence, but also because it is so intensely
political. In India, with its scenario of persistent scarcity, it is also often linked to
resource allocation, particularly concerning places to study certain subjects, securing
government jobs, and other facilities. Although the general market situation has certainly
become much better since the 1990s, severe bottlenecks remain, driving now in the new
millennium several new agenda, such as privatization of higher education, which may
then manifest in the public space as communal conflict scenarios.

Managing such a messy nation and its many problems requires, first of all, a good dose of
deep respect for the right of ‘others’—variously defined—to exist as part of a composite
whole. In that regard, well before Indian independence in 1947, vociferous demands for
recognition of various group rights were already well-rehearsed. The new Indian state

26 The rather confused and often dishonest literature on the Shah Bano case of 1985 and its aftermath,
discussed further in the following, is a case in point.
could, therefore, not behave in 1947 as though all its new citizens would just be of one kind, or as though they were henceforth autonomous individuals. Most Indian leaders realized during the 1940s that Indian legal methods of management would require continued reliance on connectivity and interpersonal solidarity to manage at least a basic social welfare system that avoids mass starvation and disastrous levels of misery below the official poverty line. This is why the Indian Constitution was drafted in such a way that many years after its promulgation, more precisely after the Emergency of 1975-77, a significant shift toward ‘public interest’ could be implemented by the much-underrated Indian judge-driven phenomenon of ‘public interest litigation’.27 The critically relevant words ‘by appropriate proceedings’ were already in the Constitution itself, but were not implemented and taken seriously until the early 1980s.28 Then it was held that even a postcard from jail by someone whose fundamental rights had been violated would constitute appropriate proceedings and should trigger the suo motu jurisdiction of the highest Court of India.29

That this focus on ‘public interest’ has gone too far for many highly politicized observers is a different matter altogether. It further obfuscates analysis of highly significant achievements in Indian law in this field. Such constitutional developments, which are far more radical than human rights activists without regional expertise realize, are matched by equally radical recent developments in Indian family laws, which even Indian specialists are refusing to debate because they go against the grain of what activists have wanted to achieve in terms of female autonomy. Such developments, for example granting divorced Indian wives post-divorce maintenance rights from their ex-husband for many years to come (and, thus, in the eyes of feminists making women continuously dependent on men rather than granting them independent rights), even if the woman has financial resources of her own, link closely with the strategy of the Indian state to

27 See on this S. P. Sathe, Judicial activism in India. Transgressing borders and enforcing limits (Oxford University Press, New Delhi, 2002).
28 The clearest example is found in Art. 32(1) of the Indian Constitution which provides: “The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed”.
29 See S. P. Gupta v. President of India, AIR 1982 SC 149.
construct a welfare state that relies on self-help and familial support structures rather than state-sponsored support systems.\(^{30}\)

It was clear from the start that India could never be a Western welfare state or a state just for Hindus. India, as the Preamble of the Indian Constitution indicates,\(^{31}\) is openly ‘secular’, in the sense that it stipulates that the state should be ‘equidistant’ from all religions. Pakistan, conversely, after some initial lip service to secular plurality, has with increasing vigour declared itself to be an Islamic Republic and, thus, from this perspective, has become a legitimate home only for Muslims, in fact, only for some types of Muslims.\(^{32}\)

Consequently, India’s deep recognition of interlinkedness and diversity at many levels irks Pakistan, upsets its Islamic fundamentalists and motivates them to cause instability in India through a series of terror attacks of increasing sophistication. That such terror plays into the hands of Hindu fascists is increasingly obvious. This identifies a rather unholy alliance of fundamentalisms, which India struggles to combat. Notably, an increasingly alert Indian electorate seems to understand this and, contrary to many predictions, India did not vote the BJP back into power at the Centre during the last Parliamentary elections. Where the BJP is presently in power at local levels, continuing corruption and upheavals demonstrate for all to see that Hindu fundamentalists are not better qualified to govern India than were the more secular-oriented Congress and its allies.

The secular *Grundnorm* of India as a nation is amply documented in the Constitution of 1950 and has been made more explicit in its many subsequent amendments. Management of diversities in a plural nation demands that the claims of majorities of whatever description are restrained and tempered by circumspect reconsideration of the needs of all others, including various religious minorities.\(^{33}\) The fundamental rights guarantees of the Indian Constitution are indeed like a giant net with many holes. It is important to be

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\(^{30}\) In this specific context, the much-misunderstood Shah Bano affair, following the case of *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945, is highly significant because it has led to factually wrong assertions that the Indian state has deliberately failed to protect Muslim divorced wives. The opposite is true: After the important decision of the Supreme Court in *Danial Latifi v. Union of India*, AIR 2001 SC 3958, scholars should know that these earlier arguments were politicized fiction rather than legal fact.

\(^{31}\) Since 1976 the wording has been that India is a ‘Sovereign Socialist Secular Democratic Republic’.

\(^{32}\) The father of the nation, Mohammad Ali Jinnah, in a famous speech, tried to lay down this guidance but he died too soon to have any further impact on subsequent policy developments.

\(^{33}\) Above all Muslims, Christians, Parsis, and Jews, although Buddhists, Jainas, and Sikhs were soon subsumed under the ‘Hindu’ category.
aware that these fundamental rights are theoretically justiciable, so one can claim them in a court of law. However, that hundreds of millions of citizens were not going to be able to afford accessing such rights and claiming such guarantees as existed on paper became more evident in independent India. This growing predicament led ultimately to the Emergency of 1975-77, a deeply politicized period over whose assessment there is no agreement at all, but which has had many cathartic effects in terms of protecting basic rights.

At least mentioning the Emergency here is relevant to the present discussion because, whatever else Mrs. Gandhi did as an obviously ruthless dictator during this time, she implanted new provisions into the Indian legal system that strengthened the nation’s commitment to plurality, flagging up explicit mention of secularism in the reworded Preamble of the Constitution in the 42nd amendment in 1976.34 It is discussed below in more detail that this word, in Indian law, does not actually mean separation of law and religion, but exactly the opposite, namely connectedness of law and religion while seeking to achieve equidistance of the state from all religions. It is important to understand this ideal of a closely monitored linkage of law and religion here. All religions are to be taken account of, ideally on equal terms. Obviously, then, Hindus as the demographic majority would be under even stronger obligations than before to account for the presence of ‘others’ in the new nation. This message clearly got stronger through the Emergency. It also clearly counteracts Hindu fundamentalism.

India’s revised legal regime, thus, explicitly reinstated and demanded forms of altruism that were earlier built into the highly plural and quite idealistic traditional South Asian legal and social structures that appealed so strongly to informal self-controlled ordering through key concepts such as dharma and sadācāra, situation-specific appropriate behaviour. These methods are informal techniques of settling conflicts, which standard human rights analyses based on equality-focused approaches might rashly vilify as ‘traditional’ and deeply discriminatory. Respect for difference is from such a perspective seen as a positive thing, not as a violation of human rights as we are taught today. Indeed, traditional Indic normative systems not only respected plurality and diversity, but also

34 Earlier it provided that India would be a Sovereign Democratic Republic, whereas as of 3 January 1977, the wording was ‘Sovereign Socialist Secular Democratic Republic’.
emphasised interlinkedness rather than individuality or personal autonomy, duties rather than rights, and equity rather than equality. Of course, people also killed each other in the name of different ‘isms’, but India is hardly unique in that respect. All of this idealizing of pluralist coexistence, however, especially in Hinduism as a religion (which is why many scholars argue that it is not a proper religion) diametrically contradicts the methodology of modern human rights jurisprudence. Typically, debates about equity versus equality as ideal elements of justice delivery have remained contested and quite inconclusive and cannot be avoided today. At the same time, the Indian Supreme Court has clearly found itself endorsing such Indian methodologies. Obviously, much more could be said about that topic here; one example must suffice. In *St. Stephen's College v. University of Delhi*, AIR 1992 SC 1630, at 1662, it was held:

> It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. The equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required.

Furthermore, already during the pre-Emergency period, highly significant changes had been made to gender relations; however, this did not strike most people until the mid-1980s, when the highly politicized Shah Bano affair, aforementioned, exploded into communal riots among Muslims.\(^{35}\) Much has happened since, but an embarrassed and somewhat indignant silence now shrouds such recent developments because they apparently neither please Muslims nor human rights activists, modernists, or feminist scholars.\(^{36}\)

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\(^{35}\) The Shah Bano case is found as *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945. The critical amendment in statute law refers to the introduction of section 125 in the restructured Criminal Procedure Code of 1973, replacing the old, ineffective section 488 of the 1898 Criminal Procedure Code. This section redefined ‘wife’ under Indian law for all citizens as including a divorced wife, so that a divorcing husband of any religion became now legally liable to maintain his ex-wife until death or remarriage. One can clearly interpret this provision as a human rights instrument, seeking to address a structural problem in a deeply patriarchal society.

The basic claim to pluralist coexistence as an inevitable element of human life that Indian law so evidently endorses is thus being challenged by powerful globalizing forces that want to see every human being as equal and have declared so on paper. The result is frequently seriously bad press for India and for South Asian laws generally. However, against this strong tide of globalizing pressure, as Indian law seems to realise, a Grundnorm of equality soon runs into deeply troubling turbulences. Considering that various realities are so manifestly plural, denial of pluralism is probably not a healthy approach. It also almost automatically creates deep problems over racial the supremacy agenda, which in principle (as Dalit activists are always quick to point out) support Brahmin claims to superior status by birth. However, Dalits also make significant distinctions among themselves and, thus, are guilty of the same types of racism and fascism of which they accuse their high-caste opponents. Specifically in India, one finds many types of Hindu nationalism raising their heads, each of them deficient in plurality-consciousness and deliberately denying space for ‘the other’.

Such examples must suffice here to show that diversity management in plural scenarios cannot be simply based on the basic principle of equality, but should still be anchored to equity. It needs to cultivate some form of tolerance of diverse opinions and interpretations, which may need to become much more than reluctant tolerance but explicit recognition of a basic right of ‘the other’ to existence right next door to oneself. The Indian Constitution is evidently deeply aware of such inherent contradictions and conflicts and the Indian courts evidently know this predicament well, but do not always manage to rise above factional politics.

Arguing from the outside, global human rights activists might indeed prefer to see the world through their eyes and may wish to have their value systems applied everywhere. But what if non-Western others—and these are billions of fellow human beings, not a few maverick radicals—do not agree? It is quite evident that regarding Indian developments, the modalities of any pluralist arrangements made or proposed will inevitably cause disagreements because we do not all think alike. The effort of researchers or observers is, therefore, often directed toward influencing the debate along the lines of their preferences and values. This becomes almost inevitable unless one
remains constantly and consciously agnostic. It also becomes extremely difficult to let facts speak for themselves because interpretation of these facts is so closely linked to subjective value judgements and conflicting assessments. An increasingly large question for regional experts like the author is becoming the reason we are so unwilling to listen to the voices of the South on their terms, why we insist that our values and techniques of management should also be applied by others.

That all such scenarios of diversity have the potential to create violence of various kinds is simply an integral part of human life experience. It does not help to dream of conflict-free outcomes; nobody can decree that there should be permanent peace. People, as more or less selfish individuals, often know that renouncing violence would be desirable, but asserting one’s position seems frequently preferable, even if it is recognized as selfish because balance is always something volatile and ambivalent and not asserting oneself may lead to subjugation. Finding balance in such volatile life scenarios is a constant struggle that will evidently never end. Strangely, lawyers, probably because of their rule-focused predilections and positivist brainwashing, constantly need to be reminded that ‘living law’ is always a compromise. Challenges arise wherever we look, provided we can ‘see’ plurality and are not programmed to constantly shut difference out. A not so minor illness called myopia afflicts many Eurocentric and modernist observers when it comes to accepting the perspectives of despicable ‘others’, among whom one often finds Hindus in a prominent place.

The various current national constructs in the South Asian region reflect some possible prominent combinations of uncomfortable coexistence. Most evidently, the split of British India in 1947 into Hindu-dominated India and Muslim-dominated Pakistan did not simply result in ethnically pure, new nation–states without minorities. Rather, this violent rearrangement gave rise to interesting new debates and developments. It also laid foundations for subsequent urgent agenda of managing ethnic, religious, cultural, and legal diversities in the specific political contexts of recently formed nation–states. Such pluralist tensions and the resulting, often troublesome, compromises continue to challenge academic observers who approach the subject from a specific subject-based

37 These are now captured in a richly documented study of Indo-Pakistani debates during the 1950s, Vazira Fazila-Yacoobali Zamindar, The long partition and the making of modern South Asia. Refugees, boundaries, histories (Columbia University Press, New York, 2009).
angle. Human rights enquiries are poor in understanding such diversities ‘on the ground’ and look for quick-fix remedies. To understand and competently assess South Asian minority issues, it is certainly not sufficient to have studied international conventions, human rights law, or specific national legal systems. Rather, deeply anchored interdisciplinary area studies expertise is required, and this is difficult to obtain. However, if we are aware of such limitations, why do we continue to make such big claims about the higher status of our perceptions? Conversely, South Asian specialists of certain local subject matters (including Hindu fundamentalists) often lack understanding of the wider perspective or of interdisciplinary challenges posed to any commentator on minority issues in South Asia. The scope for pitfalls and blockages in pluralist analysis remains enormous. Many severe problems of minority protection have indeed traumatized the region and have created much negative publicity for Hindu-dominated India. But Hindus are also victims in other scenarios, specifically in Bangladesh, in Buddhist-dominated Sri Lanka, and in Islamic Pakistan. In addition, Hindu fundamentalists argue that Hindus have become victimised in India, too.

India’s massive and increasingly sophisticated electorate, however, as recent election results indicate, to the surprise of the outside world, has learned that violent communalism is not a good foundation for a composite nation and that hindutva does not offer a Hindu paradise, but may actually be a recipe for disaster if it impairs development efforts. Such messages are not new and were even in some cases written into national constitutional documents. The Indian Constitution in Article 51-A contains a list of Fundamental Duties that counter communalism and Hindu nationalism. Thus, it is provided that it shall be the duty of every citizen of India:

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India, transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

As indicated, however, the temptation to grab unfair advantages remains strong everywhere. South Asians, as human as other people, are often driven by poverty and

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38 For horrible examples, see a now outdated conference report by Werner Menski and Biswajit Chanda, Cancer of extremism in Bangladesh. SOAS and Bangladesh Conference Steering Committee, London, 2005.
grave deprivations, sometimes justifying the desire to seek instant advantage where it might appear to be available. As world-famous literary products, including Aravind Adiga’s 2008 novel, *The White Tiger*, and the award-winning film *Slumdog Millionaire* illustrate so brilliantly, devious use of cruel and exploitative practices tend to be made by the elite rather than impoverished slum dwellers. In such pieces of rather realistic fiction, poor people appear not only as knowledgeable and thinking individuals, but are also shown in a morally better light because they are often quite dependent on solidarity with the people next door or under the neighbouring plastic sheet. Also in South Asia, then, privileged persons can evidently rely more easily on arguments of individualized autonomy and can then exploit their privileges to achieve further unfair advantages. This is precisely what the Indian Emergency sought to curtail and what the powerful Indian Constitution seeks to prevent when it tells the state as well as privileged individuals to become more concerned about public interest rather than private gain or enjoyment of political power. Nevertheless, justice, as Derrida famously said, is always “à venir”, “in the making”.

V. THE DIFFICULTY OF ASSESSING THE “OTHER”

For outsiders, it is immensely difficult to make sensible assessments, and there are massive corruptions of the entire system, with much justification for being deeply critical. So how do we assess issues such as Hindu fascism in their wider context? Is growing violence on Indian streets and rising evidence of simple road rage ominous indicators of overcrowding, reflections of human rights violations created by scarcities making the tensions of day-to-day survival explode into violent protest? Or can we blame local cultures and particular religious traditions for the human-rights violations that occur in South Asian societies, often allegedly in the name of culture and religion? Is the suggested abolition of such inbuilt elements realistic, especially if we do not really know what they would be replaced with and particularly if we cannot imagine conceptually neutral voids in the sites of ‘religion’, ‘tradition’, and ‘culture’? Grave misunderstandings continue, whereas whole branches of knowledge are marred by ‘convenient’ interpretations that defy rationality but rely on just that concept to argue that ‘the other’ is deficient in human rights credibility. Whose values, whose rationality, whose credibility
are we actually concerned with? How do we rank competing expectations, how do we make choices in the various pluralist fields of life?

South Asia as a region has always been full of contradictions and surprises. It has had to address such tricky questions for millennia and has always been the home of a number of coexisting cultures, whether we imagine them as historical layers or as conceptually interlinked elements of a triangular shape. Unsurprisingly, South Asia remains one of the most complex areas of the world to research because there are so many different states and societies and so many historical records in difficult languages or in the minds of the people. Because development has been fast rather than stagnant, although it may not look like this from the outside, even researchers who are conscious of the need to be up-to-speed face enormous challenges in catching up with the complexities of lived realities.

Hindutva as a slogan became a tool of governance in India and an electoral device that continues to capture quite a few votes, although clearly not enough to rule the nation. It also created prominent hate figures such as Gujarat’s Chief Minister Narendra Modi, whose continued popularity confounds many analyses. The Muslim terrorist attacks on Mumbai on 26 November 2008 and later acts of terrorism created by Muslims clearly drip-feed those who wish to cultivate Hindutva agenda and continue to motivate them to argue that India should be a land for Hindus only. However, as indicated, how much of such hate mongering has to do with ‘religion’, and what else is there to consider?

The author witnessed some episodes of the anti-Muslim pogroms in Gujarat in 2002 and saw that it was not that different in impact for the terrified and hounded victims than the violent clashes a few years earlier in Bangalore between Hindus of different communities, namely Tamils and Kannadigas. Although these observations certainly do not justify the anti-Muslim massacres in Gujarat, more rigid interrogation of why such forms of violence arose—and are bound to recur unless Indians learn to live with each other and respect each other’s basic rights—cannot single out ‘religion’ or any particular

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39 On a model of law as a triangular image, composed of natural law (corner 1), social norms (corner 2) and state-centric positive law (corner 3), see Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge, 2006), 612. More recently, this model has been modified into a kite-shaped structure by including ‘new natural law’ in corner 4, namely international law, human rights norms, and globalizing pressures.
religion as the sole or even the main factor. In the case of serious bloodshed in Bangalore, what made people kill each other was the burning issue of the sharing of water resources, clearly a matter of scarce resources rather than religious or ‘otherness’. In the case of the anti-Muslim ‘pogroms’ of Gujarat in 2002, in which both communities resorted to killing, scarce resources were less of an issue than matters of religious identity.

Hindu (over)reactions to Muslim attempts at religiously motivated stronger assertions of their presence in India may have triggered the wanton violence witnessed in Gujarat in 2002. This does not justify such explosions of violence and the killings that occurred. However, if one seeks to explore in depth what actually happened in 2002 and why, the fact of increasingly aggressive Muslim positioning in India cannot be overlooked. In other words, a pluralist structure such as the Indian state will in certain moments of crisis find that it needs to protect its pluralism against fundamentalist aggressions. At such moments of crisis, the state and its machinery then deliberately fail to protect the aggressive ‘other’, teaching this ‘other’ a rather cruel lesson, only to incorporate the survivors of such violence into the post-conflict scenario.

Hence, in places like Baroda today, which the author knows well, there is a less aggressive positioning of the Muslim minority now than a few years ago. One still hears loud calls for Muslim prayer in the morning that will upset many Hindu fundamentalists and create an impression that one may have woken up in Pakistan. However, notably, more efforts are being made today by almost all parties to fit oneself into a deeply plural, indeed composite, Indian structure. Although that structure is dominated, in most localities, by a local Hindu majority, that majority itself, on closer inspection, is deeply divided along various communitarian lines, more specifically between ‘caste’ Hindus and various Dalit and tribal communities. Among the many Muslims of Gujarat, the silent majority displays a wish to fit in with India’s composite presence and does not assert outwardly Islamic or even Middle Eastern patterns of identity. If one does that, one is indeed allowed to carry on business and continue life in a plural set-up. There are important lessons here about coexistence in a religiously plural and culturally hybrid scenario that we in Europe have failed to acknowledge. Seeing only one dimension of a complex picture, in terms of highlighting Hindu fascism and anti-Muslim pogroms, one fails to understand that secular coexistence requires compromises and a solid dose of
altruism from all participants. Where such coexistence temporarily fails, a one-sided diagnosis of fascism does not get to the bottom of the underlying problems and, worse, fails to develop mechanisms to assist in future protection of human rights. Before we sit in judgment on how Indians govern their hugely complex country and how they handle the stresses of religious and other pluralities, broadly speaking with remarkable success, we should be cautious to watch our treatment of ethnic minorities in Europe. In legal practice, the author continues to see totally unacceptable methods of governance at first hand, an experience which has influenced his assessment of European experience—which is not positive. 40 Although European efforts to monitor and understand South Asian minority scenarios are commendable, sitting in judgement from a distance remains a deeply risky endeavour.

VI. THE LATENT RISK OF HINDU FUNDAMENTALISM IN INDIA

So how does one assess the risks that Hindu fundamentalism and fascism pose? We saw that Hindus form a definite demographic majority in India and thus expect to have a say in the running of the country. However, the Indian Constitution itself would not permit the country to slide into a position of becoming a Hindu nation (Hindu rashtra), as many Hindus still dream. Although even a precise definition of ‘Hindu’ is impossible because there are no key dogmas that all Hindus have to accept to be included in this wide category, boundaries have remained fuzzy, giving rise to much debate that bypasses scholars who think about law and religion in black boxes. The author does not believe that there is a real risk that Hindu fundamentalism will one day take over India. The composite nature of the nation is so firmly anchored in so many pluralities that just the religious element is never going to be the sole determinator.

There are other big issues that block Hindu fundamentalism to persuade the nation that it is the right orientation for governing over a billion diverse people. It has often been argued that for the realization of human rights with universal application, the feeling of universal brotherhood is indispensable. Notably, Article 1 of the Universal Declaration of

Human Rights of 1948 declares that “[a]ll human beings are born free and equal in
dignity and rights. They are endowed with reason and conscience and should act towards
one another in a spirit of brotherhood”. This casts an obligation on every individual to
accept others for what they are and to respect diversity. If we look carefully, we see that
the Fundamental Duties of the Indian Constitution as cited earlier identified in paragraph
51-A(e) the element of common brotherhood. This snippet from the Indian Constitution,
then, makes a morally grounded state-sanctioned appeal for abstinence from religious
fundamentalism. However, such legal provisions are not known and appreciated outside
India, even as every Indian child that goes to school is taught about such provisions.
More negative is that Indians and Hindus, in particular, are simply not trusted to be
decent human beings even if one reads such constitutional slogans. Why do we not trust
‘others’ to mean business when they say so with such clarity? It seems we are just too
closely wedded to our old prejudices.

Although African laws are mostly dismissed in human rights debates and may not even
be mentioned, myopic modernists have portrayed Hindu law as a thing of the past and
treat it as an obstacle for human rights protection. Consequently, there is a strong ongoing
demand that Indians and other non-Western people should drop their cultures and
religions to become global citizens. Such demands are still shining through all too
clearly in the tortured language of the most recent writings on global human rights.

This type of approach has now become a huge impediment for the progress of global
human rights debates, because it is not only in South Asia that religion is not merely a
fact of life but remains a critical identity marker, without determining people’s lives to
the exclusion of all other potential inputs. Modernist efforts to deny and discard religions
and to operate rational and antireligiously secular doctrines of human rights in a
conceptual vacuum are not just a sure sign of myopia, they are quite indicative of the
imposition and prevalence of ultimately dangerous forms of secular fundamentalism,
perceived by some observers as another type of fascism. If such arguments leave no

41 See now at least some input from Africa in new writing on global human rights: When legal worlds
overlap. Human rights, State and non-state law. International council on human rights policy, Geneva,
2009.
42 Werner Menski, “Hindu law, human rights jurisprudence and justice in India today”, 1 Indian Journal of
Juridical Sciences (2003), 3.
43 Sate, op.cit. note 27.
space for religious identification among Hindus and other people of Asia and Africa today because one is worried about the kind of religious diktats that medieval Europe suffered from, something has gone wrong in the assessment of current developments in South Asia and specifically in Hinduism as an important world religion.44 Constructed images of ancient Hindu lawgivers are merely skeletons in the cupboards of Orientalist scholars.45 Such devious constructs have indeed infected many Hindu colonial minds over time and may also today motivate more people to wear some kind of orange clothes. They could also lead to fundamentalist excesses because all one needs is some frenzied appeal to save Hinduism or some other supposedly endangered entity from marauding ‘others’, and one gets precisely the destruction of a mosque in Ayodhya in December 1992 or the communal killings of Gujarat in 2002 that left thousands of people, mainly Muslims, dead, maimed, or severely physically and mentally damaged.

Disputes over the destruction of religious buildings and other holy sites clearly have an ancient pedigree all over South Asia. The issue itself generates and feeds lingering apprehensions in the deeply engrained mistrust of the various religious ‘others’ all over South Asia. That does not excuse what happened in Ayodhya or in Gujarat in the recent past but seeks to explain that speaking immediately of Hindu fascism might be too strong and might in fact be counterproductive because it leaves no room for the despicable Hindu ‘other’ to regain acceptability.

Significantly, events since 1992 concerning this particular religious structure in Ayodhya indicate that the Indian state has learned to remain as neutral as possible in such hotly contested circumstances. The mosque was not rebuilt, but neither was a Hindu temple built in the same place. The stalemate scenario, with court cases pending for decades, is not unusual in South Asia when there are deeply contested nationally relevant issues.46

The stalemate scenario may go on for a long time. One sees here that when faced with monstrous threats like Hindu fundamentalism, the Indian legal system may indeed turn a

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44 The same could be said for the various types of Islam and the many African religions.
46 Thus, the Indian Supreme Court took 15 years, between 1986 and the strategic moments of September 2001, to pronounce its decision in the case of Danial Latifi v. Union of India, AIR 2001 SC 3958 and 2001(7) Supreme Court Cases 740, which established that it was acceptable to retain a separate Muslim personal law in India and, thus, put a further nail in the coffin of the much-desired Uniform Civil Code.
blind eye to the various competing positions and simply hope that tempers will cool. The Indian state, probably more than others, is deeply conscious of the limits of law. That particular explanation was, however, far less convincing when there were mass murders in the Gujarat riots of 2002. I remain agnostic about the truth of why this anti-Muslim pogrom started, but was pleased when the Supreme Court reminded Narendra Modi of rājādharma, the Hindu ruler’s duty to rule properly, thus, turning the hindutva rhetoric against a clearly deficient office holder. These are rare pieces of evidence of the Indian higher judiciary shedding its reluctance to address religious issues. Quite apart from religion and hindutva, what became clear is that the state government, the central government and the judiciary have all colluded in not fully addressing the serious legal questions concerning a mass-murder scenario that should have been addressed. This is undoubtedly a huge blot on the human rights record of India. There are other serious blots that need to be addressed, such as the treatment of local Muslims in Kashmir by Indian security forces and the handling of various atrocities against Christians in several parts of India.

The author, however, is not satisfied that it is entirely correct to view such atrocities as a result just of Hindu fundamentalism or Hindu nationalist excesses. Many Hindus express resentment of being blamed as a faith community for the atrocities that were committed. Self-defence is not acceptable in most cases as a convincing argument, but the sense of being victimized in one’s country and being made to feel that certain ‘others’ have better rights than oneself reflects observations made in the aforementioned about intense competitions over resources, space, claims to specific entitlements, or simply aspirations for one’s future that seem to be ruined by too many ‘others’ and a flood of competing claims that never stops.

That this does not justify mass killings is clear. However, it is amazing that days after the atrocities, people of different communities were again engaged in business and other relationships in Gujarat. If the hatred of ‘the other’ is really so strong as to lead to killing that ‘other’ at certain times, but not at others, I fail to see how the blame can just be put on Hindu fundamentalism, let alone on assertions of Hindu identity or Hinduness (hindutva) in its less righticidal meaning. A deficiency in tolerating the presence of the
‘other’ is evident, but does not explain by itself why there are pogroms at certain times, and continued coexistence at others.

Hindus themselves have often argued that religious concepts could be a great vehicle to propagate the idea and the ideals of human rights. However, if so many Hindus then engage in murder of religious ‘others’, such rosy images are ruined. I am also deeply suspicious of the pompous assertions of ancient glory that certain Hindu authors have cultivated so skillfully.47 But I am not prepared to underwrite efforts to deprive Hindus of the fundamental right to their culture and religion just because they are Hindus and classed, evidently by quite a few observers, as inferior human beings. These are deeply racist and offensive efforts that do not befit human rights activists.

VII. SECULARISM AND EQUALITY

India, being a signatory to most major international human rights treaties, has outwardly accepted the triangular global normative model of individuality, equality, and rights as a blueprint for governance. However, this huge nation also skilfully manipulates the coexistence of individual rights and equality with traditional patterns of interlinkedness (such as between husband and wife, even now when it comes to post-divorce maintenance), of equity rather than equality (demonstrated in particular by the continued management and finetuning of protective discrimination policies), and of rights and duties.

As indicated, India has developed a powerful modern Constitution, but one should not simplistically take this as proof that the Indian legal system is just like any other legal system with historical links to common law. Although some laws even today are just copies of earlier common law principles, English law per se was never introduced into British India, which was never a completely colonized territory. Much of Indian law was tailor made for the country and its people, either by the British or by Indian legislatures. It also remains a much-underrated fact that the traditional personal laws of Hindus, Muslims, Christians, Parsis, and Jews (with the exception of the latter) have over the past few decades been gradually harmonized and still govern the most intimate affairs of most

47 Menski, op.cit. note 45.
Indian people’s lives. This does not mean, however, that religious norms are dominant when it comes to Indian family law affairs. Again, we see the methodological error of equating Hindu cultural elements too closely with ‘religion’.

The outward image of the legal system of the nation reveals a modern façade, but the lifeblood of this complex legal system is still to a large extent traditional, culturally grounded, and not necessarily connected to formal legal processes and structures. Nonstate law is hugely important and is not properly researched. Western impact is obvious, but has not wiped out a ‘tradition’ in the broadest sense that may well be almost 4,000 years old if we go back to the deepest roots, which only interdisciplinary Sanskritists may hope to reach.

Recycling relevant elements of the Hindu experience and combining it with today’s logic of human rights, provided the latter are able to accept ‘religion’ as an ingredient in such a mix, may well be a constructive way forward and looks and feels better than mutual accusations of terrorism. Plurality-conscious human reasoning, which is not the prerogative of any one cultural or religious system, does not accept the monopoly over the truth of any one individual, religion, or civilization. If certain people as individuals or members of communities can succeed in identifying their respective normative orders and value systems with the newly formulated but probably ancient values of human rights, it will be possible to carry on constructive conversations about such basic rights.

That said, certain flashpoints are difficult to remove completely through plurality-conscious conversations or negotiations. For example, the core of Hinduism not only provides for equity rather than equality, but also emphasises connectivity and thus equitable alignments of individuals who are seen in Hindu terms as interlinked entities with duties to each other and to the cosmos as a whole. I have already referred to the fact that there continue to be competing interpretations of all major ‘Hindu’ elements in Indian culture. There are different visions of the afterlife and judgement of one’s actions, but the common element appears to be that everyone and everything, not just humans, but all created entities, is invisibly linked to everything else. This is why ancient philosophical texts like the Chandogya Upanishad use the metaphor of salt dissolved in water to describe the relation between some suprahuman entity and individual beings. Hence everybody, even animals, possesses inherent dignity. For that reason, among many
others, so many Hindus are vegetarians. But as one sees, even these vegetarian Hindus may not hesitate to kill ‘others’ in situations of stress. So there are other moral inputs than purely ‘religion’ that define perceptions and boundaries of what is good and what is bad for Hindus, ultimately whether evil—apparently an inevitable part of life, however disagreeable—may be countered even by killing the perpetrator of the perceived evil. Death penalty debates come in here, but also deliberations over one’s duty to the whole cosmos at every moment of one’s life; on one’s own terms and not dictated by some grey-bearded old man. Individual duty and virtual hands-on responsibility for one’s life but also for the whole cosmos is epitomized in that famous episode in the Bhagavadgita when Lord Krishna tells the faint-hearted warrior Arjuna that it is his dharmic duty to kill his relatives. Thus, there are moments in which Hindus may feel a duty to kill to protect what is perceived to be a higher good. Whether one should classify the possibility of such conclusion as evidence of Hindu fascism remains seriously debatable. Although systematic genocide would be impermissible and a criminal offence, Indian authors like to argue that there is no contradiction between notions of equal inherent dignity, such a fundamental element of modern concepts of human rights, and Hindu concepts of microcosmic interlinkedness. The author argues that there is actually an alternative perception in Hindu cultural patterns, another overlapping consensus, namely that all individuals and other beings are actually different and, thus, ultimately we are all equal. It also matters on whose terms and in whose conceptual language we conduct the conversation. If Western human rights discourse bans talk of difference and only allows references to equality, this creates cultural barriers in the path of an open and honest discussion at global level. One mischief suffered by Hinduism as a whole and Hindus as individual participants in debates is that only discriminating material is highlighted when Western observers address contested issues about India. One does not trust the Hindu ‘other’, not even a Western writer on Hindu concepts. Although Rousseau is hailed as a great natural-law thinker, when an Indian specialist expresses the same ideas in different words, he or she is ignored and only discriminatory evidence is highlighted. The reason for such restricted visions of human rights appears to be that in Western post-Enlightenment ideology,
humans are perceived as atomized individuals, isolated from the universe. In Indic traditions, not just in Hinduism, an individual does not have an exclusively separate existence like an atom, isolated from the universe. Although man is the highest creation, an invisible link is believed to exist between all elements of creation in the universe. Although Western human rights discourse seeks to secure rights for individual humans, Indic concepts suggest that order in the cosmic universe can be maintained, and individual rights can be protected, only if every constituent element of this universe contributes its part to that order. This, then, also highlights the preference for thinking about duties rather than rights, and all of this flows into the key concept of dharma. To be faithful to the mandate of human rights, Hindus need not relinquish their religion, merely because of accusations that this is opposite to modern secular notions of equality or of ‘rule of law’. They can work on the basis of equity, provided they leave room for ‘the other’, unless that ‘other’ seeks to destroy the higher order. In that scenario, it appears, killing is systemically justifiable for Hindus.

VIII. CONCLUSION

Precisely under what circumstances one should then be allowed to reach the conclusion that someone deserves to die will remain open for debate. Hindus clearly have culturally specific answers to such troubling questions. Finding the right balance between tolerance of the ‘other’ and self-preservation in any cultural context is surely one of the most difficult predicaments of human life. Thus, to reiterate, nothing can excuse the frenzied wanton killings that have taken place recently in India in the name of protecting Hinduism, the Hindu nation, or anything else Hindus might wish to see preserved under the rubric of ‘cosmic Order’ in the Indian state. However, worldwide evidence of Islamic terrorism, which has hit India particularly hard, demands some well-considered responses, otherwise liberal human rights discourse risks contributing directly to global self-destruction.
It may be asked, finally, whether secularism is a suitable technique to handle such competing challenges.\textsuperscript{48} It clearly depends what we mean by that concept. The blatant denial of the relevance of religion in today’s world is now outdated and, specifically, does not match the cultural realities of non-European parts of the world. India has rather coyly developed a method of handling the conceptual strains and stresses of religious and value pluralism and of social diversity through its well-developed policy of secularism as equidistant connection of the now post-modern state with \textit{all} religions. Although this allows no one religion to dominate the entire field and demands of Hindus, as the majority, to step back from nationalistic claims, the South Asian region as a whole seems to learn gradually that tolerance of pluralism, also when it comes to religion, is a better recipe for national cohesion than complete denial of the existence of various religious and additional ‘others’.

Clearly, not everything that is ‘Hindu’ or ‘Muslim’ is religious; the ancient Vedic people realized this thousands of years ago and, therefore, made terminological distinctions between two types of Truth. Hence, the global phobia about succumbing to religious diktats by taking account of Hindu and other voices in South Asia represents a dangerous obfuscation with ulterior motives that should not be acceptable to a global human rights discourse. By now, we should be able to distinguish what is a properly religious argument, anchored in belief and convictions, and what is a man-made and politicized construct of expectations about how we should treat each other. Not even the Islamic religious system, once we examine the concept of \textit{jihad} carefully, claims that all nonbelievers deserve to die. Hinduism, as is known, is a very different type of religion from monotheistic faiths and has inbuilt safety mechanism that actually try to preclude Hindu fascism. Hindu fascism is, thus, not a religious phenomenon but a dangerous political dagger that must controlled.

Although there is certainly no room for rose-tinted total optimism, there are encouraging signs of growing recognition, in global scholarship as well as local management

\textsuperscript{48} On this concept, see Gerald James Larson (ed.), \textit{Religion and personal law in secular India. A call to judgment} (Indiana University Press, Bloomington and Indianapolis, Illinois, 2001).
techniques in the region of South Asia, that no one perspective can ever prevail to the exclusion of other competing expectations and agendas. Thus, more efforts in finding plurality-conscious compromises and arrangements for coexistence would recommend themselves as a suitable way forward. For South Asians as members of specific communities, that realization clearly requires deep tolerance of ‘others’ as Indian cocitizens. At the same time, various outside ‘others’, international observers, human rights activists, and international lawyers in particular, have to learn to respect that the people of this region actually have millennia of experience in handling diversity and are quite familiar with pluralist coexistence. That selfishness and ‘shark rule’ get the better of people remains a constant risk of human existence anywhere. Simply arguing for global uniformity, seeking to deny and intellectually rubbish the various cultural, religious, political and, in a wider sense, ethnic claims of specific communities in South Asia means depriving the people of this region of crucial elements of their most intimate identity markers. This desire denies them the right to be what they want to be and amounts to violation of their human rights in the name of a supposedly higher global standard.

As outside observers, we cannot expect that our values and presuppositions are necessarily the correct ones. Such neocolonialist approaches are deeply derogatory to the people of South Asia who may not even notice that this is happening to them because they are taught to model themselves on ‘the West’. Such complexities of analysis have to be brought out into the open if one wishes to engage in a globally valid debate on human rights and minority rights in South Asia today. Simply crying wolf over religious or nationalistic fundamentalisms such as Hindu fascism is no longer an adequate strategy to understand this part of the world and its internal complexities.
Indigenous Peoples: An Introduction to the Socio-Legal Framework with a Special Focus on the Declaration on the Rights of Indigenous People and South Asia

“Indigenous peoples are not victims, but critical asset to the diversity of global humanity”.1

At the foundation of human rights lie respect, tolerance, and upholding the dignity of individuals and groups in society. The basic principles of equality and nondiscrimination are applicable to every individual, with recourse through international law under the Universal Declaration of Human Rights.2 To enforce these rights requires commitment from individuals, groups, governments, and the international order. The International Labour Organisation (ILO) Convention (No. 169) and the UN Declaration on the Rights of Indigenous Peoples 20073 reiterate, in Article 3 and 1 respectively, that indigenous individuals have the right to full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the UN, the Universal Declaration of Human Rights and international human rights law.

Indigenous peoples in many areas of the world have suffered from centuries of discrimination and mistreatment. A combination of abhorrent practices has placed indigenous peoples on the periphery of the larger and more powerful societies in which they exist. Furthermore, there has been unwillingness to engage, on an international and domestic level, with collective rights by which indigenous peoples can recognise and assert their equal worth and dignity as a distinct group. Historical neglect has led to the need for distinctive provisions and legal distinctions for indigenous peoples.

2 Preamble to the Universal Declaration of Human Rights (adopted 10 December 1948).
The recognition of indigenous peoples as distinct groups has led to a separate body of international laws and norms, which have become operational over the last three decades. The rights of indigenous peoples have risen sharply to the forefront of international attention, culminating in the adoption of the Declaration on the Rights of Indigenous Peoples in September 2007, and at the same time establishing a framework for strengthened engagement on indigenous people’s issues. Related developments include the ILO Convention (No. 169) on Indigenous and Tribal Peoples (1989). The promotion of this convention is now a thematic priority of the European Initiative on the Declaration of Human Rights, the 2005 Heads of State World Summit with a reiteration on the Millennium Development Goals and the Advancement of indigenous peoples rights, the beginning of the second decade of the Worlds Indigenous Peoples, and most important, the Declaration on the Rights of Indigenous Peoples.

Difficulties arise in the application of collective rights when defining what ‘indigenous’ is and who is included among indigenous peoples. Certain states, especially in Asia, refuse to accept that indigenous peoples exist in their borders, citing imported European populations as a necessity. In this chapter, the authors rebuff this misconception, using examples of a number of indigenous peoples of South Asia and the application of international human rights law.

This chapter is divided into four main sections. Section I addresses the complex issue of defining indigenous peoples, section II addresses recent developments in International Law to promote and protect the rights of indigenous peoples. Section III addresses the recent Declaration on the Rights of Indigenous Peoples and analyzes the extent to which the rights of indigenous peoples can now be understood as international customary law, and section IV provides conclusions.

I. DEFINITIONAL ISSUES IN THE CONTEXT OF SOUTH ASIA

‘Indigenous’ is a relative concept that relates strongly to the land. To this end, colonization from Western imperialists and non-Western colonizers has played a huge part in determining the path that the rights of indigenous peoples have taken. Within the context of South Asia, the term ‘indigenous’ is perhaps the most difficult to

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define, not least of which because of its relative nature of application to the relevant
groups and communities. For example, the Veddas of Sri Lanka and the Adivasis of
India and Bangladesh were colonized well before the European imperialist powers
created the Commonwealth. A similar situation arises in the case of Sindhis, Baluchis
or Pakhtuns of modern day Pakistan and Afghanistan. Colonization led to the
destruction of many indigenous peoples whereas, the survivors were conquered or
subjugated. Furthermore, notwithstanding the independence movement in South Asia,
a more “intimate, local and knowing oppression” drawing on the establishment of
post-colonial world order, principles of territorial integrity, and state sovereignty has
developed. Thus, the relativity and slipperiness in the conception of ‘indigenous’ in
the South Asian context meant that in the transformation of the colonial world to a
world of new nation-states, the term ‘indigenous’ was equated with those wanting
independence from Western imperialists or as one author has appropriately written,
was based on “pigmentational” or “racial” sovereignty. In the march toward
independence from European colonization, rights of indigenous peoples were
overlooked. In contemporary terms, the states of South Asia have maintained that the
concept of ‘indigenous’ cannot be applied to their populations. The official argument
is that all peoples in their territorial boundaries are indigenous and, therefore, no
distinctions could, on indigenousness, be maintained. Instead, as the authors will
examine, partial recognition has been accorded through the concepts of ‘tribal areas’. The nonratification of the ILO Convention (No. 169; 1989) concerning Indigenous
and Tribal Peoples in Independent Countries by Afghanistan, Pakistan, India, or
Bangladesh has been based on the argument of its inapplicability of the provisions to

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K. Roy Burman and B. G. Verghese (eds.), Aspiring to be: The Tribal, Indigenous Condition (Konark
Publishers, Delhi, 1998), 72-121.
6 Patrick Thornberry, “Self determination, Minorities and Human Rights: A Review of International
Instruments”, 38 ICLQ (1989), 867-889.
7 Ali Mazrui, “Consent, Colonisation and Sovereignty”, 11 Political Studies (1963), 36; Mikla
Pomerance, Self-Determination in Law and Practice: The New Doctrine at the United Nations
(Martinus Nijhoff, The Hague, 1982), 15-16; Andres Rigo-Sureda, The Evolution of the Right to Self-
Determination (Sijthoff, Leiden, 1973), at 237.
8 According to Barsh, a leading authority on the subject, “Bangladesh, Indonesia, the former Soviet
China and India have maintained that there are no ‘indigenous’ peoples in Asia, only minorities”
epitomising the former Soviet Ambassador Sofinsky’s view before the Sub-Commission in 1985 that
“indigenous situations only arise in the Americas and Australasia where there are imported
populations” of Europeans. Barsh, op.cit. note 4, 375; see also Barsh, “United Nations Seminar on
the populations of these states. These assumptions were also prevalent during the drafting stages of the UN Declaration on the Rights of Indigenous Peoples. This also explains why, at the adoption of the draft Declaration by the Human Rights Council on 29 June 2006, Pakistan, a member of the Council, voted in favour of the declaration. Indeed, all South Asian states, save for Bangladesh, voted in the United General Assembly for the adoption of the Declaration on 13 September 2007.

Adding to the difficulty of identifying a holistic definition of indigenous peoples is the need to identify and treat indigenous people as distinct from minorities. Indigenous peoples occupy the position of minorities, and many of their demands coincide with those of minorities, epitomizing a minority syndrome. International standards regarding minorities are based on equality, nondiscrimination, and protection of the right to enjoy one’s culture. These standards encourage an integrative approach toward the society in which the minorities live. However, there remains a pronounced view, codified in the recent Declaration on the Rights of Indigenous Peoples that indigenous peoples belong to a distinct category, whereby distinct rights are conferred on them collectively. Eide, although agreeing with this position, argued that “there is no disagreement that rights of persons belonging to

10 72 ILO Bulletin 59 (1989); 28 ILM 1382; cf. Article 1(3).
11 Mr Ajai Malhotra from India wrote, “in an explanation of the vote before the vote [in the Human Rights Council] said India had consistently favoured the rights of indigenous peoples, and had worked for the Declaration on the Rights of Indigenous Peoples. The text before the Council was the result of 11 years of hard work. The text did not contain a definition of ‘indigenous’. The entire population of India was considered to be indigenous. With regards to the right to self-determination, this was understood to apply only to peoples under foreign domination, and not to a nation of indigenous persons. With this understanding, India was ready to support the proposal for the adoption of the draft Declaration, and would vote in its favour”. Mr Ajai Malhotra, “http://<www.ifg.org/pdf/UN%20human%20rights.pdf>.
12 Bilal Hayee, the representative from Pakistan noted that “his country had voted in favour of the Declaration both in the Human Rights Council and in the Assembly. Although the Declaration did not define indigenous peoples, he hoped that its adoption would fulfill the aims of the International Decade for the rights of Indigenous Peoples and enable them to maintain their cultural identity, with full respect for their values and traditions”. Whereas, Mr Ajai Malhotra said “while the Declaration did not define what constituted indigenous peoples, the issue of indigenous rights pertained to peoples in independent countries who were regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region which the country belonged, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retained some or all of their socio-economic, cultural and political institutions”. Bilal Hayee and Mr Ajai Malhotra, “General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ towards Human Rights for all Says President” 107th and 108th UN General Assembly Meetings, September 2007, 13, at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.
13 Rehman, op.cit. note 5, 80-84.
15 See Declaration on the Rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues.
minorities are individual rights, even if most cases can only be enjoyed in community with others. The rights of peoples, on the other hand, are collective”. The emphasis in the earlier UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) is effective participation in the society of which the minority is a part; indigenous rights seek autonomous decision-making. Indigenous peoples’ participation in wider society is secondary to the primary right to determine the ways and means in which the group participate, including legislative and administrative procedures. Indigenous rights, to a large extent, aim at consolidating and strengthening the separateness of these peoples from other groups in society. Conversely, minority rights are formulated as the rights of individuals to preserve and develop their separate group identity in the process of integration. International instruments relating to minorities implicitly rule out the entitlement of self-determination to minorities differentiating them in a fundamental respect from the rights of peoples. What further separates minority rights from indigenous rights is that instruments concerning indigenous rights, as well as relevant international customary law, often refer to indigenous rights as rights of the people as such. The instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development.

The UN, in its 2008 Development Group Guidelines on Indigenous Peoples Issues, makes the point that “the prevailing view today is that no formal definition [of Indigenous Peoples] is necessary for the recognition and protection of their rights”. It goes on to note that “this [lack of definition] should in no way constitute an obstacle […] in addressing the substantial issues affecting Indigenous Peoples”.

As one of the four members voting against the Declaration on the Rights of Indigenous Peoples, the United States stated that the failure of the Declaration on the Rights of Indigenous Peoples to define ‘Indigenous Peoples’ is “dehabilitating to the

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17 See Art. 4 “indigenous peoples, in exercising their right to self determination, have the right to autonomy or self government in matter relating to their internal and local affairs”, and Art. 18 “indigenous peoples have the right to participate in decision-making in matters which would affect their rights […] as well as to maintain and develop their own indigenous decision-making institutions”. Declaration on the Rights of Indigenous Peoples A/61/L.67.
effective application and implementation of the Declaration” and will “subject [the declaration] to endless debate especially if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration”. 21 Interestingly, there was an implicit recognition that indigenous peoples have a status to enjoy the rights and benefits contained in the declaration. As noted in the aforementioned, Bangladesh abstained from voting, citing the lack of an explicit definition of indigenous peoples. Others favoured the flexibility that a noncodified definition retained according to the facts, law, and history of each case. 22 According to Anaya, the undefined ‘indigenous peoples’ is accepted throughout numerous international instruments and in international decision-making. 23 This codifies the rights accorded to indigenous peoples; herein lies the problem of to who to accord the [legal] status of a specific and beneficial body of rights. Martinez Cobo, who carried out a study on the problem of discrimination against indigenous populations, has put forward perhaps the most widely agreed on definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. 24


22 As concluded in a report by the African Commission on Human Rights and People’s Rights and the International Work Group for International Affairs, Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (Eks/Skolens Trykkeri, Copenhagen, Denmark, 2005), 87 “there is no global consensus about a single final definition […] A strict definition of indigenous peoples is neither necessary nor desirable”.


The Working Group on Indigenous Populations’ working paper on the concept of ‘indigenous people’ additionally lists the following factors that have been considered relevant to the understanding of the concept of ‘indigenous’ by international organizations and legal experts:

- Priority in time, with respect to the occupation and use of a specific territory;
- The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.25

The crucial feature in determining to whom the status of indigenous peoples applies is self-identification as indigenous or tribal. Other attempts to elaborate on the concept of indigenous peoples are set down in Article 33 of the UN Declaration on the Rights of indigenous peoples and in the ILO’s Indigenous and Tribal Peoples Convention 1989 (No. 169) which refers to the rights of indigenous peoples to decide their identities and procedures of belonging.26 Thus, according to Article 1(1) of the ILO Convention (No. 169), the Convention applies to:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of natural community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1(2) also noted: that “self-identification as individual or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply”.

There has been an ongoing debate in South Asia as to whether the term ‘indigenous’ can be used to describe tribal populations, and consequently, what reach the Declaration has in this region. India has consistently favoured the use of the word ‘tribal’ to describe a variant of its indigenous peoples; the term ‘indigenous’ is not used in the constitution. India has been anxious to gain support for its position that it has no ‘indigenous’ people; rather, that the entire population of India is considered to be indigenous. A specific preambular paragraph has been added to the UN Declaration, acknowledging that “the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration”. A broad interpretation of this paragraph allows scheduled tribes in India to qualify as indigenous peoples because they are culturally different from mainstream Indian society as a result of being internally colonized and dominated.

Alpa Shah argued that the term ‘indigenous peoples’ has become an important tool for empowerment for tribal and Adivasi peoples because, according to research carried out by Ghosh, India has the second largest indigenous population in the world. Crispin Bates, conversely, proposed that the term ‘Adivasi’ is a colonial invention and that we need to admit in one sense that all Indians are Adivasis. He argued that complex migration patterns in India mean it is impossible to establish who the original settlers in a particular region were, unlike in the United States or Canada, for example.

To address this anomaly in the application of indigenous in India, *The Indigenous Rights in the Commonwealth Project*, initiated by the Commonwealth Policy Studies.

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27 Ibid.


Unit has used the following criteria to differentiate between indigenous and nonindigenous people in South Asia:

1. Prior origin in a territory,
2. Subjugation by external political structures such as the nation-states,
3. Cultural distinctiveness from majority population, including a special relationship based on cultural mores, with their lands,
4. Self-definition as indigenous or ‘first peoples’.

This definition has allowed for the identification of over 85 million members of the Adivasi population in India, subsequently making it the largest component of indigenous peoples in the Commonwealth project. The Declaration would allow for a homogenization of the way that rights concerning indigenous peoples are applied by states and standardize application under international standard settings. Moreover, all signatories to the Declaration agreed to respect the ‘spirit of the declaration, leading to customary practice and *jus cogens*’.

II. THE ROLE OF DOMESTIC AND INTERNATIONAL LAW IN PROMOTING AND PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES

International law requires that indigenous peoples have rights that are equal to nonindigenous individuals as a peremptory norm of international law. This includes the right not to be discriminated against on the basis of race or colour. 31 As a result, states must implicitly and explicitly pursue a policy of nondiscrimination, even if they are nonsignatories to specific instruments.

In the International Community, many indigenous peoples are granted constitutional recognition or are the object of special laws in their states. In South Asia, the Constitution of India legislates regarding ‘scheduled tribes’, which provides for affirmative action, the protection of tribal customary law, 32 and land regulation, to

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32 An important provision the Indian government agreed to during the negotiations for statehood was that customary law would hold precedence in the settlement of disputes in Nagaland. The Constitution (Thirty-first Amendment Act, 1962 C2 2d) Acts of Parliament shall not apply to Nagaland unless so decided by the Nagaland Legislature with regard to:
1. religious or social practices of the Nagas;
name a few. The 5th and 6th Amendments to the Constitution have granted further autonomy to the scheduled tribes, whereas recent Acts, such as the Forest Rights Act which, in theory, protects tribal lands. In 2002, Nepal passed the National Foundation for the Development of Indigenous Nationalities Act and indigenous peoples are recognized in the 2006 interim Constitution. The Constitution of Pakistan recognizes federally and provincially administered tribal areas, and involves tribal authorities in decision-making in these areas, although these rights are suspended under a ‘State of Emergency’ for frequent and prolonged periods of time. Despite these domestic provisions for the protection of indigenous peoples, the Minority Rights Group International has placed the Pashtuns, Sindhis and the Baluchis of Pakistan, the Nagas and other adivasis of India and the Chittagong Hill Tribes of Bangladesh on its “Peoples under Threat” 2008 list.

Although not conclusive, this list is useful in assessing the extent to which the situation of indigenous peoples has been addressed during a yearly period.

The Committee on the Convention on the Elimination of Racial Discrimination in its state report on India (2007) highlighted India’s ongoing failure to protect indigenous peoples. The concluding observations of the Committee noted that despite passing a rehabilitation and resettlement bill (the Forest Rights Act) and the Supreme Court order to close the Andaman trunk road, these efforts are ignored or there are grave failures to implement them. India’s constitutional provisions also include equality before the law (Article 14), equality of opportunity (Article 16) protection from all forms of exploitation (Article 46) and extension of 73rd and 74th amendments of the constitution (Act 1996) to ensure effective participation in the process of planning and decision-making. As the Committee on the Convention on the Elimination of Racial Discrimination, as well as other human rights bodies have pointed out, the human rights dimensions of the development process has often been sidelined because they do not fit well with prevailing conceptions of development.

Land rights, although too extensive to discuss in depth in this chapter, form the basis of many grievances of indigenous peoples worldwide. Provisions concerning tribal lands are heavily reiterated in the Declaration on the Rights of Indigenous Peoples.

2. Naga customary law and procedure;
3. administration of civil and criminal justice involving decisions according to Naga customary law;
33 The full list can be found at <http://www.minorityrights.org/?lid=464>.
34 India, 05/05/2007, CERD/C/IND/CO/19, at paras. 19-26.
Article 8(1a) refers to the right to prevention by the state and restitution for “any action which has the aim or effect of dispossessing them of their lands”. The language, aim or effect, interestingly leaves open this violation to be interpreted in line with peremptory norms. It enables those deprived of their land intentionally or unintentionally a wide remit with which to develop a broad jurisprudence of customary law in the international courts. Domestic practice encourages redress of the balance toward indigenous peoples land rights with India’s Supreme Court declaring that the transfer of land in scheduled areas for private mining was null and void. Section 3(1)(a) states: “Any transfer of immovable property situated in the Agency tracts by a person, whether or not such person is a member of a Scheduled Tribe, shall be absolutely null and void, unless such transfer is made in favour of a person who is a member of a Scheduled Tribe or Society”.

According to the 2001 census, 8.43% of India’s population are in scheduled tribes. India relies on the state apparatus to determine to whom the label scheduled tribe is applicable. This fragments and undermines the authority of the Scheduled Tribes Acts. The noninclusion of tribes in different states leads to external and internal conflict. This is seen on a large scale in the Baluchistan and Pakhtun regions of Pakistan and is in direct contravention of Article 36 of the Declaration on the Rights of indigenous peoples, which states that “[i]ndigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders”. The case of Baluchis and Pakhtuns also provides an unfortunate example of cross-border separation and consequent violation of Article 36. Throughout their history, the Pakhtuns and the Baluchis have been arbitrarily divided, a division confirmed by the Durrand line of 1893 by the British colonizers. After the independence of British India, the historical frontiers drawn by the Durrand line (1893) were maintained, thereby splitting the Afghani Pakhtuns from the Pakistani

37 For example, the Genocide Convention Opened for signature 9 December 1948, 78 UNTS 277 (entered in force 12 January 1951; ‘Genocide Convention’). Specifies certain acts that fall in the definition of ‘genocide’, including the act of ‘[d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part’.
Pakhtuns and the Pakistani Baluchis from the Afghani and Iranian Baluchis. This separation and control of borders has been maintained during the last 62 years since the independence. The only exception to this strict border control has been during the tumultuous period of the Soviet invasion of Afghanistan when, with official United States and Pakistan permission, the international border ceased to exist—the tribal belt became the mainline for the supply of ammunition supporting the Afghani *Jihad* and for the flow of refugees into the tribal areas. Millions of Afghans who poured into Pakistan have remained there ever since.

This provision impacts the integrity of the region and the state, upholding the Declaration on the Rights of Indigenous Peoples and indigenous peoples rights to “maintain and develop activities for spiritual, economic, political and social purposes” conditions need to be favourable to provide a homogenous collective right to enjoyment of Article 38 for all tribal peoples, regardless of international boundary. Border disputes, insurgency, and revolt in neighbouring states and the principles of territorial integrity and self-determination all make the practical implementation of this right extremely difficult.

The promotion of the ILO Convention (No. 169) on Indigenous and Tribal Peoples 1989 is now a thematic priority of the European Initiative on the Declaration of Human Rights. The ILO Convention (No. 107), although now seen broadly as integrationist, is a useful tool for reiterating in Articles 23 and 26 the right to read and write in the mother tongue.

The Convention on Biodiversity in its preamble referred to “the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind”. Article 16 and Articles 8(j) and 18.4 specifically provide for national and international legislative, administrative, and policy measures to protect technologies, which must be interpreted to include “indigenous and traditional technologies”. Article 7 guarantees the right of indigenous peoples to decide their development priorities and to control their economic, social, and cultural development; Article 13(1) states that governments “shall respect the special importance of the cultures and spiritual values of the peoples concerned, of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this

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relationship”. The recognition of collective rights is a critical aspect of the convention when assessing its relevance to indigenous peoples, likewise is the respect accorded to the spiritual values that often incorporate aspects of the natural environment and tribal lands.

Although International human rights provisions—as they stand—do not provide binding norms governing resettlement and restitution, there does exist a number of basic principles. The Committee on Economic, Social and Cultural Rights requires procedural guarantees from the governments, including provision for genuine consultation with the project-affected people, adequate notice to all affected persons prior to the date of eviction, and the provision of legal remedies and legal aid where applicable. At the twenty-second session of the Working Group on Indigenous Populations, the concept of free, prior, and informed consent (FPIC) was advanced. This concept recognizes the rights of indigenous peoples and directly relates to development projects and to forced eviction from lands. FPIC was considered thus:

“Free, prior and informed consent recognizes indigenous peoples’ inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent”.41

FPIC is an internationally guaranteed human right of indigenous peoples. In the context of resettlement of indigenous peoples, there is strong evidence that the right has attained the status of customary international law. As early as 1984, for instance, the Inter-American Commission on Human Rights stated that the ‘preponderant doctrine’ holds that the principle of consent is of general application to cases involving relocation of indigenous peoples.42

Observing that indigenous peoples “have lost their land and resources to colonists, commercial companies and State enterprises”, the Committee on the Elimination of Racial Discrimination called on states parties to “ensure that members of Indigenous Peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their


III. THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The recent adoption of the Declaration on the Rights of Indigenous Peoples has been seen by many commentators as a triumph for indigenous peoples’ rights worldwide. In this section, the authors address the events leading up to the adoption of the Declaration and evaluate to what extent the Declaration can be used in conjunction with existing international case law, custom, and practice.

The process leading to the adoption of the Declaration on the Rights of Indigenous Peoples spanned a 23-year period and corresponds with the emergence and expansion of the international indigenous peoples’ movement as a global movement focusing on the UN system.\footnote{Paul Oldham and Miriam Frank, “We the Peoples”, 24 Anthropology Today (2008), 4-5.} This movement began in the 1970s and accelerated during the 1980s. As a result of large-scale projects during this time investigating the widespread discrimination of indigenous peoples, the UN established a Working Group on Indigenous Populations in 1982. The mandate of the Working Group included the development of standard-setting instruments that led to the first draft of the Declaration in 1994. The Declaration is crucial in enabling a coherent approach to indigenous rights, shifting the body of indigenous rights into the legal and normative international order. It brings together preexisting rights relevant to indigenous peoples into one coherent document. According to the Office of the High Commissioner for Human Rights it also:
[c]atalogues the kinds of violations that have historically plagued and, sadly, continue to plague Indigenous Peoples around the world. In particular, there are attacks upon their culture, their land, their identity, and their own voice. The Declaration has remarkable detail on issues like “cross-border” relations and discrimination suffered by indigenous groups. In short the Declaration lays out the minimum standards for the ‘survival, dignity and well being of Indigenous Peoples.’

The Declaration is constructed from a number of sources including the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, the Genocide Convention, the ILO Convention (No. 169) and other human rights treaties. The key feature of the Declaration is that the collective rights enshrined in the Declaration apply to indigenous peoples as peoples under international law, rather than as mere ‘populations’. The question of whether a specific regime for indigenous peoples is necessary is central to the debate about the Declaration on the Rights of Indigenous Peoples. On one hand, it can be argued that a specific regime is not necessary due to the rights enshrined in general human rights law, whereas on the other hand, it can be argued that due to the unique collective rights that indigenous peoples have, a specific regime is absolutely necessary to allow full realization of the rights subsumed in international human rights law. Synthesising these individual and collective rights between the state and the indigenous peoples is the primary aim of the Declaration and indeed of indigenous peoples worldwide.

The Declaration is intended to serve “as a standard of achievement to be pursued in a spirit of partnership and mutual respect” between states and indigenous peoples,

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48 Also see Andre Beteille, “The Indian heritage—A sociological perspective”, in D. Balasubramian and N Rao Appaji (eds.), The Human Heritage (University Press, Hyderabad, 1998), 87–94. This is an important differentiation when closely examining the right to self-determination under international law.


50 See Declaration on the Rights of Indigenous Peoples, Preamble “indigenous individuals are entitled without discrimination to all human rights recognised within international law, and that Indigenous Peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples”.

providing “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”. The Preamble, like the International Covenant on Economic Social and Cultural Rights (ICESCR) Article 10, refers to moral culpability, homogenizing the universal reach and scope of the Declaration as an international tool for the promotion of indigenous peoples rights. Moreover, the Committee on the Elimination of All Forms of Racial Discrimination (1965) has reiterated that states should use the Declaration “as a guide to interpret [their] obligations under the Convention relating to indigenous peoples”. The problem, as has been noted in India, is that constitutional provisions are subject to amendments and changes, such as the 5th and 6th Constitutional Provisions. Although the Declaration is not a legally binding instrument it is, according to Oldham and Frank “in some respects declaratory of customary international law”. The Declaration is already being invoked as international customary law in domestic courts. For example, in the recent landmark decision in the Belize Supreme Court, the Court concluded that “this Declaration, embodying as it does, general principles of international law relating to Indigenous Peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it”. Bolivia has also implemented the Declaration in its domestic legislation ensuring that the provisions are provided positive legal effect.

Indigenous peoples rights can constitute as sui generis category of rights, according to Berman, “aris[ing] sui generis from the historical condition of Indigenous Peoples as distinctive societies with the aspiration to survive as such”. Authoritative working definitions provide a basis on which to identify the sui generis nature of indigenous peoples in the international order. Recent case law, including the Awas Tingni

51 Declaration on the Rights of Indigenous Peoples para. 24: Art. 43.
52 United States, 02/2008, CERD/C/USA/CO/6, at para. 29.
53 Oldham and Frank, op. cit. note 45, 5-6.
54 Cal (on behalf of the Maya Village of Santa Cruz) and Others & Coy (on behalf of the Maya Village of Conejo) and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment Claims Nos. 171 and 172 of 2007, Supreme Court of Belize, Judgment of 18 October 2007, unreported.
57 Kirby definition (p. 279 of the Report), which was used by the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, 27–30 November 1989. According to the Kirby definition, a people is: “1. a group of individual human beings who enjoy some or all of the following common features: a. a common historical tradition; b. racial or ethnic identity; c. cultural homogeneity; d. linguistic unity; e. religious or ideological affinity; f.
case,\textsuperscript{58} the Saramaka People case,\textsuperscript{59} and the Maya Village case\textsuperscript{60} significantly support the development and the implementation of a specific legal approach to indigenous peoples rights. In the Maya Village case, the court noted that Belize was party to treaties which have consistently upheld the rights of indigenous peoples over their lands and resources, including the International Covenant on Civil and Political Rights (ICCPR), Conventions on the Elimination of Racial Discrimination (CERD), and the Organisation of American States (OAS). This case on behalf of the Maya Village of Santa Cruz in Belize was a resounding success for the Declaration on the Rights of Indigenous Peoples. The Supreme Court noted throughout that Belize is obligated not only by the Belize Constitution but also by international treaty and customary international law to recognize, respect, and protect Maya customary land rights. The presiding Judge, Chief Justice Conteh set it out thus:

I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to Indigenous Peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it.\textsuperscript{61}

In their judgement, paragraph 120, the Supreme Court noted that Belize was party to such treaties which have consistently upheld the rights of indigenous peoples over their lands and resources. Accordingly, the court concluded that Belize is “bound, in both domestic law in virtue of the Constitutional provisions that have been canvassed in this case, and international law, arising from Belize's obligation there under, to respect the rights to and interests of the claimants as members of the indigenous Maya community, to their lands and resources which are the subject of this case”.\textsuperscript{62}

\textsuperscript{58} The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of 31 August 2001 IACHR, (Set C) No. 79 (2001), para. 148.


\textsuperscript{60} Cal (on behalf of the Maya Village of Santa Cruz) and Others & Coy (on behalf of the Maya Village of Conejo) and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment Claims Nos. 171 and 172 of 2007, Supreme Court of Belize, Judgment of 18 October 2007, unreported.

\textsuperscript{61} Ibid.

\textsuperscript{62} Ibid.
Moreover, the judgement interpreted the Declaration on the Rights of Indigenous Peoples as containing principles of general international law, despite General Assembly Resolutions not ordinarily binding member states\(^{63}\) while concluding that Article 46 of the Declaration “requires that its provisions shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”.

It certainly can be argued that international standard setting found in the Declaration provides the requisite opino juris to be recognised as customary international law. It was affirmed by seven of the South Asian states, with only Bangladesh abstaining. It does not seek to promote new rights; rather unites and strengthens the current provisions for indigenous peoples. Although the Declaration, by its nature, does not bind South Asian states, it serves as an important political tool for the development of indigenous peoples rights in the region. The Association of Southeast Asian Nations (ASEAN) has adopted the terms of reference for a new ASEAN Intergovernmental Commission for Human Rights (AICHR).\(^{64}\) Although no specific reference is made to the UN Declaration, the guiding principles for the AICHR include “upholding the Charter of the United Nations and international law […] subscribed to by ASEAN Member States”. Thus, as part of international law, the Declaration appears to be included. As proposed by the UN Permanent Forum on Indigenous Issues, there should be explicit consideration of the Declaration, indigenous peoples, and their human rights issues.\(^{65}\) Furthermore, the Declaration on the Rights of indigenous peoples “aspirational contents would be relied on in setting standards by which States

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\(^{63}\) Art. 132, “But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them”. Cal (on behalf of the Maya Village of Santa Cruz) and Others & Coy (on behalf of the Maya Village of Conejo) and Others v. Attorney-General of Belize and Minister of Natural Resources and Environment Claims Nos. 171 and 172 of 2007, Supreme Court of Belize, Judgment of 18 October 2007, unreported.


would be judged in their relations with indigenous peoples”\(^{66}\) which can theoretically bind those who abstained or rejected the Declaration. “Individual component prescriptions of [Declaration on the Rights of Indigenous Peoples]”, as Anaya and Wiessner wrote, “might have to become binding if they can be categorized as reflective or generative of customary international law”.\(^{67}\) *Opinio juris* as a means of establishing customary international law regarding these components has been demonstrated by all four states that rejected the Declaration on the Rights of Indigenous Peoples.

### A. Self-Determination

Self-determination and territorial integrity are principles on which the international order is based. Autonomy is a concept that is becoming increasingly useful as an emerging right of indigenous peoples, enabling a progressive approach to internal self-determination which is not inconsistent with state sovereignty or territorial integrity.\(^ {68}\) The United Kingdom, along with Sweden, understood Article 2 of the Declaration on the Rights of Indigenous Peoples as promoting the development of a new and distinct right of self-determination, specific to indigenous peoples.\(^ {69}\) This is partly a response to the historic subversion of indigenous peoples by powerful states, who have wilfully ignored and misconstrued the rights and legitimate demands of indigenous peoples. That indigenous peoples usually predate the state structure and legislature and the medium through which the formulation of assimilative ‘rules’ applicable to them come, is further example of the need for rebalancing and reconstituting indigenous rights. Daes responded by writing that,

[*self-determination means the freedom for Indigenous Peoples to live well, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbours […] [Indigenous Peoples’] goal has been achieving the freedom to live well and humanly—and to*


\(^{68}\) See Arts. 3 and 46 of the Declaration on the Rights of Indigenous Peoples.

\(^{69}\) Karen Pierce, the representative of the UK, explaining the decision to sign the Declaration on the Rights of Indigenous Peoples, 9 September 2007, to continue to uphold the UK’s promotion of indigenous rights worldwide, at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.
determine what it means to live humanly. In my view, no government has grounds for fearing that.\textsuperscript{70}

Pierce qualified the ‘right’ set out in Article 3 of the Declaration as a separate and different right from the right of all peoples to self-determination in international law in the ICCPR. It was not intended, she argued, to impact in any way on the political unity or territorial integrity of existing states. Sweden qualified this with an explanation of Article 19, seeing this as a consultative and participatory process rather than as a challenge to the political integrity of the state. The differences in interpreting Article 3 of the Declaration on the Rights of Indigenous Peoples shows a case in point in which Australia,\textsuperscript{71} New Zealand, the United States, and Canada objected to the potential breach in their territorial integrity.

The terminology used in the Declaration does not jeopardize the territorial integrity of nation states because the Declaration itself provides guarantees against secession. The Declaration limits the right to external self-determination through Article 46(1) which reads: “nothing in this Declaration may be interpreted as […] encouraging any action that would impair, totally or in part, the territorial integrity or political unity or sovereign and independent states”. Against this background, stands Article 3 which reaffirms that indigenous peoples have the right to self-determination, considered together with Article 4 which provides that “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs [emphasis added]”. Autonomy, uniquely referred to in the Declaration as a right, has been offered as a viable solution for the protection of the existence and identity of minorities and indigenous peoples by Special Rapporteur Martinez Cobo.\textsuperscript{72} At the same time, it has been underlined that


\textsuperscript{71} On Friday 3 April 2009 the Australian Government endorsed the UN Declaration on the Rights of Indigenous Peoples. Although legally Australia cannot reverse its ‘no’ vote at the UN, it can—and has—made a statement offering its support for the declaration. This move fulfilled an election promise made by Kevin Rudd to overturn Australia’s opposition to the declaration. Until that time, Australia had stood alongside New Zealand, Canada, and the United States as one of only four countries to oppose the adoption of the declaration by the UN General Assembly in September 2007. One of the key reasons given by the Howard Government for their opposition was that the declaration provided rights to one group of people to the exclusion of everyone else.

minority groups do not have a general right to autonomy in the same manner as indigenous peoples.

This *prima facie* right to autonomy in matters relating to internal affairs suggests that in the Declaration, the right to self-determination in Article 3 can only be realized through internal, rather than external, autonomy. Article 3 states, “by virtue of that right [to self-determination] Indigenous Peoples freely determine their political status and freely pursue their economic, social and cultural development”. Indigenous peoples are, by virtue of the Declaration, therefore, constrained to the recognition of self-determination in existing national boundaries. The ability of indigenous peoples to construct and maintain their autonomy is provided in Article 5, which confirms that “Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”. Indigenous peoples are not, as Article 3 suggests, able to ‘freely determine’ their development; rather, they have the right to determine their autonomous development in internal boundaries. The Declaration accords indigenous peoples the freedom to identify and choose in which way they exist according to tradition and heritage. This principle of self-identification can be seen as “part of the evolution of a right to self-determination for indigenous peoples” citing their ability to self-determine their identity in line with the Declaration. Moreover, Articles 33 and 34 provide not only for self-identification, but also allow indigenous peoples structures and membership in accordance with their procedures and international human rights standards; Article 14 “establish[es] and control[s]” educational systems and institutions providing education in indigenous languages; Article 35 determines the responsibility of individuals to their communities. Similarly, Article 20(1) provides that indigenous peoples have the right “to maintain and develop their political, economic and social systems or institutions”; Article 34 establishes the right to promote and maintain “juridical systems or customs”, provided that the latter are in accordance with international human rights standards, and Article 18 refers to the right to maintain

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indigenous decision-making institutions. The wide-ranging principle of self-determination as understood in state to state relations concerning territorial sovereignty is, therefore, not applicable to the rights of indigenous peoples. To assert, as the United States, Canada, Australia, and New Zealand did, that the principle of self-determination is contrary to international (legal) standards ignores these developments\(^{75}\) and goes so far as to contravene their domestic policies.\(^{76}\) In practical terms, the interpretation of self-determination for the purposes of this Declaration should be: “the freedom for indigenous peoples to live well, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbours”.\(^{77}\)

Claims to assert a right to self-determination, autonomy, and self-governance in South Asia have also generated serious conflicts. The Baluchis and Pakhtuns, located between Iran, Pakistan, and Afghanistan present a useful example of consistent denial of the right to self-determination, autonomy, or self-governance. Successive central governments of Iran, Pakistan, and Afghanistan have maintained the colonial stance of forcibly isolating the indigenous peoples from the remainder of the population under the pretext of an autonomous status. However, this status in effect is an attempt to deprive indigenous peoples of their fundamental rights to equality and genuine autonomy. Thus, under the Pakistani constitutional framework, tribal peoples have been denied the right to vote in national elections. In violation of Article 5 of the UN Declaration, they have been deprived of the right to participate in the “political, economic, social and cultural life of the State”. In the case of Pakistan, at the time of the creation of the state in 1947, the Pakhtun and Baluch territories were forcibly incorporated in the new state. Since 1947, the denial of the right to autonomy or self-governance for the indigenous Baluchis and Pakhtuns has been persistent and continuing. A majority of the Pakhtuns and Baluch grievances have stemmed from the denial of political and economic autonomy. Baluchistan has economic resources that the successive federal governments have exploited without either a due

\(^{75}\) It is worth noting here that all four of these countries have domestic laws relating to the ownership and management of indigenous lands by indigenous peoples. See Section 35 of Canada’s constitution, Treaty of Waitangi Act 1975 of New Zealand, \textit{Mabo (No. 2)}, the High Court rejected the principle of terra nullius and recognized the rights of indigenous peoples to native title in land where there had been a continuing connection with the land and in the absence of a supervening act of sovereignty on the part of governments or parliaments. Under United States domestic law, the US government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples.\(^{76}\)

\(^{77}\) \textit{Ibid.}, United States approach, but it is interesting to compare that to the remarks made at the US National Security Council on 18 January 2001 in which criteria to determine who was indigenous included the following: self-determination, aboriginal status, and distinct culture and customs.\(^{77}\) Daes, \textit{op.cit.} note 69, 58.
acknowledgement of Baluchistan’s contribution to the national economy or its recompense in monetary or financial measures.

B. Land Rights

Throughout the Declaration, the special relationship between indigenous peoples and their lands has been emphasised. The emerging jurisprudence of the Human Rights Committee and Committee on the Elimination of Racial Discrimination also places emphasis on the collective nature of this connection. Although the Declaration does not go so far as the ILO Convention (No. 169) Article 14(2), it does, in Article 26(3) state that “States shall give legal recognition and protection to these lands, territories and resources” to provide an effective demarcation of indigenous lands. Gilbert argued that this demarcation is further achieved as a result of the Declaration ‘indigenising’ the general right to property. Defining what these land rights refer to, however, is another widely debated topic, with the Declaration using, in Article 26(1) “traditionally owned or otherwise occupied, used or acquired” lands. This provided some clarification in Article 26(2) whereby indigenous peoples must ‘possess’ the land. Articles 25-30 of the Declaration are dedicated to the protection of the rights of indigenous peoples over their traditional lands and resources. Correlatively, states are required to give legal recognition to these lands, territories, and resources and this legal recognition should be conducted with due respect to the “customs, traditions and land tenure systems of the Indigenous Peoples concerned”. However, the Declaration does not specify what resources indigenous peoples have the right “to own, use, develop and control”. The Supreme Court of the Philippines decided that indigenous peoples are entitled only to surface resources, leading to a fairly narrow interpretation of Article 26. For those who historically have been forcibly evicted, for private enterprise or other reasons, Article 8 provides that states should provide effective

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78 Indeed, the entire Declaration could be interpreted as an implicit reiteration of land rights; without their land, many indigenous peoples would not be able to enjoy any of the rights mentioned in the Declaration whereas other instruments that can be invoked for protection rely strongly on the promotion of land rights to recognize indigenous collective rights.


80 Gilbert, op.cit. note 48, 210-212.

81 Article 26, Declaration on the Rights of Indigenous Peoples.

82 Saramuka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs. Judgment
mechanisms for the prevention of and redress for: “any action that has the aim or effect [emphasis added] of depriving them of their integrity as distinct peoples, or of cultural values or ethnic identities” and “any action which has the aim or effect of dispossessing them of their lands, territories or resources”. Article 28 provides for the right to redress. However, the right to redress does not automatically encompass the return of lands; it can include monetary compensation, which fails to recognize that land is the essence of many indigenous peoples’ culture and heritage.

In the Yakye Axa case, the court explained that compensation granted to indigenous peoples “must be guided by the meaning of the land for them”. Additionally, in this case, the court also awarded damages for harm, “not just as it pertains to its subsistence resources, but also with regards to the spiritual connection the Saramaka people have with their territory”. In a wider context, the UN Intergovernmental Forum on Forests recommended that the valuation of forests should “reflect the social, cultural, economic and ecological context and consider values that are important to local and/or indigenous communities”. To further reemphasise the importance of land rights for indigenous peoples, Article 32 of the Declaration places the emphasis on free and informed consent concerning matters relating to indigenous land whereas CERD also stresses the right of indigenous peoples, in its recommendations, to give their informed consent through self-chosen representatives relating to development activities, including: mining, oil, and gas operations.

of 28 November 2007. Series C No. 172, and see the 5th and 6th Amendments to the Constitution of India whereby the state has an addendum with which it can retake lands for state use.

83 Art. 8 (2a and 2b) Declaration on the Rights of Indigenous Peoples. In the draft Declaration, the terms ‘cultural genocide’ and ‘ethnocide’ were included, which would have allowed indigenous peoples recourse to international criminal prosecution.

84 Indigenous Community Yakye Axa v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005 Series C No. 125, at para. 149 (referring to, inter alia, para. 131, which states, “this Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations”).


87 Inter alia, Guyana, 04/04/2006, CERD/C/GUY/CO/14, at para. 19 (recommending that Guyana “seek the informed consent of concerned indigenous communities prior to authorizing any mining or similar operations which may threaten the environment in areas inhabited by these communities”); Guatemala, 15/05/2006, CERD/C/GTM/CO/11, para. 19; and Suriname, 18/08/2005, Decision 1(67), CERD/C/DEC/SUR/4, para. 3.
logging,\textsuperscript{88} the establishment of protected areas;\textsuperscript{89} dams; resettlement;\textsuperscript{90} and other decisions affecting the status of territorial rights.\textsuperscript{91} The concluding observations of the CERD 70th session noted as a concern the reports of adverse effects of economic activities, concluding that the state should explore ways to hold transnational corporations registered in Canada accountable.\textsuperscript{92} These concluding observations, from a legally binding convention, highlight the responsibilities that the state has toward indigenous peoples; namely, to monitor the actions of corporations involved in development on indigenous peoples lands. Moreover, in its concluding observations for the United States under Article 9 of the Convention, the recommendations collaborated the responsibility of the state in allowing indigenous peoples free participation in decisions affecting them. It further reiterated that the Declaration on the Rights of Indigenous Peoples is applicable to all UN Member States, regardless of whether they voted in the affirmative.\textsuperscript{93} Indigenous peoples from South Asia have serious cause for concern in relation to violation of land rights. Whereas communal landownership represents a vital element of their life pattern, the major problem of the Adivasis of Chittagong Hill Tracts (CHT) of Bangladesh is the so-called ‘land-

\textsuperscript{88} \textit{Inter alia}, Cambodia, 31/03/98, CERD/C/304/Add.54, at para. 13 and 19 (observing that the “rights of Indigenous Peoples have been disregarded in many government decisions, in particular those relating to citizenship, logging concessions, and concessions for industrial plantations’ and recommending that Cambodia “ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent”).

\textsuperscript{89} \textit{32 Inter alia}, Botswana. 23/08/2002, UN Doc. A/57/18, paras. 292-314, at para. 304 (concerning the Central Kalahri Game Reserve); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 12. 33 \textit{Inter alia}, India, 05/05/2007, CERD/C/IND/CO/19, at para. 19 (stating that India “should seek the prior informed consent of communities affected by the construction of dams in the Northeast or similar projects on their traditional lands in any decision-making processes related to such projects and provide adequate compensation and alternative land and housing to those communities”).

\textsuperscript{90} \textit{35 Inter alia}, India, 05/05/2007, CERD/C/IND/CO/19, at para. 20 (stating that the “State party should also ensure that tribal communities are not evicted from their lands without seeking their prior informed consent and provision of adequate alternative land and compensation’); and Botswana, 04/04/2006, CERD/C/BWA/CO/16, at para. 12 (recommending that the state “study all possible alternatives to relocation; and […] seek the prior free and informed consent of the persons and groups concerned”). See also, Laos, 18/04/2005, CERD/C/LAO/CO/15, para. 18

\textsuperscript{91} Australia. CERD/C/AUS/CO/14, 14 April 2005, at para. 11 (recommending “that the State party refrain from adopting measures that withdraw existing guarantees of indigenous rights and that it make every effort to seek the informed consent of Indigenous Peoples before adopting decisions relating to their rights to land’’); and United States of America, 14/08/2001, A/56/18, para. 380-407, at para. 400 (concerning “plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples’’).

\textsuperscript{92} CERD/C/CAN/CO/18 para. 17.

\textsuperscript{93} Observations Considering Reports Submitted by State Parties under Art. 9 of the Convention, Addressing the United States of America on March 7th, 2008.
grabbing’ by Bengalis. To deal with the continuing insurgency and to resolve the protracted land rights issue, a peace accord was signed between the then Government of Bangladesh and Jana Sangati Samiti. A Land Disputes Commission was to be established to deal with land-related issues, with the Commission also expected to provide quick inexpensive and easy remedies for cases of land dispossession taking into account local customs and usage regarding land right and claims. The majority of the members forming the Commission were intended to be from indigenous communities which also provided an added advantage of the knowledge and experience of land issues. Notwithstanding the provisions of the Peace Accord, the indigenous peoples of CHT in early 2010, continue to suffer from violence, discrimination, and exclusion. In November 2005, a British High Commission mission to Bangladesh visited the region and concluded that the Land Disputes Resolution Commission, set up to facilitate the effective implementation of the Peace Accord, was failing in its operations. Similar unfortunate stories emerge from Veddas of Sri Lanka, the Adivasis of India, and the Indigenous Sindhis and Baluchis of Pakistan.  

**C. Cultural Rights**

By analyzing the language of articles on cultural rights included in the Declaration, the strengths and weaknesses of the language can be identified. The authors compare the standards set in the Declaration with those in the general human rights instruments as well as ILO Convention (No 169).

- Cultural, spiritual, and linguistic identity (Articles 11-13): Rights to practice and revitalize culture and the transmission of histories and languages; the protection of traditions, sites, ceremonial objects, and repatriation of remains.
- Education, information, and labour rights (Articles 14-17): Right to education, including the right to run educational institutions and teach in language; cultures to be reflected in education and public information; access to media (mainstream and indigenous); right to protection of labour law and from economic exploitation.

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95 Ibid.
- Participatory, development and other economic and social rights (Articles 18-24): Right to participation in decision-making through representative bodies; right to institutions to secure subsistence and development; special measures to be adopted to address indigenous disadvantage and ensure nondiscriminatory enjoyment of rights; guarantees against violence and discrimination for women and children; right to development; access to traditional health practices and medicines.

The approach advocated in the Declaration may require the revision of traditional ideas held by majority or dominant cultural groups about national culture and identity. The rights of indigenous peoples to culture include the right to the enjoyment and protection of their cultures in a wider, multicultural world.96 To fully recognize these rights, however, there must be effective participation, with free, prior, and informed consent of indigenous peoples in the state. In the Convention on the Elimination of Racial Discrimination General Recommendations, states were called on to ensure that “members of Indigenous Peoples have equal rights in respect of effective participation” and that “no decisions are taken without their informed consent”.97 The Declaration uses this idea of free, prior, and informed consent, superseding the free and informed consent (Article 19) of the ILO (No. 169). Free, prior, and informed consent will underpin effective participation culturally, socially, and economically. The emphasis in the Declaration on participation is key to reconciling the interests of the state and indigenous peoples, especially in light of international development. Much development occurs in tribal lands and the Declaration serves to mitigate the effects of this by ensuring that if such development occurs, benefits can flow to the indigenous peoples. It should be highlighted that the provisions of the Declaration will not be satisfied by mere consultation of indigenous peoples; rather, there is an emphasis throughout the Declaration on the need for informed consent on the part of the indigenous communities involved and an emphasis on the importance of cultural autonomy. Article 25 expressly affirms the rights of indigenous peoples to maintain and strengthen their distinctive spiritual relationship with their lands and, thus, the

provisions in the Declaration are implicitly related to cultural autonomy. This is particular to legal regimes regarding indigenous peoples; the maintenance of a culture closely linked to particular use of land and natural resources is a main element distinguishing minorities from indigenous peoples.\footnote{98} Cultural autonomy, as Jose Martinez Cobo has stated: is “basic to [indigenous peoples] existence as such and to all their beliefs, customs, traditions and culture”.\footnote{99} Thus, those provisions of the Declaration that envisage the right of indigenous peoples to free, prior, and informed consent in relation to the approval of any project affecting them are of vital importance.\footnote{100}

This is reiterated in Articles 18 and 19 of the Declaration which are in part, a response to the Human Rights Committee warning that the enjoyment of cultural rights would require measures to ensure effective participation. It provides that indigenous peoples have the right to participate in the decision-making process in matters affecting their rights, through representatives chosen by themselves in accordance with their procedures (Article 18). Furthermore, Article 19 requires states to consult indigenous peoples to obtain their free, prior, and informed consent “before adopting and implementing legislative or administrative measures that may affect them”. UN Treaty Monitoring bodies have also made various references to the principle of free, prior and informed consent (FPIC) in their decision-making. In the report of its 27th session (2001) the UN Committee on Economic, Social and Cultural Rights also highlighted the need to obtain indigenous peoples’ consent in relation to resource exploitation impacting the indigenous peoples of Columbia. The Committee observed “with regret that the traditional lands of Indigenous Peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem”.\footnote{101}


\footnote{100} Art. 32(2), Declaration. Art. 15(2), ILO Convention (No. 169) contemplates such a hypothesis in which states retain the ownership of subsoil resources, providing that in such cases procedures aimed at the consultation of indigenous groups would be established. See also Art. XVIII(5), Proposed American Declaration on the Rights of Indigenous Peoples.

\footnote{101} E/C.12/1/Add.74, para. 12.
Many of the relevant provisions of the Declaration directly refer to, imply, or underscore the right of FPIC in relation to rights affirmed in treaties, agreements and other constructive arrangements between states and indigenous peoples as well as other rights. Article 19, addressing the adoption of legislative and administrative measures, and Article 32, addressing development activities affecting indigenous peoples’ lands and natural resources, do contain some of the broadest affirmations in the Declaration of the Right to FPIC for Indigenous Peoples. The provisions spelling out the terms and criteria for restitution, redress, and compensation in cases of land and resource rights violations are equally relevant. Article 10, which affirms that indigenous peoples shall not be forcibly removed or relocated from their lands or territories without FPIC is also of direct relevance to land as the central issue in most treaty-rights violations being carried out around the world.102 Article 12 of the ILO (No. 169) allows for indigenous and tribal peoples to take legal proceedings either individually or through representative bodies. For this article to be effective, synthesis of provisions in the Declaration and in the ILO are necessary. Violation of the cultural rights of indigenous peoples of South Asia is a persistent and unfortunate theme. All indigenous communities of the region allege serious and substantial violations of cultural and spiritual rights and an attempt by the state apparatus of forceable assimilation. Thus, the Adivasis of Bangladesh and India complain of assertive and aggressive policies of subjugation by federal institutions. Another horrid example emerges from Pakistan, where the federal administrations have made all possible efforts to eradicate linguistic and cultural identities of the Sindhis, Baluchis, and the Pakhtun peoples. The federal government continues with the policy of enforcing Urdu as the national language at the expense of minority indigenous languages.

1. The Right to Health
The right to health is a fundamental part of our human rights and of our understanding of a life in dignity. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defined health as “a state of complete physical, mental and social

well-being and not merely the absence of disease or infirmity”. The necessary steps to achieve, as Article 24 states, the highest attainable standard to physical and mental health can be found in the constitutions of the state, other declarations and conventions, and in case law; for example, the Constitution of India (1950) in Part IV, Article 47, which articulates a duty of the state to raise the level of nutrition and the standard of living and to improve public health. Provisions of the ILO (No. 169), for example, in Article 20(1c) the state should provide medical and social assistance whereas in Article 25(1-3), although it states that traditional practices should be considered, the overall emphasis is on the government providing services in coordination with other “cultural, social and economic measures in the country”. In the Declaration, in Article 29, the emphasis is on using traditional medical care “developed and implemented by peoples affected by such materials” and in Article 24, the emphasis is placed on the state to facilitate this care.

The International Covenant on Economic, Social and Cultural Rights (Article 2(2)) and the Convention on the Rights of the Child (Article 2(1)) identify the following nonexhaustive grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status. According to the Committee on Economic, Social and Cultural Rights, ‘other status’ may include health status (e.g., HIV/AIDS) or sexual orientation. States have an obligation to prohibit and eliminate discrimination on all grounds and ensure equality to all in relation to access to health care and the underlying determinants of health. The International Convention on the Elimination of All Forms of Racial Discrimination (Article 5) also stresses that states must prohibit and eliminate racial discrimination and guarantee the right of everyone to public health and medical care, as does Convention on the Elimination of Discrimination Against Women (CEDAW); Article 11(1), 12, and 14), and Convention on the Rights of the Child (CRC); Article 24). Bangladesh, Sri Lanka, and India have all ratified the CRC and CEDAW, with India and Bangladesh ratifying the recent Convention on the Rights of Persons with Disabilities (CRDP). Sri Lanka, at present, is only a signatory to this Convention, although the other states could arguably be bound under general international law. Pakistan has ratified the CRC, CERD, CEDAW, and ICESCR and has signed (but not ratified) the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
The newly adopted CRDP requires states to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, including their right to health and to promote respect for their inherent dignity (Article 1). The foremost claimants and beneficiaries of this right include indigenous peoples. Article 25 further recognizes the “right to the enjoyment of the highest attainable standard of health without discrimination” for persons with disabilities and elaborates on measures states should take to ensure this right. These measures include ensuring that persons with disabilities have access to and benefit from those medical and social services needed specifically because of their disabilities, including early identification and intervention, services designed to minimize and prevent further disabilities, as well as orthopaedic and rehabilitation services that enable them to become independent, prevent further disabilities, and support their social integration. Similarly, states must provide health services and centres as close as possible to people’s communities, including rural areas. Furthermore, the nondiscrimination principle requires that persons with disabilities should be provided with “the same range, quality and standard of free or affordable health care and programmes as provided to other persons”, and states should “prevent discriminatory denial of health care or health services or food or fluids on the basis of disability” (see generally Articles 25 and 26 of the Convention). Importantly, states must require health professionals to provide care of the same quality to persons with disabilities as they do to others, including on the basis of free and informed consent. To this end, states are required to train health professionals and to set ethical standards for public and private health care. The Convention on the Rights of the Child (Article 23) recognizes the right of children with disabilities to special care and to effective access to health care and rehabilitation services.

Bangladesh and India have ratified CRDP; Sri Lanka has signed the Convention and Pakistan has neither signed nor ratified the Convention. However, and as noted in the aforementioned, under international law, the countries of South Asia are bound to uphold international standards including a genuine applicability of the right to health for indigenous peoples. Under Article 33 of CRDP, national focal points for disability must be set up. However, as this only entered into force on the 3 May 2008, this has yet to be set up. There are marked disparities in how states treat those with

disabilities. For example, in his concluding recommendations, the Special Rappoteur for the ICESCR found that Australia had significant resources for improvement in the treatment of indigenous peoples with disabilities\(^{104}\), whereas in Bolivia, the exploitation of indigenous children with disabilities was tied into trafficking, exploitation, and child labour.\(^{105}\)

### IV. CONCLUSION

Indigenous peoples, as the authors establish in earlier sections of this chapter, have historically had a painful and enduring history. Many were colonized long before the European colonization took place and a number then found themselves under other forms of colonization after the departure of the Commonwealth colonizers. British rule brought money, government officials, and moneylenders into tribal areas, beginning the process of encroachment of Adivasis land by outsiders. As a result, there were tribal revolts from the mid-nineteenth century in several parts of Eastern India and this forced the administration to recognize the vulnerable position of tribal people and to pass laws to protect their lands from outsiders. These events saw the promulgation of laws granting a measure of autonomy, most prominently reflecting in the Bangladesh CHT regulations of 1900. This confirmed that in internal matters, the CHT was largely self-governing and subsequently, categories of land were delineated, specifically excluding nonindigenous peoples from settling in tribal areas. However, in practice, most of these laws were widely disregarded and unscrupulous merchants and moneylenders found ways to circumvent them. These problems are still encountered by many indigenous peoples today, although their opponents are far more likely to be large companies and state corporations. For example, a majority of the Pakistani Baluch grievances have stemmed from economic and political deprivation. Federal governments have exploited the Sui area in which natural gas deposits were found, and these have been used to fuel the needs of most provinces, such as Gwadar Harbour.\(^{106}\) The benefits of these projects to Baluchistan have proved to be negligible.

\(^{105}\) CRC Concluding Remarks, CRC/C/16 (1993), 13, at para, 36
\(^{106}\) The Baluchistan coast was provided with new port possibilities and the harbour of Gwadar was developed in the 1960s, becoming operational in March 2008. Despite the former Prime Minister Chaudhary Shujaat Hussain’s efforts to facilitate recommendations, including payment of gas royalty arrears, the shifting of the Gwadar Port Authority from Karachi to Gwadar and greater investment to alleviate poverty in the area through a special Parliamentary Committee, set up in 2004, none of these
and as the Baluchi consciousness expanded, the people have acutely sensed the exploitation they have been forced to undergo. Similar complaints emerge from the Veddas of Sri Lanka and the Adivasis of India and Bangladesh.

Tracing the history of the indigenous peoples in South Asia vividly reflects the unfortunate plight of these peoples. Self-determination, on which the post-colonial world order is established, is construed narrowly and, therefore, continues to be a grave disappointment to many indigenous peoples in the world. The inability of the Hindu and Muslim communities of India to compromise was largely responsible for the partition of India in 1947 and with this, the full realization of the right to self-determination. Despite promises for indigenous peoples that their collective right to self-determination would be upheld, no acceptable mechanism has been advanced.

The impact of the Declaration, therefore, for indigenous peoples, whether or not it is or can be customary international law, is such that it can be used as an instrument to discuss, interpret, and resolve rights. It provides an even-handed articulation of indigenous rights in the context of existing nation–states institutions. The Declaration describes the requirements for respect for indigenous institutions and equality before official institutions. It describes the recognition of indigenous identity, but at the same time, also emphasises the right to national citizenship. It describes respect for traditional justice systems and requires access to national justice systems. This balanced ‘choice’ approach to human rights follows existing international human rights structures and instruments and codifies them in one Declaration. The Declaration is a point of dialogue, negotiation, and mutual understanding about the rights and responsibilities of indigenous peoples—set down in broad terms—and nation–states and as such allows for contextualisation.

The Joffe Report shows that in the two years since the adoption of the Declaration, governments, UN agencies, and regional and national courts have increasingly turned to the Declaration for guidance in implementing measures to protect indigenous peoples. Despite this, for indigenous peoples, “human rights may be recognised at the international level but their real and only value consists in their application in everyday situations. It is only at this level that the human rights record of any state

recommendations have yet been actioned by the federal government and instead arrest and detention has been adopted as coercive measure to counter Baluchi dissidents

can be judged”. At the level of practical “application in everyday situations”, the Declaration is as yet only of limited significance for the indigenous peoples of South Asia.

109 See <http://www.ielrc.org/content/n0003.htm>.
Freedom of Religion in South Asia: Implications for Minorities

I. INTRODUCTION

The accommodation of religious diversities is always a challenging issue and constantly remains in the forefront of public debate in South Asia, comprising India, Pakistan, Bangladesh, Nepal, Sri Lanka, Bhutan, Maldives, and Afghanistan. The partition of India in 1947, which remapped the political geography of South Asia and paved the way for further remapping, was a direct consequence of the inability to accommodate the interests of various religious groups in an independent India. This historic partition was, be it justified or not, the cause of continuing violation of minority rights in India, Pakistan, and Bangladesh due to animosity between Muslims and Hindus. The other countries of South Asia also lag well behind international standards on freedom of religion. Keeping these realities in mind, in the present article, the authors examine the constitutional jurisprudence of South Asian countries on freedom of religion and analyze the potential implications of such jurisprudence for the religious minorities of these countries.
Recognizing that the promotion and protection of the legitimate rights of religious minorities depend on several constitutional, legal, institutional and social factors, the authors stress that the constitutional arrangement of freedom of religion has significant bearing on religious minorities. In particular, the way in which the higher courts of a country interpret the scope and application of this fundamental right demarcates the minimum level of protection that religious minorities can expect to assert before judicial forums. Alternatively, the higher courts failure to interpret and recognize the strictly limited nature of the limitations and restrictions can pose a hazard to freedom and thereby promote legal vulnerability of religious minorities.

Before auditing the jurisprudence of these countries’ higher courts on the issue of fundamental rights to freedom of religion, one has to keep in mind that these countries’ constitutions provide certain provisions that are arguably not consistent with the international human rights standards on freedom of religion. These constitutional provisions limit and restrict the courts in offering progressive interpretation of the freedom of religion clause as contained in the constitution. Accordingly, sometimes the constitutions, rather than the courts, contribute to the antiminority jurisprudence developed in these countries concerning the right to freedom of religion.

II. INTERNATIONAL STANDARDS ON FREEDOM OF RELIGION

Religious rights are the oldest of the internationally recognized human freedoms and were incorporated into political instruments long before the idea of systematic protection of civil and political rights was developed. In the early days of the human rights regime of the United Nations, Article 18 of the Universal Declaration of Human Rights, 1948 recognized everyone’s right to freedom of religion. This provision protects theistic, nontheistic and atheistic beliefs, as well as the right to not profess

Interim Constitution since 2007. Accordingly, the authors scrutinize the Draft Constitution of Bhutan and the Interim Constitution of Nepal for the purpose of the present article.

7 GA Resolution 217A (III), UN Doc A/810, at 71 (1948).
8 Art. 18 reads: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”
any religion or belief, and underscores that freedom of religion includes practice of religion in public together with others. Exercise of the right to freedom of religion can only be restricted, according to this instrument, by law that satisfies the “legitimate aim test” and the “necessity test” as stipulated in Article 29(2). With almost similar tone, Article 18 of the International Covenant on Civil and Political Rights, 1966 outlines the scope and extent of freedom of religion. This provision, however, distinguishes between inner freedom of belief and outer or public freedom to manifest one’s beliefs. Whereas the former is absolute, the latter is subject to limitations specified in Article 18(3). Pursuant to Article 18(3), any limitation on the manifestation of religion or belief must be (a) prescribed by law, (b) serve one of the listed purposes (public safety, order, health, morals, or the fundamental rights and freedoms of others), and (c) be necessary for attaining the purpose asserted.

Despite all these human rights norms dealing with freedom of religion, the treatment of religious human rights as compared with other basic freedoms has induced specialists and observers to assert that the world community has neglected religious rights, probably as a consequence of the basic disagreement on the nature and extent of some religious freedoms. This neglect is manifest in the fact that no global obligatory treaty has been adopted yet in this sensitive area. Nearest to it is the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief, proclaimed in 1981 by the UN General Assembly. This Declaration was the culmination of about twenty years of work following the United Nations’ mandate to draft such a document. Although not legally binding in the strict sense of terms, this

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9 Human Rights Committee, General Comment No.22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), CCPR/C/21/Rev.1/Add.4, para. 2.
10 According to Art. 29(2): “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”
12 Karen Musalo, “Claims for Protection Based on Religion or Belief”, 16(3) IJRL (2004), 165-226, at 173.
15 Lerner, op.cit. note 13, 79.
instrument is regarded as an important and persuasive elaboration on the right to freedom of religion.\footnote{Donna J. Sullivan, “Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination”, 82(3) *AJIL* (1988), 487-520, at 488.}

According to the 1981 Declaration, everyone is entitled to religious freedom that shall include freedom to have a religion or belief of his or her choice and freedom, either individually or in community with others and in public or private, to manifest his or her religion or belief in worship, observance, practice and teaching.\footnote{Art. 1, para. 1.} In particular, the freedom of religion herein is meant to include, *inter alia*, the freedoms: (a) to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes; (b) to establish and maintain appropriate charitable or humanitarian institutions; (c) to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief; (d) to write, issue and disseminate relevant publications in these areas; (e) to teach a religion or belief in places suitable for these purposes; (f) to solicit and receive voluntary financial and other contributions from individuals and institutions; (g) to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; (h) to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and (i) to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.\footnote{Art. 6.}

The freedom of religion, according to the Declaration, can only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.\footnote{Art. 1, para. 3.} Proposal to add “national security” to the list of permissible limitation was not accepted.\footnote{Bahiyyih G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Kluwer Law International, The Hague, 1996), 169.} The Declaration also prohibits discrimination on the grounds of religion or belief\footnote{Art. 2.} and requires the states to take effective measure to prevent and eliminate any such discrimination.\footnote{Art. 4.}

\footnotesize{Discrimination Based on Religion or Belief”, 2 *Brigham Young University Law Review* (2002), 217-236, at 217.}
Apart from all these general prescriptions regarding freedom of religion, international standards also address the question of religious minorities’ freedom of religion. The International Covenant on Civil and Political Rights (CCPR)\textsuperscript{24} requires states not to deny the persons belonging to minorities their right to profess and practice their religion.\textsuperscript{25} With a similar voice but in a more explicit manner, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Decl. Min.)\textsuperscript{26} recognizes that persons belonging to religious minorities have the right to profess and practice their own religion, in private and in public, freely and without interference or any form of discrimination.\textsuperscript{27} The only permissible restriction, according to this Declaration, on the exercise of religious rights concerns practices which are “in violation of national law” and are “contrary to international standards”.\textsuperscript{28} However, the criterion “in violation of national law” does not authorize a state to adopt any prohibitions against minorities’ practices that it sees fit. The intention is to respect the margin of appreciation which any state must have regarding which practices it wants to prohibit, taking into account the particular conditions prevailing in that country and provided the prohibitions are based on reasonable and objective grounds.\textsuperscript{29} Alternatively, the criterion “contrary to international standards” should apply to practices of majorities and minorities. Religious practices that violate human rights law should be outlawed for everyone, not only for minorities.\textsuperscript{30} Sometimes a question arises—whether state recognition of the majority population’s religion as the state religion offends the rights of religious minorities or not. In an attempt to reply, the Human Rights Committee (HRC) clarified that although a religion is recognized as a state religion, is established as official or traditional, or its followers comprise the majority of the population, these facts shall neither result in impairment of the enjoyment of any rights under the

\textsuperscript{24} GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on 23 March 1976.
\textsuperscript{25} Art. 27.
\textsuperscript{26} UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res. 47/135, UN Doc. A/RES/47/135 (18 December 1992).
\textsuperscript{27} Art. 2(1).
\textsuperscript{28} Art. 4(2).
\textsuperscript{30} \textit{Ibid.}, para. 57.
Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or nonbelievers.31

III. Freedom of Religion in South Asia vis-a-vis Religious Minorities

A. Constitutions on State–Religion Relationship

The constitutions of all South Asian states except India and Nepal accord special status to the majority population’s religion. Pakistan,32 Afghanistan,33 and Maldives34 are constitutionally Islamic states. These states also declare Islam as the state religion.35 Bangladesh, although it does not declare itself as an Islamic state, declares Islam as the state religion.36 Alternatively, the Constitution of Sri Lanka proclaims that “the Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana”.37 Bhutan’s position is similar. The country’s Draft Constitution specifies that “Buddhism is the spiritual heritage of Bhutan”.38 Although the relative importance given to the religion of the majority population varies among these constitutions, commonly, the majority religion has greater constitutional status over other minority religions. As stated earlier, such a constitutional status per se is not opposed to international standards unless it impairs the religious freedom of minorities. From that point of view, the constitutions of Pakistan, Bangladesh, Sri Lanka, Afghanistan and Bhutan appear to be in conformity with international standards. Nevertheless, having an official state religion can imply a likelihood of the state also having other policies that produce grievances in religious minorities. However, there is not necessarily a connection. When viewed isolated from other factors, having an official state religion can be seen as merely symbolic and thus viewed as a relatively low-scale cause of frustration.39 However, Maldives has moved

31 HRC, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18), CCPR/C/21/Rev.1/Add.4, para. 9.
32 See, the Constitution of the Islamic Republic of Pakistan, Art. 1(1).
33 See, the Constitution of Afghanistan, Chapter 1, Art. 1.
35 See, the Constitution of the Islamic Republic of Pakistan, Art. 2; The Constitution of Afghanistan, Chapter 1, Art. 2; The Constitution of the Republic of Maldives 2008, Art. 10(a).
36 See, the Constitution of the People’s Republic of Bangladesh, Art. 2A.
37 The Constitution of the Republic of Sri Lanka, Art. 7(1).
38 The Draft Constitution of the Kingdom of Bhutan, Art. 3, Section 1.
far from international standards by declaring in its constitution that Maldives is an Islamic state, that Islam is the state religion and that it does not recognize the religious freedom of any community other than Muslims.

Alternatively, India has constitutionally declared itself a secular state.\(^{40}\) However, over the years, it has developed a concept of secularism that is fundamentally different from the parallel American concept of secularism requiring complete separation of church and state and from the French ideal of laïcité, relegating religion to the private sphere and therefore, having no place in public life whatsoever.\(^{41}\) Although Hindu monarchy ruled Nepal for centuries maintaining Hinduism as the state religion, the interim Constitution of 2007 introduced secularism and dropped Hinduism as the state religion bringing about renewed hope for religious minorities. Article 8 of the original constitution of Bangladesh adopted in 1972 set “secularism” as one of four fundamental principles of state policy. Later, in 1977, this principle was substituted with the principle of “absolute trust and faith in the Almighty Allah”.\(^{42}\)

There are certain religion-specific provisions in the constitutions of Pakistan and Maldives that go against the legitimate expectations of religious minorities. In Pakistan\(^{43}\) and Afghanistan,\(^{44}\) a non-Muslim is disqualified from becoming the President. In Maldives, the president,\(^{45}\) the vice president,\(^{46}\) the members of People’s Majlish (parliament),\(^{47}\) and the cabinet members\(^{48}\) have to be not only Muslim but also a follower of the Sunni school of Islam. Moreover, the 2008 Constitution of the Republic of Maldives states that a non-Muslim is not eligible to even be a citizen.\(^{49}\)

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\(^{42}\) See, Art. 8.

\(^{43}\) See, the Constitution of the Islamic Republic of Pakistan, Art. 41.

\(^{44}\) See, the Constitution of Afghanistan, Chapter 3, Art. 3.

\(^{45}\) See, the Constitution of the Republic of Maldives 2008, Art. 109(b).

\(^{46}\) See, the Constitution of the Republic of Maldives 2008, Art. 112(c).

\(^{47}\) See, the Constitution of the Republic of Maldives 2008, Art. 73(a)(3).

\(^{48}\) See, the Constitution of the Republic of Maldives 2008, Art. 130(a)(c).

\(^{49}\) See, Art. 9.
B. Definition of Religion

In discussing religious freedom, one initial difficulty is a lack of any definite idea of the concept of religion and the absence of any definition in the Constitution. This absence might be defended with the argument that defining religion in the Constitution is contrary to the freedom of religion itself which guarantees an individual to define his or her own religion. However, when the courts are asked to adjudicate on the issue of religious freedom, definitional questions can become important as they implicate threshold issues. Because in a modern democracy it is usually the court, not the constitution, that attempts to define religion, “it is difficult, if not impossible” for the judiciary “to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist or have existed in the world”.

In the case of *David vs. Beason*, the US Supreme Court offered a theistic definition of religion that excluded some religions which do not predicate religion on “Creator” or “God”. In the early days of the constitutional journey of independent India, this theistic explanation seemed to be accepted and endorsed by the judiciary in the cases of *Sardar Syedna Taher Saifuddin vs. Moosaji*, *State of Bombay vs. Narsu Appa Mali*, and *Masud Alam vs. Commissioner of Police*. In these cases, the courts failed to embrace religion in its universality. In the case of *Rati Lal Pana Chand Gandhi vs. State of Bombay*, the Bombay High Court deviated from this narrow view.  

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50 F. K. M. A. Munim, Rights of the Citizen Under the Constitution and Law (Bangladesh Institute of Law and International Affairs, Dhaka, 1975), 228.
55 In the words of Justice Field: “The term religion has reference to one’s views of his relations to his CREATOR, and to the obligations they impose of reverence for his being and character and of obedience to his will”.
56 V. M. Bachal, Freedom of Religion and the Indian Judiciary (Shubhada Saraswat, Bombay, 1975), 64.
57 1953 Bom. 183.
58 AIR 1952 Bom. 84.
59 AIR 1956 Cal. 9.
and offered a broader definition by saying that whatever binds a man to his own conscience and whatever moral and ethical principles regulate lives of men would constitute religion in the Constitutional sense. Since the decision in the *Rati Lal* case, the Indian Courts have adopted a liberal approach when defining the term “religion.” They have rejected the theistic approach propounded earlier by the American Courts.  

However, the definition offered in the *Rati Lal* case was restrictive because it did not regard religious practices inclusive within the definition of ‘religion’. To make the definition more extensive, the Indian Supreme Court in the *Shirur Mutt* case held that freedom of religion is not only confined to an opinion, doctrine or belief but also extends to its outward expression in acts, i.e. rituals, observances, ceremonies, modes of worship, and even food or dress that are regarded as an integral part of any religion. This view is currently uncontested in Indian judicial decisions and consistently followed in other jurisdictions in South Asia. This jurisprudence confirms that religion, in a broad sense, includes all forms of faith and worship including the belief systems or doctrines regarded by those who profess any religion as conducive to their spiritual well-being and the code of ethical rules laid out for its followers.

It is relevant here to mention that although the constitutions of south Asian countries refrain from defining the term “religion”, the interim constitution of Nepal qualifies the term in a vague manner: “Every person shall have the right to profess, practise and preserve his/her own religion as handed down to him/her from ancient times”.

**C. Status of Religious Groups**

In the constitutional journey of several south Asian countries, constitutional identity and status of different religious groups has at times become relevant. As stated earlier, non-Muslims are denied citizenship status in the constitution of Maldives. In the cases of *Narantakath Avullah vs. Parakkal Mammu*, *Khalil Ahmad vs. Malik Israfil*, and

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64 P. M. Baimadham Nambodripad v. Cochin Devaswom Board, AIR 1956 Tra-Coch 19 = ILR 1955 TC 741.
66 Emphasis added.
67 AIR 1923 Mad 171.
Shihabuddin Imbichi Koya Thangal vs. K. P. Ahammed Koya, the Indian courts were asked to declare Ahmadiya as non-Muslim. A similar issue arose for the Wahabis in the case of Queen Empress vs. Ramzan. In Pakistan, the same issue arose in the cases of Abdur Rahman Mobashir vs. Amir Ali Shah, and Abdul Karim Shorish Kashmiri vs. The State of West Pakistan regarding the Ahmadiya community, and in the case of Jiwan Khan vs. Habib regarding the Shia community. In Bangladesh, there is an unreported case decided in 1993 wherein the petitioner claimed a declaration to the effect that the Ahmadiya Community are non-Muslim. In all the cases, the Courts of India, Pakistan and Bangladesh declined to declare any community as “non-Muslim”.

However, in 1985, the Pakistan constitution witnessed an amendment whereby the terms “Muslim” and “non-Muslim” were constitutionality defined. This definition stripped the Muslim status claimed by the Ahmadiya community. In the case of Mujibur Rahman vs. Pakistan, this ammendment was unsuccessfully challenged as repugnant to Islam before the Federal Shariat Court. An appeal against it to the Supreme Court of Pakistan was subsequently withdrawn by the appellant. In fact, the Ahmadiya community has been made a minority by force through the 1985 constitutional amendment and subsequent judicial response. Alternatively, in Bal Patil vs. Union of India, the Supreme Court of India decided that the Jains, although mentioned in the constitution as an independent religious community, are not a religious minority as their religion in the opinion of the Court is merely “a reformist movement amongst Hindus”.

68 AIR 1916 Pat 87.
69 AIR 1971 Ker 206.
70 (1885) ILR 7 All 461.
71 PLD 1978 Lahore 113.
72 PLD 1969 Lahore 289.
73 AIR 1933 Lah 759.
75 For the definition see, the Constitution of the Islamic Republic of Pakistan, Art. 260(3).
76 PLD 1985 FSC 8.
77 A minority group that desires assimilation with the majority but is barred is a minority by force. See, J. A. Laponce, The Protection of Minorities (University of California Press, Berkeley, 1960), 12.
79 6 SCC (2005) 690.
D. Freedom of Religion as a Fundamental Right

A reading of the constitutions of South Asian states reveals that constitutions of all the states except Maldives contain specific provisions on freedom of religion and safeguard against discrimination on the basis of religion. The Constitution of the Republic of Maldives does not recognize the freedom of religion as a fundamental right. Moreover, the nondiscrimination right of the constitution does not guarantee protection against discrimination on the grounds of religious freedom.

Although seven out of eight South Asian constitutions provide for freedom of religion, the scope, extent, and limitations on that right are not alike. In Bangladesh, Pakistan and Bhutan, the freedom of religion is only guaranteed in favour of the citizens, whereas the constitutions of Afghanistan, India, Sri Lanka and Nepal extend the guarantee even in favour of noncitizens. However, Article 20(b) of the Constitution of Pakistan is sometimes constructively interpreted, along with the freedom clause, to argue that religious liberty to practice and profess one’s religion is available to citizens and foreigners in Pakistan.

In prescribing the elements of the right to religious freedom, the constitutions of Bangladesh, India and Pakistan acknowledge the rights to “profess, practice and propagate” religion. With slight linguistic variation having significant consequences, however, the interim constitution of Nepal uses the words “profess, practice and preserve”. To manifest this variation, i.e. not recognizing the right to propagate religion, the interim constitution also stipulates that “no person shall be entitled to convert another person from one religion to another, and shall not act or behave in a manner which may jeopardize the religion of others”. The constitution of Sri Lanka

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80 The Constitution of Afghanistan, Chapter 1, Art. 7; the Constitution of the People’s Republic of Bangladesh, Art. 41; the Constitution of India, Art. 25; the Constitution of the Islamic Republic of Pakistan, Art. 20; the Constitution of the Republic of Sri Lanka, Art. 15; the Interim Constitution of Nepal, Art. 23; the Draft Constitution of the Kingdom of Bhutan, Art. 7, Section 4.
81 The Constitution of Afghanistan, Chapter 2, Art. 1; the Constitution of the People’s Republic of Bangladesh, Art. 28(1); the Constitution of India, Art. 15(1); the Constitution of the Islamic Republic of Pakistan, Arts. 26 and 27; the Constitution of the Republic of Sri Lanka, Art. 11(2)(a); The Interim Constitution of Nepal, Art. 13(3); The Draft Constitution of the Kingdom of Bhutan, Art. 7, Section 15.
82 See, Art. 17(a).
83 The freedom of religion clause of the Constitution of Afghanistan, however, is not placed in the chapter on fundamental rights.
84 Art. 20(b) reads: “Subject to law, public order and morality […] every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions”.
narrows down the freedom of religion to mean the right to manifest religion in “worship, observance, practice and teaching”. The constitution of Afghanistan takes a more restrictive view and equates freedom of religion simply with the right to “perform […] religious ceremonies”. Arguably, these two constitutions, although they do not contain express antiproselytizing provisions like Nepal, do not recognize the right to propagate religion as an element of religious freedom. The draft constitution of Bhutan is the only exception in this regard because it does not attempt to prescribe the elements of religious freedom but rather uses the generic term “freedom of religion” as a guaranteed fundamental right for its citizens.

E. Dichotomy of Essential and Nonessential Practices

As stated earlier, the term “religion,” as understood in South Asian cases, is not confined to religious belief alone but also includes religious practices. In this context, when the issue of freedom of religion arises, identification or determination of religious practices becomes vital and demands the answers to several questions. Is religion to be identified by what its practitioners regard as such? Or is there some independent test beyond self-estimation which the observer may apply? If religion is to be defined by its practitioners, then its contents and proper sphere, objectives and methods may differ from one group to another. How should courts react to such multiplicities? To find a way out, the Shirur Mutt case from Indian jurisdiction developed the “essential practices doctrine,” meaning that only the integral practices of a religion are entitled to the protection of the freedom of religion clause. In subsequent cases, the courts of India, Pakistan and Sri Lanka have consistently followed this doctrine. Accordingly, the courts are frequently asked to decide what constitutes an essential part of religion and what does not, and consequently what issues are or are not amenable to state intervention. In Afghanistan, Bangladesh, Nepal, Bhutan, and Maldives, application of this doctrine is yet be in issue in any case.

Although the Shirur Mutt case developed the essential practices doctrine, subsequent cases deviated from one of the principles of this case, which is: “religious

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denominations have autonomy to decide what practices are essentials”. In the case of *Acharya Jagdishwaranand Avadhuta vs. Police Commissioner, Calcutta*\(^8\) the Indian Supreme Court confirmed that the courts have the power to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion. Development of this jurisprudence is said to have created more problems than it solved.\(^8\) Courts are yet to answer some critical issues associated with this doctrine. When deciding which practices are essential to a religion, what kind of evidence should be considered authoritative? Should the courts interpret the religious texts or rely on experts? If the courts interpret the texts, what would be the rules of interpretation?\(^9\) In the absence of straightforward guidelines, judges are adopting varying standards to determine essentiality.\(^1\)

In India, a good number of cases involving the issue of freedom of religion for religious minorities have been decided by invoking the essential practices doctrine. Most notable among these are the cow slaughter cases. Amongst the Muslims, sacrifice of cows on *Bakr-id* day is a common religious practice which is backed by religious texts. However, because Hindus regard cows as sacred, many provinces in India passed laws to ban cow slaughter. These legislations have been challenged on different occasions before the courts as interfering with the freedom of religion of Muslims as guaranteed by Article 25 of the Indian constitution. However, in the case of *Mahomed Hanif Qureshi vs. State of Bihar*\(^2\) the court rejected the claim and concluded, with a brief reference to the religious scriptures that cow sacrifice on *Bakr-id* day is not an obligatory part of Muslim religion.\(^3\) The authenticity of the court’s interpretation was questionable because it could claim no special competence in Islamic scholarship. It neither sought the help of Islamic theologians nor did any of them depose as experts.\(^4\) Alternatively, regarding the religious verses relied on by the petitioner seeking to establish that cow slaughter on *Bakr-id* day was a religious practice of Muslims, the court simply concluded: “We have no affidavit before us by

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\(^8\) AIR 1984 SC 51.
\(^1\) Ibid.
\(^2\) AIR 1958 SC 731.
\(^3\) See, para. 13 of the judgment.
\(^4\) Rao, *op.cit.* note 91, 386.
any Maulana explaining the implications of these verses or throwing any light on this problem”.95 All subsequent cases on this issue have had similar conclusions.96

The case of Durgah Committee vs. Hussain Ali97 held that religious practices must be distinguished from “superstitious beliefs”. This extraordinary position of the court pushed the essential practices doctrine in a new direction. The court was not only playing the role of gatekeeper regarding what qualified as religion, but was now taking up the role of determining superstition from ‘real’ religion.98 This attempt by the judiciary is also evident in the cases of Sri Govindlalji vs. State of Rajasthan99 and Shastri Yagnapurushdasji vs. Muldas.100 On this point, the jurisprudence of Sri Lankan Supreme Court, however, offered a proright interpretation. In the case of Premalal Perera vs. Weerasuriya,101 the court held:

A religious belief need not be logical, acceptable, consistent or comprehensible in order to be protected. Unless where the claim is so bizarre or so non-religious in motivation, it is not the function of the Court to inquire whether the person seeking protection has correctly perceived the commands of his faith. The Court would consider only whether the professed belief is rooted in religion and whether the claimant honestly and sincerely entertained and held such belief.

In Ismail Faruqi vs. Union of India,102 the Supreme Court of India held, against the well-established Muslim religious belief, that offering prayers in a mosque is not necessarily an essential practice in Islam. In Acharya jagdishwaranand Avadhuta vs. Police Commissioner, Calcutta,103 the Court held that the tandava dance (worshippers dancing with human skulls in their hands) is not an essential practice of the Ananda Margi Hindu faith, notwithstanding the contrary claim of religious leaders of the community.104 Interestingly, in the opinion of the Court: “Anada Marga as a religious order is of recent origin and the tandava dance as a part of the religious rites of that order is still more recent. It is doubtful as to whether in such circumstances the

95 See, para. 11 of the judgment.
97 AIR 1961 SC 1402.
98 Ronojoy Sen, Legalizing Religion: The Indian Supreme Court and Secularism (East West Centre, Washington DC, 2007), 20.
99 AIR 1963 SC 1638.
100 AIR 1966 SC 1135.
101 (1956) 2 Sri LR 177.
102 AIR 1995 SC 605.
103 AIR 1984 SC 51.
tandava dance can be taken as an essential religious rite of the Ananda Margis”. This way of reasoning implies that to enjoy the protection of the freedom of religion clause of the constitution, a religious practice must not be of recent origin and when there is any doubt a rites essentiality to the religion, benefit of doubt should go in favour of regulation, not freedom.

The doctrine of essential practices developed further to demand a higher threshold in a case the Indian Supreme Court decided in 2004 wherein the Court held: “The essential part of a religion mean the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practice that the superstructure of religion is built. Without which, a religion will be no religion”.¹⁰⁵

The Pakistani Supreme Court, using the essential practices doctrine, found that the Ahmadiya’s public religious practices are not an essential and integral part of their religion.¹⁰⁶ In fact, during the last fifty years, the concept of the “essential practices doctrine” has been consistently denying many religious denominations their autonomy to decide what practices are integral to their religions. In the Menzingen case¹⁰⁷—a case from Sri Lanka concerning Christians’ rights to convert practitioners of Buddhism—the Sri Lankan Supreme Court also resorted to the essential practices doctrine.

The most worrying aspect of the essential practices doctrine is that in nearly all the cases in which it has been applied, the ruling goes against the religious minorities, particularly when a conflicting claim (either legal, political or social) by the majority community remains in the forefront of public debate. Because of consistent judicial emphasis on the essential practices doctrine and continuous expansion of the doctrine in favour of state regulation of religious freedom, the scope of state intervention in the matter of religious practices has been widening. Understandably, religious minorities are the target of such interventions. On many occasions, the religious practices of such minorities have failed to pass the essential practices test because the Courts can discard as nonessential anything which is not proved to their satisfaction—although

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¹⁰⁶ Zaheruddin v. The State, 1993 SCMR 1718.
they are not religious leaders or qualified in any relevant way in such matters—to be essential, with the result that it would have no constitutional protection.108

F. Permissible Extent of Limitations on Freedom of Religion

Regarding limitations on religious freedom, in all seven constitutions the right to freedom is not absolute but is subject to certain restraining factors. In fact, unrestrained freedom of religion is a concept foreign to the study of constitutional law. Even in countries (e.g., United States and Australia) whose constitutions confer religious freedom in absolute terms, many limitations have been imposed on this freedom by judicial interpretations.109 In Afghanistan, Sri Lanka and Bhutan, any restriction on the freedom of religion can only be prescribed by law. This condition is further subjected to qualifying criteria in Sri Lanka and Bhutan. The Constitution of Sri Lanka stipulates that legal restrictions must be “necessary in a democratic society in the interests of national security, public order, or for the purpose of securing due recognition and respect for the rights and freedoms of others”. The draft constitution of Bhutan says that any such legal restriction be reasonable and concern (a) the interests of the sovereignty, security, unity and integrity of Bhutan, (b) the interests of peace, stability and well-being of the nation, (c) the interests of friendly relations with foreign states, (d) incitement to an offence on the grounds of race, sex, language, religion or region, (e) the disclosure of information received regarding the affairs of the State or in discharge of official duties, or (f) the rights and freedom of others.110 In Afghanistan, it is permitted by the constitution to impose any restriction on the freedom of religion if it is done by law. In this regard, the constitutions of Bangladesh and Pakistan map a broader range of restrictions by declaring that the freedom of religion is subject to law, public order and morality. In India, the freedom of religion is subject to public order, morality and health. It appears more rights-friendly than Afghanistan, Bangladesh and Pakistan in the sense that it does not allow unreasonable

110 The Draft Constitution of the Kingdom of Bhutan, Art. 7, Section 22.
and unnecessary restriction by law. Nepal maintains a status quo, declaring that the freedom of religion is subject to “social and cultural traditional practices”.

As discussed earlier, international standards on freedom of religion demand that any restriction on such freedom be imposed by a law that satisfies the “legitimate aim test” and “necessity test” as outlined in these standards. From that point of view, the Constitution of Sri Lanka and the draft Constitution of Bhutan are consistent with international standards. However, the domestic standards of Afghanistan fall below international standards as the country does not insist on the “legitimate aim test” and “necessity test” for the approval of any restrictions. Likewise, the Constitutions of Pakistan and Bangladesh, although they mention legal limitations, allow legitimate objects as alternative grounds for limitations and make no reference to “necessity test”. However, the courts in Pakistan and Bangladesh have interpreted the constitutional positions in a restrictive manner declaring that the terms “subject to law” mean essentially a regulatory power that must be exercised for a permissible end.111 Alternatively, the Indian constitution altogether omits the requirements of legal limitation and the necessity test. The position of the interim Constitution of Nepal is too vague to comply with international standards.

If we look at the case laws of South Asian states, it is evident that in most of the cases, courts are expanding limitations and marginalising rights, thus allowing increasing state incursions. In particular, in cases concerning the freedom of religious minorities, the judiciary’s stand is not only liberal but also full of contradictions. In a number of Indian cases challenging restrictions placed on freedom of religion, courts have not even touched the issue of constitutional justification of such limitations. The doctrine of essential practices allowed them to simply throw most of the alleged freedom of religion outside the purview of constitutional protection. In Bangladesh Anjuman-E-Ahmadiya vs. Bangladesh,112—a case from Bangladesh—the forfeiture of a book of the Ahmadiya community for outraging the religious beliefs of many (sunnī) Muslims was upheld by the High Court Division. The Court commented that the petitioner “has no right to propagate any religious belief or any other matter in a book which would outrage the religious feeling of the Muslims of the Country”. Although the book in question was claimed to be an exercise of the right of the

Ahmadiya community to profess religious beliefs, the judgment gave priority to the religious beliefs of the majority Muslim population of the country. Interestingly, the book’s 10th edition was regarded as offensive to the religious beliefs of (Sunni) Muslims in 1984, long after several editions of the book circulated throughout the country since its first publication in 1948.113

In the case of *Zaheruddin vs. The State*,114—a case from Pakistan—a statute prescribing punishment for public practice of religion by the Ahmadiya community was challenged because it was opposed to the fundamental right to freedom of religion. While dismissing the case, the Court observed:

> The Ahmadis like other minorities are free to profess their religion in this country and no one can take away that right of theirs, either by legislation or by executive orders. They must, however, honor the Constitution and the law and should neither desecrate or defile the pious personage of any other religions including Islam, nor should they use their exclusive epithets, descriptions and titles and also avoid using the exclusive names like mosque and practice like 'Azan', so that the feelings of the Muslim community are not injured and the people are not mislead or deceived as regard the faith.

Here again, concerns of the majority population were regarded as a good ground of limitation on freedom of religion. The court also tried to justify such restriction on the ground of safety and security of the Ahmadiya community who could otherwise be victim of violence committed by the majority population. In the words of the court:

> “If an Ahmadi is allowed by the administration or the law to display or chant in public, the Shaair-e-Islam, it is like creating a Rushdi out of him. Can the administration in that case guarantee his life, liberty and property, and if so, at what cost?”. Anticipating the violent reaction of the religious majority, the Muslims, in response to the religious literature the Ahmadiya community’s founder produced, the court also observed: “Can then anyone blame a Muslim if he loses control on hearing, reading or seeing such blasphemous material as has been produced by Mirza Sahib?”

This case also held that because of the adoption of the objective resolution as a part of

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114 1993 SCMR 1718.
the constitution, in defining the terms “subject to law,” injunctions contained in the Quran and Sunnah are to be treated as positive law of the land. This is in clear contradiction of the true spirit of the constitution as well as the earlier cases decided by the courts. In this case, the court also held that in analogy with the law on trademarks and copyrights, the state can protect certain religious terms peculiar to Islam from being used by other religious communities. This also contradicts with an earlier decision in the case of *Abdur Rahman Mobashir vs. Amir Ali Shah* pronounced by the Lahore High Court and constitutes a radical departure from established judicial practices. Interestingly, in deciding the case, the court did not confine its attention to testing the constitutional validity of the legislation in question but reminded the government to concentrate on heavy restrictions of the religious freedom of the Ahmadiya community. This is evident in the language of the judgment: “In this ideological state, the appellants, who are non-Muslims want to pass off their faith as Islam. It must be appreciated that in this part of the world, faith is still the most precious thing to a Muslim believer, and he will not tolerate a government which is not prepared to save him of such deceptions.” In the wake of this decision, the number of Ahmadis arrested and charged with blasphemy dramatically increased.

In South Asia anticonversion legislation is another area of concern which is particularly designed as a limitation on the religious minorities’ freedom. As stated earlier, right to propagate religion is not expressly included in the freedom of religion clauses of the constitutions of Nepal, Afghanistan, and Sri Lanka. Moreover, Nepal’s draft constitution contains an express antiproselytizing provision which is clearly in contradiction with international standards. Although the Constitutions of India,

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115 The *Objective Resolution*, one of the most important documents in the constitutional history of Pakistan, was a resolution adopted in 1949 by the Constituent Assembly. In 1985, this document was annexed to and made a substantive part of the 1973 Constitution of Pakistan. For more details, see Javaid Rehman, “Minority Rights and the Constitutional Dilemmas of Pakistan”, 19(4) *Netherlands Quarterly for Human Rights* (2001), 417-443.


117 PLD 1978 Lahore 113.


Pakistan and Bangladesh acknowledge the right to propagate religion, the true meaning of the term “propagate” is yet to be an issue in any case of Pakistan or Bangladesh but remains for the last few decades a debated issue in India.

In 1968, Orissa, a state of India, enacted anticonversion legislation criminalizing any act or abetment to convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force, inducement or any fraudulent means. In *Yulitha Hyde vs. State*, the Orissa High Court held that the restriction on conversion by “force” or “fraud” would be covered by the limitation subject to which freedom of religion is guaranteed by the Constitution of India. The court, however, held that the definition of the term “inducement” was vague—that it included even “threat of divine displeasure”—and that many proselytizing activities would be covered by the definition, therefore, this restriction was not constitutionally permissible. However, in *Rev. Stainislaus vs. State*, a similar case challenging the constitutionality of an anticonversion law Madhya Pradesh passed—the Madhya Pradesh High Court reached a decision in favour of the law in question. Appeals against both decisions were simultaneously heard by the Supreme Court of India in the case of *Stainislaus vs. Madhya Pradesh & others*. In this case, the apex court of India held these anticonversion laws to be within the permissible limit of restrictions stipulated by the constitution. In particular, the Court held that the right to propagate religion, guaranteed by Article 25 of the Constitution, should be interpreted as “not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets.” This decision miserably failed to acknowledge that conversion by persuasion is a legitimate part of the exercise of the right to religion; the freedom to change one’s religion is meaningless if a person does not have the opportunity to be persuaded.

In the *Menzingen* case, the Sri Lankan Supreme Court held that the propagation and spreading of Christianity “would not be permissible as it would impair the very

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120 AIR 1973 Orissa 116.
121 AIR 1975 MP 163.
122 2 SCR (1977) 611.
124 Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation), SC Special Determination No. 19/2003. For an analysis of the case see, Alexandra Owens, “Protecting Freedom of and from Religion: Questioning the Law’s Ability to Protect Against Unethical Conversions in Sri Lanka”, 1(1) *Religion and Human Rights* (2006), 41-
existence of Buddhism”. Inspired by this decision, a bill was placed before the parliament to prohibit conversion from one religion to another by the use of force, allurement or fraudulent means. This bill was once again challenged before the Supreme Court. The Court suggested several amendments, particularly regarding the broad definition of the term “allurement”, to the bill. To neutralize these suggestions, a bill was once again proposed in the parliament for amendment of the constitution making Buddhism the official state religion. This bill was successfully challenged before the Supreme Court who declared the bill unconstitutional. Despite this ruling, the proposal resurfaced and was again to be the subject of debate and put to a vote in Parliament in 2005, although it did not come to the floor. In 2005, the Sri Lankan government once again announced that it was enacting anticonversion legislation. However, the process is yet to materialized.

IV. CONCLUSION

The foregoing discussion reveals that in South Asia, no domestic constitution fully complies with international standards. In particular, the position of Maldives is most alarming. Sometimes researchers argue that the demographic composition of Maldives does not necessitate any freedom of religion as a fundamental right. However, in this article, the authors argue that even if Maldives is considered to be a state having 100% Muslim population, the constitutional provision to the effect that a non-Muslim is not eligible to be a citizen and the absence of a freedom of religion clause effectively deters a Muslim’s right to convert to another religion of his or her choice.

The overall South Asian realities also confirm that democracy itself is no guarantee for freedom of religion for minorities. The majority may transmit its religious tenets

126 Nineteenth Amendment to the Constitution (Constitutional Amendment Bill) 2004.
128 According to the Constitution of Sri Lanka, the judiciary cannot review any enacted legislation, even if it is clearly inconsistent with the fundamental rights provisions of the Constitution [Art. 80(3)]. A bill can, however, be challenged before the Supreme Court for being unconstitutional before it is passed by Parliament [Art. 121(1)], although this does not necessarily prevent its enactment [Arts. 82, 83 and 123].
into positive law, barring individuals from acting on beliefs that conflict with the will of the dominant majority. Accordingly, it is indispensible that the body politic must be constrained by constitutional measures that dilute the power of majoritarianism. Because religious minorities lack the political power to defeat legislative and executive interventions, protection of their freedom of religion largely depends on the role of the judiciary. However, the higher courts of South Asian states have been failing to demonstrate a consistent stand in line with the developing jurisprudence of international human rights law and thereby contributing to the deprivation, as far as freedom of religion is concerned, of religious minorities. On many occasions, the courts have put heavy restrictions on religious practices. Although the Courts formulate these restrictions as secular reasoning, in most of the cases these restrictions are unfortunately aimed at minority religions and secular reasoning is reflective of majoritarian values. The courts are therefore required to realize that religious minorities are the first to benefit when religious regulations are lifted and the first to suffer when regulations are allowed; religiously divided states that impose restrictions on minority religions are more likely to experience conflict than are states without such restrictions.

Finally, although in this article, the authors argue that the judiciary in South Asia should play a proactive role to offer genuine protection to the religious rights of minority groups, one should not be unmindful of the sociopolitical realities the judges face in playing their due role. Reference can be made to the case of Salamat Masih vs. The State. In this Pakistani case, a division bench comprising two judges acquitted a Christian facing a blasphemy charge. Shorty thereafter, the senior judge was

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133 Ragnhild Nordas, “Regulating Religious Minorities—for Better or Worse?”, paper presented at the 45th Annual International Studies Association Convention, 17-20 March 2004, Montreal, Quebec, Canada.

murdered in his office and consequently the other judge fled to the United States on an immigrant visa.\textsuperscript{135}

\textsuperscript{135} Hassan, op.cit. note 85, 292-293.
Pakistan: Nation-State, State-Nation or Multinational State?

The model of the ‘modern’, ‘Westphalian’ or ‘nation-state’ contains within it an inherent bias towards conflict. Premised on the doctrine of territorial sovereignty, it requires the unity of all persons within its territorial boundaries and demands complete loyalty from all its inhabitants. However, human society is made up of myriad identities based on language, culture, race and religious beliefs that also demand loyalty. Consequently, citizens are subject to more than one set of demands, and this can create friction between different ethnic, national or cultural groups. If there is no clash between identities, then the impetus for conflict is minimized; however, as is the case in most states, when different identities enter into contradiction with one another this can give rise to conflict and tension, with varying degrees of intensity. Moreover, conflict can spill over from the territorial limits of the state and affect other states in the region and, by extension, international peace and stability. Some states, through a variety of approaches and policies, have been able to accommodate and contain such conflicts; others by contrast, have failed. The central question is thus how to these manage these differing and at times conflicting identities.

This essay focuses on Pakistan’s management of its ethnolinguistic mosaic. First, a theoretical section outlines the debate surrounding the concepts of nation-state, state-nation and multinational state, and contextualizes the case of Pakistan within it. That is followed by an analysis of Pakistan’s development as a unitary state, with an identity based on religion that negates its ethnolinguistic mosaic. The concluding section discusses briefly the Pakistani federal system, and suggests that its unitary rather than federal structure furthers negates ethnolinguistic diversity rather than protecting it.
I. THEORETICAL FOUNDATIONS

In simple terms, the ‘nation-state’ refers to a state within the boundaries of which there is only one nation. This is an ideal situation, and very rare; most of the states in existence today comprise multiple identities. Then there is the ‘state-nation’ approach, by which the state precedes the nation, and a national identity gradually evolves within its boundaries. Historically speaking, the idea of the modern state was based on that of the nation-state. As a consequence, most state-builders believe that having a single national identity is a prerequisite for stability in a given state.

Most studies of the state also revolve around the idea of a single national identity. Even the most democratic approaches are aimed at the ultimate goal of achieving a unitary national identity. ‘Nation-state policies’ represent a political–institutional approach that attempts to privilege one sociocultural identity over other potential or actual sociocultural cleavages that might be mobilized politically. Historically, that approach has been realized through a variety of routes: (1) by creating or arousing a special kind of allegiance or common cultural identity among those living in a state; (2) by encouraging the voluntary assimilation of those who do not share the initial allegiance to, or cultural affinity, with the national identity; (3) by exerting various forms of social pressure for assimilation, and preventing or destroying alternative cultural identities; and (4) by coercion that might, in the extreme, even involve ethnic cleansing.

By contrast, ‘state-nation policies’ represent a political–institutional approach that respects the legitimate public and even political expression of active sociocultural cleavages, and develops mechanisms for accommodating competing or conflicting claims between them without privileging or imposing any one claim. State-nation policies involve creating a sense of belonging (or ‘we-feeling’) with respect to the state-wide political community, while simultaneously creating institutional safeguards for respecting and protecting politically salient sociocultural diversities. The ‘we-feeling’ may take the form of defining a tradition, history and shared culture in an inclusive manner, with attachment to common symbols of the state and/or inculcating some form of
“constitutional patriotism”. Unlike India, Pakistan has adopted nation-state policies, using “various forms of social pressure and coercion to achieve this and to prevent or destroy alternative cultural identities”, and thereby denying diversity, notably on ethnolinguistic grounds.

From the very beginning, the Pakistani leadership adopted a nation-state policy, basing the claim to national identity on the religion of Islam, negating language, ethnicity, culture or history as sound basis for any claims for any political or economic rights. Mr. Mohammad Ali Jinnah, the leader of Pakistan movement and the first governor of Pakistan, underlined that policy very clearly when he refused to accept the demands of Bengalis that Bengali be recognized as a national language, in parallel with Urdu. The Pashtuns were faced with similar rejections when they demanded that their province, the North West Frontier Province, be renamed ‘Pashtunistan’ to reflect their ethnolinguistic identity. This laid the foundations for a unitary state structure and the undemocratic development of Pakistan. It also provided the basis for a ruling elite composed of Muhajirs (refugees from India after the 1947 partition), military personnel, and bureaucrats. Gradually Punjabis replaced Muhajirs, and later still alliances with the religious right became a useful policy tool.

The ideological basis for the creation of Pakistan in 1947 was the construction of an identity rooted in religion, namely, Islam. As such, the state was founded on the denial that anything other than religion could serve as the basis for identity. For the Muslim League leadership, which made up most of Pakistani elite after 1947, during the struggle for Pakistan the real opponent was not British imperial rule, but the Indian

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2 During a visit to Dhaka University in 1948, Mr. Mohammad Ali Jinnah flatly refused to accept the demands of Bengali students for recognition of Bengali as a national language, which led to riots on the streets of Dacca, considered the first language riots in Pakistan, led by Sheikh Mujib Ur Rehman. Sheikh Mujib Ur Rehman was the leader of Awami League that successfully led the War for the secession of East Pakistan from Pakistan in 1971.
3 Abdul Ghaffar Khan, leader of the Pashtun nationalists, first articulated the demand for renaming the NWFP ‘Pashtunistan’ in 1948 in the Constituent Assembly of Pakistan. However, rather than accepting his proposal, the state reacted by dismissing his party’s elected government in the NWFP and incarcerating him, along with thousands of his followers. Many Pashtuns lost their lives and were injured in the riots that ensued.
National Congress, which they perceived as representing Hindus. This experience, along with the tragic events of partition, became the basis of a strong perception that Indian leadership had not accepted the division of the sub-continent and would not miss any opportunity to undo it. The controversy over what Pakistan considered to be its fair share of assets within a united India was seen as further indication of Indian plans to strangle the new state economically at its inception.\(^5\) The fact that most of the Muslim League leadership came from territories that did not become part of the state for which they had struggled, and in which they became refugees, was also a significant factor in the evolving India-centric threat perceptions of the newborn state. Security policy became the central concern, and determined the content and contours of Pakistan’s foreign and domestic policy. This dominance of security policy also paved the way for the superior position of the military within state establishments and society.

Thus, identity founded on religion led to a denial of other identities rooted in ethnolinguistic characteristics, a development that was also attuned to the mindset and interests of the colonial bureaucracy. As a result, it generated a preference for a unitary state structure and slogans of one religion, one language and one nation.

II. RELIGIOUS IDENTITY, SECURITY PERCEPTIONS, UNITARY STATE STRUCTURE AND IDENTITY

Against this background, the Pakistan Army began a gradual journey towards near total domination of Pakistan’s decision-making elite, especially but not exclusively in the context of security policy. The prioritization of security concerns was also evident in foreign and domestic policy:

The primary reason for military’s emergence as the most influential element in […] decision-making lies in its significance in the country’s power politics. It assumed the responsibility of guarding the Islamic ideological identity and

frontiers of the country. The threat perception from India, viewed as a Hindu power, which cannot bear the existence of an Islamic Pakistan, has provided a certain ideological justification to the argument that it is only the military establishment that can provide security to this ideological state. Projection of threat from India is fundamental to the survival of the Pakistani establishment that even views internal insecurity as a continuation of the external threat. Islamabad has always looked at the internal political turmoil as the doing of a ‘foreign hand’ (insinuating India). It is in this background that Army has always kept the Kashmir issue on the hot burner.  

Under Pakistan’s first military ruler, General Mohammad Ayub Khan (1958-69), the military vowed to build a modern, pro-Western Islamic state that would serve as a bulwark against Soviet communism. Although religious parties disapproved of some of the liberalizing domestic programme of Gen. Khan, they shared with the military the perception that communism was the main threat faced by Islam. The military and the mullahs regarded those Pakistanis who professed communism, socialism, ethnic and cultural nationalism and/or secularism, as their common enemy.

During the East Pakistan/Bangladesh crisis of 1971, the religious lobby, led by the Jamaat-I-Islami’s (JI) youth wings, actively joined the war alongside Pakistani troops to fight their secular Bengali opponents; the Razakars (volunteer) force organized by the Pakistan Army was manned by such individuals. The crisis resulted in independence for Bangladesh in December 1971, after military intervention by India. This important episode from Pakistan’s history illustrates the basic convergence of perception between an essentially secular state and religious forces that regarded nationalists as adversaries. Similarly, the fact that religious Afghan opposition groups and their leaders were welcomed in the 1970s clearly underscores the point that the otherwise secular Pakistani establishment found common cause with religious groups, especially when it came to dealing with Pashtun nationalists and in areas of foreign

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policy. It should be noted that, even though Pakistan was under the leadership of a
civilian government, the supervision of the Afghan groups in the 1970s was
undertaken by the military.\(^8\)

This nexus between the centrist state establishment and the religious forces reached
its peak during the period of General Mohammed Zia-ul-Haq (1977-88), who joined
forces with the religious parties prior to overthrowing the elected government. Gen.
Zia Ul Haq and the religious parties had a common domestic enemy: secular
mainstream political parties. Zia’s personal proclivities also matched those of his
religious strategic partners. Rigid interpretations of Islamic injunctions and
jurisprudence were introduced during his 11-year rule\(^9\), and his legacy still haunts the
state and society of Pakistan.

III. PAKISTANI FEDERALISM

“The more a formal federal system operates in practice as a unitary system, the less is
[the] system’s capacity to accommodate ethnic and territorial cleavages”\(^{10}\). Structurally,
Pakistan has been a federation throughout its existence, and has undergone a number of
constitutional experiments. The federal superstructure is based on a very strong
centralized ideology, and civil and military bureaucracy. The federating units are not
demarcated on the basis of ethnolinguistic realities, even if there is one major
ethnolinguistic identity in each of them. Pakistan has retained the colonial provincial
demarcations, which were drawn mainly on the basis of administrative considerations.

\(^8\) The individual responsible were the then Inspector General (IG)FC of the Frontier Constabulary (a
paramilitary force, with regular army officers as commanders), Major General (Retd.) Naseerullah Babar
was the IGFC (then a brigadier), joined PPP after retirement and continued his interests in Afghanistan.
General Babar, who became interior minister in the Benazir Bhutto government (1993-1997), is considered
responsible for the rise of the Taliban in Afghanistan. C.f., \textit{inter alia}, Interview of Afzal Khan, Pashtun
nationalist leader from Swat in daily ‘Dawn’ Karachi, 4 May 2009, at
<http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/national/afzal-khan-
lala-says-swati-girl-was-flogged-publicly-459>; also
Namuddin Sheikh, former foreign Secretary of Pakistan, in “Daily Time”, Lahore, 28 August 2008, at


\(^{10}\) Atul Kohli, “India: Federalism and Accommodation of Ethnic Nationalism”, in Ugo Amoretti and Nancy
Though one must acknowledge, except for NWFP, all the names do have a historical reference and represent the majority ethnolinguistic group of that province.

The minority syndrome that had characterized Muslim politics in British India, in both theory and practice, continued to cast its shadow on the politics of Pakistan. The state forming character of Muslim nationalism in British India was transformed into a nation-forming agenda in post-independence Pakistan. The fact that the Pakistan movement was lacking in policy content only meant that the state elite increasingly pressed Islamic ideology into serving the need for national integration at the cost of addressing the pluralist character of the society.11

The unnatural focus on national unity premised on Islamic identity kept any attempts to create a federal Pakistan at bay. The new state, dominated by Muhajirs (in politics and the bureaucracy) and Punjabis (in the army), paid little attention to the aspirations of minorities, and did not accord them fair representation in the institutions of the new state.

Dr. Waseem states that:

An obvious casualty in the way the establishment in Karachi developed a self-sustaining machinery of government in the immediate post-partition years was the political representation of various ethnic communities from East Bengal and the smaller provinces of the western wing. The leadership of these communities was either not the visible and significant part of the Pakistan movement, such as the political leadership in the Baluchistan states of Kalat, Mekran and Lasbela, or was on the other side of the political divide such as the NWFP’s Congressite leadership and the leadership of the Hindu community in general.12

There are four provinces, Punjab, Sindh, North West Frontier Province (NWFP) and Balochistan and the two special administrative regions of the Pakistan Federally Administered Tribal Areas (FATA) and the Federally Administered Northern Areas (FANA). These divisions are dominated and thus politically coloured by one or the other ethnolinguistic group. Thus, we note the dominance of Punjabi identity in Punjab, Sindhi

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identity in Sindh, Balochi identity in Balochistan. Although Pashtuns dominate the North West Frontier Province, significantly, that province unlike the other three is not named after them.

As noted above, Pakistan also consists of two special administrative regions, the Federally Administered Tribal Areas (FATA) and Federally Administered Northern Areas (FANA). Again, only historic continuity (not local but British colonial) and strategic and political considerations are at work here. FATA, consists of almost 100% Pashtuns and is adjacent to NWFP. It is principally administered by the bureaucracy and the governor of the NWFP, although the elected government of the province has nothing to do with its administration. FATA further divides the Pashtuns administratively. FANA, historically part of Kashmir, is kept separate from the government of (Pakistan-held) Kashmir, but does not occupy a normal constitutional position within Pakistan, be it as a separate province or as part of an existing one. This ambiguity is maintained because the territory forms part of the Kashmir territory, where since 1948 various UN resolutions have called for a plebiscite, and on which Pakistan has based its rationale for the Kashmir dispute. Pakistan has administratively separated this territory from the part of Kashmir held by it, but has not formally incorporated it within Pakistan, believing that this would weaken its position on Kashmir. The current government has held elections for a local assembly and given the title of governor to the federal minister responsible for the territory, which gives it the semblance of a province without actually making it one; for example, no provisions are made for representation of the territory in the federal parliament. This, while recent government action does represent a small step forward are occurring, it does not change the constitutional status of the territory.

The Stanford encyclopedia cites two ways in which independent regions can form a federation: they “may come together by ceding or pooling sovereign powers in certain domains for the sake of goods otherwise unattainable, such as security or economic prosperity” (examples include the United States of America, Switzerland and Australia); or they can form a “holding together” federation, developed “from unitary states, as

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governments’ response to alleviate threats of secession by territorially clustered minorities” (examples include India, Belgium, Canada and Spain). The particular way in which a federation takes shape explains why it is that in some federal systems the centre is more powerful than the state or the provinces, while in others states or provinces have greater authority than the central government. The ‘coming together’ federations are based on a bottom-up approach where the centre does not possess any powers to begin with. Its authority is the sum total of all the powers ceded to it or pooled willingly by the constituent units. In fact, the ‘holding together’ federations come into being as a result of transformations in unitary states that are trying to hold their own in the face of separatist or secessionist tendencies among their constituent parts. By contrast, a top-down mechanism is one whereby a strong centre gradually allows the constituents parts to gain power at its own expense.

The ‘coming together’ federations are arranged in such a way that power is not concentrated in the centre or the majority, thereby preventing these from overriding the smaller constituent parts or minorities. That said, however, the ‘holding together’ federations “often grant some subunits particular domains of sovereignty e.g. over language and cultural rights in an asymmetric federation, while maintaining broad scope of action for the central government and majorities”.15

The Pakistani federation does not fit into either of these two classifications; it is neither a ‘coming together’ nor a ‘holding together’ type. Arguments have been put forward in favour of both. Historically at least two provinces, Balochistan and NWFP opted to become part of Pakistan. Similarly, FATA’s merger with Pakistan was also the result of that option being exercised by them. NWFP decided through a referendum, Baluchistan decided in a Tribal Jirga headed by the Baloch ruler, ‘Khan of Kalat’, and the people of FATA gave their consent through their tribal elders. However, the method by which these and other federating units became part of Pakistan is not illustrative of its status as ‘coming together’ federation. The Pakistani state also failed to exercise the ‘holding together’ path as it did not give any substantive powers to the federating units or

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15 Badar Alam, Federalism in Pakistan: The Liberal Perspective (Liberal Forum Pakistan, Islamabad, 2006).
recognize any diversity in culture or language, let alone grant constituent units economic or political rights.

The federal structure has been retained in each of the three constitutions of Pakistan (1956, 1962 and 1973). However, the 1956 and 1962 constitutions denied federalism in the then West Pakistan (since 1971, the whole or remaining Pakistan). Both these constitutions described the Pakistani federation as having only two provinces: West Pakistan and East Pakistan. Both these units were accorded “parity” of representation in the federal legislature. This may appear to be an ideal federal arrangement from the point of view of minority federal units. However, the truth is that the provision was not incorporated to protect the rights of smaller units but to deny rights to the majority Bengalis. It was also based on an outright denial of the ethnolinguistic divisions of West Pakistan. This arrangement did not work and Pakistan split in two, with East Pakistan becoming the new state of Bangladesh. In 1969, the unit created through merger of the three provinces and the territory of Baluchistan (Baluchistan was not given the status of a province earlier) was dissolved. From that date, Pakistan has comprised four provinces and two special territories.

The 1973 constitution claims to be the most federal constitution that Pakistan has ever had. Although it retains most of the weaknesses of its predecessors, for the first time in the country’s history it did take steps towards creating some sense of federalism. A bicameral legislature was introduced, a National Finance Commission was set up to distribute financial resources between the provinces, and a Council of Common Interests was constituted to oversee the management of natural resources as well as strategic economic and industrial assets.

However, a number of anomalies continue to favour the central government at the expense of the provinces. These were rendered more prominent by the erratic behavior of Bhutto while in power, and subsequent amendments to the constitution. The unitary substance of the 1973 constitution was further strengthened by the 8th amendment introduced by President Gen. Zia Ul Haq. This was undone by parliament in 1997 under Prime Minister Mian Nawaz Sharif. The next military ruler, General Musharraf, who came to power with the idea of devolving powers, actually reintroduced most of Zia Ul Haq’s centralizing amendments through the 17th amendment (a parliamentary committee
is currently trying to develop a consensus on how to undo this amendment). As a result of
the 17th amendment, executive power rests with the president and the governors of the
provinces, rather than with the prime minister and the chief ministers. The appointment of
the governors is within the discretionary powers of the president. Ultimately, therefore,
gubernatorial powers are exercised with the blessing of the president, giving the latter
near absolute powers over the provinces. This is true even in those few areas of
competence that are still reserved to the provinces, the most important being the power of
the governor to dismiss the provincial government and the provincial assembly at his or
her discretion.

In fact, on the issue of lists of respective legislative competences, the constitution was a
major step backwards. The Government of India Act 1935, which Pakistan adopted as its
first working constitution gave the federation 96 items which were reduced to 49 by the
1956 and 1962 constitutions. However, the 1973 constitution enlarged it to a massive
114. Also in the 1956 constitution, unlike the 1973 constitution, there were separate
federal, provincial and concurrent lists. There were 30 items on the list of federal powers,
94 items on the list of provincial powers and 19 items on the list of concurrent powers.
Furthermore, when the 1973 constitution accorded superior status to federal legislation on
the concurrent powers list, the legislative autonomy of the provinces was reduced even
more.

The imbalance of powers between the two houses of parliament practically nullified the
positive impact of overrepresentation of smaller provinces in the senate. For example,
finance bills, especially the national budget, could only be introduced through the
national assembly. Second, the centre continued to control the federal legislative
competences, as well as the concurrent legislative competences, and no list of provincial
powers was even provided in the 1973 constitution. In fact, that constitution made no
changes at all to the underlying bureaucratic structure of the state, which is unitary rather
than federal. Against the backdrop of the Bangladesh debacle, the ruling elite (more
specifically the political elite now led by the Pakistan People’s Party of Zulfiqar Ali
Bhutto, president and then prime minister between 1973 and 1977) realized that the issue
of ethnic diversity needed to be addressed. However, even then it did not constitutionally
recognize the multiethnic plural fact of Pakistan, and failed to restructure the units of the Pakistani federation to represent the reality of diversity.

A crucial unitary feature of the Pakistani federation is its centralized bureaucracy, which continues the tradition of the Indian Civil Service, originally designed to control the people and keep them in check. All senior bureaucrats, even those in the provinces, belong to this unitary bureaucracy. So for example, the provincial chief secretary and the police inspector general look to the central government for their career decisions and appointments, rather than to the provincial government. This bureaucracy is so well entrenched that no action, on the part either of the military or the civilian governments, has been able to check its powers and privileges. It is this bureaucracy which ultimately prevails and no reforms, be they constitutional or administrative, has ever resulted in any fundamental change to the unitary characteristic of the Pakistani state. Once in power, political parties that initially struggled for change have always tended to rely on these centralized mechanisms to stay there. To date, the current government has undone only one reform introduced by the government of the former military dictator, Gen. Musharraf, whereby administrative powers were removed from the bureaucracy at district levels and given to local elected bodies. The current provincial governments, with the support and active prodding of the central government, have since restored those powers. It should be added that Gen. Musharraf’s devolution plan was criticized, but for undermining the provinces not the bureaucracy. Similarly, it is this bureaucracy that has prevailed over the elected government to postpone the implementation of the (not very impressive) reforms in FATA, announced by President Asif Ali Zardari on 14 August 2009.

IV. MAKING THE PAKISTANI FEDERATION A FEDERATION

Kennedy argued for “bold policies to reorganize Pakistan’s federal structure” to handle ethnic diversity. To manage difference, Kennedy has argued for “redesign[ing] territorial boundaries of the constituent units to make them accord more closely with the ethnic
landscape of the state”. He also approved more devolution of authority for the proposed homogenous constituent units.

The first step towards making Pakistan a true federation has to be acceptance of the fact of the plurality of its people, and direct acknowledgement of that fact in the constitution. Ensuring that such recognition becomes meaningful must become the basis for restructuring the state. The federating units must be restructured and some new ones created. The special territory of FATA, the Pashtun territory of Baluchistan and the NWFP must be joined together to form a new province with a name reflecting their identity. FANA has to be given the status of a full province. Punjab must also be divided along ethnic lines between Saraikis and Punjabis. A system of special regions for some of the smaller groups like the Chitralis in the NWFP, the Brohis in Baluchistan, etc. must be created so that these smaller but separate ethnolinguistic identities are also protected. This restructured Pakistan must then amend its constitution to become a federation in reality and not just in name. The bureaucratic framework between the federal and provincial authorities must be clearly delineated, with each accorded responsibilities in its own areas. All provincial departments must be headed and manned by provincial bureaucracies. Provinces must have control over their resources and any revenue generated by such resources, and should not be dependent on the federal government for financial survival.

V. CONCLUSIONS

Pakistan has the distinction of being the only state with a successful secessionist movement that led to its breaking up during the Cold War era (Bangladesh 1971). It has continuously faced crises of governance which, according to some, are actually crises of survival. The most significant underlying cause for this perpetual insecurity has been Pakistan’s failure to manage its ethnic diversity. That failure has been blamed by some on foreign intervention, primarily by India; others claim that it is the unitary militarist and undemocratic growth of Pakistani state which is primarily responsible.

The conclusions of this study are that Pakistan’s failure to build viable democracy and face the challenges of peaceful governance at home a direct result of its denial of the pluralist nature of its society, and its failure to restructure the state accordingly. So, in Pakistan, the struggle for democracy and ethnolinguistic-based restructuring are inseparable. A restructured Pakistan would not only be able to contribute more positively to regional peace, but would be more at peace with itself. It is the opinion of the author that Pakistan’s way out of its present crisis is through reconceiving itself, not as a nation-state or a state-nation, but as a multinational state.

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Annex 1:  Pakistan by mother tongue (1998)\textsuperscript{18}

<table>
<thead>
<tr>
<th>Linguistic group</th>
<th>Pakistan</th>
<th>Punjab</th>
<th>Sindh</th>
<th>NWFP</th>
<th>Baluchistan</th>
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</thead>
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<td>21.1</td>
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</tr>
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<td><strong>100</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
<td><strong>100</strong></td>
</tr>
<tr>
<td>Population (in millions)</td>
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<td>73.6</td>
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</tr>
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Gender and the Law in South Asia: Law – a Vehicle for Emancipation or a Victim of Identity Politics?

I. INTRODUCTION

In South Asia the law has been used by women’s movements to combat discrimination against women, promote their rights and improve their status, based on the belief in the emancipatory nature of the law. In particular within the region, campaigns and movements for change through law reform have to a great extent focused on issues that have been traditionally relegated to the private sphere, such as violence against women and family law. Whereas other issues such as equal pay, property rights and caste and class discrimination have attracted different levels of effort and engagement in different countries in the region. After relying on legal reform to bring about social change for more than two decades, advocates, activists and scholars are re-examining the potential of the law to bring about substantive change and its ability to challenge dominant norms upon which the law is founded; norms which are patriarchal and contain inherent class, caste and religious biases.

While acknowledging the usefulness of the rights discourse and law reform we have to recognize that the emancipatory potential of the law is limited by identity politics, which use and exploit ethnic and religious factors to curtail the rights of certain groups of persons in society. Hence, at times, laws which are expected to enhance the ability of women to make informed choices and increase their ability to exercise their rights, instead, impact adversely upon women members of social, religious, ethnic or caste

groups. Further, there is need to recognize the political nature of legal reform where the furtherance of women’s rights and their advancement is cited to introduce legislation which has as its aim the control of certain communities, most often religious or ethnic minorities; these measures invariably affect women negatively. Within the context set out above, this paper seeks to engage with feminist debates within the region on law as a vehicle for social change, and discuss the ways in which the law and legal reform have been shaped by ethnicity and religion and their effect on women within the region.

II. HAS THE LAW OUTLIVED ITS USEFULNESS?

A. The Law and the ‘Woman’ Question

In seeking to use the law as a tool to promote the rights of women we must appreciate that “the Rule of Law, despite its pretensions of objectivity and neutrality, is, in the final analysis, also a system of power. It includes and excludes people, it disciplines and punishes and it fosters certain values and attitudes encasing them in a belief that they are time-honoured and eternal”.¹ Legal reform initiatives of different feminist movements both in the west and in the global South have been articulated within the framework of the rights discourse, a trend that continues to dominate current feminist interventions and campaigns.

The law constructs what is ‘natural’ and ‘unnatural’ by criminalizing certain acts while protecting others. For instance, homosexuality has been criminalized because it is deemed unnatural. Penal Codes of the countries in the region, such as Sri Lanka and India, categorize it as an offence that is against the order of nature. In India while it has been contended that homosexuality is not part of the national culture and hence should not be decriminalized² it has been used to demonize Muslims who have been portrayed as outsiders who indulge in such “foreign perversions that undermine the nation”.³ Based on unsuccessful attempts in the region to criminalise marital rape, one would have to

³ Ibid.
conclude that it is considered natural by the state. This is illustrated by comments made by lawmakers in Sri Lanka during the parliamentary debate on proposals to amend the Penal Code, which limited recognition of marital rape to judicially separated couples, that ranged from concern for the psychological impact on the children of a woman who alleges marital rape, to claims it was against the culture of Sri Lanka which unlike the West places great value upon family and marriage.\(^4\) In Pakistan, the enactment of the Hudood Ordinances denies women recourse to legal remedies in many instances. For instance if a woman cannot prove the offence of rape, she can be accused of adultery under the Zina Ordinance which criminalizes consensual sex between persons not married to each other. The difficulty in proving rape beyond a reasonable doubt coupled with the inherent patriarchal biases within the system make it virtually impossible for women to seek legal redress. Rape, an offence which should be criminalized is instead viewed as adultery and the victim is subject to sanctions.

Legal regulation of the public and private spheres shifts and fixes meanings of acts that are deemed to require regulation and those that are free from the purview of the law. For instance, as discussed above, while sexual activity between two consenting adults is regulated by the state because it violates cultural and religious mores, acts which if recognised as offences by the state would threaten institutions and relationships that are deemed integral to the perpetuation of the family, and thereby for the preservation of cultural values and the unity of the nation, such marital rape, are acceptable in the eyes of the law.\(^5\)

Our interrogations on the nature of the law would benefit from a study of the way law fashions the citizen who benefits from the law. Who is the object of the law? Who is the “ideal citizen” envisaged by the law? The ideal is the Enlightenment man.\(^6\) Feminists put forward different reasons as to why the male body was chosen as the ideal. Menon believes that it was due to the fact the bodies of men were seen as “clearly bounded and

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\(^4\) The Hansard, 19 September 1995.
\(^5\) Kapur, \textit{op cit.} note 2, 32.
solid” whereas female bodies were viewed as being “disorderly and penetrable and subject to cyclical changes; their bodily processes were messy and challenged the idea of the closed and controlled body surface; and through reproduction, were divisible, suggesting the unlimitability of their boundaries. Thus they could never be the rational, indivisible, unambiguous individual.8 The qualities that are valued in the “ideal citizen” are qualities traditionally associated with men- “ideal male citizens were rational, independent, self-directed, autonomous and cultural, in dramatic contrast to the dependent, emotional, natural, passive female”. 9 This man then is the ideal that the law views as the standard. The behaviour, thoughts and actions of all are measured using this man as the ideal. The acceptance of this construct by the law points to its gendered nature.

In this context, women of the global South are placed in a particularly difficult position. In their own communities they may be subjected to discrimination. In addition, if they wish to be a part of the rights discourse they are forced to utilize the western, rationalist language of the law.10 They are not in a position to negotiate their own methods of engaging with the system. Instead, they have to deal with the prejudices and biases not only of their own communities but also with those of the legal system. Menon points out that in countries subjected to colonization the law was established as the “only legitimating discourse”11. In India when the British codified law they chose scholars who selected certain texts and interpretations as authentic and formulated a set of rules that were patriarchal and re-affirmed caste and regional hierarchies. Diversities and multiple interpretations were therefore ignored.12 Menon states that “the very dynamic of law tends towards the fixing and universalizing of identity”13 whereby the legal discourse erases the particularities, ambiguities and contextuality. Justice too has only one meaning

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8 Ibid.
9 Naffine, op cit. note 6, 21.
11 Menon, op cit. note 7, 283.
13 Menon, op cit. note 7, 285.
and is based upon the assumption that the fixing of meaning and identity will result in a fair result. Contextuality and particularities are extremely important to women as they take into account complicated and individual experiences. We cannot therefore continue to view the law and legal processes as universal, or as a metanarrative as “the norms of justice are interpreted inadequately or non-inclusively”. Doing so will validate the dominant meaning as universal while ignoring the voices on the margins and fringes of society.

Instead of adopting the universal language of law Hilary Charlesworth believes that “the technique of asking questions and challenging assumptions may be more valuable…” and warns against attempting to create a universal theory of patriarchy. As there are different forms of oppression that operate at different times, there could be instances where certain practices thought to be oppressive to women in one society might be quite emancipatory to women in another context. This is due to women’s multiple identities and the different spaces they occupy at different times which contribute to their particular position in the family or society.

Menon in her argument calls for accepting the self “as something negotiable and contestable” rather than more strictly defining the boundaries of our bodies through law. This is because she is of the opinion that law and justice accept many terms such as “the body” without question, which leads to the creation of assumptions about the nature of women and their bodies. One such assumption that surrounds sexual violence is that a woman’s body is naturally rapable which distinguishes sexual violence against women from other forms of violence. It creates the notion that this type of violence attacks the “selfhood” of women and reinforces the belief that rape is a fate worse than death. It also means that women experience a sense of shame as a result of rape.

\[B. \textit{The Problem with Rights}\]

14 Ibid, 264.
15 Ibid, 286.
17 Menon, \textit{op cit.} note 7, 289.
19 Ibid.
Like the law, rights too are considered to be universal. The language of rights assumes the legal system to be neutral and objective, and relies on the law and legal processes for enforcement. The appeal of rights can be easily understood as they ‘… protect the weak against the strong and the individual against the State’.

They are accessible to all or as Smart states “it enters into a linguistic currency to which everyone has access”. Hence, it is not surprising that marginalized groups have turned to the rights discourse and the law to the point where in spite of their sometimes ineffective nature a loss in rights “is equated with a loss of power or protection”. As in the case of the law and legal processes, in the case of rights too, the values and qualities upon which they are based are thought to be self-evident and universal. The allure of universality is that it gives the appearance of moving beyond prejudices and biases and being inclusive.

The language of rights assumes that individuals have the ability to make decisions unconstrained by the operation of extraneous factors. It assumes that every person makes a decision of his or her own will. The right to choose which plays a central role in the rights discourse has serious implications for women. In many instances women are simply denied this right on the basis of their sex while in other instances the law and rights discourse deny the woman the right to choose in order to ‘protect’ her. For example, in the case of a woman who wants to commit Sati, does one give her the right to choose or does one deny her that right in order to protect her person? Many feminists have argued that in such cases the woman has to be denied the right to choose because a woman’s right to choose maybe subject to external pressures and influences. They have illustrated that in the case of Sati the lack of legal prohibition could lead to women being pressurized by parents and in-laws to commit Sati for monetary reasons etc. Yet, to begin with the assumption that a woman even when seeking to act of her own will is actually

21 Ibid.
22 Ibid.
23 Coomaraswamy, op.cit, note 1, 164.
not doing so because it contravenes our (feminist) values, denies the woman the power and right to make choices and decisions\textsuperscript{25} however well-meaning the intention.\textsuperscript{26} The rights discourse also tends to oversimplify complicated power relationships.\textsuperscript{27} It assumes that the choice to exercise a right will not have an impact on other areas of a person’s life. In the case of violence against women this make it doubly important for campaigns to give as much energy to finding solutions to the socio-economic problems faced by women who experience violence. For example, in the case of a woman in a violent relationship, the law assumes that the woman has the right to choose to leave, whereas in reality economic considerations may prevent her from doing so. Hence, advocating for criminalizing domestic violence needs to be undertaken parallel to focusing on enhancing women’s economic independence and livelihood options and establishing support mechanisms such as shelters. In Sri Lanka although the Prevention of Domestic Violence Act was enacted with much fanfare it does not even recognise domestic violence as a crime and instead makes provision for the issuance of protection orders while ignoring other issues that contribute to preventing domestic violence. For instance, it is not mandatory for medical service providers to complain of incidents of domestic violence to the police; it does not provide guidelines on how police officers should respond to complaints of domestic violence etc. Hence, rights do not always solve problems “rather they transpose the problem into one that is defined as having a legal solution”.\textsuperscript{28}

The disregard by the rights discourse of existing unequal power relations can lead to unforeseen results in the real world with only a limited number of individuals obtaining justice while structural inequalities continue to exist.\textsuperscript{29} This is clearly illustrated by the case of the Protection of Women from Domestic Violence Act 2005 in India, a progressive piece of legislation, which due to lack of implementation and existing structural inequalities and insensitivities, does not provide much benefit to women. The

\begin{footnotesize}
\textsuperscript{25} Paper presented by Nivedita Menon at the Neelan Tiruchelvam Commemoration, 29-31\textsuperscript{st} January 2000. Paper on file with the author.
\textsuperscript{26} Nivedita Menon, ‘Recovering Subversion’, \textit{Recovering Subversion: Feminist Politics Beyond the Law}, (Permanent Black, New Delhi, 2004) 213
\textsuperscript{27} Smart, \textit{op.cit}, note 20, 144.
\textsuperscript{28} Ibid.
\textsuperscript{29} Charlesworth et al, \textit{op.cit.} note 10, 635.
\end{footnotesize}
state of Gujarat, where ten out of twenty six districts don’t have shelters, where instead of appointing independent full time Protection Officers, District Social, Defence Officers and Zonal Dowry Prohibition Officers have been tasked with additional duties of a Protection Officer, and no programmes have been instituted to sensitize law enforcement officials and the judiciary on the Act, is an example of the inaction and unwillingness of the state impeding women from accessing legal remedies to rights violations. This stems from the failure by the state to acknowledge violence against women as a crime; a failure that is rooted in, and is the result of persisting patriarchal notions. Further, the violence against women discourse focuses on the ‘victim subject’ whose rights have been violated which can contribute to the perpetuation of the notion that women are persons without agency, and unwittingly deprive them of the power to make choices regarding their lives.

Seeking refuge in rights and the law also means continuing to work within existing structures and condoning their processes and methods. To always look to the legal system means accepting assumptions that ignore unequal power relations between the sexes and the numerous barriers to their removal. “Sexism is not a legal aberration but a pervasive, structural problem...Thus, equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.” By focusing solely on the rights discourse and legal processes, we reinforce their power as the dominant discourse and fail to challenge the inherent biases of the system. In Sri Lanka although the Prevention of Domestic Violence Act bore little resemblance to a draft bill which was prepared by civil society and rights groups and presented to the government, the dominant view amongst these groups was that ‘something was better than nothing’ and that once enacted it would be easier to bring about amendments to the legislation. These groups hence failed to challenge existing power structures and the flawed system with the

32 Charlesworth et al, op.cit. note 10, 632.
33 Ibid.
34 Personal observations based on participation in consultations on the Bill.
result being women continue to face obstacles and sometimes are actively prevented from seeking remedies through the law.

Most scholars and activists would concur with Carol Smart’s statement that the recourse to law and legal processes was necessary at the beginning of the feminist project in order to battle legal obstructions to the empowerment of women. However today formal equality has been achieved to a great extent in many fields and continuing to focus on formal equality will detract attention away from structural impediments and inequality. Therefore, “continuing the demand for formal rights now is problematic”. 35

III. THE LAW AS A SITE OF STRUGGLE: WOMEN AND IDENTITY POLITICS

A. Secularism & its Discontents

The (in)ability of a state to manage relations between majority and minority groups impacts upon members of those groups, particularly the marginalized amongst the group. The state hence needs to have the capacity to deal with identity politics; an enterprise in which all states in the region have failed.36 The ability or inability of a state to manage identity politics impacts upon legal regimes, legal reform and access of different communities to the law.

Secularism is one of the methods employed by the state to manage and deal with minorities. In recent times secularism has become a site of contention and controversy in the region due to the rise of fundamentalisms- Hindu, Muslim and in the case of Sri Lanka a revival of Sinhala nationalism. Secularism has many avatars37, amongst them two forms which take centre place in debates on the subject in the subcontinent; one form which views it as a separation of religion and state and the other which advocates for political neutrality where religion is concerned.38 Chatterjee states that in India the Hindu Right is comfortable with secularism as it finds no threat in the separation of state from

35 Smart, *op.cit.* note 20, 139.
38 Ibid, 488.
religion in the public sphere since majority Hindu norms would by default become the norm and constitute the mainstream, which the others would be invited to join as equal citizens. Hence, secularism as constructed by Hindu fundamentalists has no space for minority groups. The destruction of the Babri Masjid and ensuing events led to criticism and claims that secularism is an import of Europe and hence its failure in South Asia is unsurprising. Asish Nandy, a self-confessed non-secularist, is kinder in his criticism and acknowledges that secularism has checked certain intolerance in Indian society. He however is of the opinion it is incapable of dealing with new and emerging ‘fears and intolerance’. Nandy advocates a non-Western version of secularism, which has ‘space for continuous dialogue among religious traditions and between the religion and the secular’. Bhargava, though sympathetic to Nandy’s critique of a secularism which excludes the religious from the public sphere, finds this problematic and points out that the gap in Nandy’s argument is its failure to see the tolerance inherent in secularism, which has as its aim the settlement of conflicts in recognition that ‘the resources of tolerance within traditional religion had exhausted their possibility’.

The Hindu right views secularism as equal treatment of all religious communities with any protection of the rights of religious minorities being viewed as appeasement, i.e. an approach based on formal equality that ‘becomes about the assimilation of minorities’. In this context the Hindu right has begun campaigns for the improvement of the status of women through law reform focusing on a range of issues from polygamy to equal wages. Although at first glance it reads like what Kapur calls a ‘feminist wish list’, a closer study reveals that it mainly targets reform campaigns at women from the minority communities with the aim of delegitimizing these communities and their way of life.

The debate in India on the Uniform Civil Code is a case in point. Although reform of Hindu law is portrayed as an example of the willingness of the community to embrace

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40 Ibid.
41 Bhargava, _op.cit._ note 37, 529-532.
43 Ibid, 330.
44 Ibid.
45 Ibid.
modern values, scholars point out that reforms were not far reaching as claimed since many discriminatory provisions against women were retained. The Hindu right extols the virtues of the secular nature of Hindu law and the willingness of the community to reform their laws with the purpose ‘othering’ the Muslim community as backward and unwilling to be a part of the nation-state for their refusal to subject their personal laws to state regulation.\textsuperscript{46} The redefinition of the debate in terms of nationalism and religion has led the women’s movements to distance themselves from this issue for fear of supporting the agenda of the Hindu right.

Multiculturalism is another means through which the state has tried to negotiate its relationship with minorities. Even the British practiced a form of multiculturalism in their colonies whereby they allowed communities to govern themselves through personal laws which applied to the private sphere. This was not due to respect for local cultures or religions, but instead was done with the purpose of making the colonized believe the private sphere was untouched- the household as the last independent space left for the Hindu\textsuperscript{47}, while highlighting and deepening difference between local communities.\textsuperscript{48} For instance where raising the age of consent was concerned, though the colonial state instituted reform of existing law due to pressure from the reformists, in the face of increased opposition from the nationalists they compromised in many ways. As Sarkar notes, often the judges hearing cases of rape and even death by rape of young girls by their much older husbands ‘bent over backwards to exonerate the system of marriage that had made this death possible’.\textsuperscript{49} Noticeably women were absent from the debate on the issue as the rhetoric of empowerment of women was used to wage a battle over the nation state.

In the current context too, multiculturalism places women in a precarious position. In multicultural states most often communities retain power over areas considered private, i.e. marriage, divorce and other issues which are related to the determination of group membership, to enable the group to have power over the construction of collective identity which is thought to be important for group survival, through personal laws.\textsuperscript{50} The paradox is that while empowering certain groups, multiculturalism subordinates certain members of these groups.\textsuperscript{51} Accommodation of group/community rights can therefore lead to “multicultural vulnerability”, where existing hierarchies in communities foster the violation of the rights of individuals who are in a vulnerable position. In Sri Lanka, Tamil women from the Northern Province who are governed by Tesawalamai, personal laws applicable to the inhabitants of the North, are in such a position. Tesawalamai restricts the right of a married woman to deal with her property without the husband’s written consent. If the husband’s consent is not forthcoming the woman can apply to court for consent, which would be given if it is deemed the husband is withholding consent unreasonably.\textsuperscript{52} The husband cannot give general consent for future disposition as it has been deemed to amount to the release of his protectorship and would therefore contravene the aim of the provision- to protect the woman from being cheated of her property.\textsuperscript{53} Yet despite this, at present, Tamil women would not support a campaign for the reform of Tesawalamai because as a community Tamils fear it will be used by the state to take over their lands. Multiculturalism also entrenches the public-private divide through its acknowledgment of the public status of the identity group and disregard for the status of individuals within these identity groups. Multiculturalism focuses on injustices in the public sphere. Yet, it is in the private sphere that most women experience discrimination, as the private sphere is maintained for the articulation and preservation of traditional values which allows communities to define gender roles and regulate the lives of women. Giving power in areas such as family law to identity groups most often places burden on

\textsuperscript{51} Sheth and Mahajan, \textit{op.cit.} note 36, 123.
\textsuperscript{52} Section 8, Tesawalamai and Matrimonial Rights & Inheritance Ordinance No.1 of 1911 as amended by Ordinance No.58 of 1947.
certain members of the group, namely women. This is the “paradox of multicultural vulnerability”\(^{54}\).

The manner in which multiculturalism views individuals is also problematic, as it begins by locating them as part of a particular community, which limits their identity to their cultural group. This approach discounts the fact that women have multiple identities, and are not solely defined by their membership of a particular cultural group.\(^{55}\)

**B. The Politics of Law Reform: The Impact of Ethnicity, Caste and Religion**

The Constitutions of India, Nepal, Sri Lanka and Bangladesh all contain equality and non-discrimination clauses which recognise women as (equal) citizens. In practice however the ideal citizen is being ‘informed by xenophobia, exclusions and other forms of alienation that treat ‘the other’ as a threat to national and social cohesion and national identity’.\(^{56}\) Minorities, ethnic, religious and linguistic amongst others, are those who are adversely affected by laws that give expression to these fears and are used to control ‘the other’. Women within these communities are doubly disadvantaged as they experience discrimination, violence and marginalisation on account of their group identity as well as sex.

Despite constitutional guarantees of equality, judges in Pakistan interpret the law in a manner that enables them to bring the Constitution in line with the mores of an Islamic society, which often means that arguments are constructed in a way that ensures that rulings which discriminate against minorities and women do not appear to contravene the Constitution. The case of Saima, where an adult woman’s right to act for herself was challenged, is a case in point. In this case the court delivered an ambiguous decision which although in favour of Saima, i.e. it decided that Saima’s marriage was valid although it was contracted without the consent of her wali since the constitution recognised her right to do so, the opinions of two of the three judges questioned the moral

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\(^{54}\) Ayelat, *op.cit*, note 50, 3.

\(^{55}\) Mahajan, *op.cit* note 36, 135.

\(^{56}\) Ratna Kapur, “Challenging the Liberal Subject: Law and Gender Justice in South Asia”, International Development Research Centre.
and social implications of her decision despite its legal validity.\textsuperscript{57} As feminist writers have pointed out ‘Eventually the judges decided to treat it as an issue of state failure in successfully integrating “Islamic” tradition and culture into constitutional law, a failure through which the relationship between the religious and the legal presented thorny dilemmas for the judiciary’. \textsuperscript{58}

In Sri Lanka ethnicity influences the implementation of the law resulting in the discrimination of the minority population with Tamil women particularly affected. A state of emergency has been in place for most of Sri Lanka’s post-independence life and emergency regulations which are in force and provide the police and army enhanced powers, mostly without checks and balances, have enabled arbitrary arrests, disappearances and custodial torture. In this context, the minority Tamils are the most affected and continue to be so even after the defeat of the LTTE. Although Tamil men are the targets of suspicion of state forces, the young Tamil woman has also invited increased cynosure due to the LTTE’s use of women as suicide bombers. Due to this, (all) Tamil women’s bodies are subject to increased scrutiny. In the eyes of the state this woman doesn’t benefit from the ‘protection’ of the law. Instead the law seeks to protect the community, particularly the majority community from her. Large numbers of Tamil women have been detained following cordon and search operations, for periods of at least 24 hours, and safeguards to protect women in custody (as contained in presidential directives for the welfare of detainees issued in July 1997) have been ignored.\textsuperscript{59}

The cases of Ehambaram Nanthakumar Wijikala and Sinnathamy Sivamani provide further example of the manner in which Tamil women are further marginalized and discriminated by the law and legal system. These two women despite threats to their lives filed fundamental rights cases for unlawful arrest and detention and custodial rape and identified three police officers and nine navy personnel as the perpetrators. Illustrating the difficulty and danger of prosecuting custodial rape, ‘the case dragged on for over four years, in the course of which Wijakala has gone missing and Sivamani received many threats to the effect that she will be killed if she comes to Anuradhapura for the court

\textsuperscript{58} Ibid, 292.
\textsuperscript{59} Tamil newspaper
hearings. The case was listed to be heard in Anuradhapura High Court on September 21, 2005 but both the victims did not turn up’. Since the law views these women with a biased eye even in when they have been affected they are unable to access legal mechanisms and remedies, and when they do face repeated discrimination and marginalisation.

When studying whether the law is a vehicle of empowerment for women, understanding that race, class, religion and ethnicity are factors that inhibit the responses of women might provide us insight into women’s reluctance to support initiatives for legal reform. Women from besieged communities who might have been subjected to extensive state controls due to their race, ethnicity, class or a similar factor may take refuge in the private sphere of their ethnic/racial/class communities. In the case of Shao Bano a Supreme Court decision affirmed the right of a Muslim woman to maintenance upon divorce according to the Criminal Procedure Code and held that it did not violate the Koran. This sparked outrage within the Muslim community and caused an uproar because according to personal law Shao Bano would have been entitled to maintenance only for three months after the divorce, i.e. during the period of iddat. In response, the state introduced legislation, the Muslim Women (Protection of rights on Divorce) Act, which exempted a divorced Muslim woman from the application of section 125 of the Criminal Procedure Code which granted a divorced woman such a right, in order to counter the Supreme Court decision. Those who supported the law were depicted as fundamentalist with Muslims once again depicted as the ‘other’. In this context even women’s groups and particularly Muslim women’s group were placed in a difficult position, as to oppose the Bill would have meant adopting the position of right-wing Hindu groups. Their reluctance to support legal reform that impacts on their particular communities highlights the conflict between individual rights and the rights of the community, and the politics of negotiating competing claims by contesting communities and interest groups. Mere law reform is hence inadequate to change the status of women in the eyes of the community.

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60 Rape and Murder of a Young Mother in Mannar: Statement by Mannar Women for Human Rights and Democracy dated 22 June 2006 available at http://www.ctmpc.blogspot.com/
which might feel targeted and therefore take social measures to ensure the continuation of their religious traditions to the detriment of women.

The debates on abortion in Sri Lanka are an example of the use of religion in politics to control women’s bodies through legal reform, which is made possible by the existence of state structures that are inherently biased against women. During the parliamentary debate on the Penal Code amendments in 1995, members of parliament spoke as representatives of their religions, identifying themselves by their religious beliefs and stated that in the interests of maternity and motherhood, which they pointed out was the highest status a woman could achieve in society, abortion should not be liberalized. They further said that it would ‘open the flood-gates’ and lead women to be promiscuous and use abortion as a method of contraception. In this case too, the state exercised control over women’s bodies via claims of protecting religious and ethnic sensitivities of communities and accepted the positions of the parliamentary representatives as the will of the community. There was no public debate on the issue nor was there space for dissenting views from within the communities as the voices of the members of parliament, as persons in the highest position of power, displaced other opinions.

IV. CONCLUSION

Feminists in the global South have ‘problematized’ legal reform and the rights discourse and call for a more nuanced understanding of the law that acknowledges the limitations of its emancipatory power. Awareness of the manner in which the law and legal systems can be subjected to the manipulations of interest groups and are shaped by identity politics would enable women’s movements to sidestep initiatives that are likely to result in diminishing the space available to women to exercise their rights. Further, recognition that legal reform has made a limited contribution to displace dominant norms and hierarchies upon which the legal system is founded would allow the exploration and inclusion of alternate methods in the efforts to empower women. Post-colonial feminist theory is an useful tool to employ in this endeavour as it recognizes the importance of

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positionality which is integral to reflecting and incorporating women’s lived experiences in the law and contest existing and new structures and processes of oppression.
India and the Paradox of Caste Discrimination

I. INTRODUCTION

Like an octopus, caste has its tentacles in every aspect of Indian life. It bedevils carefully drawn plans of economic development. It defeats legislative effort to bring about social reform. It assumes a dominant role in power processes and imparts its distinctive flavour to Indian politics. Even the administrative and the academic elites are not free from its over-powering influence. So how can it be ignored as a social force?1

This description of the role of caste2 in India, written in 1968—21 years after Indian independence3 and 18 years after the adoption of a constitution heralding a society free from poverty, inequality and discrimination4—was echoed some 35 years later in Myron Weiner’s observation that caste is still very much alive as a lived-in social reality, even as its ideological grip has weakened.5

70 years since B. R. Ambedkar’s seminal essay “The Annihilation of Caste”6 calling for an end to the caste system and

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2 From the Portuguese casta meaning species, race or pure breed, first used by Europeans in India in the sixteenth century to distinguish between Muslims and Hindus and to denote birth-groups or communities; see Susan Bayly, Caste, Society and Politics in Modern India from the Eighteenth Century to the Modern Age (Cambridge University Press (CUP), Cambridge, 1998), 105-106; Ursula Sharma, Caste (Viva Books, New Delhi, 2002), 1; Marc Galanter, Competing Equalities: Law and the Backward Classes in India (University of California Press, Berkeley, 1984), 7.

3 India became independent at midnight on 14-15 August 1947; see Dominique Lapiere and Larry Collins, Freedom at Midnight (Vikas Publishing House Pvt. Ltd., New Delhi, 1997).


6 Bhimrao Ramji (‘Babasaheb’), “The Annihilation of Caste”, in Vasant Moon (ed.), Babasaheb Ambedkar Writings and Speeches (BAWS) Vol. 1 (The Education Dept, Govt. of Maharashtra, Bombay, 1989). Babasaheb Ambedkar (1891-1956), Dalit and lawyer, was one of India’s greatest twentieth-century political leaders and legal scholars, and a lifelong campaigner for the eradication of caste; see Christophe Jaffrelot, Dr Ambedkar and Untouchability: Analysing and Fighting Caste (Permanent Black, New Delhi, 2005); Eleanor Zelliot, “The Leadership of Babasaheb Ambedkar” and “Gandhi and
the oppression associated with it, caste has not been annihilated in India, neither has ‘untouchability’ (the practice of caste-based social ostracism, segregation and exclusion, abolished by the constitution but sanctioned by culture and religion). Far from becoming a caste-neutral or caste-less society, India remains a society where caste matters. Paradoxically, says Weiner, “the movement for change is not a struggle to end caste [but] to use caste as an instrument of social change”; “what is emerging in India is a social and political system which institutionalises and transforms but does not abolish caste”. At the same time, the contours of the legal debate on caste discrimination are shifting; a new discourse on equality is emerging—albeit amidst arguments cautioning that existing benefits must not be undermined even as new approaches are explored—which looks beyond the confines of existing strategies for addressing caste discrimination towards a broader conceptualization of discrimination, inequality and diversity which accepts the need for recognition of a range of ascribed social identities in order to measure and more effectively redress persistent inequality and discrimination.

Caste as a system of social organization exists primarily in South Asia (India—the focus of this article—Nepal, Pakistan, Bangladesh and Sri Lanka) but is also found in South Asian diasporic communities around the world. Despite six decades of domestic laws and policies to eliminate discrimination on grounds of caste and secure
social and economic equality, the Dalits—formerly known as Untouchables—remain at the bottom of India’s social and economic hierarchy, while untouchability and discrimination, exclusion and violence on grounds of caste persist. Since the late 1990s, discrimination on grounds of caste—until then absent from international human rights discourse—has been acknowledged by the former UN Sub-Commission for the Promotion and Protection of Human Rights (Sub-Commission) as a violation of international human rights law—as a sub-category of discrimination based on work and descent—and by the UN Committee on the Elimination of Racial Discrimination (CERD/C) as a form of descent-based racial discrimination as defined in the International Convention for the Elimination of all forms of Racial Discrimination (CERD). The aim of this article is to provide an insight into the paradox of caste discrimination in India in the twenty-first century. Focusing on the Dalits, it outlines the nature and extent of caste discrimination in India today, maps the legal approach in India to its elimination, assesses the effectiveness of official policies and considers the prospects for eradication of this age-old and entrenched form of discrimination. Part II provides an overview of the nature of the problem and the types of discrimination occurring against Dalits today. Part III presents the legal and policy frameworks for the elimination of discrimination on grounds of caste and for the emancipation of the Dalits, including India’s affirmative action or ‘reservation’ policies, while Part IV assesses the impact of these strategies and the factors hindering their effectiveness. Part V concludes by arguing that India’s existing legal strategies for the elimination of caste discrimination are too narrowly focussed, and that alongside and beyond these

11Dalit is a term of self-identification meaning ‘crushed’ or ‘broken’ in Marathi, a regional language of western India, denoting those formerly known as ‘untouchables’. Harijan (‘children of God’), the term popularized by Gandhi, has largely fallen out of use as patronizing. The Indian constitutional, legal and administrative term for former untouchables is scheduled castes (SCs). Whilst recognizing that it is not adopted by all members of former untouchable communities, Dalit is used throughout this article except in the context of constitutional, legal and administrative measures where the official acronym SC is used. On the use of Dalit in official documents see Seema Chisti, “Caste Panel to Govt: Don’t Use the Word Dalit, Use SC”, Indian Express, 13 July 2008.
12 See CERD/C, concluding observations on India’s fifteenth to nineteenth periodic reports, 5 May 2007, UN Doc. CERD/C/IND/CO/19, 13-15, 17, 18, 20-27.
13 Now the Human Rights Council Advisory Committee.
strategies a broader approach to equality, non-discrimination and diversity, underpinned by reliable policy monitoring and assessment, and renewed civic and political vision, is needed in order to overcome age-old inequalities and discrimination based on caste.

II. CASTE DISCRIMINATION: CONTEMPORARY CONTEXT

A. The ‘Caste System’

India’s Dalits number almost 167 million or 16.2% of the population. A system of social stratification based on ascribed status, caste is distinguished by its hereditary nature, its religious underpinnings in orthodox Hinduism and by the concept of untouchability, whereby those at the very bottom of the social order—the Dalits—are considered permanently polluted, ostensibly on the grounds of their own or their ancestors’ ‘unclean’ occupation, people with whom physical and social contact is to be avoided for fear of defilement. Although this imagined ‘pollution’ is ritual and religious in origin the discrimination it engenders is circular; many Dalits are constrained to work in ritually polluting jobs which are also objectively dangerous, dirty and low paid, thereby reinforcing the untouchable status of those who perform them. Yet paradoxically, neither engagement in ‘non-polluting’ work—however prestigious—nor educational or professional attainment or economic success affects individual caste status, which despite its purely notional nature is conceived as a physical attribute—a “property of the body”—hence permanent and immutable.

India’s caste system is estimated to be some two to three thousand years old. Maintained by the twin practices of endogamy and commensality, caste is a significant (albeit not the only) feature of Indian social organization. ‘Caste’ refers both to the hierarchical division of society in orthodox Hindu creation mythology into

15 Census of India 2001, Scheduled Castes Population, at <http://www.censusindia.gov.in/default.aspx>. India’s total population is over one billion, two thirds of which is rural. Over half of all Dalits live in the states of Uttar Pradesh, West Bengal and Bihar in the north and Andhra Pradesh and Tamil Nadu in the south; see GOI, Ministry for Social Justice and Empowerment (MSJE), New Delhi, Report 2008-9, 7, at <http://www.socialjustice.nic.in/ar09eng.pdf>. Punjab has the highest percentage (almost 29%) of scheduled castes to state population.
17 See Builty, op.cit. note 2, 13; Govind Sadashiv Ghurye, Caste and Race in India (Popular Prakashan Pvt. Ltd., Mumbai, 1969), 43; Alok Parasher-Sen (ed.), Subordinate and Marginal Groups in Early India (Oxford University Press (OUP), New Delhi, 2004).
18 Galanter, op.cit. note 2, 7-17.
four categories or *varnas*\(^\text{19}\) based on social function or occupation\(^\text{20}\) and, at an empirical level, to the South Asian concept of *jati*—regional or local kinship groups or communities which are linked together in a hierarchically graded structure of exclusion, inclusion and dependence, effectively the operational units of the caste system. There are only four Hindu *varnas* but an indeterminate number of *jatis* as groups may occasionally merge or subdivide.\(^\text{21}\) While the *varna* hierarchy is fixed and immutable there has always been upward and downward movement in *jati* ranking. However, both *varna* and *jati* membership are involuntary, hereditary and fixed at birth, and characterized by individual inability or severely restricted ability to alter one’s inherited status.\(^\text{22}\) Although doctrinal support for caste exists only in Hinduism, caste has permeated other religions, and caste distinctions are found in Islam, Christianity and Sikhism in South Asia and its diaspora despite their lack of scriptural support for caste.\(^\text{23}\) At the material level, caste entails “graded inequality”\(^\text{24}\)—the “dispensation” of differing economic, social and cultural assets or opportunities, rights and deprivations to different groups or communities, sanctioned by religion and ideology.\(^\text{25}\) In this way caste and power are inextricably linked in what Sheth terms a “sacralised power structure”.\(^\text{26}\)

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\(^\text{19}\) *Varna* means colour, referring not to skin colour but to a system of colour symbolism reflecting the social hierarchy; see Flood, *op.cit.* note 16, 59.

\(^\text{20}\) Known as the *chaturvarna* system, comprising the Brahmans (priests) at the top of the hierarchy, followed by the Kshatriyas (warriors and rulers), Vaisyas (traders and artisans) and Shudras (serfs and labourers). The first three groups are the ‘twice-born’ castes—‘twice-born’ because males undergo a rebirth or initiation into their caste role and duties—while the fourth group (the Shudras) are the ‘low’ castes, now known as ‘other backward classes’ or OBCs. Outside the *varna* system is a fifth group, the *avarnas* or Dalits, formerly known as Untouchables. See Flood, *op.cit.* note 16, 11-12, 48-49, 58-61.

\(^\text{21}\) See Narashimhacher Jayaram, “Caste and Hinduism”, in Mysore Srinivas (ed.), *Caste: Its Twentieth Century Avatar* (Penguin Books, New Delhi, 1996), 78. The number of *jatis* is estimated at around 4,000. *Jatis* are region-specific which accounts for regional differences in caste formation, identity and experience.


B. Caste and Poverty

Land and learning, two of the primary sources of economic power in India, have till recently been the monopoly of the superior castes [...] the lowest in the hierarchy were those who were assigned the meanest tasks and carried no economic power [...] The lower the caste, the poorer its members.27

The framers of India’s constitution aspired to achieve an end to poverty and a radical restructuring of Indian society.28 The constitution guarantees individual rights and freedoms whilst explicitly providing for special measures of affirmative action for three categories of historically disadvantaged groups. These are the Dalits (known as “scheduled castes” or “SCs” in Indian constitutional, administrative and legal terminology, the only group afflicted by untouchability, and the primary focus of this article); the Adivasis or Tribals (known as “scheduled tribes” or “STs”),29 and the “backward” or “other backward classes” (known as “OBCs”), a category of less severely socially and educationally disadvantaged groups who do not suffer from the stigma of untouchability.30 Despite significant improvements since independence in literacy, primary school enrolment and public sector employment, many Dalits continue to suffer from discrimination and exclusion in the economic, occupational, educational and social fields and from caste-based violence and gross human rights abuses. Over 80% of Dalits live in the countryside where they constitute over 21% of the population,31 yet own under 9% of land.32 80% of Dalit households that do own land own less than one hectare, and Dalits constitute a quarter of all landless

27 Onthethupalli Chinnappa Reddy, The Court and the Constitution: Summits and Shallows (OUP, New Delhi, 2008), 100.
28 Granville Austin, The Indian Constitution: Cornerstone of a Nation (OUP, New Delhi, Thirteenth Impression, 2008), 26-27.
29 The Adivasis, numbering 84 million (around 8% of India’s population) are a distinct social and juridical category, distinguished by tribal (aboriginal) characteristics and geographical and cultural isolation from the mainstream population; see Galanter, op.cit. note 2, 147-153.
30 The OBCs are roughly equivalent to the Shudras in the Hindu chaturvarna framework, comprising between a third and a half of India’s population. The term Backward Classes is used both to denote the SCs, STs and OBCs combined; see Galanter, op.cit. note 2, 121.
households. Almost 37% of rural and 40% of urban Dalits live below India’s national poverty line, compared to 28% and 26% of the total rural and urban populations respectively. Dalits constitute over 17% of India’s vast slum population although only 12% of the urban population. In 1991 only 28% of Dalits, compared to 48% of the total population, had electricity. Yet, in India, material poverty is not unique to Dalits and is not the only source of their oppression. Rather, despite regional, linguistic, cultural and religious differences, they are distinguished by a shared experience of untouchability-based exclusion, discrimination and violence.

C. Caste and Economic and Occupational Inequality

Caste “has long been used to regulate economic life in India”. Although the link between caste and occupation has never been watertight, economic activity remains skewed along caste lines, with sharp disparities in occupational mobility, status and income between Dalits and the higher castes. Over 50% of rural Dalits are agricultural labourers dependent on low-paid and insecure employment, a figure little changed in 20 years. Only 10% of rural private enterprises and just under 7% of urban private enterprises are owned by Dalits, a consequence of historical socioreligious restrictions on Dalits’ access to land, capital, credit and right to own property; moreover, Dalit-owned businesses tend to be low income-generating ‘own account enterprises’ run by single households without hired labour, resulting in high poverty

33 Ibid.
34 GOI, MSJE, Report 2007-8, 9.
40 Figures based on the NSS 55th Round 1999-2000, cited in Ghanshyam Shah, Harsh Mander, Sukhadeo Thorat et al., Untouchability in Rural India (Sage, New Delhi, 2006), 43.
compared to non-Dalit self-employed households, particularly in urban areas.\textsuperscript{44} Bonded labour and child labour are intimately linked to caste; the vast majority of India’s forty million bonded labourers (including fifteen million children) are Dalits and \textit{Adivasis},\textsuperscript{45} while almost 32% of Dalit children in India are child workers, the largest segment of which is girls.\textsuperscript{46}

Occupational discrimination (unequal access to jobs) accounts for a large part of the earnings differential in the salaried private sector urban labour market between Dalits and \textit{Adivasis} and the rest of the population.\textsuperscript{47} Since independence, constitutional affirmative action policies (discussed in Part IV below) have enabled many Dalits to take up service and administrative jobs previously barred to them. However, such policies are restricted to the public sector—where Dalits are under-represented in senior posts and over-represented in the lowest grade posts.\textsuperscript{48} Yet, while this sector has been shrinking since the 1990s in the face of globalization and India’s economic liberalization programme,\textsuperscript{49} Dalits struggle to secure anything other than menial or low status positions in the rapidly expanding formal private sector. Thorat and Newman attribute Dalit occupational immobility to fixed economic rights defined by caste\textsuperscript{50} which make it very difficult for young Dalits to accumulate the necessary social and cultural capital—family background, education, social networks, cultural exposure and sophistication, personal skills and confidence, financial security and, crucially, fluency in the English language—to compete on a level playing-field.\textsuperscript{51} “Far from disappearing as the economy modernises”, they argue, the formal, urban labour market shows “serious evidence of continued discriminatory barriers even for highly

\textsuperscript{44} Thorat and Sadana, \textit{op.cit.} note 31, 14.
\textsuperscript{46} \textit{Ibid.}, 16.
\textsuperscript{50} Thorat and Newman, \textit{op.cit.} note 39, 4122.
qualified [D]alits”. Despite the view in modern corporate India that recruitment is ‘caste-blind’ and governed strictly by merit interviewees are invariably questioned about ‘family background’, a euphemism for caste. A study of employer responses to written job applications found that applicants with a distinctively Dalit name (the only aspect of ‘family background’ communicated in the application) had significantly lower odds of being contacted for interview than equivalently-qualified applicants with a stereotypically high caste Hindu name. The accumulated “cultural capital deprivation” of many Dalits presents a major hurdle to occupational—as well as social—mobility.

**D. Educational Inequality**

Article 46 of the constitution provides that the state “shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes and protect them from social injustice and all forms of exploitation”. Yet since independence, elementary education has been woefully neglected, especially in rural areas where the majority of the population, and the majority of Dalits live. Free compulsory education for six to fourteen year olds became a fundamental constitutional right only in 2002. Although Dalit literacy levels rose from 10% in 1961 to almost 55% in 2001, this remains below the national level of 65% and there are significant regional and gender disparities. Less than 42% of Dalit women are literate compared to almost 54% of the general female population. In 2000 70% of rural Dalit women were illiterate, while in Uttar Pradesh (UP) only 8% of rural Dalit women were literate.

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52 Thorat and Newman, *op.cit.* note 39, 4123. Muslims were found to suffer similar discrimination.
53 See Jodhka and Newman, *op.cit.* note 51, 4125. Fredman argues that merit is “not an objective and quantifiable property”, and that “even if prevailing notions of merit are accepted, one is not supplying genuine equality of opportunity if one applies this criterion to people who have been denied the opportunity to acquire ‘merit’”; Sandra Fredman, “Reversing Discrimination”, *113 Law Quarterly Review* (1997), 575-600, at 580.
Basic education enrolment rates for Dalit children aged six to fourteen are similar to the population as a whole, but fourteen-plus enrolment rates are noticeably worse among Dalits and drop-out rates are worse for Dalits aged six to sixteen, at 70%, as contrasted with 61% for the general population (and the figures are worse for girls) due in part to the high direct costs of schooling and the need for Dalit children to work.

Despite constitutional affirmative action provisions in tertiary (higher) education (HE), Dalits are significantly under-represented in the ranks of higher degree graduates (the minimum qualification for middle-ranking public-sector jobs). Dalits form around 12% of the urban population but just 3.6% of urban non-technical subject graduates and under 2% of urban medical graduates, while Hindu upper castes comprise 37% of the urban population but over 65% of both non-technical subject and medical graduates—making “their share in the highly educated [...] about twice their share in the general population”. But graduate under-representation cannot be attributed solely to discriminatory practices in university admissions, although discrimination remains a factor. Dalit children are more likely to attend state-run, poor quality, rural, non English-medium schools; inequality in primary and secondary schooling means that they are less likely to meet college admissions requirements.

By 2000 the representation of Dalits in higher education was still only half their representation in the population as a whole; moreover, two thirds of Dalit students are enrolled on low prestige programmes and they are disproportionately under-represented in masters and doctoral programmes. Although 15% of places in tertiary institutions—including the elite technology, management and medical institutes—are reserved for Dalits, it is estimated that nationally at least half of these go unfilled despite lower admissions requirements, due to a lack of suitably qualified applicants,

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60 Ibid., 117.
64 Satish Deshpande, “Exclusive Inequalities” in Thorat and Kumar, op.cit. note 9, 323-324.
66 Hasan and Mehta, op.cit. note 65, 3791.
67 Weisskopf, op.cit. note 51, 4339.
while those Dalits who do gain admission are less academically prepared. Once at university Dalits are not guaranteed freedom from social discrimination. Moreover they tend to perform slightly worse than general entry students due to financial difficulties, family demands, poorer English language capabilities and weaker sociocultural backgrounds which leave them ill-prepared for academic study.

E. Untouchability and Violence

1. Untouchability

Described by Ambedkar as a notional *cordon sanitaire* separating the untouchables from the rest of society, untouchability (customary rules of social segregation, ostracism and exclusion) and social violence operate as dual enforcement mechanisms for the maintenance of caste norms and boundaries and to exclude Dalits from wider public, economic, social and cultural life. In 1948 Ambedkar described the division of Indian villages into two sections, the Touchables and the Untouchables who must live “in separate quarters away from the habitation of the Hindus”. Although as Mendelsohn and Vizciany observe, untouchability has changed character and lost intensity since independence and there is a decline in some of the most blatant practices, a 2006 academic study of rural untouchability in 11 states found “almost universal residential segregation in villages” and untouchability practised in a variety of forms in almost 80% of the villages studied, despite its constitutional abolition. In one out of ten villages studied, Dalits were not allowed to wear new clothes or sandals, use umbrellas or ride bicycles; in almost half the villages, Dalit

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71 Ambedkar, *op.cit.* note 24, 187. See also Srinivas’ concept of the “pollution line”; Srinivas, *op.cit.* note 21, xiii.
74 Mendelsohn and Vizciany, *op.cit.* note 38, 36.
75 Shah, Mander, Thorat et al., *op.cit.* note 40, 166.
marriage processions were prohibited on public roads; in three out of four villages, Dalits were not permitted to enter savarna (upper caste) homes, let alone eat with upper castes. Moreover, one of the study’s authors argues elsewhere that the “spatial, social and institutional base for untouchability” has been recreated in the towns. On the surface untouchability has declined in urban centres—where, at least in public spaces, the touchable–untouchable barrier is impossible to maintain and caste anonymity easier to achieve—but rather than a diminution of prejudice, argue Mendelsohn and Vicziany, this reflects a combination of pragmatism, avoidance strategies and “compartmentalisation” by higher status Indians who remain occupationally, residentially and socially separated from the lower castes; the invisibility of caste from the lives of the higher castes, says Deshpande, is a luxury of the urban elite.

2. Violence

Violence against Dalits and Adivasis—known as ‘atrocities’—is on the rise, often committed with the knowledge, acquiescence, or at the hands, of law enforcement agencies including the police and the judiciary. Non-governmental monitoring groups and statutory bodies link atrocities with greater competition between Dalits and higher castes for scarce resources such as land and water as well as with

80 Ashwin Deshpande, “The Eternal Debate” in Thorat and Kumar, op.cit. note 9, 68.
attempts by higher caste groups to protect their status against growing Dalit political and economic assertion, or to punish those perceived to have transgressed social boundaries.\(^{84}\) Frequently the perpetrators of anti-Dalit violence are the intermediate castes or the OBCs, those castes just above the Dalits in the social hierarchy\(^{85}\)—the 2006 Khairlanji atrocity in Maharashtra (in which four members of a Dalit family, the Bhotmanges, were tortured and murdered by an OBC mob) being a recent well-publicized example.\(^{86}\) Collaboration against Dalits between upper castes and, in Rajasthan, Jats (landowning Sikhs), or between upper castes and other marginalized groups such as the Muslims or STs (who cannot be prosecuted under the POAA—see below), also occurs\(^{87}\) as does caste violence in the Punjab between Jats and Ad-Dharmis (a Dalit religious movement the membership of which includes Sikh as well as Hindu and Muslim Dalits).\(^{88}\)

Crimes against Dalits are punishable under the Indian Penal Code (IPC) or under special “hate crimes” legislation—the Protection of Civil Rights Act 1955 (PCRA)\(^{89}\) and the more serious Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (POAA or ‘Atrocities Act’)\(^{90}\) which defines certain acts of violence as aggravated crimes where the victim (but not the perpetrator) is an SC/ST. The very fact that the enactment of the POAA was deemed necessary, and the nature of the offences it prohibits, is indicative of the persistence and severity of abuses suffered by Dalits in contemporary India. Alongside serious caste-aggravated IPC crimes, the POAA lists 22 “hate crimes” including forced consumption of noxious substances, corrupting or fouling water springs, forced expulsion of Dalits from their homes, and sexual offences against Dalit women. Between 2006 and 2007, total reported crimes against Dalits—including murders, abductions and rapes—increased

\(^{84}\) NHRC, op.cit. note 45, 1; Bhatia, op.cit. note 76, 46.

\(^{85}\) According to Gorringe, in Tamilnadu caste violence is predominantly perpetrated against Dalits “by insecure BC groups”; Gorringe, op.cit. note 81, 238, 243; Bhatia, op.cit. note 76, 46; Anand Teltumbde, Khairlanji: A Strange and Bitter Crop (Navayana, New Delhi, 2008), 15-16; Rajni Kothari, “Rise of the Dalits and the Renewed Debate on Caste”, 29(26) EPW (1994), 1589-1594, at 1593.

\(^{86}\) See Teltumbde, op.cit. note 85.

\(^{87}\) See Bhatia, op.cit. note 76, 47.


\(^{89}\) Formerly the Untouchability (Offences) Act 1955, amended and renamed in 1976 to enlarge its scope and to strengthen its penal provisions; at <http://mrnc.nic.in/shared/sublinkimages/173.htm>.

by almost 11% to over 30,000, with the states of Uttar Pradesh, Rajasthan, Madhya Pradesh and Gujarat being the most prone to caste crime.\(^91\) However it is suggested that under-reporting by victims and police refusal to register cases, especially POAA cases, mean that the true level of atrocities is higher.\(^92\)

Caste crimes in general suffer low conviction rates and high year-on-year pendency of cases;\(^93\) in 2007 only 14,000 people were convicted of crimes against SCs out of forty-seven thousand individuals whose trials were completed, leaving 186,000 whose trials remained pending.\(^94\) Both CERD/C and CESCR/C have commented on allegations of police failure to register, investigate and properly assist victims of atrocities and caste discrimination, in addition to the persistence of untouchability practices and *de facto* segregation of Dalits in access to public places.\(^95\)

### 3. Untouchability, Violence and Gender

Paradoxically, untouchability offers no protection against caste-based sexual violence. Punitive or coercive violence against Dalits is often characterized by its highly gendered nature, with Dalit women and girls the deliberate targets of gendered untouchability practices, and rape and sexual torture an integral element of retaliatory and punishment crimes against Dalit families;\(^96\) to conceptualize caste-based sexual coercion and assault as semi-opportunistic acts of individual sexual exploitation\(^97\) is to misunderstand the use of institutionalized sexual violence as a mechanism of social control and an exercise in power, and the intersectional nature of caste/gender

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\(^93\) GOI, NCRB, “Crime in India 2007”, Crime Against Persons Belonging to SCs/STs, Table 7.8, Percentage of Cases by Courts Disposed of for Crimes Committed against Scheduled Castes During 2007, at \<http://ncrb.nic.in/cii2007/cii-2007/Table%207.8.pdf\>; Disposal of Cases by Police and Courts, Table 4.12, Conviction Rate of IPC Crimes During 2007, at \<http://ncrb.nic.in/cii2007/cii-2007/Table%204.12.pdf\>.


\(^95\) See CERD/C, *op.cit.* note 12, paras. 13, 14, 26; see also CESCR/C, concluding observations on India’s second to fifth periodic reports, 8 August 2008, UN Doc. E/C.12/IND/CO/5, 13, 14, 52, 53.


\(^97\) See Mendelsohn and Vicziany, *op.cit.* note 38, 46-47.
discrimination.\(^{98}\) Dalit women and girls are particularly vulnerable to violence where they seek to access “livelihood resources” such as water, firewood, or wages.\(^{99}\) Yet a 2006 non-governmental organization (NGO) study of violence against Dalit women found that only 15% of sexual crimes (barring forced prostitution) were being investigated by the police or pending hearing before the courts,\(^{100}\) and accuses the police of wilful failure of enforcement and collusion with dominant caste actors.\(^{101}\) Dalit girls are also subject to the pseudo-religious practice of ritualized prostitution, known as *Devadasi* or *Jogini*, where prepubescents are dedicated to a temple or deity and condemned to a life of sexual exploitation as temple prostitutes. *Devadasi* has been abolished in Karnataka and Andhra Pradesh\(^{102}\) yet the practice remains widespread.\(^{103}\) In 2007 the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW/C) identified impunity for atrocities against Dalit women, manual scavenging (see below) and the *Devadasi* system as issues requiring India’s ‘priority attention’.\(^{104}\)

Although the picture painted above is bleak, the upsurge in violence against Dalits can be interpreted as higher-caste reaction to Dalit assertion—political mobilization, resistance to subordination, and demands for a fair share of resources—described by Varshney as “an unfinished social transformation.”\(^{105}\) While the ideology of caste and untouchability has clearly not been eradicated\(^{107}\), there is much debate surrounding the extent to which the weakening of that ideology can be attributed to

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99 See Irudayam et al., *op.cit.* note 96, 5.


102 Andhra Pradesh Devadasi (Prohibition of Dedication) Act 1988; Karnataka Devadasi (Prohibition of Dedication) Act 1992. These statutes also provide for rehabilitation programmes.

103 Between 2003 and 2004 thousands of *Joginis* were identified in 12 districts of Andhra Pradesh alone; interview with worker from the NGO Andhra Pradesh Jogini Vyavastha Vyethireka Porata Sangathan, Hyderabad, Andhra Pradesh, 11 January 2007. The interview was conducted and interview notes stored in accordance with Manchester Metropolitan University’s Guidelines on Good Research Practice. Interviewees were granted confidentiality and anonymity.

104 See CEDAW/C, concluding comments on India’s third periodic report, UN Doc. CEDAW/C/IND/CO/3, 27 February 2007, 7, 28, 29. See also CERD/C, *op.cit.* note 12, 15, 18, 23.

105 NHRC, *op.cit.* note 45, 1; Mendelsohn and Vicziany, *op.cit.* note 38, 12, 74.


107 Mendelsohn and Vicziany, *op.cit.* note 38, 12, 74.
the constitutional and legal reforms and policy measures introduced post-independence to eliminate caste discrimination and secure the socioeconomic advancement of the Dalits. It is to these reforms and policies that we now turn.

III. THE ELIMINATION OF CASTE DISCRIMINATION: INDIA’S POLICIES

A. The Constitutional Vision

Since independence India has adopted legal and policy measures to uplift the lowest castes and eliminate caste discrimination. Its constitution establishes India as a “Sovereign, Socialist, Secular, Democratic Republic” committed to securing for all its citizens “social, economic and political justice, liberty of thought, expression, belief, faith and worship, and equality of status and opportunity, and to the promotion of fraternity assuring the dignity of the individual and the unity and integrity of the nation”.

As previously noted, the constitution guarantees individual rights and freedoms alongside affirmative action measures for the SCs, the STs and the OBCs. Religious, linguistic and cultural minorities are guaranteed freedom of religion and protection of their cultural, linguistic and educational rights but they are not eligible qua minorities for the special measures afforded to the SCs and STs and, to a lesser extent, the OBCs, who enjoy a constitutional status and measures of protection distinct from those communities categorized as minorities. The origins of this distinction lie in the 1947 partition of India on religious grounds into the separate states of India and Pakistan. The draft constitution originally contained electoral and employment reservations for the SCs and STs as well as religious minorities (the largest minority being Muslims, who already benefitted pre-independence from reservations in political representation) but in 1949, in the aftermath of partition, reservations for religious minorities were dropped as being contrary to the secular ideal and a threat to national unity which would serve only to “sharpen communal divisions”.

\[\text{108 COI Preamble. The words “Socialist, Secular” were added after “Sovereign” and the words “and integrity” were added after “unity” by the Constitution (Forty-Second) Amendment Act 1976, S.2.}
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\[\text{109 See Constituent Assembly Debates of India (CAD) VIII, 25 May 1949 (Lok Sabha Secretariat, New Delhi), 269-272. See also Zoya Hasan, Politics of Inclusion: Castes, Minorities and Affirmative Action (OUP, New Delhi, 2009).}\]
The constitution embodies a three-pronged strategy for the emancipation of the Dalits which owes much to the legal and political vision of Ambedkar as Chairman of the Constitution Drafting Committee, and his skills as a legal negotiator and draftsman. The first legal scholar to conceptualize caste and untouchability-based exclusion as a civil and economic rights issue, not merely a socioreligious matter, Ambedkar transformed the untouchables into a national social and political entity and secured their status as a *sui generis* legal category.\(^{110}\) The constitutional framework consists of, firstly, legal protection from the ideology and practice of untouchability and from inequality and discrimination in the social and economic fields; second, affirmative action provisions, known as reservations, in the spheres of political representation, government and public sector employment and higher education; third, measures of socioeconomic development.\(^{111}\) The purpose was to protect the Dalits from the imposition of untouchability-based disabilities, compensate them for the historical injustices and disadvantages inflicted by the “rope of Untouchability”,\(^{112}\) increase their representation in reserved fields, and facilitate and promote their economic and social advancement. The impact and effects of these policies are assessed in Section IV.

**B. Equality and Anti-Discrimination: Legal Framework**

1. **Constitutional Provisions**

Legal guarantees of equality and protection from discrimination are the classic legal mechanisms for addressing discrimination against members of identified groups. In India these mechanisms take the form of constitutional provisions, legislation, and constitutional and statutory monitoring bodies (the latter are not discussed in this article for reasons of space). Citizenship is guaranteed by Article 5 of the constitution. Articles 14-31 guarantee certain individual “Fundamental Rights” to all citizens, enforceable by law, justiciable under Articles 32 and 226, and equating broadly to civil and political rights. These include the right to equality before the law (Art. 14) and the prohibition of discrimination by public and private actors on grounds of


\(^{111}\) See NHRC, *op.cit.* note 45, 5.

\(^{112}\) CAD VII, 29 November 1948, 665.
religion, race, caste, sex, or place of birth (Art. 15(1)). Article 15(2) defines discrimination as the imposition of any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels or places of public entertainment, or the use of wells, tanks, bathing ghats, roads, or places of public resort maintained out of state funds or for general public use—these being the major forms in which untouchability is practised in the public sphere. Article 17 abolishes untouchability (but not the caste system *per se*) and makes its practice in any form a criminal offence, while Articles 16(1) and 16(2) respectively guarantee equality of opportunity and prohibit discrimination on grounds of religion, race, caste, sex, descent, place of birth, or residence in public employment or state office. Article 29(2) prohibits denial of admission on grounds of religion, race, caste or language into any state or state-maintained educational institution. The constitution prohibits deprivation of life or personal liberty except in accordance with the law (Art. 21), traffic in human beings and forced labour or *begar* (Art. 23), and the employment of children under 14 in factories, mines or other hazardous employment (Art. 24).

2. *Legislation*

(a) *Protective Legislation*

The constitutional provisions are operationalized by criminal, or ‘protective', legislation—discrimination (or anti-discrimination) legislation being the term commonly used to denote civil discrimination (‘equality’) law. The PCRA 1955 and the POAA 1989 (discussed in Section II) impose penal sanctions for untouchability practices and caste violence. Untouchability is defined neither in the constitution nor in the legislation. The PCRA criminalized certain acts “if committed on ground of ‘untouchability’”, but acts of gross violence against Dalits were not covered. 40 years later, in response to an upsurge in brutalities against Dalits and Tribals, the POAA was enacted to address tribe- and caste-based hate crimes wherever the victim, but not the perpetrator, of a prohibited act is an SC or ST. Responsibility for implementing both acts lies with state governments, which may (in PCRA cases) or must (in POAA cases) provide legal aid to victims, designate special courts and must appoint

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113 PCRA S.15A (2)(i); POAA S.21(2)(i).
special prosecutors,\textsuperscript{115} for speedy trial of cases under the acts. The POAA also requires states to ensure the economic and social rehabilitation of victims,\textsuperscript{116} set up SC/ST protection cells at state police headquarters,\textsuperscript{117} appoint special police officers at state and district level with responsibility for POAA cases,\textsuperscript{118} and ensure that investigations are carried out within 30 days by a deputy superintendent of police (DSP) or higher officer.\textsuperscript{119} Yet neither the PCRA nor the POAA have proved an effective remedy to untouchability or caste violence.

\textbf{(b) Other Measures}

Legislation has also been introduced to protect Dalits—the majority of whom work in the unorganized sector\textsuperscript{120}—from degrading and humiliating customs and employment practices, and from economic exploitation, but here too there is great divergence between statutory provisions and lived reality. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act 1993 prohibits manual scavenging—the removal by hand of human excreta from dry latrines, which is done almost exclusively by Dalit women and girls and surely the most extreme manifestation of caste-based economic exploitation and degradation—yet there are an estimated 1.2 million manual scavengers, many of whom are employed by local authorities and public bodies such as the railways.\textsuperscript{121}

As previously mentioned, state laws have also been enacted to eliminate the \textit{Devadasi} system, yet the practice persists. The Bonded Labour System (Abolition) Act 1976 abolishes agreements, obligations and customary sanctions permitting bonded labour and criminalizes its use, while the Child Labour (Prohibition and Regulation) Act 1986 prohibits child labour in certain employments and regulates it in others. Neither the relevant constitutional provisions nor the statutes specifically mention Dalits but

\begin{thebibliography}{9}
\bibitem{114}PCRA S.15A (2)(iii); POAA S.14.
\bibitem{115}POAA S.15.
\bibitem{116}POAA S.21(2)(iii).
\bibitem{117}Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules 1995 (POAR) Rule 8.
\bibitem{118}POAR Rule 10.
\bibitem{119}POAR Rule 7(1) and 7(2).
\bibitem{120}See GOI, Ministry Of Labour, New Delhi, Report 2007-8, Chapter 8 on legislation protecting workers in the unorganized sector, at \url{<http://labour.nic.in/annrep/annrep2008.htm>}.
since the majority of bonded labourers, and many child labourers, are Dalits the provisions are particularly relevant to them. The Minimum Wage Act 1948 was enacted to protect employees appropriating the fruits of labour of the poor. Like the bonded and child labour statutes this legislation was not targeted specifically at Dalits but has a greater impact on them by virtue of their greater poverty. Finally, laws have been introduced to reduce the concentration of productive assets and economic resources in the hands of the higher castes and to secure more equitable distribution of economic assets, for example land reform and debt relief legislation.122

C. Measures for Socioeconomic Development

The constitution incorporates social and economic rights in Articles 39-51 as Directive Principles of State Policy (DPs).123 The DPs mandate a “social justice” framework for state policy and law-making and direct the state to strive to secure a just social order and to “minimise the inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities”, yet successive post-independence governments have failed to systematically redistribute resources to the poor or even comprehensively to meet their basic needs in health, education and welfare.126 Neither land reform nor anti-poverty programs have succeeded in effecting socioeconomic transformation. Landlessness is a major cause of Dalit poverty but, for Dalits, land reform has been “largely a failure”.127 Designed to abolish the zamindari system of intermediary or “third party” tenures and absentee landlords and confer legal ownership on those able to establish cultivating status and tenancy of the land, the land reforms of the 1950s onwards largely benefited OBCs with secure tenancies, at the expense of upper caste landowners and Dalits.129 Most Dalits engaged in

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122 See NHRC, op.cit. note 45, 17.
123 COI Article 37 provides that the DPs shall not enforceable in any court but are nevertheless fundamental in the governance of the country and must be applied by the state in making laws. See also Chinnappa Reddy, op.cit. note 27, 74-76.
124 COI Art. 38(1) directs the state “to strive to promote the welfare of the people by securing as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life”.
126 Mendelsohn and Vicziany, op.cit. note 38, 147.
127 NHRC, op.cit. note 45, 85.
128 Varshney, op.cit. note 106, 222.
cultivation were “oral or insecure tenants at the will of landowners with no proof or record of their cultivating status”, or were landless labourers, not tenants, and therefore unable to benefit from reforms intended to confer ownership on those who actually worked on the land.  

Traditionally prohibited from land ownership, Dalit assertion of tenancy rights or even mobilizing evidence to this effect could result in eviction and physical assault—a situation which persists today. The generic state-run anti-poverty schemes of the 1970s, 1980s and 1990s failed to raise the Dalits collectively out of poverty; indeed, such schemes have been criticized for failing to reduce mass poverty among the population as a whole and, worse, for never seriously attempting to do so. In 1979 the Special Component Plan was introduced; this was an ‘approach’ rather than a specific programme which required states and central ministries, as part of their annual plans, to earmark a proportion of general development funds exclusively for the development of Dalits, commensurate with their share in the local population. Renamed the Scheduled Castes Sub-Plan (SCSP) under the auspices of the Ministry of Social Justice and Empowerment (MSJE), its principal disadvantage was that implementation was left to the states, which had administrative machinery that was already overburdened, inefficient and subject to political pressures. Despite the lure of additional “Special Central Assistance” funds to finance development programmes for Dalits for states implementing the SCSP, SCSP allocations by states have not matched the proportion of Dalits in the population.

Meanwhile in the sphere of education, a number of government initiatives have particularly benefitted or targeted Dalits including the national Sarva Shiksha Abhiyan (SSA) programme to promote universal elementary education pursuant to the Constitution (Eighty-Sixth) Amendment Act 2002; the free mid-day meals scheme, introduced in 1995, which benefits a third of all primary-school children; and schemes such as remedial coaching for Dalit students, scholarships and hostel provision. Yet

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131 NHRC, *op.cit.* note 45, 86.
as Section II of this article shows, Dalits remain at the bottom of all indices of social, economic and educational development.

D. Affirmative Action: India’s ‘Reservations’ Policies

1. Background

Affirmative action policies “provide a degree of preference, in processes of selection to desired positions, for members of groups under-represented in such positions”.136 India’s policies involve the reservation of a proportion, or quota, of positions, places or seats at national and regional levels in public sector and government employment, higher education and local, regional and national political representation for members of specified, historically disadvantaged and under-represented, ‘identity groups’ the underlying rationale being to increase their representation. The constitution mandates reservations for SCs and STs (but not OBCs) in political representation, and authorises (but does not mandate) reservations for SCs, STs and OBCs in employment and higher education.

Reservations originate in the ‘special measures’ introduced in the early twentieth century by certain princely states and provinces to increase the representation of ‘non-Brahmans’ in public services137 and in the political representation concessions made by the British to the Muslims during the same period—later extended in the constitution to SCs and STs but denied to religious minorities.138 Article 16(4) empowers (but does not mandate) the state to reserve public sector (but not private sector) posts “in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State”. Article 16(4) has enabled the reservation of posts for SCs and STs in provincial and central government services139 and for OBCs in provincial and (since 1993) in central services,140 while

139 See Arts. 335 and 16(4) COI. Art. 16(4)A, inserted by the Constitution (Seventy-Seventh) Amendment Act1995 S. 2, extends reservations in government posts to promotions for SCs and STs but not OBCs.
Article 335 requires the claims of the SCs and STs to be taken into consideration, consistently with the maintenance of efficiency of administration, in appointments to services and posts in connection with the affairs of the Union or of a State.\textsuperscript{141} Article 15(4)—inserted in 1951 following the Supreme Court decision in \textit{State of Madras v. Champakam Dorairajan}\textsuperscript{142}—confers on the state a discretionary power to make “special provision” by law for the advancement of “any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes”. In 2005 Article 15 was further amended to allow the state to make reservations for SCs, STs and OBCs in admission to educational institutions “including private educational institutions, whether aided or unaided by the State”, other than minority educational institutions covered by Article 30(1).\textsuperscript{143} It is these provisions which, in conjunction with Article 46, have enabled the introduction of reservations for SCs, STs and (since 2007) OBCs,\textsuperscript{144} in universities and other higher education institutions. Finally, Articles 330 and 332 mandate compulsory reservation of seats for SCs and STs (but not OBCs) in the Lok Sabha (House of the People—India’s national parliament), and in state legislative assemblies, based on the percentage of their population in each state, while Articles 243-D and 243-T mandate the reservation of seats for SCs and STs in village and district Panchayats\textsuperscript{145} and in urban municipalities\textsuperscript{146} in proportion to their total population in the area, of which at least one third must be reserved for SC/ST women.\textsuperscript{147}

Articles 15(4) and (5), 16(4), 46 and 335 are the legal source of India’s complex framework of reservation policies in higher education, government services and

\begin{footnotesize}
\textsuperscript{140} Prior to the Supreme Court decision in \textit{Indra Sawhney v. Union of India} (1992) AIR SC 477, states were free to grant state-wide backward class reservations in state-sector employment at their discretion, but there were no central OBC reservations.

\textsuperscript{141} Reservations in employment were extended to promotions and unfilled vacancies (but only for SCs and STs, not OBCs) by Arts. 16(4)A and 16(4)B, inserted by the Constitution (Seventy-Seventh) Amendment Act 1995, at <http://indiacode.nic.in/coiweb/fullact1.asp?tfm=77>. Art. 16(4)B allows for “roll-over” for a maximum of three years of unfilled vacancies under Arts. 16(4) and 16(4)A and their exclusion from the 50\% reservation ceiling on the total number of vacancies in any year.


\textsuperscript{143} See COI Art. 15(5), inserted by the Constitution (Ninety-Third) Amendment Act 2005 S.2.


\textsuperscript{145} Rural institutions of local self-government; see COI Arts. 243(d) and 243-B.

\textsuperscript{146} Urban institutions of local self-government, comprising Nagar Panchayats in areas transitioning from rural to urban and municipal councils or corporations in urban areas; see COI Art. 243-Q.

\textsuperscript{147} See COI Arts. 243-D(2) and 243-T(2). At least one third of all Panchayat and Municipality seats (including the number reserved for SC/ST women) must be reserved for women; see COI Arts. 243-D(3) and 243-T(3).
\end{footnotesize}
public sector employment. Central to the operation of these policies are three questions: who benefits, what is the quantum of reservation, and to what spheres of activity do reservations apply. These three questions have generated much controversy.

2. Who Benefits?

(a) Scheduled Castes

The beneficiaries designated by the constitution are the scheduled castes, scheduled tribes and the backward classes—sui generis categories distinct from those religious or linguistic groups categorized as minorities.148 “Scheduled Castes” was a creation of the Government of India Act 1935 to identify by means of a list or schedule149 those socially-excluded castes—previously termed “Depressed Classes” or, later, “Untouchables”—eligible for preferential treatment under the act.150 Both the term and the schedule were subsequently adopted in the constitution as the basis for India’s post-independence policies. Article 366(24) defines SCs as those castes so notified pursuant to Article 341. Article 341 empowers the president of India, after consultation with state governors, to notify by order in relation to each state those castes or parts or groups within castes to be deemed to be SCs for the purpose of the constitution in relation to that state.151 Thereafter they can delisted only by parliament. However the constitution contains no criteria for identifying the SCs and the lists have remained little changed since the original schedule was drawn up by the British in 1936, the basis for inclusion in which was untouchability—measured not according to ‘secular’ disadvantages such as poverty or illiteracy but on the basis of ritually polluting status in the traditional Hindu social hierarchy (although there was near total synchronicity between socioeconomic deprivation and low ritual status entailing the imposition of ritual ‘social disabilities’). SC status is established by means of a ‘caste

148 A statutory minority is “a community notified as such by the Central government”; National Commission for Minorities Act 1992 S.2(iii), at <http://ncm.nic.in/ncm_act.html>. Five communities—including Muslims and Christians—have been centrally notified as minorities. Additionally, states are free to accord special treatment to their religious or linguistic minorities.
149 The Government of India (Scheduled Castes) Order 1936.
150 Galanter, op.cit. note 2, 130. See also Dudley Jenkins, Identity and Identification, op.cit. note 22, 14.
certificate’ issued by the authorities establishing the holder’s eligibility for reservation benefits. However, as groups are scheduled on a state-by-state basis, a caste (or sub-caste) may be scheduled in one state but not in another, such that migrant workers who are SCs in their state of origin may not be able to claim SC status—and hence access to reservation benefits—in their new state. Moreover, given the value of these benefits, a significant body of ‘identity adjudication’ jurisprudence has developed concerning claims to or disputes pertaining to scheduled status arising, for example, from wrongful classification, inter-caste marriages, adoption, conversion or reconversion.

(b) Scheduled Castes and Religion

Aside from the question of reservations for women and/or religious minorities, which is beyond the scope of this article, the question of who is caught by the reservations net has been dominated since the 1980s by debates about the extension of national-level reservations to the OBCs, and secondly by arguments that the SC category should be extended to include Muslim and Christian Dalits. Despite widespread recognition that the ideology and practice of caste has permeated other religions, the constitutional framework treats caste as an essentially Hindu phenomenon. Under the Constitution (Scheduled Castes) Order 1950 only Hindus, Sikhs or Buddhists can be notified as SCs. Thus the consequence for Hindu Dalits of conversion to Islam or Christianity is the loss of SC status and entitlement to the benefit of SC reservations, while descendents of converts have never been eligible. Muslim and Christian Dalits argue that, notwithstanding the absence of doctrinal support for caste in their faiths, they suffer from the same caste-based social disabilities and exclusion—including untouchability—as Hindu Dalits, both at the hands of their coreligionists.

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152 See Dudley Jenkins, op.cit. note 22, 74-76; Galanter, op.cit. note 2, 141.
153 See Galanter, op.cit. note 2, 326-341; Dudley Jenkins, op.cit. note 22, 23-40, 67-88; Santosh Kumar, Social Justice and the Politics of Reservation in India (Mittal, New Delhi, 2008), 117-119.
154 “[N]o person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste”; see The Constitution (Scheduled Castes) Order 1950 (C.O. 19), at <http://lawmin.nic.in/lid/subord/rule3a.htm>. Apart from four castes comprising both Hindu Dalits and recent Dalit converts to Sikhism, for whom an exception was made, neither Sikhs nor Buddhists were originally included in the SC category; Sikhs were added in 1956 and Buddhists in 1990 on the grounds that these were indigenous religions, essentially variants of Hinduism.
155 Hasan cites the case of a Dalit woman elected on a SC reserved seat as a village representative who wished to convert to Islam but would have to resign from her post if she did so; see Hasan, op.cit. note 109, 196.
and higher caste Hindus, and should therefore be accorded the same constitutional safeguards as those currently categorized as SCs.\(^{156}\) As Galanter observes, the exclusion of non-Hindus from reservations “appears to give expression to a view of caste that is at variance with the [post-independence] constitutional and statutory ‘dis-establishment’ of the sacral concept of caste”.\(^{157}\) In 2007 a government-appointed Commission for Religious and Linguistic Minorities recommended the total decoupling of SC status from religion and the classification as SCs of all those groups among the excluded religions whose counterparts among the Hindus, Sikhs and Buddhists are so classified. Its report (the Misra Report) finally came before parliament in December 2009 but at the time of writing had not yet been discussed or officially published.\(^{158}\) In 2008 a Report for the National Commission for Minorities (NCM) on Dalits in the Muslim and Christian communities concluded that irrespective of religion Dalits are much worse off than non-Dalits;\(^{159}\) Muslim and Christian Dalits are socially known and treated as distinct groups within their own religious communities and are invariably regarded as ‘socially inferior’ communities by their co-religionists; in most social contexts they are Dalits first and Muslims and Christians only second.\(^{160}\) The report concluded that the denial of SC status to these groups is a historical anomaly and that there is a strong case for according them SC status.\(^{161}\)

\(\text{(c)}\) \(\text{OBCs}\)

There is no definition of backward classes in the constitution, and no constitutional criteria for identifying OBCs. Article 340 provides for the appointment of a National

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\(^{156}\) See Dudley Jenkins, \textit{op.cit.} note 22, 111-126.

\(^{157}\) Galanter, \textit{op.cit.} note 2, 324.


Just over 0.5% of Muslims are Dalits and almost 40% are OBCs, while around 10% of Christians are Dalits (although this figure is generally accepted as a gross underestimate) and almost 21% are OBCs; see Deshpande, \textit{op.cit.}, 21-22.

\(^{160}\) \textit{Ibid.}, 78.

\(^{161}\) \textit{Ibid.}, 83. Extension of SC Status to Muslim and Christian Dalit Converts is Supported by CERD/C; see CERD/C, \textit{op.cit.} note 12, 21.
Commission for Backward Classes (NCBC) to investigate the conditions of socially and educationally backward classes and to make recommendations for their improvement. To date, two commissions have been appointed: the Kalelkar Commission in 1953 and the Mandal Commission in 1979.¹⁶² The Kalelkar Commission was appointed to determine the criteria for backwardness, to draw up a central list of backward classes, and to make recommendations for the improvement of their condition. It identified almost 2,400 backward communities using caste groups as the principal units and their position in the traditional caste hierarchy as the principal criterion of backwardness, and recommended reservations for these communities in government posts and technical and professional institutions. Such a huge expansion of reservation beneficiaries was unacceptable to the government, which rejected caste as the principal criterion of backwardness and abandoned the national OBCs list, leaving it to individual states to apply their own criteria but informing them that it would be better to “apply economic tests than to go by caste”.¹⁶³ So it was that until 1992 there were no national-level reservations for OBCs although states were free to grant backward class reservations at their discretion, identifying OBCs through specially-appointed state backward classes commissions.¹⁶⁴

(i) Mandal and beyond

In 1979 the second backward classes commission (the Mandal Commission) recommended the introduction of national-level OBC reservations in employment and education¹⁶⁵—but the recommendations were not acted upon. In 1990 the Janata Dal government announced its intention to implement the Mandal recommendations, provoking uproar and violent protests among higher caste Hindus opposed to any extension of reservations. A legal challenge to the plan resulted in a landmark Supreme Court judgment in 1992, Indra Sawhney v. Union of India (the “Mandal judgment”),¹⁶⁶ in favour of national reservations in employment (but not higher education) for the OBCs and their subsequent implementation. Problems in defining

¹⁶² Art. 340 originally provided for the appointment of an Officer for backward classes, replaced in 1993 by a statutory commission; see <http://ncbc.nic.in/html/ncbc.html>.
¹⁶³ See Galanter, op.cit. note 2, 176; Radhakrishnan in Srinivas, op.cit. note 21, 205-206.
¹⁶⁵ See Mandal Report, op.cit. note 130; Radhakrishnan in Srinivas, op.cit. note 21.
“backwardness” and identifying OBC groups, and questions as to their “deservingness” have contributed to making OBCs the most controversial category of reservation beneficiaries. The Mandal Commission adopted 11 social, economic and educational indicators of backwardness, including caste, but its methods and criteria for defining backwardness were criticized. In 1993 the NCBC was established as a statutory body responsible for determining the inclusion of groups in a central government list of notified backward classes (now amounting to some 2,300 castes and sub-castes) on the basis of published social, educational and economic indicators including caste. Unlike SC status, OBC status is not defined by reference to religion, such that minority religious communities meeting the OBC criteria may be notified as backward classes. National OBC reservations in higher education were introduced by the Central Educational Institutions (Reservations in Admissions) Act 2006, enacted pursuant to the Constitution (93rd Amendment) Act 2005 permitting reservations in both aided and unaided educational institutions, itself introduced in response to the Supreme Court’s 2005 judgment in P. A. Inamdar & Others v. State of Maharashtra that reservations could not be introduced in private, unaided educational institutions. The 2006 Act and the 93rd Amendment were challenged as unconstitutional in Ashoka Kumar Thakur v. Union of India & Others (known as “Mandal II”). The Supreme Court stayed the legislation and referred Thakur to a constitutional bench (which included Chief Justice K. G. Balakrishnan, the first Dalit to hold this post). In April 2008 the bench held that the Constitution (93rd Amendment) Act 2005 was valid and did not violate the “basic structure” of the constitution so far as it relates to state-maintained and -aided educational institutions, but left open the question of whether the act would be constitutionally valid as far as private unaided educational institutions were concerned.

3. **Amount of Reservation and Protected Spheres**

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The constitution is silent on the minimum or maximum level for reservations. In the constituent assembly, Ambedkar argued that reservations must be confined to “a minority of seats” in order to safeguard the principle of equality of opportunity at the same time as satisfying the demand of under-represented communities. In 1963 the Supreme Court in *Balaji* set a 50% ceiling on total reservations, confirmed in numerous subsequent cases including *Sawhney*, the rationale being that reservations above this level would violate the constitutional guarantee of equality and non-discrimination and amount to a “fraud on the Constitution”. Reservations are currently fixed by the government at 17% for SCs and 7.5% for STs—roughly their percentage of the overall population—while reservations for the OBCs were capped by the Supreme Court in *Sawhney* at 27% (probably considerably less than their percentage of the population) such that the total reservation quota for the three categories of beneficiaries combined should not exceed 50%. Additionally, pursuant to *Sawhney* the socially, economically and educationally uppermost members of the OBCs (known in India as the ‘creamy layer’) are excluded from the benefits of reservations. The applicable spheres of reservation are public sector and central and state government employment, higher education seats in state-maintained or -aided institutions, and political representation at state and national level (for SCs and STs only). The private sector remains exempt from the application of reservations; the extension of reservations to the private sector has become a key Dalit demand in the struggle for equality.

### IV. INDIA’S POLICIES ASSESSED

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173 CAD VII, 30 November 1949, 701-702.
177 Galanter, *op.cit.* note 2, 86.
179 There is a large literature on the ‘creamy layer’ principle and the criterion for determining its members. The topic is also covered in recent literature on reservations generally. See Sreenivasan Subramanian, “Examining the Creamy Layer Principle”; Ashwin Deshpande, “The Eternal Debate”; and K. Sundaram, “Creamy Layer Principle: A Comment”; all in Thorat and Kumar, *op.cit.* note 9. The creamy layer principle does not apply to SCs or STs.
Despite almost 60 decades of equality policies and legislation, India remains a society marked by hierarchy and inequality. The constitution guarantees Dalits formal (de jure) equality yet substantive (de facto) equality remains elusive. This section assesses the measures and policies for social transformation described above, identifying factors hindering their effectiveness and limitations in the policies themselves.

A. Protective Legislation

Writing in 1998, Mendelsohn and Vicziany argued that, to the extent that ritual discrimination has been overcome since independence, this is “less attributable to the state and more to increased resoluteness on the part of Untouchables themselves and also to the emergence of a new civic [predominantly urban] culture of tolerance”, albeit driven by pragmatism rather than egalitarianism. They concluded, from the widespread continuing discrimination against Dalits and from the small number of cases registered and disposed of, that “very few Indians have been directly affected” by what they term anti-discrimination legislation, and that the best that can be said is that “[legislation] has contributed to stripping away the legitimacy of untouchability, but it is difficult to measure such an effect”. In this sub-section I briefly depict and seek to explain the prevailing “culture of under-enforcement” of protective legislation, and I argue that criminalizing the most overt and extreme manifestations of discrimination and hatred—the current legislative approach—constitutes only a partial legal response to endemic, institutionalized discrimination and inequality.

The purpose of liberal anti-discrimination legislation is multiple—to deter, to provide redress for victims, to prosecute offenders (in the case of criminal legislation), and to promote new patterns of behaviour. To what extent has India’s legislative framework met these objectives? According to India’s National Crime Records Bureau, the PCRA and the POAA “have extended the positive discrimination [sic] in favour of SCs and STs to the field of criminal law”; yet national and international

180 See Aloka Parasher-Sen, op.cit. note 17, 1; Hasan, op.cit. note 109, 3.
181 Mendelsohn and Vicziany, op.cit. note 38, 120.
182 Ibid., 125.
183 Ibid., 128, 145.
185 Marc Galanter, Law and Society in Modern India (OUP, New Delhi, 1989), 217.
human rights bodies, activists and scholars have repeatedly highlighted the poor enforcement of existing legislation, including in cases where atrocities have been committed by the law enforcement agencies themselves. Special courts to ensure early prosecution of POAA cases have yet to be established in all states. POAA acquittal rates are high, conviction rates low, and a huge number of cases remain pending. At the start of 2007 almost 91,000 persons were awaiting trial for POAA offences (including those carried over from the previous year); at the end of 2007 the number of persons still awaiting trial was 74,000, or almost 82%. Of over 16,200 persons whose POAA trials were completed in 2007, only 4,000 were convicted—an acquittal rate of over 75%. The NCSC cites as reasons for acquittal insufficient and inconsistent evidence, non-availability of witnesses, economic dependence of the victims, and procedural delays. Downgrading of POAA cases is commonplace; Dalits find their attempts to report cases under the POAA thwarted by apathy, hostility or negligence on the part of the police, government officials and the judiciary: “[t]he entire system works to exclude and ostracise Dalits”. Where a POAA investigation proceeds, courts may dismiss charges, acquit the accused or set aside sentence on the grounds that the investigation was not carried out by the correct person. This has been described by one NGO as “[amounting] to punishing the victim for a procedural error that is in fact the error of the government machinery”. Cases are dropped simply because of the failure of the police to obtain from the relevant government department the caste certificate of the victim or the accused within the stipulated time limit (the caste identity of both victim and accused being material to the prosecution of the accused), compounded by subsequent failure to request the Court for an extension of time for this purpose. Abuse of the statute through false accusations and the filing of mischievous complaints is commonly proffered as a reason for its ineffectiveness. Yet there appears to be no independent research

188 GOI, NCRB, “Crime in India 2007”, Crime against Persons Belonging to SCs/ STs, Table 7.19, op.cit. note 94.
190 See Agrawal and Gonsalves, op.cit. note 72, 1 and 1-9 on the performance of the executive and the judiciary in protecting Dalit human rights; see also Sakshi Human Rights Watch, op.cit. note 83.
191 Sakshi Human Rights Watch, op.cit. note 83, 83.
192 Interview with serving police officer, 2 February 2007, Mumbai. The interview was conducted and interview notes have been stored in accordance with Manchester Metropolitan University’s Guidelines on Good Research Practice. The interviewee was granted confidentiality and anonymity.
identifying the existence or the extent of such a phenomenon, likewise no studies carried out by the police to justify this claim. The PCRA has never been heavily invoked.

The peak volume of cases registered under the act was just under 5,000 in 1979.\(^{193}\) Since then its use has declined to just over 400 cases involving SCs in 2006; in 22 states/union territories no cases were registered at all.\(^{194}\) This does not reflect an end to the practice of untouchability but almost certainly a lack of confidence on the part of victims in the police and the courts to effectively investigate and prosecute offenders, coupled with disparity in resources between victims and accused, such that complaints under the act are simply not being made.\(^{195}\) As with the POAA, there is huge pendency of cases, with the majority ending in acquittal; in 2007, of around 1,300 persons whose trials for PCRA offences were completed, only 234 persons were convicted, a conviction rate of just over 18%.\(^{196}\) The role of the judiciary in caste crime cases has also been criticized, the 1995 Bhanwari Devi case being a nationally-publicized example involving five upper-caste men acquitted of the gang-rape of a Dalit woman, the judge stating that an upper caste man could not have defiled himself by raping a lower caste woman. Devi’s appeal against the acquittal (supported by India’s National Commission for Women) is yet to be heard.\(^{197}\) Meanwhile in January 2010 in Gujarat a case was registered under the POAA against two sessions judges, a court registrar and a public prosecutor for downgrading a case involving the gang-rape of a Dalit woman.\(^{198}\)

A fundamental problem underlies the ‘culture of under-enforcement’ described above. India’s protective legislation lacks cultural legitimacy. A huge disconnect exists between the content of the legislation and the social values and attitudes of society at large. As Galanter has remarked, “the law goes counter to perceived self-interest and

\(^{193}\) See NHRC, \textit{op.cit.} note 45, 24.
\(^{195}\) Galanter, \textit{op.cit.} note 185, 220-221.
\(^{196}\) GOI, NCRB, “Crime in India 2007”, Crime against Persons Belonging to SCs/ STs, Table 7.19, \textit{op.cit.} note 94.
\(^{198}\) See Parimal Dabhi, “Dalit Rape Victim: Gujarat Orders Cases against Judges, MLA, Prosecutor, Cops”, \textit{Indian Express}, 8 January 2010.
valued sentiments and deeply ingrained behavioural patterns”. There is little cultural imperative to obey the law or to prosecute offenders. Thorat talks of the traditional social order continuing to govern the thought processes and behaviour of the large majority of Hindus in rural areas; people continue to follow the traditional customary rules, norms and values of the caste system and untouchability, he says, because it provides immense privilege and serves their social, political and economic interests. CERD/C has noted “with concern” the entrenched nature of “caste bias” in India and the social acceptance of caste-based discrimination. Grinsell, applying Cover’s concept of nomos, explains the phenomenon in terms of castes as normative communities with normative political authority over their members, giving rise to a tension or contradiction between the constitutional objectives of social reform and equality, and existing social arrangements involving “powerful ties of attachment that Indians feel to the social and normative worlds that they inhabit in a particular caste”. In addition to an absence of cultural consensus in favour of existing legislation, the current legislative approach itself is too narrow in its focus. Ambedkar conceptualized untouchability and caste discrimination in structural and institutional terms (unlike Gandhi, for whom untouchability was an individual religious and moral issue). Yet India’s existing legislative framework is ill-suited to addressing institutionalized, structural forms of discrimination—or to promoting diversity. Both the PCRA (and its predecessor the Untouchability Offences Act 1955) and the POAA, as criminal statutes, focus legal attention on the worst manifestations of caste-based discrimination and violence. While it is important that such acts are punished, criminal law treats each instance of discrimination or violence as a single, disaggregated act committed by an individual offender or offenders, shorn of its social

199 Galanter, op.cit. note 185, 217. This deep-seated sociocultural hostility towards Dalits is exemplified in the public comment of Congress Party politician Rita Joshi who was arrested for criticizing the compensation paid by the Mayawati government to two Dalit rape victims by telling a meeting “I say one should throw this money in Maya’s face and tell her ‘if you get raped, I’ll give you one crore’” [GBP 125,000]; Gethin Chamberlain, “Indian Politician Arrested Over Rape Comments”, The Guardian, 16 July 2009.
200 Thorat, op.cit. note 41, 578.
201 See CERD/C, op.cit. note 12, 27.
204 “To say that [a form of discrimination] is ‘institutionalised’ is to recognise that this systemic [discrimination] runs into and shapes the institutions governing society”: Margaret Davies, Asking the Law Question (Thomson Law Book Co., Sydney, 2008), 296-297.
205 See Zelliot, op.cit. note 6.
and historical context, and conviction depends on the prosecution meeting the criminal standard of proof. Recognizing discrimination as problematic only in its most overt or violent manifestations entails a dangerous “conceptual disconnection between extremism and the general culture.” India lacks broader civil equality legislation designed to address ‘everyday’ acts of direct and indirect discrimination of the type described in Section II, for example in recruitment, which do not fall within the ambit of existing criminal legislation. Moreover, whereas criminal law gives control to the state to take action on behalf of the victim—whose role quickly becomes peripheral—civil anti-discrimination legislation, if well-designed, actively involves the victim in pursuing his or her case. In the absence of civil legislation to address discriminatory behaviour which falls short of the criminal threshold, the goal of challenging entrenched beliefs and promoting changed behaviour through legal means is unlikely to be realized.

B. Reservations

In 1990 O. Chinnappa Reddy, Chairman of the Karnataka Third Backward Classes Commission, described Articles 15(4) and 16(4) as “two narrow bridges constructed to enable [the] weaker sections of the people to cross the Rubicon”; yet being narrow they “only enable a select few to cross the bridge” and “touch but the fringe of the problem.” Elsewhere he stressed that reservations are not a “welfare concept” or a “poverty-alleviating programme”, neither are they a “complete or even a real solution” to the problems of the scheduled castes and the backward classes, whose economic and educational advancement cannot be achieved by reservations alone. Rather, he says, reservations must be seen as one of several methods for securing social justice for those suppressed because of their low social status in the Hindu caste system. Yet reservations are fiercely resented by non-beneficiaries even as, says Reddy, “honest execution” has been lacking and implementation has been

208 Downing, op.cit. note 206, 181.
209 Chinnappa Reddy, op.cit. note 137, 3.
210 Ibid., 4.
211 Chinnappa Reddy, The Court and the Constitution, op. cit. note 27, 114.
212 Chinnappa Reddy, op.cit. note 137, 4.
“lackadaisical” or opportunistic;\textsuperscript{213} Mendelsohn and Vizciany describe the programme as “a massive, inefficient and highly dispiriting apparatus” which has allowed the regime to “recognise the claims of the Untouchables without having to concede them any important share of power”.\textsuperscript{214}

In 2009 CERD/C recommended that special measures should be fair and proportionate, designed and implemented on the basis of the current need of the individuals and communities concerned, continually monitored, and temporary. Moreover, the human rights consequences on beneficiaries of abrupt withdrawal of special measures, especially if long-established, should be considered.\textsuperscript{215} Yet despite their longevity it is difficult to assess the impact of India’s reservation programmes. Although information on the numbers of Dalits in government and public employment is available, quantitative data on educational reservations is less readily available, and qualitative data in both fields is lacking. Studies of the factors that impact on the taking up of reserved posts or seats, the experience of beneficiaries, the long-term impact of reservations on individual socioeconomic mobility or on the families and communities of beneficiaries, or the broader social impact of the policies on reducing inequality and discrimination are few; surprisingly for a programme of such size, comprehensive monitoring and evaluation of the scheme is largely absent beyond the collection by the authorities of basic-level statistics.\textsuperscript{216}

I. Employment

While employment reservations have opened up to Dalits government and public sector jobs previously barred to them—by 2003 the central state sector employed over one million Dalits\textsuperscript{217}—disaggregated data shows uneven representation across job

\textsuperscript{213} Ibid.
\textsuperscript{214} Mendelsohn and Vizciany, \textit{op.cit.} note 38, 119.
\textsuperscript{215} CERD/ C, General Recommendation No. 32 on the meaning and scope of special measures, August 2009. See also Fredman, \textit{op.cit.}, note 53, 596, arguing in 1997 that affirmative action policies must be carefully scrutinized and monitored for aim, effectiveness, the role of “merit” and whether the costs are fairly spread.
\textsuperscript{217} NCSC, \textit{op.cit.} note 36, 179-183.
grades. After almost 60 years, Dalits in central services remain clustered in lower level jobs and under-represented in senior posts. In 2003 Dalits accounted for only 12% of Group A (the highest level) jobs and 14% of Group B jobs in central government services, but almost 18% of Group D jobs and almost 60% of sweepers. In Central Public Sector Enterprises Dalits accounted for around 12% of Group A and B jobs but almost 93% of Group D jobs if sweepers are included. In public sector banks and financial institutions Dalits were under-represented in the officer cadres but significantly over-represented in the sub-staff cadres. This is probably because the minimum qualification for a government job is matriculation, while posts at or above Group C generally require graduation, hence higher level reserved posts may go unfilled due to lack of sufficiently qualified candidates. At state level, Jain and Ratnam found in 1994 that there was “a long way to go” before (reservation) quotas were realized in some states, moreover under-representation of Dalits in senior posts/over-representation in lower grade posts was widespread. It must also be remembered that employment reservations are restricted to the public sector, representing only a fraction of India’s total economic activity.

2. Education

It is difficult, says Weisskopf, to assess how much difference education reservations have made. If they are understood as a strategy to increase the representation of identified communities in elite occupations and decision-making positions—rather than a mechanism for improving educational opportunities for the disadvantaged—effectiveness must be judged on whether reservation beneficiaries complete their programmes and achieve successful careers; yet studies of the performance of beneficiaries and their post-university careers are limited. Weisskopf attributes a “substantial share” of Dalit university enrolments to reservations, of whom between

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218 Ibid., 179-183.
219 Ibid., 179-182.
220 Jain and Ratnam, op.cit. note 63, 22.
221 Ibid., 16-20.
222 Of 459 million people employed in India, 26 million are in the organized sector (including public and government services) and 433 million in the unorganized sector; see GOI, Ministry Of Labour, Report 2008, 77, at <http://labour.nic.in/anrenrep/anrenrep2008.htm>.
223 Weisskopf, op.cit. note 51, 4340; Weisskopf, op.cit. note 136.
224 Ibid., 4347-4348. See also, Mohanty, op.cit. note 9, at 3787.
225 Weisskopf, op.cit. note 51.
one third and one half had access to more desirable institutions or programmes, or the chance to enrol at university at all, because of reservations; virtually none of the Dalit students at India’s most elite universities and technical and professional institutes would have been admitted, says Weisskopf, in the absence of reservations. Admission to a reserved seat also entitles the student to financial aid such as scholarships, subsidized living expenses and book loans which, although limited, may make the difference between completion and non-completion of the course. Evidence cited by Weisskopf indicates lower academic performance, longer completion times and lower graduation rates for reservation students (which he attributes to weaker educational and cultural backgrounds and lower self-confidence), although Dalit and ST graduation rates from India’s prestigious IITs are now over 80%. However, he contends that while Dalits graduating from less prestigious institutions may achieve only limited social mobility post-university, those graduating from elite or more prestigious institutions (especially those from higher socioeconomic family backgrounds) achieve significant upward socioeconomic mobility. Recently, liberalization of the economy and the shrinking public sector coupled with the proposed introduction of educational reservations for the OBCs have shifted upper caste focus, and anti-reservations protests, from reservations in the public sector to reservations in education, as seen for example in the ‘Youth4Equality’ anti-reservation movement.

3. Legislative Reservations

Political reservations have had “a profound effect on the Indian political landscape—a quarter of all legislators in India, at both the national and the state level, come from reserved jurisdictions”. In Uttar Pradesh (UP) the “representation of Dalits in bureaucracy, thanks to the reservation policy” provided a base in the 1980s for the

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226 Weisskopf, op.cit. note 136, 206; Weisskopf, op.cit. note 51, 4340.
227 Ibid., op.cit. note 51, 4340.
228 Ibid., 4344
229 Ibid., 4346 (although see the recent studies of Dalit private sector recruitment experience cited in Section II of this article).
emergence of the Bahujan Samaj Party (BSP, or party of the majority), a Dalit-based political party whose leaders “are a result of three or four decades of politics of ‘reservation’ […] a new generation of post-Independence educated, upwardly mobile, socially aware and politically conscious Dalits”. These beneficiaries of affirmative action, argues Varshney, rather than being co-opted “vertically” by upper caste political elites, have become a new “counter-elite” responsible for leading political mobilization.

In 2007 the BSP under its female Dalit leader Mayawati won a decisive electoral victory in the UP state elections, having previously held power three times in coalition governments in 1995, 1997 and 2003. The BSP has been characterized by some as a party lacking agenda, principles or ideology, “clamouring for power”. Certainly its leadership has focused on breaking the political hold of the Brahmin elite and acquiring state power for the purpose of Dalit economic and social advancement, following a model of “mobilisation from above” which involves “inspiring Dalits by putting a Dalit at the helm of affairs” and transferring Dalits into key positions within the state government. In that sense although “revolution has never been on the party’s agenda” the BSP has, according to Sudha Pai, been instrumental in introducing two fundamental changes that have impacted on Dalits in UP and country-wide; it has fostered “Dalit assertion”, giving Dalits a new sense of identity, awareness and self-confidence; and it has brought them into mainstream politics as a group whose support is sought by all political parties: “today, no ‘upper caste’ can take [D]alits for granted in UP.” But the BSP is no longer merely a Dalit party;

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238 Pai, *Dalit Assertion, op .cit.* note 232, 220. See also Vivek Kumar, *India’s Roaring Revolution: Dalit Assertion and New Horizons* (Gagandeep, New Delhi, 2006).

239 Kumar, *op.cit.* note 235, at 3870.
its 2007 electoral victory was achieved by appealing beyond caste and the BSP’s core base of Dalits to the poor of other communities including Brahmins, Muslims and the ‘most backward classes’ or MBCs—the poorest of the OBCs whose lives “on a quotidian basis […] are not very different from those of the SCs” and certainly not comparable to the land-owning OBCs represented by the BSP’s one-time main rival, the Samajwadi Party (SP).

Yet the success of north India’s Dalit ‘new politicians’ in improving the economic position of the Dalits and effecting a fundamental shift in traditional social relations is questioned by some scholars; according to Weiner the increase in Dalit (and OBC) bureaucrats and politicians has not led to more effective public policies for overcoming the immense poverty persisting in India which disproportionately affects their communities. Meanwhile CERD/C notes that in India generally, Dalits still find themselves denied the right to vote and that Dalit candidates, especially women, are frequently prevented from standing for election or, if elected, are pressured to resign. The impact of reservations on Indian democracy, political development and social order is much debated. On the one hand the very scheme which was designed as part of a strategy to eliminate caste inequality by bringing the Dalits—and the backward castes—“into the fold” has played a major role in the entrenchment of caste as a political as well as a social identity, and in the institutionalization of caste in the political system. On the other hand, argues Varshney, the political rise of the lower castes, deploying caste identity and a “reinvented” caste history, first in south India and more recently in north India, is resulting in a “caste-based restructuration” of power such that caste “can paradoxically be an instrument of equalisation and dignity.” In this way, “the most telling impact of affirmative action on the [SCs]

241 Gupta and Kumar, op.cit. note 234, at 3395.
244 CERD/C, op.cit. note 12, 17.
245 Weiner, op.cit. note 5, 220.
may well be indirect, not direct”;247 as expressed by Jaffrelot, “socioeconomic change may result from the rise to power of the lower castes in an indirect way”.248 Ambedkar recognized that the contradiction between the political equality introduced by the constitution and the reality of entrenched economic and social inequalities posed a threat to India’s democracy. In November 1949, on the eve of the adoption of the constitution, in a speech to the constituent assembly, he said:

On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January 1950, we are going to enter a life of contradictions […] [H]ow long shall we continue to live this life of contradictions? How long shall we deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.249

The contradictions identified by Ambedkar have not been resolved. Mendelsohn and Vizciany argue that generic anti-poverty programmes have done most to raise the socioeconomic standing of the Dalits,250 but as the figures cited in Section II show, Dalit welfare is still lower than that of any other community. We now turn, in the final section, to the question of whether, and if so, how, such deeply entrenched discrimination and inequality may be overcome.

V. LOOKING AHEAD: THE EQUALITY DEBATE—CONCLUDING REMARKS

Constitutional and legislative prohibitions of untouchability and caste discrimination have enshrined formal equality but nevertheless caste “continues to define access to food, jobs, education and marriage partners”.251 Politically, socially, economically and culturally caste is still a “unit of currency”.252 In 1936 Ambedkar observed:

247 Ibid., 20.
248 See Jaffrelot, op.cit. note 137, 188.
250 Mendelsohn and Vicziany, op.cit. note 38, 119.
252 Interview with P. Sainath, journalist and author, 24 April 2004, Mumbai. The interview was conducted and interview notes have been stored in accordance with Manchester Metropolitan University’s Guidelines on Good Research Practice.
Unless you change your social order you can achieve little by way of progress [...] you cannot build on the foundation of caste. You cannot build up a nation, you cannot build up a morality. Anything that you will build on the foundations of caste will crack and will never be whole.\(^{253}\)

Ambedkar’s response to inequality and discrimination on grounds of caste was to tackle the problem simultaneously on multiple, interrelated fronts—legal, economic, political and social. Yet one technique—reservations—has become the primary terrain and political focus of caste equality activity. Originally conceived as a short-term measure of ten years’ duration,\(^{254}\) the policy has been repeatedly extended, most recently in August 2009.\(^ {255} \) The high political investment in reservations and India’s continuing social and economic disparities have until recently hindered development of a broader national ‘equality debate’ going beyond the operation of the reservations policy and the three questions of who benefits, and what, and how much, is reserved. However there are signs that the terrain of debate is shifting. A new approach to equality and non-discrimination was signalled by the Sarchar Committee which reported in 2006 to the Ministry of Minority Affairs on the social, economic and educational status of the Muslim community of India, acknowledged to be India’s most disadvantaged minority religious group.\(^ {256}\) Instead of proposing the extension of reservations to Muslims (as demanded by some), the Sarchar Committee recommended, firstly, the creation of a national Equal Opportunities Commission (EOC) to investigate the grievances of the deprived groups; secondly, the enhancement of diversity in “living, educational and work spaces”, which it proposed could be achieved partly through a “diversity index” to incentivize organizations and companies, in the spheres of education, public and private employment, and housing, to measure and improve their “diversity performance”.\(^ {257} \) The committee also recommended the establishment of a national data bank and an autonomous assessment and monitoring authority to provide a source of reliable data on the socioeconomic conditions of socioreligious groups, for the design and monitoring of

\(^{253}\) Ambedkar, \textit{op.cit.} note 6, 66.
\(^{254}\) See CAD VIII 331.
\(^{257}\) \textit{Ibid.}, 240-242.
policies, initiatives and programmes and for ensuring transparency — ideas applicable to other groups suffering from discrimination.

Subsequently the Ministry of Minority Affairs convened two expert groups to report on proposals for a diversity index and on the structure and functions of an EOC. The objective of the Diversity Index is to “transform the idea of promoting diversity into an action-oriented strategy and bring it into all forms of decision-making relating to employment and delivery of services such that this becomes an integral element of social ethos.” The aim is to change behaviour; the concept, it is hoped, will “take root in the minds and psyche of the common person and help in easing out some of the deeply entrenched social prejudices leading to discriminatory decision making.”

The EOC for its part would be mandated to investigate and pursue through legal action complaints of discrimination or denial of equal opportunity, initially in the protected fields of employment and education, to remedy the ‘data deficit’ identified by scholars and activists, and to prescribe and monitor equal opportunity practices.

The EOC report acknowledges that eliminating disadvantage for particular identity groups involves more than abandoning explicitly discriminatory laws and instituting formal equality but rather, a focus on non-discrimination and equality in their broadest sense. This in turn involves the recognition of ascribed social identities (such as caste), and the monitoring of identity-based discrimination, direct and indirect, in order to eradicate inequality on the basis of those identities. The introduction of civil anti-discrimination legislation would provide redress for victims of caste discrimination while redefining behaviour hitherto considered non-discriminatory or acceptable as discriminatory and socially unacceptable.

Any new legislation or institution must be seen as one element in a holistic approach to the eradication of caste discrimination. Policy also needs a re-think; a major problem facing Dalit children today is the inadequate provision of public education for the poor, which prevents them even from acquiring the prerequisite education to benefit from higher education reservations:

258 Ibid., 238; see also <http://minorityaffairs.gov.in/newsite/sachar/Sachar_website_june09.pdf>.
262 Ibid.
263 See EOC Report, op.cit. note 9, 32.
264 Ibid., 24-25.
Almost all elementary schools [in city slums and in villages] have five classes but with only one classroom and one teacher—an impossible situation which cannot enable any child to gain any knowledge.\textsuperscript{265}

Policy therefore needs to focus on improving quality at the lower levels of the public education system as the economically most efficient response to the under-representation of Dalits at college level.\textsuperscript{266} There is also an urgent need for detailed data collection and wide-ranging qualitative studies if appropriate policy interventions are to be designed.\textsuperscript{267} Alongside reforms in public education, post-selection support for beneficiaries of reservations (remedial programmes, mentoring, supervision, financial support)—whether in a workplace or an institutional setting—are also critical for the success of reservation policies.\textsuperscript{268}

An emerging issue is Dalit demands for control of the fruits of their labour and a share in the nation’s assets commensurate with their economic contribution, as well as equality of access to capital, education and training, markets and other tools of wealth creation. This reflects a shift among some Dalit activists away from an exclusive focus on reservations towards full Dalit participation on equal terms in the capitalist market economy. The Bhopal Declaration, adopted in 2002, sets out a 21-point agenda including land ownership, use of common property resources, wages and working conditions, elimination of manual scavenging and bonded labour, reservations in the private sector, democratization of capital and the implementation of supplier diversity, this latter subsequently taken up by the then Chief Minister of Madhya Pradesh,Digvijay Singh.\textsuperscript{269} Increasingly for transnational, internationalized Dalit organizations it is not just reservation policies that matter but securing Dalits’

\textsuperscript{266} Hasan and Mehta, \textit{op.cit.} note 65, 3795. See also Devanesan Nesiah, \textit{Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia} (New Delhi, OUP, 1999), 171; Mohanty, \textit{op.cit.} note 9.

\textsuperscript{267} Hasan and Mehta, \textit{op.cit.} note 65; see also Khaitan, \textit{op.cit.} note 9; Weisskopf, \textit{op.cit.} note 51.


\textsuperscript{269} See Govt. of Madhya Pradesh, Task Force Report on Bhopal Declaration, at <http://www.mp.gov.in/tribal/taskforce/English/>. See also Pai, \textit{op.cit.} note 236, at 1144: “While emphasising that reservation quotas in the government sector need to be better implemented, the [Bhopal Document] recognises for the first time that there are limits to reservations [...] Even if reservations were to be extended to the private sector, only a small amount of the total Dalit population could be accommodated. Therefore, multi-pronged strategies involving the state, civil society and the market are required, such as democratisation of the unorganised sector, in which 92 percent of the SC workforce is concentrated.”
wider economic rights, in particular securing a fair share of the national wealth, which in turn requires a less restrictive approach to legal strategies for equality. If inequality is to be reduced and diversity enhanced, it is critical that the concept of ‘living, educational and work spaces’ includes both public and private sector employment as a protected field. Dalit demands for the extension of reservations to the private sector, voluntarily or by law, have intensified as the public sector declines. Opponents argue that reservations undermine the ‘merit’ principle and reduce efficiency, promoting ill-qualified poor performers at the expense of the well-qualified and the competent—a situation which India’s corporations cannot afford if they are to remain competitive on the world stage. But merit is a murky concept in an elitist society, an “amalgam of native endowments and environmental privileges”; as Jodhka and Newman point out, it relies on the “subtraction from the conversation” of institutional inequality, discrimination and disinvestment that prevents all members of a society from competing on a level playing field. The assumption underlying “merit”, says Chinnappa Reddy, is that those belonging to the higher castes will “naturally” perform better and that the “clear stream of efficiency” will be “polluted by the infiltration of [reservation appointees] into the sacred precincts”. Thus the status quo—whereby the higher castes enjoy a share of good jobs and seats in elite academic and professional training institutions far in excess of their share of the population—is seen as “essentially fair” and natural.

A small change in corporate attitudes is detectable; although the Confederation of Indian Industry (CII) remains opposed to compulsory private sector reservations, it recently launched a voluntary Code of Conduct on Affirmative Action and has instituted entrepreneurship development and mentoring for Dalits. Infosys, a major Indian IT company, has instituted a pre-recruitment Specialized Training Programme for Dalits in collaboration with the state government and educational institutions to increase Dalit recruitment in IT. The Tata group is reportedly undertaking caste profiling of its business and introducing positive discrimination policies in

\[\text{270 See Mandal Report, op.cit. note 130, 23. See also Chinnappa Reddy, op.cit. note 137, 5.}
\[\text{271 Jodhka and Newman, op.cit. note 51, 4127. See also Fredman, op.cit., note 53.}
\[\text{272 See Chinnappa Reddy, op.cit. note 137, 7.}
\[\text{273 Ibid; also, Deshpande, “The Eternal Debate”, in Thorat and Kumar, op.cit. note 9, 68.}
recruitment. And, while these initiatives are voluntary, in 2008 private sector reservations were mandated for the first time by a state government when UP introduced a 10% reservation quota each for scheduled castes, scheduled tribes, OBCs and religious minorities in public–private partnership enterprises receiving government funding and private companies doing outsourced state government work—although fully private sector firms are not included. Ambedkar believed that caste discrimination posed a problem for Indian society as a whole. The constitution, in its preamble, promises to secure to all citizens justice, liberty and equality, and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation. Without fraternity, said Ambedkar, liberty and equality “are no deeper than coats of paint”. In the absence of fraternity—in both its private and civic sense—individual dignity and national unity and integrity come loose from their moorings. It is absence of fraternity which has led to the existence of an underclass “so accepted in India” that many of the elite think it “obvious” that the bulk of workers should not enjoy the same economic equality as them, as this would “threaten their own access to [cheap] labour and comforts”. There is currently in India a huge gap between the legal status of Dalits and their sociological status. Government policies “have granted Dalits the right to equality but not necessarily the right to be treated as equals”. Legislation “guarantees Dalits the right to touch” (for example to enter temples, hotels and restaurants) but it cannot guarantee the right “to be touched”. New thinking on equality proposes a wider understanding of equality, discrimination and diversity which, in the case of caste discrimination, may result in a welcome broadening of the strategies for its elimination.

277 Ibid., 22-23.
282 Kumar, op.cit. note 238, 19.
283 Guru, op.cit. note 78.
India's multilingual polity is a laboratory of language policies. Although India is economically opening itself to global markets and culturally pushing for national integration and international exchange, the world’s most populous democratic and federal state must concern itself not only with inevitable multilingualism, but also with the rights of many millions of speakers of minority languages. As the political and cultural context privileges some major languages, minority language speakers and members of smaller communities often feel discriminated against by the current language policy of the Union and the states. On a daily basis, they experience that their mother tongues are deemed worthless dialects that have little use in India's modern life. Many of them face the decision whether to retain or to renounce their traditional language in the education of their children, in public life, and in their professional career. Many such languages have definitively disappeared, and several more are on the brink of extinction. Is this the inevitable price to be paid for economic modernization, cultural homogenization, and the multilingual fabric of India's society at large?

The Indian Constitution recognizes the concept of linguistic minorities, but is silent regarding the definition of the term. Articles 29 and 30 comprise the right of children of minority communities to be taught in their mother tongue, but they do not indicate any definition of what is a “mother tongue” and under which conditions this right can be claimed. Hence, the judiciary had to define it for the purpose of applying Article 30 of the Constitution:

A linguistic minority for the purposes of Article 30 (1) is one which must at least have a separate spoken language. It is not necessary that the language

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1 The Constitution of India, see <http://www.constitution.org/cons/india/>.
should also have distinct script for those who speak it to be a linguistic minority. There are in this country some languages which have no script of their own, but nonetheless those sections of the people who speak that language will be a linguistic minority entitled to the protection of Article 30 (1).²

After the linguistic reorganization of federal India, the territorial subdivision of the Union into federated states mirrored the linguistic diversity to some extent, but the issue of smaller language groups was territorially not addressed. Generally, the issue of linguistic rights has not been a subject of much concern in India’s minority rights discourse. Nevertheless, the neglect of the rights of linguistic minorities hampers the cultural development of a community and is detrimental to the social and economic development of her ethnolinguistic minorities. In this article, the author briefly maps India's linguistic minorities and to assess the language policy of the Union and the states toward these communities. Linguistic rights are not only a component of fundamental human rights and as such codified in a number of international covenants,³ but are also a cornerstone of the Indian Constitution. Hence, because the protection of minority languages is a constitutional and core political commitment of a multilingual polity, a regular appraisal of the extent to which minority language rights are respected is required.⁴

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⁴ Regular reports of this kind are provided by an institution established by India's Constitution: the National Commissioner of Linguistic Minorities at http://www.nclm.nic.in; a further institution committed with overarching issues of minority protection, but in practice focusing on religious minorities, is the National Commissioner of Minorities, at: http://www.ncm.nic.in. The author collected and elaborated a great deal of information providing an appraisal of such rights in India today in: Thomas Benedikter, *Language Policy and Linguistic Minorities in India* (LIT, Berlin/Münster, 2009).
I. PART ONE

A. India’s Linguistic “Landscape”: An Overview

1. “Scheduled” Languages and Minority Languages

Europe and India are areas blessed with a remarkable cultural and linguistic variety. Interestingly, the vast majority of Europeans and Indians speak languages which are part of the Indo-European language family (in India 75% of all speakers, in Europe at least 95%) and in both areas the major “link-language”, or working language, in a broad range of applications is English. Apart from the languages of the Indo-European family in India, three other language families are present with a major number of languages. Out of 114 languages, which are by official census registered as languages with more than 10,000 speakers,5 22 are recognised by the federal government through inclusion in the 8th schedule (an annex) of the Indian Constitution, whereas the remaining 92 languages are not scheduled and only exceptionally co-official in some states or districts. “Scheduling”, therefore, in the Indian legal context is equivalent to official recognition.

Table 1: India’s Scheduled Languages and Respective Territories 2001

<table>
<thead>
<tr>
<th>Language</th>
<th>Number of speakers</th>
<th>Percentage</th>
<th>State(s)/Union Territories with major presence of speakers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hindi</td>
<td>422,048,642</td>
<td>41.03</td>
<td>Andaman and Nicoba Islands, Arunachal Pradesh, Bihar, Chandigarh, Chattisgarh, the national capital territory of Delhi, Haryana, Himachal Pradesh, Jharkhand, Madhy Pradesh, Rajasthan, Uttar Pradesh, and Uttarakhand</td>
</tr>
<tr>
<td>Bengali/Bangla</td>
<td>83,369,769</td>
<td>8.11</td>
<td>Andaman and Nicobar Islands, Tripura, West Bengal</td>
</tr>
<tr>
<td>Telugu</td>
<td>74,002,856</td>
<td>7.19</td>
<td>Andaman and Nicobar Islands, Andhra Pradesh, Karnataka, Orissa, Tamil Nadu, Puducherry</td>
</tr>
<tr>
<td>Marathi</td>
<td>71,936,894</td>
<td>6.99</td>
<td>Maharashtra, Goa, Dadra and Nagar Haveli, Daman and Diu, Madhya Pradesh, Karnataka</td>
</tr>
<tr>
<td>Tamil</td>
<td>60,793,814</td>
<td>5.91</td>
<td>Tamil Nadu, Andaman and Nicobar Islands, Puducherry</td>
</tr>
<tr>
<td>Urdu</td>
<td>51,536,111</td>
<td>5.01</td>
<td>Jammu &amp; Kashmir, Uttarakhand, Uttar Pradesh, Bihar, Andhra Pradesh, Maharashatra, Karnataka, Uttarakhand and Delhi; and Muslim population in other states</td>
</tr>
<tr>
<td>Gujarati</td>
<td>46,091,617</td>
<td>4.48</td>
<td>Dadra and Nagar Haveli, Daman and Diu, Gujarat</td>
</tr>
<tr>
<td>Kannada</td>
<td>37,924,011</td>
<td>3.69</td>
<td>Karnataka, Andhra Pradesh</td>
</tr>
<tr>
<td>Malayalam</td>
<td>33,066,392</td>
<td>3.21</td>
<td>Kerala, Andaman and Nicobar Islands, Lakshadweep, Puducherry</td>
</tr>
</tbody>
</table>

5 At the 1991 census, 1,576 “rationalised mother tongues” were returned, but subsequently regrouped as 114 languages. The statement made by the Census Organisation, while presenting the abstract of languages and mother tongues, read: “Presented below is an alphabetical abstract of languages and the mother tongues with strength of 10,000 and above at the all India level, included under each language. In 1991, there have been a total of 114 languages and 216 mother tongues, 18 scheduled languages and 96 not specified in the schedule.” In 2008, 22 languages are scheduled, 92 are not. The total remains 114 languages.
When addressing the issue of linguistic rights, minority situations of different kinds and sizes have to be acknowledged. Generally, linguistic minorities in federal India are defined in relation to their state of residence, and the majority of the more than 90 million Indian citizens belonging to linguistic minorities are “relative minorities”: they have one of the “scheduled languages” as mother tongue, which is an official language in another state of the Union, but not in their state. Inclusion in the 8th schedule (annex of the Indian Constitution) is a form of recognition, which covers just 22 of India’s languages, but is not synonymous with the status of a ‘majority language’ referred to in a precise territory. Only about 30 million people, which is 3% of India’s total population, mostly tribals, speak “nonscheduled languages”, India’s less protected and often most threatened languages. The major part of these languages is neither taught in any school, nor recognized for any use in the public administration. Many of these languages do not have script and, thus, are deprived of any inclusion in modern cultural or media productions. This fact does not mean that just inclusion in the 8th schedule of the Indian Constitution will solve all problems. There is no official inventory of languages spoken in India reporting all languages recognized by linguists. The only source of the languages is the official

<table>
<thead>
<tr>
<th>Language</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oriya</td>
<td>33,017,446</td>
<td>3.21</td>
</tr>
<tr>
<td>Punjabi</td>
<td>29,102,477</td>
<td>2.83</td>
</tr>
<tr>
<td>Assamese/Asomiya</td>
<td>13,168,484</td>
<td>1.28</td>
</tr>
<tr>
<td>Maithili</td>
<td>12,179,122</td>
<td>1.18</td>
</tr>
<tr>
<td>Santali</td>
<td>6,469,600</td>
<td>0.63</td>
</tr>
<tr>
<td>Kashmiri</td>
<td>5,527,698</td>
<td>0.54</td>
</tr>
<tr>
<td>Nepali</td>
<td>2,871,749</td>
<td>0.28</td>
</tr>
<tr>
<td>Sindhi</td>
<td>2,535,485</td>
<td>0.25</td>
</tr>
<tr>
<td>Konkani</td>
<td>2,489,015</td>
<td>0.24</td>
</tr>
<tr>
<td>Meitei (Manipuri)</td>
<td>1,466,705</td>
<td>0.14</td>
</tr>
<tr>
<td>Bodo</td>
<td>1,350,478</td>
<td>0.13</td>
</tr>
<tr>
<td>Sanskrit</td>
<td>14,135</td>
<td>negligible</td>
</tr>
</tbody>
</table>

Source: Census of India 1991 and 2001.6

6 According to the general census in 2001, India’s total population was 1,027,015,247; see the population figures and other statistical information <http://www.censusindia.net/t_00_005.html> Maithili, Santali, Dogri and Bodo have been scheduled in the 8th Schedule of the Constitution only in 2003. A concise overview is also provided by the UNESCO, Language atlas and endangered languages of India, available at <http://www.unesco.org:80/culture/ich/index.php?pg=00206>.

7 The number of speakers of such 'nonscheduled' languages is not equivalent with the number of members of India's tribal peoples as a substantial part of these recognized tribal peoples do not retain their native language, but shift to major Indian languages. See, Benedikter, op.cit., note 5, 98-118.
Indian census, which for 1991 reported 114 languages and 216 “mother tongues”\(^8\) spoken by more than 10,000 people. Since 1991, the population census neglected small language groups, which in sum comprise about 560,000 speakers, virtually giving up the effort to monitor their sociolinguistic development. All states have linguistic minorities, no state is monolingual.\(^9\) In India, the question of mother tongue is often mixed up with region, religion, profession, ethnicity, or caste names. A clear classification from a linguistic point of view of languages, distinct from dialects, is still lacking.

Table 2: India’s Nonscheduled Languages According to the Census of 1991\(^10\)

<table>
<thead>
<tr>
<th>Number</th>
<th>Language</th>
<th>Speakers</th>
<th>Number</th>
<th>Language</th>
<th>Speakers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Adi</td>
<td>158,409</td>
<td>49.</td>
<td>Kuki</td>
<td>58,263</td>
</tr>
<tr>
<td>2.</td>
<td>Anal</td>
<td>12,156</td>
<td>50.</td>
<td>Kurukh/Oraon</td>
<td>1,426,618</td>
</tr>
<tr>
<td>3.</td>
<td>Angami</td>
<td>97,631</td>
<td>51.</td>
<td>Lahauli</td>
<td>22,027</td>
</tr>
<tr>
<td>4.</td>
<td>Ao</td>
<td>172,449</td>
<td>52.</td>
<td>Lahnda</td>
<td>27,386</td>
</tr>
<tr>
<td>5.</td>
<td>Arabic/Arbi</td>
<td>21,975</td>
<td>53.</td>
<td>Lakher</td>
<td>22,947</td>
</tr>
<tr>
<td>6.</td>
<td>Bhili/Bhilodi</td>
<td>5,572,308</td>
<td>54.</td>
<td>Lalung</td>
<td>33,746</td>
</tr>
<tr>
<td>7.</td>
<td>Bhotia</td>
<td>55,483</td>
<td>55.</td>
<td>Lepcha</td>
<td>39,342</td>
</tr>
<tr>
<td>8.</td>
<td>Bhumij</td>
<td>45,302</td>
<td>56.</td>
<td>Liangmei</td>
<td>27,478</td>
</tr>
<tr>
<td>10.</td>
<td>Bodo/Boro</td>
<td>1,221,881</td>
<td>58.</td>
<td>Lotha</td>
<td>85,802</td>
</tr>
<tr>
<td>11.</td>
<td>Chakesang</td>
<td>30,985</td>
<td>59.</td>
<td>Lushai/Mizo</td>
<td>538,842</td>
</tr>
<tr>
<td>15.</td>
<td>Deori</td>
<td>17,901</td>
<td>63.</td>
<td>Maring</td>
<td>15,268</td>
</tr>
<tr>
<td>16.</td>
<td>Dimasa</td>
<td>88,543</td>
<td>64.</td>
<td>Miri/Mishing</td>
<td>390,583</td>
</tr>
<tr>
<td>17.</td>
<td>Dogri</td>
<td>89,681</td>
<td>65.</td>
<td>Mishmi</td>
<td>29,000</td>
</tr>
</tbody>
</table>

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\(^8\) See note 6. The concept of “mother tongue” is not further defined by the Indian Census. For further information see also: Central Institute of Indian Languages, Mysore, at <http://www.ciil.org>.

\(^9\) S. S. Bhattacharya, “Languages in India – Their Status and Function”, in Itagi and Singh (eds.), *Linguistic Landscape in India* (CIIL, Mysore, 2002), 59. Information regarding mother tongue and bilingualism remain fairly stable and widespread. Both concepts play significant roles in planning ethnolinguistic identity, because languages and identity are interrelated. In India, for all communities other than scheduled tribes, the only identity provided to a group is its mother tongue.

\(^10\) Population figures and other statistical information are available at <http://www.censusindia.net/t_00_005.html>. All kind of information and analysis on Indian languages is to be found at: Language in India, the online review of the Central Institute of Indian Languages CIIL at <http://www.languageinindia.com/index.html> and The Virtual Library of the CIIL at <http://www.ciil-ebooks.net/html/disorder/index.htm>. 
<table>
<thead>
<tr>
<th></th>
<th>Language</th>
<th></th>
<th></th>
<th>Language</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>20.</td>
<td>Gangte</td>
<td>13,695</td>
<td>68.</td>
<td>Munda</td>
<td>413,894</td>
</tr>
<tr>
<td>22.</td>
<td>Gondi</td>
<td>2,124,852</td>
<td>70.</td>
<td>Nicobarese</td>
<td>26,261</td>
</tr>
<tr>
<td>24.</td>
<td>Halam</td>
<td>29,322</td>
<td>72.</td>
<td>Nocte</td>
<td>30,441</td>
</tr>
<tr>
<td>25.</td>
<td>Hmar</td>
<td>65,204</td>
<td>73.</td>
<td>Paite</td>
<td>49,237</td>
</tr>
<tr>
<td>26.</td>
<td>Ho</td>
<td>949,216</td>
<td>74.</td>
<td>Parji</td>
<td>44,001</td>
</tr>
<tr>
<td>27.</td>
<td>Jatapu</td>
<td>25,730</td>
<td>75.</td>
<td>Pawi</td>
<td>15,346</td>
</tr>
<tr>
<td>28.</td>
<td>Juang</td>
<td>16,858</td>
<td>76.</td>
<td>Phom</td>
<td>65,350</td>
</tr>
<tr>
<td>29.</td>
<td>Kabui</td>
<td>68,925</td>
<td>77.</td>
<td>Pochury</td>
<td>11,231</td>
</tr>
<tr>
<td>30.</td>
<td>Karbi/Mikri</td>
<td>366,229</td>
<td>78.</td>
<td>Rabha</td>
<td>139,365</td>
</tr>
<tr>
<td>31.</td>
<td>Khandeshi</td>
<td>973,709</td>
<td>79.</td>
<td>Rengma</td>
<td>37,521</td>
</tr>
<tr>
<td>32.</td>
<td>Kharia</td>
<td>225,556</td>
<td>80.</td>
<td>Sangtam</td>
<td>47,461</td>
</tr>
<tr>
<td>33.</td>
<td>Khasa</td>
<td>912,283</td>
<td>81.</td>
<td>Santali</td>
<td>5,216,325</td>
</tr>
<tr>
<td>34.</td>
<td>Khezha</td>
<td>13,004</td>
<td>82.</td>
<td>Savara</td>
<td>273,168</td>
</tr>
<tr>
<td>35.</td>
<td>Khiemnungan</td>
<td>23,544</td>
<td>83.</td>
<td>Sema</td>
<td>166,157</td>
</tr>
<tr>
<td>36.</td>
<td>Khond/Kondh</td>
<td>220,783</td>
<td>84.</td>
<td>Sherpa</td>
<td>16,105</td>
</tr>
<tr>
<td>37.</td>
<td>Kinnauri</td>
<td>61,794</td>
<td>85.</td>
<td>Tangkhul</td>
<td>101,841</td>
</tr>
<tr>
<td>38.</td>
<td>Kisan</td>
<td>162,088</td>
<td>86.</td>
<td>Tangsa</td>
<td>28,121</td>
</tr>
<tr>
<td>39.</td>
<td>Koch</td>
<td>26,179</td>
<td>87.</td>
<td>Thado</td>
<td>107,992</td>
</tr>
<tr>
<td>40.</td>
<td>Koda/Kora</td>
<td>28,200</td>
<td>88.</td>
<td>Tibetan</td>
<td>69,416</td>
</tr>
<tr>
<td>41.</td>
<td>Kolami</td>
<td>98,281</td>
<td>89.</td>
<td>Tripuri</td>
<td>694,940</td>
</tr>
<tr>
<td>42.</td>
<td>Kom</td>
<td>13,548</td>
<td>90.</td>
<td>Tulu</td>
<td>1,552,259</td>
</tr>
<tr>
<td>43.</td>
<td>Konda</td>
<td>17,864</td>
<td>91.</td>
<td>Vaiphei</td>
<td>26,185</td>
</tr>
<tr>
<td>44.</td>
<td>Konyak</td>
<td>137,722</td>
<td>92.</td>
<td>Wancho</td>
<td>39,600</td>
</tr>
<tr>
<td>45.</td>
<td>Korku</td>
<td>466,073</td>
<td>93.</td>
<td>Yimchungre</td>
<td>47,227</td>
</tr>
<tr>
<td>46.</td>
<td>Korwa</td>
<td>27,485</td>
<td>94.</td>
<td>Zeliang</td>
<td>35,079</td>
</tr>
<tr>
<td>47.</td>
<td>Koya</td>
<td>270,994</td>
<td>95.</td>
<td>Zemi</td>
<td>22,634</td>
</tr>
<tr>
<td>48.</td>
<td>Kui</td>
<td>641,662</td>
<td>96.</td>
<td>Zou</td>
<td>15,966</td>
</tr>
</tbody>
</table>

*Source: Census of India, 1991.*

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11 Dogri, Maithili, Bodo, and Santali have been scheduled in 2003. The Dogri figure in the table refers only to Dogri speakers outside of Jammu & Kashmir; however, there are more than 2 million Dogri speakers in Jammu. No figure for Maithili has been registered in the 1991 census. The Indian Census Organization reported that "the population of Jammu & Kashmir is not included in these figures as the 1991 census was not conducted there due to disturbed conditions". Note that the names of languages given here are rather
In India, there exists the problem of exactly determining a language and distinguishing it from dialects. Moreover India, unlike Europe, still has to come to terms with mass illiteracy and therefore, in the census’ declarations, a certain bias toward languages with higher prestige and script can be registered. A serious problem is present in correctly registering some non written languages, mainly used by tribal peoples. In such cases, neither the speakers have a complete self-identification with their language, nor do the authorities classify the declared languages always as such.

India has to cope with a unique linguistic complexity that is raising more problems than the multilingual reality in some major neighboring states like Russia and China, let alone the few multinational European states. In India, under the respective provisions of the federal Constitution, all government levels are sharing the powers regarding the protection of minorities; however, the 28 states bear the central responsibility for the policies of the “official language policy” and the minority languages. The states’ implementation of the official language politics has made huge progress in the last few decades, but quite often the process of “linguistic homogenization” of the states disregards the needs and interests of the linguistic minorities and the nonscheduled languages in particular.

Table 3: Numerically most Important Linguistic Minorities in each State and Union Territory

<table>
<thead>
<tr>
<th>State/Union territory</th>
<th>Linguistic majority</th>
<th>Percentage</th>
<th>First linguistic minority</th>
<th>Percentage</th>
<th>Second linguistic minority</th>
<th>Percentage</th>
<th>Third linguistic minority</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andhra Pradesh</td>
<td>Telugu</td>
<td>84,77</td>
<td>Urdu</td>
<td>8,36</td>
<td>Hindi</td>
<td>2,77</td>
<td>Tamil</td>
<td>1,33</td>
</tr>
<tr>
<td>Arunachal</td>
<td>Misi/Dafla</td>
<td>19,91</td>
<td>Adi</td>
<td>17,94</td>
<td>Nepali</td>
<td>9,39</td>
<td>Bengali</td>
<td>8,19</td>
</tr>
<tr>
<td>Assam</td>
<td>Assami</td>
<td>57,81</td>
<td>Bengali</td>
<td>21,67</td>
<td>Bodo/Boro</td>
<td>5,28</td>
<td>Hindi</td>
<td>4,62</td>
</tr>
<tr>
<td>Bihar (+Jharkhand)</td>
<td>Hindi</td>
<td>80,86</td>
<td>Urdu</td>
<td>9,89</td>
<td>Santhali</td>
<td>2,95</td>
<td>Bengali</td>
<td>2,92</td>
</tr>
<tr>
<td>Goa</td>
<td>Konkani</td>
<td>51,52</td>
<td>Marathi</td>
<td>33,36</td>
<td>Kannada</td>
<td>4,64</td>
<td>Urdu</td>
<td>3,41</td>
</tr>
</tbody>
</table>

blanket terms, in some sense. Each language, for which the population figure is given in the table, includes also some other languages or dialects that are not explicitly presented in the table. For example, the blanket term Kannada includes the language or dialect Badaga. Hindi includes around 48 languages, dialects, or mother tongues like Awadhi, Bhojpuri, and Garhwali.

12 In Arunachal, Mizoram, Meghalaya, and Nagaland, the languages of the overwhelming majority of indigenous peoples are not scheduled.
<table>
<thead>
<tr>
<th>State</th>
<th>Language</th>
<th>Percentage</th>
<th>Language</th>
<th>Percentage</th>
<th>Language</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gujarat</td>
<td>Gujarati</td>
<td>91.49</td>
<td>Hindi</td>
<td>2.94</td>
<td>Sindhi</td>
<td>1.70</td>
</tr>
<tr>
<td>Haryana</td>
<td>Hindi</td>
<td>91.00</td>
<td>Punjabi</td>
<td>7.11</td>
<td>Urdu</td>
<td>1.99</td>
</tr>
<tr>
<td>Himachal</td>
<td>Hindi</td>
<td>88.87</td>
<td>Punjabi</td>
<td>6.28</td>
<td>Kinnauri</td>
<td>1.19</td>
</tr>
<tr>
<td>Jammu &amp; Kashmir</td>
<td>Kashmiri</td>
<td>52.29</td>
<td>Dogri</td>
<td>24.39</td>
<td>Hindi</td>
<td>17.32</td>
</tr>
<tr>
<td>Karnataka</td>
<td>Kannada</td>
<td>66.22</td>
<td>Urdu</td>
<td>9.96</td>
<td>Telugu</td>
<td>7.39</td>
</tr>
<tr>
<td>Kerala</td>
<td>Malayalam</td>
<td>96.56</td>
<td>Tamil</td>
<td>2.12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>Hindi</td>
<td>85.55</td>
<td>Bhili</td>
<td>3.35</td>
<td>Gondi</td>
<td>2.24</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>Marathi</td>
<td>73.34</td>
<td>Hindi</td>
<td>7.81</td>
<td>Urdu</td>
<td>7.26</td>
</tr>
<tr>
<td>Manipur</td>
<td>Manipuri</td>
<td>60.43</td>
<td>Thado</td>
<td>5.64</td>
<td>Tangkhul</td>
<td>5.45</td>
</tr>
<tr>
<td>Meghalaya</td>
<td>Khasi</td>
<td>49.54</td>
<td>Garo</td>
<td>30.86</td>
<td>Bengali</td>
<td>8.36</td>
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<tr>
<td>Mizoram</td>
<td>Mizo</td>
<td>75.11</td>
<td>Bengali</td>
<td>8.57</td>
<td>Kokborok</td>
<td>3.83</td>
</tr>
<tr>
<td>Nagaland</td>
<td>Ao</td>
<td>40.04</td>
<td>Sema</td>
<td>12.38</td>
<td>Konyak</td>
<td>11.37</td>
</tr>
<tr>
<td>Orissa</td>
<td>Oriya</td>
<td>82.75</td>
<td>Hindi</td>
<td>2.40</td>
<td>Telugu</td>
<td>2.10</td>
</tr>
<tr>
<td>Punjab</td>
<td>Punjabi</td>
<td>92.22</td>
<td>Hindi</td>
<td>7.29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rajasthan</td>
<td>Hindi</td>
<td>89.56</td>
<td>Bhili</td>
<td>5.13</td>
<td>Urdu</td>
<td>2.17</td>
</tr>
<tr>
<td>Sikkim</td>
<td>Nepali</td>
<td>63.09</td>
<td>Bhotia</td>
<td>8.20</td>
<td>Lepcha</td>
<td>7.34</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>Tamil</td>
<td>86.71</td>
<td>Telugu</td>
<td>7.12</td>
<td>Kannada</td>
<td>2.16</td>
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<tr>
<td>Tripura</td>
<td>Bengali</td>
<td>68.88</td>
<td>Kokborok</td>
<td>23.50</td>
<td>Hindi</td>
<td>1.66</td>
</tr>
<tr>
<td>Uttar Pradesh (+</td>
<td>Hindi</td>
<td>90.11</td>
<td>Urdu</td>
<td>8.98</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uttarakhand )</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>West Bengal</td>
<td>Bengali</td>
<td>85.99</td>
<td>Hindi</td>
<td>6.08</td>
<td>Santhali</td>
<td>2.73</td>
</tr>
<tr>
<td>Andaman Islands</td>
<td>Bengali</td>
<td>23.05</td>
<td>Tamil</td>
<td>19.07</td>
<td>Hindi</td>
<td>17.63</td>
</tr>
<tr>
<td>Chandigarh</td>
<td>Hindi</td>
<td>61.07</td>
<td>Punjabi</td>
<td>34.72</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dadra NH</td>
<td>Bhili</td>
<td>55.03</td>
<td>Gujarati</td>
<td>21.91</td>
<td>Konkani</td>
<td>12.32</td>
</tr>
<tr>
<td>Daman and Diu</td>
<td>Gujarati</td>
<td>91.01</td>
<td>Hindi</td>
<td>3.59</td>
<td>Marathi</td>
<td>1.24</td>
</tr>
<tr>
<td>Delhi</td>
<td>Hindi</td>
<td>81.64</td>
<td>Punjabi</td>
<td>7.94</td>
<td>Urdu</td>
<td>5.45</td>
</tr>
<tr>
<td>Lakshadweep</td>
<td>Malayalam</td>
<td>34.47</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pandicherry</td>
<td>Tamil</td>
<td>89.19</td>
<td>Malayalam</td>
<td>4.75</td>
<td>Telugu</td>
<td>4.31</td>
</tr>
</tbody>
</table>


*Note:* The figures in the table 3 refer to 2001 for the minority speakers as percentage of the respective total population of the state; in bold: “absolute” linguistic minorities.

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13 In Jammu & Kashmir, Kashmiri is the absolute majority language of the Kashmir Valley, whereas Dogri is the majority language of Jammu.

14 In Meghalaya, Garo and Khasi are sharing the role of most important languages of the state, including 80% of speakers.
B. A Brief Typology of Linguistic Minorities

The landscape of Indian languages reflects a mosaic of major and minor linguistic groups. Different kinds of linguistic minorities at different government levels can be distinguished. On the one hand, the numerical criterion (size of a linguistic community) is inadequate for describing the minority situation in India. On the other hand, in a sociolinguistic analysis, no simple criterion of language dominance can be applied in India because in her typically multilingual environments, different languages are dominant in different domains. Different criteria are also used by state authorities when it comes to accord legal recognition and protection of linguistic minorities.

1. Relative and Absolute Minorities

The concept of a “relative minority” refers to the existence of a “kin-state” using the language of linguistic minority as the officially recognized language. Whenever the language of a linguistic minority is spoken as the official language in another state, it is a “relative minority”, whereas a minority language is “absolute” when no other state has accepted its language as official, apart from being scheduled or not. Based on these criterion, three groups of minority languages can be distinguished:

1. Non-dominant minority status in one or more home states (“absolute minorities”).

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15 A minority language is an “absolute” one, when no other state has accepted this language as official, whether it is scheduled or not. In no state do such languages form a majority and have a reduced functional load vis-à-vis the Regional official language in most of the public domains. “Majority language” is not equivalent with “State official language”, which may differ from the most widely spoken language or minority language.

16 See Benedikter, op. cit. note 5, 47-61.

17 Pandharipande on comments this issue in the following way: “[I]n the light of the above, I propose that a different framework needs to be formulated which will take into account the multilingual profile of India, the functional distribution of languages across domains, the size of the linguistic community and the notion of dominance. Moreover, the framework should be able to explain various types of minority in the country, and why the same language can have the status of minority as well as dominant language simultaneously (in different states). For example, minority languages can be divided into three groups: (a) those which have “minority (nondominant)” status in their native state; (b) those which are reduced to “minority status” in their non-native states; and (c) languages which do not have a native state but are distributed across states (e.g. Sindhi and Konkani). This framework clearly shows that a language acquires minority status when its functional load is reduced (in a non-native state where the dominant language of that state is different, and used in many public domains), while it continues to enjoy the status of a dominant (non-minority language) in its native state”. See Rajeshwari V. Pandharipande, “Minority Matters: Issues in Minority Languages”, 4(2) Int. Journal on Multicultural Societies (2002), 6.
Such languages can be either tribal languages or nontribal languages.

2. A language reduced to a non-dominant minority status in an Indian state in which it forms a numerical minority, but a majority in other Indian states ("relative minority" in one or some states of India).

3. Languages distributed across various states without any “home-state” in India: Sindhi, Urdu, Sanskrit, English ("relative minority" everywhere; non-dominance not univocally attested. Apart from Sanskrit, these languages are also widely spoken in countries other than India).

2. **Scheduled and Non-scheduled Languages**

The inclusion of a language in the list of languages of the 8th schedule of the Constitution yields a form of official state recognition. In 2008, 22 languages were accorded this status. They are neither official languages of any state (e.g., Santali, Bodo, Maithili, Dogri, Kashmiri), nor do they require a precise geographical area of diffusion (no link to a specific territory such as Urdu, Sindhi, and Sanskrit). According to the census of 2001, the speakers of scheduled languages constitute 97% of India’s total population.

<table>
<thead>
<tr>
<th>Schedule Status</th>
<th>114 languages</th>
</tr>
</thead>
<tbody>
<tr>
<td>22 scheduled languages</td>
<td></td>
</tr>
<tr>
<td>(97% of speakers in 2003)</td>
<td></td>
</tr>
<tr>
<td>Scheduled languages official in at least one state: 14</td>
<td></td>
</tr>
<tr>
<td>Scheduled languages official in no state: 8</td>
<td></td>
</tr>
<tr>
<td>957 million speakers (2001)</td>
<td></td>
</tr>
<tr>
<td>33 million speakers (2001)</td>
<td></td>
</tr>
<tr>
<td>24 million speakers (1991)</td>
<td></td>
</tr>
<tr>
<td>31 million speakers (2003)</td>
<td></td>
</tr>
<tr>
<td>92 nonscheduled languages</td>
<td></td>
</tr>
<tr>
<td>(3% of speakers in 2003)</td>
<td></td>
</tr>
<tr>
<td>Nonscheduled languages (very few coofficial on district or local level)</td>
<td></td>
</tr>
</tbody>
</table>

Table 4: Scheduled and Nonscheduled Languages

Note. Out of 114 languages (total of languages registered by census) 88 are “tribal languages” (including Santali and Bodo, the only scheduled tribal languages) with about 31 million speakers.

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18 Urdu (51.5 million speakers in 2001) here is counted under “official language in at least one state”, as it is the official language of Jammu & Kashmir. In reality, the mother tongues of 80% of the population of that state are Dogri and Kashmiri. Fifty million Indian citizens using Urdu as mother tongue are living in all other states as a minority, in which Urdu is coofficial only in a few cases.

19 No figures are available for the total speakers of nonscheduled languages in the 2001 census. By estimate, it should be 31 million because in 2001, India’s population reached 1,027 million and in 2003, 3% were speakers of such languages.
For the speakers of a language, being scheduled does not automatically bring about a clearly defined set of individual or collective rights. It is not yet clear what rights can be legitimately derived on a federal constitutional level or on a state level from such recognition. However, most states recognize scheduled languages spoken in their territory as minority languages, yet with a widely differing degree of legal attributes. Most of the 92 nonscheduled languages are neither used in education nor public administration.

3. **Notified Tribal Languages versus Nonnotified Tribal Languages**

Fifty-eight out of about 90 tribal languages of India have been notified as tribal languages by a Presidential Order published in the Gazette of India. They are: Abor, Adi, Anal, Angami, Ao, Assuri, Agarva, Bhili, Bhumij, Birhor, Binija/Birijia, Bodo including Kachari, Mech, Chang-Naga, Chiri, Dai, Dimasa, Gadaba, Garo, Gondi, Ho, Halam, Juang, Kabui, Kanawari, Kharia, Khasi, Khiemnungam, Khond/Kandh, Koch, Koda/Kora, Kolami, Konda, Konyak, Korku, Kota, Korwa, Koya, Kurukh/Oraon, Lushai/Mizo, Mikir, Miri, Mishmi, Mru, Mundari, Nicobarese, Paite, Parji, Rabha, Rangkul, Rengma, Santali, Savara, Sema, Tangkhul, Thado, Toda, Tripuri/Kokborok. However, 'notification' is not equivalent to official recognition. The criteria for such a distinction are not clear; however, the distinction itself is not very relevant because the majority of notified tribal languages do not enjoy any special attention, recognition, or promotion.

4. **Languages With and Without a Literary Tradition**

Recognition of an Indian language under the 8th schedule typically required evidence of a literary tradition, which could not be provided for most of the nonwritten languages. Languages in India, hence, are not sufficiently qualified with their comprehensive

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20 See Presidential Order on Notified Tribal Languages in: Gazette of India, Part II, section 1, dated 13 August 1960.
potential, but rather on their cultural performance in history. This is one of the reasons advanced by states for denying education through “non-literary languages”.

5. **Languages by the Number of Speakers**
The mere quantitative criterion still has an important role. Languages with fewer than 10,000 speakers are not even registered in the general census and are instead included in an undifferentiated and unrecognised category of “other languages”. This criterion again denies the potential of development and the possibility of the preservation of these languages; without officially stating so, they are essentially written off.

6. **Old and New Linguistic Minorities**
This criterion, quite important and often discussed in the European discourse of ethnic, linguistic, and national minorities has played no major role in India thus far. However, with increasing numbers of people migrating between states, fostered by inequalities of economic growth and diverging labour market opportunities, the issue of cultural consequences of internal migration is rising. This leads to the concept of “autochthonous minorities” and “newly immigrated minorities”, currently under debate, which refers to the historical time period of settlement of an ethnolinguistic group in a given territory.

The “absolute minorities”, despite being numerically less important (just 24% of all members of linguistic minorities), form a considerable part of the total population in many states. One hundred and twenty-five million Indian citizens are in a “linguistic minority position”; however, most speak a scheduled language, which is an official language of another state of the Union. The percentage of all speakers of minority languages (relative and absolute together) of India’s total population regarding the figures for the 1991 census is 14.9%. Tentatively, Europe’s and India’s majority and minority languages can be divided (and compared) in the following way: Europe has national languages (which are an official state language in at least one state and a minority language in other states) and “stateless languages” (absolute minorities), which have

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22 The count has been done based on the 2001 India census figures. See Benedikter, *op.cit* note 5, 58.
neither a home state nor a “kin-state” of cultural reference.\(^{23}\) Out of 90 European languages, 53 are attributed to “stateless languages”. By far, the majority of the 330 European linguistic minorities speak languages that are a majority in another nation state (thus, sometimes defined “national minorities”). Also, India has “relative minorities” (whose language is official in another state) and “absolute minorities” (or stateless languages). Although Europe’s stateless languages account for 5% of the whole population (35 million), 5.6% of India’s total population (55 million people) speak a language as mother tongue which is not official in any state. If Urdu were regarded as a minority language, as it is in 27 and a half states (the “half state” is Jammu), the number of speakers of a relative minority language would increase to 105 million people, interestingly reaching in India the same share of members of linguistic minorities as were counted for Europe (10.5%–10.8%).\(^{24}\)

II. PART TWO

A. Central Issues of India’s Language Policy vis-à-vis Linguistic Minorities

1. Minority Protection as a Constitutional Issue

Considering the issue from a European perspective, it should be recalled that not all European states have enshrined the protection of minorities in their constitutions and in other cases, international covenants have not yet been transformed in state acts, legal provisions, and political action in all states. Several states’ domestic legislation on minority rights is still half-hearted, incoherent, and insufficient for this purpose.\(^{25}\) India, on the contrary, conferred constitutional value on the right of minorities to protect their identity from the beginning. The Indian constitution is clear in its principles, but far less

\(^{23}\) This concept is presented by Christoph Pan and Beate S. Pfeil, *National Minorities in Europe – Handbook, volume II* (Braumüller, Vienna, 2003), 34.

\(^{24}\) *Ibid.*, for detailed figures and information on ethnolinguistic or national minorities in Europe.

\(^{25}\) Several European states still do not recognize any linguistic or ethnic minorities (France, Turkey, Greece, and Belarus), and several states have not yet ratified the most important legal instruments for the protection of national minorities (The Framework Convention for the Protection of National Minorities [FCNM] and The European Charter for Regional or Minority Languages [ECRML]). In other European states it can be observed that the official recognition of minority languages has not been followed by an adequate political attempt to implement the provisions linked to recognition.
advanced in the level and substance of the single rights seen as indispensable for cultural survival in the modern world.

Article 29 of the Constitution of India provides explicit guarantees for protecting the interests of minorities:26

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Having stated the right of minority peoples to maintain their language and culture, the Constitution then includes the explicit protection of the rights of minorities to provide their education in their language, certainly an important part of language maintenance. Article 30 details this right, along with protection against discrimination, in the receiving of government grants for education:

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of any educational institution established and administered by a minority, referred to in clause 1, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause. The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

This final clause does not keep the state from regulating for educational standards, but does protect against regulations concerning medium of instruction. Besides these general

26 The text of the Indian Constitution can be found at <http//www.constitution.org/cons/india/>. The constitution does refer explicitly to languages while declining to comment on religion. See Joshua Castellino and Elvira Domínguez Redondo, Minority Rights in Asia, A Comparative Legal Analysis (Oxford University Press, Oxford, 2006), 76-77.
safeguards, the Indian Constitution includes a section titled Special Directives which explicitly addresses language and education issues beyond simple protection for minorities. Article 350 guarantees the right of all people to use a language they understand in “representations for redress of grievances”. In the Seventh Amendment to the Constitution made by the Constitution Act of 1956, two articles were added addressing linguistic minority issues:

350A. Facilities for instruction in mother-tongue at primary stage.
It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

350B. Special Officer for linguistic minorities.
(1) There shall be a Special Officer for linguistic minorities to be appointed by the President.
(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.

To ensure protection to a minority language under the constitution, being defined as a minority becomes an important issue tied to the complexity of defining language and mother tongue.27

However, can granting primary education in the mother tongue and the right to run private schools in minority medium languages be truly sufficient for ensuring their survival? And if minority rights are entrenched by the constitution, who is safeguarding these rights and how are they enforced? If more than half of the living minority languages

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are not even taught as a subject in primary schools and several are only taught for 2-3 years before being replaced by regional majority languages, the minority members are deprived of a fundamental cultural and linguistic right. Considering states are responsible for the implementation of the educational right, how can it be enforced? How can the states be obliged to cater to the educational needs of linguistic minorities? Is it not a bitter experience for millions of tribal community members to have quota regulations in public employment and in universities, but not enough schools with appropriate curricula and funding to ever allow a sufficient number of students to reach the educational level entitling them to apply for such a course or job?

Such questions immediately arise when screening the Indian states' language policy. Indeed, under the present legal setting, the multilingual fabric of the country is not questioned regarding the regional official languages. These 14-15 languages, along with the two nationwide link languages, all have a secure legal and societal space and power to be stabilized and further developed. However, linguistic legislation and the language policy of India's states do not assign enough importance—either on a territorial or cultural basis—to absolute linguistic minorities in public administration and in the educational system. In fact, such minority languages are not contemplated as languages for education beyond the primary stage. This is due to a fundamental “missing link”.

The minority languages that India's “Founding Fathers” had in mind were not the small tribal languages, but the major languages which became minority languages after the linguistic reorganisation. The provision for private community action to promote and preserve minority languages only makes sense for those large languages and linguistic communities with powerful elite lobbies and kin states, not for tribal languages or smaller and poorer marginalised people. Protection of the absolute minority languages was, therefore, conceptually limited from the beginning with clear-cut linguistic rights linked to the presence of minorities on their traditional territories. Fifty years after India's “linguistic re-organisation”, could it be time to reorganise the states internally along linguistic lines?

What remedies are available in the event of violations of linguistic rights? After long debates and complicated decisional procedures, India has found a solution for the official

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28 Saxena and Mahendroo, op.cit. note 28, 151.
languages which could stabilize the whole system and have an integrative effect on the state and federal level. The existence of many states has been decided on the federal level in response to claims stemming from parts or groups in a preexisting state at a substate level. The federal state, in a certain sense, has taken on the role of mediator of conflicts between the states and minority groups at the substate level. The implementation of legal provisions on language in India goes through different steps of control and revision: the political parties, the media, pressure groups of civil societies and state institutions, such as the “Commissioner for Linguistic Minorities”. He represents the interests of the linguistic minorities irrespective of relative or absolute kind. Thus, the centre is in charge of defending the interests of linguistic minorities and their individual members, particularly against the powerful policy of the states to affirm and promote their respective official languages. But is the Centre really doing what it is required to do? The annual reports of the NCLM are more than sceptical about this issue.

2. The Importance of Language in Identity Building in India

The importance of language in building up a national identity in India differs from that prevailing in Europe. India’s “national cultures” (Hinduism and other religions) and link languages (Hindi and English) act as superordinate cultural coordinates that coexist with regional state cultures. Indian citizens who grow up, for instance, in Karnataka and speak no other language but Kannada can perfectly combine their feeling of being a member of the Indian nation and a Karnataki. On the contrary, the European identity and self-perception starts from being a citizen of one of its nation-states, and only then a feeling of membership of the supranational European construction is embraced. The overwhelming majority of French citizens perceive themselves first as French and second as Europeans or citizens of the European Union. The same pattern prevails in the other

29 Art. 350B of the Constitution provides for the appointment by the Indian President of a “Special Officer for Linguistic Minorities” (NCLM). The NCLM has the duty to investigate all matters relating to safeguards provided for the linguistic minorities and reports to the President at such intervals as may be fixed. These “Annual Reports” of the NCLM, to be presented to the President of India, are the major source of information on minority languages (available at <http://nclm.nic.in>). As of 2008, 43 reports can be retrieved on this website. The office of the NCLM has its national headquarters at Allahabad in Uttar Pradesh. In June 2006, A. Keswani, an ex-member of the Indian Parliament, took over as NCLM. The Constitution of India is to be found at <http://www.constitution.org/cons/india/>.

30 See INRA (Europe) for the Education and Culture Directorate General, Eurobarometer 54 Special Report, 2001, on Europeans and languages, at:
European states. The national minority issue—or in India the issue of linguistic minorities—as well as the multifaceted issue of dialects brings in the third layer or what Europeans call the regional dimension: the home region, often home to linguistic minorities or communities which develop a strong sense of belonging to their region. Apart from this dimension, about half of Europe’s peoples or linguistic communities do not have their own state and thus are “absolute minorities” who speak languages which are not recognized as official in any European state and are not backed by any other European “kin state”. In turn, ethnolinguistic minorities with a “kin state”, against the background of a continent deeply moulded by the concept of the nation–state, are also defined as “national minorities”.

In India, on the contrary, pan-Indian national cultures act as a kind of “superordinate” languages, whereas regional cultures behave like localized distinct languages. As the renowned sociolinguist Srivastava wrote, “regionalised cultures like dialects usually do not detract from the wider loyalties to a nation; rather it provides the people with a sense of belonging instead of inbreeding feeling of hyphenated rootless life. It is the cultural pluralism within a multilingual framework, with a sense of super ordinate feeling of being one nation, which is the Indian identity.” In India, the Constitution does not consider that one language is required for developing India into a nation, although Article 343 Constitution envisioned that Hindi should assume this role. Nevertheless, such provisions are dormant.

Indian nationalism or national identity is not tied up with just one language or one religion. The constitution, as in matters of religion, prescribes linguistic secularism for India. This has been the case historically, and the constitution reflects this historical fact. The acceptance of multilingualism as a basic principle of the organization of the Union at the federal and state level has utmost political and psychological importance as the

31 Region in the European understanding is equivalent to “district” in some South Asian states, such as India. Currently, the EU has 250 regions, whereas India's states are further subdivided into 330 districts.
32 For instance, the Occitans, the Romany and Sinti, the Basques, the Rhaeto-Romans, the Kashubs, the Frisians, the Bretons, the Corsicans, the Welsh, the Sami, the Gagauz, the Sorbs, and the Aromanians. For a more complete explanation see, Pan and Pfeil, op.cit. note 25.
33 N. H. Itagi and Shailendra Kumar Singh (eds.), Linguistic Landscaping in India (CIIL and M. Gandhi International Hindi University, Mysore, 2002), 50.
people, speaking so many diverse languages small and big, have the feeling that all languages are equally a part of the multilingual fabric of the country. Consequently, the constitution tries to square the circle: establish national link languages, enhance the regional official language, ensure the multilingual character of the country, and safeguard the rights of linguistic minorities. It is a different matter whether these constitutional objectives are actually implemented in the present-day political reality. The multilingual character of India, with largely no boundaries sharply demarcating languages, castes or religions, often is exemplified by the famous Gujarati spice merchant settling in Mumbai: he speaks Gujarati in his family, Marathi in the vegetable market, Hindi with the milkman, Konkani in trading circles, and rarely English on formal occasions.\footnote{Rakesh Bhatt and Ahmar Mahboob, “Minority Languages and their Status”, in Braj B. Kachru, Yamuna Kachru, and S.N. Sridhar, (eds.), \textit{Language in South Asia} (Cambridge University Press, Cambridge, 2008), 14.}

Multilingualism is an age-old phenomenon in the Indian subcontinent because there has been continuous migration, intermingling, and contact between many people and ethnic groups in the same major cities and regions of settlement. Historically, as today, millions of Indians were accustomed to switching from one language to another depending on the social context and their individual roles in society. They switched from Pali to Sanskrit, from Tamil to Sanskrit, and from Ardhmagadhi to Sanskrit with ease. Bilingualism is a widespread phenomenon in predominantly oral forms (the census asks only for communication capacities). There are certainly many quality differences in the degree of multi- and bilingualism, which have still not been researched in depth. However, at the same time, a considerable process of language loss and assimilation is also occurring.\footnote{Ibid., 146.} Multilingualism is a structural must for a country with 114 living languages. The 2001 Census of India reported that 26\% of India’s total population is bilingual or trilingual, but among the speakers of nonscheduled languages (including almost all 'absolute minorities'), 42\% claim to know at least one language other than their mother tongue. India is multilingual in two senses: each state in India is multilingual in the sense that alongside the dominant regional language there exist several minority languages, a situation somewhat similar to Europe. In addition, a steadily growing share of the population in all states and speech communities is bilingual or multilingual. Again, in
Europe rather than “multilingual” a person would be qualified as “being fluent in one or more foreign languages”, although the majority of the European population is still not fluent in a foreign language. The majority of India’s population is not multilingual or even bilingual, although commanding a second language is a societal “megatrend”. Table 5 shows an overall increase of ‘multilinguals’ among all language groups and also reflects the systematic implementation of the Three-Languages-Formula (TLF) in most Indian states in the last 30-40 years.

Table 5: Ratio of Bilingual Speakers among Major Indian Speech Groups 1971, 1981, 2001

<table>
<thead>
<tr>
<th>Language group</th>
<th>Percentage of bilingual speakers</th>
<th>Percentage of bilingual and trilingual speakers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sindhi</td>
<td>43.0</td>
<td>57.2</td>
</tr>
<tr>
<td>Urdu</td>
<td>27.9</td>
<td>29.4</td>
</tr>
<tr>
<td>Punjabi</td>
<td>21.0</td>
<td>30.6</td>
</tr>
<tr>
<td>Malayalam</td>
<td>18.7</td>
<td>20.0</td>
</tr>
<tr>
<td>Kannada</td>
<td>17.1</td>
<td>15.2</td>
</tr>
<tr>
<td>Telugu</td>
<td>17.0</td>
<td>13.3</td>
</tr>
<tr>
<td>Kashmiri</td>
<td>16.0</td>
<td>24.2</td>
</tr>
<tr>
<td>Marathi</td>
<td>14.7</td>
<td>23.0</td>
</tr>
<tr>
<td>Tamil</td>
<td>13.8</td>
<td>19.6</td>
</tr>
<tr>
<td>Assamese</td>
<td>13.2</td>
<td>20.7</td>
</tr>
<tr>
<td>Gujarati</td>
<td>13.1</td>
<td>19.4</td>
</tr>
<tr>
<td>Bengali</td>
<td>12.0</td>
<td>5.6</td>
</tr>
<tr>
<td>Oriya</td>
<td>8.5</td>
<td>9.6</td>
</tr>
<tr>
<td>Hindi</td>
<td>6.4</td>
<td>4.8</td>
</tr>
</tbody>
</table>


3. Minority Protection in a Multilingual and Federal Political Context

Compared with India, Europe’s linguistic communities are intertwined to a much lesser extent and languages are less intermingled, whereas most linguistic minorities have a close and stable relationship with their traditional territory. In many such territories, autochthonous (primordial) ethnolinguistic groups are living together with groups of the majority population of the respective state. Although they usually show a tight linkage with the territory, developed throughout history, rather it is the emerging phenomenon of the newly immigrated minority groups which in many urban areas are giving rise to de facto “multilingual environments”, comparable with the Indian urban scenarios.
Nevertheless, the cultural imperative in the European “national states” is still that all citizens are required to know and learn the state official language before learning foreign languages. Hence, although linguistic minorities have their own public schools with a mother tongue medium, they are obliged to establish such a priority. However, the necessity of a European link language is a historically new challenge that emerges more strongly as the economic and social integration of the nation states deepens. European integration is extending to a larger number of states and deepening with an increasing impact into a wide range of policies and the daily life of the citizens.\textsuperscript{36} Although the EU has issued recommendations regarding national education policies to ensure that in the future every young European is fluent in at least two other European languages apart from his mother tongue, most European states are far from adopting a TLF in the Indian style.\textsuperscript{37} Because English is the absolute favourite foreign language in most European countries, it is learned at the expense of other major languages, such as German, French, Spanish, Polish, and Italian. The national education systems are not destined to transform into systems with three-language-medium schools. For the foreseeable future, they will remain national-language-medium schools with one or two “foreign languages”, although soon the EU will include almost all of Europe. For speakers of minority languages, this strategy in Europe also automatically entails a TLF because, apart from the mother tongue and foreign languages, they are required to learn the national majority language (the “state language”) as well. India, operating with two link languages and the TLF as a main pillar of the education policy, requires linguistic minorities to learn at least three other languages apart from their own, which translates to a “4-language-formula”. This means that Indian youths are under a higher language-learning stress than their European counterpart age group.

Practical regulations and instruments are not the only features determining a language policy; psychological and emotional factors are also important in India. Language is a central feature of cultural identity and a political symbol for the integration of major

\textsuperscript{36} These issues are extensively analysed by Peter A. Kraus, \textit{A Union of Diversity – Language, Identity and Polity-Building in Europe} (Cambridge University Press, Cambridge, 2008). The best overview on the situation of linguistic rights of minorities is given in Christoph Pan and Beate S. Pfeil, \textit{Minderheitenrechte in Europa, Handbuch der Europ. Volksgruppen} (Band 2, Springer, Vienna 2006); the screens the situation in all European countries except the microstates (only available in German).

\textsuperscript{37} India’s TLF is concisely explained in K. Vishvanatham, “The 8th Schedule and the TLF”, in UNESCO (eds.), \textit{Language Education in Multilingual India} (UNESCO, Delhi 2001), 298-333.
groups, as was the case for the Tamils and other Dravidian linguistic groups of South India. Moreover, language conflicts sometimes hide deeper cleavages on a political and social level, such as the perceived dominance of one group in the political sphere. Decisions of language policy therefore, have manifold effects not limited to the cultural life proper, but affecting the whole architecture of the Indian Union. Fortunately, the language policies in India were discussed and implemented in a federal and pluralist institutional framework accompanied by a free media and information system. Decisions opposed by strong minorities could be redressed later, and flexible solutions were found instead of forcibly imposing languages on other states. The initial project to develop Hindi as an “indigenous national language” was opposed by several states, which succeeded in maintaining a strong role for English and in reinforcing the single regional state languages. The existence of English as an overarching neutral link language from a historical perspective is a rather fortunate circumstance that avoided a large-scale “linguistic imperialism” as happened in Latin America and China.

India has also done a great deal to strengthen linguistic pluralism: the strong emphasis on multilingual formal education reinforced by promoting the TLF has contributed to a widely accepted pluralist approach to languages in India’s modern society. The efforts to promote multilingualism had to be combined with the constitutional safeguards for the rights of linguistic minorities. Ensuring primary education in the mother tongue, allowing for media in minority languages, providing safeguards to use minority languages at the local level when a minimum of population speaks them—all such provisions are not to be taken for granted in the difficult social reality of a developing country.

In heterogeneous societies like India’s, it is important to promote cohesion or integration at both levels: federal and state. This is also happening through languages and language policy. However, it has to be acknowledged that languages are not equal and do not have the same standing. Absolute equality in function, prestige, and status is quite unrealistic, but if linguistic variety is to be preserved—as an overriding political aim—legislation and policy must respond to this goal. Weaker, smaller minority languages must receive major promotion to compensate for their difficulties regarding dominant languages, provided the goal is to enable their survival. Every language should obtain recognition and the promotion its speakers desire, so to be accepted by all and to avoid the discrimination of
linguistic minorities. In India, as in Europe, there is a cleavage between constitutional postulations and material, social, and political performance.

4. *The Economic Dimension of the Protection of Linguistic Rights*

For illustrating this point, one must recall the principal causes of language endangerment as quoted in the introduction. The main symptom of such a process is the dwindling number of speakers, mainly due to native speakers forsaking their language and neglecting to pass on to their children. Every language is endangered if it is held in low esteem by its speakers and if it is deemed a language with little or no use in domain outside the family home. Such languages, instead of being useful for each kind of communication and livelihood are instead considered a liability. Their speakers prefer and feel compelled to prefer to equip their children with languages of the majority culture, be it the official state or the national one. Bilingual parents, belonging to a linguistic minority, are often not keen to pass on the problems linked to being a “minority language speaker”, but rather prefer to ensure the optimum of professional opportunities for their offspring. Unless learning a minority language, apart from being a cultural heritage, is important for improving one's social and economic opportunities, such languages will be endangered. Language skills in a modern society turn out to be a resource only if there is a link to their use on the labour market.

Therefore, the real issue is how to redress the structural disadvantage of minority languages in states dominated by one linguistic majority, coupled with the general requirement of multilingualism in a multilingual nation. Which kind of legal–political framework must be created for also endowing minority languages with use and relevance in the modern social, economic, and cultural life in their environment? This “redress” of structural dominance can occur only on a territorial basis referring to the traditional “homelands” of such minorities; in India mostly to be identified on the district or subdistrict level. For the purpose of the protection of minority rights and of tribal peoples’ rights in particular, district autonomies have been established under the 5th and
6th schedule of the constitution. Most 6th-schedule district autonomies were created in the ethnically heterogeneous Northeast; none were created in the big tribal belt of central India. There are many districts outside the Northeast which have a majority of tribal peoples or groups speaking a different native language than the official state language. District autonomy is not only an issue for so-called tribal peoples, but also for linguistic minorities generally. In Europe, out of 36 operating autonomous regions, the major part has obtained this status due to the presence of an ethnolinguistic minority, and several more are striving for this status.

In this regard, India's quota regulations for members of “Scheduled Tribes” (ST) become a double-edged sword. They are there to ensure equal rights and opportunities to disadvantaged groups of the society and to avoid substantial discrimination; however, due to the ST-quota reservation, part of the tribal elite can often get a public job. Then they migrate to major towns and are absorbed in the mainstream. Usually they do not return to their communities to work. This “brain-drain” weakens the tribal community and the efforts for modernizing the smaller languages. In the long run, qualified jobs have to be created locally and require a certain degree of command of the local or regional languages if these languages are to be preserved.

5. **Language and Territory**

As has been noted, in Europe, major linguistic groups (people) and linguistic minorities have a tight link with their traditional territory. The local–regional dimension is relevant in India as well because it was a society that was much less mobile and migrant in the past, with an economy based on agriculture and less integrated before the industrialization of the recent decades. But as a political factor, territory does play a much weaker role in India’s architecture of state powers. One example is the unusual faculty of the Centre’s legislature to carve out new federated states from existing states; a second example is the relatively scarce powers of the substate government level. India’s third government level—in the European Union, the roughly 250 regions (sometimes identical with federal units) and in India, the 330 districts—has much less power of self-

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38 Further details on the education of scheduled tribes and scheduled castes in India at <http://education.nic.in/scst/SCST-special.asp> and by India's Ministry of Tribal Affairs at <http://tribal.nic.in/index1.html>.
government than in most European states. In India, there are commonly no legislative powers on the substate level (district or *taluq*), and territorial autonomy is a rather rare exception concentrated mostly in the Northeast and West-Bengal, where 11 “Autonomous Hill Councils” have been established under the 6th schedule of the constitution. Although India is the most populous federal state in the world, most European states, having the size of Indian states, are themselves structured on three levels: the centre or federation, the regions or federal units, and the municipal level. This territorial power-sharing structure forms a remarkable difference in the “institutional infrastructure” of a state that is relevant for the protection of ethnolinguistic minorities. The more decentralised a state is, the more opportunities regional minorities have for self-government, for shaping cultural and educational policies according to linguistic peculiarities, and for implementing such linguistic rights as official bilingualism in public administration. The latter concept is more coherently adopted in cases of full-fledged territorial autonomy, which has been established in 37 regions in 11 European states. India is still much more reluctant in conceding regional autonomy, and it remains to be seen whether the existing forms of autonomy (e.g., Leh & Kargil, Bodoland, Darjeeling, Khasi, Garo and Jaintia Hills, North Cachar, Karbi-Anlong, Chakma, Lakher, and Lai) have met the goal of preserving minority languages. At least 50 other Indian districts have a considerable, if not majority indigenous (Adivasi) population. Yet, their languages only exceptionally enjoy official status in those districts. A precise mapping of such areas and an assessment of the requirements of local self-administration has not yet been conducted.

Some provisions of Part XVII of the constitution on “Official Language” seemingly seek to protect minority languages on a territorial basis. Most, however, have remained ineffective in protecting the rights of linguistic minorities. Article 347 reads: “On a

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39 The other two are located in Jammu & Kashmir, the autonomous districts of Kargil and Leh. An analysis and comparison of all worldwide operating regional autonomies has been elaborated by the author. See Sabyasachi Basu Ray Chaudhury, Samir Kumar Das, and Ranabir Samaddar (eds.), *Indian Autonomies: Keywords and Key texts*, (Kolkata, 2005); and Thomas Benedikter, “The World’s Modern Autonomy Systems – Concepts and Experiences of Regional Territorial Autonomy”, EURAC 2009, at <http://www.eurac.edu/ORG/Minorities/IMR/Projects/asia.htm>.

demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a state desire the use of any language spoken by them to be recognised by that state, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify”. Instead of making it a duty of the state to determine the size and spread of linguistic minorities for their official recognition at appropriate levels and purposes, Article 347 makes such recognition and use dependent on the subjective satisfaction of the federal President and on the “desire of a substantial proportion of the local population”—quite a vague concept. This is based on the ground that a substantial proportion of the population desires it and that desire has been expressed in the form of a demand. This amounts to treating numerically inferior groups of citizens as subject people and not as citizens with inherent and inalienable rights, including the right to the use of their mother tongue in important public domains. What proportion should be treated as substantial, 25% or 50%? No precise indication is given, and hence, it is not surprising that few minority languages have been declared coofficial on the regional or district level. 41

6. Differences in Perceiving Multilingualism: the Hierarchy of Linguistic Domains

Because of close contacts with other speech communities and possibly because of early alphabetization in other languages, claims of proficiency or having native-like control over multiple languages or dialects is a common phenomenon in India. Bi- and trilingualism in India is not just a feature of “highbrow-culture” or of the well-educated elite, but is widely spread among all social strata. Due to the TLF policy, the share of bilinguals is steadily increasing. In such a plurilingual society, one’s total linguistic repertoire is influenced by more than one language or dialect, and a person’s choice of languages is hardly obstructed by linguistic boundaries. The boundary between dialect and language or between two languages (when children have been lingualised, acculturated, and socialised in two languages simultaneously) remains fluid. Apart from mastery over language at large, Indian people do not show over-consciousness of speech

41 But Ranabir Samaddar, Director of the Mahanirban Calcutta Research Group objects to this statement: “Thus, the idea ‘if a majority group could freely adopt its own language regulation in its area, the usage would be quite different’ betrays our disregard of the fundamental fact that India has been often plurilingual and linguistic nationalism went hand in hand with Indian nationalism, and the search for such ‘areas’ may at times be fruitless” (from an interview with the author conducted in September 2008).
characteristics in operating in various domains, unless a formally high level of accuracy is demanded: “Therefore, in such multilingual societies mere speech characteristics cannot be a strict marker of lingual identification unlike in European countries.” In linguistically heterogeneous countries like India, a child acquires languages other than his or her mother tongue from everyday life situations as he or she grows or starts moving from lower-based linguistic environments to successively higher ones; that is, from home to school and from the school to the capital. Therefore, the speech behaviour or course of language choice is guided by various sociolinguistic demands made by close groups, regional societies, supraregional spaces or functional requirements in different contexts. Whenever they decide to learn other languages, Indian citizens usually respond to functional needs at various sociolinguistic layers without attaching a nationality or ideologically overloaded significance. Unlike Europe, with its “national languages” and first and second “foreign languages”, in India there is no strict separation of languages, even if the states try to impose their respective official languages in several domains such as education, public administration, and the media. People’s social, cultural, and political identity is linked with the language in which they speak, think, and communicate. Multilingualism in India is seen as a hindrance in its development by the developed world. Often, anxiety is expressed concerning how a central government could function in a hundred languages. But neither India nor Europe’s national or supranational operate in a hundred languages. The European Union has 23 official and only 2 working languages: English and French. India has 22 scheduled languages and also two “working languages”: English and Hindi. Hence, the need to have a national or supranational link language while preserving the state languages in other domains is not linked with the imposition of a dominant culture and language by a centralized leadership. A multicultural and multilingual society can perfectly maintain this fundamental feature, although usually adopting one or some common languages for political and institutional communication. In the past, at least in some parts of India, Hindi was perceived as a language that was going to be imposed on other states. However, today a relaxed

42 Shailendra Kumar Singh, Linguistic Landscaping (CIIL, Mysore, 2002), 46.
43 Ibid., 47.
44 See Saxena Mahendroo, op.cit. note 28, 151.
approach to multilingualism can be observed based on the hierarchy of languages with their functional differentiation.45

7. Minority Languages in Education

Again, India’s education system presents many differences compared with the European “mainstream model”. The most striking differences are: almost all European countries (at least the EU member countries) have a school attendance requirement until the age of 18, and the prevailing form of education for the vast majority of students is the public, tuition-free school for everyone from class I to class XII or XIII. In areas or regions with linguistic minorities, this public primary and secondary school operates in the languages the local communities desire as medium languages. This system has not only ensured almost complete literacy and progress for equal opportunities, but also a much better starting position for linguistic minorities. Under this regime, the state or the responsible substate unit has to offer a tuition-free public school system for linguistic minorities, wherever they wish, operating in the mother tongue of the minority students from class I to class XII or XIII. The Indian Constitution lacks both: there is no provision for free education for all students for this duration, and it is not a right of linguistic minorities to have their own public schools on all levels, or at least from class I to class VIII. Under these circumstances, it is not surprising that linguistic minorities, especially “absolute minorities” (minorities with no kin state or major cultural references beyond the state borders) enjoy much less education in their mother tongue. They simply are not in the financial condition to run private schools. The legal (constitutional) provision for providing mother-tongue classes or schools according to the 10:40 ratio46 is seldom effective or sufficiently funded. However, the minority population has to live in a concentrated form; otherwise it will always be difficult to organize separate education institutions.

46 Whenever there are 10 minority children in a class or 40 minority children in a school, separate classes or a separate school must be provided.
Article 350(A) of the Indian Constitution reads as follows:

It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

Because it is vague, it has been possible to disregard this article in all three aspects: “endeavour”, “adequate facilities”, and “directions to the state” as is borne out by the Report of the Official Committee to Examine the Implementation of the Recommendation of the Gujral Committee for Promotion of Urdu. 47 The most blatant case is the denial of the use of Urdu script in primary education in Uttar Pradesh, where the script of Urdu is fast going into disuse. Article 350(A) was specially provided through the 7th Constitution Amendment Act (1956) to protect the minority languages used at the primary stage of education on the recommendation of the States Reorganisation Commission. Because of the way it is phrased, however, it has been possible to render it a “mere teasing illusion, and a promise of unreality.” 48 India, by its very nature, needs to cope with multilingualism much more than Europe. The TLF of the future will have to provide proficiency in three languages for all, but these languages will be introduced at different stages. By introducing languages at certain levels of schooling, values or weights are automatically attributed to those languages. This weight is expressed in teaching time per week, the duration of teaching in years, and the subjects taught in the language concerned. For the typical Indian student enrolled in compulsory school, the problem is not to learn three languages, but which methodology should be used with which performance. The amount of time devoted to the teaching of languages also becomes a problem for minority language speakers. Generally, schools in different states devote between a quarter and two-thirds of the total teaching hours to teaching languages. The allotment of greater or lesser time to the teaching of particular languages is judged as a prestige status issue for that particular language. Strategies for teaching contact

48 Ibid., 134.
languages\textsuperscript{49} in different regions are designed to satisfy the immediate and long-term societal need. This speaks to the necessity of undertaking a critical assessment of the TLF as implemented in most of India’s states \textit{vis-à-vis} the teaching of minority languages. To be blunt, with the present TLF system, India's youths face an overload of language teaching, let alone the requirement to learn the mother tongue if it is an absolute minority language. There is much evidence that in most schools challenged to cope with India’s national multilingual requirements, the interests and needs of the speakers of minority languages are systematically disregarded. The sentiment that millions of minority language speakers receive in the classroom is that if small languages don't matter in education, why learn them? Thus, all players, learners, language teachers, the society, and families have to seek a new balance between mother tongues and dominant languages.

8. \textit{The Languages of the Tribal Peoples: A Lost Cause?}

The victims of the inadequacy of many Indian states’ language policies toward linguistic minorities are the tribal people. Out of more than 80 million (the current number of members of scheduled tribes) only about half have retained their traditional language, whereas others have shifted to regional languages but maintain a tribal cultural identity not based on language.\textsuperscript{50} There are tribes in India who do not want schools with their mother tongue medium language, and others who live dispersedly can hardly be provided adequate central infrastructure. Many more, including hundreds of thousands of members and despite a clear need and common will, do not enjoy the right to education in their mother tongue, the right to a bilingual school, or the right to use their mother tongue in the local public administration.

The tribal languages are those Indian languages that not only face attrition, but in many cases, are close to extinction.

\textsuperscript{49} 'Contact languages' in India are not only the major official 'link languages' such as Hindi and English, but are also most of the official state languages; as for absolute linguistic minorities, regionally they are covering a considerable range of linguistic domains in contact with the linguistic majority of the respective state.

\textsuperscript{50} Concerning the linguistic implications of the situation of India's tribal people, updated information is provided by the annual report of the Asian Indigenous and Tribal Peoples Network AITPN, \textit{The State of India's Indigenous and Tribal Peoples 2009,} New Delhi 2009, at <http://www.aitpn.org/Reports/Tribal_Peoples_2009.pdf>; further official information on the education of scheduled tribes and scheduled castes in India can be found at <http://education.nic.in/scst/SCST-special.asp> and at India's Ministry of Tribal Affairs <http://tribal.nic.in/index1.html>.
Language should not be perceived just as a tool for learning, reading and writing and to master other subjects. It should be a process on which social values and traditions of a society are passed on leading to identity building, critical thinking, creativity and the capacity to learn other languages. Every smaller language has a rich literary or orally tradition. The replacement of such languages by standard regional languages not only denies the right of speakers to preserve their languages, but also brings about a loss in articulation of cultural and social experience and identity.51

Both are at stake: the cultural values of many ethnolinguistic communities and the linguistic human rights of individual citizens.

In India the absence of a written script often serves as a pretext to deny education in a mother tongue. But is this enough to deny not only education, but also language acquisition planning? Is it legitimate to deny public structures for language development because they are allegedly too costly? Can the additional costs of print work, the formation and employment of teachers, and the creation of additional school facilities be presented as decisive obstacles? Certainly India does not boast the wealth of some European states; however, the country is developing nuclear armament and space research programs. The financial cost is one of the major arguments for rejecting serious programs of linguistic empowerment because the protection of minority languages faces few problems relating to political acceptance. However, in a democratic state, education should be made accessible to all citizens according to fundamental rights, which in India as it is elsewhere, includes education in the mother tongue.52

51 See Saxena and Mahendroo, op.cit., note 28, 150.
52 This is the opinion of the Indian National Commissioner of Linguistic Minorities, expressed in his 42nd report, Allahabad 2007, available at <http://nclm.nic.in>.
When addressing the issue of India's linguistic rights, one must acknowledge that minority situations are different in kind and size compared with Europe. Generally, linguistic minorities in federal India are defined in relation to their state of residence: the vast majority of more than 120 million Indian citizens belonging to linguistic minorities are “relative minorities”, speaking one of the “scheduled languages”, which is an official language in another state of the Union but not in their state, as their mother tongue. Only 3% of India’s total population, about 30 million people, mostly tribal communities, speak “non-scheduled languages”—India’s less protected and often most threatened languages. They can be termed “absolute minorities”, as no kin state or major linguistic community is in charge of their protection. Most of these languages are not taught in any school or recognized for any use in public administration. Many of these languages have no script and thus are deprived of any use in public life. This fact does not mean that mere inclusion in the 8th schedule of the Indian Constitution will solve all their problems.

Considering this brief analysis of India's major issues concerning minority languages, the result is not overwhelmingly positive. India, the most populous democratic country in the world, must cope with a unique linguistic complexity that raises far more problems than the few multinational European states. In a federal state like the Indian Union, all government levels are responsible for such fundamental aims, such as the protection of minorities. Since the 1960s, public institutions have been committed to using the regional official languages as working languages. When considered from the viewpoint of the official goals of minority protection, the Indian language policy demonstrates major achievements, but there is also evidence of serious shortcomings. The States' implementation of official language policy has made great progress in the last decades, but quite often in this ongoing process of “linguistic homogenization”, the needs and interests of the linguistic minorities are seriously neglected.

A first problematic issue is the arbitrary and incomplete approach taken regarding the recognition of languages, minority languages in particular, under the 8th schedule of the Constitution. The major victims are the tribal languages, irrespective of the number of
speakers and their literary traditions. Other “absolute minorities” face many hardships in obtaining legal recognition and the necessary minimum resources for safeguarding their survival. The “relative minorities”, which have a “kin state” or a major linguistic community as their cultural reference area beyond their state of residence are better off and can rely on greater cultural production, better educational facilities, larger numerical size, and other advantages deriving from their status as a scheduled language. Apparently, the forces of economic, technical, and social change are putting the minority languages under stress and the governments' commitment is too weak to effectively implement constitutional safeguards for minority languages in education and administration to counteract their slow erosion.

India's minority languages, which are not recognized under the 8th schedule, are not openly discriminated against, but also clearly lack public support and prestige. There is no numerical criterion for recognition, considering there are nonscheduled languages with millions of speakers. Hence, the 8th schedule has to be revised and the institution of such scheduling has to be questioned. If the constitution assigns federal responsibility for the protection of minorities to the Centre, recognition should be regulated in a transparent and complete manner by federal law. As concrete minority issues can only be tackled by state policies, a federal legal framework provision should delegate this task to the states, stipulating equal criteria and setting appropriate standards for recognition, for avoiding arbitrary proceedings, and for monitoring its application. In addition, the act of recognition of a language has to be linked to a clearly determined set of group rights in linguistic matters.

A second problematic issue is located in the field of education, where the prevailing strategy to cope with multilingual complexity is the TLF. This again acts to the disadvantage of the smaller, nonscheduled linguistic minorities. Major contradictions have emerged in the implementation of this formula. The major conflicts arise between equal implementation in the Northern Hindi belt vis-à-vis the states with Dravidian official languages in the South. However, this ambiguous formula can hardly be combined with linguistic minorities’ right to education in their mother tongues, let alone with the rights of tribal people who already suffer under weak education structures. Despite many laudable efforts, the number of minority languages used in education is
continuously declining. The duration of the use of minority languages in education, the availability of trained teachers and textbooks, the content of the curricula, the social appreciation of minority languages in public education, and the existence of institutions for the development of educational support are, in many cases, insufficient to meet tribal peoples’ fundamental right to education in their mother tongues as enshrined in the constitution. There is no numerical or juridical criterion for offering mandatory public education for linguistic minorities at higher levels, and even on the primary level, the majority of minority languages are no longer taught.

The use of minority languages in administration and the media is constrained by economic, administrative, and sociocultural factors. No coherent and comprehensive approach to grant equal rights in public administration to linguistic minorities and to minor groups like scheduled tribes could be found. The situation is better when minority languages are declared “official languages” on a territorial level (district, tehsil, or municipality) or when former minorities or tribal people obtain a federated state (Meghalaya, Nagaland, Manipur, or Mizoram). This analysis, however, revealed the problem that many minority languages, although constituting a major percentage of the population at the local level (approximately 50 out of 330 districts) are not recognized as official languages. Even if there is no comprehensive regime of bilingualism, some rights for the use of mother tongues in public administration are upheld.

What are the main reasons for this situation? In addition to general factors of social change, such as national economic integration, free migration, and opening to global markets, there are other constant factors impeding and hampering the maintenance and development of minority languages. These factors are absent in environments in which a language is in a majority or dominant position and is endowed with the necessary functional load and transparency to survive. There are internal shortcomings and external pressures that may jeopardize efforts to preserve minority languages.

First, members of the minority may be divided, as is often observed in India, in their opinion regarding the economic, social, administrative, and educational advantages to using their mother tongue. When the elite of a linguistic community, due to economic self-interest, is divided on such a crucial issue, no social and political mobilization will
occur to ensure the maintenance of the language and culture. Under such conditions, the language risks becoming insignificant, paving the way for acculturation and assimilation. Second, there are external factors, in the form of external pressures, from the society in which the linguistic minority is embedded. Such factors are a product of modern centralized and rapidly industrializing societies that favour the standardization of national languages, consumer styles, and cultural patterns at the cost of minor languages and cultures. Considering the multiplicity of languages, minority languages may be considered a structural obstacle to trade, mobility of labour, transfer of technology and innovation, interregional and international communication, and efficient governance. National networks of media, education, and administration are encouraged through the use of standardized national languages to facilitate uniformity of ideology and culture. What was once centralized planning on different government levels is today constrained by the concerns of big corporations that do not wish to invest time and money to adapt their languages to a specific regional minority situation. These processes of acculturation and assimilation pose a grave threat to the survival of minority languages. Their functions are first reduced to religion, traditional customs, and the home, whereas the functional load of the majority languages is continuously extended through media, education, administration, and business life. Then majority languages penetrate into the private domains and ultimately bring about the end of minority language use.

The Indian Constitution contains several provisions of the utmost importance in granting some rights to linguistic minorities. The fundamental right to preserve identity is enshrined, along with the right to education in the mother tongue and the right to have minority languages declared as ‘co-official languages’ if some basic conditions are fulfilled. Nevertheless, the constitutional safeguards after 60 years of an independent India have revealed to be neither sufficiently comprehensive nor exhaustive to effectively protect linguistic minorities:

- There is no duty of the states or governments to recognize linguistic minorities.
- There is no clear-cut right to benefit from mother tongue instruction at the primary level.
- Compulsory education in one’s mother tongue at the secondary level is not contemplated.
• There is no comprehensive right to establish a bilingual public administration in minority areas.

• The only institution of control and monitoring on the federal level, the NCLM, lacks powers to redress shortcomings and violations of constitutional or state provisions.

• There are no rights for linguistic minorities to be represented on a political level (mainly at the state and district level).

• There is no public responsibility to support language status and acquisition planning, enshrined on the federal level and part of state official language policy.

• There is no right for tribal people to claim cultural or local autonomy, including basic linguistic rights, and to be vested with adequate financial funding to preserve their languages.

How can India cope with the challenge of protecting linguistic minorities if the constitution itself is not complete in this regard? How is India to cope with this problem if public efforts, particularly in terms of funds earmarked for this purpose, are grossly inadequate to meet the great demand? Language policy cannot be improvised if no general legal framework on the federal level is set obliging all states to enhance minimum standards of language protection. India’s polities are more concerned with coping with and effectively implementing the TLF than with investing funds in minority language medium schools, bilingual education programs, full bilingualism in public administration on local and regional levels, and minority language media. India as a multinational state is more concerned with the task of national integration, which is pursued by exploring “unity in diversity”. Cultural diversity necessarily includes the smaller and weaker language groups and their fundamental rights and requires their recognition and enhancement.
Minorities within Minorities: Gender Implications for Minority Policies in India and Bangladesh

In the quest to protect minority rights, minority policies in South Asia often treat minorities as given and indivisible social groups, so much so that policies targeting minority groups are intended to uniformly and equally benefit all their members. Although protection of minority rights has radical implications for the quality of democracy that exists in South Asia, treating minorities as given and indivisible entities ignores the differences that are internal to them. Often, being insensitive to these differences translates into active discriminations and minority policies that then create another subset of minorities, such as minority women, sexual minorities, ati-shudras\(^1\) and ati-dalits\(^2\) within the officially acknowledged minorities’ category. In this article, the author calls for the adoption of more nuanced and differentiated policies toward the minorities of South Asia than is presently followed there.

Due to the length limitations of this article, the author seeks to trace primarily, although not exclusively, the gender implications of minority policies followed by the states of South Asia in general and India in particular. The author examines how, at one level, the ambiguous separation of the personal from the public in the context of minority laws proves critical for minority women in India and subjects the personal—predominantly governed by personal laws in a country like India—to the diktats of the community leaders and caste panchayats.\(^3\) Because these institutions, as the case studies suggest, are

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\(^1\) In the fourfold Hindu caste hierarchy, the Shudras are regarded as the lowest in terms of ritual and social status. Ati-Shudras refer to those who are the lowest among the lowest in the hierarchy.

\(^2\) Literally the most repressed among the repressed. The term is widely in circulation particularly in India and Nepal. In India, sometimes ‘Extremely Backward Classes’ is often recognized as a legal category within the official category of ‘Other Backward Classes’. At times, in some states of the Indian Union, seats and posts are reserved for ‘Extremely Backward Classes’ within those that are reserved for the category of ‘Other Backward Classes’. But such recognition of internal differentiation in the minorities is yet to be extended to include minority women.

\(^3\) Panchayat in India is a form of a local adjudicating institution consisting of five members sitting in a court and meting out summary judgments without any legal standing. However, panchayat judgments are nevertheless effective insofar as the ‘offenders’ are subjected to social boycott, ostracism, financial hardship, expulsion, and even physical punishment. The established penal system in India is dilatory and expensive for most Indians, particularly in the countryside. These panchayats are not to be confused with
deeply embedded in patriarchy, minority women accordingly become subjected to it. The author also examines the Bangladesh case, which shows another level of separation of the legal from the political with its obvious effects on the reproduction—at times exacerbation—of gender inequalities among minority women. Although it sounds circular, the author proposes to define the political in terms of what makes the legal enforceable and applicable to whatever is rendered applicable and enforceable by law. The applicability and enforceability of law, therefore, presupposes the creation of a social body or a field governable by the rule of law. Although law *per se* does not create the social body, there is a whole multitude of extralegal if not thoroughly illegal means—‘exceptions’ to laws as they are called in legal circles—which in their combination help in creating and consolidating the social body. The law does not harbour any obligation to those who remain outside the body. In the eye of law, those individuals simply do not exist. However, this should not give us the impression that the separation of the legal from the political is only peculiar to Bangladesh. The same is largely true of the minorities in South Asia.

Before continuing, it is necessary to remark on what is meant by ‘minority’ in this article. In the legal literature, Capotorti’s is regarded as the most widely acknowledged definition of minority. Considering Article 27 of International Covenant on Civil and Political Rights (ICCPR), he defined a minority group as: [A] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.4

This definition hardly views ‘preservation’ as a response to active discrimination that minorities nearly worldwide face from the ‘dominant’ majority groups. The urge for ‘preservation’ is aimed at ‘achieving equality with the majority’. The author instead proposes to define minority not so much in terms of a contingent outcome of a political party or how an individual fares in a periodically held election (and then presumably sits

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in opposition because of its or her minority status), but as a numerically smaller racial or ethnic group that suffers from systematic denial of access to power by virtue of its race or ethnicity. Discrimination against minorities, according to this definition, is therefore not only active but also takes on a racial and ethnic character. That the people in South Asia are not conversant with “the language of majority-minority and identify themselves in line with the majority-minority status” (two out of six respondents in the given sample) as it is recently being argued does not mean that racial and ethnic discriminations do not exist. Viewed in this light, a minority group is neither socially vacuous—an ‘ideological cipher’—nor merely a numerical statement as classical liberal theorists suggest. However, the two aforementioned sets of separation are integrally connected with each other. The outcomes of the case studies conducted for the current article point to the role the political plays in constituting and bringing the legal into existence. Thus, law, by creating the social body to which it applies and renders itself enforceable either does not recognize the minorities living outside the given body or suitably transforms them before it admits them and requires them to follow its rules. Whereas the first course of action makes the minorities ‘disappear’ and creates a universe in which they, therefore, do not exist, the second concerns the transformation of minorities claiming to be defined as ‘nations’ into ‘national minorities’. The process of transformation—variously described as ‘de-ethnicization’, ‘domestication’, ‘institutionalization’ or ‘routinization’—is neither linear nor irreversible. The figure of minorities as ‘nations’ constantly haunts the body politics in South Asia and the transformative process never appears to have come to an end. The rising demands for self-determination in the countries of South Asia are usually preceded by the nationalist claims of the communities that refuse to identify them as minorities.

What we call extralegal or illegal forces directly target minority women, literally impinging on their bodies and constituting the legally recognizable social body in a crassly gender-blind manner. The India and Bangladesh cases show two relatively distinct modes of impingement: whereas in India, the exclusion from the legal by way of keeping the jurisdiction of personal law outside the ambit of the constitution and normal

law of the land and law courts implies subordination of women to such institutions as caste and community *panchayats*, in Bangladesh, the minority women are likely to secure remedies if they have the appropriate kinship network, political clout, and are personally connected to ‘the right persons at right places’ of government. The women in both cases have to bear the brunt of the extralegal or illegal that circulates in society. This article examines how the constitution of this social body is implicated in the twin process of converting the minorities claiming themselves as nations into minorities within a nation and subsequently degendering and homogenizing them into a generic and undifferentiated category.

I. INDIA: THE PERSONAL AND THE PUBLIC

India is described as a country of civilizational magnitude. According to the latest census count, Hindus (including scheduled castes) form 76%, Muslims 11%, Christians 2%, Sikhs 2%, Buddhists 0.7%, Jains 0.5%, Jews 0.1% and the Zoroastrians or Parsees 0.1%. Linguistic divisions more often than not cut across the religious lines. There are eight major language groups: Hindi-speaking population is more than 183 million, Bengali-speaking 45 million, Assamese-speaking 9 million, Kannada-speaking 22 million, Marathi-speaking 42 million, Tamil-speaking 38 million, Telugu-speaking 49 million, and Urdu-speaking 29 million. The indigenous population forms about 7% of the country's population. There are over 60 sociocultural subregions and 12 states in the country, which are larger in population and some in territory than a majority of states on earth. Although the Constitution establishes the principles of ‘equality before law’ and ‘equal protection of laws’, it also provides for certain kinds of group rights (like the freedom to profess, practise, and propagate one’s religion and other cultural, and educational rights) and protection of minorities. The partition of the subcontinent in 1947 on the basis of religion and the bloodbath and displacement accompanying it were

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6 The Government, as per the provisions of the Constitution of India, maintains schedules of castes (updated from time to time) that, because of their ‘backwardness’, are eligible for protection in forms such as reservation of seats and posts in state-run and state-aided educational institutions and government offices, among others. Scheduled castes account for about 15% of the total Indian population. In India, however, schedules have become a contentious topic insofar as there have been movements for certification even by a section of upper castes (like the Brahmans of Rajasthan) to gain access to protection as well as decertification for denying protection to others.
primarily responsible for preventing the Constitutional fathers from making special provisions for affirmative action for religious minorities on the ground that this would further encourage fissiparous tendencies. The indigenous peoples, officially called ‘scheduled tribes’,\(^7\) constitute yet another category of minorities premised on the divide between the Caste–Hindu mainstream and the tribes. Although Article 370 of the Constitution of India grants ‘special status’ to the state of Jammu and Kashmir, Article 371 lays down provisions that are meant to facilitate and supervise the ‘transition’ of the underdeveloped districts inhabited by the indigenous peoples mainly of the Northeast to a more general mode of administration. Therefore, the provisions of these Articles do not apply to the rest of India. Although language was never officially recognised as the basis of state formation, states within the Indian Union were indeed reorganized on such a basis since the mid-1950s. The fact that the demand for formation of smaller states took a particularly ugly and violent turn in such subregions as Telangana of Andhra Pradesh, the hills and slopes of northern West Bengal, and Vidarbha of Maharashtra underlines the ‘second-generation problem’ that minorities living in the once-reorganized units face today. Apart from provisions in the Constitution, there is an elaborate institutional arrangement for protection of minorities. Besides the ideal of fundamental rights as enshrined in the Constitution, the growing discourse on human rights and pluralism has helped in the setting up of several institutions, such as the National Human Rights Commission, National Commission for Minorities, National Commission for Women, National Commission for Scheduled Castes and Tribes, and similar bodies in a few cases at state level. In addition, there has been discussion concerning reforming the police force, which has proved repeatedly unable and incompetent to protect the minorities. The National Commission for Minorities Act, 1992 lends a statutory status to the National Minorities Commission.

In short, mapping the minorities in a country like India is a question of locating them at a point where a whole host of minority identities based on religion, language, race, caste, and ethnicity intersect. The crosscutting nature of lineages, according to the early

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\(^7\) Like those in the case of scheduled castes, the Government maintains schedules listing out the ‘tribes’ eligible for reservation and protection. The term ‘tribe’ is used both in official circles and in popular parlance without any of its necessarily pejorative meanings. Since scheduled tribes are much smaller than scheduled castes, the demand for certification as scheduled tribe rather than scheduled caste (as in the case of Gujjars of Rajasthan) has acquired a certain stridency in recent years.
pluralists writing on Indian society, reduces if not cancels out, one’s minority identity and protects one from more heinous forms of discrimination in which a host of minority identities converge. Thus, to cite an instance, one who is a minority in terms of one’s religion may not be so in terms of one’s language. Muslims constitute about 26% of the total population of West Bengal. Yet, Bengali Muslims living in predominantly Bengali-speaking West Bengal provide a case in point. Indeed, language is more often than not seen as a means of mitigating religious and communal conflicts in contemporary India. However, intersection of only minority identities in all spheres of social life is likely to be highly regressive because all the possible lines of minority identity converge at one point and make discrimination all the more unbearable. The discriminatory effects of being in a minority remain perpetually unaddressed unless there is taken some form of affirmative action. Thus, minority women constitute a minority within the minorities. Although the women in a patriarchal society are usually shunted off into the personal sphere, their entry into the public sphere is severely restricted. Even when they find it accessible, they are invariably at the wrong end of the spectrum. In this article, the author confines his examination to an analysis of how minority women, by virtue of their confinement to the personal sphere, are subjected to special kinds of discrimination as compared with their male counterparts.

The Hindu Code Bill was first debated in the Central Legislature in 1943-44 before India became independent and the Constituent Assembly created a revised draft. Jawaharlal Nehru, the first prime minister of India, was forced to abandon the Bill because of the opposition he faced from his Congress Party. The then law minister, Dr. B. R. Ambedkar, resigned in protest. After the 1952 elections (the first general election in independent India), Nehru used his popular mandate to secure the passage of the Bill, but it was divided into five separate Acts and finally passed in 1956. The Hindu Code Bill made significant departures from traditional Hindu laws in that it allowed intercaste marriage, enforced monogamy, and made divorce possible. Nevertheless, the Constitution distinctly anticipated a single civil code for all citizens, and the Hindu Code Bill was only “a half-

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8 See, M. N. Srinivas, Nation-Building in Independent India (Oxford University Press, Delhi, 1976).
way house to this end”¹⁰ the issues of marriage, divorce, and inheritance are still part of a system of personal laws, applicable solely on the basis of a religious identity. Article 44 of the Constitution of India, forming part of the section on otherwise nonenforceable ‘Directive Principles of State Policy’ provides that “the State shall endeavour to secure for citizens a Uniform Civil code”. The government hardly made any attempt at bringing about reforms in Muslim personal law. The expectation was that the Islamic community rather than the state would initiate change. In the wake of the creation of Pakistan as an Islamic state and the population movement and bloodbath associated with it, the government of India did not want to be seen as imposing any law on the Muslims. Hasan observed:

The government used its latitude to reform Hindu law: and in a sense used the same latitude to allow the preservation of personal laws which claimed religious sanction. There is little reason to doubt that the denial of rights to Muslim women, which are available to women of other faiths, is a violation of the constitutional provision that the state shall not discriminate against any citizen on ground of religion.¹¹

Nevertheless, personal law for the minority Muslims in India has become the norm, with its obvious consequences for Muslim women. For example, the case of a Muslim woman from a remote village in Northern India who is a rape victim. The village Kukda is located 5 kilometres from Muzaffarnagar town. It is a large village with a sizable Muslim population. In fact, the Muslim population in the Muzaffarnagar district averages between 35%-40%. This is part of the sugarcane belt in western Uttar Pradesh. Land ownership is concentrated mainly among the Jats.¹² A few upper-caste groups and fewer Muslims own land. The large majority of Dalits, Maalis, and Muslims work as agricultural labour. Sugarcane is grown almost throughout the year, and considering the ample supply of canal water, the crop is assured and the area is a witness to a high rate of crime. The area is sometimes referred to along with such medium-sized cities of Uttar Pradesh as Merut, Saharanpur, Bulandshahr, and Ghaziabad as the “Wild West”. In Kukda, Muslim homes are located at the end of the village, signifying their economic backwardness. In stark

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¹⁰ Zoya Hasan, “Minority Identity, State Policy and the Political process” in Mala Khullar (ed.), Writing the Women’s Movement: A Reader (Zubaan, New Delhi, 2005), 203.
¹¹ Ibid., 206.
contrast to the bigger dwellings and wide pathways at the entrance to the village, the Muslim dwellings are small and situated in congested, narrow lanes.

At the time of the rape, Imrana was at Charthawal village in her husband’s home. Her husband, Noor Ilahi, was away at work at a brick kiln near capital Delhi when her father-in-law criminally assaulted her. She was 28-years-old when she was reportedly raped. Noor Ilahi is a rickshaw puller and part-time brick-kiln worker of Kukda village. She suffered ‘the worst humiliation’ when she was raped by her 59-year-old father-in-law, Ali Mohammed, in June 2005. The next day, when Noor Ilahi returned, Imrana told her husband of the assault. Instead of sympathizing, he became furious. “You cannot be my wife any more,” the 32-year-old shouted before uttering the dreaded word for divorce.

She reported the matter to her mother-in-law, who advised her to remain quiet but assured her that justice would be done. She rebuked her son. However, as the news circulated, Imrana’s brothers came from Kukda village, not far from Charthawal, on 11 June 2005 and assaulted the father-in-law. The incident quickly became known to the entire village. At this point, the village panchayats took control of the situation. The panchayat in Kukda is called ‘Chaudrahat Jamaana’ (the term Chaudrahat originates from Chaudhary, which is a common Jat surname). The Ansari (the community of weavers to which Imrana belonged) panchayat met on 13 June. The local clerics were present at the panchayat and the leaders declared her marriage to Noor Ilahi haraam or illegal. She was then instructed by the village panchayat to sever relations with her husband and treat him as her ‘son’. The logic was that as she had sexual relations (the lack of consent was not an issue) with his father, she could only be her husband’s mother. After the verdict was given, she was told to go to her parental village. In reply to the question of what should be done in such circumstances, the Darool Uloom, the seminary of Islamic instruction and teaching located in Deoband not far from Muzaffarnagar, issued a fatwa (edict) on 24 June, offering various possibilities. The fatwa was not in Imrana’s name and was not registered.13 According to the Darool Uloom, it was delivering only a general opinion in response to a specific query and it endorsed the interpretation of the Ansari panchayat and Shamim Ahmed, the Imam of Charthawal, that her marriage to her husband was

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12 Jats of Uttar Pradesh are a middle-ranking, Hindu peasant caste.
13 Registration of fatwa is considered as a requirement for making it enforceable.
rendered null and void by the sexual contact between Imrana and her father-in-law. It is neither possible to offer any interpretation of Islamic theology on such matters nor necessary, because the interpretations acquire their meaning and relevance only in specific contexts.\footnote{But if one were to understand the explanation behind such an interpretation, the following statement of Zafarul-Islam Khan, an eminent Islamic scholar, might be helpful (at \url{http://www.islamonline.net/livedialogue/english/Browse.asp?hGuestID=bB39kb}): The [...] problem was with the Hanafi fiqh [a school of legal interpretation] which surfaced because of this incident. In some of their old books it is said that even zina (rape) is like marriage and it invalidates the marriage of a son whose wife is “raped” by his own father. This interpretation is peculiar to the Hanafi fiqh where a crime (haram) is considered enough to invalidate a solid contract like marriage while in the Quran the words used are “la tankihoo ma nakaha aabaokum” where “nakaha” can mean only marriage and not a crime like rape whose perpetrator has to be punished if the crime is proved. This problem with the Hanafi fiqh will not go away as our muftis and scholars are very rigid. But at the same time people from their own ranks have called for \textit{ijtihad} in such matter where no clear text from the Quran or Hadith supports such a view. Ulama of other masalik have spoken out against this opinion. In any case, the rape even if it has taken place does not repudiate the marriage except in the opinion of the Hanafi school. Imrana is perfectly free and able to follow Ahle Hadith or any other school, which does not consider that rape by a father-in-law invalidates his daughter-in-law’s marriage.}

It was at this juncture that women’s groups and nongovernmental organizations entered the debate and attempted to reverse the “grossly unjust” verdict. They had a medical examination done on Imrana and got her statement regarding the incident recorded under Section 164 of the Criminal Procedure Code on 20 June 2005. In a statement issued on 20 June 2005, a group of 33 women’s organizations based in different parts of India wrote:

> We the undersigned women’s organizations are horrified by media reports regarding totally unjust and inhuman decisions by "community panchayats". These were in terms of incidents that took place in a village in Muzaffarnagar district in Uttar Pradesh, and the case of an inter-caste marriage in a village of Haryana. […] How can a system exist parallel to the judicial and executive bodies constituted by the state, manned (they appear to be exclusively run by men) by persons who are ignorant and insensitive and whose judgments are irrational and inhuman? How can their authority supersede that of the state?

Although the All India Muslim Personal Law Board upheld the edict and held that she had the right to marry anyone she wished, other than her husband, the then newly formed All India Muslim Women’s Personal Law Board condemned it. The All India Muslim Women’s Personal Law Board denied that the incident of rape had taken place. As far as
the police were concerned, Imrana had charged her father-in-law, Ali Mohammad, with rape. He had, according to her, pointed a *tamancha* or a locally made pistol at her youngest child, a one-and-a-half-year-old boy, and threatened to kill him if she did not succumb.

Most of the political parties pandered to the hardliners. Barring the Left parties, particularly the Communist Party of India (Marxist) which took a strong stand against the issuance of such a *fatwa* and its interpretation because they viewed it as clearly antidemocratic and antiwomen, no other party took up the issue directly. The Bharatiya Janata Party (widely considered as a rightwing Hindu force) underlined the need for a uniform civil code for all communities in India. Mulayam Singh Yadav of Samajwadi Party, the then Chief Minister of the state of Uttar Pradesh, played it safe and reportedly stated that the decision that Imrana’s relationship with her husband was *haraam* must have been correct as it had been made by learned religious leaders. The Congress Party too refrained from condemning the community *panchayat* and the issuance of the *fatwa* from Deoband. When Tehriq, a Lucknow-based organization working on violence perpetrated on the urban poor, especially Muslim women, approached the State Women’s Commission in Uttar Pradesh, it was told that because the matter concerned “them” (i.e., the Muslim women), the Commission could not intervene beyond a point. This obviously raised a storm of protest. Naish, an activist from Tehriq pointed out: “We were shocked. They told us, ‘yeh aap logon ka maamla hai’ (this is a matter confined to you). Girija Vyas, Chairperson of the National Commission for Women in New Delhi, met Imrana for more than an hour only to emerge and have Imrana announce that she would abide by the *Shariat*. She told reporters that if Imrana received the *fatwa*, she would accept it. Girija Vyas refused to get involved in an argument over the legitimacy of the *fatwa*.

Imrana’s family members, as the detailed reports suggest, said belligerently that they would abide by the *Shariat*. If there were a *fatwa*, she would obey it and she could not go against her *Mazhab* and the *Deen*, they told the reporters. As for Imrana herself, she initially had stated that she would continue to stay with her husband and her children notwithstanding the *fatwa*. She retracted her statement later. When reporters met her, she said she was in a state of shock and that she would do exactly what was required by the *Shariat*. She also expressed her wish that her father-in-law should be imprisoned for at
least 20 years for what he had done to her. Imrana’s case is by no means unique. In a chilling reminder of the Imrana case, Salma, a 25-year-old unlettered mother of two from Muzaffarnagar was allegedly raped by her father-in-law over the last six months and then had to leave for her parental home after Mufti Maulana Imran, the senior cleric of Darool Uloom Deoband, annulled her marriage on 7 July 2008 on the ground that “a woman who has had sexual relation with her husband’s father cannot be his [the husband’s] consort anymore and a divorce is a must”.

Imrana’s case is emblematic of many such cases of minority women in India. Stories of women being governed and administered by patriarchal and bewilderingly divergent personal laws abound. There is a story of a woman in Darbhanga in Bihar whose husband pronounced talaq (divorce) on her because she had not cooked liver for him in one meal. The researchers from Centre for Women’s Development Studies (CWDS) came across her while conducting a survey on divorced Muslim women in the district. Kolhapur’s (in Western India) Zubeida Khan was divorced because she could not add numbers. Her husband discovered this ‘flaw’ in her after she had produced three children for him. Eighteen-year-old Shabana Sheikh of Mumbra near Mumbai in Maharashtra had talaq pronounced on her as a mob of male relatives cheered lustily, egging on her husband to do away with her in the middle of a busy intersection.

The women, as the aforementioned cases show, do not have any agency—whether as disembodied individuals or as members of their community—vis-à-vis the decisions that affect their personal and private lives. On one hand, minority women as individuals have nearly no freedom to make marital, sexual, or reproductive decisions. Keeping the personal or private sphere outside the ambit of normal law may have benefited the minorities, but not minority women. On the other hand, one major advantage of an “antecedently given” framework of community values is that it, as Michael Sandel wrote, enables us to “secur[e] […] the capacity to choose against the vagaries of circumstances that would otherwise engulf them”. What he assumed to be “antecedently given” is seldom “given” to us in any definite and objective way. Rather the framework is

amenable to interpretations that often give credence to gender and other forms of discrimination within the minorities. The separation of the personal from the public—otherwise considered crucial to the protection of religious minorities’ rights—does not invest minority women with the agency to make decisions that effect their personal lives.

II. BANGLADESH: THE LEGAL AND THE POLITICAL

Although Bangladesh was created as a sovereign and secular state through a series of movements against the discriminatory policies of the then Pakistani state, fundamentalist tendencies, according to Mamoon and Kabir, were never too distant from the newly born and fledgling Bangladeshi state.18 Although at one level, the state slowly transformed itself into an ‘Islamic’ Republic by an amendment to the Constitution made in 1988, at another level the country has now become what an analyst described as “the second front of Islamic terror”, next only to Pakistan.19 Bangladesh has a significant, although constantly declining, minority population estimated in the 1991 census at 12.6% of the total. It includes Hindus (10.5%), Buddhists (0.6%), Christians (0.3%), and other religious minorities (0.3%). The Buddhists are largely concentrated in the Chittagong area whereas the other communities are spread across the country. Besides which, there are 27 ethnic minorities known as the ‘indigenous people’ (adivasis), accounting for 1.13% of the population, who are concentrated in the Chittagong Hill Tracts and northern Bangladesh. Several analysts have argued that the population of ethnic minorities may actually be higher than the official figures.20 Linguistic minorities include the Biharis who, being Urdu speaking, opted to go to Pakistan in 1973 after Bangladesh was created as a predominantly Bengali-speaking state in 1971, with the Adivasis speaking several different dialects. The proportion of the largest religious minority to the country’s population, the Hindus, has been declining. In 1941, they constituted 28.3% of the population, the Hindus, has been declining. In 1941, they constituted 28.3% of the population.

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19 Subir Bhaumik, “Bangladesh: The Second Front of Islamic Terror”, in Omprakash Mishra and Sucheta Ghosh (eds.), Terrorism and Low Intensity Conflict in South Asian Region (Manak, New Delhi, 2003), 271-283.
20 For an excellent account of discrimination against and in the adivasis, see Mezbah Kamal, Ishani Chakrabarty, and Zobaida Nasreen, Nijabhume Parabasi: Uttarbang Adivasir Prantikata Discourse (in Bengali), [Aliens in Own Land: A Discourse on Marginalization of Indigenous People in North Bengal], (Dhaka, Divyaprakash, 2006).
population. In 1947, when the territory became part of Pakistan, the figure dropped to 25% and continued dropping to 12.6% in 1991. The census shows that although the population of Muslims rose by 219.5% during 1941-91, the Hindus increased by only 4.5%. The demographic change in the area of concentration of the ethnolinguistic minorities has been most pronounced in the Chittagong Hill Tracts. In this district, the indigenous population was 97% in 1947, but by 1991 it had declined to 51.5% whereas the Bengali population had increased from 2% to 48.5%.

Salam Azad and other researchers have chronicled in detail examples of minority rights violations cases. In April 1995, Tulsirani, a Hindu girl of fifth standard, was abducted in broad daylight in front of her parents and the villagers of Harpara. Her parents did not approach the police fearing reprisals from the abductors. They made an earnest appeal to the villagers to return their child rather than punishing the abductors. The villagers could do neither. Tulsirani did not return; the convicts were not punished. Finally, her parents lodged a complaint with Srinagar police station. If they knew the names and whereabouts of the abductors, her parents did not mention them in the complaint out of fear. They simply wanted police help to see their daughter safely returned to them. Tulsirani’s entire family had had to go on the run for lodging the complaint, despite not mentioning any names in the complaint. When political influence was exerted, the police recovered Tulsirani. This example shows that the law is not enough unless it is backed by political influence.

However, political connection does not always weigh in favour of the victims. At about 11pm on 3 July 1989, Mukul, the son of Abdus Sattar who was living in Ikarshali village under the Taraganj police station of Greater Rangpur district, reportedly abducted Jayantirani Saha, a Hindu girl studying in seventh standard. After her father, Tinkari Saha, lodged a complaint, the police recovered Jayanti and kept her in their custody. Some influential people put pressure on the administration to coerce Jayanti to appeal for Mukul’s bail. These people attacked the court building and ransacked it. In addition, they stopped traffic on the busy Dhaka-Dinajpur Road for about three hours. They also prevented Tinkari Saha’s advocate from entering the court compound and severely beat

him. Through these means and others, they put pressure on Tinkari to withdraw the suit. In the end, the suit being carried out on Jayanti's behalf was withdrawn and she was handed over to her abductors.

On 8 February 1994, a band of armed miscreants attacked Rampada Rishi’s house and stole cash and valuables worth more than Taka100000 belonging to his younger brother, Lakshman, who had recently returned from abroad. Prior to this, they had kidnapped Rampada’s wife Rani at gunpoint and serially raped her in an open field. The same miscreants reportedly abducted Rupi, Rishi’s daughter, and raped her. Rupi became pregnant and eventually gave birth to a son. Rupi claimed that Habibur Rahman Habi fathered the child. Habi was close to Mishir Ali, the chairman of the local Union Board. The police did not take any action even after hearing Rupi’s claims. Unmarried Rupi was doing everything she could to attain justice with Saddam, her three-year-old son. The same attackers allegedly unleashed a reign of terror on other Hindu families in the village for supporting Rupi’s cause.

Anil Kumar Sarkar, a Hindu by religion, was the owner of Comilla Medical House, a medicine shop located in Fakir Market of Dhaka under Tongi police station. His wife, Seemarani Sarkar, was abducted by a band of miscreants led by Alauddin, son of Abdul Sattar Ghazi of Abispur village on 25 July 1998. They kept her in their custody while physically torturing her. On 9 September 1995, Anil got his wife released after paying Taka50000 to them. On 1 January 1996, Motiur Rahman, who belonged to the same gang, claimed that Seema had converted to Islam and become his wife. They put pressure on Anil to return Seema, asking for subscriptions (a common way of harassing minorities in Bangladesh) and threatening to kill them.22

In all these examples, minorities and minority women are unable to take recourse to Constitutional and legal remedies when their rights are violated. Although the Constitution and the law declare their rights, they are unable to take recourse to them because they do not have the requisite political power. Legal remedy remains a mere rulebook expression for those who lack political clout. Amena Mohsin remarked: “In

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22 Azad’s is by no means the only case. Many such cases are chronicled in media reports, white papers, reports prepared by various volunteer groups, independent intellectuals, and journalists, including Amena Mohsin, Dalem Chandra Barman, Abul Barkat, Meghna Guhathakurta, Anisuzzaman, Shariyar Kabir and others.
many instances the victims could not even take recourse to law due to fear of further repercussion”.

Much of the literature on minorities in Bangladesh emphasized the organized and systematic nature of attacks on minorities, often Hindus, with the active collaboration of the state through various acts of commission and omission. The aforementioned cases aptly exemplify how these cases are also mediated by a plethora of local factors and personal interests including rallying of wider support by lending a communal colour to otherwise interpersonal disputes, appropriating land and property, harassing and sexually assaulting minority women and thereby taking advantage of their helplessness and minority status, and the extent of political and administrative backing one enjoys, whether in the nearest police station, the Union Board, or the corridors of political power in capital Dhaka. Indeed, the role of local factors and personal interests is so intense that it may be difficult to argue that the difficulties minority women have to bear in Bangladesh are entirely the outcome of any deliberate state policy, although there is hardly any doubt that the communalization of the Bangladeshi state feeds into myriad of these local and personal interests. Be that as it may, such factors combine to deprive minorities and minority women of the fundamental rights and other remedies guaranteed by the Constitution and law.

Masahiko Togawa concluded that “there is actually a sense of lost hope regarding the national integration” among the Hindu minorities in view of their migration out of Bangladesh. Targeting minority women has been responsible for triggering noticeable spikes in the flow of Hindus crossing into India during what a report in 2001 called ‘critical times’, like the riots of 1992 after the demolition of the Babari mosque in India.

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24 Meghna Guhathakurta and Suraiya Begum point to instances of such acts of commission and omission in their case studies on internally displaced persons in Bangladesh. See, Meghna Guhathakurta and Suraiya Begum, “Bangladesh: Displaced and Dispossessed” in Paula Banerjee, Sabyasachi Basu Ray Chaudhury and Samir Kumar Das (eds.), Internal Displacement in South Asia: Relevance of UN Guiding Principles (Sage, New Delhi, 2005), 175-212.

25 For an understanding of this, see, Abul Barkat et al., Deprivation of Hindu Minority in Bangladesh: Living with Vested Property (Pathak Shamabesh, Dhaka, 2009).

26 Afsan Chowdhury, for example, argued that the discrimination of minorities and minority women should not lead one to designate Bangladesh as ‘a rogue state’. See, Afsan Chowdhury, “Hindus in a Polarised Political Environment: Bangladesh’s Minority” (2009, mimeo).


or the post-election violence of 1996 and 2001. In all these cases of violence, women invariably became the soft targets. Minority discourse, while harping on discrimination against the minorities, loses sight of the discrimination against minority women, whether by their community or by others.

III. NEITHER WOMEN NOR A MINORITY PER SE, BUT MINORITY WOMEN

Muslim women in India like all minority women elsewhere in South Asia seldom constitute a homogeneous category. If Muslim women constitute a minority within a minority, Muslim lesbians then constitute yet another layer of minority group—a minority within ‘a minority within a minority’. The regression of minorities as a category appears infinite and as one deconstructs its’ layers, it is like one is peeling an onion.

The recent debates on minority women in South Asia have taken a three-way normative course: One, researchers have argued that the rights claims of minorities should not be stretched beyond a critical *threshold* after which they then become detrimental to the women belonging to these groups. Implicit in this normative statement is the doctrine of ‘basic values’ (perhaps a softer version of Kant’s ‘categorical imperatives’), which holds that such basic values are not only knowable but also the necessary first step for the

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31 The condition of Muslim lesbians, as a recent report on the Indian state of Karnataka noted, amounts to ‘a double bind’ or the author of the current chapter would emphasize a triple bind for them:

- Sexuality [sic] minorities from lower castes sometimes feel a double bind where they have to hide their lower caste status along with their sexuality minority status; just as many Muslim lesbian women who are poor and illiterate have to cope with the repressive family ties of their community in addition to the social alienation experienced due to their sexuality.
- Recently, two sexuality groups have been formed in Kannada (*Snehashraya* and *Gelaya* in Bangalore) to overcome these social disabilities.

See, Peoples’ Union for Civil Liberties-Karnataka (PUCL-K), *Human Rights Violations against Sexuality Minorities in India: A PUCL Fact-Finding Report about Bangalore* (PUCL-K, Bangalore, July 2001), 33. Lesbians and transgendered individuals among Muslims, according to the aforementioned report, are to be considered as a special minority, particularly in South Asia. Amena Ali—an Indian living in Canada and a bisexual by orientation—admits that she faces far less social stigma and isolation than did Rehan, the first Muslim woman to change her gender in the Indian state of West Bengal. See, Amena Ali, “Musalmans Deshe Bideshe”, (in Bengali) [Muslims at home and abroad] 1(3) *Prasnabachi* (2007), 24. Such cases are on the rise in South Asia.
preservation and protection of life, livelihood, and dignity of women *per se*, irrespective of their majority or minority status; minority claims may be conceded provided they are not incompatible with the ‘basic values’. Minorities also, in their frenzy, often lay down claims that are anathema to the life, livelihood, and dignity of their women. Such frenzy may be a reaction to the discrimination they suffer from the majority; however, it may be completely unjustified if seen from the perspective of the ‘basic values’ of the life, livelihood, and dignity of their women. The doctrine lays down the criteria of rightfulness of the rights claims made by the minorities. In simple terms, the rights claims of the minorities are not merely claims to rights, but claims that must have the potential of being recognized as rightful in terms of the ‘basic values’. The state has a role to play in ensuring that the ‘basic values’ find constitutional and legal recognition and the life, livelihood, and dignity of women are thereby preserved and protected. As a corollary to the aforementioned, if minority claims turn against the ‘basic values’, their claims cannot be considered as rightful and legally recognized. In the name of minority rights, such ‘cruel and inhuman acts’ as female genital mutilation or denial of women’s access to public education cannot be practised.\(^{32}\)

There are some problems with this line of argument. Even if we ignore the standard denunciation extreme cultural relativists make questioning the existence of such universal ‘basic values’ in the governance of our moral lives, we cannot ignore the strong statist traces implicit in the argument. The governments in South Asia have refused to bring about radical transformation in the society at the risk of eliciting adverse reactions from minorities and thereby causing instability and violence. We have to remember how Indian Parliament—the apex legislative body—reversed the Supreme Court verdict in the famous Shahbano case (1985) that guaranteed the right of Muslim women against destitution forced by divorce in a single act of legislation. It is clear that the apex court upheld the ‘basic values’ doctrine while delivering the landmark verdict. This judgment provoked widespread reactions and led to mass demonstrations, strikes, and petitions by a section of Muslims calling for a reversal of the judgment because they saw it as violating Muslim Personal Law. In 1986, Indian Parliament passed the deceptively named ‘Muslim

Women’s Protection of Rights on Divorce Bill’, which withdrew the right to appeal for maintenance under the Criminal Procedure Code (CrPC). It took away the divorced Muslim woman’s right to invoke a secular provision for maintenance under the CrPC, enjoined the husband to pay maintenance for only three months after divorce, and shifted the onus of the woman’s upkeep onto her family and the community (waqf). In Bangladesh too, as we have seen, minority women are deprived of any legal recourse when they lack political power.

Two, argumentation in the society is often cited as a means to the ‘advancement of the cause of equality in different spheres of life’. Although in the first case, the rightfulness of rights claims emanates from their compatibility (or lack of it) with the ‘basic values’, the second case does not set forth any given and unalterable set of universal values before us, but subjects all such ‘values’ to the processes of reappraisal through deliberation and argumentation. Deliberative competence is an issue that is likely to keep women from participating in making the community’s or panchayats’ decisions that affect them, in addition, women’s voices are unlikely to be translated into these decisions. By keeping the personal beyond the realm of normal law and courts, the women are left to the caste or community panchayats.

Three, historically strident minority assertion and subjection of minority women go hand in hand. Under such circumstances, researchers have argued that women must be able to assert their rights claims independently of the minority groups to which they belong. Their alliance with the women of the majority groups is likely to be more enduring and beneficial than is the alliance of the men with their minority groups. A section of feminists often call for an ‘autonomous’ women’s movement that will transcend all the divisions internal to their identity as women, including the majority–minority division. In India’s North East, the call for such ‘autonomous’ women’s movements cutting across ethnic and majority–minority divides has already gathered certain momentum. Because such movements are intended to bring about a decisive breach in the minority communities between men and women and restore women’s agency by setting the

34 For more information, see Paula Banerjee, Second Civil Society Dialogue on Peace (Calcutta Research Group, Kolkata, 2002).
women free from the deeply patriarchal structures of minority communities, this stands in sharp contrast to what Gurpreet Mahajan described as ‘consensus’ which, according to her, “needs to be built by getting the cooperation of the male members as well as the religious leadership, which is predominantly male”. 35 Radical feminists argue that such a liberal consensus in the minority community is not possible, at least in the short run, before any more ‘harm’ is done to women’s rights.

In a previous paper, the author noted that the women’s movements in South Asia and particularly in India’s North East underline a vast gray area in which ethnic and democratic movements meet, gradually moving toward their organic connection.36 Women of the region play a significant role in democratizing the ethnic movements. The author proposes to extend the same argument in this article while emphasizing that the dialogical existence of minority women as a gender group and a minority lends them an identity that refuses to be reduced to either category. At one level, building women’s alliances across the majority–minority divide is likely to undercut the importance of rights claims of the minorities, particularly at a time when most of the societies of South Asia have been undergoing a process of rapid majoritarianization.37 At another level, the significance of minority women’s rights claims in interrogating patriarchy that exists in the ‘antecedent structures’ of minority communities can hardly be exaggerated. Minority women are neither women per se nor a minority. They are what they are—minority women, a constant reminder of the need to redefine the agenda of minority rights and women’s rights.

36 Samir Kumar Das, “Ethnicity and Democracy Meet When Mothers Protest”, in Paula Banerjee (ed.), Women in Peace Politics, South Asian Peace Studies: Vol. 3 (Sage, New Delhi, 2008), 54-77.
37 See in particular, Sumanta Banerjee (ed.), Shrinking Space: Minority Rights in South Asia (South Asia Forum for Human Rights, Kathmandu, 1999).
Inclusion Through Ethnic Federalism?
Some Considerations on the Constitutional Transition in Nepal

I. INTRODUCTION

“To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic federal system.”¹ After a long history of centralized power within a unitary state structure, Nepal recently embarked on a journey toward federalism. Because these two characteristics of the country’s political and constitutional past have always gone together with the exclusion of large segments of the population, it is hardly surprising that the transformation into a federal state is perceived as the key instrument in realizing the central aim for Nepal’s future: inclusive democracy.² While the demanding task of federalism is thereby clarified, the question of the criteria on which the restructuring of the state is to be based so far remains unresolved. However, undeniably ethnic federalism is currently on everyone’s lips and promoted by main actors in the political arena. In this article section, the author sheds light on the question of whether this concept actually answers its purpose of realizing inclusive democracy. Using the example of the Madhes (or Tarai) region, its feasibility is examined closely. However, before approaching this question, a retrospective on Nepal’s history of exclusion and centralism is important for assessing the suitability of ethnic federalism to do away with these two particular ills of the past.

² Art. 4(1) Interim Constitution.
II. EXCLUSION AND CENTRALIZATION—A RETROSPECTIVE

A. Origins—The Rana and Panchayat Period

In 1769, Prithvi Narayan Shah, the ruler of the small principality of Gorkha, merged small warring kingdoms into one unified state. Since that time, Nepal has experienced a number of constitutions and systems of government. Two characteristics, however, have remained constant throughout those two and a half centuries: centralization of power and consequent political, economic and social exclusion of large segments of the Nepalese population, affecting caste groups such as the Dalits and the many ethnic groups of the country.

Early foundations of today’s recent centralization and exclusion were already laid in the middle of the nineteenth century. During that time, the regime of the Rana family (1846-1951) made the position of prime minister hereditary and thus progressively constrained the role of the Shah monarch to a mere figurehead. One main goal of the new rulers was the hierarchical structuring of Nepal’s society in compliance with notions of orthodox Hinduism. With the codification of the country’s legal system in the Mulukhi Ain of 1854 the caste system was firmly entrenched and enforced with the ruthless power of an authoritarian regime. The hereby privileged groups, Bahun and Chetri castes, spread out and colonized the country by occupying all influential positions such as landowners, priests, public officials or soldiers. In the simplified Nepalese caste system of this era, tribal people constituted the comparatively well-treated middle class whereas Dalits were even forced to crawl at the roadside to avoid soiling high caste people in the middle of the road. Only in 1951 the Rana regime was eventually overthrown with the support of newly independent India, which aimed at expanding its sphere of influence to the north to counterbalance China’s control of Tibet. Both integral parts of the alliance against the Rana government, King Tribhuvan as well as recently founded parties such as the Nepali Congress, were massively supported by their southern neighbour. Unlike the struggle for Indian independence shortly before, this process of shaking off the yoke of an authoritarian regime did not involve figures like B. R. Ambedkar, who spoke out against the exclusion of caste and ethnic groups.

In search of a new constitutional solution along the lines of the Westminster system, the following years under the Interim Government of Nepal Act of 1951 were characterized by turmoil and struggles for power between the monarch and party leaders. These quarrels were eventually ended by force in 1960 as King Mahendra imprisoned Prime Minister B. P. Koirala and embarked on a system without parties which relied on *Panchayats* instead. These councils were elected at village level and selected district representatives who in turn nominated the national delegates. While discrediting parties and ethnic organizations as forces of discord and eventually banning them, the king’s self-conception was that of an ultimate guarantor of unity rising above divisive factionalism of democratic politics. The agenda of the king-led *Panchayat* period can be described as conservative on the one hand and developmentalist on the other. Continued exclusion of the majority population connected with privileges of the monarch and his entourage counteracted indisputable progress in terms of education or healthcare. On the basis of the still prevailing caste system, which was only officially abolished in 1964, the upheld principle of formal equality was not sufficient to tackle tacit discrimination. As a result, higher caste people from the Kathmandu area, the hub of modernizing Nepal, occupied the bulk of new positions in public service and economy. Because economic power was equally centralized along with political power, a strong regional dimension was added to the so far predominantly caste- and ethnic-based exclusion. This second dimension has had the potential to either alleviate or reinforce the previously existing patterns of exclusion. The situation of a *Chetri* in the remote high mountain zone of Karnali, for instance, does not bear much resemblance to the situation of a *Chetri* in Kathmandu. This sometimes reinforcing second dimension contributed decisively to the growing political salience of exclusion in the 1990s and the resulting ethnicization which developed in the periphery. During the *Panchayat* period, such tendencies were

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6 Only in response to student riots in 1979 did the Monarch concede the right to hold direct elections to the National Assembly, see David N. Gellner, “Ethnic Rights and Politics in Nepal”, *Himalayan Journal of Sociology and Anthropology* (2005), 1-17, at 3.

deliberately suppressed. Regarding the main goal of modernization, different identities were seen as obstructive and therefore consciously weakened through a strategy of Nepalization. This meant assimilation for the sake of forging a common Nepalese identity which was to be based on one language (Nepali), one religion (Hindu) and the culture of one caste group (hill Bahun-Chetri). A visible outcome of this government campaign is that some nationalist people changed their surname, indicative of their caste or ethnic identity, to “Nepali”.

B. Multiparty Democracy Under the Constitution of 1990

The king-led Panchayat regime eventually provoked fierce opposition which culminated in 1990. At that time, the People’s Movement (Jana Andolan) took to the street and coerced King Birendra into legalizing parties and consenting to constitutional change. In actual fact, however, this movement was to a high degree monopolized by an unusual party alliance of the Nepali Congress and the United Left Front. As a consequence, the process and the result of the constitutional reform finally reflected interests of these parties’ leaders. Because they were practically all members of the high castes, their interests naturally did not concur with those of the marginalized caste and ethnic groups whose exclusion was hereby perpetuated.

Although the monarch or the Rana regime had always imposed earlier constitutions on the Nepalese people, the process of framing the Constitution of 1990 admittedly enlarged the circle of involved persons. However, with hindsight, it is beyond dispute that the stated aim of founding a new order on broad public consultation was missed. Although public meetings were held, the final outcome was shaped by a nine-member commission with two royal delegates behind closed doors and without taking note of recommendations. The king and the party leaders then made further changes which they deemed fit and proper so that the reform process essentially amounted to horse-trading among a small group of decision makers. Against this background it is more than ironic that the final text of the constitution claims to be “made with the widest

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8 Gellner, op.cit. note 4, 1823.
possible participation of the Nepalese people, to guarantee basic human rights to
every citizen of Nepal”.10
Considering that the document is a compromise between the king and party leaders, it
is hardly surprising that prominent among the foundation pillars mentioned in the
preamble are constitutional monarchy and multiparty democracy connected with a
parliamentary system of government based on adult franchise.11Although several
provisions considerably strengthened the monarchy as institution,12 its powers were
clearly constrained. Except for those few discretionary powers which the constitution
explicitly conferred to the king, he was as a general rule restricted to acting “upon the
recommendation and advice and with the consent of the Council of Ministers”.13
However, this redistribution of power over a larger but still extremely small circle
essentially created an oligarchy of the king and high caste party leaders which was of
little avail for the still excluded groups.
Admittedly, the text of the constitution was fairly progressive in some respects.
However, sublime wording mostly did not correspond with practical implications. For
instance, in sharp contrast to the Panchayat period, the new constitution contained an
explicit acknowledgement of diversity by declaring Nepal “multiethnic,
multilingual”.14 Although Nepal’s multilingual reality was thereby officially
recognized, an important distinction was made between Nepali as “official
language”15 and “all the languages spoken as the mother tongue in the various parts of
Nepal are the national languages of Nepal”.16 However, regarding the implications of
this sublime declaration of national languages, the constitution remained silent and the
Supreme Court took up a restrictive stance by interpreting this provision as precluding
local governments from assigning official status to any other language than Nepali.17

11 The minimum age for using active electoral rights was set at 18 [Art. 45(6)] and that for using
passive electoral rights at 25 for the House of Representatives and 35 for the National Assembly [Art.
47(1)b].
12 Although the king was to preserve and protect the constitution under an obligation to abide by it [Art.
27(2)], none of his acts could be questioned in court (Art. 31). Aside from that, he was declared the
symbol of Nepalese unity [Art. 27(2)], could decide solely on his succession (Art. 28) and was
exempted from tax payments (Art. 30).
13 Art. 35(2).
14 Art. 4(1).
15 Art. 6(1).
16 Art. 6(2).
17 Sujit Choudhry, “Drafting Nepal’s Language Policy”, 8 (Nepal Special Issue) Federations (2009),
26-28, at 27.
Another example of the gap between promising wording and practical implications is
the constitutional mandate that the “state shall, while maintaining the cultural
diversity of the country, pursue a policy of strengthening of national unity”. 18 This
provision expresses a clear break with the previous justification of Nepalization which
points at the allegedly mutually exclusive character of maintaining diversity and
realizing national unity. Here, they are perceived as two opposing goals which are
reconcilable and merely need to be balanced. That the state actually refrained from
keeping this balance is evident in respect to the explicit rights of each community in
Nepal to “promote its language, script and culture”19 and to “operate schools up to the
primary level in its own mother tongue”.20 These rights were largely rendered
ineffective as they were to be used in the private domain without vitally needed
financial support from the state.21

The excluded caste and ethnic groups experienced an even more bitter disappointment
regarding their claim for a secular state which was repeatedly advanced during the
process of constitutional reform. Against a broad front of opposition, Nepal was
defined as a “Hindu and Constitutional Monarchical Kingdom”.22 Although religious
freedom was granted, the respective provision was highly restrictive and conservative
as a believer’s practice of religion was confined to a manner “as handed down to him
from ancient times having due regard to traditional practices”.23 Further provisions
illustrating the preference for Hinduism were the declaration that “the cow shall be the
national animal”24 and the requirement that the king had to be “a descendant of the
Great King Prithvi Narayan Shah and an adherent of Aryan Culture and the Hindu
Religion”.25 Bearing in mind the promising recognition of Nepal’s diversity in Article
4(1), it is inconsistent to then define the king, a person with constitutionally specific
ancestry, culture and religion, as a symbol of “the unity of the Nepalese people”.26
However, this notion of national unity is fully in line with Article 2 which references,
in Panchayat tradition, a Nepalese nation “irrespective of religion, race, caste, or
tribe”.

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18 Art. 26(2).
19 Art. 18(1).
20 Art. 18(2).
21 Ghai and Cottrell, op.cit. note 7, 42.
22 Art. 4(1).
23 Art. 19(1).
24 Art. 7(2).
25 Art. 27(1).
26 Art. 27(2).
There are many reasons the Constitution of 1990 eventually collapsed and made way for a period of bloodshed, among them a Supreme Court devoted to the king and biased against any progressive constitutional interpretation, parties indulged in corruption and cronyism leaving initiative largely to a king who repeatedly exceeded his powers. Apart from these failing institutions, which should have served as cornerstones of post-1990 Nepal, the constitution contributed to its own failure through vague terminology and the depicted perpetuation of exclusion and centralism. It is important to mention that even after the farewell to the king-led Panchayat system, sufficient division of power was absent both in its vertical and horizontal dimension. The preservation of unitary state structures and insufficient checks on the clearly dominating executive reinforced each other in leading to a concentration of power in the hands of a few. Abundant evidence of these problems is clear in an investigation on the representation of caste and ethnic groups in 12 sectors of public life. According to this survey, the “caste hill Hindu elite” hold roughly two-thirds of these positions. There is proof that some groups were excluded even more in certain sectors during the period of multiparty democracy than were under the Panchayat system. Dalits were practically unrepresented in political institutions throughout the 1990s. Besides, Muslims and Madhesi had to cope with declining representation during that period.

Continued exclusion of most caste and ethnic groups was a decisive factor in fuelling the armed uprising of the Communist Party of Nepal (Maoist) which had emerged in 1994 as a breakaway faction from the Communist Party of Nepal (Unity Centre). Interestingly, the campaign of the CPN(M) was, at its beginning in 1996, not mainly based on ethnic demands but rather on claims for a constitutional reform according to

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28 Paradigmatic is the wording of Art. 35 (“upon the recommendation and advice and with the consent of the Council of Ministers”), which does not clarify if and when the acts of the Council of Ministers have binding character and thus facilitated the abuse of power on the part of the king.
30 These sectors are judiciary, constitutional commissions, cabinet, parliament, public administration, leading members of national political parties, District Development Committee leaders, industrial and trade association leaders as well as central figures in education, science, cultural and civil society associations.
31 Govinda Neupane first published the study in Nepali in 2000. It was then adapted and presented in English in Lawoti, *op. cit.* note 29, 14.
Maoist ideas. Only over the course of their campaign did Maoists start to use the strategic advantage of demanding ethnic equality to recruit the excluded groups as constituencies. This was done with great success because the interests of these groups were not represented in the political arena by any party. First, striving after ‘harmony’ in the sense of the Panchayat period, the Constitution of 1990 disallowed the recognition of parties which were formed “on the basis of religion, community, caste, tribe or region” or whose “name, objectives, insignia or flag is of such a nature that it is religious or communal or tends to fragment the country”. Second, the existing Nepalese parties were elite-dominated and failing institutions for the abovementioned reasons with no credibility as representatives of the excluded groups.

These preconditions made it easy for the Maoists to increasingly gain support and establish a solid stronghold centred in the remote districts of Rolpa and Rukum in Western Nepal, distinguished by intense poverty and little state presence. In November 2001, an attack on an army base in Ghorahi eventually turned the already violent struggle into a civil war which no longer only involved state police forces but also the army. The following armed clashes, which the Maoists labelled the People’s War, were aimed at toppling the monarchy and founding the “People’s Republic of Nepal”. For a long time, the war was marked by different spheres of influence. Although the Maoists constantly expanded their powerbase in rural areas, Kathmandu and Nepal’s main towns long remained under government control. Only in 2004 did disturbances reach the capital when the Maoists announced a blockade of the city.

C. Constitutional Transition Toward Inclusive Democracy

On 1 February 2005, King Gyanendra eventually seized absolute power by declaring a state of emergency, dismissing the prime minister and detaining several party leaders. Ironically, all these actions were taken on the pretext of restoring multiparty democracy. This assumption of power, however, caused a backlash at the king. In response, the main parties formed a broad coalition against the takeover, the Seven

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33 Art. 112(3).
34 Art. 113(3).
35 Gellner, op.cit. note 4, 1827.
36 Luther and Francavilla, op.cit. note 32.
Party Alliance (SPA)\textsuperscript{37}, and obtained agreement in principle with the Maoists on 22 November 2005. The Maoists pledged themselves to multiparty democracy. In exchange, the SPA accepted the claim for an elected Constituent Assembly. In April 2006, the Maoists called for a ceasefire while here in the temporal sense the SPA invoked a general strike. Together with street protests, repeated strikes eventually evolved into the mass movement \textit{Jana Andolan II}.\textsuperscript{38} In the wake of these events, the king lost his power base as the army renounced its allegiance and he was eventually forced to reestablish the parliament. Compared with \textit{Jana Andolan} in 1990, the movement put more emphasis on the problem of exclusion and therefore, sought to achieve not only democracy but also decentralization.

During the first phase of constitutional transition starting in April 2006, the constitution of 1990 remained in force, albeit with several modifications and deletions. On the Maoists’ insistence and on the basis of an eight-point agreement\textsuperscript{39} between SPA and CPN(M) on 15 June 2006, a new Interim Constitution was adopted on 15 January 2007 by the House of Representatives and then ratified by the new interim Legislature-Parliament\textsuperscript{40} whose powers were later absorbed by the Constituent Assembly.\textsuperscript{41} The new order established by this document is clearly characterized by

\textsuperscript{37} This alliance comprised Nepali Congress, Nepali Congress (Democratic), Communist Party of Nepal (Unified Marxist-Leninist), Nepal Workers and Peasants Party, Nepal Goodwill Party (\textit{Anandi Devi}), United Left Front and People’s Front.

\textsuperscript{38} This movement is sometimes also labeled \textit{Loktantra Andolan} (Democracy Movement). But the term \textit{Jana Andolan II} is used more commonly to emphasize continuity with the same-named movement of 1990 (see II B).

\textsuperscript{39} Point 4 of that agreement reads as follows: “4. To form an interim constitution, constitute an interim government accordingly, to announce the date for elections of the Constituent Assembly (CA), to dissolve the House of Representatives on the basis of consensus and after making alternative arrangements, and dissolve the ‘people’s governments’ formed by the CPN (Maoist) on the basis of 12-point understanding between the SPA and the CPN (Maoist), the spirit of the preamble of the ceasefire code of conduct and by guaranteeing the people’s rights acquired from the people’s movement of 1990 and the recent historic people’s movement.” Quoted in Luther and Francavilla, \textit{op.cit.} note 32, 9.

\textsuperscript{40} Art. 161. The Legislature-Parliament replaced the House of Representatives and the National Assembly after the commencement of the Interim Constitution (Art. 161). As a unicameral institution it was composed of the elected 209 members of the former chambers as well as 73 delegates nominated by CPN(M) and another 48 members designated by the SPA/CPN(M) alliance on a consensual basis [Art. 45 (1)].

\textsuperscript{41} The term of the Legislature–Parliament came to an end following the first meeting of the Constituent Assembly [Art. 45 (4)] which since that time, exercises the powers of the Legislature–Parliament on the basis of Art. 59.
the principle of consensus in the SPA–CPN(M) alliance\textsuperscript{42} which had already been adopted in the eight-point agreement.\textsuperscript{43}

Regarding procedure and content, the Interim Constitution exhibits continuity with the Constitution of 1990. The drafting committee, initially composed of six legal experts, was headed by a member of the previous committee and Supreme Court judge and was only extended by ten lawyers in response to criticism of underrepresentation of the thus far excluded groups. Although public submissions were collected, this body lacked the administrative structure to analyze them.\textsuperscript{44}

The draft, which was eventually submitted in August 2006 and then modified at an SPA–CPN(M) summit on 8 November 2006 was largely based on the previous constitution. Although it offered only a few changes, they were quite important.\textsuperscript{45} This continuity also explains why the Interim Constitution is strikingly long considering that it is to serve as a temporary arrangement. Completely new, however, is the fundamental goal of inclusive democracy rather than multiparty democracy. Considering the Constitution of 1990 was regarded as a source of exclusion due to the aforementioned reasons,\textsuperscript{46} this change is all but surprising. Indeed, inclusiveness ranks prominently among the pillars of the new constitution which defines Nepal as “an independent, indivisible, sovereign, secular, inclusive and a fully democratic state”.\textsuperscript{47}

Whereas the first three are quite unexceptionable, the latter three are new and deeply interconnected. The reference to a \textit{fully} democratic state is a clear potshot at the exclusive character of multiparty democracy while secularism expresses the new perspective that Hinduism declared as state religion fuelled exclusion of lower-caste people and non-Hindu ethnic groups. The text of the Interim Constitution also tackles exclusion by granting an explicit and comprehensive right against untouchability.\textsuperscript{48}

Moreover, state policies of positive discrimination to the benefit of thus far excluded groups are not only exempted from the general ban on discrimination\textsuperscript{49} but also

\textsuperscript{42} Yash Ghai and Jill Cottrell, “Constitution-Making in Nepal”, 8 (Nepal Special Issue) \textit{Federations} (2009), 5-7, at 7; Ghai and Cottrell, \textit{op.cit.} note 7, 49.

\textsuperscript{43} Point 5 of that agreement reads as follows: “5. To take decisions on the basis of consensus on the issues of national importance that may have far-reaching consequences.” Quoted in Luther and Francavilla, \textit{op.cit.} note 32, 9.


\textsuperscript{45} Luther and Francavilla, \textit{op.cit.} note 32, 9-11.

\textsuperscript{46} See II B.

\textsuperscript{47} Art. 4(1).

\textsuperscript{48} Art. 14.

\textsuperscript{49} Art. 13(3).
requested through a directive principle. There are also improvements in terms of recognizing Nepal’s multilingual reality because languages other than Nepali, “the language of official business”, were not merely declaratively acknowledged as “national languages of Nepal”. In contrast to the constitution of 1990, this solemn declaration is coupled with practical implications: “[T]he use of one’s mother tongue in a local body or office shall not be barred. The State shall translate the language used for such purposes into the language of official business for the record.” Apart from ranking prominently among the characteristics of new Nepal, inclusion as key note of the Interim Constitution reappeared among the directive principles and was eventually linked with the necessity of abolishing the centralized and unitary system: “To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, federal democratic system.” It is worth mentioning that the word federal was only inserted into the original text by the First Amendment on 13 April 2007. Thus, it was clarified that Nepal would not embark on a state reform by decentralization, which might not have penetrated beyond the administrative sphere, but that it will follow the path of federalization.

The Constituent Assembly, whose 601 members were elected on 10 April 2008, is to lead the way to a federal Nepal. Although, in its first meeting, this body abolished monarchy by proclaiming Nepal a republic, it still has to succeed in reconciling continuing differences among the parties. Thus, the Constituent Assembly still has a long journey to a new constitution. This journey is predetermined by the Interim Constitution. Based on the recommendations of a High Level Commission, whose composition, power and terms of service are to be determined by the government,
the Constituent Assembly vested with the final decision on the future state structure.\textsuperscript{61} Because one central lesson from 1990 was the necessity to establish a link between the inclusiveness of the constitutional process and the inclusiveness of the constitution as its eventual outcome, this key note of the Interim Constitution was to be reflected in the composition of the Constituent Assembly. It was stipulated that parties should take the principle of inclusiveness into consideration while selecting candidates and “ensure the proportional representation of women, \textit{Dalits}, oppressed communities/indigenous groups, backward regions and Madhesis”\textsuperscript{62} on their lists of candidates. Thus, the presence of these groups is successfully promoted regarding the 335 proportional representation seats. However, this only affects slightly more than half of the parliament because 240 seats are allocated according to the first past-the-post system and the Council of Ministers nominates another 26 members. Despite constitutional promotion, it is doubtful whether the Constituent Assembly can be regarded as truly inclusive.\textsuperscript{63} It is true that with 199 indigenous people among the 601 members, this group is fairly proportionally represented.\textsuperscript{64} However, unlike the \textit{Madhesi}, whose interests are represented by two parties, indigenous groups as well as \textit{Dalits} are usually members of the mainstream parties and therefore pressed to vote according to party policy. In the meantime, it has become clear that the Constituent Assembly is under tight control of party leaders so that in the end “the constitution could be made by a small group, and the 601-member assembly could become a rubber stamp”.\textsuperscript{65}

Whether inclusive or not, the Constituent Assembly still has to settle on a specific Nepalese model of federalism and deliver its draft of the constitution whose final shape is difficult to foresee. To some degree, however, the agenda appears to lean toward ethnic federalism. Although Article 138(1) is not entirely unambiguous on that topic, the explicit purpose of federalism “to bring an end to discrimination based on class, caste, language, gender, culture, religion and region” is sometimes construed as a sign of movement in this direction.\textsuperscript{66} The plausibility of this interpretation is fuelled by the Fifth Amendment, whose new Article 138(1A) makes explicit reference to

\textsuperscript{61} Art. 138(3).
\textsuperscript{62} Art. 63(4).
\textsuperscript{63} Ghai and Cottrell, \textit{op.cit.} note 7, 50.
\textsuperscript{64} Mukta S. Tamang, “Meeting Demands for Self-Determination in Nepal”, 8 (Nepal Special Issue) \textit{Federations} (2009), 20-22, at 22.
\textsuperscript{65} Ghai and Cottrell, \textit{op.cit.} note 42, 7.
\textsuperscript{66} Ghai, \textit{op.cit.} note 7, 11.
claims of several groups for autonomous territories: “Accepting the aspirations of indigenous ethnic groups and the people of the backward and other regions, and the people of Madhes, for autonomous provinces, Nepal shall be a Federal Democratic Republic.”

III. INCLUSION THROUGH ETHNIC FEDERALISM? THE MADHES QUESTION

B. Why Federalism? The Failure of Administrative Decentralization

By mandating the Constituent Assembly to restructure the state into a democratic system which is not decentralized in some way but explicitly federal, the First Amendment set the course for Nepalese federalism. It was already stated that Nepal was characterized by a high degree of centralism from the beginning. Regarding the last four decades, however, this was not the result of a complete lack of decentralization efforts but rather of their half-heartedness and consequential failure. The earliest attempts at decentralization can be traced back to the 1960s. In 1961, King Mahendra proclaimed that he would charge a committee with dividing the state into 14 zones and 75 development districts. As the word “development” implies the districts were to primarily serve the monarch’s overall aim of economic modernization. Accordingly, the committee’s guiding principle in demarcating the districts was economic self-sufficiency, which included considering comparable population size and access to infrastructure. Two further criteria were the preservation of cultural identity to the benefit of communities living along the northern border and the general recognition of historical tradition. Each of the 14 zones consisted of several districts and formed distinct administrative units. In 1970, the zones were initially grouped into four and later five development regions with the purpose of reducing inequalities between the regions. These subdivisions, however, neither achieved the economic nor the political weight to challenge deeply entrenched centralism. In this way, the instrument of administrative decentralization was substantially discredited.

67 Fifth Amendment Act, 2065 (12 July 2008).
68 See II C.
69 See II A.
70 Ghai, op.cit. note 7, 2-3.
Scepticism did not diminish during the era of multiparty democracy. Like in the Panchayat period, the Constitution of 1990 took up the cause of decentralization. Unlike the earlier period, its intended purpose was not economic decentralization but rather public participation in a newly democratic state with sparse communications infrastructure: “It shall be the chief responsibility of the State to maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in the governance of the country and by way of decentralization.” As a directive principle, the cited provision was not enforceable by legal action. The most recent effort of decentralization was the Local Self-Governance Act of 1999. According to that Act, significant responsibilities such as primary education, subhealth posts and agricultural development services were at times to be transferred to the level of local government. Unfortunately, this law was implemented in a faltering manner and never in its entirety. The fact that local governments’ share of Nepal’s total expenditures between 1999 and 2001 roughly amounted to 4% best illustrates that this decentralization process was futile. After the onset of civil war in November 2001, the implementation process was definitively halted by the dissolution of local elected bodies and the displacement of many of their members. In sum, Nepal’s history of administrative decentralization is anything but a success story. In this way, the concept gradually lost credibility and was eventually challenged by the increasingly widespread rhetoric of federalism which the Maoists, in particular, used to gain support among excluded groups in times of civil war. This pushed the expectations of the Nepalese people clearly beyond mere administrative decentralization. As one observer aptly remarked: “The genie of federalism has already escaped, and it would be difficult to bottle it back.”

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72 Art. 25(4).
75 International Crisis Group, *op.cit.* note 44, 7; Ghai, *op.cit.* note 7, 1.
C. Why Ethnic Federalism? The Rise of Ethnopolitics

Today, it is well-recognized that the revolution of 1990 triggered ethnicization of Nepalese politics. In marked contrast to the Panchayat period when the government-decreed programme was Nepalization, ethnic identities became politically salient. This was associated with two underlying conditions: the first-time publication of data on people’s ethnic and caste affiliation and an improved human rights situation which enabled the formation of ethnic organizations.

The census of 1991 revealed in detail not only the ethnic but also the religious and linguistic composition of Nepal. In total, it listed 60 ethnic and caste groups. Listing only the largest ones they are grouped as: first, the hill caste groups (Pahadi or Parbatiya), including the dominating castes of Bahun (12.3%) and Chetri (18%) as well as the marginalized Dalits (9%); second, the hill ethnic groups (hill Janajati), comprising Magar (7.2%), Tamang (5.6%), Newar (5.5%), Rai (3%), Gurung (2.4%) and Limbu (1.6%); third, plains people of the Tarai, consisting of Madhesi (roughly 16%) and plain ethnic groups (plain Janajati), such as Tharu (6.7%) and Yadav (4%); fourth, other groups such as Muslims (4.2%).

Two group labels, namely Janajati and Madhesi, have enormous political salience and therefore need to be clarified. The latter name literally stands for a settler in the Madhes and could therefore theoretically be applied as a purely territorial term to all inhabitants in the plain region of Tarai. In practice, however, Madhesi today has a clearly ethnic connotation as a label for the Hindus of Indian origin in this southern region of Nepal. Thus, it excludes the hill origin Pahadi people. In addition, Muslims and the indigenous people of the region, such as the Tharu, overwhelmingly do not want to be included due to fear of being monopolized by the regional majority of Indian origin. In respect to language and culture, they have close bonds with people living across the Indian border in Uttar Pradesh and Bihar. Precisely these close transnational contacts to the kin-state in

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78 Today’s status of the Chetri as the single largest group is primarily based on intermarriage. The offspring of Chetri or Bahun men with indigenous women were classified into this group (David N. Gellner, op.cit. note 4, 1823-1824.
79 Ibid., 1824.
81 Only some assimilated groups of Tharu people in the eastern Tarai regard themselves as Madhesi (International Crisis Group, op.cit. note 44, 2).
terms of marriage or education put the Madhesi in a position to successfully preserve their cultural distinctiveness and main languages, Maithali, Bhojpuri and Bajika, in the face of Nepalization efforts during the Panchayat period. The expression Janajati, in turn, is a new creation and has only gained wide use since the beginning of the 1990s. In public debate, it has gradually supplanted words such as tribe or indigenous people and is described as “a mixed bag of historically and culturally diverse ethnicities, brought together mainly by the common negative traits of not being Bahun-Chetris, not being Indian, and not being Muslim”. Because only 43 of today’s 59 officially recognized Janajati groups were recorded in the census of 2001, it is estimated that as much as 42% of Nepal’s population may belong to this category.

The growing awareness of ethnic affiliation, which can quite often be guessed from a person’s surname, soon also appeared in institutional terms. Without a doubt, enlarged individual freedom, one positive aspect of the otherwise negative period of multiparty democracy, facilitated the emergence of numerous ethnic organizations. For instance, the origin of the now considerably powerful Nepal Federation of Indigenous Nationalities (NEFIN; Nepal Adivasi Janajati Mahasangh), can be traced back to the year 1990. This politically nonaligned umbrella organization is composed of delegations of Janajati groups who are equally represented. Although its leadership is dominated by the few larger groups such as Tamang, Gurung and Limbu, NEFIN claims to speak for all Janajati people. Other movements, such as the Khambuwan, Limbuwan and Magar Liberation Fronts focus only on the specific interests of Rai, Limbu and Magar people. Some ethnic organizations, such as the Rastriya Janajati Party even tried to form political parties and to seek electoral

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82 Hachhethu, op.cit. note 80, 4.
83 The term appears to be taken from the Bengali language and was introduced in Nepal by political activists around 1990 (Gellner, op.cit. note 4, 1825).
84 Gellner, op.cit. note 4, 55. It has to be added that Dalits are also excluded from the Janajati category (Gellner, op.cit. note 6, 4).
85 Gellner, op.cit. note 6, 5.
86 Gellner, op.cit. note 4, 1823.
87 See II B.
89 The organization was initially called Nepal Federation of Nationalities. Only at a national conference in 2003 in the wake of the 10th anniversary of the UN Declaration of a Year of Indigenous Peoples was the term indigenous (adivasi) added (Gellner, op.cit. note 6, 4).
approval, but were finally refused recognition by the Election Commission in 1991.\textsuperscript{90} Among these organizations NEFIN evolved into an especially influential player in the political arena and sparked the creation of a government commission, the National Foundation for the Development of Indigenous Nationalities (NFDIN), in 2002 as a logical counterpart for negotiations. A visible expression of collaboration between these two institutions was the official classification of Janajati groups, which takes into account their respective degrees of marginalization. This state recognition had significant practical impacts insofar as it was coupled with the assignment of reserved seats in political, administrative and educational institutions.\textsuperscript{91}

\textit{C Ethnic vs. Territorial Federalism}

Among current political parties, federalism is practically undisputed. With the exception of the small leftist National People’s Front (Rastriya Janamorcha) all 25 parties with representatives in the Constituent Assembly are in favour of it.\textsuperscript{92} Quite contrary to this general endorsement of federalism, its specific form is highly disputed. Without doubt, the harsh controversy between proponents of ethnic and territorial federalism is one of the defining features of Nepal’s current constitutional transformation. In recent times, innumerable models have been proposed to realize one or the other concept.\textsuperscript{93} The rationale of ethnic federalism requires the boundaries between federal units to be drawn along ethnic lines so that as many of them as possible are controlled by minorities. In this way, minorities at the state level are transformed into majorities at the level of the constituent units. Thus, the federal units are intended to be homogenous in ethnic terms. They do not have such an ethnic character, by contrast, if the concept of territorial federalism is applied which bases the boundaries on nonethnic criteria. In the Nepalese case, advocates of territorial federalism have in common that they primarily build on such factors as infrastructure, economic viability, physical conditions and their interaction.


\textsuperscript{91} Gellner, \textit{op.cit.} note 4, 1825-1826.


Looking for a specific territorial model, one can imagine a horizontal or vertical orientation. The first approach would amount to a subdivision on the basis of Nepal’s topographically, and as a result, economically distinct regions: the mountains in the north are tourist attractions, the plains in the south favour the growing of cereals and the hills in between produce dairy products or vegetables. However, most proposals in favour of territorial federalism deliberately cut across these topographic regions by creating constituent units in the vertical dimension, thus leaving each of them with a portion of mountain, hill and plain region. There are two major reasons for taking this approach. The first is simply the convenience of avoiding a shift of boundaries because the current five development regions are structured along the north–south axis and often regarded as natural points of contact for a federal state organization. The second reason is related to economic considerations. Because the development regions reflect Nepal’s major river basins, such a vertical structuring is designed to reduce conflicts among constituent units for the scarce water resources and integrate the differing but interdependent and complementary economies of Nepal’s three topographic regions. In this way, federal units with comparable economic potential could be created.

Without a doubt, ethnic federalism is a current concern for everyone. Already in July 2006, NEFIN got the Interim Constitution Drafting Committee to deal with the issue and has repeatedly demanded the reorganization of Nepal along ethnic lines. Unlike others, however, the organization fails to put this general claim into concrete terms by submitting a tangible proposal. In the face of NEFIN’s character as representative of diverse and often conflicting interests, this is hardly surprising. Organizations of single ethnic groups such as the Khambuwan National Front or the Limbuwan Autonomous Concern Forum equally demanded ethnic federalism. Claims of such representatives of special interests are usually marked by a fixation on their right to form a federal unit without looking at the big picture. Whereas the aforementioned ethnic organizations only speak for small parts of Nepal’s population, the popularity

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94 In a rare example of combining both dimensions, the Nepal Sadbhawana Party put forth a proposal which envisages the creation of two constituent units in the plain region (Eastern and Western Tarai) and three federal units in the hill region (Eastern, Central and Western Hills) which would incorporate the mountain region (Vijaya R. Sharma, “Comparative Study of Federation Proposals for Nepal”, 2(2) Liberal Democracy Nepal Bulletin (2007), 1-33, at 11-12).


of ethnic federalism in mainstream politics was decisively boosted by the Maoists’ support. Their advocacy of the concept can be traced back to the year 1995, when they postulated a right to autonomy on the regional, district and local level when an ethnic group is in a majority position. In April 2002, they established a special territory for the benefit of the Magar community in the Maoist stronghold in western Nepal which anticipated the declaration of nine autonomous regions in January and February 2004. Although it is still unclear whether the Maoists have backed up the cause of ethnic federalism from conviction or have only exploited it to garner support among excluded ethnic groups, it is clear that this move significantly increased their popularity. Having set the agenda for federalism whereas the other parties climbed on the bandwagon rather belatedly and reluctantly, the Maoists are still regarded as comparatively authentic in pursuing this crucial transformational agenda. The four major competitors of CPN(M) still grapple with communicating their respective ideas to the people and attracting broad support for them. Most notably the only recent shifts by the Nepali Congress and CPN(UML) toward federalism are viewed with some mistrust. Similar to the aforementioned ethnic organizations, the two Madhesi parties, Madhesi Janadhiyak Forum (MJF) and Tarai Madhesh Loktantrik Party (TMLP), are characterized by a blinkered view on their region without presenting viable solutions for the whole country.

D. One Madhesh, One Pradesh?

Caveats Against Ethnic Federalism in Nepal

The current situation in the Madhesh region and the ferocious debate over its future status deserve to be scrutinized particularly closely because they lucidly illustrate two intertwined problems which ethnic federalism faces under certain demographic circumstances. Other parts of Nepal with similar preconditions might face similar difficulties with reorganization along ethnic lines. However, the highest risk of these problems leading to large-scale ethnic violence certainly exists in the Madhesh. This

98 Gellner, *op.cit.* note 4, 1826-1827.
99 In the Constituent Assembly 38.1% of the seats are held by CPN(M), whereas the Nepali Congress holds 19.1%, the CPN(UML) 18.0%, the Madhesi Janadhiyak Forum (Madhesi People’s Rights Forum) 9.0% and the Tarai Madhesh Loktantrik Party 3.5%.
101 Mattheeus and Ghai, *op.cit.* note 92, 50.
assessment derives from an evaluation of recent violent conflicts in Nepal\textsuperscript{102} and from historically polarized interethnic relations which contrast with crosscutting and accordingly often tension-reducing allegiances in other regions.\textsuperscript{103} Using the therefore partly generalizable and partly exceptional example of the Madhesh, in the next two sections, the author analyzes difficulties in applying ethnic federalism to this crucial region.

1. The Demographic and Historical Point of Departure

The historical evolution of interethnic relations and Madhesh’s current demographic structure are anything but conducive to the success of ethnic federalism. In the nineteenth century, most of the Tarai was covered with jungle which served as a natural barrier between Nepal and India. Due to the harsh living conditions, this forested area was initially sparsely populated by the Tharu and other indigenous people. Then the Rana regime promoted an influx of people from across the Indian border to generate more tax revenues. The period after World War II was marked by an even larger wave of immigration. Due to malaria eradication programmes in the 1950s and 1960s, the fertile plains of the Tarai became more hospitable and attracted a great number of people from the densely populated Indian states of Uttar Pradesh and Bihar who crossed Nepal’s traditionally open southern border. This process was complemented by the immigration of Pahadi from the hill region which the government actively sponsored as a tool of Nepalization. Due to several measures, such as the Land Reform Act of 1964, the launching of settlement programmes and the construction of the East–West highway, immigration from the north eventually prevailed and resulted in an unequal distribution of land and forest resources to the benefit of the Pahadi settlers.\textsuperscript{104}

In this manner, the existing exclusion of Madhesi people and their treatment as a potentially traitorous fifth column due to their Indian origin was clearly accentuated. Although they could easily identify with some elements of Nepalese nationalism, such as monarchy and Hinduism, they were naturally opposed to others, such as the Nepali language, hill culture and the antagonism to India. Over time, the exclusion of

\textsuperscript{102} That recent outbreaks of large-scale violence have been centered in the Madhesh is well illustrated by the survey in Mahendra Lawoti, \textit{Looking Back, Looking Forward: Centralization, Multiple Conflicts, and Democratic State Building in Nepal} (East-West Center Washington, Washington, 2007), 31.

\textsuperscript{103} Gellner, \textit{op.cit.} note 4, 1823.
Madhesi people took various forms. During the Rana period, they were required to obtain a written authorization to enter the Kathmandu Valley. The Panchayat years and the 1990s were marked by striking underrepresentation of Madhesi people in bureaucracy and army. Moreover, meeting the requirements of the Citizenship Act of 1963 in terms of Nepali language skills expected too much of the Madhesi people and created a nationality problem which loomed into the 1990s. However, in 1999, an attempt to alleviate the problem of 3.5 million residents of the Tarai lacking citizenship certificates was finally dashed against the Supreme Court. Moreover in 2002, in an act of clear violation of the constitution all major parties, in each of which Madhesi were clearly underrepresented, denied the Tarai an increment of parliamentary seats which would have been obligatory due to the region’s population growth.

The census of 2001 revealed that a significant share of Nepal’s current population (48%) lives in the 20 districts of the Tarai. Today’s demographic situation in this region features a Madhesi majority but a significant minority of Pahadi (36%) as well as smaller minorities of Tharu and several other indigenous groups. However, the exploding increase of the Pahadi population in the last five decades from 6% to 36% has to be put into perspective because it is not reducible entirely to immigration. Whereas in former times, all districts of the Tarai were confined to the topographic region of the plains to the south of the Siwalik range, in 1963 they were extended to the Pahadi inhabited hill area to the north of this range during the reorganization into 75 districts. Thus, the hill people of these newly affiliated territories, which now account for a remarkable 32% of the total Tarai area, make up a substantial share of the total 36%. The rest of the Pahadi people who immigrated in the past decades predominantly settled in the western Tarai. Because this part of the region is traditionally inhabited primarily by indigenous groups and less by Madhesi people, the latter were actually affected to a lesser degree by the influx from the hill region.

However, owing to the aforementioned historical hostility dating back to the Rana period, the risk of large-scale ethnic conflict primarily exists between Madhesi and Pahadi. This possible scenario was foreshadowed by the events at the beginning of 2007. In those days, a mass movement for Madhesi rights, dominated by the MJF,

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104 Ibid., 1824; Hachhethu, op.cit. note 80, 8.
105 Choudhry, op.cit. note 17, 27.
106 Gellner, op.cit. note 4, 1827; Hachhethu, op.cit. note 80, 9-10.
eventually led to a violent outbreak of deeply rooted anti-Pahadi sentiments. The central slogan “Pahadis out of Madhesh” was repeatedly put into practice in the form of kidnappings, killings and expulsions, particularly from eastern Tarai.\textsuperscript{108} Although the uprising is interpreted as a struggle of traditional Madhesi elites for influence in Nepalese politics,\textsuperscript{109} it also has an internal dimension of factional power struggles. Quite strikingly, many leading figures of the dominating Madhesi movement were members of the CPN(M) at some point and once struggled for the party’s proclaimed goal of ethnic federalism along with Pahadi fellow campaigners. Claiming the insincerity of the Maoist attitude toward an autonomous Madhes region, some factional leaders split from the party and used existing prejudices to create a Madhesi phalanx against Maoist influence and Pahadi people in general. Obviously, these regional leaders’ dissociation served the purpose of pressing ahead with their vision of Madhes’ future status in a federal Nepal, which clearly differs from Maoist ideas.

2. The Unfeasibility of Ethnic Federalism

Whereas the CPN(M) proposal on Nepal’s territorial organization provides for a separation of the Madhesh into two federal units, MJF and TMLP pursue an agenda of “one Madesh, one Pradesh”.\textsuperscript{110} Regarding the internal organization of this envisaged federal unit, the latter party advocates a delegation of the decision on the number and demarcation of provinces to the Constituent Assembly members of that region.\textsuperscript{111} Considering the underrepresentation of Pahadi and Janajati from the Tarai, this would amount to leaving such an important decision to the Madhesi representatives without being hampered by the regional minorities or the central government. MJF again made demands regarding the language policy of this intended single constituent unit. Similar to Art. 345 of the Indian Constitution, which leaves the decision on the official language to the legislative assemblies of the states, the party wanted to make Hindi the official language and thereby unleashed fierce resistance from the regional minorities and people elsewhere in the country. Opposition, for instance, erupted in street protests when the current Vice President of Nepal, the MJF party member

\textsuperscript{107} Hachhethu, \textit{op.cit.} note 80, 4-9.
\textsuperscript{108} Gellner, \textit{op.cit.} note 4, 1827; Hachhethu, \textit{op.cit.} note 80, 5-7.
\textsuperscript{110} Pradesh refers to a province or state in several languages of South Asia.
\textsuperscript{111} Matthaeus and Yash Ghai, \textit{op.cit.} note 92, 51.
Parmanand Jha, took his oath of office in Hindi. So far, the Madhesi political elite are refraining from secession. Although there had reportedly been meetings as early as May 2007 to initiate a struggle for independence, occasional claims are regarded as part of a bargaining strategy for ethnic federalism because independence would be injurious to economic interests of the Madhesi elite in Kathmandu. Moreover, from a geopolitical perspective, such a radical step would not have India’s support. The growing support among Madhesi people for a single federal unit can be interpreted by the successful mass mobilization of the regional parties and deeply-rooted anti-Pahadi sentiments. They predominantly regard establishing their own dominance as the only way to avoid being dominated by the immigrants from the hills. Only a few Madhesi oppose this approach, pointing to the imminent danger of extensive ethnic violence and stressing the need of economic integration with the hill region. The regional minorities naturally offer resistance to a single federal unit under Madhesi domination. Considering their traditional status as ruling majority in Nepal, many Pahadi of the Tarai are sceptical of federalism and would prefer the retention of the—from their perspective—favourable unitary system. Whereas Pahadi people are afraid of being downgraded from masters to slaves, the prospect of “one Madhesh, one Pradesh” would only entail a change of master from the Janajati point of view. Unlike the proposals of MJF and TMLP, the federal design that the Maoists outlined is in favour of a partition of the Tarai into two constituent units, namely “Madhesh” in the east and “Tharuwan” in the west, which attempts to address the aspirations of the largest indigenous community of the region. However, Tharu people would only make up a relative majority in a region which is allegedly defined along ethnic lines and is even named after them. They would be confronted with an almost equally large population of Pahadi and numerous smaller Janajati groups. That these circumstances in the Tarai are irreconcilable with a successful application of ethnic federalism is clearly demonstrated by the ambivalent posture of NEFIN. On the one hand, the organization has repeatedly criticized the model of “one Madesh, one Pradesh” by emphasizing the distinct identity of the Tarai indigenous people and their adherence to peaceful protest which ought to be rewarded, as opposed to the

112 Choudhry, op.cit. note 17, 27.
113 International Crisis Group, op.cit. note 44, 31-32.
114 Ibid., 15.
115 Hachhethu, op.cit. note 80, 11.
violent outbursts of the *Madhesi* movement in 2007.\footnote{Lok Raj Baral, “Federalism in Nepal: Too Many Models Too Little Solution”, *Telegraph Nepal*, 1 May 2007, 1.} On the other hand, its ideological predisposition for the concept of ethnic federalism logically resulted in a failure to make any viable counter proposal to the benefit of all of the *Janajati* groups it aims to represent.

The proposals of the leading *Madhesi* parties and the Maoists are based on ethnic federalism and illustrate one its inherent problems under certain demographic circumstances. If settlement areas are mixed to such an enormous extent as in Nepal the essence of this concept, namely, drawing the boundaries of federal units in such a way that national minorities constitute broad regional majorities, is not feasible. Under such conditions, a regional majority, if at all possible to find, is regularly confronted with significant regional minorities which may be of two possible kinds: members of the state majority population and members of “double minorities” which are in a minority position at the regional and state level. In the case of the Tarai, the first definition applies to the *Pahadi* and the second one to the *Tharu* and all other indigenous people. In the case in which a constituent unit is created to the benefit of a group which is not much larger, such regional minorities might in turn assert claims to be awarded *their own* federal unit. In that way, however, the problem would only be shifted to a new entity that in a case of complex settlement patterns might again produce a similar majority–minority situation. Thought through to the end, every new regional minority could justifiably demand its own federal unit and thus trigger a chain reaction of territorial fragmentation.

Even proponents of ethnic federalism, therefore, have to acknowledge that a concept which is based on transforming state minorities into regional majorities is no panacea and is rather unfeasible under circumstances like in the Tarai and other parts of Nepal with very mixed areas of settlement. Structuring the territory of a state with such an extreme diversity of caste and ethnic groups, which are in many cases scattered all over the country, would amount to a Sisyphean task. The sheer impossibility of this endeavour is lucidly illustrated by the failure of proposals adherent to ethnic federalism to create constituent units with absolute majorities of the titular community. The *Bahun* and *Chetri*, usually regarded as a single coherent group due to

\footnote{International Crisis Group, *op.cit.* note 44, 31.}
their common language, religion, culture and history as Nepal’s ruling class, are so widespread and numerous that such a creation of federal units to the benefit of target ethnic groups is practically rendered impossible. Close examination reveals, for instance, that the Maoist design only provides for relative majorities of the Tamsang in Tamsaling and the Tharu in Tharuwan, with an almost as large combined population of Bahun-Chetri. The latter would even constitute majorities in the envisaged autonomous regions of Magarat, Tamuwan and Newar, which are supposed to confer autonomy to the Magar, Gurung and Newar, respectively. The Maoist proposal was actually intended to reorganize Nepal according to a mixture of ethnic and territorial criteria. Ironically, however, the units of Bheri-Karnali and Seti-Mahakali, which were meant to be territorially defined for the sake of economic development, are the most homogenous ones with large majorities of Bahun-Chetri. The bias of the proposal against this group is also obvious in the naming of these two constituent units. In contrast to all other entities, they do not bear ethnic names but are neutrally called after rivers. Similar to the Maoists’ design all other proposals of ethnic federalism, which normally feature roughly a dozen constituent units, fail to draw their boundaries in such a way that regional majorities are consistently created. On a smaller scale, a look at the current 75 districts makes clear that ethnic homogeneity is practically impossible even there. The Bahun-Chetri presently constitute an absolute majority in 15 districts, Madhesi in 10 and Tharu, Magar, Tamang, Newar and Gurung in one district, respectively. But most of these 30 districts feature significant minorities. The remaining 45 districts are even more heterogeneous without one group in an absolute majority position. Thus, it can be presumed that not even the creation of 100 federal units would be enough to accomplish a consistent model of ethnic federalism. Paradoxically, Nepal is too diverse in ethnic terms for ethnic federalism. The unfeasibility of this concept and the tangible risk—at least in the Madhes—of a violent eruption of already existing ethnic tensions rules out ethnic federalism as a viable solution in the Madhes and thus, elsewhere in Nepal.

118 See for instance Baral, op.cit. note 116; Sharma, op.cit. note 95.
119 Baral, op.cit. note 117, 1; Sharma, op.cit. note 94, 12-13.
120 Sharma, op.cit. note 94, 13-14.
IV. CONCLUSION

Having pointed out that a model of ethnic federalism is unfeasible in the Nepalese context, there arises the question of viable alternatives. Because the author’s purpose in this article is not to add a new detailed proposal to the many federal maps which are currently circulating, it is only possible to outline some of the most important elements. The complex demographic situation of Nepal requires a complex solution which might involve a combination of territorial and ethnic federalism. There have already been some steps in this direction, notably the proposals of K. T. Limbu and Pitamber Sharma. Both rely on a four-level structure whose second level is defined territorially whereas the units at the third level are carved out along ethnic criteria. Two objections, however, can be lodged against such a design. First, the aforementioned demographic situation in the present districts indicates that delimiting homogenous districts will not be an easy task. This applies to 3 to 13 districts in the seven zones of Limbu’s proposal and even more to the 19 districts of Sharma’s six regions. Thus, Sharma admits that few of his districts would feature one caste or ethnic group in an absolute majority position. The second objection relates to the four-level structure in itself. It is likely that such a design would amount to a costly institutional overkill. In a country with scarce financial resources and limited administrative capabilities, this is an especially serious problem which deserves to be scrutinized with particular attention. For that reason, it is hardly surprising that many scholars make the case for abandoning the districts in favour of a three-level structure.

A feasible solution should feature three levels with economically viable regions stretching along the major river basins from north to south and local entities with some autonomous powers in identity-related fields such as language, education, religion or customs. Not to forget the minorities at local level and the widespread and universally excluded Dalits, the same powers should be conferred to personal

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121 Ibid., 16.
122 Ibid., 11.
124 Matthaeus and Ghai, op.cit. note 92, 43-44.
125 Of course, the local entities cannot have exclusive powers regarding these broad domains. In particular, such fields as education require a differentiated allocation of powers on more than one level.
corporations under public law. Because they would be composed of individuals whose affiliation was a matter of free choice, people of the aforementioned target groups from different local entities could unite to form such corporations. In this way, just such a form of personal autonomy\textsuperscript{126} would be collateral to local autonomy which operates on a territorial basis.

Of course, a federal design on the basis of these outlined cornerstones can not offer a guarantee of success. Admittedly, the advantages of federal regions which each contain portions of all three topographic regions in terms of comprehensive countrywide economic development\textsuperscript{127} are currently less popular than the perceived autonomy in ethnically defined regions. Considering the high hopes for ethnic federalism which the Maoists, the leading Madhesi parties and others in the political arena raised, this is anything but surprising. However, in an attempt to attract popular support, they all refrain from telling the inconvenient truth: such a federal design is not universally applicable. It has to be stated clearly that in the Nepalese context, ethnic federalism could in any case only confer autonomy to one group at the expense of others.\textsuperscript{128} The resulting emergence or increase of tensions between caste and ethnic groups would likely be a recipe for disaster. The here outlined solution of a third level combining local and personal autonomy might be more conducive to interethnic relations as it includes autonomy aspirations of more groups. Because inclusiveness is the explicit aim and function attributed to federalism by the interim constitutional framework, such a federal design might be worth pursuing.

However, at the moment,\textsuperscript{129} the prevailing political deadlock between the CPN(M) and the other national parties prevents any progress toward any Nepalese federalism. Apart from animosities and programmatic differences, the current impasse can be ascribed to a fundamental contradiction between the federal character of the envisaged state structure and the centralized character of most parties. With the self-evident exception of regional parties such as MJF and TMLP, almost all parties recruit a large share of their leading representatives from the central part of Nepal rather than from


\textsuperscript{127} See III C.

\textsuperscript{128} See III D 2.

\textsuperscript{129} 23 October 2009.
the periphery. Following the instinct of self-preservation, they might cling to their newly acquired powers of the still unitary state instead of dividing and sharing powers with federal units. Moreover, transforming a unitary state into a federal one not only presupposes the willingness to give up a favourable status quo from politicians but also asks the same of central civil servants. Changing a unitary state with a strong role of the army can involve additional problems. A still important player in the political arena, the Nepalese army is particularly interested in undermining the power base of its archenemy, the CPN(M). The impact of this conservative force on the present constitutional debate should not be underestimated as the army publicly promotes its political agenda in a more coherent and vigorous way than some supposedly leading elected parties. Whether these circumstances will eventually allow a more or less smooth transformation of Nepal into a viable and truly inclusive federal state remains to be seen.

131 International Crisis Group, op.cit. note 44, 14.
Emma Lantschner

National Human Rights Commissions in India and Nepal: State of Affairs and Challenges Ahead

I. INTRODUCTION

National Human Rights Institutions (NHRI) are a quite recent phenomenon in the range of bodies dealing with the promotion and protection of human rights. Most of them are fewer than twenty years old. In 2009, 65 NHRI all over the world were found to be in line with the Paris Principles on the status and functioning of NHRI as defined in October 1991. According to these principles, such institutions need to be independent (in terms of legal basis, budget, and regarding their members), members need to be an expression of the diversity and plurality in a country, and the mandate of the institution should be as broad as possible. NHRI can be organized as a collegial organ in the form of a commission or as an individual organ in the form of an ombudsperson. Both types can either have a general mandate or be assigned a special purpose. Examples for the latter are the national commissions for women or language issues or ombudspersons dealing only with persons belonging to national minorities.

In South Asia, only the National Human Rights Commissions (NHRC) of India and Nepal have the status of being in compliance with the Paris Principles. Sri Lanka and the Maldives have observer status, which means that their institutions are either not fully in line with the Paris Principles or insufficient information has been provided to
make a determination. The National Human Rights Commission of Bangladesh and Afghanistan’s Independent Human Rights Commission so far have no registered status at the International Coordinating Committee of NHRIs.

In the present article assesses the functioning of the NHRC of India and Nepal, starting with an overview of the technical aspects related to their legal bases, composition, and mandate (II) and then presents a more substantive analysis of the major challenges encountered by these two bodies in their day-to-day work (III).

II. FORMAL PRECONDITIONS

A. Legal Bases

According to the Paris Principles, NHRI should be based on a law or even on the constitution of a country. The obvious purpose of this provision is to de-link the existence, mandate, and composition of the institution as much as possible from the arbitrary decisions of changing governments.

The NHRC in India is based on the Protection of Human Rights Act of 1993. The NHRC was immediately established and is thus one of the most longstanding institutions. However, from the beginning, the first NHRC detected a discrepancy between the aims and objectives of the Act and the means foreseen by the Act to reach these goals. Although a high-level Advisory Committee made suggestions as to the amendment of the Act already in 1999 and the Commission’s proposals based on this work were submitted to the government in 2000, it was only in 2006 that the law was finally amended.\(^5\) Quite a number of proposed changes have not found their way into the new law.\(^6\) How they still hamper the functioning of the Commission will be analyzed in part III of this article.

Nepal’s Commission has its foundation in the 1997 National Human Rights Commission Act. However, due to the political instability in the country, the Commission was set up only in 2000.\(^7\) After the turbulences connected to the killing of the king in 2001, the new king’s dismissal of the government in 2005 to command the war against Maoists, and the democracy movement in 2006 which finally ended

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with the abolishment of the monarchy in 2007, the Interim Constitution of the same year made the NHRC a constitutional body, partly amending also the law of 1997. In late 2009, the Commission’s compliance with the Paris Principles was under review by the responsible Sub-Committee on Accreditation (SCA) of the International Coordination Committee of NHRI (ICC). The Sub-Committee was not in the position to come to a conclusion as the work on a review of the NHRC legislation was still pending at the Nepalese Parliament. The NHRC of Nepal will, therefore, have to undergo another review in March 2010 during which it will be established whether the status of being compliant with the Paris Principles can be maintained or whether the Commission will be downgraded.

B. Composition

The Paris Principles require that the composition of NHRI and the appointment of its members “shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights”. These social forces include NGOs, trade unions, social and professional organizations, different philosophical and religious thoughts, academic experts, and members of parliament. Also, the General Observations of the ICC Sub-Committee on Accreditation emphasize in this context the importance “to maintain consistent relationships with civil society”. In terms of selection and appointment of the members of the Commissions, the SCA attaches great importance, amongst other things, to a transparent process and broad consultation throughout the process.

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8 For an account of Nepali recent history, see Manjushree Thapa, Forget Kathmandu: An Elegy for Democracy (Penguin, New Delhi, 2007).
9 Part 15 of the Interim Constitution of Nepal (Arts. 131-133) is specifically dealing with the National Human Rights Commission of Nepal.
10 Documents of these bodies as well as a list of accredited NHRI and their status of accreditation can be retrieved at <http://www.nhri.net/>.
12 Paris Principles, B(1), emphasis added.
13 ICC Sub-Committee on Accreditation, General Observations, adopted by the International Coordination Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC) by email after the SCA meeting of March 2009, Geneva, June 2009, para. 2(1).
14 Ibid., para. 2(2).
The UN Survey on NHRI\textsuperscript{15} noted that only half of the Commissions under consideration indicated that their founding law included a provision on pluralism. The laws establishing the NHRCs of India and Nepal are a case in point. Neither of the legal bases emphasized the importance of diversity in the Commission. In the case of Nepal, this has changed with the Interim Constitution which now foresees that “the representation from all fields including women” needs to be maintained in the appointment process.\textsuperscript{16} The Indian and Nepalese Commissions attach great importance to the prestige of the members of the Commissions. The Indian Act, for instance, foresees that the chairperson of the NHRC is a former Chief Justice of the Supreme Court,\textsuperscript{17} the highest position in the judiciary of a country. Also according to the Nepalese Act of 1997, the chairperson of the Commission had to be a former judge of the Supreme Court, albeit not necessarily a Chief Justice.\textsuperscript{18} Here again the Interim Constitution brought a change in that it foresaw that “a person who hold[s] a high reputation and has rendered outstanding contribution being actively involved in the field of protection and promotion of human rights and social work” can be appointed to chair the NHRC.\textsuperscript{19} These characteristics are also preconditions for being appointed to the position of one of the four ordinary members in the Nepalese NHRC. In this point, the Indian NHRC differs slightly because two out of the remaining four members have to be a former judge of the Supreme Court and a former chief justice of a high court. The other two members are appointed from among persons who have knowledge or practical experience with human rights issues.

The focus on judges can be seen from two perspectives: on the one hand, a judge—and in particular a former Chief Justice of the Supreme Court—knows the law, is used to procedures and knows how to move in a legal environment. A person of this rank might also have the necessary leverage to push for systemic changes. On the other hand, as has been criticized by human rights activists, the judges often lack a strong background in human rights and do not really know the situation on the ground. The overrepresentation of judges—as well as retired high ranking government servants, whose independence might be questioned—has been seen critically by human rights

\textsuperscript{15} UN Office of the High Commissioner for Human Rights, \textit{op.cit.} note 1, 50.
\textsuperscript{16} Interim Constitution of Nepal, 2007, Art. 131(2). The meaningful participation of women to ensure plurality is also emphasized by the General Observations of the ICC Sub-Committee on Accreditation, \textit{op.cit.} note 13, para. 2(1).
\textsuperscript{17} The Protection of Human Rights Act, Art. 3(2)(a).
\textsuperscript{18} National Human Rights Commission Act, Art. 3(1)(a).
\textsuperscript{19} Interim Constitution of Nepal, Art. 131(1)(a).
organizations. For instance, the appointment of a former Director of the Central Bureau of Investigation and lifelong employee of the India Police Service has been heavily criticized in a recent report because, according to some, his bias is unavoidable. Since the establishment of the Indian NHRC there has been no trade unionist, no NGO representative, no academic or member of parliament represented. Also, the current composition does not reflect diversity in other respects because it is composed of only male, upper-caste Hindu commissioners.

A difference between the composition of the Indian and Nepalese Commissions, which could also enhance its plurality, lies in the fact that it has ex-officio members: the chairs of the National Commissions for Minorities, for Scheduled Casts, for Scheduled Tribes, and for Women. What could be seen as a useful way of creating synergies between the national commissions has not proven to be successful in practice. In fact, despite previous invitations, for the last couple of years the chairpersons of the mentioned human rights institutions have not been invited to a joint meeting by the NHRC, which puts in doubt the commitment of the NHRC of India to put in practice the principle of cooperation as foreseen by the Paris Principles.

The members of the NHRC of Nepal are appointed by the prime minister, on the recommendation of the Constitutional Council, consisting of the Chief Justice, the speaker of the parliament, and three cabinet ministers. As all of them are appointed by the prime minister or belong to the governing party, there is an imminent danger of the political interests influencing the Commission’s composition. As has further been noted by human rights organizations, there was no broad consultation process during the appointment process to the current Commission and it could not be considered as transparent. A parliamentary and public hearing apparently took

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21 Interview with the director of the Asian Centre for Human Rights, Suhas Chakma, in New Delhi on 23 April 2009. View shared also by Gil and Muzaffar Dawson, op.cit. note 20, 49-51 and 53.
22 According to the Protection of Human Rights Act, Art. 3(3), these members participate in all functions of the Commission except for the investigations into complaints of human rights violations.
23 Gil and Muzaffar Dawson, op.cit. note 20, 57-58.
25 Ibid., 5.
place but was not to the satisfaction of the civil society sector. Even more doubtful was obviously the appointment of the members to the previous commission. After the royal coup in 2005, the king appointed new commissioners without parliamentary oversight at all. These commissioners were, however, in office only for about one year because in 2006 they were forced to resign by the newly restored parliament.

In India, the NHRC is appointed by the President after obtaining a recommendation by a Committee composed of governing and opposition politicians. Although this composition balances better between the political forces in the country it still neglects the involvement of other actors. It has been criticized that the appointment process is a political bargaining instead of an open consultation process with civil society and other relevant players.

In light of the aforementioned, it might be legitimate to put in doubt the conformity of the NHRC of India and Nepal to the Paris Principles related to independent Commissioners, reflecting the plurality of a country and appointed through a transparent and inclusive process.

C. Funding

One way to ensure the independence and autonomy of a body is by providing it with the necessary financial means. The Paris Principles foresee in this context that NHRC should get adequate funding with the purpose of enabling it to have a staff and premises, to be independent from the government and to not “be subject to financial control which might affect its independence.” The Interim Constitution of Nepal is silent on this point, and the issue appears to be controversial during the drafting process of the new Act regulating the NHRC. In late 2009, members of the NHRC and of civil society alike criticized the fact that the government intended not only to delete the adjectives “independent and autonomous” as a description of the Commission from the draft bill, but also that it was reluctant to equip it with the

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26 Interview with Commissioner K. B. Rokaya in Kathmandu on 15 April 2009.
27 Information from the website of the NHRC of Nepal at <http://www.nhrcnepal.org/>.
28 These are the prime minister, speaker of the House of the People, the minister of home affairs, the leader of the opposition in the House of the People, the leader of the opposition in the Council of States and the deputy chairman of the Council of States. See Protection of Human Rights Act, Art. 4(1).
29 Interview with Colin Gonsalves, Executive Director of Human Rights Law Network, New Delhi, on 21 April 2009.
30 Paris Principles, B(2).
31 Chapagain, op. cit. note 24, 3.
necessary financial autonomy so that it could, for instance, recruit its own staff.\textsuperscript{32} If this is not the case, the NHRC “cannot function independently as expected by the civil society and on a par with the international standards.”\textsuperscript{33}

The financial autonomy of the Indian NHRC is spelled out in Article 32 of the underlying Act. However, Article 11 foresees that the Central Government shall “make available” to the Commission the staff required “for the efficient performance of the functions of the Commission.” This makes the Commission dependent on the government, as it is the latter to choose how many staff and whom to make available to the Commission. This results in a situation in which many officers working at the commission come there “with a certain mind-set”, which is characterized by “deep resistance to change, bureaucratic procedures of work and very heavy accumulated backlog of bad practices.”\textsuperscript{34} Their knowledge about and commitment to human rights is limited and they are not trained once they join the commission.\textsuperscript{35} It is also highly questionable whether this is in line with the General Observations of the ICC Sub-Committee on Accreditation. The Sub-Committee notes that for the sake of guaranteeing the independence of the commission it should be good practice that the number of seconded staff does not exceed 25% and in any case is never more than 50% of the workforce at the commission.\textsuperscript{36} How easy it is to weaken a commission if it completely depends on the secondments by the government is shown by the Commission for Scheduled Tribes, in which 40% of the required staff is missing. In addition, although the number of senior staff was increasing over the last year, the lower-level posts remained vacant or were even abolished, which considerably reduces the functionality of the Commission.\textsuperscript{37}

\textsuperscript{32} See “Nepal: Draft bill raises Commission’s concern”, \textit{Ekantipur News}, 12 October 2009; Ananta Raj Luitel, “Is draft bill trying to weaken NHRC?”, \textit{The Himalayan Times Online}, 21 October 2009. According to the information provided by Commissioner Rokaya, the state had increased the budget of the NHRC in 2009 for 85% (which allowed for an increase of staff from 165 to 310) and it was never necessary to ask for funding from external donors. Other sources say that the NHRC could not function if it was not supported, also financially, by a capacity building project of the UNDP.

\textsuperscript{33} NHRC Chair Kedar Nath Upadhyaya, quoted in the article “Toothless draft raises NHRC hackles”, \textit{The Kathmandu Post}, 11 October 2009.


\textsuperscript{35} \textit{Ibid}.

\textsuperscript{36} ICC Sub-Committee on Accreditation, \textit{op.cit.} note 13, para. 2(4).

\textsuperscript{37} Interview with a senior official of the National Commission for Schedules Tribes, on 30 April 2009. Similar problems persist in other NHRI all over the world, as identified in the UN OHCHR’s Survey on National Human Rights Institutions, \textit{op.cit.} note 1, 52.
D. Mandate

Civil society and international bodies expect the commissions to be independent to be able to carry out their mandate in a way most conducive for the promotion and protection of human rights. The Paris Principles foresee that the mandate should be as broad as possible. On this point, the Acts of both NHRC are in line with the principles. They include the task to inquire, *suo motu* or on a petition by the victim or another person on his or her behalf, into a complaint of violation of human rights. In addition, they have the task to give advice to the governments by reviewing legislation concerning the protection of human rights as well as studying international treaties and giving recommendations to the government for their effective implementation. Finally, they undertake research and spread human rights literacy among the population. Both commissions have the task to cooperate with civil society.\(^{38}\) In the next chapter, the author examines the question of what challenges appear for the NHRC in fulfilling their mandate.

III. CHALLENGES FOR THE NHRC OF INDIA AND NEPAL

Considering the overwhelming diversity, economic disparities and internal conflicts existing in India and Nepal, it is not hard to imagine that both National Human Rights Commissions are faced with tremendous challenges. India’s population of 1.16 billion is more than twice that of the European Union. More than 100 languages are spoken compared with about 92 in Nepal. Both countries are mainly Hindu (about 80% in both) but are also home of members of several other religious denominations. Although both countries are officially secular, religion—as well as the caste system—still plays an important role. How the NHRC of India and Nepal have managed to deal with these challenges while putting into practice their mandate will be explored in this chapter.

A. Investigating into Individual Complaints

The National Human Rights Commissions are not there to substitute the court systems in both countries. Rather, they should constitute an additional, more easily accessible and faster possibility for victims of human rights violations to get redress. The judicial system in India and Nepal has been able to address important cases of human rights

\(^{38}\) For details, see The Protection of Human Rights Act, Art. 12; Interim Constitution of Nepal, Art. 132.
violations. Nevertheless, in both countries there is a pervasive regime of impunity. For instance, serious human rights violations by security forces, such as torture or extrajudicial killings are rarely prosecuted, which gives the perpetrators the feeling of being above the law and results in yet other violations of human rights. The NHRC are sometimes also addressed by persons who hope that the Commissions are more forceful in fighting human rights violations. However, local human rights organizations are not satisfied with the record of the NHRC in this context.

Regarding the Indian Commission, they criticize the way in which investigations into complaints are carried out and the lack of transparency. On receiving a complaint, the NHRC requests a report from the alleged perpetrators. In many cases, it is the same person who is accused of the violation of human rights who conducts the investigations and writes the report for the Commission. Often, the Commission closes the case after receiving such a report without giving the victim the possibility to react to it and without inquiring into the correctness of the facts stated in the report. Only in 6% of the cases has the Indian Commission carried out its own investigations, a situation which is also connected to the fact that it has quite limited investigation capacities. In some cases, the reports recognized that torture had taken place and the Commission nevertheless dismissed the case. Furthermore, often individuals or organizations who have lodged the complaint on their behalf are not informed about the closure of the case, or that the cases have not even been registered without providing reasons for this action to the complainants.

Another criticism of human rights organizations concerns the reluctance of the Indian NHRC to recommend compensation for the victims of human rights violations. From the more than 637,000 cases filed with the Commission until 2006, the victims had been paid compensation only in 716 cases. In addition, the amounts recommended are

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40 For India see, *ibid.*, vii and 68-69; *id.*, *India Human Rights Report 2009* (Asian Centre for Human Rights, New Delhi, 2009), iv-v and 83-84. For Nepal see, Chapagain, *op.cit.* note 24, 3.
42 Interview with Suhas Chakma.
43 The Asian NGO Network on National Institutions (ANNI), *op.cit.* note 41, 63. For recommendations against all these practices see, Recommendations following the National Consultation on Strengthening National Human Rights Commission, organized by Public Advocacy Initiatives for Rights and Values in India (Pairvi), Asian Centre for Human Rights (ACHR) and People’s Watch Tamil Nadu (PWTN), New Delhi, 29-31 January 2007.
44 Lacking more updated figures, the ones of 2006 have been used.
very low and can hardly be considered a deterrent for perpetrators of human rights.\textsuperscript{45} The record concerning recommendations for prosecution is even worse. Again, until 2006, “the NHRC had recommended disciplinary action in 223 cases and prosecution in 74 cases against state actors”. It is also remarkable that in the two and a half years preceding this date, only two disciplinary actions or prosecutions were recommended.\textsuperscript{46}

Although certainly not serving as an excuse for the deficiency in the complaint-handling procedure, the amount of complaints the NHRC of India has to deal with every year needs to be taken into consideration. The workload increased from 496 complaints in the first year of its existence to 82,233 cases in the period of April 2006 to March 2007.\textsuperscript{47} About 32,000 cases were still pending so that the Commission had to deal with more than 114,000 cases in the period under consideration by the last Annual Report. The number of complaints rose further to 94,559 in 2008.\textsuperscript{48} The Secretary General of the Indian NHRC acknowledged that the slow pace in which individual complaints are dealt with is one of the weaknesses of the Commission.\textsuperscript{49}

The huge backlog of cases might be easier to handle if there existed some sort of decentralization. The Protection of Human Rights Act 1993 provides in Article 21 that the state governments may constitute State Human Rights Commission (SHRC). Up until now, 18 such Commissions have been established.\textsuperscript{50} The mandate of the SHRC is, with one exception,\textsuperscript{51} exactly the same as the one of the NHRC, whereas the sphere of competence is limited to matters in which states have exclusive or concurrent legislative competence.\textsuperscript{52} This means, at least in theory, that each type of Commission has a field of competence and that the National Human Rights Commission has not been conceived as a last instance commission. However, many people prefer to

\textsuperscript{45} Human Rights Documentation Centre, “India’s NHRC Fails to Use its Meagre Powers”, \textit{Human Rights Features} (2007).
\textsuperscript{46} Ibid.
\textsuperscript{47} National Human Rights Commission, Annual Report 2006-2007, 1, at <http://nhrc.nic.in/>. This report is the last Annual Report publicly available.
\textsuperscript{49} Interview with Akhil Kumar Jain, Secretary General of the NHRC of India, in New Delhi on 29 April 2009.
\textsuperscript{50} These are in the states of Andhra Pradesh, Assam, Bihar, Chhattisgarh, Gujarat, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Maharashtra, Mahya Pradesh, Manipur, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal.
\textsuperscript{51} The exception consists of Art. 12(f): to study treaties and other international instruments on human rights and make recommendations for their effective implementation.
\textsuperscript{52} The Protection of Human Rights Act, Art. 21(5).
address the NHRC instead of the SHRC due to, at least in some cases, a lack of trust in the effectiveness of the Commissions at the state level. Appointments to the SHRC are reported to be “extremely political” and staff members are not sufficiently trained to properly fulfill their task. The theoretically separate spheres of competence do not prevent that both Commissions are sometimes requested to decide on cases which require the use of similar concepts or approaches. However, the Act does not give the NHRC any supervisory power over the SHRC. This leads to a situation in which important guidelines or instructions issued by the NHRC are ignored by SHRC so that decisions are reached that do not reflect the approaches taken by the NHRC. The proposals of the NHRC for the amendment of the Protection of Human Rights Act in 2000 recommended a hierarchical relationship between National and State HRC to remedy this situation, but it was not adopted into the amended Act. There seems to be some tacit convention of respect of the chairs of the SHRC (former Chief Justices of High Courts) vis-à-vis the chair of the NHRC (former Chief Justice of the Supreme Court) which allows the latter to invite the former to reconsider decisions in case they are not in line with the views of the NHRC. This can, however, be hardly satisfactory in lack of an institutionalized mechanism of coordination. The last published Annual Report of the NHRC, covering 2006-2007, gives an account of the initiative of the NHRC to organize annual meetings with all SHRC to foster “mutual discussions […] keeping in view the social, cultural and linguistic diversity” that the Indian society comprises. Although this is a positive first step, the collaboration between National and State HRC needs to be further strengthened with the aim of increasing the quality of work of SHRC, ensuring the consistency of the jurisprudence of the Commissions and raising the awareness of people for human rights and the mechanisms available for their protection. The annual meetings of the NHRC with all SHRC could well serve as a platform to find the appropriate ways and means for this purpose.

By doing so, the outreach of the NHRC could also be improved. The statistics of 2008 show that 58.39% of the cases filed with the Indian NHRC have come from Uttar Pradesh.

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53 This is possible as Art. 32 of the Indian Constitution can be applied mutatis mutandis also to the NHRC.
54 The Asian NGO Network on National Institutions (ANNI), op.cit. note 41, 67.
55 Interview with Virendra Dayal, former member of India’s NHRC, in New Delhi on 28 April 2009.
Pradesh, the state adjacent to New Delhi where the Commission is seated.\textsuperscript{57} Since 2007, the Indian NHRC has been trying to raise awareness about its existence by organizing sittings in state capitals.\textsuperscript{58} For that purpose, and to better spread human rights literacy across the country, it would also be recommended to establish regional offices of the NHRC across the country.\textsuperscript{59} This has been done by the NHRC of Nepal in an attempt to improve the outreach of the NHRC of Nepal also to the remote and hardly accessible parts of the country. Five regional and three subregional offices were created.\textsuperscript{60} In the period from July 2007 to June 2008 a total of 16 regional-level and 74 local-level training events or meetings were organized to promote the idea of human rights.\textsuperscript{61}

The success of NHRC depends also on the willingness of the state authorities to follow suit to the recommendations of the Commissions. In the case of Nepal, the record is not all too positive.\textsuperscript{62} Out of the 149 recommendations made by the Commission to the government in the period between 2000 and June 2008, the government has fully acted only on 16 cases and partially on another 35 cases. The lowest performance by the government is shown on recommendations related to violations committed by the police (28 out of 29 remained unimplemented), killings by Maoists (11 out of 13 unimplemented) as well as disappearances and torture by security forces (9 out of 11 unimplemented). The government does not even respond to communications from the Commission requesting to follow-up on the recommendations.\textsuperscript{63} According to Article 132(2)(h) of the Interim Constitution, the NHRC has the possibility “to publicize the names of the official, person or bodies not following or implementing the recommendations and directions” adopted by the NHRC “and to record them as human rights violators.” So far, the NHRC has never made use of this possibility to blacklist human rights perpetrators.\textsuperscript{64} The currently debated new law on the NHRC would foresee an obligation of the government to

\textsuperscript{57} Op.cit. note 48. The ratio of Uttar Pradesh is, however, decreasing: in 2006-2007, 63% of all registered cases came from that state. See NHRC of India, Annual Report 2006-2007, 294.

\textsuperscript{58} The Asian NGO Network on National Institutions (ANNI), op.cit. note 41, 57-58.

\textsuperscript{59} In this sense see also Recommendations following the National Consultation on Strengthening National Human Rights Commission, op.cit. note 43.

\textsuperscript{60} Eastern Regional Office, Biratnagar; Central Regional Office, Janakpur; Western Regional Office, Pokhara; Mid-Western Regional Office, Nepalgunj; Far-Western Regional Office, Dhangadi. Subregional Offices were created in Khotang, Jumla and Rupendehi. In the interview with Commissioner Rokaya, he announced six subregional offices.


\textsuperscript{62} Kamal Raj Sigdel, “Govt apathy riles NHRC”, The Kathmandu Post, 15 April 2009, 1.

\textsuperscript{63} Chapagain, op.cit. note 24, 10-11.

\textsuperscript{64} Raj Luitel, op.cit. note 32.
implement NHRC recommendations within a three months period or, in case of failure, report back to the Commission giving reasons for the nonimplementation.65

B. Monitoring of Legislation and Cooperation with Civil Society

Apart from investigating into individual complaints, the NHRC have the mandate to advise the states concerned regarding the effective implementation of legislation concerning human rights and recommend necessary reforms or amendments thereto.66 Although these provisions, in particular the Indian one, could be restrictively interpreted in the sense that the NHRC have a say only on the implementation or amendment of laws that are already in force, it seems to be clear that their review of any legislation dealing with human rights is required already at the drafting stage. As the legal system in Nepal is undergoing considerable reform after the end of the Maoist insurgency and the people’s movement, the NHRC of Nepal is currently focusing on the monitoring of new legislation. It has for instance given recommendations to the government during the drafting of the bill on the Truth and Reconciliation Commission and on the disappearances bill. These recommendations have, at least partly, been considered by the government. As has already been mentioned, the Commission was of course also involved in consultations concerning the new bill on the NHRC; however, the government has made changes to the agreed draft afterwards, which again raised the concern of the NHRC. Most importantly, the NHRC is involved in the making of the new constitution of Nepal, with the aim to ensure that it becomes a human rights friendly document. The NHRC has further been mandated to monitor the human rights related implementation of the Comprehensive Peace Agreement concluded between the Maoists and the government to end the war.67 In this context, the parties pledge “to accept the reports submitted by the above-mentioned bodies [among them also the NHRC], to provide the information requested by them, and to implement the suggestions and recommendations given by them on the basis of consensus and dialogue.”68 With this provision, the Commission would have quite a strong leverage. It seems, however, that it has not had much effect.

68 Ibid., Art. 9(5). In this context, the NHRC published in 2007 the “Summary of the Report on the Status of Human Rights under the Comprehensive Peace Agreement” and in 2009 the report “Three-
In general, the NHRC seems to be satisfied with the government when it comes to its involvement in the reviewing and commenting on existing and draft legislation. According to the information provided by the Commission, it also seeks to involve the civil society sector when making recommendations to the government. Prominent human rights organizations in Nepal are, however, not satisfied with the level of involvement afforded to them by the NHRC. The relationship between the NHRC and human rights organizations was severely damaged by the installment of a procoup Commission by the king in 2005. Organizations and activists were skeptical about its independence and autonomy. Nevertheless, they were convinced of the use of such a commission. When the Commission seats remained vacant for more than a year after the commissioners appointed by the king stepped down, they organized, together with NHRC personnel, a campaign entitled “Save the National Human Rights Commission”. However, still today, NGOs and human rights organizations feel that there are too few instances of coordinated activities initiated by the Commission and no mechanisms facilitating regular interaction. One of the aims of a UNDP led project dedicated to the capacity development of the NHRC is to link the Commission with the civil society sector and to create a framework for good working relations between the NHRC and other human rights stakeholders in the country. Efforts, in this sense, are reflected in the strategy of the NHRC for the period 2008-2010, in which it envisages a “[f]unctional and goal-oriented collaboration with NGOs, civil society and human rights defenders for the promotion and protection of human rights of people and for the effective implementation of state commitment on it in action.”

According to the Annual Report 2006-2007 of the Indian NHRC, “[t]he promotion and protection of human rights cannot gather momentum without the fullest co-operation between the Commission and the NGOs” For that purpose, the NHRC established a Core-Group of NGOs already in 2001, which functioned until 2004 and

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69 Interview with Commissioner K. B. Rokaya.
68 Chapagain, op. cit. note 24, 6; as well as interview with Bidhya Chapagain, Chief of Human Rights, Monitoring and Advocacy Department of INSEC (Informal Sector Service Centre) in Kathmandu on 17 April 2009.
71 Ibid., as well as interview with Bidhya Chapagain.
was finally reestablished in 2006. Since then, it has met five times although the NGOs consider that at least two meetings per year should be held. From the NGOs perspective, there is a feeling that the NHRC is unwilling to convene the Core Group of NGOs or to invite it to regional meetings of NHRI.\(^75\)

**C. International and Regional Cooperation of NHRC and the Role of SAARC**

When it comes to the monitoring of the states’ performance regarding the implementation of international treaties, the situation in India and Nepal is comparable. In India, the NHRC neither provided input nor participated in deliberations during the process of preparing the country’s periodic reports to various UN treaty bodies. Although the recent reports of India to the UN Committee on the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) deny the existence of racial discrimination in India, the NHRC has remained silent on the domestic implementation of CERD.\(^76\) It seems, however, that the NHRC was involved in the review of India under the Universal Periodic Review, presenting its own country paper.\(^77\) In Nepal, the Commission regrets in its 2004 Annual Report that several reports to UN treaty monitoring bodies had been sent by the government without inviting the council of the NHRC.\(^78\) The following report remains silent on the issue. Conversely, it needs to be acknowledged that in 2007, the Commission published a study of the domestication status of the International Covenant on Civil and Political Rights in Nepal and in 2009 a report on the status of child rights in Nepal.\(^79\)

Both NHRC are members in the Asia-Pacific Forum (APF), a regional organization composed of national human rights institutions from across the Asia Pacific.\(^80\) In the occasion of the APF meeting in 2008, the chair of the NHRC of India announced that his NHRC proposes to organize a conference on capacity building of NHRI for the countries belonging to the South Asian Association of Regional Cooperation (SAARC) in an attempt to share experiences and broaden understanding of human

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\(^75\) Gil and Muzaffar Dawson, *op.cit.* note 20, 53-55.
\(^76\) *Ibid.*, 60.
\(^77\) Conference Paper of the Conference of NHRIs of South Asian Countries on “Human Rights Awareness and National Capacity Building”, organized by the NHRC India in New Delhi on 16-18 April 2009, 20 and 40.
\(^79\) Both documents are available on the website of the NHRC of Nepal at <http://www.nhrcnepal.org>.
\(^80\) See <http://www.asiapacificforum.net>.
rights issues in the SAARC region.\textsuperscript{81} The meeting, which was the first of this kind, finally took place on 16-18 April 2009 in Delhi.\textsuperscript{82} The participating NHRI agreed to:

- work toward national capacity building through sharing of experience, information and best practices on human rights;
- take steps to promote human rights awareness, and toward this end, hold conferences at least once in two years, apart from exchanges of visits, training programs and bilateral or regional cooperation between the NHRIIs;
- work together to identify and cooperate on capacity building for dealing with human rights issues like human rights awareness, human trafficking and migrant labour;
- work collectively at UN fora, including the Human Rights Council, for an independent status for NHRIIs, distinct from NGOs;
- appeal to the respective governments to support and provide necessary wherewithal to NHRIIs to ensure that they become fully compliant with Paris Principles, which includes administrative and financial autonomy.\textsuperscript{83}

Although the exchange of experience and views as well as the organization of joint meetings and training courses should be a feasible endeavour, it is important for NHRC to function with fearlessness, with independence, also in the international cooperation. They must encourage states not to hide from international monitoring bodies but to cooperate with them unreservedly. To uphold universal standards must be the highest priority of NHRC.\textsuperscript{84} This is particularly true because for the time being, there is no regional mechanism for the protection of human rights. The question arises, whether the time is ripe for such a mechanism in South Asia. Some think that it is not realistic to believe that states could agree on such a mechanism in the near future. It is felt that the direction is rather the opposite: laws are being tightened, police are given increased rights to infringe on civil rights under the guise of fighting

\textsuperscript{81} Opening Remarks of Mr. Justice S. Rajendra Babu, Chairperson, National Human Rights Commission, India, chairing the session on “Regional Co-operation between National Human Rights Institutions”, 13\textsuperscript{th} Asia Pacific Forum Meeting, Kuala Lumpur (Malaysia), 28-31 July 2008.

\textsuperscript{82} Although an invitation to participate at least in the inauguration of this conference was extended to Indian NGOs, this invitation was not repeated after the conference had to be postponed. Gil and Muzaffar Dawson, \textit{op.cit.} note 20, 54.

\textsuperscript{83} Resolution of the Conference of NHRIIs of South Asian Countries on “Human Rights Awareness and National Capacity Building” at New Delhi on 16-18 April 2009, at <http://www.nhri.net/latest_news/nhrc.htm>, as well as in Gil and Muzaffar Dawson, \textit{op.cit.} note 20, 54-55.

\textsuperscript{84} Intervention of Virendra Dayal at the Conference of NHRIIs of South Asian Countries on “Human Rights Awareness and National Capacity Building” at New Delhi on 16-18 April 2009, on file with the author.
terrorism, impunity is not countered by courts with sufficient determination and the mistrust among states of the region is still widespread. Others consider that there still persist too many ways of thinking. Whereas in Europe, after the Second World War there was a strong political desire for an overarching understanding of human rights, in South Asia the situation is different. It is felt that the making of formal institutions has to be preceded by a greater accommodation on the political side and by more coherent ideas about the kind of standards that need to be protected.\textsuperscript{85}

Few are optimistic about the establishment of a South Asian human rights mechanism, albeit only in the middle term. The South Asian Centre for Human Rights has given some thought to the idea of a regional human rights document. It noted that the serious human rights problems encountered in South Asia show a high level of common patterns. Apart from an imperatively needed reform of the security forces, the judiciary must act against the compounding problem of impunity for human rights violations much more strongly. According to that study, the added value of a regional mechanism is in its “capacity to contextualize international standards and to enhance their cross-cultural appeal and applicability.” Such a mechanism could “address human rights issues of particular shared concern in the SAARC region.” The study, therefore, recommends the SAARC countries to “establish a Working Group of Eminent Persons of South Asia to explore the possibility of drafting a South Asia Human Rights Convention with full and active participation of civil society groups and other stakeholders”. The study further recommends NHRI in South Asia to establish a South Asian subregional mechanism.\textsuperscript{86}

During the following SAARC Summit in Colombo, Sri Lanka, from 27 July to 3 August 2008, nothing like that was established or even discussed. SAARC has so far been reluctant in labeling the issues it is dealing with as human rights. There is no doubt about the fact that the SAARC Convention on Combating the Crime of Trafficking in Women and Children for Prostitution, its Convention on Regional Arrangements on the Promotion of Child Welfare in South Asia as well as the Social Charter are human rights related.\textsuperscript{87} What is more, the president of the Maldives asserted during the 13\textsuperscript{th} SAARC summit in 2005 that “it is time that an autonomous

\textsuperscript{85} Interview with Virendra Dayal and Colin Gonsalves.
\textsuperscript{87} For more on these Conventions and the organization in general, see the article of Ugo Caruso in this volume.
SAARC Centre for Human Rights, based on civil society, is established. Such a Commission could promote international standards, facilitate co-operation among lawyers and jurist, and share expertise and resources in the advocacy of human rights and democracy in the region.\(^8^8\)

Not dealing with sensitive issues among the member states, which allows for more friendly cooperation seems, however, to be an approach which still persists in the organization. Consequently, SAARC has played no role so far in forging regional guidelines or a regional platform for the work of the NHRIs in South Asia.

The second recommendation of the Asian Centre for Human Rights addressed to the NHRC requested them to establish a South Asian subregional mechanism; this can also be implemented only with the participation of the states. However, even if the cooperation of NHRC, as started with the first meeting in 2009, should not receive an institutional roof any time soon, it is already a first step toward approaching the many viewpoints on human rights issues persisting in the various countries.

\(^{88}\) Quoted in Asian Centre for Human Rights, *op.cit.* note 86, 184.
As the presentation of the functional preconditions and day-to-day challenges of the NHRC of India and Nepal have shown, one can conclude that the problems both commissions are dealing with are, to a large extent, similar. In both countries, widespread impunity for human rights violations persists. Regarding Nepal, one is tempted to look for explanations by pointing to the fact that it is a young democratic state which has only recently ended a war and is still struggling to set up functioning structures. Indeed, it has been said that the problem in Nepal is not so much that the state violates human rights but the absence of the state. The point of departure of India is different: it has been an established democracy for more than 60 years. Nevertheless, the state has not managed to operationalize the principles as laid down in the constitution and break impunity. Of course, the NHRC of India and Nepal cannot be the left alone with the burden of fighting this state of affairs. However, some structural changes might help to deal with the Sysiphusian struggle.

First, the financial independence and autonomy of both institutions must be ensured. It would be a missed opportunity for Nepal, if the upcoming Act regulating the NHRC would be reluctant to speak out clearly in that sense. Regarding the Indian Commission, the fact that its entire staff is seconded by the government needs serious reconsideration. Second, both Commissions need to take the principles of plurality and transparency more seriously and, among other considerations, give room for the appointment of representatives of NGOs or human rights organization to the commission.

In the case of India, a better coordination between the NHRC and the State HRC would further be recommendable. First of all, State Human Rights Commissions should be set up in all states. They should further be strengthened in terms of qualified staff and independent Commissioners and be conceived at sort of “first instance” commissions. This might lower the number of complaints filed with the National Human Rights Commission. The NHRC could still serve as a kind of appeal Commission but would have more time to dedicate to conceptual work and proposals for systemic change. Alternatively, it could be envisaged to establish regional offices of the NHRC whose staff could carry out investigations on behalf of the NHRC, could be present during the interrogations of suspects to make sure that no inhuman or...
degrading treatments take place, and could more regularly visit prisons or clinics in which people are detained for the purpose of treatment to see how detainees are kept. They could furthermore engage in awareness raising activities covering a wider geographical scope than what is possible from the centre in Delhi.

A closer cooperation with other human rights institutions would also be beneficial for the sake of not only reducing the workload of the NHRC but also for ensuring a coherent jurisprudence throughout the human rights institutions of the country. A better and coordinated outreach of human rights institutions—an issue equally important for Nepal—would also contribute to an increasing awareness by people of the role and function of each commission. In this way, it could be avoided that the Commission is getting a high number of complaints for which it is not responsible.

In terms of regional cooperation, it is encouraging to see the interest of the NHRI of South Asia to work together in improving their work and promoting the awareness of human rights. Although it seems unrealistic to expect that a regional human rights mechanism will be established any time soon, all efforts in that sense are to be strongly supported. The NHRC of South Asia, in cooperation with the civil society sector, could play an important role, first, by engaging in serious discussions including experts and human rights activists on possible differences and obstacles hindering a common approach in human rights issues so far, and second, by pushing their respective governments as well as SAARC toward putting human rights issues high on the agenda of all states involved and starting a debate on such an instrument at the governmental level. An improved functioning of National Human Rights Institutions in South Asia could thus, if not create heaven on earth, be a major blessing in helping to keep away the furies of hell.90

90 Dayal, op.cit. note 84, inspired by Dag Hammarskjold who said: “The UN was not created to take earth to heaven, but to save it from going to hell!”
Ugo Caruso

Comprehensive Security in South Asia: SAARC and the Applicability of OSCE Standards

I. INTRODUCTION

Today, the presence of specific regional mechanisms is relevant to the management of human and minority rights issues. This is of particular importance for South Asia, a region where, despite the existing regional institutional framework provided by the South Asian Association for Regional Cooperation (SAARC), a mechanism dedicated to the protection of human and minority rights is still missing. This research aims to contribute to the academic discussion on the applicability of European experiences and the implementation of higher standards of protection within the South Asian context by investigating whether the experience of the Organization for Security and Cooperation in Europe (OSCE) is relevant to future possible SAARC developments. To that end, a detailed study of SAARC structure and legal instruments will emphasize the difficulties encountered by the association in its implementation process. The results of such a study should contribute to an assessment of whether a comprehensive OSCE-style security-oriented approach would be suited to a SAARC regional instrument for human and minority rights protection.

II. AN OVERVIEW OF SAARC

A. SAARC Structure and Decision-Making Bodies

The South Asian Association for Regional Cooperation was established in December 1985, with the formal adoption of its charter by its seven founding members—namely Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. The association is committed, inter alia, to promoting the welfare of the people of South Asia and to improving their quality of life; to accelerating economic growth, social progress and

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cultural development in the region; and to providing all individuals with the opportunity to live in dignity and to realize their full potential.\(^1\) In 2005, official membership was extended to Afghanistan, which become the eighth official SAARC member state.

Cooperation within the framework of the association is governed by respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of other states and mutual benefit.\(^2\) However, it is foreseen that SAARC regional cooperation should complement rather than substitute bilateral and multilateral cooperation, and should not be inconsistent with bilateral and multilateral obligations.\(^3\) According to Article 10 of the SAARC Charter, decisions are taken on the basis of unanimity and no bilateral and contentious issues can be included in the deliberations.\(^4\) Informal political consultations can also be undertaken with the aim of enhancing political cooperation.\(^5\)

As to its internal structure, SAARC operates through meetings of heads of state or government, held on an annual basis or more frequently if deemed necessary by the member states.\(^6\) The association also has a Council of Ministers, generally convened twice a year, and mandated to formulate policies and review the progress of cooperation.\(^7\) A Standing Committee of Foreign Secretaries is responsible for overall monitoring and coordination, and for projects and financing approval. Technical committees are responsible for the implementation, coordination and monitoring of

\(^{1}\) As from the Art. 1 of the SAARC Charter, the remaining objective of the association shall be: “to promote and strengthen collective self-reliance among the countries of South Asia; to contribute to mutual trust, understanding and appreciation of one another’s problems; to promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields; to strengthen cooperation with other developing countries; to strengthen cooperation among themselves in international forums on matters of common interests; and to cooperate with international and regional organizations with similar aims and purposes.”

\(^{2}\) See Art. 1(b) of the SAARC Charter, Dhaka, Bangladesh, 8 December 1985.

\(^{3}\) Ibid., Art. 2.


\(^{7}\) The Council of Ministers can establish additional mechanisms within the SAARC structure. See Art. 4 of the SAARC Charter, op.cit. note 2.
the programme in their respective areas of cooperation, and action committees can also be created to oversee implementation of projects involving more than two, but not all, member states.

Coordination and implementation of SAARC activities and decisions fall under the responsibility of a poorly staffed SAARC secretariat, established in 1987 in Kathmandu, Nepal, which functions as an interlocutor between the association and other international organizations. The SAARC secretary general has repeatedly requested that SAARC member states strengthen the secretariat and furnish it with sufficient resources to cope with a significantly expanded agenda. In addition, SAARC regional centres have been set up on the basis of key priority areas for the region, such as agriculture, tuberculosis, documentation, meteorological research, and human resources development.

Although SAARC’s early years were devoted to its institutional establishment and development, on the occasion of the 3rd SAARC summit in Kathmandu in November 1987 its members promptly agreed to move away from a focus on internal structures and to expand the association’s activities into concrete areas of cooperation. The focus was then on ensuring “more tangible benefits from SAARC to the people of the region”; SAARC leaders believed that the association’s long-term perspective should be to focus on the formulation and implementation of more concrete and action-oriented programmes to expand and strengthen areas of regional cooperation.

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8 For instance, the Committee on Economic Cooperation, composed of secretaries of commerce, supervises economic regional cooperation.

9 See Art. 7 of the SAARC Charter, op.cit. note 2. For instance, the South Asian Growth Quadrangle (SAGQ) comprising Bhutan, Nepal, the North-Eastern part of India and Bangladesh, was endorsed by the 9th SAARC Summit of May 1997 as a subregional initiative under SAARC.

10 The secretariat comprises the secretary general, several directors, and the general services staff. The secretary general is appointed by the Council of Ministers on the principle of rotation, for a non-renewable tenure of three years.


12 The regional centres are: the SAARC Agricultural Information Centre (SAIC) in Dhaka, the SAARC Meteorological Research Centre (SMRC) in Dhaka, the SAARC Tuberculosis Centre (STC) in Kathmandu, the SAARC Documentation Centre in New Delhi, the SAARC Human Resources Development Centre (SHRDC) in Islamabad, the SAARC Information Centre in Nepal, the SAARC Costal Zone Management Centre (SCZMC) in Male, the SAARC Forestry Centre in Thimphu, the SAARC Disaster Management Centre in New Delhi, the SAARC Energy Centre in Islamabad, and the SAARC Cultural Centre in Colombo.


14 See the 3rd SAARC Summit Declaration, Kathmandu, Nepal 12-14 November 1987, 19.
and to better coordinate national policies and approaches to common regional problems.\footnote{Lohani, \textit{op. cit.} note 13, 165.}

Although well established on paper, SAARC has faced numerous obstacles in moving from declaration to implementation, and numerous shortcomings in the SAARC institutional infrastructure have emerged. For instance, though the SAARC Charter, in Article 3, clearly declared that “the Heads of State and Government shall meet once a year or more often as and when considered necessary by the member states”, in SAARC’s 25-year lifespan only 15 summits have been held.\footnote{See Art. 3 of the SAARC Charter, \textit{op. cit.} note 2. The annual SAARC summits should in any case be considered an excellent confidence-building opportunity towards achieving a better understanding of the respective member states’ position in the region.}

Curiously, in spite of ex-Article 10 of the SAARC Charter, which explicitly stated that “bilateral and contentious issues shall be excluded from the deliberations”, bilateral and political issues were most the common reason for postponing SAARC summits.\footnote{See Art. 10 of the SAARC Charter, \textit{op. cit.} note 2.}

Previously, India-related issues were the main reason for postponement; the postponement of the 11th SAARC summit, for instance, demonstrates the dominant position of India–Pakistan bilateral issues \textit{vis-à-vis} other SAARC member states.\footnote{It is worth recalling that the 5th summit was postponed because of the reluctance of Sri Lanka to host the event in spite of the continued presence of the Indian Peacekeeping Force (IPKF) in its territory. The 6th summit was postponed because of the Bhutanese political problems coming from the expulsion of Lhotsampas from Southern Bhutan. The 7th summit was postponed because of security concerns expressed by the Indian government after the demolition of the Babri Mosque in the state of Uttar Pradesh in December 1992.}

Due to its gag on bilateral and contentious issues, the association has been heavily constrained in its ability to contribute in a valuable way to a discussion of sensitive regional issues, such as terrorism.\footnote{See Mohsin, \textit{op. cit.} note 5.}

This policy of non-interference, and the continuous delaying of SAARC summits, has raised questions about the credibility of the SAARC process, and about the advisability of decision-making by unanimity.

A more substantial evaluation of the work of SAARC suggests that coordination, monitoring and implementation occur outside the framework of a responsible dedicated entity within the SAARC structure. The effective dispensation of time and
resources is a recurrent problem in the implementation of SAARC activities, as are persistent duplication of efforts and the lack of a culture of accountability.\textsuperscript{21} 23 years after its inception, on the occasion of its 15th summit, South Asian leaders were still emphasizing the need to consolidate and ensure effective implementation of all SAARC programmes and mechanisms.\textsuperscript{22} In this context, it should be recalled that although the declaration of the 1st SAARC summit formally recognized that the existence of a peaceful and secure region was a prerequisite for achieving all subsequent SAARC objectives, the association has never embarked on security-related activities.\textsuperscript{23} On human rights issues, for instance, there has been no concerted efforts to tackle this matter effectively, apart from a collective resolve expressed at the 1997 Male summit “to take all necessary steps to achieve the objective of promoting and protecting human rights”.\textsuperscript{24} Besides, though specific studies have been conducted on determinate issues, for instance the SAARC Regional Multimodal Transport Study (SRMTS), no studies have been conducted on the state of human and minority rights in South Asia.\textsuperscript{25}

By contrast, developments have occurred at the international level. The association has granted observer status to several countries, including China, Japan, South Korea, Iran, Mauritius, USA, Australia and Myanmar.\textsuperscript{26} The same status was also granted to several United Nations (UN) entities, as well as to international financial bodies and organizations.\textsuperscript{27} In addition, regular dialogue with other regional organizations such as

\textsuperscript{21} See Institute of Policy Studies (IPS), Sri Lanka, \textit{Assessing and Reformulating SAARC Road Map}, SACEPS Paper No. 18 (South Asia Centre for Policy Studies (SACEPS), Kathmandu, Nepal, December 2008), 49.

\textsuperscript{22} See the 15th SAARC Summit Declaration, Colombo, Sri Lanka, 2-3 August 2008, Art. 4. See also Anjan Shakya, “The Challenges and Opportunities of SAARC”, in Pokharel \textit{et al.}, \textit{op.cit.} note 13, 206.

\textsuperscript{23} See the 1st SAARC Summit Declaration, Dhaka, Bangladesh, 8 December 1985, Art. 4.

\textsuperscript{24} See, the 9th SAARC Summit Declaration, Male, Maldives, 12-14 May 1997, Art. 63.

\textsuperscript{25} For further information about the SRMTS, see Mahendra Lama, “Monitoring of SAARC Policies and Programmes”, SACEPS Policy Paper No. 18 (SACEPS, Kathmandu, 2008), Art. 53.

\textsuperscript{26} See Shakya, \textit{op.cit.} note 22, 209.

\textsuperscript{27} Memoranda of understanding have been signed to promote collaboration with the: United Nations Conference on Trade and Development (UNCTAD), United Nations Children’s Fund (UNICEF), United Nations Development Programme (UNDP), United Nations Economic and Social Commission for Asia and Pacific (UNESCAP), United Nations Drug Control Programme (UNDCP), International Telecommunications Union (ITU), World Health Organization (WHO), United Nations Fund for Women (UNIFEM), Canadian International Development Agency (CIDA), European Union (EU), World Bank, Asian Development Bank (ADB), Joint United Nations Programme on HIV/AIDS (UNAIDS) and South Asia Cooperative Environment Programme (SACEP). Guidelines and procedures for establishing fruitful cooperation with UN and its agencies as well as ASEAN, the EC and the ADB were agreed in 1992 against the background of the 6th SAARC summit. See Report by the Secretary General to the 17th Session of the Standing Committee, Dhaka, Colombo, 7-9 December 1992, in SAARC Documents, “Milestones in the Evolution of Regional Cooperation in South Asia”, Vol. IV
the Association of South-East Asian Nations (ASEAN), the Economic Cooperation Organization (ECO) and the Pacific Islands Forum Secretariat (PIFS) have been held with the aim of promoting cooperation among subregional organizations.\textsuperscript{28} Finally, SAARC was granted observer status with regard to the UN at the 59th General Assembly session.\textsuperscript{29} Although these development have expanded the scope of SAARC’s framework for international and regional collaboration, formal comprehensive guidelines for constructive and mutually beneficial cooperation with the observers are still missing.\textsuperscript{30} The absence of defined parameters for cooperation has proved detrimental in moving beyond the simple exchange and capacity-building programmes agreed with some of the observers to date.\textsuperscript{31} The same concerns have already been expressed by the secretary general of SAARC who stated, in 2004, that collaboration with states outside the region could not be entertained in the absence of modalities or institutional mechanisms for defining such relations.\textsuperscript{32}

B. An Attempt to Revitalize the SAARC Process: The SAARC Group of Eminent Persons

In 1997, in a significant development during the 9th SAARC summit, its leaders commissioned a 12-member Group of Eminent Persons (GEP), consisting of independent and experienced personalities from the member states, to undertake a comprehensive appraisal of SAARC and identify measures to enhance the effectiveness of the association in achieving its objectives. Tasked with evaluating SAARC’s performance from its inception, it’s the GEP submitted a report to the 10th summit in Colombo, in which it examined various options for revitalizing the SAARC process and tried to develop a long-term vision for the association for the year 2000 and beyond.\textsuperscript{33} The report also included a comprehensive package to manage

\textsuperscript{28} See Iqbal, \textit{op.cit} note 4, 137.

\textsuperscript{29} See the 13th SAARC Summit Declaration, Dhaka, Bangladesh, 12-13 November 2005, Art. 49.

\textsuperscript{30} See Deepak Dhital, “The Importance of Project-Based Cooperation in SAARC”, in Pokharel \textit{et al.}, \textit{op.cit.} note 13, 68.

\textsuperscript{31} \textit{Ibid.}, 69.


\textsuperscript{33} In order to facilitate the work of the group, the secretariat of SAARC prepared and presented a comprehensive set of background papers: among the others a paper on “SAARC—An Overview of Achievements and Challenge Ahead”, a paper on “Poverty Eradication—the SAARC Dimension”, and
SAARC’s transition from a free trade area to a customs union by 2010, and to an economic union by 2020.\textsuperscript{34} Although it noted positive achievements—for instance, the successful establishment of schemes for promoting greater personal contact, and the development of systems for exchanging information and sharing experiences under the so-called “Integrated Plan of Action (IPA)” —the GEP also highlighted the main evolutionary difficulties faced by the association.\textsuperscript{35} In particular, the GEP noted that the gradual development of a comprehensive agenda for the association led to growing concerns about the social aspect of SAARC evolution and recommended the development of a social charter.

Broadly speaking, the GEP was of the opinion that SAARC’s achievements over the years, while significant, have fallen short of its founding objectives. Too often, cooperation has been hindered by a lack of political will and hampered by periodic political bilateral confrontations.\textsuperscript{36} Furthermore, the GEP agreed that, despite the positive developments noted, SAARC was still very far from maturing as a regional economic grouping. It felt that progress made through negotiations under the South Asian Preferential Trade Agreement (SAPTA) had been very limited, and SAARC countries had consequently failed to develop collective leverage in global economic negotiations or to constitute an effective voice in global economic fora. Overall, the GEP was of the opinion that the association had made little headway in realizing its primary objectives, namely to promote the welfare of the peoples of South Asia and to improve their quality of life. Even on the IPA, the GEP was unanimous in its opinion that the impact of activities carried out under its auspices had been compromised by an \textit{ad hoc} selection process, the short-term nature of those activities, and their inability to generate and implement regional programmes for harnessing South Asian countries.\textsuperscript{37} The GEP concluded its report by stressing the need to reinforce member state commitment to moving “beyond formalistic proclamations” and attaining


\textsuperscript{35} The GEP went further in identifying the elements of a possible plan of action for the SAARC agenda, along with a set of recommendations for consideration. For further information, see Mohsin, \textit{op.cit. note} 5, 38-39.

\textsuperscript{36} See SAARC Group of Eminent Persons (EGP), SAARC Vision beyond the year 2000 \textit{op.cit} note 34, 15.

\textsuperscript{37} \textit{Ibid.}, 16.
effective formal implementation of the fundamental goals and objectives set out in the SAARC Charter.\textsuperscript{38}

Though a committed approach was strongly recommended by the GEP, the report was never given appropriate consideration; it was never even fully discussed at the inter-governmental level, let alone endorsed in its entirety.\textsuperscript{39} Efforts to implement the recommendations set out in the report were undertaken only on an \textit{ad hoc} basis.\textsuperscript{40}

Furthermore, contrary to the suggestions formulated in the GEP report, SAARC member states made no pledge at the summit level to provide adequate human resources to the secretariat or existing national focal points (NFPs).\textsuperscript{41}

C. SAPTA, SAFTA and the Future South Asian Economic Union

The preferential trade agreement was signed in 1993 and entered into force on 7 December 1995. Overall reciprocity and mutual advantage were the basic principles for pursuing equitable benefit for all SAARC member states, and negotiation of a tariff regime was to be achieved through a step-by-step process and periodic reviews. However, SAPTA was confined solely to the issue of tariff cuts. Significant trade imbalances were recurrent between member countries and intra-SAARC trade was usually of a bilateral nature.\textsuperscript{42}

In 2002, the association considered the possibility of developing a free trade regime in South Asia. Then, at the 12th SAARC summit in 2006, South Asian leaders took the pragmatic initiative to adopt a framework arrangement on a South Asian Free Trade Agreement (SAFTA), together with other major decisions such as an additional protocol to the SAARC Convention on Suppression of Terrorism and a SAARC Social Charter.\textsuperscript{43} SAFTA agreed to eliminate barriers to trade, facilitate the cross-border movement of goods, promote conditions of fair competition and ensure equitable benefits for all contracting states. Furthermore, since the ultimate goal of

\textsuperscript{38} Ibid., 18.

\textsuperscript{39} By that time, the Council of Ministers requested the SAARC Secretary General to glean the report and extract measures that could be implemented at the high level. The report prepared by the SG and endorsed by the Standing Committee of the Foreign Secretaries were considered “inappropriate” by the Council of Foreign Ministers and sent back to be presented again in 1998. For further information, see Sridhar K. Khatri, “Vision and Strategy for a Third Decade of SAARC”, in Pokharel \textit{et al.}, \textit{op.cit.} note 13, 185.

\textsuperscript{40} See South Asia Centre for Policy Studies (SACEPS), \textit{SACEPS Focus on South Asia Vol. 1 No. 1} (SACEPS Newsletter, Kathmandu, Nepal, January 2009), 1.

\textsuperscript{41} See Institute of Policy Studies (IPS), \textit{op.cit.} note 21, 50.

\textsuperscript{42} See Lama, \textit{op.cit} note 25, 22.

\textsuperscript{43} See Mohsin, \textit{op.cit.} note 5, 37-38.
SAARC was the creation of the South Asian Economic Union, preferably by 2020, SAFTA was actually concluded and signed very quickly, although it was acknowledged that the kind of treaty required to cover “substantially all the trade” under Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 was still a way off.\textsuperscript{44} At the 15th SAARC summit in 2008, leaders pledged to improve and implement SAFTA by taking concrete measures to improve trade, including mutual recognition of standards, the adoption of common tariff nomenclatures and the harmonization of customs procedures.\textsuperscript{45}

Despite significant efforts, SAFTA has yet to become fully operational. Although the region is experiencing high economic growth, intraregional trade rate is less than 5% of the total regional trade.\textsuperscript{46} Moreover, representation of the private sector within the SAPTA–SAFTA negotiations and implementation process has been minimal.\textsuperscript{47}

\textbf{D. IPAs, Poverty Eradication Activities and the Decade of Implementation}

The respective foreign ministers, at their first meeting in New Delhi in August 1983, formally launched the first SAARC Integrated Programme of Action in particular areas of cooperation such as agriculture and rural development health and population activities; women, youth and children; environment and forestry; science and technology and meteorology; human resources development; and transport. High-level working groups were also established to strengthen cooperation in information and communication technology, biotechnology, intellectual property rights, tourism, and energy. Each IPA is implemented through a technical committee, established to help member states build up or reinforce their national capabilities in identified IPA areas; committees can also undertake coordinated programmes and activities at the national and regional levels.\textsuperscript{48}

However, practice has indicated that technical committees have been unable to coordinate and harmonize their work, leading to duplication and compartmentalization of activities.\textsuperscript{49} In 1992, the Standing Committee of Foreign Secretaries further observed that “[m]any of these [IPAs] fell short of achieving their

\textsuperscript{44} Ibid., 38-39.
\textsuperscript{45} See the 15th SAARC Summit Declaration, Colombo, Sri Lanka, 2-3 August 2008, Art. 27.
\textsuperscript{46} See Gyan C. Acharya, “SAARC: A Nepalese Perspective”, in Pokharel et al., \textit{op.cit.} note 13, 102.
\textsuperscript{47} See Lama, \textit{op.cit.} note 25, 24.
\textsuperscript{48} The Technical Committees were reduced from eleven to seven under the reconstituted SAARC Integrated Programme of Action (IPA) of 2000.
\textsuperscript{49} See Lama, \textit{op.cit.} note 25, 4.
intended purpose due to various reasons, including inadequate preparation, inappropriate representation and lack of adequate follow-up on the part of Member States.\textsuperscript{50} The same standing committee also labelled SAARC mechanisms for effective coordination, particularly between sectors at the national level or between the technical committees at the regional level, as inadequate.\textsuperscript{51}

In 1998, an Independent Expert Group on IPA was constituted to review the functioning of the IPAs. In its report, the group observed that much of the energy and resources dedicated to implementation had been directed towards short-term activities, with limited impact, and that inadequate attention had been paid to ensuring relevance and sustainability. Moreover, the group identified severe resource shortages, a lack of internal coordination and non-implementation of decisions as some of the key impediments adversely affecting the performance of the IPAs.\textsuperscript{52} The process for monitoring and evaluating IPAs was also criticized for not having been conducted on a continuous basis.\textsuperscript{53}

On poverty-related issues, at the 6th Summit in Colombo SAARC leaders created the Independent South Asian Commission on Poverty Alleviation (ISACPA), mandated to conduct an in-depth study of the diverse experiences of poverty alleviation among the seven countries. At the 7th summit in Dhaka, ISACPA presented a report entitled “Meeting the Challenge”, which aimed to tackle the scourge of poverty in South Asia. Among other issues, the report acknowledged that in many cases conflict and militancy were at least partially the result of the inability of regional economies to grow rapidly enough to satisfy the newly-awakened aspirations of the people.\textsuperscript{54} The same report also noted the ad hoc nature of consultations held with the poorest groups in each country and the absence of comprehensive social mobilization programmes to enable South Asian populations to contribute to regional growth and human


\textsuperscript{51} Ibid., (h), 56.


\textsuperscript{53} See SACEPS, Recommendation to the 15th SAARC Summit (SACEPS, Colombo, 2008), 16.

development. By adopting the ISACPA report, SAARC leaders pledged to halve poverty by 2002 through the adoption of an Agenda of Action which would, inter alia, embrace the implementation of proper development strategies at the macro and micro levels.\textsuperscript{55}

In 1995, the 8th SAARC summit approved the establishment of a ‘three-tiered mechanism’ for dealing with poverty issues. That mechanism was composed of a first tier, comprising the secretaries of the governments concerned with poverty eradication and social development in SAARC countries; a second tier involving finance/planning secretaries; and a third tier consisting of finance/planning ministers. However, at the 11th SAARC summit in 2002, the first and unrealistic deadline for poverty reduction was adjusted, and it was actually agreed that the Independent South Asian Commission on Poverty Alleviation (ISACPA) would be reconvened to review progress made in cooperation on poverty alleviation and to suggest further appropriate and effective measures. The reconstituted ISACPA finalized its report, entitled “Our Future Our Responsibility. Road Map towards a Poverty Free South Asia”, in December 2002.

On minority issues, the 2002 report properly underlined the minimal effective representation of minorities in local government bodies and their lack of access to a number of basic social services, and noted minimal participation in economic and political activities by disadvantaged groups such as schedule castes, ethnic, racial and linguistic minorities, indigenous people and refugees.\textsuperscript{56} In January 2004, the 12th SAARC summit commended the work of the commission, and decided that ISACPA should continue its advocacy role and set out a series of ‘SAARC Development Goals (SDGs)’ in the areas of poverty alleviation, education, health and environment, with a blueprint for their implementation over the next five years.\textsuperscript{57} In 2004, the commission submitted its report, “An Engagement with Hope”, in which it identified 22 such SDGs.\textsuperscript{58} SDG 6 on “Reducing social and institutional vulnerabilities of the poor,

\textsuperscript{55} See Lohani, \textit{op.cit.} note 13, 166. For further information about the Agenda of Action see the 7th SAARC Summit Declaration, Dhaka, Bangladesh, 10-11 April 1993, Art. 10.
\textsuperscript{56} See Independent South Asian Commission on Poverty Alleviation (ISACPA), \textit{Our Future Our Responsibility. Road Map towards a Poverty-Free South Asia} (SAARC, 2003), 27 and 68.
\textsuperscript{57} See the 12th SAARC Summit Declaration, Islamabad, Pakistan, 4-6 January 2004, Art. 13. The summit went further to declare poverty alleviation as “the overarching goal of all SAARC activities”.
women and children” dealt with “disadvantages suffered by marginalized and socially excluded people”.  
In January 2007, the ISACPA then finalized the SDG indicators in its report, “Taking SDGs Forward”. The report, endorsed by the 14th SAARC summit, actually included representation of excluded group (dalits/tribals/indigenous people) within local governance structures among the indicators of Goal 6. Furthermore, access to free legal aid for marginalized groups was among the indicators of Goal 7, to “Ensure access to affordable justice”. As suggested by the ISACPA report, SDGs will only serve their purpose if governments pay due attention to the observed gaps and to the changes needed to safeguard the rights of everyone, especially the poorest and most vulnerable groups. Although the formulation of SDGs did indeed represent a valuable effort to localize the UN Millennium Development Goals (MDG), the implementation of their indicators and monitoring mechanisms has yet to be properly established in practice. In this context, an officially agreed timeframe for the implementation of each target/sub-targets at the country level would certainly help to internalize the SDGs within respective national planning processes.  
In 2005, during the 13th summit in Dhaka, SAARC leaders declared 2005-2015 to be the “SAARC Decade of Poverty Alleviation”; in this context, a two-tiered mechanism consisting of ministries and secretaries replaced the former and ineffective three-tier mechanism, and was mandated to serve “as an exclusive forum for focused and comprehensive examination of poverty-related issues”.

The summit went further, calling for the association to “focus on formulation and implementation of concrete regional programmes and projects”. Simultaneously, the so-called ‘SAARC Development Fund (SDF)’ was established as an umbrella financial institution for all SAARC projects and programmes, and to attempt to overcome the shortcomings of the previous South Asian Development Fund (SADF). Finally established in August 2008 at the 15th summit meeting, the SDF operates through three distinct ‘windows’:
the Social Window, focused on poverty alleviation and social development; the Infrastructure Window, covering projects in areas such as energy, power, transportation, telecommunications, environment and tourism; and the Economic Window devoted primarily to non-infrastructure funding. Furthermore, SDF could mobilize and generate funds from both internal and external sources. SAARC leaders recommended that the Social Window of development be put into practice at the earliest possible occasion.

As noted above, in April 2007 SAARC heads of state and government emphasized that, in the third decade of its existence, SAARC should move urgently from a declaratory to an implementation phase; this official sentiment heralded the arrival of the popularly labelled “SAARC Decade of Implementation”. In this normative context of refocusing the association on results-based work, there were also calls for a review of existing SAARC mechanisms, its secretariat and its regional centres. It was also foreseen that the ‘Third Decade’ would contribute to a dynamic following up of the relationship between SAARC and the national authorities responsible for the implementation of SAARC conclusions.

III. SAARC LEGAL INSTRUMENTS OF PROTECTION

A. The SAARC Regional Convention on Suppression of Terrorism

Signed at the 3rd SAARC summit in Kathmandu in November 1987, the SAARC Regional Convention on Suppression of Terrorism (SRCST) came into force on 22 August 1988 upon ratification by all member states. A SAARC Terrorist Offences Monitoring Desk (STOMD) was established in Colombo in 1995, and mandated to collate, analyse and disseminate information about terrorist incidences, tactics,
strategies and methods. It was also to update the convention to meet the obligations incumbent upon member states as a result of UN Security Council Resolution 1371 (2001) and the International Convention for Suppression of Financing Terrorism. Additionally, at the 12th summit in Islamabad in January 2004, SAARC member states supplemented the SRCST with an Additional Protocol, which sought to strengthen the convention by criminalizing the provision, collection or acquisition of funds for the purpose of committing terrorist acts. The Additional Protocol came into force on 1 January 2006 following ratification by all SAARC member states.

However, implementation of the convention and its additional protocol yielded poor results, and raised the issue of the effectiveness of the two legal instruments. Bilateral difficulties in interstate relations were seen to result from a lack of sincerity and commitment to the regional goal of suppression of terrorism. Furthermore, as already highlighted in the GEP report, some of the countries were very late to enact the enabling national legislation giving effect to the convention. In fact, these unexpected delays were identified as the major obstacle to implementation of the convention as a whole. In 2001, the then secretary general released an analytical report to the 27th session of the Standing Committee opining that “the implementation of the SAARC Convention on the Suppression of Terrorism and the related Convention on Narcotic Drugs and Psychotropic Substances has not been effective”.

A year later, SAARC leaders reiterated the need to “accelerate the enactment of enabling legislation within a definitive time-frame for the full implementation of the Convention”. In 2005, the 13th SAARC summit declaration spelt out member state agreement on the early and effective implementation of the additional protocol to the

75 Following the SAARC Legal Experts Meeting in 1999, three key elements were identified for successful implementation of the convention: 1) creation of offences listed in Art. 1 of the convention as extraditable offences under SAARC members’ domestic law; b) treatment of such offences as “non-political offences” for the purposes of extradition; c) ensure of extraterritorial (criminal) jurisdiction in the event of extradition not being granted (Arts. 4-6).
76 See Art. 1 of the Additional Protocol to the SAARC Convention on Suppression of Terrorism, Islamabad 2004.
77 See Sugheeswara Senadhira, “China and South Asia: Possible Cooperation between SCO and SAARC”, in Pokharel et al., op.cit. note 13, 31.
78 See GEP, op.cit. note 34, 16.
80 Please refer to the 11th SAARC Summit Declaration, Kathmandu, Nepal, 2002, Art. 44. The same concern was expressed at almost all of the 15 SAARC summits to date.
convention. Yet in 2008, variations in the definition of terrorism and the absence of bilateral agreements on extradition were common elements of country-level implementation evaluations. This was exacerbated by the seemingly contradictory relationship between the prohibition of including bilateral and contentious issues within SAARC deliberations, and the strong crossborder and bilateral character of the terrorist acts in South Asia. For instance, India and Pakistan did not show much interest in implementing the convention because of their seemingly contrasting views on crossborder terrorism. Ambiguities in the implementation process were also encountered with regard to the 2004 additional protocol to the convention. The implementation of Article 17, for instance, was widely debated; as terrorists acts were usually grounded in ethnic and religious elements, the inclusion of the latter made the workability of the additional protocol even more difficult.

B. The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, and on Regional Arrangements for the Promotion of Child Welfare

The Convention on Preventing and Combating Trafficking in Women and Children for Prostitution was signed in 2002 to promote cooperation in the various aspects of prevention, interdiction and suppression of trafficking in women and children. The treaty also deals with the repatriation and rehabilitation of victims of trafficking, and prohibits the use of women and children in international prostitution networks. A specific Regional Task Force was established in 2006 to oversee implementation of the treaty; however, the convention is also experiencing operational difficulties at the country level. Furthermore, the convention was triggered by the general demand of

81 See 13th SAARC Summit Declaration, Dhaka, Bangladesh, 12-13 November 2005, Art. 38.
82 See Lama, *op.cit.* note 25, 11.
84 Art. 17 of the Additional Protocol to the Convention on the Suppression of Terrorism states that “the member countries are not under obligation to extradite or provide legal assistance if the requested state party has substantial ground to believe that extradition has been requested for the purpose to punish a person for his race, religion, nationality, ethnic group or political opinion and the request would cause prejudice to that person’s position for any of these reasons.” On this point, see Smruti S. Pattanaik, “Strategies for developing Comprehensive Security in South Asia”, in Pokharel *et al.*, *op.cit.* note 13, 148.
86 See Lama, *op.cit* note 25, Art. 22, 14.
NGOs and civil society organizations, but no effective roles were assigned to these organizations.\(^{87}\) To date, no serious regional follow-up initiatives have been taken.\(^{88}\) The Convention on Regional Arrangements for the Promotion of Child Welfare was signed in 2002, with the aim of forming appropriate regional arrangements to assist SAARC member states in facilitating, fulfilling and protecting the rights of South Asian children.\(^{89}\) As with the other conventions, its implementation has proved challenging, and to date no regional initiatives have been undertaken to that end.\(^{90}\) In July 2004, the SAARC secretary general was still asking remaining SAARC member states to expedite the ratification process.\(^ {91}\) One year later, however, SAARC heads of state and government expressed satisfaction that both conventions had been ratified by all member states.\(^ {92}\)

C. The SAARC Social Charter

The first mention of a SAARC social charter initiative was at the 10th summit, held in Colombo, Sri Lanka, in 1998. Six years later, the SAARC Social Charter was finally signed at the 12th Summit in Islamabad in 2004.\(^ {93}\) The charter has a broad range of objectives, including for instance poverty eradication, population stabilization, empowerment of women, youth mobilization, human resource development, and promotion of the rights and wellbeing of children.\(^ {94}\) Furthermore, the social agenda of SAARC is focused on addressing issues of population planning and disadvantaged groups.\(^ {95}\)

\(^{87}\) See South Asia Centre for Policy Studies (SACEPS), SACEPS Focus on South Asia Vol. 1 No. 1 (SACEPS Newsletter, Kathmandu, Nepal, January 2009), 10.


\(^{90}\) See Lama, op.cit. note 25,14.


\(^{92}\) See the 13th SAARC Summit, Dhaka, Bangladesh, 12-13 November 2005, 26. The two conventions entered into force on November 2005 after the last ratification by Nepal.

\(^{93}\) The 12th SAARC Summit Declaration mentioned that: “[W]e hail the signing of the SAARC Social Charter as a historic development, which would have a far-reaching impact on the lives of millions of South Asians. Issues covered under the Charter, such as poverty alleviation, population stabilization, empowerment of women, youth mobilization, human resource development, promotion of health and nutrition and protection of children are key to the welfare and well being of all South Asians.”

\(^{94}\) See the 12th SAARC Summit Declaration, Islamabad, Pakistan, 4-6 January 2004, Art. 18.

\(^{95}\) See Mohsin, op.cit. note 5.
Implementation of the charter is facilitated by national coordination committees (NCCs) or “appropriate national mechanism as may be decided in each country.”96 Furthermore, information on such mechanisms are exchanged between states parties through the SAARC secretariat, and at the regional level “appropriate SAARC bodies” are tasked with reviewing implementation of the charter. To ensure full workability of the provisions and a transparent broad-based participatory process, the charter also requires the formulation of national plans of action, or modification of any already in existence, by SAARC member states.97 South Asian leaders rightly concluded at the 13th SAARC summit that realizing the objectives of the charter would be crucial to enabling SAARC to meet the hopes and aspirations of the South Asian people and to visibly improve their quality of life. In this context, it was foreseen that national implementation efforts would be complemented by regional programmes and projects in areas requiring a collective regional response, while member states should expeditiously complete preparation of their respective national strategies and plans of action.98 On this point, in 2002 the SAARC secretary general stressed that the Social Charter was not intended to be merely declaratory but to serve as a means of promoting effective action.99 By 2007, however, implementation of the charter had to a large extent been left to civil society organizations. While directing NCCs to formulate concrete programmes and projects to complement national implementation efforts, the 14th SAARC summit declaration underscored the vital role to be played by civil society organizations in driving forward implementation of the Social Charter.100 Further exposing its fragile internal structure, SAARC was not able to address the absence of effective results in its implementation process, preferring to rely instead on support from external civil society organizations.

It should also be underlined that no monitoring instruments outside the official SAARC framework were in place at the time of writing. Additionally, many of the themes and targets of the Social Charter are common to those of the SAARC Development Goals (SDGs), indicating an apparent duplication of efforts and a

96 See Art. 10 of the SAARC Social Charter, Islamabad, Pakistan, 4 January 2004. The first meeting of the heads of NCCs was held in Islamabad, Pakistan, in 2006, to review the country-wise status on the preparation of the national plans of action to implement the charter.
97 ibid.
98 See the 13th SAARC Summit, Dhaka, Bangladesh, 12-13 November 2005, 23.
99 See Analytical Report by the SAARC Secretary General at the 27th Session of the Standing Committee, op.cit. note 80, 6, 335.
100 See the 14th SAARC Summit Declaration, New Delhi, India, 3-4 April 2007, Art. 7. For further information see Lama, op.cit. note 25, 201.
consequent misuse of SAARC resources. No clear institutional or operational mechanisms have been set up by SAARC to synergize the two sets of activities. Ultimately, although the Social Charter was conceived as an inclusive participatory process, most member states failed to involve policy makers and civil society in its implementation.

IV. COMPREHENSIVE SECURITY IN SOUTH ASIA

A. SAARC and the Rise of a New Regionalism

With the decline of the traditional security paradigm, which prioritized interstate military threats, the post-Cold War era has witnessed the increased ability of non-state actors to intervene in the global security architecture. The resultant shift in international approaches towards security has also impacted on regional systems of cooperation. The desire to reduce political and military conflicts through heightened economic interdependence, cooperation and integration, and the development of a notion of comprehensive security, has led to consideration of both traditional and non-traditional threats. Thus, the political, economic and sociocultural dimensions of security have come to be included within a new approach to security characterized by comprehensiveness. In this context, these substantial new security concerns have not only influenced the institutional development of international and regional organizations, but have contributed to the modelling of their tools and competences. Nowadays, systems of regional military cooperation—previously focused on external enemies or efforts to contain the risks of confrontation through regional arms control agreements and military confidence- and security-building measures—are increasingly characterized by regional institutions with a strong economic

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101 In August 2002, the proposal to form a committee on social cooperation to take stock of cooperation in the social sector was advanced by the SAARC secretary general. See Analytical Report by the SAARC Secretary General at the 28th Session of the Standing Committee, Kathmandu 19-20 August 2002, in SAARC Documents “Milestones in the Evolution of Regional Cooperation in South Asia”, Vol. VII (March 1999-January 2004), prepared by the SAARC secretariat, Kathmandu, Nepal, January 2004, 1, 348.

102 See Sridhar K. Khatri, Labour Migration, Employment and Poverty Alleviation in South Asia, SACEPS Paper No. 15 (SACEPS, Kathmandu, 2009), 33-35. On this point it is worth recalling that the document entitled “SAARC Vision 2015: An Agenda of Implementation for the Third Decade”, presented before the 5th Special Session of the Standing Committee invites “all stakeholders, including the private sector, Media and civil society organizations, including the NGOs, to contribute to the achievement of the objectives of the SAARC Social Charter”.

103 See Mahendra Lama, “SAARC Dynamics of Emerging New Regionalism”, in Pokharel et al., op.cit. note 13, 110.

character; in other words, regional economic cooperation or integration is increasingly regarded as having important security dimensions or implications. As illustrated by the European experience, economic cooperation may be initiated by a desire to reduce the probability of political or military confrontation between the states involved, but lead to a win–win situation in which common interests are realized under the auspices of a new framework of regional economic integration. Beyond the purely economic dimension, the regionalism of today has thus succeeded in broadening its security agenda to include both traditional and non-traditional security threats, thus creating a new comprehensive paradigm for security. This latter development, initiated in Europe through the comprehensive security framework developed by the OSCE in the 1990s, has incorporated economic and environmental issues alongside traditional political military security concerns and democracy and human rights.

Although primarily a European development, the Asian continent has also witnessed the evolution of similar, but distinct, trends. For instance, the experience of the Association of Southeast Asian Nations (ASEAN) clearly demonstrates how an Asian regional organization, originally created with an economic development agenda, was able to incorporate security-related functions; the recognized interconnectedness of economic development with peace and security issues can thus not be regarded as an exclusively European affair.

Since SAARC’s very inception, the close correlation between economic development and peace and security has been well understood; however, no initiatives have been undertaken to provide the association with early warning systems or crisis management tools. Though conscious of the importance of fostering mutual

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106 Ibid., 211.
107 Ibid., 212.
108 In 2004, ASEAN adopted a plan of action to establish an ASEAN security community with an early warning system and preventive diplomacy functions. These developments reflected a broadening and deepening concept of security, which now is widely viewed as including ‘human security’ and the interrelatedness between security, development and human rights. For further information see Craig Collins, Erik Friberg and John Packer, Overview of Conflict Prevention Capacities in Regional, Sub-regional and Other Inter-governmental Organisations (European Centre for Conflict Prevention, International Secretariat of the Global Partnership for the Prevention of Armed Conflicts, The Hague, 2006), 11.
109 It is worth recalling that at the 1st SAARC Summit Declaration: “The Heads of State or Governments reaffirmed that their fundamental goal was to accelerate the process of economic and social development in their respective countries through the optimum utilization of their human and
understanding and meaningful cooperation among member states for achieving its core objectives—peace, freedom, social justice and economic prosperity—the association has been unable to agree on a common framework for regional security.\footnote{110}{SAARC activities in this context continue to be characterized by the ongoing paradox, in which the primary position of the human security segment is recognized within the association’s charter, its objectives and its conventions, but here is a persistent absence of meaningful correspondence between the normative standards developed and their effective implementation at the country level. The real challenge for SAARC today is thus to develop a security policy that is capable of effectively balancing politico–military, economic, and human security issues.}

B. Comprehensive Security in South Asia

In the South Asian context, the partition and creation of nation-states had a long-lasting impact on the definition of state (in)security. The formation of states against a background of bloody partitions actually resulted in state security being prioritized high above human security. From the post-1947 period, for instance, states perceived their existence as a way of advancing their own politico–strategic objectives, and expanded the role of military security strategy within their external relations.\footnote{112}{See Pattanaik, \textit{op.cit.} note 84, 143. For instance, interstate wars between India and Pakistan in 1949, 1965, 1971 and the Sino–Indian war of 1962 made the states, and especially India and Pakistan, increasingly oriented towards military security.}

Consequently, interstate relations became increasingly oriented towards military security, creating a situation in which South Asian countries were forced to respond to post-Cold War realities by holding on to Cold War conceptions of security.\footnote{113}{See Khalida Ghaus, “The Changing Security Spectrum of South Asia: Consequences for SAARC”, in Pokharel \textit{et al.}, \textit{op.cit.} note 13, 159.}

However, with the decline of military confrontation in the region and the emergence of socioeconomic and political problems, states were slowly forced to develop a more
comprehensive approach towards security.\textsuperscript{114} On the importance of SAARC considering social dimension issues, the secretary general stated in his 2002 report to the 27th session of the standing committee that: “Economic growth figures do not guarantee overall national or regional development unless accompanied by social equity and effective measures of poverty alleviation. The promotion of economic growth, whether nationally or collectively, is, therefore, not an end in itself. It is intrinsically related to the region’s development agenda including its vital social and human dimensions.”\textsuperscript{115}

According to this scenario, the primary interest of South Asian in military security has hampered the development of SAARC, which since its inception has been characterized by the absence of a common security threat perception. The association’s prohibition on addressing bilateral and contentious issues also proved detrimental to SAARC’s regional institutional development: its security spectrum was trapped at both the intra- and interstate levels within the fragile confines of Indo–Pakistani rivalry.\textsuperscript{116} The situation is exacerbated by the growing importance of the religion–politics nexus in South Asia. Aside from their predominant role in the core conceptions of nation-states, religious values have frequently been invoked as justification for political action, triggering religious conflicts with demonstrated influence at the intra- as well as interstate level.\textsuperscript{117} Furthermore, on the issue of terrorism for instance, the coherent and effective implementation of standards previously agreed within the framework of SAARC proved extremely problematic, and the region was consequently exposed to international intervention, with no sizeable role for SAARC. On all these issues, little space was devoted to consideration of human security elements and, regrettably, SAARC member states continue to ignore the importance of the human security dimension, which paradoxically could play a pivotal role in channelling efforts to forge a comprehensive security paradigm for South Asia.\textsuperscript{118}

\textsuperscript{114} For instance, the open nuclearization of the India–Pakistan relationship caused both sides to argue for stability in their respective relations.

\textsuperscript{115} See Analytical Report by the SAARC Secretary General at the 27th Session of the Standing Committee, \textit{op.cit.} note 80, 5, 335.

\textsuperscript{116} See Hussain, \textit{op.cit.} note 105, 162.

\textsuperscript{117} \textit{Ibid.}, 159.

\textsuperscript{118} See Khalida Ghaus, “The Changing Security Spectrum of South Asia: Consequences for SAARC”, in Pokharel \textit{et al.}, \textit{op.cit.} note 13, 158.
In resolving this current state of affairs it could prove significant to work, with essential support from India, on the implementation of a new SAARC security regionalism, complete with effective crisis management tools and capable of generating a favourable win–win situation for all member states.\footnote{See Lama, \textit{op.cit.} note 104, 112-113.}

\section*{C. \textit{Comparison With and Lessons From the OSCE Experience}\footnote{Established as a multilateral forum to promote dialogue between east and west, the organization was first established as the Conference on Security and Cooperation in Europe (CSCE). Until 1990, the CSCE functioned as a series of meetings and conferences, at which norms and obligations were elaborated and information on their implementation was reported periodically. Determined to give more political impetus to the CSCE, it was agreed at the 1994 Budapest Summit that the CSCE would be renamed the Organization for Security and Cooperation in Europe (OSCE). The CSCE was built on political commitments without a founding legally-binding treaty; the change in name was an important political step but was not intended to revise its legal status. To date, the legal personality of the OSCE in public international law is very much debated. For further information, please see Sonya Brander, “Making a Credible Case for a Legal Personality for OSCE”, \textit{OSCE Magazine}, March-April 2009.}}

\subsection*{1. \textit{OSCE and SAARC Approaches towards Security}}

The OSCE was the first organization to conceive and adopt a comprehensive approach towards security, recognizing it a multifaceted phenomenon, indivisible and beneficial to all participating states, and demanding a multidimensional approach.\footnote{For further information see OSCE Secretariat Conflict Prevention Centre, “The OSCE Concept of Comprehensive and Cooperative Security: An Overview of Major Milestones”, Vienna, 17 June 2009.} The comprehensiveness of the OSCE security vision is evident in its inclusion of both military and non-military security aspects, paralleled by an emphasis on democratic institutions, respect for the rule of law, fundamental freedoms and human rights, including minority rights, and economic wellbeing and stability.\footnote{See Thomas M. Buchsbaum, “East Asian Security: Can the OSCE’s Experience Be Helpful?” in Institute for Peace Research and Security Policy at the University of Hamburg (ed.), \textit{OSCE Yearbook 2003} (Nomos Publishers, Baden Baden, 2003), 351-353.} This thematic inclusiveness was officially recognized in the 1975 Helsinki Final Act, which made explicit the complementarity of political and military security goals within the framework of broad organizational aims.\footnote{See Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975, Art. 3, 13.} In 1990, the Charter of Paris for a New Europe reaffirmed that “security is indivisible and the security of every participating state is inseparably linked to that of all the others”.\footnote{See CSCE Charter of Paris for a New Europe, Paris, 19-21 November 1990, Art. 5.} New impetus was given to traditional military threats through continued negotiation on confidence- and security-building measures (CSBMs) and the Treaty on Conventional Armed Forces in Europe.
CSCE peacekeeping activities were also foreseen “in cases of conflict within or among participating states to help maintain peace and security in support of an ongoing effort at a political solution”.

The growing importance of environmental and economic security issues was reflected in the established in 1992 of the Economic Forum, renamed the Economic and Environmental Forum (EEF) in 2006. On this latter point it is worth noting that the forum has been very active in advocating for the economic and social integration of persons belonging to national minorities; the third preparatory seminar to the 13th OSCE Economic Forum was entitled “Integrating Persons belonging to National Minorities: Economic and Other Perspectives”. The increased activity of the EEF prompted participating states to establish the Office of the Coordinator of OSCE Economic and Environmental Activities (OCEEA) in November 1997, with the overarching objective of strengthening security and stability in the OSCE region by promoting international cooperation on economic and environmental issues. Combating corruption, the financing of terrorism, trafficking in human beings and other forms of transnational organized crime were also among the activities foreseen for the OCEEA.

As to SAARC, although the association has since its very inception formally recognized that a peaceful and secure region is a prerequisite for the achievement of its core objectives, no security-related activities or studies have as yet been undertaken. Efforts towards the establishment of a South Asian Economic Union have revealed that economic development is severely hindered by political constraints, thereby widening the gap between more influential countries such as India and Pakistan and the rest of SAARC member states. The ‘isolated’ approach currently evident in the implementation of the political and economic dimensions of SAARC strategy should now be replaced by a more holistic methodology that enables coherent progress on the association’s politico–military and economic–environmental pillars. However, before this process can begin, member states must state their clear

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125 Ibid., 8.
127 The CSCE foreign ministers decided at the Prague Council meeting on 30 January 1992 to establish an annual economic forum.
129 See the 1st SAARC Summit Declaration, Dhaka, Bangladesh, 8 December 1985, Art. 4.
commitment to the advancement of SAARC, and take action to combat the bilateral
tensions and lack of timely implementation of programmatic and legal instruments
that have been identified by critics as central blocking points to regional development.

2. **Institutional Development**

In order to properly address the expansion of its thematic areas of intervention, the
OSCE has been involved in a continuous process of restoration of its institutional
capabilities. In 1990, the Charter of Paris for a New Europe officially established a
CSCE secretariat responsible for administering the organization.\(^{130}\) The charter further
strengthened the OSCE process by creating new institutions and structures, such as
the Conflict Prevention Centre and the Office for Free Election in Warsaw (later to
become the Office for Democratic Institutions and Human Rights).\(^{131}\) In 1992, with
the Helsinki Document, “The Challenges of Change”, decisions were taken to develop
new structures and instruments to strengthen early warning, conflict prevention and
crisis management.\(^{132}\) In this framework, it worth drawing attention to the creation of
the OSCE High Commissioner on National Minorities, an “instrument of conflict
prevention at the earliest possible stage”\(^{133}\) and the establishment of the CSCE Forum
for Security Cooperation.\(^{134}\) In 1994, through adoption of the Code of Conduct on
Politico–Military Aspects of Security, OSCE participating states committed
themselves to maintaining only such military capacities as were commensurate with
legitimate individual or collective security needs and, with respect to intrastate
relations, to provide for democratic control of armed and security forces and their
compliance with international humanitarian law. Through that code of conduct,
participating states also agreed to prevent and combat terrorism.\(^{135}\) The decision of the
Forum for Security Cooperation formalized voluntary participation in activities

\(^{130}\) See CSCE Charter of Paris for a New Europe, Paris, 19-21 November 1990, E, 16.

\(^{131}\) Ibid., 13.

\(^{132}\) See CSCE Helsinki Document, *op.cit.* note 127, I.

\(^{133}\) Ibid., I(2). The High Commissioner provides “early warning” and, as appropriate, “early action” at
the earliest possible stage in regard to tensions involving national minority issues.

\(^{134}\) See CSCE Helsinki Document 1992, *op. cit.* note. 127, V. Since its creation, the forum has agreed
on a number of documents and decisions on arms control, disarmament and confidence-building
measures, and in 2003 produced the OSCE Document on Stockpiles of Conventional Ammunition
(SCA). Outlined in its tasks by the Programme of Immediate Action in the Annex to Chapter V of the
Helsinki Summit, the forum immediately adopted the so-called “Stabilizing Measures for Localized
Crisis Situations”, the “Principles governing Conventional Arms Transfers”, the “Global Exchange of
Military Information (GEMI)” and the “Principles Governing Non-Proliferation”.

\(^{135}\) See OSCE Code of Conduct on Politico–Military Aspects of Security, adopted at the 91st Plenary
Meeting of the Special Committee of the CSCE Forum for Security Cooperation, Budapest, 3
December 1994.
related to the Code of Conduct by the OSCE Partners for Cooperation. Through the Rapid Expert Assistance and Cooperation Teams (REACT), the OSCE was able to quickly deploy skilled civilian and police expertise to field operations, while the Platform for Cooperative Security aimed at strengthening cooperation between the OSCE and other international and regional organizations; the Charter for European Security took important steps to advance the OSCE’s structural capability.

By contrast, the establishment of the SAARC secretariat was not incorporated within the SAARC charter; the Secretariat is in fact the result of a memorandum of understanding signed in November 1987 between SAARC founding members in accordance with Article 8 of the SAARC charter. Repeated requests for structural improvements have not been properly addressed by SAARC member states; an under-resourced secretariat is thus faced with the growing demands of an expanding association. In addition, the principles of subsidiarity and proportionality currently in force in the European context have not received official recognition nor been correctly applied within the SAARC context. While strict adherence to the principle of unanimity in decision-making process has hindered the development of a coherent SAARC position on many issues, this problem was redressed in the OSCE by the introduction of the ‘consensus-minus-one’ procedure and the adoption of specific human dimension instruments, such as the Vienna and Moscow mechanisms.

In fact, the European experience has led to growing acceptance that strict adherence to unanimity will result, at least in certain cases, in deadlock. Finally, analysis of the problems encountered in the implementation of SAARC decisions, programmes and legal instruments seems to indicate a general resistance to

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139 An Operation Centre was also established to plan and deploy OSCE field operations. See OSCE Charter for European Security, Istanbul, 19 November 1999, 43.
140 See Memorandum of Understanding on the Establishment of SAARC Secretariat, 17 November 1987 Bangalore, India.
141 The ‘consensus-minus-one’ procedure was introduced at the 2nd CSCE council in Prague on 30 and 31 January 1992 (“Prague Document on Further Development of CSCE Institutions and Structures”) where it was decided that in cases of a state’s “clear, gross and uncorrected violation” of CSCE commitments, decisions could be taken without the consent of the state concerned. This exception was invoked in July 1992 to suspend Yugoslavia from the CSCE.
revitalizing the association through a structural amendment of its charter and rules of procedure. The strategy pursued by European regional organizations, that is, to embark on a constant process of institutional advancement through the development of consecutive and coexistent legal (e.g. EU treaties) and political instruments (e.g. OSCE charters) of a constitutional and non-constitutional nature, has to date not been considered by SAARC.

3. Human and Minority Rights Concerns

The OSCE, built solely on political commitments and without a founding legally binding treaty, was nevertheless the first organization to link peace and security to respect for human rights through its 1975 Helsinki Final Act. The latter also included the principle of equality before the law of all persons belonging to national minorities, to be respected by all states parties to the organization.\textsuperscript{142} The 1990 Copenhagen Document on the Human Dimension of the then CSCE clearly stated that “protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government”; the document further defined respect for the rights of persons belonging to national minorities as an essential factor for peace, justice, stability and democracy in the participating states.\textsuperscript{143} As noted above, two years later the OSCE created a specific institution on minority-related issues, the OSCE High Commissioner on National Minorities, mandated to function as an “instrument of conflict prevention at the earliest possible stage”.\textsuperscript{144} Furthermore, the 1992 Helsinki Document also remarked the close relation of human and minority rights with peace and security issues by clarifying that “gross violations of CSCE commitments in the field of human rights and fundamental freedoms, including those related to national minorities, pose a special threat to the peaceful development of society, in particular in new democracies”.\textsuperscript{145} In the 1994 Budapest Document, “Towards a Genuine Partnership in a New Era”, participating states clearly defined the protection of human rights, including the rights of persons belonging to national minorities, as an essential

\textsuperscript{142} Furthermore, the Final Act also states that states parties should afford people belonging to national minorities the full opportunity for actual enjoyment of their human rights and fundamental freedoms. See Final Act of Helsinki, Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975, Art. VII, 6.

\textsuperscript{143} See Copenhagen Meeting on the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, 1 and 30.


\textsuperscript{145} \textit{Ibid.}, Art. 12.
foundation of democratic civil society.\textsuperscript{146} Two years later in Lisbon, participating states reaffirmed their determination to fully respect and implement commitments relating to the rights of persons belonging to national minorities as an important contribution to security.\textsuperscript{147}

An analysis of SAARC performances in human and minority rights reveals an association only weakly committed to this key issue, unable to translate relevant policy summit declarations into reality. For instance, at the 6th SAARC summit, heads of states and government observed that civil and political rights on the one hand, and economic and social rights on the other, were interdependent and of equal importance. They further underlined the need to view the efforts of states to guarantee human rights holistically, by pursuing development for all citizens in conditions of stability, which in turn would guarantee the enjoyment of human rights for all persons.\textsuperscript{148} Later, in 1997, member states collectively resolved “to take all necessary steps to achieve the objective of promoting and protecting human rights”\textsuperscript{149} and, on the 50th Anniversary of the Universal Declaration of Human Rights, reaffirmed their commitment to further advancing human rights and fundamental freedoms in the region by strengthening the relevant national institutions.\textsuperscript{150} In addition, the association has been unable to properly implement the standards developed during its regional conventions.

Today, a specific mechanism for dealing with human and minority rights issues in South Asia is a priority. However, even if SAARC is considered the appropriate forum for the design and implementation of such a mechanism, great uncertainty would persist as to whether this should be developed within the framework of a top-down or a bottom-up approach; to date, neither of these two options has guaranteed positive outcomes. An analysis of the implementation record for SAARC conventions suggests uneven results: although in some cases the development of legal instruments has been primary triggered by NGOs or civil society organizations, the latter have been marginalized during the implementation phase. By contrast, in a top-down process, where particular conventions have been designed to address common

\textsuperscript{148} See the 6th SAARC Summit Declaration, Colombo, Sri Lanka, 21 December 1991, Art. 7.
\textsuperscript{149} See, the 9th SAARC Summit Declaration, Male, Maldives, 12-14 May 1997, Art. 63.
\textsuperscript{150} See, the 10th SAARC Summit Declaration, Colombo, Sri Lanka, 29-31 July 1998, Art. 75.
member state concerns, their entry into force and subsequent implementation have been regrettably delayed and ineffective. Furthermore, the current reluctance on the part of member state to deal with human and minority rights issues through SAARC structures should raise new questions about the advisability of pursuing a soft-law approach in developing a mechanism dedicated to the protection of those rights rather than a hard-law implementation process.

In any event, an absolute precondition for moving forwards on this issue is the full commitment of all member states to the empowerment of SAARC. The association should be considerably reinforced, both in its secretariat and accountable instruments, to guarantee satisfactory monitoring activities, and to permit follow-up and ultimately sanctionatory procedures. The eventual development of an instrument of regional human and minority rights protection would certainly advance a more people-centric approach of SAARC, and go a long way to redressing the state-centric focus of the association in evidence today.

4. CBM/CSBMs

OSCE Confidence-Building Measures (CBMs) and Confidence- and Security Building Measures were first identified as available organizational tools in the 1975 Helsinki Final Act.\(^{151}\) Refined by the 1986 Stockholm and 1990 Vienna Document,\(^{152}\) CBM/CSBMs were further developed in the 1990 Treaty on Conventional Armed Forces in Europe and the 1992 Treaty on Open Skies.\(^{153}\) In 1996, a Framework for Arms Control was set up within the framework of the OSCE Lisbon Document.\(^{154}\) Three years later, the Vienna Document on Negotiations of Confidence- and Security-Building Measures further complemented OSCE resources.\(^{155}\)

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\(^{152}\) The Stockholm Document provided, for the first time in the history of modern arms control, for compulsory inspections as a means of verification. The Vienna Document introduced new communication and consultation measures, qualified the ‘third generation of CSBMs’ such as the points of context for hazardous incidents of a military nature and a communication network for transmitting computerized information.

\(^{153}\) Even though these were not CSCE/OSCE documents in a formal sense, both treaties were nevertheless closely associated with the organization as they were negotiated in conjunction with talks among CSCE participating states on confidence-building measures.

\(^{154}\) See OSCE Lisbon Document 1996, Framework for Arms Control, 3 December 1996, III, 17. The framework was designed to create a web of interlocking and mutually reinforcing arms control obligations and commitments, and to channel arms control efforts into a comprehensive structure.

\(^{155}\) See OSCE Vienna Document 1999 of Negotiation on Confidence- and Security-Building Measures, 16 November 1999. A number of mechanisms of the Vienna Document 1990 are contained in the
In the context of SAARC, particular CBMs were undertaken against the background of the association, but were never listed as being among its available tools, and peace agreements concluded in the region were bilateral in nature and often the result of third party intervention. This inability of SAARC to formally internalize CBSMs among its available tools resulted, for instance, in an extensive number of bilateral CBMs being concluded between India and Pakistan, the implementation of which was not always straightforward. As in the case of human and minority rights issues, enhancement of SAARC capabilities is primarily contingent on the sincerity of the political commitments of its member states. Studies conducted by the OSCE on the applicability of OSCE CSBMs in different regions indicated that negotiating partners should agree initially on a broader set of political commitments to guarantee the political framework in which implementation of the CSBMs could then occur.

Vienna Document 1999: the mechanisms for consultation and cooperation as regards unusual military activities; the mechanism for cooperation as regards hazardous incidents of a military nature, and the voluntary hosting of visits to dispel concern about military activities.

For instance, the Lahore Declaration of 1999 reaffirming India and Pakistan’s commitment to find a peaceful resolution to the issues of Jammu and Kashmir has been designed and agreed in the frame of SAARC.

For instance, the 1997 Chittagong Hill Tracts Peace Accord was signed between the government of Bangladesh and the Parbatya Chattagram Jana Sanghati Samity (PCJSS) was possible due to the positive role played by India. The 2002 Ceasefire Agreement between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) was facilitated by the Norwegian government which also took part, together with Sweden, Finland, Denmark and Iceland, in monitoring the ceasefire agreement through the Sri Lanka Monitoring Mission. For further information see Satish Nambiar, “Military Confidence-Building Measures in the India-Pakistan Context”, in Dev Raj Dahal and Nishchal Nath Pandey (eds.), Comprehensive Security in South Asia (Manohar Publisher, New Delhi, 2006), 203-214.


V. THE RELEVANCE OF AFGHANISTAN

The history of Afghan membership within SAARC clearly suggests the incredible results that can be achieved when India and Pakistan converge to pursue particular objectives. ¹⁶⁰ Officially recognized as a SAARC member state in 2007, Afghanistan has key geopolitical importance in connecting SAARC to the Central Asian countries. For example, the 2002 Kabul Declaration on Good Neighbourly Relations, signed by Afghanistan and its six neighbours—China, Pakistan, Tajikistan, Turkmenistan, Uzbekistan, and Iran—was a significant step towards achieving a peaceful and stable region through constructive and supportive bilateral relationships based on the principles of territorial integrity, mutual respect, friendly relations, cooperation and non-interference in each other’s internal affairs.¹⁶¹ When the OSCE included Afghanistan among its Partners for Cooperation on 3 April 2003, SAARC was presented with an opportunity to move closer towards the cooperative security architecture of the OSCE.¹⁶² With due consideration for the 1975 Helsinki Final Act, which notes the close link between peace and security in Europe and in the world as a whole, and the 1999 Charter for European Security, which states that “the OSCE is the inclusive and comprehensive organization for consultation, decision-making and co-operation in its region”, Afghanistan will play a pivotal role in exposing SAARC to the comprehensive security approach employed by the OSCE. The association could surely gain from a comparative analysis of the 2002 Charter on Preventing and Combating Terrorism and the 2003 OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century: the latter aims, inter alia, to intensify OSCE cooperation with its Mediterranean and Asian Partners for Cooperation;¹⁶³ moreover, the formal recognition by the 2003 strategy of the cross-dimensional nature of modern

¹⁶² The other Asian Partners for cooperation are Japan, Korea, Mongolia and Thailand.
¹⁶³ OSCE Ministerial Council in Madrid, second day of the 15th meeting, MC(15), Journal No. 2, Agenda Item 8, Decision No. 4/07 OSCE Engagement with Afghanistan, Doc. MC15ED04, 30 November 2007, 1. Cooperation should be enhanced through the early identification of areas of common interest and concern and possibilities for further coordinated action.
threats to security and stability would provide SAARC with a good template for any of its future security-related activities.\textsuperscript{164} The same is true of the formal OSCE reference to the wide range of potential threats linked to systematic violations of human rights and fundamental freedoms, including the rights of persons belonging to national minorities.\textsuperscript{165} In pursuing this objective, SAARC would have much to gain from OSCE feasibility studies on sharing norms, principles, commitments and values with other regions, in particular neighbouring areas.\textsuperscript{166} Afghan interest in the OSCE Border Security and Management Concept should also be considered positively in view of the country’s possible future proximity to OSCE norms and standards.\textsuperscript{167} In this view, the current climate of international commitment to peace and stability in Afghanistan should be complemented by a firm acknowledgement by SAARC members of the importance of a stable environment for regional cooperation in South Asia.\textsuperscript{168} The association could also seize the opportunity to finally address the issue of policy cooperation with those regional bodies to which one or more of its member states belong—namely the Indian Ocean Rim Association for Regional Cooperation (IOC–ARC), Economic Cooperation Organization (ECO), Organization of Islamic Conference (OIC), and Bangladesh India Myanmar Sri Lanka Thailand Economic Cooperation (BIMSTEC).\textsuperscript{169}

VI. CONCLUSION

The above analysis reveals several limitations in existing SAARC procedures and institutional development. The secretariat appears to be heavily constrained by difficulties in coping with an expanded range of activities. By contrast to the experience in Europe, developments at programme- and activity-level have not been complemented by adequate structural amendments, which has adversely impacted on

\textsuperscript{164} See \textit{ibid.}, 3. With the 2003 strategy, the OSCE formally recognized that “threats to security and stability in the OSCE region are today more likely to arise as negative, destabilizing consequences of developments that cut across the politico–military, economic and environmental and human dimensions, than from any major armed conflict”.

\textsuperscript{165} \textit{Ibid.}, 4.

\textsuperscript{166} See OSCE 11th Meeting of the Ministerial Council, 1 and 2 December 2003, OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century, Art. 23.

\textsuperscript{167} See keynote address of H.E. Mr. Mohammad Kabir Farahi, Deputy Foreign Minister of Afghanistan, to the 2007 OSCE–Mongolia Conference on Strengthening the Cooperative Security between the OSCE and the Asian Partners for Cooperation, Ulaanbaatar, 12-13 June 2007, 15.

\textsuperscript{168} See Wilke, \textit{op.cit.} note 162, 348.

\textsuperscript{169} CASAC, \textit{op.cit.} note 159, 8-9.
the accountability of the association as a whole, and led to the lack of a clear long-term vision for its ‘third decade of implementation’.

In addition, the absence of a dispute settlement mechanism within the association has negatively affected the development of a regional, South Asian, concept of peace and security. By failing to develop such a mechanism, SAARC has involuntarily bolstered the asymmetric configuration of the region in which a regional approach is the exception to a powerful Indian policy of bilateralism.

The above analysis has also indicated that the political dimension of SAARC is today the most problematic: deep-rooted tensions among member states and a strong predominance of bilateral issues have hampered the efforts of the association to achieve satisfactory regional results. The challenge is now to review the whole SAARC process and to agree on a roadmap for moving the association from a declaratory to an implementation phase. Within this context, amending the SAARC charter and its rules of procedures to permit consideration of both bilateral and contentious issues will be a crucial precondition for all future activities of the association, as will ensuring the full political commitment of its member states.

In any event, the development of a comprehensive security approach for South Asia will require an initial reassessment of the national security perspectives of SAARC member states. The current impossibility that members will agree on a common security perception is indeed the first obstacle to the development of a comprehensive regional framework for security. In this context, there is a pressing demand for a more balanced approach between traditional and non-traditional security issues, which will guide decision-makers in forging, through a multidimensional and comprehensive methodology, a collective regional mechanism capable both of resolving traditional interstate security issues and including non-traditional security challenges. Such a mechanism is a precondition for redirecting the attention of policy makers from the traditional to the non-traditional security paradigm.

More work should thus be dedicated to the advancement of the SAARC structure; increased attention should be paid to the concept of ‘human and societal security’, and a specific SAARC human dimension mechanism should be developed. An empowered SAARC could lead the regional cooperation process, thereby avoiding the regional imbalance of powers evident today, and influence collective efforts to forge a comprehensive security approach for South Asia. Proper harmonization of regional security concerns, coupled by a clear and firm political commitment on the part of its
member states and a SAARC specific human rights mechanism, would certainly help South Asia, as a regional community under the aegis of SAARC, to move closer in practice to the standards of human and minority rights protection that have already agreed at the international level.