

IMPORTANCE OF CONSTITUTIONAL MANDATE FOR HUMAN RIGHTS: AN INDIAN AND AUSTRALIAN PERSPECTIVE

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Abstract:

India and Australia are both former colonies of the Great Britain. Where Australia was established as a constitutional monarchy on 1 January 1901, India had to fight for its independence and became an independent state on 15th August 1947. Where the Monarch of the United Kingdom is still the head of the state of Australia, India has moved away from any colonial connections. The stories of both these nations may not be similar but one can trace various inspirations that the two nations have taken from their common colonial ruler.

Analysing the constitution of India and Australia, one has to conclude that there are various similarities between the two, mainly focusing on distribution of power between the Centre and the State, laying down the extent of power of the Parliament and the State Legislatures. But one cannot escape from the differences that these constitutions present. One of the starkest difference between the Indian and the Australian constitution is on the provisions of Human Rights. Where India has incorporated all the human rights in the Indian constitution the Australian constitution provides for only few human rights in the constitution.

The author will focus in bringing out the importance of constitutional mandate for protection and promotion of Human Rights. Comparing the Indian and Australian Constitution provides one with a unique position to analyse the importance of the constitution of a country for human rights. Where one country has a kind of bill of rights in the supreme law of the land, the other consciously kept the human rights out of the constitutional boundaries. Both the countries are leading democracies in the world, so how has the constitutional mandate impacted the growth of Human Rights in these nations? The author will focus to understand, analyse and try to answer few of such questions.

Key Words: India, Australia, Human Rights, Constitution

Introduction:

Development in international law and general awareness about rights, have now made human rights a popular almost every-day discourse in public discussions. It has formed part of not just general public discussions, but also of state interactions with each other on international platform. Excerpts from philosopher R.G. Frey's work of 1986 still true hold when he says that, *"There is a tendency today to clothe virtually all moral and social issues in a language of rights, in order to be able to demand one's due. Declarations of human rights have come into their own and an increasing number of things- from immigration to medical assistance are now ceded as being rights. What we should do about the poor of the Third World is increasingly transformed into an issue of the poor having a moral right to subsistence against the incomes and food supplies of the industrial nations. Politicians have kept human rights into their ideologies and governments around the world are taken to task for their treatment of their citizens and coerced through the use of foreign aid to improve their human rights."*¹

But the development in human rights comes with a rich history. The term "human rights" became part of popular conscience only after the World War II². It effectively did replace the "natural rights" after the latter was increasingly criticised by various philosophers. World War II proved to the world that there are certain rights that cannot be infringed and that the very basis of such rights lay in fact of being "human". This prompted the leaders of the world to come together to bring in place certain mechanism to safeguard these rights for future generations. This lead to the formulation of United Nations and the adoption of Universal Declaration of Human Rights which provided for certain inalienable rights that every state has to provide to it's citizen.

HUMAN RIGHTS

One of the earliest measures in the conceptualization of human rights has been the formulation of the United Nations and adoption of Universal Declaration of Human Rights (hereinafter referred to as UDHR) but interestingly, both the charter of UN and UDHR do not define or explain the term 'human rights'. Instead the preamble of UDHR declares 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'

¹ JOHN WARWICK MONTGOMERY, HUMAN RIGHTS AND HUMAN DIGNITY 15-16 (Steven W. Webb ed. 1986).

² Winston L. Frost, *The Developing Human Rights Discourse: A history of the Human Rights Movement*, 10 Trinity L.R. (2000).

and Article 1 provides 'all human beings are born free and equal in dignity and rights'.³ Similarly the charter of UN declares in its preamble 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'.⁴ It is argued that one of the reasons that the member states chose not to define human rights is the all encompassing and changing nature of these rights and that defining it would be deterrent in development of human rights⁵.

After the UN charter came into force, one of the most important tasks before the UN was the implementation of fundamental human rights, fulfilling its obligation under the UN Charter and fulfilling one the basic objectives of formulation of UN. Consequently, it was decided that UN could fulfill its obligation only after they prepare an International Bill of Rights, which took the form of the UDHR, which was adopted in the year 1948. UDHR consist of 30 articles which comprehensively deal with various fundamental civil, political, economic and social human rights. UDHR is by no means the only declaration on human rights; rather various covenants were brought in force by UN for declaring, implementing and protecting various fundamental human rights. The International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) and the International Covenant on Economic Social and Cultural Rights (hereinafter referred to as ICESCR) were adopted in 1966. ICCPR incorporated nearly all the rights proclaimed in the UDHR except the right to own property and right to asylum. Similarly ICESCR incorporated the economic and social rights as proclaimed in the UDHR. This significantly makes majority of all rights enumerated in the UDHR, legally binding on member states. Both these covenants have also elaborated on certain other rights that have not been mentioned in the UDHR. Later on General Assembly adopted two optional protocols to ICCPR in 1966 and 1989, one optional protocol to ICESCR in 2008. UDHR along with ICCPR, ICESCR and optional protocols comprise the International Bill of Human Rights.⁶ Along with the International Bill of Human Rights, certain other covenants were enforced which today are popularly known as core human rights covenants and include the International Covenant on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as CERD), the Convention on the Elimination of All forms of Discrimination against Women (hereinafter referred to as CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as CAT), the Convention on the Rights

³ Universal Declaration of Human Rights.

⁴ Charter of United Nations.

⁵ Joy Gordon, *The Concept of Human Rights: The History and Meaning of its politicisation*, 23 Brooklyn Journal of International Law 689 (1998).

⁶ H O Agarwal, HUMAN RIGHTS (Central Law Publications, 15th ed, 2014).

of the Child (hereinafter referred to as CRC), The Convention on the Rights of Persons with Disabilities (hereinafter referred to as CRPD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their families (hereinafter referred to as ICRMW) and the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter referred to as CED). These documents can be called as Magna Carta of the modern times. Though UDHR is not a legally binding document nevertheless has acquired legal status partly due to an eighteen-year delay between its adoption and ratification of two covenants and has influenced numerous legislations at international and domestic level.⁷ Both ICCPR and ICESCR are legally binding treaties, binding the acceding states to bring in domestic legislatures in line with the covenants. These declarations and treaties are no less achievements in the field of human rights rather they create a standard of human rights which have to be maintained by all states and ensure that the states are at par for protection and implementation of human rights in their jurisdictions.

In this globalised, internet-fuelled era, the states are under humongous pressure to implement human rights. States have very often taken stands against a state on lines of human rights violation. Various effective coercive measures have been taken by states to coerce another state to fulfill its obligations towards human rights. Internet has become a powerful source for the public to coerce the states towards implementation of human rights. One cannot deny the reality of popular demand for human rights. Consequently majority of the states today have laws in place for protection and promotion of human rights in their jurisdictions.

INDIA AND HUMAN RIGHTS

Human rights in India has had a strong history. They made an appearance right in the freedom struggle and perhaps the first explicit demand came in 1895 itself while the Constitution of India bill was prepared.⁸ During the freedom struggle, the Indian National Congress time and again made demands for various civil, political and economic rights. One of the major development was also the drafting of “Mrs Beasant’s Commonwealth of India Bill of 1925” that contained a list of seven fundamental rights.⁹ Pandit Jawaharlal Nehru’s Objective Resolution became the guiding light for the drafters of the Indian constitution after independence which extensively laid down the goals of an emerging nation and its stand on protection of human

⁷ Frost, *supra* note 3.

⁸ B SHIVA RAO, THE FRAMING OF INDIA’S CONSTITUTION: A STUDY (Universal Law Publishing ed., 1968).

⁹ GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford University Press 2018) (1972).

rights. This objective resolution later became the Preamble to Indian Constitution which laid down that the constitution would strive to provide for social, economic and political justice, liberty of thought and religion and equality amongst all. Shah in his articles argues that the western societies view the human rights development with faulty lens wherein they ignore the marginalisation, discrimination and exclusion of their own society and their failure to recognise their faults manifest to claims that the developing countries forgo of the civil and political human rights in lieu of development. He provides the example of the Indian three-pronged model where democracy, development and human rights work hand-in hand. According to him India believes that human rights can best be protected with democracy and rule of law and that development and tolerance towards all is what best guarantees the human rights protection. He further argues that India understands the 1966 covenants as the duty of the state to recognise and provide for various rights with the best avenues available with the State and recognising its culture, population and size provides for the mechanism to ensure the observance of such rights.¹⁰ Part III of Indian Constitution lays down rights such as Right to Equality¹¹, Right against Discrimination¹², Right of Equal opportunity¹³, Freedom of speech and Expression¹⁴, Freedom to form association¹⁵, Freedom to move freely throughout the territory¹⁶, Right against self-incrimination¹⁷, Right to life and personal liberty¹⁸, Freedom of Religion and Conscience¹⁹. Towards the international human rights obligations, India was one of the initial nations that signed the UDHR. Even before adopting the Indian constitution, India had showcased its stand towards human rights by adopting the UDHR. India has also ratified ICCPR, ICESCR, CERD, CEDAW, CRPD, CRC and optional protocol to CRC. India has also signed CAT and CED. To fulfil its treaty obligations, India has brought in force various domestic legislation such as the Protection of Human Rights Act, 1993, Persons with Disability (Equal Opportuni-

¹⁰ Prakash Shah, *International Human Rights: A Perspective from India*, Fordham Intl' L.J. 24 (1997).

¹¹ INDIA CONST. art. 14.

¹² INDIA CONST. art. 15.

¹³ INDIA CONST. art. 16.

¹⁴ INDIA CONST. art. 19, cl. 1 (a).

¹⁵ INDIA CONST. art. 19, cl. 1 (c).

¹⁶ INDIA CONST. art. 19, cl. 1 (d).

¹⁷ INDIA CONST. art. 20, cl. 3.

¹⁸ INDIA CONST. art. 21.

¹⁹ INDIA CONST. art. 25, cl 1.

ties, Protection of Rights and Full Participation) Act, 1995, Right of Children to Free and Compulsory Education Act, 2009, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, etc.

Human rights are primarily protected by the Indian constitution. The supremacy of the constitution lays down that none of the statutes in the country can go against the norms set by the constitution. Indian constitutional courts safeguard the human rights through Article 32²⁰ and 226²¹ wherein a person is empowered to approach the Supreme Court of India and the High Courts for protection, enforcement and redressal towards his/her human rights. This makes the judiciary the ultimate guardian or the watch-guard of the human rights in India. Advocate Nariman in his article provides for the importance of Article 21 towards the human rights protection in India and the role of judiciary towards enforcing and protecting the same. He argues that judicial protection of human rights principally revolves around Art 21 and its interpretation by the Supreme Court of India. He further argues that Art 14 and Art 21 are more forceful in thrust and content and thus constitute the core of human rights protection in India. The Supreme Court of India in *Gopalan's case*²² restricted the interpretation of Art 21 to not include the *due process of law* and it took Supreme Court of India another 25 years to get free of the clutches of *Gopalan case* and broaden the interpretation of Art 21. Up until then Art 21 did not really pose any threat to any statute wherein personal liberty was attacked by just showing to the court that such a statute was enacted according to the procedure established by law. It took the case of *Maneka Gandhi*²³ wherein finally the Supreme Court of India broadened the interpretation of Art 21 and that every statute will also have to be reasonable, fair and just and that only procedure wouldn't suffice. The interpretation of the article through this judgement became the springboard for the Supreme Court of India to judicially intervene for the protection of human rights in India.²⁴ Art 21 has now been invoked in front of the Supreme Court of India in numerous cases of human rights violation. Judicial activism has lead to enforcing numerous human rights in India. For instance in *Hussainara Khatoon*²⁵ Supreme Court of India held right to speedy trial as a fundamental right, in *Sunil Batra*²⁶ Supreme Court of India held personal

²⁰ Remedies for enforcement of rights conferred by this Part (*Right to Constitutional Remedies*).

²¹ Power of High Courts to issue certain writs.

²² A.K. Gopalan v State of Madras, AIR 1950 SC 27.

²³ Maneka Gandhi v Union of India, AIR 1978 SC 597.

²⁴ Fali S Nariman, *Judicial Aspects of Human Rights Protection in India*, International Legal Practice (1992).

²⁵ Hussainara Khatoon v Home Secretary, State of Bihar, AIR 1979 SC 1369.

²⁶ Sunil Batra v Delhi Administration, AIR 1978 SC 165.

liberty of prisoners and recognised right against solitary confinement, in *Puttaswamy*²⁷ judgement, Supreme Court of India has recognised right to privacy as fundamental right, Supreme Court of India has recognised the right against custodial violence in *Sheela Barse*²⁸ case, it has included right to shelter within the ambit of Art 21 in *Tekraj*²⁹ case, in *Chandrima Das*³⁰ case the Supreme Court of India emphasised upon the applicability of UDHR in domestic jurisprudence, it has recognised fundamental right of working women in *Vishaka*³¹ judgement wherein it also gave the judgement in tune with India's obligation under CEDAW. The Indian constitution thus bestows the apex court with a unique position where it has constitutionally mandated the court to provide for redressal in cases of violation of fundamental rights. The extent of protection of human rights can only be measured with the way the court interprets and implements the constitutional provisions and the Supreme Court of India has not backed away from its obligations towards the same. The supremacy of the constitution along with the independent and strong judiciary has helped the modern India in realising its goals towards human rights protection.

But even with an active judiciary, the picture of human rights in India is not all glossy. To fulfil its obligations towards the international bill of human rights, India established the National Human Rights Commission (herein after referred to as NHRC) under the Protection of Human Rights Act, 1993. NHRC is the main body entrusted with promoting and protection of human rights in India. Banerjee in his paper examines the workings of the NHRC and he argues that NHRC is nothing more than a toothless and inept institution due to various restrictions placed on its jurisdiction and intervention and that NHRC is nothing more than a tool designed to please UN. Examining the powers of NHRC under the act one can analyse that it has no power to punish the violators of human rights, nor does it have the power to investigate any alleged human rights violations by the defence forces and on the top of it its recommendations are not legally binding on the government. Essentially NHRC was set up due to extreme international pressure but one reading of the act proves that the government did not bestow the commission with any real powers to protect human rights violations in the country.³² The critics on this basis question the sincerity of the Indian government towards implementation of human rights.

²⁷ Justice K S Puttaswamy & Anr v Union of India & Anr, MANU/SC/1054/2018.

²⁸ Sheela Barse v State of Maharashtra, AIR 1983 SC 378.

²⁹ Tekraj v Union of India, AIR 1988 SC 469.

³⁰ Chairman, Railway Board v Chandrima Das, AIR 2000 SC 988.

³¹ Vishakha & ors v State of Rajasthan, AIR 1997 SC 3011.

³² Sumanta Banerjee, *Human Rights in India in the Global Context*, 38 Economic and Political Weekly (2003).

India has always been a forerunner towards enactment of laws but its achilles heel has always been the implementation of those laws and the story run same for human rights in India.

AUSTRALIA AND HUMAN RIGHTS

On 1st January 1901 the then British Parliament passed a legislation to allow six Australian colonies to govern in their own right. Australia was established as a constitutional monarchy. The constitution of Australia was brought into existence through a British Act of Parliament, the Commonwealth of Australia Constitution Act, 1900 which took effect on 1st January 1901. Australia has played an important role in the international domain since it's inception. Australia was one of the founding members of the UN and played a prominent role in the negotiation of the charter of UN, more specifically the clauses that dealt with Security Council. Next Australia was one of the eight nations that were involved in drafting of the UDHR. This provides for a strong position for Australia in the international domain and it's role towards international peace keeping and human rights. Australia has had a strong record when it comes to human rights. The country has rightly been praised at the international forum for protection of various civil and political rights in the past but at present there are serious unresolved human rights problem in Australia. Australia has been repeatedly reprimanded by the UN for its inaction towards protection of certain human rights in the country. Many writers believe that this could be due to the fact that Australia has been adamant to not enforce a bill of rights and to claim that all the human rights are anyways protected in Australia.

Interestingly though Australia is now the only "English-Speaking Democracy" without a national bill of rights.³³ A debate for incorporating bills of rights was defeated while framing of the constitution and just a few rights were guaranteed protection under the constitution. Williams argue that a lack of domestic bill of rights might be due to the fact that comparatively Australia has had a strong record towards human rights. Prime minister Howard has stated in 2000 that "*Australia's human rights reputation compared with rest of the world is quiet magnificent*" and thus not having a bill of rights does not primarily affect Australia.³⁴

While analysing the domestic legal regime, we understand that in Australia, some rights are protected by the constitution, some by federal and state legislation and some by way of common law courts. The handful of rights that are guaranteed by the Australian constitution are

³³ Bruce Stone & Nicholas Barry, *The Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights*, Canadian Journal of Political Science (2014).

³⁴ George Williams, *Human Rights and the Second Century of the Australian Constitution*, UNSW L.J (2001).

Right to Vote³⁵, Protection against acquisition of property on unjust terms³⁶, Freedom of religion³⁷, Right to a trial by jury³⁸, prohibition on discrimination on the basis of state residency³⁹. Towards the international human rights, Australia is a signatory to the UDHR. It has signed and ratified seven of the nine core international human rights instruments namely, ICCPR, ICESCR, CEDAW, CERD, CAT, CRC, CRPD and the Optional Protocols of the ICCPR, CEDAW and CRC. Australia has enforced different federal laws such as the Age Discrimination Act, 1992, Racial Discrimination Act, 1975, Sex Discrimination Act, 1984, etc for fulfilment of international obligations. Australian Human Rights Commission⁴⁰ has been set up for overseeing and reporting towards the protection of human rights in Australia.

The Australian government has relied on the indirect effects of legislations and governmental policies to implement and protect many of the human rights.⁴¹ Dianne in her paper argues that this indirect implementation falls short towards the international obligations. She argues that the government has indeed taken positive steps towards the implementation of treaty obligations but there is a lack towards individual remedy.⁴² Bill of Rights is a sensitive and much debated topic in Australia. One of the line of opposition provided for this is that Australia does not require a bill of rights as the country already through various means protects human rights and further that the people would rather trust an elected and answerable government for protection of rights than a non elected and non answerable judge for the same. This uncritical faith in democracy, that ultimately the protection rests on the elected democracy and hence should not be subject to control by judiciary has now become the hallmark argument of proponents opposing a bill of rights.⁴³ The strong federation and political system of Australia has also been one of the obstacle towards bringing in a bill of rights where the federal government has been rather slow in implementing its international human rights obligations due to the concern for stepping over state powers. Bruce and Nicholas in their paper argue that the very constitutional design of Australia with strong bicameralism and statutory bills provide Australia a rather

³⁵ AUS CONST. Sec. 41.

³⁶ AUS CONST. Sec 51. cl. xxxi.

³⁷ AUS CONST. Sec. 116.

³⁸ AUS CONST. Sec. 80.

³⁹ AUS CONST. Sec 117.

⁴⁰ Australian Human Rights Commission Act, 1986.

⁴¹ Dianne Otto, *Addressing Homelessness: Does Australia's Indirect Implementation of Human Rights Comply with its International Obligations?*, Oxford University Press (2003).

⁴² *Ibid.*

⁴³ Bede Harris, *The Bill of Rights Debate in Australia- A study in constitutional disengagement*, Journal of Politics and Law (2009).

unique position as compared to other common law nations and as such have made the debates towards bill of rights rather stale.⁴⁴ Though Australia has ratified the important treaties, these ratifications have been delayed and majorly in regards to the complaint procedures. When we analyse the implementations of international human rights conventions, Australia's track record is far from perfect though CERD comes out to be an exception which was fairly successfully implemented by the Racial Discrimination Act, 1975. Taking other instances, the Sex Discrimination Act, 1984 only partly implements the CEDAW and no specific legislations have been implemented for CRC. Evatt in her paper also argues that due to delay in reporting by Australia and its unwillingness to communicate with various treaty bodies, the relationship of Australia with different treaty bodies have deteriorated.⁴⁵ Otto in her paper states that Australia's "reluctance" to domestically implement Australia's international human rights obligations have turned from "exceptionalism" to "isolationism" where the government conveniently sidesteps its international obligations towards human rights.⁴⁶ The opponents of bill of rights argue that by enforcing a bill of rights, there would be stagnation in the development of human rights in Australia and that the bill would be unable to cope with the changing times but these criticism towards the Australian policy prove that the government though empowered with enforcing all its treaty obligations have largely failed to do so and that certain human rights have no protection in the Australian legal environment. For instance the Australian government has been criticised for its inability to protect the human rights of refugees and asylum seekers and the Aboriginal and Torres Strait Islander people. If Australia has to maintain its position in the international domain as pro-active protector of human rights, it has to implement rights for everyone and not "pick and choose".

INDIA AND AUSTRALIA: A COMPARISON ON CONSTITUTIONAL MANDATE

India and Australia present us with a unique position to compare and understand the importance of constitutional mandate for protection, enforcement and redressal of human rights in a country. Both India and Australia are democratic countries. Democracy itself plays a very important role in the realm of human rights. Take for instance the opening paragraphs of the European Convention on Human Rights which state that "*fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective*

⁴⁴ Stone & Barry, *supra* note 34.

⁴⁵ Elizabeth Evatt, *Australia's Performance in Human Rights*, Alternative L.J (2001).

⁴⁶ Dianne Otto, *From 'reluctance' to 'exceptionalism' The Australian approach to domestic implementation of human rights*, Alternative L.J (2001).

political democracy” which affirms the fact that human rights are indeed best protected by a functional democracy. The citizens of both India and Australia place their utmost faith in the democratic government. Nilanjana in her article argues that in reality, human rights do not even have presence in countries where there is no democracy. She cites the example of China wherein even after the constitution providing for human rights due to one-party rule and subordination of judiciary, these rights are not justifiable. Similarly in the Shariat following countries, human rights take a secondary position to the Shariat Law⁴⁷. The proponents against bill of rights in Australia argue that the Australian citizens have faith in the democratic government and that the similar depth of faith cannot be expected towards the judiciary where people have no right or no say in elections of the judges.⁴⁸ India presents us with an absolutely contrasting picture where people obviously have faith in their government which can be witnessed by the success of democracy in India but citizens of India place similar or sometimes even to a far greater extent faith in an independent judiciary. The faith in the judiciary is itself due to the fact that there is no interference in the judicial institution by both the public as well as the government and that this independence provides the judiciary with an important position in the country where the citizen can expect the judiciary to work in an unbiased manner towards the development of human rights in the country. This faith has manifested in the judiciary being actively involved in securing and protecting human rights in India. The Australian constitutional courts do not have similar power of redressal as compared to the Indian constitutional courts. The reason for the same can be attributed towards the lack of bill of rights in Australia which restricts the power of the courts as compared to the legislature. Even United Kingdom, which has parliamentary supremacy chose to incorporate a bill of rights for certain civil rights of the citizen. Incorporating rights in the constitution or even providing for a bill of rights provides the citizens and non-citizens alike a recourse and more importantly a guiding map for them in respect of their human rights and the same provides for a strong almost infallible aid for the enforcement and protection of their rights.

Another argument against incorporating a bill of rights in Australia has been the concern over stagnancy in the scope of human rights. According to the same bringing in bill of rights leads to stagnancy in human rights and that it would be difficult to cope with the changing dimensions of the same. Not having a bill of rights provides for a flexibility in the legal regime wherein the courts and the government are not bound by the already provided for or defined

⁴⁷ Nilanjana Jain, *Human Rights Under Democracy*, 67 *The Indian Journal of Political Science* (2006).

⁴⁸ Harris, *supra* note 44.

rights in the country. But yet again we have seen that the Indian constitutional court have been successful in incorporating human rights beyond what has been provided in the law which has kept up with the changing dimensions of human rights. Wider interpretation has led to enforcement of prisoners rights, women rights, LGBTQ rights, etc in the country. This judicial activism by the Indian apex court provides for a direct counter to the argument of stagnancy. But here it will also be important to provide the limitation that can be placed in for the judiciary with incorporating a bill of rights. If the bill of rights do not have the scope of broader interpretation or if the judiciary of a particular country restrains from interpreting rights in broader sense, then the same bill of rights will cause to be a limitation and lead to stagnation. Thus what is required is strong and courageous judiciary that is ready to take the responsibility to step in for enforcement and recognition of human rights in a country.

For a complete comparison, it is also important for us to discuss the performance of both India and Australia in human rights. The Indian as well as the Australian governments are answerable both at domestic and international forums for their efforts towards the protection of human rights. Recently both India and Australia have been selected as member states to the Human Rights Council. The membership to this council provides both these countries a platform to work more diligently towards their obligations in progress in human rights in their respective countries. In the year 2006, the Human Rights Council created a unique process known as the Universal Periodic Review (UPR). UPR involves a periodic human rights review of all the member states. UPR assesses the state obligations under the UDHR and the covenants ratified by the states. It examines the reports that are submitted by the states to the treaty bodies under different covenants. It involves each nation presenting its national report to inform the progress in improving human rights record in their respective countries. After this the other member nations get floor to raise questions and make recommendations to the country. UPR has been successful in examining, questioning and criticising the state actions towards their obligations of different human rights. The human rights committee has been vocal in criticising both India and Australia on their track-record over human rights.

Australia has been in the fire line due to its “pick and choose” policy due to their routine rejection of committee’s suggestions.⁴⁹ More specifically it has been criticised on the treatment of both asylum seekers in offshore detention and Aboriginal and Torres Strait Islander peoples

⁴⁹ Ben Doherty, *‘Unacceptable’: UN committee damn Australia’s record on human rights* (Jan.17, 2019, 11:28AM), <https://www.theguardian.com/australia-news/2017/oct/19/unacceptable-un-committee-damns-australias-record-on-human-rights>.

in the justice system.⁵⁰ Australia has also been criticised for its failure to build effective mechanism for prevention and accountability.⁵¹ According to a non-profit organisation, Human Rights Watch, there is mass spread human rights violation towards asylum seekers and refugees in Papua New Guinea and Nauru. There have been reports of significant abuses against the children in Australian criminal system. UN special rapporteur on human rights of migrants has urged the Australian government to end its offside processing policy of asylum seekers.⁵² Australia has been urged from both international and domestic fronts to rethink the implementation of bill of rights to preserve its status as the human right protector. Former Chief Justice Anthony Mason wrote, *“Australia's adoption of a Bill of Rights would bring Australia in from the cold, so to speak, and make directly applicable the human rights jurisprudence which has developed internationally and elsewhere. That is an important consideration in that our isolation from that jurisprudence means that we do not have what is a vital component of other constitutional and legal systems, a component which has a significant impact on culture and thought, and is an important ingredient in the emerging world order that is reducing the effective choices open to the nation state.”*⁵³

India got elected as the member of UNHRC for the third time. According to some, this proves the strong image of India as human rights protector. India came in the line of fire during its UPR⁵⁴ on certain key issues such as the India clampdown on foreign funds for voluntary agencies which according to few countries restricts the freedom of association in India. It was also heavily criticised for inability to take actions over discrimination against the African Nationals. Even on the international forum. India was been criticised over the much debated Armed Forces (Special Powers) Act which has been alleged to empower the army for any violation of

⁵⁰ Calla Wahlquist, *Australia could face UN criticism over dismissal of Indigenous voice to parliament* (Jan. 17, 2019, 11:30AM), <https://www.theguardian.com/australia-news/2017/nov/23/australia-could-face-un-criticism-over-dismissal-of-indigenous-voice-to-parliament>.

⁵¹ Apoorva Kolluru, *What Australia can do while on the Human Rights Council*, Australian Outlook (Jan. 17, 2019, 11:45AM), <http://www.internationalaffairs.org.au/australianoutlook/australia-on-the-human-rights-council/>.

⁵² Human Rights Watch, *Report on Australia*, (Jan. 17, 2019, 11:56 AM), <https://www.hrw.org/world-report/2018/country-chapters/australia>.

⁵³ Sir Anthony Mason, *Rights Values and Legal Institutions: Reshaping Australian Institutions*, 13 Austl' Intl' L.J. (1997).

⁵⁴ Indulekha Aravind, *So what is India's human rights record really like?*, ET Bureau (Jan 17. 2019, 1:00PM), <https://economictimes.indiatimes.com/news/politics-and-nation/so-what-is-indias-human-rights-record-really-like/articleshow/58662843.cms>.

human rights without any accountability. India's reluctance to ratify CAT and its optional protocol has also been raised numerous times at UPR.⁵⁵ The non-profit organisation, Human Rights Watch recorded that one major area where there is wide spread human rights violation is the lack of accountability under AFSPA. Secondly, there have been rising cases of mob attacks on dalits, tribal groups and religious minorities. According to the report due to excessive usage of sedition and criminal defamation laws in India, the freedom of expression is being curtailed in the country. The report also included that even after having numerous strong legislations for protection of women and children in India, the implementation of the same does not have a strong record with crimes against vulnerable groups on a rise.⁵⁶ India has also been repeatedly questioned about its lack of implementation of comprehensive constitutional and legal framework. But one positive appreciation that India has always received is for the sweeping proactive legal and administrative provisions towards protection of human rights for all sections of the society.⁵⁷

CONCLUSION

The author tried to analyse the importance of constitutional mandate or bringing in force a bill of rights towards human right protection in a country. India and Australia have chosen two different paths, the former chose to incorporate fundamental human rights in the constitution itself whereas the latter ensured just a few fundamental rights in the constitution and ensured few others through various federal or state laws. We've also discussed the arguments for and against such mandate for human rights. Lastly we've also briefly discussed on the actual performance of both these countries towards human rights. Foremost, human rights can be called as living rights, which mean that these rights would require constant protection, enforcement and redressal by a country. But the question that that been deliberated upon was whether a constitutional mandate makes human rights more efficient and robust in a country. The major arguments against a bill of rights can easily be dispersed with. Essentially providing for a constitutional mandate compels the government to compulsorily protect and enforce them, violation of which can attract judicial redressal. Internationally as well as in the domestic academic circles, Australian government has been urged to bring in force a bill of rights. The recent

⁵⁵ Devirupa Mitra, *India Comes in the line of Fire at UNHRC over rights record, racism*, THE WIRE (Jan 17. 2019, 1:05PM), <https://thewire.in/diplomacy/india-unhrc-universal-periodic-review>.

⁵⁶ Human Rights Watch, *Report on India* (Jan 17. 2019, 1:15PM), <https://www.hrw.org/world-report/2018/country-chapters/india>.

⁵⁷ Dilip Lahiri, *International human rights standards: How does India measure?*, 13 ORF Issue Brief (2008).

examples of number of African countries can also be looked into which have after now decided to enforce human rights through their constitutions. Human rights require maximum level of legal protection which according to me can only be guaranteed through a constitution. Supremacy of a written constitution accord these rights a blanket of judicial protection where citizens will have a recourse for redressal in cases of violation of their rights. But at the same time, implementation of the same is quite necessary. India has lacked in effective implementation of human rights even after legally providing for them. This means that human rights need two pronged actions for being effective, one is to provide them with supreme legal backing which would not allow any branch of the government to subdue them and secondly an effective implementation mechanism which would ensure protection of human rights. Both India and Australia lack one of these actions. Where India has provided for a robust legal backing, it has been unable to provide for effective implementation and on the other hand Australia has been able to provide for effective implementation but has been reluctant to provide for a strong legal backing which at times create situations where human rights are subdued by governmental actions. Both these countries have impressive record when it comes to human rights protection but they also have a long way ahead for protection of human rights for all sections of society. Both these countries have to make few major decisions in the coming years to build a strong and an impregnable system for enforcement and protection of human rights.