JUDICIAL APPOINTMENTS IN INDIA; TOWARDS DEVELOPING A MORE HOLISTIC DEFINITION OF JUDICIAL INDEPENDENCE

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ABSTRACT

This paper discusses the recent controversy pertaining to judicial appointments in India. The Supreme Court of India in Supreme Court Advocates on Record V Union of India struck down the 99th Amendment to the Constitution which had created the National Judicial Appointments Commission to oversee judicial appointments to Supreme Court and High Courts , with the effect that the collegium system of judicial appointments continue to be operative. This paper is divided into three parts. The first part discusses the Constitutional provisions relating to judicial appointments and its interpretation in the initial years of Independence leading up to the emergency and the consequent birth of the collegium system. The second part discusses the National Judicial Appointments Commission and the Supreme Court decision in Supreme Court Advocates on Record V Union of India. The third and final part discusses a few suggestions for the better working of the collegium system drawn mainly from the UK system of judicial appointments.

I. HISTORICAL BACKGROUND

1.1 CONSTITUTIONAL PROVISIONS

Article 124 and 217 of the Indian Constitution gives the President the

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power to appoint judges to the Supreme Court and High Courts of the country respectively. In the appointment of judges other than the Chief Justice of India, the President shall consult the Chief Justice of India in case of Supreme Court and in case of High Courts; in addition to the Chief Justice of India the Chief Justice of the concerned High Court and the Governor shall also be consulted. The makers of the Constitution had envisioned a system of judicial appointments that gave executive the final say. Speaking on the dangers of a system that makes the Chief Justice of India the sole repository of all powers in terms of appointment of judges, BR Ambedkar said –

'*But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day*[1]'

In not giving the Chief Justice of India the final word and by establishing the need to consult the judiciary on part of the President, the Constitution of India laid down a consultative process for appointments to higher judiciary. The preponderance of the executive in judicial appointments that the law guaranteed, however did not translate into reality, at least in the initial years of Independence. It was the Chief Justice of India who played a predominant role in judicial appointments and the role of the President was

1 Constituent Assembly Debates , Volume VIII , Page 258.

limited to making the formal announcement[2]. Therefore the predominance the law gave the executive did not result in political interference in the judiciary but rather served as a check on the judgment of the Chief Justice of India. This was a good model of separation of powers, which worked well as long as both the executive and the judiciary worked with the intention of building an accountable and independent judiciary. This intention was laid to rest by the Government of Indira Gandhi that superseded three senior judges for the post of Chief Justice of India in 1973 and initiated an effort the pack the judiciary with judges committed to the ruling dispensation. During the period of Emergency the case *ADM Jabalpur V Shiv Kant Shukla*[3] and the 39th and 42nd amendments to the Constitution severely affected the credibility and independence of the judiciary. The Government that was elected after Emergency undid the damage done to the judiciary and the Court, perhaps sensing a credibility crisis took on a more activist role in to order to restore some amount of legitimacy after the dark days of emergency[4].

1.2 BIRTH OF THE COLLEGIUM SYSTEM

The experience of the judiciary under the Indira Gandhi regime during the Emergency and even after the Emergency[5], gradually created a

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2 George H. Gadbois Jr, Selection, *Background Characteristics, and Voting Behavior of Indian Supreme Court Judges, 1950-1959* , in COMPARITIVE JUDICIAL BEHAVIOR , (G. Schubert and D. J. Danelski eds. in press)

3 1976 AIR 1207

4 See , Jamie Cassels , *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?,* 37 The American Journal of Comparative Law 3 1989 , pp 495-519 (510-511)

5 See , Life Insurance Corporation of India V D.J Bahadur and Ors , AIR 1980 SC 2181 , See , Bhagwan .D. Dua , *A study in Executive-Judicial conflict : The Indian case,* 23 Asian Survey 1983 , pp 463-483 (473-474)

trust deficit between the judiciary and the executive, which was taken to its logical conclusion in the *Second Judges case*[6] in 1993. In a decision that has been subject to much criticism the Supreme Court held that judiciary will have primacy in judicial appointments with the effect that executive effectively no longer had a say in the process. This case along with the Presidential Reference to the Supreme Court in 1998[7] on the matter of judicial appointments brought to existence the collegium system of appointments, where a close coterie of judges determined appointments to higher judiciary through a process shrouded in secrecy. In spite of the collegiums system being the only system in the world where judges appoint judges, it survived without major challenges for two main reasons. The era of collegiums was also the era of coalition governments at the center and the memories of executive interference in the judiciary was still fresh in the minds of the Indian public. However with a majority Government now in power and members of the Supreme Court[8] speaking out against the collegiums system, a new method of appointing judges seemed inevitable. It is against this background that the NDA Government introduced the National Judicial Appointments Commission Bill in the Parliament, to set up a six member commission with representatives from both judiciary and executive to recommend names for appointments to the higher judiciary.

6 Supreme Court Advocates on Record V Union of India , AIR 1994 SC 268

7 AIR 1999 SC 1

8 Daily News and Analysis , 29th July 2014 , *Collegium system of recommending judges have completely failed : Markandey Katju ,* Hindustan Times , 16th December 2009 , '*Collegium system has done more harm to judiciary'*

II. 99TH AMENDMENT AND *SUPREME COURT ADVOCATES ON RECORD V UNION OF INDIA*

2.1 THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION

The National Judicial Appointments Commission is composed of the Chief Justice of India as its Chairperson, two other senior judges next to the CJI, the Law Minister and two eminent persons selected by a committee that includes the Prime Minister, Leader of the single largest opposition party and CJI. One of the eminent persons has to be nominated from the Schedule Caste, Schedule Tribe, and Other Backward Class, Minorities or women. No recommendation can be made to the President if any two members of the commission does not approve of the recommendation. Appointments will be made by the commission not only on the basis of seniority but more importantly on the basis of merit of the candidate. Further the bill gives the commission the power to frame regulations in a wide array of areas that include, `criteria and procedure involved in appointing judges, procedure for transfer of judges from one High Court to any other etcetera. The changes enumerated above was sought to be inserted in the Constitution vide the 99th amendment which brought in Article 124A, 124B and 124C into the Constitution. While Article 124A brings into existence the National Judicial Appointments Commission, 124B gives the commission the authority to recommend names to higher judiciary and 124C regulates the functioning of the said Commission. Predictably the judiciary took a tough stand on the bill with the Chief Justice at the time of passing this bill, stressing the need for separation of powers and independence of judiciary in a number of public

meetings[9] that coincided with the introduction of the bill in Parliament.

2.2 THE CHALLENGE BEFORE THE SUPREME COURT

The challenge to the 99th Constitutional Amendment was heard by the Supreme Court in *Supreme Advocates on Record V Union of India*[10]. The five judge bench struck down the Amendment for being ultra vires the basic structure of the Constitution, with Justice Chelameshwar being the sole dissenting voice. The major question that the Supreme Court had to answer to unravel the controversy was whether judicial primacy in judicial appointments is part of the basic structure of the Constitution. If it is part of the basic structure, then there is no basis for the 99th Amendment for the Parliament does not have the power to amend the basic structure of the Constitution. However if judicial primacy is not part of the basic structure but only a result of the textual interpretation of the Constitution , then it is open for the Parliament to remove the basis of such a textual interpretation by an amendment.

The Union, in the course of arguments had requested the Supreme Court to refer the matter to an eleven judge bench to reconsider the decision of a nine judge bench in the Second Judges case. The Supreme Court while rejecting this plea, agreed to deal with this question while handing down the final judgment. Thus the judgments of Justice Khehar, Justice Lokul and Justice Goel are divided into two parts; one dealing with the referral and the

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9 The Hindu Business Line , 15 August 2014 , *All organs must have mutual respect for each other : Chief Justice*

10 2015(11)SCALE1

other with the constitutional validity of the amendment. Such an approach has lead to substantial amount of confusion between the reasons for denying the referral and holding the amendment to be unconstitutional. It needs to be noted that the validity of the 99th Amendment has to be seen in isolation and the constitutionality of the collegium system in no way makes the 99th Amendment unconstitutional. However it appears from the majority opinions that the Court has drawn a causal link between the constitutionality of the collegiums system and the unconstitutionality of the 99th Amendment. In order to hold the 99th Amendment to be unconstitutional the Court had to necessarily show that the Second Judges case held that judicial primacy in judicial appointments is part of the basic structure of the Constitution. This is because neither the constitutionality of the collegium system nor the correctness of the Second Judges decision takes away the power of the Parliament to make the 99th Amendment. The majority opinions takes a logical leap from constitutionality of the collegium system to the unconstitutionality of the 99th Amendment with the unsubstantiated underlying premise being that judicial primacy in judicial appointments is part of the basic structure. In order for some feature to qualify as a basic structure of the Constitution it has to be first established to be part of Constitutional law and as such binding on the legislature[11]. In the failure of the majority opinions to establish that judicial primacy in appointments is the only way to maintain judicial independence, such an assumption is '*empirically flawed without any basis either in the constitutional history of the Nation or any other and normatively*

[11] M. Nagaraj & Others V Union of India & others , 2006 8 SCC 212

fallacious apart from being contrary to political theory'[12]. Thus the failure of the majority opinions to establish that judicial primacy in judicial appointments is part of the basic structure independent of the constitutionality of the collegium is a major deficiency of the majority opinions.

2.3 UNDERSTANDING JUDICIAL INDEPENDENCE

The erosion of Judicial Independence by virtue of coming into being of the National Judicial Appointments Commission was the major plank of reasoning in holding the 99th Amendment to be ultra vires the Constitution. It is therefore of utmost importance to understand the broad contours of 'Judicial Independence' to develop a better understanding of the judgment. The Constitution provides for the judges, security of tenure, salaries that are not subject to vote of the Parliament, and prohibits any discussion on the conduct of judges in Parliament. Further the jurisdiction of the Supreme Court cannot be curtailed by Parliament in any manner. It was hoped that such measures would secure independence of the Court and allow it to administer justice without interference from the Government. The 99th Amendment does not alter any of these features but yet has fallen foul of 'Judicial Independence'. Thus judicial independence in the context of the Supreme Court judgment seems to be understood as judicial primacy in judicial appointments to the exclusion of all other conceptions of 'Judicial Independence'.

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12 Supreme Court Advocates on Record V Union of India , 2015(11)SCALE1 , (J.Chellemeshwar , dissenting)

Such an exclusive conception of 'Judicial Independence' has been in operation since the Third Judges case. Justice Chelameshwer's powerful dissent brings to fourth the dangers associated with such a conception of 'Judicial Independence'. In paragraph 1 of the judgment he wonders if the judiciary has-

'*developed an alternate constitutional morality to emancipate us from the theory of checks and balances, robust enough to keep us in control from abusing such independence? Have we acquired independence greater than our intelligence, maturity and nature could digest?'*

The judgment takes notes of some instances in the last one and a half decade which gives weight to the argument that the notion of judicial independence as propounded by the Second and Third judges case is not the best way of safe guarding the interests of the judiciary. Reference was made to statements made by members of the collegiums speaking out against the system[13] and the Supreme Court decisions in *Shanti Bhushan & Another V Union of India & Another*[14] and *P.D Dinakaran V Judges Inquiry Committee*[15] . All this leads credence to the argument that a more holistic definition of 'Judicial Independence' should be considered for the best interests of the judiciary. Independence of Judiciary should not just be seen as Independence from executive pressure but also '*fearlessness of power centers, economic or political and*

13 "*An Independent Judiciary*" – speech delivered by Ms. Justice Ruma Pal at the 5th V.M. Tarkunde Memorial Lecture on 10th November 2011.

14 2009 1 SCC 657

15 2011 8 SCC 380

freedom from prejudices acquired and nourished by the class to which judges belonged[16]*'.*

A study of social backgrounds of Supreme Court judges appointed between the period 1950-1990 reveal that over 40% of them were Brahmin at any point of time while close to 50% were from other forward castes and the percentage of Schedule Caste , Schedule Tribes and Other Backward Class barely crossed 10% at their highest[17]. Not much changed during the period of the collegium system as in the year 2011 the report brought out by the National Commission for Schedule Caste[18] noted that out of 850 judges of 21 High Courts of India , only 24 belonged to SC/STs. Just as the presence of regional diversity in the Supreme Court is hard to explain as chance, the relative homogenization of the Supreme Court in terms of social backgrounds too, is hard to explain as chance[19]. Even though courts have no obligation to be representative the continued absence of people belonging to certain backgrounds can make people to draw the implication that there is an ingrained bias in the judiciary against these backgrounds. The possibility of people making such an implication is in itself a sever attack on the credibility, public confidence and hence the legitimacy of the Court. As Justice Khehar notes in his majority decision, '*people are conscious and alive to the fact that their rights should be adjudicated in consonance to the rules of natural justice*'. Just as a system that allows the executive to weigh in its interests at the stage where

16 S.P Gupta V President of India and Ors , 1981 Supp (1) SCC 87

17 George H Gadbois , *Judges of the Supreme Court of India : 1950-1989*. New Delhi: Oxford University Press 2011

18 National Commission on Schedule Caste , *A Report on Reservation in Judiciary*

19 Madhav Khosla , Sudhir Krishnaswamy , *Inside Our Supreme Court ,* XLVI Economic and Political Weekly 34 , August 20th 2011

the merits and demerits of candidates are discussed is antithetical to the idea of natural justice so is a homogeneous judiciary as far as the disadvantaged and minorities are concerned. Therefore it is important for the Courts to see if such hidden institutional biases have crept in and take measure to break free from them to be truly independent. An exclusivist definition of judicial independence is problematic from two angles ; it makes the judiciary accountable to none and capable of much abuse , and secondly such a scheme will not take into be open to concerns of the homogenization of judiciary as is evident from the last one and half decades.

III. IMPROVING THE COLLEGIUM SYSTEM

3.1 LESSONS FROM UNITED KINGDOM

In the order striking down the 99th amendment one of the components was the consideration of introduction of appropriate measures if any for an improved working of the collegium system[20]. The Supreme Court in showing the willingness to reform the appointments process was however categorical that any reform will be effected within the framework of the collegiums system where judicial primacy is a given. The Court in an order dated 5th November 2015 invited suggestions in four categories, i.e., Transparency, Eligibility Criteria, Complaints and Collegium Secretariat.

The UK system of judicial appointments where an independent Judicial Appointments Commission makes judicial appointments to all

[20] Available at http://onelawstreet.com/wp-content/uploads/2015/11/order-supreme-court-invites-suggestions-to-improve-collegium-system-6-nov-2015.pdf

judicial posts expect senior posts has some lessons in making the collegium system a better functioning model. Even though in the UK system the final say in judicial appointments rest with the executive it still has important lessons pertaining to questions of transparency , eligibility criteria, complaints and putting in place a permanent institution to deal with judicial appointments.

The present mechanism of a close coterie of judges discussing in private and appointing judges without any information as to what guides the appointments process has severely affected the legitimacy of the judiciary. Thus, brining in transparency to a process shrouded in secrecy must be the central goal of the reform process. It is safe to assume that the infusion of transparency in a much publicized process such as judicial appointments will result in accountable practices improving the overall efficiency of the appointments process.

The infusion of transparency to the appointments process should be at three levels. One, vacancies should be advertised widely so that any individual satisfying the Constitutional stipulation of eligibility is afforded the opportunity to be considered for the post being advertised for. This would be a substantial improvement over the present system where from the very beginning certain candidates are excluded from appointments due to reasons shrouded in secrecy. Further as Baroness Usha Paresher , Commissioner of the UK judicial appointments commission which follows the method of advertising vacancies noted , a wider pool of candidates can enhance the

merit of those selected[21]. Two, it is important to develop a simple definition of what constitutes merit and to make it known to the candidate base. Equally important is to develop fair, non discriminatory and effective processes for the application of the merit criteria to achieve desired goals of quality appointments. Though the modalities of this process is beyond the scope of this paper, it would be ideal to devise a system where individuals who are rejected in the process of appointments are given reasons for they being rejected. Assuming that the modalities of such a process involve a preliminary elimination based on applications submitted, this system may not be possible at this stage, considering the number of people who will apply. At advanced stages of selection where the number of people are low enough it would be ideal to give individual feedback. However even at the application stage generalized feedback that identify common mistakes and problems will be a significant step towards making the appointments process transparent. Third, it is equally important to devise measures which will ensure transparency from the applicant's side as well. To that effect, the inclusion of a 'good character' policy like in the UK which makes it incumbent on the applicant to declare anything in her/his past or present circumstances that should be declared or might affect judicial appointments, can foster transparency from the applicant's side and ensure that only applicants with an impeccable record are considered for judicial appointment.

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21 Professor Jeffrey Jowell QC , Lord Mackay of Clashfern KT , Jonathan Sumption OBE QC , Baroness Prashar CBE, MR. Justice Hickinbottom , Shami Chakrabarti CBE , Her Honour Judge Frances Kirkham , Lady Justice Hallett DBE , *Judicial Appointments Balancing Independence Accountability and Legitimacy ,* at 49 , http://jac.judiciary.gov.uk/static/documents/JA_web.pdf , Last accessed on 14th September 14:56 PM

As important as brining in transparency in the appointments process is understanding the importance of a diverse judiciary. The higher judiciary in India, as has been noted before, is a homogenous body with very little representation from women, minorities and SC/ST. A homogenous body of judges appointed through a secret process sitting in judgment over a highly diverse population, raises important questions of natural justice. Though judges are thought to be above questions of gender, caste, religion, the mere possibility of an individual belonging to a historically disadvantaged group perceiving a homogenous judiciary to be against his or her interests is an attack on the natural justice principal of justice should not only be done but seen to be done. Further the legitimacy of the justice system itself will be in question if it is perceived to be discriminatory towards entry of the historically disadvantaged.

The question of increasing diversity in judiciary is politically loaded and is often retorted by concerns of merit being sacrificed at the altar of political correctness. The very idea of merit principle can be said to be discriminatory towards the historically marginalized[22]. What constitutes merit is not decided in isolation but in relation to the pool of candidates. The candidate pool, or majority of candidate pool belong to the historically advantaged groups, whose kin have previously dominated the same profession. Therefore the whole concept of merit is loaded in favour of the elite to the disadvantage of the historically marginalized whose skill sets

22 See , Kate Malleson , *Rethinking the Merit Principle in Judicial Selection ,* 33 Journal of Law and Society pp 126-140 (135-137)

might vary. An accurate representation of the same was seen during the Second World War, when the concept of merit was radically changed and defined in terms of skills women have in the absence of able bodied men. After the war when the men returned there was a need to accommodate them, and merit was again defined in terms of the skill set of men, leading to the exclusion of women. It is important for the judiciary to be aware of institutional biases that may have crept in to be truly independent. To this effect a mandate to increase diversity in judiciary would be step in the right direction towards increasing the legitimacy of the justice delivery system. This mandate will of course be subordinate to the obligation of selecting the best person for the post. However such a mandate can by itself play an important role in increasing diversity in the judiciary. The importance of a diverse judiciary has been recognized by UK, where the JAC has a mandate to make the judiciary diverse without compromising merit. What such a mandate has done is made the commission aware of the hidden institutional bias against minorities in judiciary. Such awareness has resulted in a 50% increase in women appointments to High Courts[23], through a system that weighs only merit. Further, with the objective of encouraging wider participation in the application of judicial posts, the JAC organizes Candidate Seminars targeting under-represented groups [24] . These seminars are conducted by members of the commission, who explain in detail the selection procedure, and give advice on the selection process such as techniques to ace the final interview. The JAC has also established a

23 Supra Note 21 at Page 51
24 Supra Note 21 at Page 78

Diversity Forum which brings together parties interested in a diverse judiciary to discuss and bounce off ideas to improve diversity in the judiciary. These are important structures India can follow in establishing a diverse judiciary and thereby improving the legitimacy of the justice delivery system.

IV. CONCLUSION

The 99th Amendment was definitely a step in the right direction, considering the urgent need for reform in judicial independence. However, a system that lets the executive to weigh the merits and demerits of each candidate and eliminate inconvenient candidates, as the NJAC would have allowed for is hardly the right method for fixing a broken system. A system like in the UK where the JAC that recommends names is free from executive interference but the executive retains the final say in appointments would have helped achieve the objective of judicial independence and at the same time respect the Constitutional mandate of separation of powers. Such a system would have ensured that the executive cannot eliminate inconvenient candidates at the consultation stage, like the NJAC allowed for. A system like this seems closer to the model of judicial appointments the Constitutional makers envisioned and the country followed in the initial years of independence, where the executive's role was limited to ensuring that no gross injustice was committed by the judiciary in appointments, as pointed out earlier. In the event of the Supreme Court striking down the 99th Amendment it is hoped that the call for suggestions to improve the collegium system will lead to a more transparent and accountable system of judicial appointments that will help achieve the twin objectives of an efficient and diverse judiciary.

HUMAN RIGHTS IN THE WSIS PROCESS: THE NOTION OF INTERDEPENDENCE AND INDIVISIBILITY AS A WAY FORWARD

Puneeth Nagaraj[*]

The High Level Meeting UN General Assembly from 15-16th December, 2015 marked the end of the Overall Review of the Implementation of the Outcomes of the World Summit on the Information Society (WSIS). The Outcome Document[1] that was adopted as a General Assembly Resolution was notable for including a separate section on human rights. This is in continuation of the mandate from the Tunis Agenda which highlighted the importance of human rights to the Information Society. Having a separate section on human rights was an important step. But, the document does not reflect the progress the human rights movement has made in the last decade on human rights and the internet. There is a need for a distinct framework on human rights on the internet and its recognition at the international level is an important first step.

This paper argues that giving effect to the notion of interdependence and indivisibility of human rights is a means of realising the goal of an "internet bill of rights". As the WSIS process moves into the smaller policy making bodies, the realisation of a distinct online framework of human rights can be achieved by embedding human rights into all levels of functioning of the WSIS process.

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1 General Assembly Resolution, A/70/L.33.

I. THE WSIS PROCESS AND THE 10 YEAR REVIEW

The idea for a Summit on the information society first emerged as a response from the UN system to the digital divide. However, there was a need to resolve many other issues that related to the global governance of the internet. In 2001, the UN General Assembly,[2] on the recommendation of the International Telecommunications Union (ITU) passed a resolution to hold the Summit over two phases in Geneva (2003) and Tunis (2005).

The first phase in Geneva produced the *Declaration of Principles and Plan of Action* which set out a roadmap for further discussion and identified action lines for to respond to many of the challenges faced by the information society. The second phase in Tunis in 2005 was meant to put these plans into motion by achieving consensus on many contentious issues. The *Tunis Agenda for the Information Society* is a consensus statement that was an outcome of the second phase. The Tunis Agenda established guiding principles for internet governance processes.[3] On human rights, the Tunis Agenda was notable for making a reference to the *Universal Declaration of Human Rights* (UDHR). But the reference was limited to the rights to privacy and free expression. The *Declaration of Principles* from the Geneva phase on the other hand was far more comprehensive, referring to a range of human rights issues and international human rights instruments.[4]

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2 General Assembly Resolution, A/RES/56/183.

3 William J. Drake. "Encouraging Implementation of the WSIS Principles on Internet Governance Procedures." In, Wolfgang Kleinwächter, ed. The Power of Ideas: Internet Governance in a Global Multistakeholder Environment. Berlin: Marketing fur Deutschland GmbH, 2007, pp. 271-280, at p. 271.

4 Cees J Hamelink, "Human Rights Implications of WSIS", (2005) 18.1 Revue québécoise de droit international, pp. 28-39, at p. 29.

The ten-year review, negotiations for which began in July 2015 offered an opportunity to expand on the human rights language from the first two phases of the WSIS. The six-month long process was meant to take stock of the developments and challenges that have emerged in the Information Society over the last decade. The Outcome Document was seen as a success by many,[5] but as a product of a political negotiation process can perhaps be described as a qualified success. The inclusion of a separate section on human rights- which was a contentious issue between countries and stakeholders- is illustrative of the negotiation process.

The document does acknowledge the growing challenges posed to human rights by the information society. It is also an improvement on the Tunis Agenda which only mentioned human rights twice. But, the outcome document also paid scant attention to a new generation of human rights whose implementation is crucial to the future of the information society. More importantly, it fails to acknowledge the evolution of the discussions around human rights over the last decade with respect to online rights.

II. HUMAN RIGHTS IN A DIGITAL AGE

The expansion of the Information Society over the last decade has raised new challenges to the realisation of human rights. Some rights like

5 See for instance, Constance Bommelaer, "Wrapping Up a Successful WSIS+10 Review", Internet Society Blog, 18th December 2015, available at <https://www.internetsociety.org/blog/public-policy/2015/12/wrapping-successful-wsis10-review>; Byron Holland, "WSIS+10: In Internet Governance, Actions Speak Louder Than Words", Council on Foreign Relations Blog, 14th December 2015, available at <http://blogs.cfr.org/cyber/2015/12/14/wsis10-in-internet-governance-actions-speak-louder-than-words/>.

privacy and free speech which predated the internet, have acquired new significance in the context of internet and ICTs. Other issues like the access and development, which were the focus of rights related discussions, are increasingly dealt with as stand-alone rights. Discussions on these rights have been supported by legal instruments at both the national and international level. The right to access [to the internet] for instance, has been recognised as a right in one form or the other in a number of countries including France, Spain and Greece.[6] But the recognition of a new set of rights is only one facet of the problem.

Enforcement of human rights has been traditionally understood as the prerogative of the State. However, in the information society, corporations like Google, Facebook and Twitter (to name a few) are beginning to take on many of the functions of the states. In processing requests to take down content, they become arbiters of speech. In collecting user data of millions of users, they have become a resource for governments across the world to tap into for law enforcement purposes. However, as private actors, there is no recourse under human rights laws against businesses for the abuse of such powers. With the exception of voluntary codes that companies can sign up for, there are few, if any formal mechanisms to hold businesses accountable for human rights violations.

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6 David Rothkopf, "Is Unrestricted Internet a Modern Human Right?", Foreign Policy, 2nd February 2015, available at <http://foreignpolicy.com/2015/02/02/unrestricted-internet-access-human-rights-technology-constitution/>.

The challenges described in the preceding paragraphs are not new. As far back as the first two phases of the WSIS, issues like privacy and free expression were debated and brought to the table by civil society actors.[7] This has also resulted in many soft law instruments and coordinated civil society efforts aimed at creating a framework of online rights.

Notable among these efforts is the multistakeholder, Dynamic Coalition for an Internet Bill of Rights, which was launched after the first Internet Governance Forum in 2006. It was one of the earliest efforts at mapping human rights obligations as it related to the internet. The initiative also received the support of the Brazilian and Italian governments who signed a Joint Declaration for the elaboration of an internet Bill of Rights[8]. A similar effort by the Association for Progressive Communications in 2006 produced the Internet Rights Charter.[9] The Charter builds on existing international human rights instruments to identify internet related human rights obligations across 7 themes.

Such human rights campaigns led by civil society/multistakeholder groups have led to recognition of internet related rights by many UN bodies. The UN Special Rapporteur on Freedom of Expression devoted his 2011

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7 Roy Balleste, 'Rising Toward Apotheosis: The Deconstruction of the WSIS Tunis Agenda for the Information Society', Pittsburgh Journal of Technology Law and Policy 12(1) Spring 2012 1-36, at p. 19. For a discussion on communication rights in the context of the first two phases of the WSIS, see Id Hamelink, pp. 32-34.

8 Wolfgang Benedek, 'Internet Governance and Human Rights' in Wolfgang Benedek et al (eds), "Internet Governance and the Information Society: Global Perspectives and European Dimensions" (2008), at p. 38.

9 Association for Progressive Communications, 'APC Internet Rights Charter', available at <http://www.apc.org/en/node/5677>.

report to access to the internet and highlighted the restriction of access to the internet as being violative of Article 19 of the UDHR.[10] In 2014, the Human Rights Council adopted a resolution[11] on the protection of human rights online which was also adopted by the General Assembly.[12] The resolution primarily called for the protection online of the same rights available offline. On privacy, the High Commissioner of Human Rights on the recommendation of the UN General Assembly produced a report on the 'Right to Privacy in the Digital Age' in 2014.[13] The Human Rights Council has since appointed a special Rapporteur on the Right to Privacy.

Even on the question of holding businesses responsible for human rights, there has been traction at the international level. The Guiding Principles on Business and Human Rights or the 'Ruggie Principles' were approved by the Human Rights Council in 2011. The question of its extension to human rights over the internet, however, is still being contested at various fora.

The human rights efforts in the last decade of the WSIS were successful in bringing attention to internet related human rights issues. Though there isn't a framework for online rights, it seems like the system is headed in that direction. The High Level Meeting in December was an opportunity to recognise this progress and signal a move to a framework of rights. The Outcome document did recognise the recent HRC and General

10 Human Rights Council, A/HRC/17/27, pp. 16-18 ¶ 60-66.
11 Human Rights Council, A/HRC/Res/26/13.
12 General Assembly Resolution, A/Res/68/167.
13 Human Rights Council, A/HRC/27/37.

Assembly resolution on online rights. It did not however highlight the need for a framework of internet rights.

III. INTERDEPENDENCE AND INDIVISIBILITY OF RIGHTS IN THE WSIS PROCESS

One of the criticisms of the Outcome Document has been its focus on Civil and Political Rights without due recognition to Economic, Social and Cultural Rights. The right to expression and its attendant concerns of protection against arbitrary and unlawful detention were recognised. But the right to access, development and education which were highlighted at various stages of the review process found no place in the document.

However, this claim presumes a dichotomy between the two categories of rights which does not exist. While it is true Economic, Social and Cultural rights were not mentioned in the Outcome Document, their absence does not preclude its application as the WSIS discussions move to other fora. The interdependence and indivisibility of rights refers to the idea that commitment to one category of rights (Civil, political or economic, social and cultural) must mean the other category of rights must also be safeguarded. [14] This was first mentioned in the 1968 Proclamation of Teheran[15] and affirmed in the Vienna Declaration of 1993[16].

14 James W. Nickel, "Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights", 30 HUM. RTS. Q. (2008) 984, at p. 985.

15 Proclamation of Teheran, International Conference on Human Rights (1968).

16 The Vienna Declaration and Programme of Action (1993).

The notion of independence and indivisibility easily translates to the information society. For instance, as mentioned in the 2011 Report of the Special Rapporteur on Freedom of Expression, the right to free expression cannot be enforced without a right to access. Similarly, the right to access is meaningless without the right or privacy. However, it must be cautioned that not all rights are interdependent and not all interdependencies need to be recognised or enforced. While some interdependencies are strong (like speech and access), others can be weak.[17] When the interdependence between rights is very strong, the relationship becomes indivisible.[18]

The absence of a recognition of economic, social and cultural rights does not mean they cannot be embedded into the information society. In fact, the Geneva Declaration of Principles makes an explicit reference to the interdependence and indivisibility of human rights and the Vienna Declaration.[19] Thus, the notion of interdependence has already been recognised in the WSIS process. As the process moves into smaller bodies, there is also space for more nuanced human rights discussions, allowing for the implementation of both categories of rights, notwithstanding the bare bones structure that the Outcome document has presented.

As human rights discussions become more prominent in internet governance for a, the push for a framework of internet related rights is likely

17 Supra, Nickel n. 10, at p9. 988-991.

18 An example of this is when a substantive right like freedom of expression is supported by a procedural right like the right to constitutional/legal remedies. In such a case, giving effect to one right in the absence of the other diminishes both rights.

19 Geneva Declaration of Principles, WSIS-03/GENEVA/DOC/4-E, at para 3.

to become stronger. At the IGF and the Working Group on Enhanced Cooperation, which have renewed mandates, informed discussions on human rights can lead to a framework of internet related rights. Even a purely multi stakeholder body like ICANN has accepted its human rights mandate. In these discussions, the notion of interdependence is essential to promote such a framework.