CHALLENGES TO CIVIL RIGHTS GUARANTEES IN INDIA (2012). By A. G. Noorani. South Asia Human Rights Documentation Centre. Oxford University Press. Pp. xiv + 283. Price Rs. 695/-.

IN FURTHERANCE of the preambulor promises, which reflect the solemn resolve of "[W]e the People of India", the Constitution of India not only guarantees certain rights and liberties that are considered to be inherent in the dignity and worth of the human person but also accords them the status of fundamental rights. The purpose behind elevating them to the status of fundamental rights is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of political parties having transient majority.

The idea of inclusion of fundamental rights in the Constitution of India has its genesis in the freedom struggle. In the pre-independent India there was no charter of fundamental rights of justiciable nature. That allowed the British regime to adopt more repressive measures to suppress the freedom struggle, when it was gaining more momentum. These repressive measures have, indeed, strengthened the demand for constitutional guarantee of fundamental rights.[1] It is evident from the series of resolutions adopted by the Indian National Congress starting from 1917.[2] In a resolution passed at the Madras session of the Indian National Congress in 1927, it was categorically asserted that: "the basis of the future Constitution of India must be a declaration of fundamental rights." The same was emphasised in the Karachi session of the Indian National Congress held in March 1931.[3] Even the Nehru Committee appointed by the All–Parties Conference in its report submitted in 1928 also stated that: "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances".[4]

The Constituent Assembly, which was entrusted with the task of drawing a Constitution for the governance of free - India, has also reiterated the commitment of freedom fighters. In the objective resolution adopted on January 22, 1947, it was resolved to draw-up for the future governance of the country a Constitution wherein, *inter alia*, "shall be guaranteed and secured to all the people of India justice, social economic and political: equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject

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1 Subhash C. Kashyap, *The Framing of India's Constitution: A Study* 170 - 171 (2004).

2 Subhash C. Kashyap, 1*The Constitutional Law of India* 402 (2008).

3 *Supra* note 1 at 172, 173; also see D. D. Basu, *Human Rights in Constitutional Law* 122 (2008).

4 *Ibid.*

to law and public morality". It was also resolved that the "adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes".[5] This became a reality when "[W]e, the people of India…have enacted, adopted and given to ourselves the Constitution on the twenty-sixth day of November, 1949".

Certain civil and political rights that are considered to be the first generation human rights, thus, came to be guaranteed under the part – III of the Constitution of India. The idea of recognizing the human rights in the written Constitution is, of course, not unique to the Constitution of India. It was in accord with the contemporary democratic and humanitarian temper and constitutional practices in other nations of the world.[6] The federal Constitution of the United States of America was one of the major influences for incorporating a 'bill of rights' in the Constitution of India.[7]

Referring to the various rights that are guaranteed under part – III of the Constitution, Subhash C. Kashyap observed:[8]

> [T]he Constitution contains perhaps one of the most elaborate charters of human rights yet framed by any state, consistent with the aim of the unity of nations and the interests of the public at large. These fundamental rights substantially cover all the traditional civil and political rights enumerated in articles 2 to 21 of the Universal Declaration.

The scope and contents of various rights that are guaranteed under part – III have also been judicially expanded through the interpretive process, which resulted in the creation of whole range of unenumerated fundamental rights as concomitant of those that are expressly guaranteed. Judiciary has relied, in the process, on directive principles of state policy as well as international human rights instruments, which are proliferating in the age of globalization. It may be noted that India, by signing many such international human rights instruments, has undertaken international obligation to protect and promote far greater number of human rights. Judicial expansion of fundamental rights has even blurred, to some extent, the distinction between the first

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5 See "Some Facts of Constituent Assembly" *available at*: http://parliamentofindia.nic.in/ls/debates/facts.htm (last visited on May 20, 2012).

6 *Id.* at 409.

7 The Constitution of America was the first modern Constitution to give concrete shape to the concept of human rights by putting them in to the Constitution and making them justiciable and enforceable through the courts of law.

8 Subhash C. Kashyap, *supra* note 2 at 417.

generation civil and political rights and the second generation socio-economic and cultural rights. As a result some of the rights falling into the latter category also come to be enforced under the garb of fundamental rights in India.

Looking into these developments, one may possibly think that the Independent India is marching fast and making steady progress in 'securing' to all the people of India, not only the first generation rights in part – III but also second generation rights envisaged in part – IV in the form of directive principles of state policy. But, the reality, however, is quite different. Notwithstanding the constitutional guarantees, even the first generation rights have not yet become living realities in the country. There are many roadblocks that exist in fully realising and meaningfully translating them into living realities as per the wishes of "[W]e the people of India". The book under review deals with some of those road blocks.

The book – *Challenges to Civil Rights Guarantees in India* – is the work of the South Asian Human Rights Documentation Centre (SAHRDC). Inspirations for the contents of the book have been derived from articles by the eminent constitutional law lawyer A. G. Noorani published in issues of the *Economic and Political Weekly* and *Sunday* magazine over the years.[9] However, it is the SAHRDC, which provided "the flesh and blood" for the book based on the collaborative discussions with A. G. Noorani.[10]

The book, as the title suggests, maps some of the major challenges for the civil rights in the country. It focuses on both traditional and emerging challenges. The major challenges, the book maps are: (i) Preventive detention, (ii) Extra-judicial killings, (iii) Counter-terrorism laws, (iv) Death penalty, (v) Narcoanalysis, (vi) Under trials and videoconferencing, (vii) Anti-conversion laws, (viii) Impunity, and (ix) Armed Forces (Special Powers) Act. The book consists of nine incisive essays examining each of these challenges separately.

The *first* essay on 'Preventive Detention' narrates history of preventive detention laws in India during the British period and how provisions providing for preventive detention and safeguards against such detentions came to be incorporated into the Constitution of India. It also provides an account of preventive detention laws enacted by the states and the centre after the adoption of the Constitution of India. The essay explains inadequacy of safeguards available against such detention and how judicial attempts to strengthen and expand them have failed. Critical analysis of the constitutional and legal regime on preventive detention in India in the light of international human rights law is the most important component of the essay. It is

9 A. G. Noorani, SAHRDC, *Challenges to Civil Rights Guarantees in India* xiii (OUP, 2012).

10 *Id.* at x and xiii.

contended that increasing use of preventive detention laws and lack of adequate safeguards are the major challenge to civil liberties in the country. In order to provide adequate protection for civil liberties, in the opinion of the author, significant reforms need to be introduced to the existing preventive detention regime and safeguards to prevent abuse and careless use of preventive detention laws need to be strengthened.

In the *second* essay on 'Extra - judicial Killings', the focus is on encounter killings in India. It provides an historical overview of extra - judicial killings in India. It attributes wide-spread prevalence of encounter killings to the official and unofficial policies adopted by the police, the government and even the judiciary in dealing with such cases. The essay highlights certain factors within the judicial system that allow and have the potential to encourage such killings. After examining the legality of encounter killings in the light of both domestic and international law, the essay concludes thus:[11]

> [T]he longstanding practice of encounter killings in India marks a clear violation of international law, fundamental human rights, and the most basic conception of justice.

The third major challenge to the protection of civil rights in India is the prevalence of counter - terrorism laws. It is dealt with in essay *three*. The essay presents a brief overview of India's experience with terrorism since independence. There is a detailed analysis of legislative measures undertaken in response and their enforcement. It focuses on the problems generated by such legislations.

The fourth essay on 'Death Penalty in India' provides an account of laws that provide for imposition of death penalty. It is contended that the continued imposition of death penalty in India by following procedure, which is fallible, is a grave threat to protection of civil rights in the country. The chapter highlights how the broad discretion afforded by the *rarest of rare* doctrine leaves enormous scope for subjectivity in the decision making process involving choice between death penalty and other alternative punishments prescribed. Arbitrary application of the *rarest of rare* doctrine by the judiciary in several cases has also been elucidated in the eassy.

Increasing use of narcoanalysis by the police in the course of investigation and interrogation in criminal cases is another major threat to the civil rights in India. Many have endorsed it as a scientific alternative to the third – degree interrogation methods. The *fifth* essay addresses the scientific, legal and ethical issues relating to narcoanalysis. It criticises the wide and frequent use of the test in the criminal investigation notwithstanding serious doubts on its scientific validity and reliability of its results. It

11 *Id.* at 67.

is vehemently contended that "narcoanalysis violates a number of civil and constitutional rights: the right against self-incrimination; the right to personal liberty, privacy and health; and the right to be free from torture and cruel, inhuman or degrading treatment".[12] Further, policy considerations in support of the narco test have also been critically examined.

Another major challenge to the protection of civil liberties is the practice of detaining people undergoing trials in prisons for longer periods as 'undertrial prisoners'. Such detentions curtail their civil liberties without complete justifications. It is shocking to note that around 70 per cent of India's prison population are undertrials. The sixth essay explains the magnitude of undertrials' problems in the country and the legislative and judicial shortcomings in addressing such problems. It critically examines the proposal to introduce videoconferencing for holding trials as part of the solution to the undertrial problem. It explains how adoption of any such methods violates the right to fair trial. Judicial delineation on videoconferencing has also been discussed in comparative perspective.

Enactment and enforcement of anti-conversion laws in several states in India have been perceived as greater threats to civil liberties. Such laws have been described in the book as 'Acts of Bad Faith'. These laws have been examined in the seventh essay. It is stated, at the very outset of the eassy, in unequivocal terms that "[C]onversions conducted by coercive or violent means are no doubt unconscionable and violate the right to freedom of religion enshrined in Article 25 of the Constitution, as well as various human rights instruments".[13] However, it is argued that the laws enacted by various states to prevent conversion by such methods also undermine the integrity of articles 25 and 26 of the Constitution. Imprecise expressions used in such laws leave scope for discriminatory abuse and overreach by law enforcement officials. The discussions in the chapter bring out how pro - majoritarian biases are inbuilt in the legislations enacted by some states. Necessity of having anti-conversion laws in India, legislative competence to enact such laws and judicial approach have also been examined in the light of provisions in the Constitution and the international human rights instruments.

The eighth essay is titled "Impunity". By "Impunity" the author refers to the situation created by both *de jure* and *de facto* immunity provided to the government functionaries that violate human rights and the state that backs them. It was contended that "the rampant impunity results from both the partial *de jure* and near complete *de facto* immunity provided in law and practice".[14] According to the author, the Constitution

12 *Id.* at 140.

13 *Id.* at 207 and 208.

itself is partly at fault as it authorizes the Parliament to enact laws granting both official and sovereign immunity. The essay discusses in some detail the legislative provisions that grant police, security forces and other government officials with widespread powers and then provide safeguard against their prosecution for abuse of such powers by making it mandatory to obtain priorsanction from the government for the same. It basically covers provisions under the Code of Criminal Procedure, 1973 and other national security, counter insurgency and counter terrorism laws that provide immunity.

Further, discussions on law relating to sovereign immunity highlight the failure of the Supreme Court's jurisprudence to create an effective remedy against constitutional torts. In conclusion it is asserted that:[15]

> The current state of the law in India continues to allow impunity for even the most serious human rights violations. The combination of the relative silence of the Constitution, various legal provisions granting official and sovereign immunity, Supreme Courts judgements' endorsement of such provisions, and multiple practical impediments to justice all combine to create a system of impunity.

"The current system of impunity in India", it was contended, "both perpetuates human rights abuses and runs afoul of international human rights standards."[16]

The *ninth* essay deals with the Armed Forces (Special Powers) Act (hereinafter AFSPA). It emphasises on the urgent need to review not only AFSPA but also decision of the apex court rendered in *Naga People's Movement of Human Rights* v. *Union of India*,[17] wherein the constitutional validity of AFSPA was upheld notwithstanding the draconian provisions it contains. What is more shocking is that the apex court did not even invoke article 21 of the Constitution of India while examining the validity of AFSPA though it authorizes, under section 4, 'extra-judicial executions', which is described in the book as 'a license to kill'. By referring to various judicial decisions, it is demonstrated that section 4 of AFSPA is manifestly violative of article 21 of the Constitution. Thus, the author suggests two important changes to be brought to AFSPA:[18]

(i) Drastic amendment of section 4.

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14 *Id.* at 239.

15 *Id.* at 262.

16 *Id.* at 240.

17 (1998) 2 SCC 109.

18 *Super* note 9 at 275.

(ii) Setting up of an independent appellate body to entertain complaints against armed forces or the police when they operate under AFSPA.

No doubt, the changes suggested by the author to the AFSPA are highly desirable but one fails to understand the need for reviewing the judgment of the apex court, when the Act itself is reviewed and necessary changes are introduced.

On the whole, essays in the book highlight prevailing imbalances between 'individual rights' and 'state power'. Maintaining a fine balance between the two is one of the hardest tasks. How to reconcile the 'individual rights' with the 'state power' required to maintain safety and security of the nation is, perhaps, one of the eternal problems of governments all over the world. Edmund Burke has finely articulated the problem in the following words:[19]

> To make a government requires no great prudence, settle the seat of power, teach obedience, and the work is done. To give freedoms is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a free government, that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought and deep reflection.

Essays in the book convincingly establish that a fine balance between 'individual rights' and 'state power' has not been maintained in the constitutional and legal frameworks in India. The failure to strike a proper balance between the two can equally be attributed to the book under review as well. On a careful reading of various essays, it is somewhat evident that the issues relating to state expediency have not been given adequate consideration in comparison to the emphasis in the book on the need to accord greater protection to individual rights. Balance is slightly tilted towards individual rights by focusing more on their violations and threat of violations under the laws than on the necessity to have such laws. This, in fact, shows that the task of striking a proper balance requires much greater thought and deeper reflection. The book certainly throws light on issues relating to civil rights guarantees in India and contributes greatly to understand the problems in proper perspective.

The book is a value addition to the existing literature. It is rich in information and highly thought provoking. It undoubtedly makes the reader to understand the wide gap between highly advanced discourses on different generations of human rights and the living realities. The challenges to civil rights it identifies and addresses are only illustrative and not exhaustive. There are many more that exist. Usha Ramanathan, in

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19 Cited in L.M. Singhvi, *Freedom on Trial* 36 (Vikas Publishing House Pvt. Ltd. 1994).

her paper titled "Human Rights in India: A Mapping",[20] has listed many/more challenges, all of which needs to be addressed. The fact that there are numerous challenges confronting civil rights framework in the country has been acknowledged by Ravi Nair, SAHRDC in "Introduction" in the book. He has promised to cover them in a subsequent volume. Hope the subsequent volume comes soon and throws further light. SAHRDC deserves to be complimented for undertaking this exercise.

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20 *Available at:* http://www.ielrc.org/content/w0103.pdf (last visited on Mar.25, 2014).

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