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Human Rights in Contemporary Society

Challenges From an International Perspective

Edited by Jana Mali

Human Rights in Contemporary Society - Challenges From an International Perspective

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Sustainable Development

Volume 9

Aims and Scope of the Series

Transforming our World: the 2030 Agenda for Sustainable Development endorsed by United Nations and 193 Member States, came into effect on Jan 1, 2016, to guide decision making and actions to the year 2030 and beyond. Central to this Agenda are 17 Goals, 169 associated targets and over 230 indicators that are reviewed annually. The vision envisaged in the implementation of the SDGs is centered on the five Ps: People, Planet, Prosperity, Peace and Partnership. This call for renewed focused efforts ensure we have a safe and healthy planet for current and future generations.

This Series focuses on covering research and applied research involving the five Ps through the following topics:

1. Sustainable Economy and Fair Society that relates to SDG 1 on No Poverty, SDG 2 on Zero Hunger, SDG 8 on Decent Work and Economic Growth, SDG 10 on Reduced Inequalities, SDG 12 on Responsible Consumption and Production, and SDG 17 Partnership for the Goals

2. Health and Wellbeing focusing on SDG 3 on Good Health and Wellbeing and SDG 6 on Clean Water and Sanitation

3. Inclusivity and Social Equality involving SDG 4 on Quality Education, SDG 5 on Gender Equality, and SDG 16 on Peace, Justice and Strong Institutions

4. Climate Change and Environmental Sustainability comprising SDG 13 on Climate Action, SDG 14 on Life Below Water, and SDG 15 on Life on Land

5. Urban Planning and Environmental Management embracing SDG 7 on Affordable Clean Energy, SDG 9 on Industry, Innovation and Infrastructure, and SDG 11 on Sustainable Cities and Communities.

The series also seeks to support the use of cross cutting SDGs, as many of the goals listed above, targets and indicators are all interconnected to impact our lives and the decisions we make on a daily basis, making them impossible to tie to a single topic.

Meet the Series Editor

Usha Iyer-Raniga is a professor in the School of Property and Construction Management at RMIT University. Usha co-leads the One Planet Network's Sustainable Buildings and Construction Programme (SBC), a United Nations 10 Year Framework of Programmes on Sustainable Consumption and Production (UN 10FYP SCP) aligned with Sustainable Development Goal 12. The work also directly impacts SDG 11 on Sustainable Cities and Communities. She completed her undergraduate degree as an architect before obtaining her Masters degree from Canada and her Doctorate in Australia. Usha has been a keynote speaker as well as an invited speaker at national and international conferences, seminars and workshops. Her teaching experience includes teaching in Asian countries. She has advised Austrade, APEC, national, state and local governments. She serves as a reviewer and a member of the scientific committee for national and international refereed journals and refereed conferences. She is on the editorial board for refereed journals and has worked on Special Issues. Usha has served and continues to serve on the Boards of several not-for-profit organisations and she has also served as panel judge for a number of awards including the Premiers Sustainability Award in Victoria and the International Green Gown Awards. Usha has published over 100 publications, including research and consulting reports. Her publications cover a wide range of scientific and technical research publications that include edited books, book chapters, refereed journals, refereed conference papers and reports for local, state and federal government clients. She has also produced podcasts for various organisations and participated in media interviews. She has received state, national and international funding worth over USD $25 million. Usha has been awarded the Quarterly Franklin Membership by London Journals Press (UK). Her biography has been included in the Marquis Who's Who in the World® 2018, 2016 (33rd Edition), along with approximately 55,000 of the most accomplished men and women from around the world, including luminaries as U.N. Secretary-General Ban Ki-moon. In 2017, Usha was awarded the Marquis Who's Who Lifetime Achiever Award.

Meet the Volume Editor

Associate Prof. Dr Jana Mali has dedicated her professional career to working with older people. Her scientific research and teaching activities involve social work with older people, and people with dementia, supervision in social work, social work methods, long-term care, and action research. Her bibliography includes more than 400 scientific and professional works that have been published nationally and internationally. She has written five scientific monographs in which she deals with institutional care for older people, long-term care, and social work with people with dementia. She is Vice Dean for Research, Development, and Doctoral Studies and Head of Chair of Long-Term Care at the Faculty of Social Work, the University of Ljubljana, Slovenia.

Contents

Preface

Humanity has always been and will continue to be confronted with situations that present many changes at the level of social action. In recent decades, in addition to developmental changes, we have increasingly witnessed various crises occurring at many levels of our lives. In addition to economic, social, and political crises, there are climate and environmental crises that appear and emerge randomly. The world is being redefined by various crises that occur with increasing frequency and are becoming global. The whole of humanity is confronted with unknown, completely new events that push us into a state of ignorance, unpredictability, and various forms of distress. In such circumstances, it is essential how fundamental human values and rights, such as dignity, freedom, equality, and solidarity, are provided. The provision of human rights in contemporary society is a complex area, described in this book through the perspectives of conceptualising and defining human rights, institutional responses, and practices of human rights protection, ensuring social justice and equality in a society faced with many contemporary challenges.

The book is a compilation of interdisciplinary and international experiences in the study of human rights, responding to its violations and ensuring the provision of rights in the everyday lives of individuals, communities, and society as a whole. Although it brings together contributions from authors from various countries and continents, it is the very common subject matter of human rights that binds us together globally. The provision of human rights draws our attention to those areas of our lives that define us as humanity and bring us together in a common world. This is the fundamental difference between crises and human rights. Crises merely encompass us globally, while human rights efforts define and connect us as humanity.

The book includes five chapters. In Chapter 1, authors Kehinde Babalola, Simon Hull and Jennifer Whittal present their perspective on land administration systems reforms in the context of Sub-Saharan Africa. They highlight the need to incorporate the principles of human rights, the rule of law, and legal pluralism into the constitution and therefore provide an analysis and assessment of the constitution in the context of meeting the land tenure and land rights needs of suburban and rural populations. The principles of a human rights-based approach need to be incorporated into the existing legal system to provide people with equal land rights, while the respect for land rights, both individual and communal, needs to be enshrined in the constitution. The authors point out that only through a legal system that incorporates a human rights-based approach can countries reduce the number of forced evictions, ensure adequate compensation in the event of land expropriation, register land rights and interests, and protect land rights holders.

Chapter 2 by Jubaida Auhana Faruque and Md. Rafiqul Islam presents the successes and challenges in the implementation of human rights in Bangladesh. They critically evaluate the historical evolution of human rights efforts in Bangladesh over the past decades. With relevant literature, they outline how the constitution was created and highlight the relevance of the implementation of human rights. They assess the current state of human rights implementation from three perspectives: institutional, legal and political, and law agencies. In the central part of the chapter, they discuss the challenges that human rights issues present in the 21st century. In doing so, they draw on themes such as globalisation, capitalism, climate change, transnationalism, and technology. They reflect on how to approach the future in a global context and conclude with a summary of the situation in Bangladesh.

Chapter 3 by Jana Mali presents the possibilities for a human-rights-based approach in long-term care for people with dementia in Slovenia. It stems from the assumption that the modern concepts of care for people with dementia are based on the guarantee of fundamental human rights and active participation in the implementation and development of long-term care. Fundamentally, long-term care must be anti-discriminatory and against any kind of contempt, exclusion, labelling, and stigmatisation. The chapter shows how and in what way this premise is implemented in Slovenia utilizing the results of a study based on the Rapid Needs and Services Assessment method. The study involved formal and informal carers of people with dementia. The results of the research highlight that there is a need to regulate respect for the fundamental human rights of people with dementia by (1) giving them equal access to medical treatment and early diagnosis, (2) by increasing the availability of care tailored to their needs, and (3) by enabling them to exercise their right to live in the community.

In Chapter 4, John P. Gilmore presents healthcare rights for gender and sexual minorities. His contribution reveals a relevant topic that is often overlooked in the context of respect for human rights. It starts from the premise that health care is a basic human right to which everyone should have universal access. Through analysing relevant contemporary literature, the author presents various perspectives and argues for their relevance in terms of the status and specific health situations of sexual and gender minorities. These groups of people are much more vulnerable than the rest of the population, and their treatment by health professionals should be more personalised and tailored to their needs so that they do not experience the same situations of stigmatisation, discreditation, and neglect in the context of health care as they do in other spheres of their lives. The author explicitly points out that the realisation of and respect for the right to health should be associated with other human rights.

Chapter 5 by Andrej Bozhinovski addresses the wrongful convictions in Croatia through revision of the novum criterion. The chapter sheds clear and understandable light on the practices of wrongful conviction that have been hidden, with a focus on protecting the rights of the wrongfully convicted. It is a presentation of a new topic that is particularly characteristic of Croatian legal practice. Although the author focuses on Croatia, he draws on the practices in the European context by analytically presenting the practices of three European countries: Italy, Germany, and the Netherlands. The author also analyses the issue from the perspective of the case law of the European Court of Human Rights and the Court of Justice of the European Union. The importance of the "novum criterium" is in a legal principle that allows the retrial of a case when new evidence emerges that could change the outcome of the trial.

In the final part, suggestions are made for changing practice in this area.

This book presents a variety of aspects of contemporary challenges in the field of human rights, and therefore, all professionals, politicians, students, and the general public are invited to read it, reflect on the topical issues presented, and join us in our reflections. In this way, we can also contribute to better practices and more effective provision of human rights.

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Chapter 1

Land Administration Systems and Legal Framework Reform Focussing on Constitutional Principles in Sub-Saharan Africa

Kehinde Babalola, Simon Hull and Jennifer Whittal

Abstract

A nation's constitution should be overtly pro-poor in its objectives. These should include how constitutional principles support land administration systems and their legal frameworks, their reform. Constitutions have, been long neglected. There is a need within developing nations to embed pro-poor objectives into land administration systems and their legal frameworks such that reforms meet the needs of the most vulnerable in society. Prior to reform of any system, understanding of that system is imperative. However, there is a lack of a context-specific frameworks to assess existing land administration systems in conjunction with constitutional law prior to a reform intervention. To develop a conceptual framework for the thorough evaluation of a country's constitution in the context of Sub-Saharan Africa, secondary data and a text-based methodology were used. Sampling logic was applied to gather and analyse the data. A conceptual framework for accessing land administration systems and their legal frameworks, for use prior to land administration systems reform initiatives, is proposed in this chapter. To deliver pro-poor land administration systems and their legal frameworks, three fundamental constitutional tenets—human rights, the rule of law, and legal pluralism—were identified and inform the assessment of various country constitutions.

Keywords: land administration systems, legal frameworks, reform, legal pluralism, human rights, the rule of law, constitution, land policy, customary law, social justice

1. Introduction

This chapter identifies human rights, the rule of law, and legal pluralism as imperatives for successful, long-lasting land administration systems (LASs) and their legal frameworks in SSA. We examine whether a country's constitution embeds or ignores human rights, the rule of law, and legal pluralism. Because the rule of law is one of the guiding concepts of human rights, both the rule of law and legal pluralism are important. Both structural and operational concepts make up legal pluralism [1].

A conceptual framework for evaluating LASs and their legal frameworks is developed taking into consideration these fundamental tenets [2].

Focusing on customary land law, land tenure, and LASs, researchers examined the significance of LASs and their legal frameworks for the advancement of human rights, the rule of law, and legal pluralism in SSA. We learn that a state's responsibility for ensuring responsible land management (RLM) [3] is based on providing for human rights, ensuring the rule of law, and, in the context of customary societies, also embedding the principles of legal pluralism within LASs and their legal frameworks. When striving to attain RLM, Fit-For-Purpose Land Administration (FFPLA) identifies that spatial, institutional, and legal frameworks should be considered.

Some international human rights treaties [4, 5] include the guarantee of 'land rights for all', which includes the right to secure land tenure and appropriate housing. Land rights should be documented, respected, and acknowledged by the respective state; this is challenging in the context of African customary law. LASs may be ineffective if there is conflict between customary and statutory law, tenure, and land administration systems. Furthermore, human rights, the rule of law, and legal pluralism should be embedded within constitutions in support of RLM. Without these, realising RLM may be jeopardised.

2. Human rights and responsible land management principles

Human rights can be classified as structural or operational [1]. Within the laws of a country, structural aspects of human rights include universality, inalienability, indivisibility, interdependence, and interrelatedness. Participation, accountability, non-discrimination, transparency, and the rule of law are operational concepts of human rights (see **Table 1**). These should be applied with due consideration to context.

Some countries address human rights principles in a dedicated chapter in their constitution. For instance, Chapter IV (Sections 33–46) of the Nigeria Constitution deals with Fundamental Rights [11]. This covers human rights principles relevant to that national context [12]. Comparing the Universal Declaration of Human Rights [5] and these Fundamental Rights, reveals commonalities and differences. Those aspects that address human rights principles are common, while differences are found in the context-specific aspects of the law. An example is in Sections 43 and 44 that address the right to acquire and own immovable and movable property and compulsory acquisition of property [11]. However, the definition of property is lacking. What constitutes property has been a significant debate [13–16]. Although Sections 43 and 44 stipulate the human rights of Nigerian citizens [11]; there are several violations of these rights, including those relating to land [17, 18]. Such contradictions between constitutional principles and practice are not particular to Nigeria.

In the Constitution of South Africa, rights, duties and obligations, as well as the horizontal (public-public) and vertical (state-public) relationships are included and explained [6]. The South African state must respect, protect, promote, and fulfil human rights in the vertical relationship of responsibility towards citizens. In the horizontal relationship, rights holders must uphold the Bill of Rights [6]. These horizontal and vertical relationships are lacking in the Constitution of Nigeria. For instance, unlike the South African Constitutional Sections relating to Rights and Application (Sections 7 and 8), there are no comparable sections in the Constitution of Nigeria.

Structural principles	Universality	Without exception, human rights apply to everyone. Everyone is entitled to protection under the law, regardless of ethnicity, gender, or affiliation with a particular faith. Because they are people, everyone, wherever, is entitled to human rights [7–10].
	Inalienability	No one's human rights may be taken away or violated, but some may have their enjoyment temporarily or permanently limited for a reason, typically for the greater good [7, 10].
	Indivisibility	All human rights have equal status and cannot be ordered hierarchically [7, 10]. Human rights are not ranked in any hierarchy, and all have equal standing.
	Interdependence & Interrelatedness	All human rights—economic, social, cultural, political, or civil—are a part of every person's intrinsic dignity. The accomplishment of one right depends entirely or partially on the achievement of other rights, and the enhancement of one right makes other rights easier to advance [7–10].
Operational principles	Non-discrimination & equality	Apartheid is an example of intentional discrimination. Intentional or inadvertent effects of laws and behaviours that can have a discriminatory impact are prohibited. The equality principle complements non-discrimination [7–10].
	Participation	Individuals have a right to participate in decisions that influence how their rights are protected, upheld, and realised. Furthermore, participatory processes should ensure that marginalised groups are included and that all voices are heard [7, 10].
	Accountability	Governments should be held accountable if they do not defend human rights. It is not enough for rights to be acknowledged in law or policy; there also needs to be a practical and realistic means of ensuring that these obligations are kept [7, 10].
	The rule of law	No person (natural or non-natural) is above the law. Governments should abide by the national and international legal requirements and norms that uphold and safeguard human rights. Rights holders who have been wronged should be able to seek compensation or suitable redress through legislated norms and procedures that are consistent with human rights principles [7, 10].
	Transparency	The public should have access to information about how key choices that affect their rights are made, and governments should be open about the decision-making processes they use [10].

Table 1.
Human rights principles (adapted after [6]).

The RLM framework is developed based on eight normative notions and goals (8Rs) related to structures, processes, and impacts/outcomes [3]. These are resilience, robustness, reliability, respectfulness, reflexiveness, retraceability, recognisability, and responsiveness. They are indicators of RLM that also address the structural and operational principles of human rights (See Section 3 of this chapter) [1]. The indicators of RLM are explained thus [19, 20]:

- Resilient: In order to avoid failure, intervention structures should be sturdy enough to endure unforeseen events.

- Robust: The implementation of the intervention should be carefully planned, implemented, and strengthened into a system that can endure despite challenges.

- Reliable: Based on past performance, there is a reasonable expectation that the intervention mechanism will produce the desired outcomes.

- Respected: Any biases, corruption, or other activities that cast suspicion on the design of an intervention should be avoided.

- Reflexive: To enable individuals to genuinely contribute, intervention structures and management should inculcate the people and their ideas.

- Retraceable: Decision-makers should be identified; intervention structures should be clearly established. To allow for future referencing, the methods should be thoroughly documented.

- Recognisable: People can identify with the decisions; there is ownership of the project or intervention.

- Responsive: Including needs, requests, long-term views of stakeholders addressing urgency of need [20].

3. The link between human rights principles and responsible land management

Achieving some Sustainable Development Goals (SDGs) that support land rights for all requires RLM; this will help contribute to successful and significant LASs and their legal frameworks. Land management is described as the regulation of land use in connection with actions made to safeguard the land rights of specific vulnerable groups, such as women, children, pastoralists, and hunter-gatherers [21]. These actions include zoning, conditions, and environmental protection measures. The measures put in place to guarantee that policies are carried out in accordance with their stated objectives are equally important [22]. According to de Vries and Chigbu [3], this concept is the culmination of changes made to governance, law, socio-spatial relationships, economic possibilities, attitudes, and behaviour. In terms of this definition, RLM may help to regulate land use and protect the land tenure of vulnerable groups. Handling LASs and their legal frameworks as part of RLM is intertwined with the realisation of human rights. For instance, some rights, restrictions, and responsibilities (RRRs) can only be realised if a holistic approach to land administration includes a human rights perspective. Access to land and the way land is regulated can be negatively affected by non-adherence to human rights principles [23].

Human rights principles are included in numerous national and international frameworks for sustainable development that would support RLM. A few noteworthy frameworks include Fit-for-Purpose Land Administration (FFPLA) and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests (VGGT). The objective of FFPLA is inclined to pro-poor approaches based on human rights principles of non-discrimination and equality, participation, accountability, and transparency. These are embedded in the spatial, institutional, and legal frameworks of FFPLA, as reflected in each of the 12 associated indicators (four per framework) [24]. According to the VGGT, the objective is to enhance tenure management through the application of the Guidelines in all programmes, policies, and forms of technical assistance intended to assist states in meeting their current obligations under international law, such as the Universal Declaration of Human Rights and other international human rights instruments [25].

RLM, as indicative of the VGGT, is rooted in human rights obligations [26]. The objectives of RLM align with the goals of VGGT. In integrating human rights principles in land management, the VGGT set the standards and criteria for achieving these [26, 27]. Prominent is the provision of a flexible legal and organisational frameworks for the management of land tenure [see Section 5 of VGGT]. The legitimacy of tenure, including customary tenure, should be recognised and respected by the legal and organisational frameworks for land management [25]. Using the legitimacy of tenure, the VGGTs specify that the frameworks should provide non-discriminatory laws and promote social equity and gender equity by providing adequate protection for women with the enforcement and implementation of laws that recognise women's tenure and land rights [25]. All these recognitions promote action that is aligned with human rights principles.

Due to pressures for land that are differently felt in rural and urban areas, RLM is becoming more and more necessary [27]. Person-to-land relationships, such as access, use, and ownership of land, are impacted by the differing needs of the urban and rural contexts [27]. RLM was designed to address needs while taking into account such contextual differences. Legitimate tenure and land rights of the most vulnerable and marginalised people are acknowledged for urban, peri-urban and rural areas. Although the principles of RLM align with human rights principles, violations of human rights principles are still increasing [26]. This may be addressed most effectively through constitutional change which directs all legislation and processes within a state. Changes to LASs and their legal frameworks may then result, leading to more effective RLM and VGGT implementation, which still need to be improved. The human rights-based approach to responsible and democratic land governance is advocated [6, 26].

4. Methodology

This study employed a desktop examination of secondary data and a text-based approach to identify gaps in land reform by consulting a variety of secondary data sources, including peer-reviewed journal articles, conference papers, PhD theses, books, and briefs on policy concerns. These sources discuss issues that are unique to the SSA environment, such as land reform, human rights, the rule of law, and legal pluralism. Secondary data sources on the topic of LAS reform, land tenure reform, legal frameworks, cadastral systems, human rights, legal pluralism, rule of law, and land laws were included in the subject search. The sources used contained records created after 2010.

The following search criteria are used to locate sources:

Search terms for peer-reviewed journal publications, conference papers, PhD theses, books, and briefs on policy topics included land, LAS reform, land tenure reform, rule of law, human rights, and legal pluralism, utilising JSTOR, ScienceDirect, Springer Link, and Google Scholar. Literature is restricted to works published in English. Peer-reviewed journal articles, conference papers, doctorate theses, books, and briefs on policy concerns are among the publications. The sources emphasise SSA and other emerging settings.

A final list of 16 publications was chosen by using a saturation sampling logic and reading the title and abstract. During the sampling process, new categories for texts that dealt with human rights and constitutions but were not specifically about land emerged. The sources were deemed enough to satisfy the research purpose since adding more sources is unlikely to have an impact on the study's findings.

NVivo was used to code and categorise the source documents, aiding in data transparency and the accuracy of the conclusions. NVivo is a multitasking program that enables academics to interpret dense qualitative data. The procedure makes it possible for additional researchers to conduct similar study. There was information coding and categorisation done. Coding is the process of identifying important themes and briefly summarising them [28]. Similar codes are grouped into concepts, and concepts are divided into categories to pinpoint literary themes.

The original text was imported into NVivo 12 and categorised under the headings of legal pluralism, human rights, and rule of law. Human rights, the rule of law, and legal pluralism are explored in line with the research's main focus on the country in question's constitution. These components are distinguished in the literature by distinct colours through coding. Potential indicators that could be used to assess the LAS from a constitutional (aspect) perspective emerged during the coding process, along with the elements. Section 6 provides a description of these indicators.

5. Evaluation framework for land administration systems and their legal frameworks in Sub-Saharan African countries

A constitution should express explicitly how it addresses human rights, the application of the rule of law, and the recognition of legal pluralism in respect of LASs [29, 30]. The supreme law of any nation is its constitution. This directs national land policy and land law which may not violate constitutional principles [2, 31, 32]. The intersection of the legal, political, and social systems in relation to land, which is of huge importance to societal stability and advancement, should be outlined in a country's constitution [33]. **Figure 1** illustrates the role of a constitution in a national LAS. At the apex of the triangle is the constitution. Land policy and land law must be drafted to be in line with constitutional principles and thus falls one level down. These, in turn, direct land administration and management whose structures and processes must also be in line with constitutional principles. It is clear that constitutional amendment may have far-reaching consequences in LASs reform. Constitutional amendment to recognise the rule of law, legal pluralism, and human rights should ensure that these are delivered through the LAS.

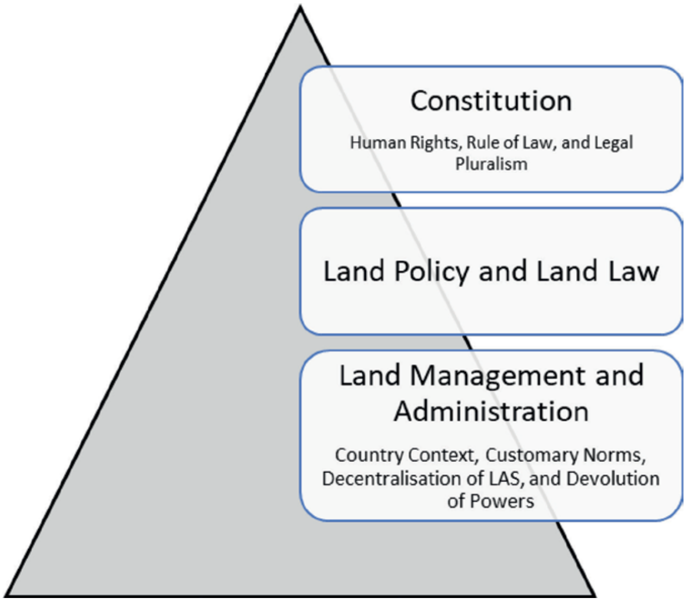

Figure 1.
LAS and their legal frameworks: Human rights, the rule of law, and legal pluralism in relation to a constitution [2].

The rule of law, legal pluralism, and human rights are the three tenets of constitutions that are identified and explored (see **Figure 1**). Several SSA constitutions uphold the rule of law and human rights, yet there is room for improvement in terms of acknowledging the realities of legal pluralism [29]. Breaches of human rights continue to be linked to land tenure and rights disputes, even where human rights are promoted in SSA [26]. Every nation's constitution should include provisions for LAS reform, with state-citizen property relations serving as its foundation [34]. Constitutional change should address human rights, the rule of law, and legal pluralism if it is to be effective, long-lasting, and meaningful.

A conceptual framework that includes the constitution at the apex of the triangle, as illustrated in **Figure 1**, expands the '3S' framework of success, sustainability, and significance developed by Hull [35]. The potential indicators relating to this additional level are therefore aligned to whether the principles of human rights, the rule of law and legal pluralism are embedded in the constitution and thus act as a directive for land law and policy as well as land management and administration. The subsequent sections discuss these proposed indicators in detail.

6. Human rights-based approach for improving responsible land management

The human rights-based approach (HBRA) with respect to the development of land is explained in the first part of this section. The second part describes reforms to strengthen RLM in the context of LASs and their legal frameworks.

The HRBA is outlined in the United Nations Common Understanding (UNCU) [1, 36]; three conditions should be satisfied. Human rights principles should inform all development initiatives, programmes should seek to improve the capacity of duty-bearers to maintain their obligations, and rights-holders to exercise their rights. These three requirements for understanding the HRBA to development are encompassed in the human rights, the rule of law and legal pluralism conceptual framework developed in this chapter. The human rights, the rule of law and legal pluralism conceptual framework furthers the realisation of development goals and is guided by human rights principles (see **Table 2**). It also contributes to improving duty-bearers' obligations and right-holders' claims. These requirements of the human rights principles are discussed below.

There are four distinct ways to implement development using a HRBA [37]. These are: as a set of normative principles to guide development; as a set of instruments to develop assessments, checklists, and indicators against which interventions may be assessed; as a component to be incorporated into programmes; and as the underlying justification for interventions to strengthen institutions, such as whether to increase the advocacy skills of organisations.

Human rights are put at the heart of development by providing a framework through the HRBA for development [37]. In development processes, there are winners, but there may also be losers due to power imbalances and potential disempowerment [12]. Reform may entail shifting power dynamics where these are negative, empowering marginalised groups, and combating injustice and exclusion [38]. Creating a rights-based approach to development entails transferring authority to the beneficiaries of a development initiative and also to rights-holders [12]. This empowers beneficiaries and rights-holders; consequently, a state is under greater pressure to fulfil its obligations to citizens [12].

Elements	**Potential indicators**
Human rights	• Few or no forced evictions • Expropriation with adequate compensation • Records of registered and unregistered land rights protection against state interference and powerful groups • Recognition of indigenous laws • Non-discrimination and human dignity • Equitable rights and tenure • Equitable access to land • An integrated and sustainable approach to land administration.
The rule of law & legal pluralism	• The clarity of the law • Availability in a local language • Enactment through democratic procedures • Substantive demand (civil and political rights, justice, and social welfare) • Accommodation of social rules and protection of social tenures • The exclusive power to customary institutions • Recognition of customary law • Local dispute mechanisms and social justice • Devolution of powers • Hierarchy, and self-determination.

Table 2.
Constitutional provisions relating to legal pluralism, the rule of law, and human rights [2].

A human rights tradition enjoins states to be duty-bearers. Individuals are holders of rights, not just recipients. Governments have a responsibility to respect, preserve, and fulfil people's human rights as service providers and duty bearers. With respect to Nigeria, the fundamental rights of citizens are outlined in Chapter IV of the Constitution of the Federal Republic of Nigeria [11]. Although the Nigerian State is obligated to uphold and protect human rights, in practice it falls short. Section 7 (2) of the Constitution of the Republic of South African, 1996, specifies the duty to respect, safeguard, and fulfil human rights. Moreover, Section 9 (2) mandates that services be promoted that help Disadvantaged persons assert their claims which promote equality.

The duties of states are discussed below [12]. A state should

1. assure that all rights can be enjoyed without being subjected to discrimination,

2. promote moving swiftly towards the full realisation of economic, social, and cultural rights,

3. refrain from taking any actions that would prevent the full realisation of economic, social, and cultural rights,

4. use all of the resources at its disposal to fulfil duties; giving priority to helping the most disadvantaged groups, and

5. ensure that a minimum core commitment is met in order to satisfy the minimum requirements of each right.

Suppose that a state fails in these duties? In such a case, the HRBA emphasises the accountability of policymakers and other role-players whose actions can affect people's rights [39]. Accountability in this regard requires fulfilling three conditions: responsibility, authority, and adequate resources. Responsibility means that the state should accept their obligations. Authority means that the state has the right to carry out the obligation. In addition, the state needs to have the necessary supplies to act on their responsibility.

Accountability and participation are essential to a state pursuing a HRBA to development that includes the people in the process [12]. This aims to empower citizens to recognise and claim their rights rather than relying only on the state assessing their needs. This takes place simultaneously with duty-bearers honouring their responsibilities. This fulfils the vertical obligation [37]. In realising human rights, a community needs to be empowered to take responsibility for identifying their needs and taking steps to have these needs met. This meets the horizontal obligation in a constitution [12]. Community participation in development processes puts pressure on a state to fulfil its vertical obligations [12].

Human rights to land (land access) are globally contested and not recognised. A human right to property protects a person against state intervention and has nothing to do with how a person interacts with land. Instead, it concerns how a person interacts with the state [40]. Protection measures should focus on curbing illegitimate and illegal state meddling and coercive influences from powerful elite groups [40].

Both substantive and procedural aspects [40] of human rights concerning LASs and their legal frameworks should be included in constitutions [2]. Substantive aspects include the respect for land rights, whether registered or unregistered or extra-legal, individual or communal. These should be reflected in the constitution of every country [40]. Both in terms of legislation and customary law, land tenure and land rights should be defined in constitutions [6, 12]. How land tenure and land rights are constitutionalised for achieving HRBA to land development in SSA is of primary importance to peri-urban development [12, 41].

A state should perform both positive and negative obligations with regard to land tenure and land rights [42]. The adoption of a legal framework that accommodates legal pluralism is required. Citizens should have the right to access land, with adequate land tenure and land rights, without discrimination in terms of customary law [2]. Negative obligations include that a state refrains from acquiring land without permission, engaging in forced evictions, and enforcing unreasonable land use restrictions [43]. There should be an explicit clause in the respective constitution specifying sufficient compensation to cover all forms of property deprivation [34]. Human rights can be violated when a state fails to provide adequate compensation [34, 40]. The expectation of citizens is that their state will not deprive them of land rights for arbitrary reasons unrelated to universally applicable laws [2]. Such trivial defences might be based on social constructs such as status, gender, or ethnicity [40]. A state's primary duty is to respect, defend, and advance the land tenure of its residents in order that they may exercise their land rights. A state may recognise access to land as a human right, but states are not compelled to provide access to land for all because the premise of the positive responsibility calls for a state to regulate rather than do something. Instead, states are supposed to safeguard landholding [40].

Strengthening RLM requires a HRBA to development. In designing or reforming LASs and their legal frameworks, the indicators as to whether human rights principles are enshrined in a country's constitution will reveal possible improvements in this regard. For instance, the Fundamental Rights of citizens are specified in Chapter IV of the Constitution of the Federal Republic of Nigeria. However, these Fundamental Rights still need to have human rights principles of LASs and their legal frameworks embedded. Section 43 gives citizens the right to own immovable property anywhere in Nigeria. In contrast, Section 44 (1) says that no such moveable or immovable property may be compulsorily acquired without following the prescribed law. In addition, prompt payment of compensation is required when a citizen's land interest is compulsorily acquired. This Chapter of the Constitution of the Federal Republic of Nigeria needs to incorporate human rights principles in order to enhance the significance and sustainability of the Nigerian LAS and its legal frameworks.

7. The rule of law and legal pluralism in improving responsible land management

The rule of law and legal pluralism are identified as operational and structural principles of human rights in Section 1 of this chapter. Hence the need to discuss this duo in terms of its twofold effect in achieving RLM through LASs and legal reform aligned to human rights principles.

Based on theoretical underpinnings and actual applications, the rule of law and legal pluralism are normative concepts in non-Western law, especially in Sub-Saharan Africa [44]. Both play a role in the instrumentality of law and in legal institutions and processes [44]. Successful constitutional states share cultural commitment to the rule of law [45]. The areas embodying conflict and opportunity in statutory legal reform that begin with constitutional reform are described by Schmid [46] and Berman [47] as being part of legal pluralism.

To describe the rule of law, *thinner* and *thicker* ideas are crucial [48]. The idea of the *thinner* means that the law must be followed and obeyed by both citizens and public servants [48]. Democracy and human rights are not included in the minimalist definition of the rule of law used in this section, which means that since law is the foundation of governance, it should be accessible to the public, consistent, and non-contradictory [48]. The process of law-making and operation should be inclusive in a *thicker* conception of the rule of law. This should also include substantive content relating to social justice, constitutionality, and good governance [44]. Without a written and unambiguous law, the legitimacy of states and institutions may be called into question, according to the thinner definition of the rule of law [49, 50]. When institutions adopt a thicker understanding of the rule of law, they are more likely to safeguard the interests of all land rights holders.

Social justice can be used as a gauge of the quality of state service delivery. Thus, a constitution that reflects a thicker conception of the rule of law is expected to advance social justice more than one that reflects only the thinner conception [51]. It is recommended that the rural and peri-urban population receive assistance in their quest for social justice [52]. In recognition of the right to culture, a constitution should acknowledge and preserve customary law and the system of customary justice [2].

Those who challenge the necessity for legal pluralism in land administration use the hierarchy between state and non-state actors to argue against a positive role of legal pluralism in a post-colonial constitutional state. It is argued that customary law in land administration is suppressed using statute law and that there is no true legal pluralism [2]. Others argue that all legal regimes are by necessity plural [2].

Legal pluralism is first described based on studies on land disputes [53]. The categorisation of legal pluralism on a scale of *strong* to *weak* is advocated by its supporters [54, 55]. *Strong* legal pluralism is when customary, indigenous, and religious laws are used in land administration without state recognition [56]. State recognition exists under the *weak* categorisation of legal pluralism and may be backed by the law (de jure) as well as taking place extralegally (de facto) [see also 42]. In weak legal pluralism other laws and state agencies promote the constitutional enshrinement of customary law [57].

The post-colonial state's reluctance to recognise collective tenure in its constitution is a significant legal exclusion [58]. Land in Guyana must belong to the tiller because it is for communal use [59]. Since 1994, South Africa's land policy has evolved from the "land to the tillers" principle proposed in the African National Congress' Freedom Charter of 1955 to one that is more convoluted [60]. The post-colonial state constitutions should uphold the ideals of human rights and include democratisation, agricultural reform, and restitution [61–63]. To recognise legal pluralism within a legal framework [64], the human and social rights provisions of a constitution, such as the recognition of customary law, are crucial. The significance of the constitutional connection between customary law and cultural rights should be emphasised [65].

A HRBA to LASs using the rule of law and legal pluralism will shift focus away from a legal framework focussed on statutory law and a market-based approach to land access and land value. It will likely shift towards one that acknowledges customary law and is likely to include a socio-institutional approach to land access and value [66]. Legislation can also recognise customary law [29, 66]. This process is termed codification – a process that is not value-free. Customary land laws were developed and continue to change as a result of social processes and social constructions. These are context-specific and constantly alter in response to changing society [67–69]. Customary land laws become less flexible and less nuanced once customary land law is codified in legislation [2]. They also then lose their essential characteristic of adaptability.

Alden Wily [70] advocates a pro-poor approach to customary rights which supports a HRBA to land value and land access — this protects social tenure. The reasons for pursuing a pro-poor policy for customary rights are [70] that the majority of people in the customary sector are poor (75% according to international measurements [70]). Also, the poor are most dependent on shared natural resources. These are the easiest for states and private sector organisations to appropriate. Not only state institutions, but also local elites have been shown to manipulate customary norms in their favour at the expense of customary (poor) societies [70]. Elites are often able to avoid the recognition of customary land rights [70].

Decentralisation of land administration from state to local, possibly non-state, entities is made possible by a HRBA for development (see [29, 71, 72]). Where decentralisation is employed, local-level land administration systems could be electronically linked to a national recording system for security purposes. A flexible, simple, gendered [73] and affordable system for maintaining land rights is necessary in an uncertain environment to secure the land tenure and rights of people, families, and communities that possess unregistered land rights and interests [73, 74].

8. Conclusion

This chapter focuses on the reform of LASs and their respective legal frameworks through embedding the principles of human rights, the rule of law, and legal pluralism within constitutions, in order to strengthen RLM. The chapter develops a conceptual framework for assessing a constitution with respect to these principles in the context of meeting the land tenure and land rights needs of peri-urban and rural residents. This considers customary law as an important aspect that should be explicit in a constitution. Recognising the significance of this can enable reforms that last and deliver on the identified reform goals over time.

Adhering to the HRBA for strengthening RLM empowers the customary land administration legal framework, which will provide for local land management. This is expected to reduce forced evictions, provide adequate compensation when land is expropriated, record land rights and interests, whether registered or unregistered, and protect land rights holders against interference by the state and powerful groups. Strengthened land tenure and rights of access to land are more likely to be achieved, while indigenous laws in land administration are expected to be promoted.

Principles of human rights, the rule of law, and legal pluralism align with the objectives of RLM in addressing pro-poor objectives. The significance and sustainability of LASs and their legal frameworks should be at the forefront of the reform of LASs and associated legislation, especially to address the tenure insecurity of rural and peri-urban dwellers. Constitutional reform should lead the way through consideration of the tenets of human rights, the rule of law, and legal pluralism.

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Conflict of interest

The authors declare no conflict of interest. The funders had no role in the study's design; in the collection, analyses, or interpretation of data; in the writing of the manuscript, or in the decision to publish the results.

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Chapter 2

Human Rights in Bangladesh: Success and Challenges

Jubaida Auhana Faruque and Md. Rafiqul Islam

Abstract

Human right is a wide spectrum that includes various opportunities that human being deserves to sustain and thrive in life. It is state's responsibility to assure access of all to fundamental rights. But often the state faces challenges from internal as well as external sources in that pursuit. Bangladesh is quite a new country with the credit of creating a congenial environment for its citizens. Nonetheless, over the years, the country has gone through various natures of regimes and had its own share of human rights violence. This chapter discusses the foundation on which the human rights of Bangladesh stand and how that has been shaken and made robust over time. The main background of discussion is the democratic regimes when the expectation on human rights provision is the highest. Followed by that, the current situation of human rights in the country is analyzed, and the challenges that the global human rights structure is facing are discussed. Bangladesh is not immune to these challenges and needs a strong basis to deal with them. Lastly, the chapter comes up with a few recommendations to tackle these challenges and determines the ways to create a just human rights regime in the country.

Keywords: human rights, Bangladesh, the constitution, democracy, rule of law

1. Introduction

> *The human person has rights because of the fact that it is a person, a whole, a master of itself and its acts, and which, consequently, is not merely a means to an end, but an end, an end which must be treated as such.... by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things that are owed to a man because of the very fact that he is a man.*
>
> *Jaques Maritain*[1] *[1]*

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[1] Jacques Maritain (1882–1973), French philosopher and political thinker, was one of the principal exponents of Thomism in the twentieth century and an influential interpreter of the thought of St. Thomas Aquinas.

In 1971, three million people laid down their lives [2] so that a country named Bangladesh can be born, and that every citizen of that country can have the recognition of nationality and access to the basic rights of life. The main aim of the liberation war was to achieve economic and political emancipation—freedom from want and freedom from any form of exploitation [3]. The repression of the tyrannical West Pakistani rulers was no more to be endured, and the spirit of freedom encouraged the common people to fight against domination and exploitation. People of all sections irrespective of religion and ethnicity fought for their liberty and legitimate rights. However, the people of Bangladesh still continue to fight for their economic and political rights despite the fact that nearly 50 years have passed after the liberation war. The country has thus far gone through several segments of political, societal, and economic changes to reach the situation of the present. Beginning with the biggest loss of losing the "Father of the Nation" in 1975 at the hands of a few degraded military officers and political personnel, the journey toward development has been wrought with strife [4]. Years of nondemocratic military rule that followed have crippled the nation; misuse of constitutional provisions has deteriorated law and order; economic turmoil has challenged progress, and political instability caused widespread violence. But the people, inspired in the spirit of the liberation war and under the protection of the constitution, always raise their voices for their rights. The coalition among people has allowed the toppling down of oppressive governments in order to establish a democratic state system. Governance has often become infringed with immorality, but the courage to stand for one's rights never died off. However, even till today, the country sees various forms of human rights violations inflicted on its people just to sustain the interest of a handful. With the fast-moving world of the modern era, these challenges are becoming more and more vicious and difficult to tackle. This chapter focuses on this pertinent issue of the status of human rights, mainly during the democratic regimes of the country.

In the initial part of the discussion, the emergence of Bangladesh as a glorious country with an acclaimed history has been presented. The foundation of this country stands on its constitution, which provides the picture of a nation where everyone is designated to basic human rights. The best part of this foundation is that it is an exact reflection of the international standard of human rights, which allows every human being, under the jurisdiction of its sovereignty, to be born with an identity and lead a life of protection.

Secondly, an image of the human rights situation of the country over the past few decades has been captured to understand the essence of the changing human rights perspective. Followed by this discussion, the current status of human rights in Bangladesh has been focused on where three sections of the state, responsible for human rights protection have been analyzed—the institution, the laws and policies, and the law enforcement agencies.

In the third part, the challenges that the human rights paradigm might be facing in this rapidly changing world have been discussed. People are no more constricted within borders and free movements have created opportunities that are amicable for development. But with that process, come situations that might be harming the civilization: technologies that are demolishing societies, systems that are creating divisions, and interactions that are intensifying conflict.

And lastly, before laying down a conclusion, a set of recommendations has been put forward to make Bangladesh prepare for these challenges. Bangladesh has decorative sets of policies and institutions, which if used properly, can create a human rights regime like no other. These measures are urgent to take to compete equally on the platform of fast development. Only the assurance of every citizen leading a protected life can create an environment proficient for development.

2. The emergence of Bangladesh, the formulation of the constitution, and the projection of human rights

The emergence of Bangladesh as an independent nation has a long historical background of oppression and relative deprivation imposed by a tyrannical government [5]. People of the then East Pakistan did not only fight to gain an autonomous state but also to establish a sovereign nation where they are the protector of their rights. With the inspiration of a democratically ideal, equitable, and prosperous society, millions of people laid down their lives for a better future. The aspiration of this enthusiasm has been reflected in the constitution developed in 1972 [6]. The constitution of Bangladesh provides the framework that signifies Bangladesh as an independent sovereign state with a unitary and parliamentary form of government with democracy, comprising fundamental human rights, an independent judiciary, democratic local governments, and a national bureaucracy [7]. In a democratic country like Bangladesh, its constitution not only serves as paperwork or document to set certain rules and procedures for navigating the state but also symbolizes the principles that support the foundation of the nation. It provides the basic structure to the state including the provision of rights that are owed to its citizens and the duties that are to be carried on for the cumulative welfare of the state.

Besides determining various structures to regulate administrative activities, it elaborates the distribution of power, formation of and relations among the key institutions of the states, determines the basic identifying characteristics of a state, and establishes the rule of law through vivid legitimacy. Most importantly, the constitution represents the core belief that a nation bears not only at the administrative level but also through the inclusion of the public, in the spirit of nationalism, and for the sake of cultural as well as political sustenance [8]. The constitution of Bangladesh is the written form of The Proclamation of Independence of Bangladesh, pronounced on 10 April 1971, which formally reaffirmed the Declaration of Independence made by the father of the nation, Bangabandhu Sheikh Mujibur Rahman on 26 March 1971 [6]. This proclamation is an essential part of the constitution, in the sense that such a declaration itself is a manifestation of the people's collective right to self-determination beyond the colonial paradigm. It is a testament to the manifold virtues of the democratic exercise of human rights, as a response to the deprivation operated as an aftermath of the general elections of 1970 in Pakistan.

Though the constitution of Bangladesh has been activated in document form on 4 November 1972, its establishment as a legal representation was on 26 March 1971, soon after the proclamation of Bangladesh as an independent nation was delivered [9]. Comprising of a well-formed preamble declaring the independence of the state and the four basic pillars that represent this nation, it emphasizes the democratic coordination of a socialist society. It ensures a national environment free from exploitation with the implementation of the rule of law, fundamental human rights and freedom, equality, and justice, and political, economic, and social security for all citizens. The most significant parts of this constitution are the denotation of fundamental rights and fundamental principles, which form the substantial basis of the constitution, providing it its structural foundation. The originality and inherent character of the documents rest on these clauses. The fundamental principles range from articles 8 to 25 of part II which determine the certain direction for state regulations. This set of articles creates a ground for ideological objectives regarding the necessities and guides that the state is responsible for ensuring a constant increase in productive forces and a steady improvement in the material and cultural standard of living of the people through continuous economic growth. The aim is to provide the citizens with all necessities to ensure their secure well-being [10]. This indicates the basic duties that are to be carried on by the state and certain basic functions related to economic and human rights that are dependent on the performance of the state in abiding by these very duties. These principles are not judicially enforceable and act as guidelines to the state [10].

On the other hand, the fundamental rights mentioned in the constitution, ranging from articles 26 to 47 of part III, are the significant rights that are available for the protection of every citizen of the country. Every individual has the privilege of moving the High Court as per the provision of Article 44 following clause (1) of Article 102 to ensure the enforcement of these rights imparted by part III of the constitution. These articles are the reflections of the Bill of Rights, thus substantially incorporating the rules of the International Bill of Human Rights. These provisions ensure the equality of all human beings irrespective of their religion, race, caste, sex, or place of birth. It emphasizes that everyone is entitled to equal protection of the law, opportunity in public employment based on nondiscrimination, right to protection of the law, of life and personal liberty, safeguards in case of arrest and detention, protection in trial and punishment under the law, freedom of thought, conscience, and speech, freedom of movement and assembly, freedom of religion, right to property, etc. [11]. Unlike the fundamental principles, the rights are constitutionally enforceable by the court, the provision which makes these rights legal human rights for the citizens of Bangladesh.

The most prominent point of these articles of both the parts, mainly the fundamental rights under part III, have been devised keeping in consideration all the significant international human rights bills, notably the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) along with its two Optional Protocols. The fundamental rights are by default the written form of universal human rights which are protected by constitutional guarantees. They are protected by the supreme laws of the countries. The provisions of including the fundamental rights into the constitution are rooted in the advent of the French Declaration of Rights of Man and Citizen, 1789, and the American Declaration of Independence, 1776. Likewise, the constitution of Bangladesh has also been formed keeping in consideration the abidance of the International Bills of Human Rights [11]. The 25 notions of human rights mentioned in the constitution, with 19 civil and political and 6 economic, social, and cultural rights—divided between the articles of fundamental principles and fundamental rights, indicate that the economic, social, and cultural rights are not judicially enforceable, whereas the civil and political rights under judicial prudence [6]. The main aim of the document has been to bring in the three rudiments which assure the human rights of each citizen—equality, human dignity, and social justice. The objective of the creator was to create a compatible society that is in tune with the duties and obligations prescribed by the UN Charter, even before Bangladesh became a member [12]. There is clear mention of the notion with its reflection in Article (25) that,

> *The State shall base its international relations on the principles of respect for national sovereignty and equality....and respect for international law and the principles enunciated in the United Nations Charter. [7].*

Article 11 of the constitution deserves particular mention, which works as the guiding principle toward establishing democracy and a regime of human rights. Article 11 states.

> *The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed in which effective participation by the people through their elected representatives in administration at all levels shall be ensured. [7].*

So, it is evident that the constitution that came into being for creating a guideline for a war-torn country, Bangladesh, in 1972, has been a cornerstone in ensuring the inclusivity of all international provisions of human rights for the upcoming future so far. Thus, the pertinent aim to establish democratic regimes with equitable access to rights for each of its citizens has been an appreciated visionary of the makers of the constitution.

3. State of human rights in Bangladesh

With two steps forward in Democracy Index [13] and one step backward in the Corruption Perception Index [14], it is quite difficult to ascertain the state of human rights protection or violation in Bangladesh. Certainly, the situation goes through continuous ups and downs depending on the political, economic, and societal circumstances. Other factors that are affecting the global situation of human rights, of course, have an impact. This part of this chapter discusses the human rights situation in Bangladesh since her independence in 1971, primarily focusing on the state of human rights during the democratic regimes. Besides, though protecting human rights is a provision guided by the constitution, it is the state institutions that avail the realization of the rights and principles. It takes a country decade to form an institutional structure where regulations are all under control and democratization has been possible in its true sense. The analysis of human rights violation prospects by definite institutions will provide a clearer picture of which sectors need more concentration and which others need maintenance. On the other hand, for regulating the institutions, robust and effective laws are needed that are made for the welfare of the citizens and those which can be hardly violated. When the laws and policies are not effective enough to ensure the public the protection of human rights, various institutions, systems, or individuals take advantage of the situation, which ultimately encroaches on the rights of many. Connecting these links, this section will create a portrait visualizing the situation of the institution, policies, and organizations that are responsible for uplifting the duty of protecting human rights. Alongside this, it will criticize the activities that are creating a complicated situation for the government in protecting the human rights of the citizens.

3.1 Human rights in Bangladesh over the eras

Since gaining independence, Bangladesh has experienced changing forms of governance and varying levels of access to basic human rights. From 1972 to 1975, the country had a democratic government, but this period was characterized by efforts to rebuild the nation after the war, including the bureaucracy, military, and economy. After the assassination of Bangabandhu in 1975, the country was ruled by a tyrannical military occupation, first under Ziaur Rahman from 1975 to 1981, and then under Hussain Md. Ershad from 1982 to 1990. During this time, institutions were subservient to political interests, and human rights were degraded, leading to mass protests [15]. These protests ultimately led to the downfall of the authoritarian regime of Ershad and the holding of the first democratic election in 1991. The election marked a shift toward a more democratic form of government, with the Bangladesh National Party (BNP) taking power through the electoral process [15].

The first elected government of Bangladesh in 1991 was marred by several human rights violations, as highlighted in a report by the Immigration and Refugee Board of Canada. The report details several incidents, including clashes during city corporation elections that resulted in the death of 14 people. The violence was allegedly instigated by armed activists from the Bangladesh National Party (BNP), who attacked election polls and attempted to interfere in the voting process. In addition to political violence, the government also restricted freedom of expression, as demonstrated by the revocation of state advertising provision to a popular newspaper, *Janakantha*, due to an anti-government news series [16]. The government's nonsecular stance also became apparent when Bangladeshi author Taslima Nasreen was exiled to India for advocating women's rights, and the incident revealed the rise of nonsecular political organizations, leading to recurrent attacks on minority groups, particularly Hindus. While some actions were taken to support human rights, such as adopting The Women and Children Repression Bill and repatriating Chakmas in CHT, rampant threats to life, kidnapping, extortion, bomb blasts, political riots, and police brutality took years to recover the trust of the people by the preceding governments [16].

In 1996, the AL party led by Sheikh Hasina, daughter of Bangabandhu Sheikh Mujibur Rahman, came to power after the general election. The new regime saw sporadic incidents of violence, mainly caused by the police, but also saw insurgency among tribal groups in CHT brought under control through the deployment of security forces, the retransmission of some international news networks, and more allowances provided for academic research. The two most important incidents that occurred during this period were the signing of the CHT Peace accord between the government and the main political groups fighting for the rights of indigenous people, and the provision of more assurance to minority groups who were victims of violence in the previous regime. Despite this, there were increasing cases of extrajudicial killings, police brutality, death in custody, political violence leading to deaths, and corruption within the legal process [17]. In 2001, the BNP came to power again through a coalition with the fundamentalist party Jamat-i-Islami, and some nonsecular parties aimed to establish Bangladesh as a pro-Islamic state [18]. This period was marked by a series of bomb blasts, including an attack in Ramna in 2001 while celebrating Bengali New Year, a bomb blast in Udichi, an attack on Sheikh Hasina at a rally in August 2004, and on SMAS Kibria on January 27, 2005. These incidents demonstrated that violence was growing in Bangladesh, and the country's deteriorating law and order was failing to protect basic human safety. According to an analysis by Awami League in 2005, titled "Growing Fanaticism and Extremism in Bangladesh," there were 34 bomb blasts between 1999 and February 2005 [19].

Both regimes in Bangladesh violated human rights by using the Special Powers Act of 1974 to detain citizens without charges and by controlling media through censorship [20]. In 2007, a military-backed caretaker government was installed, leading to concerns about democracy and increasing cases of arbitrary arrests, torture, and custodial killings [21]. AL came to power in 2009, and consecutively won elections in 2014 and 2019 [20].

3.2 State of human rights in current Bangladesh

The current human rights regime in Bangladesh has been under the democratic governance of the Awami League party which has come to power through wins in three consecutive national elections. As a result, if the current status of human rights is to be analyzed, the time frame of this governance period is adequate. In this chapter, three main factors of the human rights state will be discussed—the institutions that are responsible for maintaining human rights, the policies that are capable of protecting human rights, and the responsibility of law enforcement agencies in ensuring human rights.

3.2.1 Institutional violation of human rights

In the late 90s, the National Human Rights Commission Ordinance 2007 was created, which combined Bangladesh's Constitution, the NHRC Act 2009, and international conventions to protect citizens' human rights. The commission was aimed at protecting, promoting, and ensuring human rights, but its effectiveness in violation cases was questionable. Despite creating hotlines, appointing more manpower and lawyers, monitoring activities, and increasing local offices, the commission failed to address issues like blogger-killing by extremist groups, torture, brutality, arbitrary detention, and summary executions. It was unable to contribute to any aspects of the rule of law and was not vocal about freedom of expression issues and citizen safety [22–24].

Public administration, bureaucracy, and judiciary, once dedicated to serving the people, are now themselves inflicting significant human rights violations, restricting the public from receiving legitimate services due to corruption [25]. However, the judiciary is taking a more robust position and allowing help from NGOs and local organizations to make justice accessible. In 2010, the Supreme Court criticized the government for not protecting citizens, especially women, from cruel, inhuman, and degrading treatment. NGOs and the High Court are taking the initiative to combat the pervasive numbers of extra-judicial cases, including allegations of custodial death, torture, and inhuman treatment [26].

3.2.2 Policies and laws: Protecting or violating human rights?

Bangladesh's laws and policies are derived from the constitution, which is intended to protect human rights [27]. Although most of the policies are formulated accordingly, their practical implementation often falls short of actual human rights protection. As a signatory to the United Nations Convention against Torture (UNCAT), Bangladesh enacted the Torture and Custodial Death (Prevention) Act in 2013 [27]. From 2013 to 2019, only 18 cases were filed under this act in the High Court due to victim harassment and threats from perpetrators. Additionally, victims and their families were forced to withdraw cases out of fear [27]. Inactivity in filing cases may be due to the lack of an adequate legislative framework, low-level focus on marginal perpetrators, laws that serve as barriers to domestic proceedings, or general issues of political will and judicial capacity [28].

Although laws dating back to British rule are still in force, such as Sections 54, 61, and 167 of the Criminal Procedure Code (CPC) of 1898, it is inappropriate to assume that they are suitable for the modern world. Sections 54, 61, and 167 of the CPC allow the arrest of defendants without a warrant and detention in police custody for over 24 hours. If investigations cannot be completed within this time frame, the risk of torture and ill-treatment increases [27]. Amnesty International has suggested the abolition of the Special Power Act and a review of the CPC to establish clear and enforceable safeguards against it [29]. On a positive note, the government established a committee in 2018 to modernize the Code of Criminal Procedure, 1898 [30].

Despite some regulations being enacted to safeguard human dignity and uphold the rule of law, they are being used with impunity. The Information and Communication Technology (ICT) Act and the Digital Security Act (DSA) are the two primary legal tools authorities use to detain critics on social media platforms. The Digital Security Act was developed to prevent the spread of extremism, terrorist propaganda, and hatred against religious or ethnic minorities through social or mass media but is frequently used to arrest and charge those who express opinions critical of the government [31]. Laws regulating online news and NGO operations have curtailed media and civil society's freedom to hold the government accountable [31]. The ICT Act was passed in 2006 and allows for the arrest of suspects without a warrant, increasing the maximum jail term from 10 to 14 years, and making offenses under Section 57 of the act nonbailable [31, 32]. This provision has led to the arbitrary detention of editors, journalists, teachers, social media users, and free thinkers charged with defamation and the dissemination of false information on Facebook [32]. Thus, law enforcement authorities have been given arbitrary power to arrest anyone based on suspicion, violating the right to justice and freedom [31].

3.2.3 Human rights violations by the law enforcement agencies

In Bangladesh, law enforcement agencies such as the police, Rapid Action Battalion (RAB), military and civilian intelligence agencies, and Bangladesh Ansar have been accused of human rights violations like extrajudicial killings, torture, and enforced disappearances [33]. The police and RAB have been the primary agencies in these allegations, with the police refusing to record complaints and investigate cases, and demanding bribes from the families of those detained [27]. The RAB also conducted 136 extrajudicial killings under the "war on drugs" operation in 2018 [34], leading to the US Treasury Department imposing sanctions on the force and several of its current and former officers in 2022 [35]. Despite the government's efforts for development, civil society repression and human rights violations continue with impunity [27]. However, there is hope in the government's efforts to reform the agencies and prevent such violations [31].

Bangladesh needs to work rigorously in many sectors to improve its human rights situation amidst the challenges of a fast-paced developing world, globalization, capitalism, cross-border disputes, and mass killing weaponry. This section will discuss the challenges that the human rights regime might face with globalization and recommend domestic and international curricula for human rights work in Bangladesh's current situation.

4. Challenges toward human rights protection in the twenty-first century

Life in the twenty-first century is challenging, with changes in political, social, and economic circumstances making it difficult to protect basic human rights. The increasing population and decreasing resources have resulted in conflicts for survival, propagating more violations. Providing support to victims, protecting children, empowering women, and ensuring good governance are also facing serious threats from transnational conflicts, climate change, and deteriorating governance. This section will discuss the challenges human rights face due to globalization, capitalism, technological development, and transnational conflicts. It will also suggest how these factors can be utilized to protect human rights. The focus will be on Bangladesh.

4.1 Uncontrolled globalization impacting human rights protection

Rampant human rights violations lead to feelings of deprivation and injustice among populations worldwide, which has been exacerbated by advancements in communication technology [36]. While technology has allowed for greater access to information and activism, negative aspects of globalization continue to rise, posing threats to vulnerable groups in developing nations [37]. These threats are exemplified in Bangladesh's ready-made garment industry, which lacks infrastructure and safety measures, pays low wages, and suppresses worker associations [38]. Such conditions have resulted in major tragedies such as the Rana Plaza incident and the fire at Tazrin Fashions [39], with many more accidents occurring since 2010 [40]. The role of globalization is double-edged, with positive and negative impacts on human rights, and it is essential to understand these impacts to develop effective strategies for protecting human rights in the current globalized world.

Globalization challenges the traditional notion of sovereignty by allowing transnational entities to gain greater power over state institutions. As a result, foreign actors who are not relevant to a particular society, gain control over the lives of individuals [38]. Multinational corporations (MNCs) are becoming stakeholders in the economic and political might of many modern states. However, their profit-generating schemes often ignore the protection of human rights [41] and extend beyond legislation to influence policy and law-making in areas such as public health, foreign investment, consumer protection, environmental protection, women's rights, child labor, workers' rights, and indigenous people's rights.

4.2 Capitalism leading to violation of human rights

Capitalism is seen as a hindrance to protecting human rights and observing universal human rights. Three models of human rights testing economic, political, cultural, and demographic factors found more support for the negative human rights-capitalism theoretical perspective [42]. Although capitalism has become a focal point for free-market scholars whose main focus is democratic development [43], it poses a threat to democracy and human rights. The dominance of free-market capitalism without social norms such as income redistribution is considered a challenge to democracy and human rights practices [44].

Despite the opposition of scholars, capitalism has negative impacts on human rights as it is built on little state intervention, reducing the protection of workers. Multinational companies often abuse the free market to exploit cheap labor, disregarding UDHR Article 23 on workers' rights. Chomsky and Herman argue that capitalist states are driven by economic interests, which depend on political instability in developing nations. The IMF and World Bank forced developing states to reduce state intervention, leading to a deterioration of human rights conditions. However, some argue that capitalism and human rights are linked by guarantees of freedom, and some governments demand businesses provide basic social and economic rights [45–47].

4.3 Climate change and human rights

Climate change poses a significant threat to human life and well-being globally, with immediate and gradual impacts on access to resources like clean water and food. Different regions experience varying attributes of climate change, such as coastal areas experiencing adverse effects from sea level rise and Arctic ecosystems undergoing significant changes affecting indigenous communities. IPCC projections indicate that dry subtropical regions will be most affected, with competition for resources like water causing security issues for agriculture, settlements, industry, ecosystems, and energy production. This will impact economic sectors and services, leading to violations of various human rights like the right to water, health, life, food, and self-determination [48–50].

Bangladesh is highly vulnerable to climate change and ranks in the top positions of the Climate Change Vulnerability Index. As a result, potential climate-induced migration in Bangladesh is an overwhelming concern, and it is the national government's responsibility to protect its citizens and establish protection instruments to safeguard the rights of climate migrants [51, 52].

4.4 Lack of good governance causing violation of human rights

Corruption, political aggression, and economic imbalances have led to massive human rights violations and a breakdown in governance [53]. Transparency International's Corruption Perceptions Index found that the judiciary is perceived as the most corrupt institution [13]. Systemic corruption has become a key part of the political order, allowing for the capture of the majority of the government by corrupt individuals or groups [54]. This has resulted in political instability, which has paved the way for populist leaders and movements [55]. Globalizing forces have also threatened the realization of democracy and human rights, leading to a "democratic deficit" [56]. This issue is severely threatening allegiance to democratic institutions which were supposed to look into the concern of its citizens' rights rather than prioritizing the interest of the political and societal elite.

4.5 Transnational threats and human rights

During transnational conflicts, human rights face gross violations, particularly during armed conflicts, and the changing pattern of war poses unprecedented challenges for human rights protection [57]. The Russia-Ukraine crisis, ongoing for 8 years, has killed over 16,000 people, displaced close to 1.5 million people, and violated fundamental rights such as the right to life and the duty to ensure judicial review [58, 59]. The recent war raised the death toll to over 8000 and caused injury to more than 13,000 human beings, of which a considerable number are civilians [60].

One of the biggest byproducts of cross-border conflict is the refugee situation all over the world. Around a million Rohingyas, victims of severe human rights violations, are currently residing in camps in Southeastern Bangladesh due to persecution in Myanmar [61]. The Rohingya refugee crisis is just one example of the larger refugee situation worldwide, with 59 million people displaced, including 32.5 million refugees, who are victims of similar violations [62].

4.6 Technology and violation of human rights

Technology can improve human rights by providing access to information, education, and entrepreneurship, as seen in Bangladesh's poverty reduction which has allowed it to overcome poverty from 40 percent in 2005 to 24.3 in 2016. In this scenario, instruments like digital centers, e-Education, and internet-boosted entrepreneurship have significantly helped [63, 64]. However, technology can also be used to restrict human rights, such as China's mass surveillance and censorship system [65]. Authoritarian governments use highly classified technologies to censor expression, filter information, and monitor online activities to control citizens. China is a prime example of cyber-suppression, where the government uses digital tools for mass surveillance, censorship, and social monitoring to control citizens' daily life, creating a system that effectively controls what people think, want, and how they should act. In the name of national security and counterterrorism, democratic states are also violating human rights by imposing expansive and vague cyber-related laws [65]. The uncontrolled use of technology has led to grave violations of human rights, and law enforcement agencies have been unwilling to stop unethical use despite knowing its implications.

Finally, in the context of a digitally connected world, cyber-vulnerability can be the biggest threat, as seen in the 2016 cyberattack on a Ukrainian power plant [65]. The question arises of how technology can be used to enhance freedom, governance, and globalization, rather than facilitate repression. This threat puts the basic human rights of life, liberty, and security at risk, and developing countries like Bangladesh are more vulnerable. The chapter concludes with significant recommendations to make Bangladesh fit for this changing world, with mechanisms to address the human rights of all citizens.

5. Human rights in Bangladesh: solving the challenges

In the twenty-first century, protecting human rights is a challenge that transcends borders and political regimes. Bangladesh, as a developing nation, faces a significant concern in this regard. While the wheels of development must keep turning, a coordinated effort among all institutions is critical to defying this problem. Although international community intervention may be necessary to resolve some human rights issues, the state must create an environment conducive to the protection of basic rights. Any infringement within the state structure creates a domino effect that can lead to the breakdown of all other structures. Waiting for an individual to face a violation and resort to the law for protection is impractical in this rapidly changing world. Instead, mechanisms for checks and balances among institutions must be managed to prevent any human rights violations from occurring in the first place.

This part of the chapter highlights some realistic recommendations that are viable and urgent to be applied in the present Bangladesh scenario. The suggestions are expected to be constructive in assisting policy-makers to come up with instruments that might stand against the ongoing human rights violation prospects of the country:

- The highest instrument for protecting human rights is the Constitution. It is the protector of every right with sufficient guidance to cease the violation. According to Article 11 of the constitution of Bangladesh, "the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed" [7]. Based on this provision, the state must ensure a full guarantee of the basic human rights and principles of freedom to each citizen. Our constitution is the reflection of the international standard of protecting human rights and it covers every kind of human rights segment. Thus, complete obedience to the constitution is the first pillar to creating a concrete ground for human rights protection. All other institutions and laws that are under the regime of human rights protection are created following the basic extract of the constitution. So, if the constitution can be strictly in every segment of societal direction, protecting human rights becomes complimentary.

- Law enforcement agencies should not be seen as the violator of rights, but the protector of them—as their oath of profession summarizes. The United Nations Human Rights Office of the High Commissioner's Code of Conduct for Law Enforcement Officials of 1979 has been devised to guide the duty of law enforcement forces in protecting human rights. Article 2 states that, "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." [66]. The articles of the UN mandate outline the role of policing as being the representative of human rights protection, and accountable to the entire community for establishing a peaceful environment. Likewise, The Vienna Declaration and Programme of Action states that "the administration of justice, including law enforcement, is essential to the full and nondiscriminatory realization of human rights." It suggests that necessary means need to be taken to ensure systematic education for law enforcement officials to let them know about their restrictions, duty, the arena of power, and most importantly to create a clear conscience of what they are enforcing [67]. Unless a clarified sense is created that the unlimited range of power does not allow any of the forces "to bend rules," it would always be difficult to create an environment of trust between the agencies and the public. Without this trust, it is not possible to establish the rule of law with the help of effective policing. The system needs to embed that these agencies must prevent assaults on human dignity and not become a source of it [68].

  Quoting all these international documents clarifies that in the case of Bangladesh also the law enforcement agencies need to be the first protector of human dignity. It has become mandatory to provide human rights training to each member of the force before they start their duty. A medium of trust needs to be established between the police officers and citizens to maintain a relationship of impartiality which will lead to the protection and enhancement of human rights. That includes considering any form of unwarranted arrest, extra-judicial killing, police brutality, and agency harassment as a crucial violation of the law and bringing about the perpetrator under strict jurisdiction to confirm justice for the victims. These actions need to be brought under a strict provision of criminal justice with the top priority of discernment.

- The magnitude of institutional violation cannot be prevented if the application of laws is not robust enough. To create a circumstance where no agency can stay beyond the shade of law, the Code of Criminal Procedure should be modified in sections 54, 167, and 344 to eliminate the possibility of any circumstances where police employees can involve themselves in any action of violating human rights [69]. Besides, an amicable situation should be created where the interaction between police officers and citizens can be unbiased and based on grounds of trust and empathy. The violations of Human Rights by any agency, institution, or individual should be subjected to exemplary punishment so that others can learn about the consequence of such action and refrain from any such perpetration. Violation of any form of human rights should be considered under emergency jurisdiction and reported to the pertinent agency [69]. A separate protection cell for the victims can be created to keep him/her safe from further harassment. To assure unbiased predication at all levels the inquiry department should be kept apart from the police department that is investigating the accused.

- With the view to protecting and sheltering every citizen from infringement of human rights, the National Human Rights Commission, Bangladesh (NHRCB) has the mandate under Section 12 of the National Human Rights Commission Act (NHRC) 2009 to handle complaints relating to allegations of human rights violation [70]. The Human Rights Commission has been allowed with such an extent of provision that it can ask for a report from the disciplinary forces or the law enforcing agencies on the allegation of human rights violation, can inquire and report a matter being referenced by the Supreme Court of Bangladesh on a written petition heard by it, recommend the government to provide a temporary grant to the aggrieved person or his family, directly bring any matter of noncompliance to the notice of the President who shall cause it to be laid before parliament, and can even apply to the High Court Division if the case fits with the conditions of filing writ petitions under the constitution [70]. These reflect upon the broad perspective arena where the commission can exercise its power to protect the citizens from harm. It is high time that the mandate of the commission that provided a such strong base for the institutional exercise of protection bring into proper realization. Letting the commission sit as an audience watching all the violations in the society and not letting it intervene for political, bureaucratic, or internal reasons should be overcome. This institution itself can work as a concrete wall against all kinds of violations and ensure justice for any victim of human rights violation. It is time we used this valuable entity for the service of society.

- A considerable amount of human rights violation cases goes beyond acknowledgment because—many even do not realize that their rights have been violated. Lack of literacy on the national and international provisions of human rights, most importantly the unawareness about the protective nature of the constitution, often creates an environment that structurally nurtures the scope of the violation. Educating the citizens about their rights with the help of relevant organizations needs to be the foremost duty of states. To establish the practice of human rights protection in the core of society, the topic of human rights literacy should start from the primary level of schooling. Children who know about human rights and whose human rights are respected will grow up to be responsible citizens [71]. Unfortunately, there is no independent initiative on human rights education in any university in Bangladesh except a few. To overcome these lacking, immediate steps should be taken to develop a human rights-focused education curriculum. To give a head start, a national policy can be adopted where the inclusion of a syllabus on human rights is mandatory. It needs to reflect on the objective, purposes, and contents of the various levels of human rights education and training that have been focused on national and international mandates. The curriculum needs to be developed in line with the spirit and obligation of the constitution and international treaty obligation. Human rights should be added elaborately at the primary and secondary levels as well as introduced as a separate graduate-level department in the topmost universities [72]. Because with education comes awareness.

- The biggest problem of the human rights regime in Bangladesh is that most people do not know whom to reach out to in case of any incidents of violation. A people-to-government interaction is highly needed for this purpose. Policymakers need to know where the gap is existing and exactly where more focus is needed. An elaborate view from the mass people's perspective would help in extensive research at the academic level, from where viable recommendations might emerge.

  The general public needs to be made aware of their basic rights via public-private organizational campaigns. Besides, communities and societies can provide a broader platform where people can practice the ways of fostering the traditional culture that poses respect and promotion of human rights. In this way, they can not only help in creating awareness for human rights but also supplement the efforts of the government and other relevant bodies in the proper implementation of these laws. Communities can play a very effective role in protecting human rights and creating a comfortable environment for the victim in case of violation or denial of their rights by resorting to all sorts of assistance. Communities can contribute extensively to financing, spreading awareness, sheltering them, or protecting their rights through effective advocacy [73].

- Human rights organizations and activists have proliferated globally in the past few decades, advocating for the rights of oppressed and underprivileged people. In Bangladesh, powerful civil society and nongovernmental organizations (NGOs) are working to attract state attention to rampant human rights issues, while young people are using digital activism to intervene in different forms of violations. Instead of suppressing activism, it should be used to identify issues that need work. Misuse of policies to shut down activism creates a situation where perpetrators know they will not be opposed. Therefore, adequate provisions of digital and practical activism should be maintained, and voices should be acted upon through proper jurisdictions [74]. Keeping in check the adequate provisions of digital as well as practical use of different activism methods, these voices should be paid hid to and acted upon via proper jurisdictions.

- NGOs, civil societies, and the media are crucial in raising awareness about human rights issues, but their work is limited and dependent on external factors.

While they play vital roles in promoting social welfare, criticizing policies, and increasing awareness, a comprehensive set of strategic actions is necessary to counter challenges. Mushroom organizations have grown, violating rather than protecting rights, and authorities restrict organizations from fearing loss of control. The government must surveil both situations through a comprehensive strategic action plan to ensure human rights protection [74].

- Globalization can serve as an important tool to protect human rights by promoting cross-border collaboration and increased mobility, despite the potential threats it may pose. It enables more monitoring of social conditions and opportunities for economic expansion, while also allowing for increased cooperation among transnational activist networks [75].

  Technology, including satellites, artificial intelligence, and forensic tools, can aid human rights work and help track abuses. If used ethically, these tools can enhance the work of human rights organizations, as they provide advanced tracking and communication tools. Technologies are being used to track information on human rights abuse and can amplify the capacities of human rights practitioners in all sectors of human rights work [76].

- When comes to the discussion of human rights in Bangladesh, an ending cannot be pulled without talking about the human rights of one million forcefully displaced Myanmar nationals (Rohingyas) living inhumane life in the congested camps of Cox's Bazar. Over a million Rohingya refugees living in congested camps in Bangladesh's Cox's Bazar are victims of decades-long discrimination and repression in Myanmar. Stateless and without government protection, they are denied citizenship under Myanmar's 1982 Citizenship Law and left with no access to basic rights [77]. Though not citizens of Bangladesh, their inhumane living conditions violate universal human rights, and their long-term solution is their repatriation with full rights in Myanmar. Several organizations are working to educate them about their rights, but returning to their home country is necessary for them to practice them.

6. Conclusion

Fifty-three years of independence have given a defining shape to the human rights regime of Bangladesh that was beyond prediction. From a war-torn country seeking recognition from big states to becoming a member of the UN Human Rights Council for the fifth time in 2022—the pattern of development is itself visible [78]. But the journey does not stop here. The Human Rights regime is facing continuous deliberate challenges, and the system needs to be reevaluated in such a manner that it addresses these issues. With the fast-pacing world, Bangladesh is also facing these major challenges in human rights protection and many of its basic institutions are still in need of revolutionary changes to keep up. Maintaining the notion that the constitution is the ultimate guardian of the human rights of the citizens, every prospect needs to be aligned. Every sector of human rights implementation needs to keep in consideration that violation of any clause of the constitution is followed by the strict prohibition of law and is punishable under various jurisdictions. As a result of institutional reforms, respect for human rights, the rule of law, and better governance would be safeguarded for human rights within the domestic regime. Keeping respect to the provisions of the constitutions and the institution responsible for realizing them, all sectors of the state, the bureaucracy, law enforcement agencies, judiciary, legislature, relevant commissions, etc., need to be more transparent and public-friendly to create a system complementary to human rights work. As these sectors are brought under rigorous monitoring and made responsible to the wider people, the incidence of human rights violations will predominantly decrease. The stakeholders that are innately involved and responsible to act as a check and balance mechanism in ensuring human rights protection need to be more strong and more aware of their duties. Civil society and NGOs need to be more aware of their responsibilities and boundaries to play their role in this dynamic. However, spectating from the perspective of constitutional and legal reforms, many of the country's laws require changes to reflect the democratic values of the twenty-first century by enforcing fundamental rights. Initiatives should be taken to introduce policies that ensure the execution of steps like bringing about judicial independence, strengthening parliamentary supremacy, reducing dependency among the branches, reforming security agencies from the root to put an end to the violation of civil liberties, and repealing laws that restrain freedom of the press [79]. The global challenges originating from uncontrolled globalization, excess and illegal use of technology and information, transnational conflicts, refugee influx, insufferable climate change, etc., need to be kept under check to create a congenial environment that is convenient for human rights protection. Only through the development of proper instruments to defend against the challenges against human rights and rigorous reform of institutional structure with an embedded oath in protecting human rights, a better Bangladesh where every individual is treated equally by the law and provided access to the benefits of development can be ensured.

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Chapter 3

The Possibilities for Human-Rights-Based Approach in Long-Term Care for People with Dementia in Slovenia

Jana Mali

Abstract

The number of people with dementia is increasing, triggering a number of innovations in the organisation of long-term care. Modern concepts of care for people with dementia put their rights and active participation in care at the forefront. In this paper, we highlight the relevance of this perspective in Slovenia, where the institutional care dominates long-term care to date. Long-term care for people with dementia should be anti-discriminatory and against any kind of contempt, exclusion, labelling and stigmatisation. The organisation of institutional care for people with dementia alone will not be able to meet these objectives, therefore, we conduct a research with the method of rapid needs and services assessment to identify the practices of formal and informal care providers in implementing a 'human-based approach'. The results of research manifest that there is a need to regulate respect for the fundamental human rights of people with dementia by (1) giving them equal access to medical treatment and early diagnosis, (2) by increasing the availability of care tailored to their needs and (3) by enabling them to exercise their right to live in the community. The rights of people with dementia to make free, autonomous and participatory decisions can serve as a model.

Keywords: community care, dementia, informal care, formal care, dementia-friendly society, participation, destigmatisation, anti-discrimination

1. Introduction

Long-term care (LTC) for people with dementia is becoming an increasingly recognised phenomenon; as the number of people with dementia increases both nationally and globally, the provision of care for people with dementia has become a major challenge. The number of people living with dementia—estimated to stand at 55 million in 2019—is expected to rise to 139 million in 2050, according to the most recent World Health Organisation figures (Gauthier, Webster, Servaes, Morais and Rosa-Neto) [1]. In Slovenia, there is no register of people with dementia available; however, it is estimated that in 2019 there were around 43.038 people with dementia, a number that is expected to double by 2035 due to demographic trends [2]. One person with dementia is cared for by at least three people, therefore, around 150.000 relatives, friends and formal providers of care are indirectly affected as well [3]. In general, LTC in Slovenia has traditionally been institutionally oriented [4], therefore, institutional care is also foreseen for people with dementia. This is in contrast to the accepted guidelines for dementia care at the global level, which highlights independent living for people with dementia in the community or home environment [5].

We believe that the institutionalisation of people with dementia in Slovenia is a severe violation of their rights and that the LTC that is being established following the adoption of the Long-Term Care Act [6] should be based on community-based care. The shift towards community-based care can also be based on legal, professional and ethical principles required by a number of international documents and declarations. Of particular relevance to the field of LTC for older people and people with dementia are: Charter of Fundamental Rights of the European Union (2010), EU Charter of Rights and Responsibilities of Older People in Need of LTC and Assistance (2010), European Social Charter (2010), International Covenant on Economic, Social and Cultural Rights (1992), Madrid International Plan of Action on Ageing (2010), Regional Implementation Strategy (2002) and Convention on the Rights of People with Disabilities (2008) [7].

The guidelines for understanding dementia and the development of care should be based on a *human-rights-based approach* [8], which puts the needs of people with dementia at the forefront and does not see dementia only as a disease, but rather as a disability, a condition that affects the social functioning of individuals and the people around them. It enables an understanding of the participatory role of people with dementia in making decisions about their lives; therefore, the voice of people with dementia needs to be heard by the professionals providing care for them and by the politicians planning and guiding the development of care for people with dementia.

In this paper, the results of the empirical study titled LTC of people with dementia in the theory and practice of social work, which is part of the Slovenian national research, are analysed. The results of the analysis manifest to what extent the elements of the *human-rights-based approach* are authentic in understanding the LTC for people with dementia by formal and informal care providers, in order to be able in the future to design a modern LTC for people with dementia that puts human rights at the forefront.

2. LTC for people with dementia as anti-discrimination field

LTC for people with dementia should be anti-discriminatory, which means that the long-term care system and all its staff should work against prejudice, negative attitudes and contempt that result in exclusion, labelling and stigmatisation. These are fundamental human rights that should be respected and implemented within LTC. First and foremost, the anti-discriminatory practices should be developed at all three levels of LTC (e.g. micro, meso and macro levels), as this is the guiding principle that makes the realisation of the fundamental human rights of people with dementia possible.

At a *micro level*, people with dementia quickly become stigmatised, because their behaviour is often different from normal, socially acceptable behaviour. To this end, the use of words and expressions is adapted, that is, the language of politicians, professionals, informal and formal care providers, representatives of local and wider society and others who make up LTC. Swaffer [9], Reynolds et al. [10] and Heward, Innes and Cutler [11] draw attention to the correct use of language to reflect the attitudes towards people with dementia. The use of expressions, such as *demented*, *dementia sufferers*, *dementia subjects*, *dementia victims*, *not all there,* is still common in political documents, in professional and scientific conferences across various disciplines and, consequently, among researchers in these disciplines, and is by no means different from everyday language. Swaffer [9] points out that stigmatisation of people with dementia is endemic in the literature and that discrimination against people with dementia is present even in advocacy organisations. There is a need to advocate for a language that normalises the lives of people with dementia, is inclusive rather than exclusive, and supports people with dementia in making decisions about their lives rather than insulting them. The rhetoric of various professionals working in the field of dementia not only has an impact on people's everyday language but also shapes the general image of people with dementia and determines their position in the community. In such a situation, it is understandable why people with dementia live without social power and unconditionally accept any kind of help. The prevailing rhetoric about dementia and people living with it disempowers people with dementia, is demeaning, affects their identity, labels and stigmatises them. The disability rights movements have been most successful in eliminating the pejorative language previously used to describe people with disabilities, and words like 'retarded', 'handicapped', 'cripple', 'infirm' and 'imbecile' are, fortunately, no longer in use [8]. Following this example, the rhetoric about the people with dementia could be changed and by giving them an activist role in education processes, the language that today is predominantly derogatory in the media, among professionals, researchers, politicians and society at large, could change as well.

People with dementia are not involved in research, not even in research on stigma, the area they could report on most authentically, because they experience stigmatisation on a daily basis. Unfortunately, the research on the social dimensions of dementia is dominated by the principle of knowledge about people with dementia being created without them. A common excuse for excluding people with dementia from research is their reduced cognitive abilities [12]. If we aim to promote the empowerment of people with dementia, research needs to be designed and conducted based on the inclusive research strategies. It is not sufficient to only partially involve, for example, a small number of people with dementia, without drawing up clear goals, purpose and their roles. Including people with dementia in research in this way is 'tokenistic', since it only manifests the awareness of the exclusion of people with dementia on a symbolic level, without actually destigmatising them.

The starting point of such research is based on the belief that only people with experience of living with dementia can change the prevailing exclusionary attitudes towards them. These examples are certainly relevant for the LTC of people with dementia in Slovenia, as there are no such organisations in the field of dementia. They are exemplified by:

1. The Scottish Dementia Working Group [13] is a group of people with dementia campaigning to improve existing care and change the prevailing negative attitudes towards people with dementia. The group is actively involved in various professional forums and committees, and it participates in conferences and has an impact on the policy change.

2. European Dementia Working Group [14] is a group of people with dementia working under the umbrella of Alzheimer Europe, an organisation that brings

together 37 national NGOs working in the field of dementia support, of which Spominčica [15], the Slovenian association is a member. They make sure that the priorities and the perspectives of people with dementia are included in all Alzheimer Europe activities.

3. Australian Dementia Advisory Committee [16] is a national advocacy platform for people with dementia. Its members help shape the services, programmes and policy development, and strive for a community where people with dementia are valued and respected.

At the *meso level*, the so-called *dementia-friendly communities* can serve as a model for establishing anti-discrimination practices. The concept of these communities is rooted in the philosophy of 'age-friendly communities', which can be traced in contemporary social gerontology [17, 18]. It is a community that enables its members to live meaningful lives as they age because it is tailored to meet their specific needs and priorities [19]. Age-friendly communities provide support for people in need of LTC, while allowing them to be actively involved in the community and have recognised social roles. These communities should also be modelled as 'dementia-friendly communities', where the conditions are in place to empower people with dementia to live their lives as they did before their diagnosis. According to the Alzheimer's Society [20], these communities should provide the inclusion of people with dementia in the living community, its activities, early diagnosis, community support and care and mobility and stigma reduction. Only people with dementia can define what a 'dementia-friendly life' is for them and what they want their community to be like, which is inclusive and enables them to live independently as they did before the onset of dementia [21]. There are a number of good practices of 'dementia-friendly communities' around the world, for example, in the UK, Belgium, Germany, the USA, Australia and Japan. In the UK, the economic impact of dementia-friendly communities for people with dementia was quickly recognised, as caring for people with dementia in a home environment is cheaper and safer than institutional care in a nursing home or hospital [11]. However, this should not be the only lever for establishing such communities, otherwise, the desired changes in the destigmatisation of people with dementia will not be achieved.

At a *macro level*, the general public's opinion on dementia can also be changed in different ways. Not only through education. Learning from one's own experience is effective, as is manifested by Reynolds et al. [10], who present an experiment in which people with dementia participated in a concert organised by a university campus symphony orchestra. Before the concert, the audience was asked questions about their expectations, and after the event, it was asked how their opinion about people with dementia changed. Their perception of dementia changed a lot after the concert because they realised that people with dementia were not only dependent on others for help but could also make a relevant contribution to the community despite their disease.

3. Human-rights-based approach in LTC for people with dementia

Cahill [8] develops an interesting concept of understanding dementia through the lens of human rights by introducing dementia as part of the social model of disability. She asserts that dementia as a disability is a human rights issue because the person diagnosed with dementia is at risk of experiencing injustice, marginalisation, and discrimination. In different countries, it is common for persons with dementia to face various structural barriers, such as difficulties in accessing diagnostic and post-diagnostic services, disregard for the right to autonomy and respect for their dignity. Therefore, it is important to consider the needs of people with dementia as their basic human needs, and the responses to their needs (i.e., services, forms of assistance) must be organised and implemented according to the realisation of human rights.

Respect, consideration and coexistence are values that should be internalised and implemented by people working in the area of LTC. They enable people with dementia to play a participatory role at the level of community and society as a whole. On the other hand, it is also important to develop the methods of support or care at the level of LTC that enable the participation of people with dementia. One such method is personal planning, which is important for people with dementia already before the onset of the disease. There is a method known as advanced personal planning [21–23] because it is important for people with dementia to make decisions about their future and to express their wishes at a stage in their disease when they are still able to do so and are believed by others to be truly able to do so. Boyle [22] cites the results of a study that looked into the participatory role of people with dementia in day-to-day decisions about the course of their lives and the impact of social factors on this role. She concludes that it is up to us without dementia to recognise and provide the participation of people with dementia. By talking less and communicating more, by reducing daily activities and tasks, and by allowing reflection on activities, we will enable people with dementia to take an active part in decisions about their lives. We will identify their wishes and life goals and be able to follow them through the advanced stages of their disease.

This approach is also getting increasingly relevant due to advances in medicine, which can predict at an early stage whether a person may potentially suffer from dementia (e.g. Alzheimer's dementia) through various tests (e.g. biomarkers) [24]. Advances in medical science are "buying time" for people with dementia to think about their future. However, in reality, people do not think this way at the time of diagnosis, and neither do their care providers, who are usually family members and expected to help them. All together, they do not want to plan ahead, because they follow the normative assumptions that it is their duty and commitment to provide care for a relative with dementia. If the assumption that informal care providers are the agents of care for people with dementia is made also at the systemic level of action and organisation of support, it is quite difficult to put the participatory role of people with dementia into practice. This is confirmed by Donnelly, Berley and O'Brien [25] who argue that the power of decision-making is left to the relatives of people with dementia as there is no opportunity for people with dementia to participate in decision-making. For instance, despite the fact that in Ireland the participatory role of people with dementia is legalised, there are bureaucratic procedures at the level of implementation, the organisational procedures that dictate pressures and immediate decisions about life courses. People with dementia who have not planned their decisions in advance are therefore excluded from decision-making and left to the decisions made by their relatives.

In contemporary practice of providing help or LTC, people with dementia are not involved in care planning, either because it is not possible for them to be included (e.g. regulatory provisions to help social workers explain to the relatives why it is relevant for people with dementia to be involved in the care process) or because they are not invited by other professionals to be involved in care planning (usually because they do not think they are able to be involved in the care process) [25]. Family members are automatically involved in planning, a practice that has become routine, while people with dementia rarely play a participatory role in care planning. When they are not excluded, they are most often involved only symbolically, for instance by attending meetings, but not being given the opportunity to talk about their wishes [26]. Such practices are also strongly affected by medical reports showing the extent to which dementia has already advanced and reduced the ability to think and judge. Involving people with dementia in care planning is also important as it informs them about their rights, possible solutions and forms of support [27]. By no means should participation be seen only as a technique or a specific method of work, but rather as a relationship, an attitude, an ethical commitment and a core value of LTC [7]. Or else, it becomes a tool for the realisation of illusory aspirations of equality and empowerment of people with dementia. Participation should become a philosophy or a mindset that creates a culture of support in which a person with dementia plays a central role.

4. Methodology of research on LTC for people with dementia in Slovenia

During the almost 20 years of drafting the Long-Term Care Act and the many heated debates among professionals, the topic of LTC for people with dementia has rarely been addressed in Slovenia. This is one of the reasons why the basic research project LTC of people with dementia in the theory and practice of social work (No. J5-2567) as the first national study in the field of research on the social dimensions of dementia was focused on LTC. The project applied the method of Rapid Needs and Services Assessment (RANS), which was developed in Slovenia at the Faculty of Social Work, University of Ljubljana, in order to identify LTC needs and plan the process of deinstitutionalisation [28]. The method is one of the fundamental research methods in social work, which is used to develop theory and practice in the core areas of social work in an integrated and hermeneutic way. It is a combination of qualitative research methods, techniques and approaches, among which grounded theory, ethnography and action research are predominant, but with regard to research objectives, it is also complemented with methods from the quantitative research methodology [29]. The purpose of the method is twofold: (1) on the one hand, the needs (scope, type, intensity, characteristics, etc.) are assessed, and, (2) on the other hand, the responses (those that are already known and available, and those that need to be developed in new ways or require action—change). Needs assessment is primarily an analytical assessment of the situation and the resources available. On this basis, the guidelines for new and needed resources are given. RANS is also a method used to make suggestions for necessary research-based interventions, which are feasible with proper planning.

In this paper, we present the results of three focus groups with key actors in the provision of LTC for people with dementia from three selected municipalities. The selection of municipalities was based on the results of the basic project community-based care for older people in Slovenia [30], in which five groups of municipalities[1] were defined with regard to institutional and community-based care, namely municipalities from groups 2, 3 and 5. A total of 29 participants from various organisations

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[1] Group 1: higher welfare—high quality of care; Group 2: higher welfare—poor quality of care; Group 3: lower welfare—poor quality of care; Group 4: lower welfare—high quality of care; Group 5: Ljubljana and Maribor: high availability of care (favourable price)—no sufficient quality of care.

took part in the focus groups: social work centres, old people's homes, health centres, general and psychiatric hospitals, municipalities and NGOs (pensioners' associations, Spominčica—a dementia support organisation, adult education organisations). The following questions were discussed with them:

1. What are the needs of people with dementia that you perceive in your work?

2. What are the trends in the amount of support for people with dementia in your municipality?

3. What is your vision of helping people with dementia?

People with dementia enter the LTC system when they are diagnosed. The right to a diagnosis is written in the expired Dementia Care Strategy of Slovenia 2016-2020 [31] and in the proposed Dementia Care Strategy of Slovenia 2030 [2]. Our aim was to get a user's perspective on this practice, therefore, 22 relatives of people with dementia from the selected municipalities were interviewed and the following topics were discussed with them:

1. What is your experience in getting an official diagnosis of dementia?

2. How did you and your relative with dementia react to the diagnosis?

3. What has changed in the life of your relative with dementia since the diagnosis and in your life?

The empirical data was collected from March to October 2022 and analysed using a qualitative data analysis method [32, 33] to create an overview of the LTC needs of people with dementia. We were interested in the ways in which the 'human-rights-based approach' was implemented, in particular: the right to early diagnosis, the access to care tailored to people with dementia and the right to organised care in the community. The results are described based on the mentioned themes.

We are aware of the fact that the survey is limited in that we only interviewed communities that were accessible to us, and professionals who later gave us access to the relatives. Unfortunately, this was the only possible approach at the time of the research, because after the epidemic of COVID-19 the field of research on the social dimensions of dementia was quite closed, access to people was limited, and people's trust in research was low. We relied on the research methods available to us in order not to stigmatise the relatives of people with dementia even more than they already are in Slovenian society. In this context, we also ask the readers to understand our research results, which we present in the following sections.

5. Results

5.1 The right to early diagnosis

The relatives of people with dementia report that they associated the behaviour and actions of their family member with dementia, which seemed to indicate memory problems. Initially, the memory gaps were attributed to changes in age and therefore not given much attention. However, when they witnessed an unusual event with tragic implications, they became convinced that the memory problems were due to uncharacteristic ageing.

Memory loss is the second most common reason for relatives to think about dementia, next to the unusual event. When observing the behaviour of their family member, the relatives were quite specific in describing the areas where they observed a memory loss in their family member, which is certainly an important message for professionals and should be taken into account more in the process of providing professional support. The relatives report memory loss in the following areas:

- the inability to do household chores due to memory gaps, for example, cooking, doing the laundry,
- forgetting to eat (forgetting that they have eaten, what they have eaten, how much they have eaten),
- losing things (keys, wallet, money).
- disorientation at home and away from home (not remembering their home address, their own name).
- loss of vocabulary, inability to read various texts.
- forgetting the names of places and people.

In addition, the relatives described changes in their family members' behaviour, habits and beliefs. They describe them as personality changes, for example, a father who had never been quarrelsome in his life suddenly started arguing a lot; a mother who had always been a caring housewife and wife changed overnight and left everything to others to do; a father who had always been good-humoured and liked company suddenly became sad, unemotional and unsociable. These changes led to an appointment with a general practitioner and a diagnosis. Early diagnosis is important because, in the early stages of dementia, a person can still make independent decisions about his or her life, which from a human rights perspective represents an opportunity to preserve human dignity and autonomy [8].

The diagnosis is experienced and described by the relatives of people with dementia with a range of emotions, for example, shock, fear and sadness. Shock is the most common emotion described by relatives in response to the diagnosis. For some, shock is the result of a rapid deterioration in the relative's health and the diagnosis is only a confirmation of the suspicion of dementia. Similar experiences are also found in the literature, which states that family members also experience stigma when a diagnosis is made [1, 34].

Fear is common in those who have never heard of dementia or have little idea of the consequences it can have on their lives. It is a reaction against the unknown, the feeling of insecurity and ignorance of the changes that await them: *'The doctors didn't have much work to do, because my mother seemed to conceal the disease that was already fully advanced. So the doctors quickly found out through tests that it was dementia. As I didn't know about dementia at the time, I came to terms with the diagnosis with great fear'.* (Z 1).

However, those who know about the disease, are overwhelmed by a feeling of sadness when they are informed about the diagnosis, especially if a person with dementia knows the disease and does not want to accept it.

In addition, the relatives' accounts show that the process of diagnosis varies. The relatives describe different experiences of how they made the conclusion about the diagnosis themselves, although the Dementia Care Strategy for Slovenia 2016–2020 [31] prescribes a uniform procedure for treating the patients: 'A patient suspected of having dementia is treated by a specialist, a psychiatrist or a neurologist. To be seen by a neurologist, the patient needs a referral from a general practitioner, while a psychiatrist is available without a referral'. The story of a daughter describing a revolving door syndrome, a common problem in the medical model of help, is particularly striking: '*We turned to doctors for help. First, we met a psychologist, who soon gave up, said that he could not help us and referred us to a general practitioner. The GP referred us to a psychiatrist and after the psychiatrist assessed my mother's condition it became clear that a neurologist should also be involved. We went from door to door for a while, meeting various specialists, before we were lucky enough to come across a doctor who understood and supported us. The doctors went through their treasure trove of knowledge and tried to help us, but at that moment, when we were still so confused, we needed someone to do all they could and get to the bottom of it. The last neurologist looked into my mother's health, examined everything that could have impacted the changes in her and discovered many things. In the multitude of tests and examinations, for the first time we were able to really understand what it was all about - Mum had been diagnosed with multi-infarct dementia. Besides, during this time the rest of us got to get acquainted with the guest who had been hiding in the corridors of our home for years'. (Z 20).*

Diagnosis takes between a year and a few months. Sometimes it can take several years from the first problem to the diagnosis, either because the person neglects the first signs, or because the family doctor is inattentive to the initial signs. National guidelines on diagnosis should follow international guidelines to ensure that people with dementia receive a diagnosis as soon as possible and are entitled to follow-up care. For example, the Global Action Plan on the Public Health Response to Dementia 2017–2025 [35] states that 'by 2025, at least 50% of countries will have at least 50% of the estimated number of people diagnosed with dementia'. Often the initial signs of the disease do not seem alarming for people who experience them. In contrast to the relatives who experience strong emotional reactions to the diagnosis, some people with dementia take the diagnosis for granted, mainly as resignation: '*Stane did not react emotionally to the illness, but rather accepted it with indifference, even when he was asked about what he thought, he replied that if that was the way it had to be, so be it'.* (Z 12) In some families, however, the members take on a caring, protective attitude and do not even mention the diagnosis to the relative with dementia: '*As I've mentioned before, my mother does not even know that she has got dementia. We didn't tell her because she would have forgotten it the next day anyway. Why tell her something she might not even understand, or that would depress her. We benefit from the moments when we are with her to talk or go for a walk together'.* (Z 10) It is hard to say for sure that people with dementia are not aware of the disease, therefore, it is unacceptable for relatives to disbelieve them by feeling that they are unaware of the disease: '*After her diagnosis, my mother's life didn't change much, she was already in her own world. Even when we talked to her about her disease, she didn't understand the conversation, she claimed that she didn't have dementia and that she didn't notice that she was forgetting things. But she had forgotten that she had forgotten. For us, it was just the beginning, because it turned things upside down'.* (Z 1) This belief is probably due to the fact that dementia still causes fear among people. The social dimensions of dementia are still full of stigma, dementia is still a mark, a sticker, a label and something bad.

The relatives describe how difficult it is to accept dementia of a family member. The information about the characteristics of dementia, the course of the disease and the treatment options are welcome, but sometimes they do little to help with the next step that the relatives need to take, which is to accept all the changes that the disease brings to the life of the person with dementia and to all those around them.

The family is faced with the challenge of how to change the patterns of life that have been established so far so that everyone can live together with dementia in the least stressful and most comfortable way possible. Often children choose to take their parents under their own roof, or a relative may move in with the person with dementia, which can be an additional barrier.

The biggest changes concern the abandonment of activities and tasks that help the person maintain their identity, as they present a new challenge for both the person with dementia and their relative. The person with dementia needs new roles within and outside the family, and needs time and space to assert them. He or she needs a lot of support and understanding from family members in establishing and asserting the new roles. Due to the disease, the persons experience a lot of negative emotions and losses on a daily basis, they do not understand what is happening to them, so our role is to help them cross the threshold of a negative understanding of the world and to guide them into a world where they will feel accepted in their new role. Doing so also requires us to accept certain risks and responsibilities, but at the same time, it gives the persons with dementia a better quality of life.

5.2 The accessibility of personalised care for people with dementia

The analysis of the empirical results of the focus groups manifests that people with dementia need a lot of help and support from other people in their daily lives, which in the current LTC means that most care is provided by relatives. Help from existing institutions is insufficient, poorly accessible or not available at all. Old people's homes are full, with people with dementia waiting for months or years to be admitted. Home help is not evenly developed across municipalities, its scope (20 hours per week), in particular, is not sufficient to meet the needs of people with dementia. It is the relatives who ask for professional help, not people with dementia, in particular when they are no longer able to provide care for family members with dementia. They would also need help themselves, as they feel exhausted and helpless due to burnout. However, the professionals cannot offer them adequate solutions as the existing system does not provide services that would respond to the acute needs of people with dementia and their relatives.

Among the existing forms of support, care in old people's homes appears to be the most adapted to the needs of people with dementia, as modern forms of care are developed along with the existing organisation of care and focus on meeting the needs of the residents. Similarly, this could be the case with home care, but its scope is too narrow to provide personalised and individualised care, tailored to the needs of people living with dementia [7]. We have recognised that we really need personalised plans for people with dementia, as highlighted in the World Alzheimer's Report 2022 [1], where it is stated that every person deserves care and support that meets their individual needs and ensures they have access to the right information at the right time to make decisions about the whole course of their care.

In recent years, all municipalities have developed programmes to raise awareness of dementia among the general population, which is a relevant activity in terms of proactivity to identify the specific needs of people with dementia. In the municipalities, involved in our study, these programmes are implemented by public universities, old people's homes and NGOs. Unfortunately, we did not experience the correct use of expressions during the focus groups, as even the professionals referred to people with dementia by using terms such as 'demented' or 'demented people' and felt that they were passive and unable to make decisions about their lives. Perhaps the guidelines for more appropriate language being developed by various NGOs around the world to help people with dementia could be of great help in changing our vocabulary. Swaffer [9] cites three organisations that between 2008 and 2021 adopted the guidelines for using the language that is no longer offensive to people with dementia: Alzheimer's Australia (2009), Alzheimer's Society Canada (2012) and Alzheimer's Society of Ireland (2008). The example of these organisations in designing the Dementia Care Strategy for Slovenia 2030 [2] should be followed, as the draft document does not sufficiently highlight the correct use of words and expressions.

The issue most often referred to by our respondents is that the existing LTC system should be developed and upgraded, increasing both institutional and community-based forms of care, especially home care. Personal assistance for people with dementia could also be developed in the future. The staff in the current and, more particularly, in the future LTC system need to know how to deal with people with dementia, and they need to be educated and trained to be able to help them. Their work needs to be valued and better paid, as there is already a lack of qualified staff in this area.

When it comes down to the trends in support, our respondents mention the promotion of self-organisation of people with dementia in self-help groups, the increased presence of people with dementia in the community and their active role in developing support programmes. We find that the experts aim to encourage user organisations and activism on the part of the people with dementia, but do not find the right levers to make this happen.

The vision of help is reflected in coordinated care that is integrated and integrative, where the available services complement each other. No one benefits from too much competition between service providers. If we are to develop new forms of support and new services for people with dementia, they need to be coordinated. In two municipalities, the focus group resulted in an agreement on such cooperation; therefore, in one municipality it was agreed that the municipality's Social Council would convene a meeting to organise the preventive dementia awareness activities, while in the other municipality, it was agreed that the providers of support for people with dementia would meet again to agree on how to tackle the problems at hand on the ground.

We need a national programme for early detection of dementia to help both to accept the taboo of the disease and to develop appropriate forms of help and services for people with dementia. At the same time, a register of people with dementia will be introduced, therefore, we shall gain a more accurate perception of how many people with dementia need organised help. However, as long as we do not even know how many people with dementia are living in our country and what types and stages of dementia they have, we will continue to spin in a vicious circle in which no one is satisfied with existing system of help.

5.3 The right to organised care in the community

Current trends in LTC and care for people with dementia highlight the need to create the conditions for living independently in the home environment for as long as possible by providing a base of LTC policies at national and local levels on these premises [36]. This ensures, on the one hand, the development of home care services and, on the other, the support for maintaining home and its possible adaptation in the event of sudden adaptations to ensure independent living in the home environment.

Traditionally, the concept of family care for old people in Slovenia has been established and supported by institutional care [30]. Intergenerational solidarity is formally reflected in existing legislation, which requires family members to care for the ageing family members when they are unable to care for themselves independently. There is also a strong cultural intergenerational solidarity based on reciprocity of help—the parents who provided care for their children when they were young can expect their children to provide care for them when they are dependent on other people for help in old age. This 'caring culture' [37] is also passed on to members of the extended family when older people do not have children. In addition, it is mentioned by our respondents in the study, as most of them encounter in their work the relatives of people with dementia who, in desperation and exhaustion, ask for help from professionals and institutions.

From a socio-cultural point of view, it is extremely important that people with dementia are provided with care in their own homes, as close as possible to their immediate and extended family members. This is reflected both in our previous research [28, 38, 39], as the contact with family members is extremely important in the lives of older people, and in the current research. Older people describe family as a community that provides them with help and support in all forms, from material and emotional to providing contact and companionship. They rely on their family members (most often their children) in all situations, also when it comes down to various life crises. In the context of LTC for people with dementia, this involves developing services and forms of support that aim to support both, people with dementia and their family members.

Institutional care is the last in a series of services for a person with dementia, as it is important for them to remain in their home environment for as long as possible. As home care is the only available form of community care and there are no available places in old people's homes, people with dementia are forced to follow an institutional career path, which most often leads them to being admitted to an old people's home.

First, they are hospitalised, often in a psychiatric hospital, from where they return home and are soon hospitalised again, and then after a while, they are placed in an old people's home, often away from their home town. It is not uncommon for them to move from one old people's home to another in order to be as close as possible to their familiar surroundings and, above all, to their relatives. The pointless multiple institutionalisations should be stopped, either re-institutionalisations in a hospital that are due to inadequate care in the home environment, or moving from distant old people's homes to those that are closer to the relatives, so that they can visit more often, etc.

People with dementia have the right to live in their own homes and should be empowered to live in the community and receive care aligned with their wishes and preferences [35]. However, when life circumstances are such that institutionalisation is inevitable, it is important that the institution is in the home environment of a person with dementia, or in the vicinity. An old people's home could provide a crisis accommodation to provide temporary institutionalisation until the living situation in the home environment has been sorted out (e.g. adjustments in a flat or a house), home help has been provided and life in the extended family has been organised in a way as to provide support in the home environment.

The existing response is not in line with the real needs of people with dementia, therefore, the research data is needed to identify what changes in the organisation of care provision (sectoral division, supply of care, resources) and the way care is delivered (services, work methods, role of users) are needed to create a long-term sustainable system of LTC for people with dementia. The existing services need to be reorganised by redesigning large institutions, dispersing services, ensuring coherence and changing the work of professionals. Along with reorganising existing services, new services and structures need to be set up by organising new spaces (forms of living, socialising and occupation), new forms of work and methods in various organisations (e.g. individualised care). The new services should be accompanied by new activities, by linking organisations with activities outside their own sphere of interest, providing more choice, more events and, in particular, ensuring the participation and involvement of people with dementia in the planning and delivery of services.

6. Conclusions

In Slovenia, the LTC of people with dementia needs to be regulated in several areas in order to respect fundamental human rights. **Table 1** summarises the main findings of the research on the existence of a human-based approach according to Cahill [8].

Firstly, all people should have equal access to medical treatment and early diagnosis. The experience of relatives shows that there are various practices involved when it comes down to pinpoint a diagnosis, which leads to people waiting for years before they are actually diagnosed. During this time, the disease may worsen to the point where people with dementia are no longer able to make independent decisions about their lives. Cahill [8] critically observes that in 'high-income countries', only half of people are diagnosed with dementia, while in other countries, only 10% are diagnosed, which is not serve as an example in Slovenia. In terms of the realisation of human rights, we should strive for the right of every person to early medical treatment and diagnosis.

The characteristics of human-based approach	The realisation of characteristics of human-based approach in Slovenia
1. The right to early diagnose	Partially (between 4 years and a few months)
2. The right to treatment after diagnosis	Partially (family members take over all tasks)
3. The right to personalised care	Partially (personal care plans exist only in homes for older people, not in community services)
4. The language of inclusion used by professionals	Not present (was not used in the focus groups of the research)
5. The right to organised care in the community	Not available (institutional care is prevalent but not accessible, same for home help)

Table 1.
The realisation of human-based approach in LTC for people with dementia in Slovenia.

Secondly, the access to personalised care for people with dementia needs to be increased. The waiting periods for the provision of formal care in LTC are unacceptable as is the repeated institutionalisation of people with dementia, which does not respect their self-determination and participation in care planning. We need LTC in which people with dementia are active agents in their own care planning. A system of advance planning or planning ahead [21–23] needs to be developed to make the implementation of care tailored to the needs of people with dementia possible. In the Long-Term Care Act [6] the planning of LTC is provided as a method of support, which is a good basis for the development of 'human-based approach'.

Thirdly, the right to organised care in the community is heavily limited due to the prevailing cultural and professional orientations that perceive people with dementia as vulnerable members of society whose voices are powerless, unheard and ignored. There is a need to create conditions in the society and at a local level that would enable people with dementia to express their need to live in a home environment, in their community and, to strive for a 'dementia-friendly society'. The right to live in the community needs to be given more prominence in professional circles and at the level of policy-making. It should become the basis for new solutions in LTC.

We suggest that LTC in Slovenia for people with dementia is built on the experience from abroad, which highlights the rights of people with dementia to free, autonomous and participative decision-making about their lives.

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Conflict of interest

The author declares no conflict of interest.

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Chapter 4

Healthcare Rights for Gender and Sexual Minorities

John P. Gilmore

Abstract

There is broad consensus that a key factor for human flourishing is access to safe, effective, and appropriate healthcare. Whilst health inequalities exist for many marginalised and minoritised groups, the impact of broader social inequities on healthcare delivery and health outcomes is particularly notable in gender and sexual minority groups. Health inequalities faced by Lesbian, Gay, Bisexual, Transgender, Intersex, and other gender and sexual minority groups exist across domains of physical, psychological, and emotional wellbeing; many stemming from experiences of broad social exclusion and discrimination, explained through the concept of 'Minority Stress'. This chapter will explore the concept of health inequality and inequity faced by LBGTQI+ groups, considering the relationships between social inclusion, legislative protection, and access to healthcare. It will also question why, even in societies with high acceptance rates of gender and sexuality diversity, health inequalities remain evident. Furthermore, the chapter will present strategies to enhance the healthcare rights of sexual and gender minority groups.

Keywords: LGBTQI+ rights, LGBT, healthcare, LGBT health, Trans

1. Introduction

This chapter will discuss the health and healthcare of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex people, framing it as an issue of human rights. Across the world, there are significant differences in the visibility, participation, and access to civil and legal rights for gender and sexual minority communities, which inevitably intersects with the availability and accessibility of appropriate healthcare and, ultimately, health outcomes for these groups.

Some key differences between gender and sexual minority communities and other minoritised and marginalised groups are that they are not always recognisable through their appearance or physical characteristics. They are not necessarily born into or socialised within these groups, and in many cases, the minoritisation and marginalisation they face are directly linked to societal perceptions that their lived experiences are unnatural, and that they are somehow way disordered [1].

Whilst research into the health of gender and sexual minority communities remains limited in many contexts, this chapter will put forward some of the areas where health disparities and inequalities are established, as well as discuss some of the confounding factors around these inequities including experiences of discrimination, stigma, and minority stress [2]. These inequalities both directly and indirectly link to wider issues of LGBTQI+ rights.

Addressing gender and sexual minority healthcare as a right is dependent on the realisation of other human rights, but also in the understanding and acknowledgement of specific healthcare needs of LGBTQI+ communities. This chapter puts forward an argument as to why issues of health equity for these communities should be considered through a Human Rights lens. There are also more specific issues put forward where human rights abuses intersect with healthcare such as the case of conversion practices to change gender and sexual minority identity, often framed as therapy, and surgical violence perpetrated on intersex individuals.

2. Gender and sexual minority rights around the world

Globally there has been an overall positive shift towards more visibility and recognition of the rights of LGBTQI+ people. However as pointed out by the Council of Foreign Relations [3] this shift in progress has not been evenly experienced; whilst there are growing numbers of countries decriminalising homosexuality, ensuring legal protections, recognising partnership rights, and the right to legally change gender, in other jurisdictions there has been growing opposition to LGBTQI+ rights.

Since the 1970s, there has been consistent campaigning and social activism to combat the oppression, inequality, and injustices faced by gender and sexual minorities, stemming from many legal and societal injustices with roots in nineteenth century colonial laws [4]. Initially, these movements were very much focused on safety and opposition to violence and the criminalisation of LGBTQI+ people.

The Stonewall Riots, which occurred in response to police brutality and oppression experienced at the Stonewall Inn, a gay bar in New York, marked the most notable event during the early period of LGBTQI+ activism, as LGBTQI+ people fought back against the violence and discrimination they faced by taking to the streets. Whilst this is often seen as the beginning of the modern LGBTQI+ rights movement, it was neither the first, nor arguably the most impactful activism of the time [5]. The 'Stonewall Myth' as described not only obscures history, and ignores the contextual nature of global LGBTQI+ movements; LGBTQI+ rights have a particular history and approach within the particular context they appear. It is important to remember when considering the history of LGBTQI+ rights that discussions around legal protections, recognition, partnership rights, and access to services can be hard to grasp in areas where there is an immediate and direct threat to safety and life.

Legal protections for LGBTQI+ individuals vary widely across different regions of the world; and how LGBTQI+ communities view the role of the legal system, whether as oppressor, or liberator, concurrently differs. Some countries have laws that protect LGBT individuals from discrimination, conflictingly others have laws that criminalise same-sex behaviour. According to a report by the International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA), as of 2020, 70 countries still criminalise same-sex behaviour, with punishments ranging from fines to imprisonment, and even the death penalty in some jurisdictions [6]. In many of these countries, laws which are used to persecute and criminalise gender and sexual minorities have roots in colonial penal codes; however, it is too simplistic to suggest that just simply revoking such laws would lead to societal acceptance and freedom from persecution. Indeed, in some jurisdictions such as India and Uganda, former colonial laws were repealed and subsequently replaced with new laws which criminalise LGBTQI+ communities to some extent. Addressing LGBTQI+ inequality on a global scale needs to be done cautiously and with cognisance to this history [4], what is happening in many cases is that the promotion of LGBTQI+ rights is being seen as a Western dictate, and almost as a new form of colonialism, this is why a clear human rights approach is favourable.

Although legal protections are vitally important in the promotion of gender and sexual minority rights, this does not necessarily lead to a concurrent shift in societal views, which are often linked to cultural and religious norms. In many countries, where there is widespread stigmatisation of sexual and gender minorities, their lifestyles are considered immoral or against cultural norms. This stigma can have a profound impact on LGBT individuals' mental health and well-being, leading to feelings of shame and self-hatred [2]. In some countries, the threat and experience of violence, harassment, or persecution of LGBTQI+ individuals, leads in turn to fleeing their homes or seek asylum in other countries as described by the UN High Commission for Refugees in their discussion paper [7].

Societal stigma and discrimination against gender and sexual minorities are widespread and take many forms, such as verbal and physical abuse, exclusion from commercial or social activities, and indeed physical violence. LGBTQI+ individuals may also face discrimination in employment, housing, and access to health care. These issues are not only experienced in contexts where there is criminalisation of gender and sexual minorities, but is commonly experienced, even in jurisdictions with legal protection. The ILGA Europe reported that 2022 saw the deadliest rise in anti-LGBTQI+ violence in over a decade across Europe and Asia [8]; and similar trends are being seen in other parts of the world, with statistics from the USA national crime victimisation survey 2017–2019; LGBT individuals are more likely to experience hate crimes than non-LGBT individuals, and these experiences have a significant and lasting impact on health and wellbeing [9].

Concurrent with the criminalisation and stigmatisation of gender and sexual minority communities, there has also been an attempt in many contexts to pathologise LGBTQI+ identity. Homosexuality and gender non-conformity are seen as either symptoms of, or diseases in themselves. Homosexuality was classified as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM) until 1978, and it was only in 2018 that the World Health Organisation declassified transgender identity as a mental illness [10]. The theories of pathologisation are grounded in the belief that the presence of atypical gender or sexuality behaviour are symptoms of a disease or disorder to which a medical professional should attend to [11]. In a similar vain to the dichotomy of a justice system which can either be seen as a liberator or oppressor, the relationship between LGBTQI+ individuals and healthcare providers can be complex. This perspective then further adds to stigmatisation and non-acceptance in society more generally.

The international human rights community has been strong in advocating for the rights of LGBTQI+ individuals. Organisations such as the United Nations, Council of Europe, World Health Organisation, and Amnesty International have all advocated for the decriminalisation and de-pathologisation of homosexuality, and in promoting sexual and gender minority rights as human rights. In addition to being linked to core human rights values such as respect for the dignity, liberty, and autonomy of the individual, as well as rights related to life and safety, the right to good health and appropriate healthcare for gender and sexual minorities is a key intersection that this chapter will discuss.

3. Healthcare as a human right

In initially addressing the substantive issue of gender and sexual minority healthcare as a human right, it is important to acknowledge that this chapter proposes, more generally, that universal healthcare is a human right for all. This stance, although widely accepted within the community of human rights scholars and practitioners, is not universally accepted; and for some, healthcare should be treated as a commodity rather than a right.

The concept of healthcare as a human right has its origins in the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948. The UDHR has become the foundational document for modern understanding of human rights and outlines the basic human rights that every person is entitled to, including rights to life, security, and safety. It explicitly recognises the right to healthcare by stating that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care'. The UNDHR is subsequently supported in this statement by various subsequent international treaties, instruments, and covenants, such as International Covenant on Economic, Social, and Cultural Rights, the EU Charter on Human Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights.

The founding basis for establishing access to healthcare as a human right is the understanding that illness, injury, and preventable disability can not only be a threat to life itself but can also hinder human flourishing and the realisation of other fundamental human rights.

Opponents of the idea that healthcare is a human right argue that healthcare is a service or commodity, and therefore, like any other service or commodity, it should be provided based on the principles of supply and demand. One challenge is that there is a perceived vagueness in support for universal healthcare, as the distinction between needs/fundamental and preferences/amenities is not always made clear in debates on universal healthcare provision [12]. For them, there is a fundamental difference between providing life preserving care and what is considered more elective healthcare.

Whilst opponents of universal healthcare as a human right do not refute that basic health is necessary for human flourishing, they still contend that the government's role in healthcare should be limited to providing a regulatory framework that ensures quality standards are met and promotes competition amongst healthcare providers. For some, a key issue in provision of healthcare as a universal right is the role of lifestyle and behaviour in the fulfilment of good health outcomes. In an era where many public health crises worldwide are linked to preventable conditions like cardiovascular disease, diabetes, and obesity, questions arise about how to consider individual behaviours and strike a balance between the choice to engage in unhealthy behaviours and the right to access healthcare to address negative outcomes [13].

Undoubtedly, healthcare services are expensive, and providing them as a fundamental human right places a significant financial burden on governments and healthcare providers. It may also be argued that considering universal healthcare as a human right would lead to an overburdening of the health system, because of an inability to discriminate based on issue of acuity and need. If everyone tried to access healthcare benefits to maximise their wellbeing to the full extent possible, it would be impossible to provide, and ultimately result in the failure of the system. Viewing healthcare provision as a continuum that encompasses health system planning, education, health promotion, and service delivery can help to mitigate its burdensome expense.

Despite the ongoing debate on whether healthcare is a human right, evidence suggests that healthcare as a human right has numerous benefits. The WHO World Health report in 2010 found that countries that provide universal healthcare coverage have better health outcomes than those that do not [14], countries with universal healthcare coverage had lower rates of infant mortality, lower rates of deaths from preventable diseases, and higher life expectancies. Inevitably this approach leads to significant economic benefits with more opportunity for participation in the economic activity of any society, as well as a society where people can realise their rights more fully. There is also evidence that the provision of universal healthcare coverage leads to higher economic growth rates for countries that provide when compared to those that do not [15].

Furthermore, advocates of healthcare as a human right argue that healthcare services should be accessible to everyone, regardless of their social status, race, ethnicity, gender, or sexuality. Asserting that the provision of healthcare services should not be based on one's ability to pay but on the principle of equal access to healthcare services. This is based on the idea that healthcare is a public good and that the benefits of good health are shared by everyone in society.

Providing healthcare services as a human right has been found to reduce health disparities; simply put, by removing cost as a barrier, countries that provide universal healthcare coverage have lower rates of health disparities compared to those that do not [16]. This is because universal healthcare coverage ensures that everyone has equal access to healthcare services, regardless of their social status or income.

Universal healthcare provision, however, should not mean the same healthcare provision for everyone. Healthcare needs are diverse, some groups face particular health inequalities and disparities which require unique and specific interventions. In the next section, I will describe some of the health inequalities faced by gender and sexual minorities.

4. LGBTQI+ health inequalities

This chapter contends that universal healthcare is a human right for all, but it is important to note that healthcare must also be appropriate, culturally responsive, and address the specific needs of those who access it. One size does not fit all, and one approach to healthcare does not address the needs of all either. Lesbian, gay, bisexual, transgender, queer, and intersex individuals have specific health needs and related to the specific health disparities and inequalities that they face. These disparities and inequalities are attributable to a range of social, economic, and cultural factors, including lived experiences of discrimination, stigma, and prejudice. Research has shown that LGBTQI+ individuals experience higher rates of mental health issues, problematic and harmful substance use, sexually acquired infections (STIs), body image issues as well as higher prevalence and poorer outcomes related to other physical health conditions when compared to their non-LGBTQI+ peers [17]. The field of LGBTQI+ health studies is an emerging area of research, there is much we do not know about LGBTQI+ health; however, addressing the inequalities and disparities we do know about is a good start.

Mental health issues are some of the most significant and recorded health disparities experienced by LGBT individuals. Several studies have found that LGBTQI+ individuals have higher rates of depression, anxiety, and suicidal ideation compared to their non-LGBTQI+ peers [18].

The mental health disparities experienced by sexual and gender minority individuals are attributable to a range of social, economic, and cultural factors. Discrimination, stigma, and prejudice are significant contributors to these disparities. LGBTQI+ individuals face discrimination in various forms, including employment, housing, and healthcare and this discrimination can lead to social isolation, low self-esteem, and a sense of hopelessness, which can contribute to mental health problems [2]. A significant contributing factor to this may be that the isolation and exclusion experienced by many LGBTQI+ people in their youth, may also be attributed to poorer mental health outcomes, with adverse childhood experiences having a major impact on mental wellbeing later in life [19].

Substance use disorders are another significant health issue experienced within gender and sexual minority communities, linked in many ways to poorer mental health. Several studies have found that LGBTQI+ individuals have higher rates of substance use disorders compared to their non-LGBTQI+ peers and the health impacts are multifaceted and complex [20, 21]. The factors that contribute to substance abuse disparities amongst LGBT individuals are complex and multifaceted. Discrimination, stigma, and prejudice are significant contributors to substance abuse disparities.

Whilst substance use may be a coping strategy for many individuals who experience social isolation, stigma, and discrimination within gender and sexual minority communities, it is important to note that in many of these communities, alcohol and other substances perform an important role in socialisation, and the substances and norms associated with these communities are diverse and contextual [22].

Rates of Sexually transmitted infections (STIs) and HIV continue to have a more significant burden in communities of gender and sexual minorities than the general population, particularly in communities of Gay and Bisexual men and Trans people [23–25].

In the 1980s and 1990s, during the height of the HIV and AIDS epidemic, Gay, Bisexual men, and the Trans community were some of the most impacted by the new virus, which was killing most people infected. Communities of LGBTQI+ people were also at the forefront of political action to ensure adequate resources and appropriate information were provided. Treatment for HIV has now significantly improved to mean that people living with HIV can live full and healthy lives. However, a significant impact of the burden of HIV and STIs within LGBTQI+ communities is the shame and stigma associated with infectiousness and transmissibility of these diseases [26]. People living with HIV on effective treatment can no longer transmit the virus to sexual partners, however, the message around undetectability and transmissibility is not as well-known as it could be.

Few issues in health and medicine receive as much focus as cancer, and given that it is one of the leading causes of death globally, this focus is undoubtedly justified. However, much of the rhetoric surrounding cancer is generic and generalised, despite emerging evidence indicating that gender and sexual minority individuals may be at higher risk for certain cancers than the general population. Lifestyle and behavioural issues are often key factors in the development of cancers, excess alcohol and drug usage as well as higher prevalence of STIs such as HPV in LGBTQI+ may have an impact on the development of cancer.

Data about cancer risk amongst members of the LGBTQ community is limited, however, some recent studies have found that this group may have an elevated rate of cancer diagnoses. In a review of the 2013–2016 US National Health Interview Survey, a comparison was made in cancer diagnoses between 129,431 heterosexual adults and 3357 lesbian, gay, and bisexual adults [27]. Gay men had over a 50 percent increased likelihood of reporting a cancer diagnosis compared to heterosexual men. Likewise, compared to heterosexual women, bisexual women had a 70 percent greater likelihood of reporting a diagnosis of cancer, although the authors suggest that this figure may be an underestimation due to the possibility of non-disclosure of LGBTQI+ identity status.

As with the areas of health and illness discussed above, data on the prevalence and aetiological links between sexual and gender identity and experiences of other chronic illness is sparse. LGBTQI+ people are often invisible, and if demographic data on sexual and gender identity is not gathered, causative links cannot be identified.

The dearth of research around sexual and gender minority experiences of chronic illness aside from HIV plays a particular role in stigmatising gay men's health issues in particular [28], with LGBTQI+ healthcare only being seen as HIV and sexual healthcare. Using the American National Health Interview Survey data, it was identified that there were some areas where LGB people had higher prevalence of certain disease categories, sexual minority men in particular identified as having higher prevalence of coronary disease and cancer [29]. With a universally ageing population, focus should be given to the experiences of LGBTQ people living with chronic illness. In a qualitative survey of 190 LGB people exploring experiences related to 52 different non-HIV related chronic illness, four distinct themes emerged: ableism within LGBT communities, isolation from LGBT communities, heteronormativity within healthcare, and homophobia from healthcare staff [30]. Regardless of prevalence of illness or disease, the clear disparities in access, experience, and utilisation of healthcare by sexual minorities warrant particular focus.

In conclusion, gender and sexual minority communities experience significant health inequalities and disparities that are attributable to a range of social, economic, and cultural factors. Mental health problems, substance use disorders, STIs, and healthcare disparities are amongst the most significant health disparities experienced by LGBTQI+ individuals. Discrimination, stigma, and prejudice are significant contributors to these disparities. Addressing LGBTQI+ health inequalities requires a multifaceted approach that addresses the social, economic, and cultural factors that contribute to these disparities. Strategies to address these disparities include increasing access to healthcare, addressing discrimination, stigma, and prejudice, and supporting LGBTQI+ communities.

5. Intersections between sexual and gender minority health and wider human rights

A key limitation in gender and sexual minority healthcare is the absence in data around LGBTQI+ health experiences or outcomes, in many cases this is because sexual orientation and gender identity data simply is not collected in healthcare provision or research. In contexts where gender and sexual minority communities are not recognised, and particularly in cases where these identities are persecuted and criminalised, it is obvious why this is the case; it would be dangerous to gather data which could be used against individuals or communities. However, there is also evidence that LGBTQI+ people more generally hesitant to share their sexual orientation and gender identity data with healthcare providers. In a European-wide survey of LGBTI individuals, the EU Fundamental Rights Agency found that 46% of people have not disclosed their sexual orientation or gender identity to any healthcare provider [31]. A lack of trust in healthcare systems may be linked to histories of pathologisation and stigma, and indeed to histories where health systems largely ignored the needs of LGBTQI+ people such as during the AIDS crisis of the 1980s and 1990s.

Not collecting this data makes it impossible to address the health inequalities and disparities that exist for gender and sexual minorities, with the old adage of—if you are not counted, you do not count—ringing true with these groups. In an aim to address LGBTQI+ health inequalities by understanding more about the disparities in health outcomes, the US government issued a directive on collection of sexual orientation and gender identity, and whilst this approach is a useful one in highlighting health needs of gender and sexual minority communities, in many cases individuals are choosing not to disclose, or there is a failure on the part of the healthcare provider in gathering this data [32].

The experiences of discrimination in everyday life, employment, and services add to the stigmatisation and oppression of gender and sexual minority individuals. Compounding this, the experience of discrimination within healthcare can have an even greater impact on health and wellbeing. In a prospective study of LGB individuals and experiences of discrimination in everyday life, almost a quarter of LGB individuals perceived that they received less favourable treatment by medical professionals because of their sexuality [33]. The experience of Trans people can be even further victimising and stigmatising, due to wider unacceptability of Trans identity in society and inability to withhold gender identity in many circumstances [34].

The experiences of discrimination within healthcare are obviously a barrier to build trust and therapeutic relationships with healthcare professionals, and to receive appropriate and culturally responsive care, but may also have a significant impact on health-seeking behaviours. A study by UK LGBT rights organisation Stonewall reported that a 17% of LGBT individuals reported that they avoided healthcare when they needed it due to fear of discrimination [35].

The minority stress model presented by Ilan Meyer [2] highlights three stress processes experienced by sexual and gender minorities: External events and conditions, which in large relates to the direct experience of discrimination and stigmatisation faced by LGBTQI+ individuals; the awareness and vigilance around that discrimination and stigmatisation, being constantly prepared to experience negative responses to sexual identity disclosure; the internalisation of wider discriminatory and oppressive societal attitudes of homosexuality. These experiences of prejudice, expecting rejection, concealing identity, and internalising homophobia in turn can lead to maladaptive coping processes [2]. Although sexual and gender minority individuals may become more familiar with adapting to these stressors over time, the ongoing need to adapt due to external environment can ultimately have further negative impacts on their mental and physical health, as the stress associated with this adaptation persists [36].

The theory provides a useful framework to consider how inequalities related to gender and sexual minority health are complex and dependent not only on internal experiences but also linking these experiences to wider societal conditions. The minority stress model presupposes that the stressors are unique to sexual minorities and not experienced by heterosexual people, chronic (related to social and cultural structures), and socially based [2].

Minority stress theory is a most explicit determination of how wider LGBTQI+ rights can have a significant impact on an individual sexual or gender minority person's health outcomes. Societal rejection of gender and sexual minority communities can lead to a lack of access to specific services for LGBTQI+ individuals. It further leads to a limitation of social support within a close and more broad social structure—therefore feelings of isolation, stigma, and discrimination become internalised, leading in turn to poor mental health outcomes and coping behaviours which may have further negative physical health outcomes.

Although it has been well established for decades that homosexuality is not an illness, some jurisdictions still pathologise and attempt to 'treat' homosexuality [37]. Although clearly repudiated by all major health and human rights organisations, the practice of 'conversion therapies' aimed at 'treating' or 'curing' homosexuality continues, even in jurisdictions with relative societal acceptance and legal protection of LGBTQI+ individuals such as in Ireland [38]. Conversion therapy practice has strong associations with religious beliefs, especially strongly held beliefs that sexual orientations and gender identities that fall outside heterosexuality or cisgender are sinful [39].

As well as being politically unpopular within the human rights community, these conversion therapies can cause actual physical and mental harm to those who experience them, having little efficacy in terms of sexual orientation conversion [38, 39].

With widespread condemnation from human rights organisations, there has been a movement to internationally regulate and ban conversion therapy; however, approaches differ and there are narratives of conflict between banning these practices and religious freedoms [37].

A relatively invisible community within the wider umbrella of gender and sexual minorities are those individuals who are born with intersex variations or differences in sexual development. Intersex variations encompass a diverse set of congenital differences relating to gonads, chromosomes, and genitals that fall outside usual binary views of male and female sex.

Although some intersex people may also identify as Transgender, not all do, and there are very specific needs and experiences shared by these communities. A significant issue for intersex communities is the commonplace surgical interventions which are performed on intersex infants to address anatomical variations [40]. Argued by many, these interventions are cosmetic and not medically warranted, and because they are performed without the consent of the individuals who they are performed on, are equivocal to a form of torture [41]. The long-term consequences of these surgeries are not only physical, and can have wider impacts on the emotional and mental wellbeing of intersex adults—for many of whom the surgeries are kept a secret from them for much of their lives.

It is contradictory that in some contexts where adults face significant barriers to accessing medical and surgical interventions for transitioning to their preferred gender, unwarranted surgical procedures are performed on infants to align them with perceived gender norms.

6. Addressing the healthcare rights of gender and sexual minorities

The right to healthcare is indivisible and interdependent on all other human, civil, and social rights. In order to promote the healthcare rights of sexual and gender minorities, their other rights must be realised in order for them to access healthcare in a safe and appropriate way. Even in a country where there is a right to universal healthcare, this right cannot be realised for gender and sexual minority communities if their other legal and civil rights are not maintained. If healthcare is not appropriate, culturally responsive, and addressing the needs of people then it is not in fact universal. The principles of equality and non-discrimination are key in ensuring that gender and sexual minority healthcare rights are realised.

In addressing the healthcare needs of gender and sexual minority communities there is a dichotomy of approaches which could be taken: either providing specialist and targeted services addressing the communities' needs based on the health disparities they face, or an approach of promoting LGBTQI+ inclusion within all healthcare services. In truth, a blended approach is most likely to be effective, whereby there are concurrent programs promoting LGBTQI+ visibility and healthcare needs within the main healthcare system, whilst also providing targeted interventions to support LGBTQI+ communities specifically where there are health disparities to be addressed.

The provision of specialist gender and sexual minority healthcare services emerged through community LGBTQI+ healthcare in the USA, whereby LGBTQI+ organisations and clinicians began providing specialist healthcare within their own communities. The provision is clearly linked to political, social, and scientific associations between LGBTQI+ people and health, and the wider needs of the community in gender and sexuality affirming approaches [42].

One significant factor in providing effective healthcare for gender and sexual minority individuals is the need to have confident, competent, and knowledgeable healthcare practitioners, aware of the specific healthcare needs of LGBTQI+ people. For healthcare providers, the gaps in education at both undergraduate and continuing professional development level around LGBTQI+ issues are key barriers to ensuring appropriate care for gender and sexual minorities [43].

Within medical, nursing, and dental students and providers, LGBTQI+ related bias have been identified, and training is a key strategy to reduce this [44]. Whilst there is no definitive and agreed strategy for implementing gender and sexual minority issues within healthcare professional education, an approach that integrates LGBTQI+ issues within both theoretical and practice-focused learning could be beneficial [45].

As with the development and provision of healthcare services discussed above, a strategy which encourages and promotes both inclusion and integration of LGBTQI+ issues within mainstream healthcare education and delivery, as well as prepare practitioners to develop specific healthcare provision is warranted. A framework of 'Usualising' and 'Specifising' has been developed to ensure both LGBTQI+ individuals are considered in a general way in healthcare education whilst also giving consideration to the specific needs of sexual and gender minority communities [46]. The recommended two-pronged framework suggests that gender and sexual minority identities should be 'Usualised' throughout the curriculum, with clinical cases involving LGBTQI+ individuals accessing healthcare as a natural occurrence rather than the primary focus. At the same time, the curriculum should engage in 'Specifising' by directly addressing issues related to the specific healthcare needs of gender and sexual minority communities, health inequalities, and interventions to support gender and sexuality affirming care.

7. Conclusion

Undoubtedly there have been significant strides in recognising and protecting sexual and gender minority rights globally, but there is still much work to be done. Discrimination, social stigma, and legal barriers continue to exist in many countries, creating significant challenges for LGBTQI+ individuals. Issues around the health inequalities and disparities further contend that basic legal protections are only one elementary part of ensuring that the rights of sexual and gender minority individuals are realised.

Advocacy and activism have been critical in raising awareness and pushing for legal protections, but continued efforts are needed to ensure that LGBTQI+ can live healthy and well lives, ensuring that all consideration to universal healthcare rights are cognisant of the specific needs of these communities.

Whilst further research on the healthcare needs of gender and sexual minorities is necessary to gain a more comprehensive understanding of their specific healthcare requirements and appropriate interventions, it is important to remember that sexual and gender minority health rights are inseparable from other universal health rights.

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Chapter 5

Addressing Wrongful Convictions in Croatia through Revision of the *Novum* Criterion: Identifying Best Practices and Standards

Andrej Bozhinovski

Abstract

The topic of miscarriages of justice in Croatia is new. It had begun to be the center of academic discussion in 2015 and culminated with the establishment of the experimental Innocence Project in Croatia in 2020. For the first time, experts started to analyze the domestic legal framework and judicial practice concerning the protection of the rights of wrongfully convicted persons, with a special emphasis on carrying out a post-conviction revision of criminal proceedings to prove eventual miscarriages of justice. This chapter examines wrongful convictions as miscarriages of justice through the scope of the *novum* criterion in different European countries, and the standards of the ECtHR and CJEU. The novum criterion is a legal principle that allows for the reopening of a case if new evidence emerges that could change the outcome of the trial. The purpose is through comparative and case study methods to address the revision of criminal proceedings in Croatia by examining the requirements for establishing a *novum* in the legislation of different European countries and examine the jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the E.U. (CJEU) and establish best practices.

Keywords: revision of procedure, *novum*, innocence projects, wrongful convictions, miscarriages of justice

1. Introduction

The topic of miscarriages of justice in Croatia is relatively new. It had begun to be the center of academic discussion in 2015, after for the first time was presented at the ISABS Conference in Dubrovnik and culminated with the establishment of the experimental Innocence Project in Croatia in 2020. For the first time, experts started to analyze the domestic legal framework and judicial practice concerning the protection of the rights of wrongfully convicted persons, with a special emphasis on carrying out a post-conviction revision of criminal proceedings to prove eventual miscarriages of justice. They are analyzing judicial practice *de lege lata* on the use of the *novum criterion* in the reopening of criminal cases for serious crimes. So far serious criminal cases, where renewal of the proceedings was requested, have been reviewed. Also, the potential discrepancy in the evaluation of the *novum* criterion in theory and practice is analyzed to determine what constitutes a *novum* in the eyes of the courts. However, preliminary results of several cases indicate that establishing a *novum* criterion in Croatia is far from an easy ordeal. It is a costly and time-consuming effort with a high threshold. On average the pre-trial investigation procedure in Croatia lasts 1–2 years, including the time to review the new evidence or conduct new forensic investigations. The absence of income and deprivation of liberty of the convicted persons, to finance this endeavor to establish a novum criterion is very problematic.

This chapter examines wrongful convictions as miscarriages of justice through the scope of the *novum* criterion in different European countries, and the standards of the ECtHR and CJEU. The novum criterion is a legal principle that allows for the reopening of a case if new evidence emerges that could change the outcome of the trial. The purpose is through comparative and case study methods to address the revision of criminal proceedings in Croatia by examining the requirements for establishing a *novum* in the legislation of different European countries and examine the jurisprudence of the European Court of Human Rights (ECtHR) and Court of Justice of the E.U. (CJEU) and establish best practices. In doing so, the first part of this chapter will explain the importance of the *novum* in correcting miscarriages of justice. The second part will identify positive legislative best examples from Italy, Germany, and the Netherlands, as countries with similar legal traditions. The third part shall examine the principles and standards from the jurisprudence of the ECtHR and the Court of Justice of the European Union. The fourth part will present the revision of the criminal procedure from the Croatian procedural legislation and a few cases of the Croatian Innocence Project in identifying the main problems in establishing the *novum* criterion in practice. The conclusive part highlights which positive practices should be adopted in Croatia, as well as why the promulgation of the special law of lowering the threshold of the *novum* criterion is needed in Croatia in order to protect the rights of the wrongfully convicted persons as a special vulnerable group. Ultimately, this chapter will provide valuable insights into the use of the novum criterion as a tool for correcting wrongful convictions and will inform the development of best practices for its implementation in the Croatian criminal legal system. This chapter will also contribute to the ongoing debate on wrongful convictions in Europe and the role of new evidence in correcting them.

2. Wrongful convictions and the importance of the *Novum*

Merriam-Webster's dictionary [1] defines miscarriage of justice as a "Grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime". This means that Innocent people lose their liberty and do "end up in jail". Regardless of the legal system, this *virus* can be found in either the Continental or the Common law system. The wrongful convictions came to light with the birth of the innocence movement in the U.S. in the 80s and the 90s through which academics and law practitioners started to take seriously this problem by analyzing cases and having them overturned to shed light on the causes of such mistakes. This was by no mistake. These were the formative years of the DNA sciences as well. Science reached the ability to match with sufficient precision DNA profiles. Luparia [2] argues that the DNA testing technology, which is frequently used to convict a suspect dead to rights, is also used in the post-conviction procedure to repeat the procedure and overturn the initial judgment based on the re-examination of the biological samples which were either inconsistently tested or contained inconclusive results. In the U.S. alone post-conviction DNA examination is used to exonerate persons wrongfully convicted of rape and murder charges. However, the grounds for exoneration are numerous and do not apply only to DNA evidence. They can also be: witnesses or victims' recantations of testimonies, police or prosecutorial misconduct, illegally obtained evidence, and depositions given under duress. For any of these reasons, a revision of the criminal procedure can be requested. Peters [3] further explains that the adversarial (accusatorial) systems, particularly in the American version, may be more vulnerable to factual errors than their European counterparts. Furthermore, Kilias [4] argues that another factor may be that factual errors in Europe have a higher chance of remaining undiscovered because of the statutes of limitation for the retention of evidentiary materials. Also, this pertains to physical evidence, such as blood samples, skin, sperm, and hair are usually destroyed once the case has been disposed of through the judicial hierarchy. Another reason is that in the U.S. the rulings are never "final" as in Europe, given the many possibilities to appeal or petition the redress under the form of *"habeas corpus"* petitions. Also, the storage of physical evidence tends to be conserved over long periods of time. In the European (Continental legal system), the availability of legal remedies for revision of the criminal procedure is very narrow, and it is usually an extraordinary legal remedy.

With the transcendence of the "innocence" revolution in the U.S. in Europe, past judicial decisions and legislation were reviewed aimed at overturning wrongful convictions. The results uncovered those judicial errors existed in Europe as well. European judges were obliged to face what Luparia and Pitturi call a long-standing *taboo* that European judges do make mistakes and yes, there are wrongfully convicted persons in Europe as well [5]. Unlike in the U.S., in Europe, there is no single style of criminal procedure. Some European countries switched from an inquisitorial to an adversarial style of criminal procedure, some retained the inquisitorial style, and others made a mixed style of procedure. According to Kilias [6] several prominent causes for wrongful convictions were identified through cross-national studies in Europe: simplified and accelerated procedures with negotiated outcomes in the form of plea bargains and mostly penal orders. Gilleron [7] explains that these are the major factors for wrongful convictions because facts are assessed summarily and beyond the controls of the courts. Other sources for wrongful convictions are the unreliability of witnesses and incompetent or corrupt forensic reports [8]. However, both authors agree that the predominant problem for wrongful convictions in Europe is preconceived police and prosecutorial investigations. By law, they should investigate exculpatory evidence as well. Judges are obligated to critically assess what the parties present in court. However, this works in theory only, as certain researches from Luparia and Geert indicate that confirmation bias is very present in European court practice. Confirmation bias pertains to the tendency to uncritically confirm what the law enforcement authorities have found in the investigatory procedure or in the first instance procedure (should an appeal is lodged against a judgment) and to eliminate any other alternative hypotheses. As Geert puts it, such biases occur particularly under systems and in countries with a strong preference for consensual thinking [9].

The system of extraordinary legal remedies in Europe was mostly left untouched by the reform process. For overturning wrongful convictions and ascertaining judicial errors, only the "Revision of the criminal procedure" remedy can be considered as a main tool. Revisions are tools that benefit convicted persons, as it is the only way to ascertain judicial error and reverse the final decision. It allows the overturning of the final judgment due to the existence of new cognitive elements that reveal the court's faulty evaluation of the factual state. However, there is a mutual dependency between revision and judicial error. Luparia calls this a 'system security mechanism' where the error is a prerequisite for the request of revision, while on the other side, the judicial error gains legal significance after its assessment through the revision judgment [10]. This makes the system more efficient in guaranteeing the individual's personal freedom. Revision is perceived as a remedy operating only in favor of the convicted person. The most common type is a revision to the advantage of the accused who is convicted. All jurisdictions offer this remedy. Another type of revision is the *ad malam partem* revision or to the detriment of the convicted person. This type of revision is found in some jurisdictions in Europe, Croatia included.

The revision is often guided by the principle of the *novum* criterion. This criterion helps to ensure that any revision to the criminal procedure is not arbitrary but is based on solid reasons and evidence. Furthermore, this ensures that the revision is guided by objective criteria and promotes the goal of justice and fairness in the criminal justice process. Revision can be requested for all final judgments and decisions made by the court, only for factual issues *error facti*. Revision is allowed to be proposed at any time by the convicted person or his or her next of kin or person's guardian; if the convicted person is deceased, by his heir or a next of kin. However, revision is also permissible to be lodged by the public prosecutor or the procurator general. All judgments can be subject to revision. The only precondition is the finality of the judgment. Revision must not be understood as a fourth degree of judgment. Only the error that emerges from new facts can justify the overcoming of a final judgment.

The *novum* criterion or the new evidence criterion plays an important part in the revision hypothesis. The new evidence in the classical legal theory is divided into *noviter repertae, noviter productae, and noviter cognitae* evidence. The *repertae* evidence pertains to newly discovered evidence and refers to evidence that was not available at the time of the trial but has been discovered after the finality of the judgment. This type of evidence can include physical evidence, witness testimony, or other forms of evidence that could change the outcome of the trial if it had been presented during the original trial. The *productae* evidence refers to evidence that was not available at the time of the trial because it was not in existence. An example of this type of evidence could be a new scientific method that is used to re-test DNA evidence, which was not available at the time of the original trial. The *cognitae* evidence refers to evidence that was known to exist at the time of the trial but was not presented in the original trial. This type of evidence can include, for example, evidence that was withheld by the prosecution or defense, or evidence that was not considered relevant at the time but is now considered relevant considering new information.

However, there is a lack of consensus regarding the *novum* criterion in judicial practice. In Croatian jurisprudence, the applicability of the *novum* differentiates in theory and in practice. In theory, the court should be obliged to take into consideration all three types of *novum*. However, the inspection of several cases by the Innocence Project in Croatia, identified that the application of the *novum* by the courts is restricted mostly to the *noviter productae and repertae* evidence, and not so much to the *cognitae*.

3. *Novum* in the revision proceedings in Europe: Practices and experiences

Here we will identify several legislative examples from Italy, Germany, and the Netherlands, because of their diverse and special laws for lowering the threshold of establishing a *novum* in the revision of the procedure. The interpretation and application of the *novum* ground vary between jurisdictions. The question of whether a different expert opinion or a change of law can be considered a *novum* is still a topic of debate among legal scholars. The criteria for what is considered new enough and how the new evidence is evaluated also differ between countries. Some countries require new evidence to prove the person's innocence, while others only require substantial doubt on the person's culpability. The standard for what is considered enough for revision is still under development. In European jurisdictions, there are two types of revision. The first type is the revision to the advantage of the convicted person, and the second type is a revision to the detriment of the convicted person, even though the proceedings resulted in his acquittal. The second type of revision exists only in some jurisdictions and is considered problematic regarding the *non bis in idem principle*. The jurisdictions of France, Belgium, and Spain do not accept revision *ad malam partem*. In France, there was a proposal to add this option in 2014 but it was ultimately rejected due to conflict with the Constitutional provisions of *non bis in idem* [11]. Meanwhile, Germany, Croatia, the Netherlands, Poland, Sweden, and England allow for revision to the detriment of the accused under specific circumstances. The *novum* being the most common ground for granting revisions, its interpretation depends on judicial determination in each country specifically. For instance, in Germany, facts can still be considered new even if they were discussed in the main proceedings, as long as the court did not take them into account deliberately. Furthermore, a change of law can also be a cause for revision in some jurisdictions but not in others. England and Croatia, for instance, allow for new arguments of law to be raised in the revision procedure, while Germany and the Netherlands reject a change of law as a ground for revision. The aim here is to detect the diverse practices and experiences these countries have and how can they be transferred into the Croatian criminal procedural legislation.

3.1 Italy

The Italian legal system, after the 1988 reform can be considered a hybrid system with both inquisitorial and adversarial traits. The Italian experiences of the revision proceedings and the establishment of *novum* are quite interesting and very close to the Croatian examples. The cases for renewal are stipulated in the Italian Code of Criminal Procedure [12], under which a revision can occur if: (a) the facts in the judgment or criminal decree of conviction are incompatible with those established in another final criminal judgment; (b) the decision was based on a judgment that was later revoked if new evidence that proves the accused person's acquittal is found, or (c) the judgment of conviction was delivered on the basis of false documents or statements. However, the new evidence must be exculpatory and prove the accused person's innocence. Another basis for revision of the procedure, allowed by the Constitutional Court of Italy, and not envisaged in the law is the revision based on compliance with an ECtHR judgment. To some extent, this is not seen as a direct remedy for judicial errors, and it is considered as an indirect remedy because it does not produce any new evidence [13].

Luparia and Pittiruti [5] explain the legal treatment of the revision proceedings stemming from the 1988 Code of Criminal Procedure where the assessment of admissibility and the revision trial are handled by the Court of Appeal. According to Article 634, paragraph. 2 of the 1988 CCP the Court of Appeal must preliminarily assess the admissibility of the request and exclude groundlessness while being careful not to evaluate the merit of the request. If the request is deemed inadmissible, the applicant can appeal to the Court of Cassation. If the request is deemed admissible, the revision trial can take place and the enforcement of the sentence can be suspended by the Court of Appeal. If the request is accepted, the judgment of conviction will be revoked and the acquitted will be ordered. If the request is rejected, the applicant can appeal to the Court of Cassation or file another application based on different elements. Furthermore, the judgment of the Court of Appeal can also be appealed to the Court of Cassation for errors in *procedendo*, *iudicando*, or *motivation*.

Concerning the clarity of the revision provisions in the law, Luparia notes that revision in article 630, paragraph 1, letter c of the Code of Criminal Procedure has been the subject of numerous legal interpretations, due to the lack of clarity in the law regarding the definition of “new evidence” pertaining to the *noviter cognitae* type of evidence [2]. Initially, he argues that the judicial praxis’s interpretation was extensive and encompassed all three types of new evidence. Recently, this position was reversed to allow for admission in the revision of any evidence that was not considered by the court. Furthermore, Gialuz [14] identifies the challenge of balancing the limitations of a criminal trial with the continuous advancements in science and technology. Italian case law generally allows revision requests based on new scientific evidence, but there are difficulties in regard to reassessments of previously acquired evidence. However, with the inclusion of new evidence in the legal definition, the Court of Cassation reversed its stance and has started to allow revisions based on new scientific methods applied to previous evidence. The principle of *favor innocentiae* supports this adaptation of the trial to the advancements in science. Another extraordinary legal remedy in the Italian procedural system is the Rescission of the final judgment stipulated in art. 629-bis CCP [12]. This remedy allows a convicted person who was absent during the entire proceedings to obtain a revocation of the final judgment if they can prove that their absence was due to an inculpable unawareness of the proceedings. However, the requirements for this remedy, according to the practice of the Court of Cassation are very strict. Such example the absence must be ruled out if the accused had stated an address for service during the investigation phase. The request must be submitted within thirty days to the Court of Appeal in whose district the decision was taken and if accepted, the judgment will be rescinded and the case file forwarded to the first instance court. This remedy is a restorative *post iudicatum* remedy and is meant to protect the convicted if it is proven that the presumed knowledge of the trial was not accurate. The rescission of final judgment does not result in acquittal but rather a new trial where the accused can fully exercise their right of defense. The new judgment might end with the acquittal of the accused, making the rescission of final judgment a “mediated” remedy for miscarriages of justice.

Summarizing the Italian experiences, it is obvious that the extensive judicial policy of the Court of Cassation is crucial in the admissibility of new scientific evidence. It is important in jurisprudence not to limit the *novum* criteria to only evidence which were not known previously to the court—*the productae.* It is imperative to include scientific evidence from supplementary expertise (such as in DNA cases) as a point to establish a *novum*. Furthermore, as argued by Luparia and other Italian eminent experts, the accessibility to data is of crucial importance. In this perspective along the lines of the American experience, it would be advisable to create an Italian equivalent of the U.S. National Registry of Exonerations, providing detailed information on all the cases where final convictions were reversed in a revision trial. This tool would be extremely helpful for scholars to easily obtain the information and data they need to build their own theory on the causes of wrongful convictions, advance reform proposals, and share awareness.

3.2 Germany

The German style of criminal procedure is a classic inquisitorial type of procedure. The German CCP stipulates the grounds for retrying a case in sections 359 and 362 and there are two types of retrial: (a) in favor of the convicted and (b) in disadvantage of the convicted [15]. The grounds for retrial in favor of the convicted are: (a) if separate final verdicts have been reached which are in difference with each other; (b) If a procedural violation has been established by the European Court of Human Rights that has led to a conviction or a conviction of the same act, and a retrial is necessary in line with the principle of redress enshrined in article 41 of the ECHR; (c) If there is a new finding which was not known to the trial judge and, such if the judge would have been aware thereof, it must have most likely resulted in a different verdict. Concerning the applicability of the novum, retrial is possible should new facts or evidence is discovered, or falsified documents have emerged [16]. Furthermore, the law takes into perspective any false confessions from witnesses or experts given under oath or a judge or juror involved in the ruling being guilty of a criminal violation of their public duties. Concerning the praxis of allowing a retrial, they argue that the conditions for reaching a novum are stringent and have been criticized by experts for several reasons. One of the main criticisms is the high threshold of the requirement of proof, and the other is the possible conflict with the constitutional principle of non bis in idem. The provisions for a retrial to the disadvantage of the defendant under Section 362 nos. 1 to 3 of the Code of Criminal Procedure are largely similar to the provisions for a retrial in favor of the convicted persons in Italy. However, there are some differences between the two provisions that are worth noting. Section 362 no. 3 of the CCP, does not envisage the fact that the defendant caused a criminal violation of public duty, unlike in Section 359 no. 3 of the CCP. Furthermore, Section 362 does not contain any grounds for a retrial that correspond to those contained in Section 359 no. 4, which concerns the annulment of a civil court decision. On the other hand, Section 362 no. 4 includes grounds for a retrial that are not found in Section 359 such as the giving of a credible confession by the acquitted party to the crime in question. As this is a new ground that is not found in the Italian, Dutch, or Croatian legislation, A. Engländer and T. Zimmermann point out that this pertains to convicts who are boasting about the crime without punishment. They put this into perspective, as the convicts are factually guilty, but were exonerated on procedural grounds, or lack of evidence [17]. Furthermore, grounds for credible confession can be established when the confession comes directly from the acquitted person, meaning that the facts admitted must be logically possible and in line with reality. Furthermore, the confession must be given personally, and testimonial confessions from alleged accomplices are not sufficient. Permissibility and merit of the petition for retrial are reviewed using the addition method or Additionsverfahren envisaged in Section 366 et seq. The petition must specify the statutory ground for reopening proceedings and the evidence [16]. Furthermore, the petition must be signed by the defense counsel or other legal representative. If the defendant or a close family member wishes to seek a retrial, they may do so in writing or orally, recorded by the court registry. The petition for retrial is decided by another court with the same jurisdiction to avoid unconscious bias or conflict of interests. The court reviews the formal requirements and evidence indicated in the petition.

Concluding the German experiences there is a need for up-to-date empirical knowledge and potentially establishing a national registry for exonerations to aid research. The lack of retrial statistics is also a problem. in Germany no official statistics are kept for successful retrial processes, making it difficult to determine the actual number of judicial errors. However, in Germany, certain Innocence Projects and academic studies are analyzing successful retrial processes and are publishing the results which would further aid the promulgation of updated legal solutions. Alongside the German Innocence Project which is monitoring the field situation, Lindemann and Lineau refer to the study by the Kriminologische Zentralstelle in Wiesbaden [18]. The preliminary results of these studies have shown that the majority of the wrongfully convicted persons had been convicted of sexual or violent offenses and the reasons for the errors were mainly false accusations and incorrect evidence from expert witnesses. Regional differences in handling retrial processes and the threshold for novum criteria were also noted. Also, several political initiatives in Germany campaigned to allow for the retrial of a defendant in criminal cases if new facts or evidence come to light. The idea was primarily driven by advancements in DNA analysis but was limited to murder and other crimes potentially subject to life imprisonment. However, these initiatives faced constitutional objections and the most recent proposal faced significant opposition in Parliament. Some of the concerns were that losing the current restriction on presenting new evidence would potentially undermine the principle of non bis in idem.

3.3 The Netherlands

The Dutch criminal justice system is inquisitorially based. What makes this system unique is the promulgation of the new law on lowering the threshold for establishing a *novum* in the retrial procedure. Before the promulgation of this law, wrongful convictions were perceived to be a problem that occurred abroad, and not in the Netherlands. The law was a product of the work of the Netherlands' Innocence Project and the several major cases that were revised based on the wrongful determination of the facts. As in Germany, the judge and the public prosecutor are expected to establish the truth. Knoops and Bell [19] argue that this system in the Netherlands will be successful only when the investigation is truly objective and when incriminatory and exculpatory evidence is fully disclosed to the defense. Concerning the retrial procedure, in the Netherlands, the Supreme Court determines whether or not a retrial should be granted. If it is granted, the case is referred to the Court of Appeals to conduct a new trial. The major case which has contributed to the promulgation of the Law on Redressing Miscarriages of Justice was the *Schiedammer Park Murder* case where a wrongful conviction was established. That case illustrated that the threshold for revision of the criminal procedure, was very narrow, and thus, a new Law was promulgated. The law on redressing the miscarriages of justice further expanded the review system of criminal cases to the advantage of the accused and lowered the threshold for establishing a *novum*. The promulgation of this law was not *pro forma*. The first new aspect of this law puts the focus on expert scientific findings to be subsumed under the *novum* criterion. Furthermore, this new law established the ACAS Commission for finding new facts and aiding convicted persons in identifying the *novum*. The Dutch legislator followed partially the German criminal justice system with respect to new expert evidence. However, there were never any issues in the Netherlands with the principle of *non bis in idem* as was the case with the German legal proposals. Under the legal provisions, expert evidence can be deemed admissible when (a) particular issues have not yet been examined; (b) after the expert research has been conducted, there is a new expert with new conclusions derived from using different research methods, or it is from a different profession, and (c) a new expert reaches different conclusions on the basis of the same facts of the case because the previous research was either based on incomplete or incorrect factual assumptions or as a result of new scientific development. Knoops and Bell argue that not every fact or finding will be sufficient to *novum* threshold and provide an example of a verdict of the Supreme Court of the Netherlands rejecting a new witness statement for establishing a *novum* for a retrial, in which the witness recants a previously incriminating statement [19]. The second aspect of this law is the establishment of the ACAS system. The new law recognized that establishing a *novum* is very time-consuming and costly effort and therefore made it possible to request the attorney general of the Supreme Court to conduct a pre-investigation [20]. This means that forensic investigations, should they be granted, could be conducted and paid for through this legal avenue. The ACAS system facilitates a defendant who claims that a *novum* exists, without having full proof of it. Summarizing the Dutch experiences there are major novelties worth considering. The establishment of a special Exoneration Register has been pointed out by Knoops and Bell as a main obstacle to conducting further research. However, the acknowledgment of the problems of wrongful convictions by society and the promulgation of the new laws for lowering the threshold of establishing a *novum* and having that indication to be researched by the state is a major breakthrough.

4. Jurisprudence of the European court of human rights and the court of justice of the European Union on the revision of criminal proceedings

Concerning the issue of new evidence and revision of the criminal proceedings, the ECtHR and the ECJ, although have different mandates, have some similarities and differences. In cases involving new evidence and reopening of criminal proceedings, the ECtHR assesses whether the state has respected the right to a fair trial and other related rights, such as the prohibition of torture and inhuman or degrading treatment. On the other hand, the ECJ in cases involving new evidence and reopening of criminal proceedings focuses on the interpretation of EU law in relation to the rights of individuals in criminal proceedings, such as the principle of the sound administration of justice and the principle of the protection of the rights of the defense.

4.1 ECtHR jurisprudence

From the cases elaborated in this chapter, it is evident that when it comes to new evidence in terms of *novum* criterion, the ECtHR applies a three-part test when assessing the reopening of criminal proceedings in light of new evidence: (1) the nature and reliability of the evidence, (2) the nature and extent of the proceedings, and (3) the interests of justice. Should the new evidence raise serious were not evaluated by a court, or a retrial was not allowed, the Court will generally find a violation of the right to a fair trial. As seen through the comparative overview of the other jurisdictions, the ECtHR judgments are considered a tool for allowing a revision in national jurisdictions. The ECtHR (ECtHR) has applied the *noviter repertae, productae, and cognitae* evidence principle in various cases to determine if a violation of the ECHR in terms of revision of the criminal proceedings has occurred. In the case of Kostovski v. the Netherlands the applicant claimed that his right to a fair trial had been violated because the prosecution had withheld evidence that was favorable to the defense and could potentially lead to his exoneration. The prosecution's failure to disclose the evidence had seriously undermined the fairness of the trial [21]. As argued above, how in some jurisdictions there is a problem with presenting new scientific evidence, especially DNA evidence and supplementary testing, the case of Ocalan v. Turkey, demonstrates why lowering the threshold for admissibility of such evidence is crucial. The applicant claimed that his right to a fair trial had been violated because new scientific methods that were not available at the time of the trial had been used to re-test DNA evidence that was crucial to the prosecution's case. The Court has determined that the applicant's right to a fair trial had been violated. Evident from these cases is the position of the ECtHR in recognition of the revision of the procedure based on any type of new evidence in determining whether the right to a fair trial had been violated [22]. Furthermore, by applying the margin of appreciation in each case, the Court had demonstrated that not considering new evidence may infringe on the right to a fair trial. From the practice of the Court, it is evident that national jurisdictions should lower the threshold of presenting a *novum* for the revision of criminal proceedings.

4.2 CJEU jurisprudence

The jurisprudence of the CJEU in cases involving new evidence and reopening of criminal proceedings focuses on the interpretation of EU law in relation to the rights of individuals in criminal proceedings. Regarding the revision of criminal proceedings and presentation of new evidence, the CJEU applies the principle of the sound administration of justice and the principle of the protection of the rights of the defense. This is demonstrated through the case of the Q.M. v. Minister for Justice and Equality from Ireland and Aranyosi and Caldararu [23] where the applicant was convicted of a criminal offense. After the original trial, new evidence came to light that called into question the reliability of the evidence used previously. The applicant sought to have their conviction reviewed in light of this new evidence but was unable to do so because there was no provision in Irish law allowing for a review of a final conviction in such circumstances. He argued that the EU law, specifically the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union, required national courts to have the power to review convictions in the light of new evidence. The CJEU was asked to determine whether the EU law required national courts to have the power to review convictions in such circumstances. In the judgment, the CJEU held under the EU law national courts must allow the possibility to review convictions in the light of new evidence, even where there was no provision in national law allowing for such a review. The ECJ concluded that the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union required national courts to have the power to review convictions in the light of new evidence and that this right must be granted to all individuals, regardless of the type of proceedings they are involved in. Another interesting case of the CJEU where the conditions under which a revision of the criminal procedure based on new evidence are presented, is the case of X and Others v. Public Prosecutor's Office [24]. The applicants of this case were previously acquitted in a criminal trial but the procedure was reopened to their detriment due to the emergence of new evidence. The CJEU upheld that EU law mandates national courts to consider all relevant and admissible evidence in the decision-making process of a retrial in a criminal procedure, including evidence that was previously unavailable or unknown to the parties involved. The court emphasized that a retrial must be granted in all relevant and admissible evidence, and the accused must be granted the opportunity to contest and present evidence in defense, in accordance with the principles of a fair trial and the right to an effective remedy. Although there are no direct cases against Croatia, a lesson should be learned about expanding the grounds for evaluating a *novum,* and lowering the threshold.

5. Revision of the criminal procedure in Croatia

Jurisdictions in South-Eastern Europe have undergone criminal justice system reforms over the past two decades with the aim of moving away from the legal systems established during the Socialist Federal Republic of Yugoslavia and creating new systems reflective of the post-conflict political and societal reality. These jurisdictions have moved away from traditional continental/inquisitorial criminal justice systems and have introduced elements of Anglo-Saxon/adversarial criminal justice models in an effort to increase the efficiency of their criminal justice systems. These new criminal procedure codes were adopted with the goal of modernizing the system but have also raised concerns about the wrongful conviction for the convictions efficiency of the procedure. The interest in Innocence Projects started in Croatia in 2015, mainly as a result of academic discussions and conferences about the fate of wrongfully convicted people and the possibilities of post-conviction DNA examination. It culminated in 2020 when for the first time the experimental Innocnce Project was established, implemented by the Faculty of Law in Zagreb, and financed by the Croatian Science Foundation. The main purpose of the Croatian Innocence Project is to raise public awareness of miscarriages of justice, campaign for legal changes which ought to lower the threshold for defendants to have their cases re-opened, and to provide legal representation for those who are believed to have been wrongfully convicted [25]. The Institute for revision of the criminal procedure envisaged in the Croatian Code of Criminal Procedure has been subjected to the overall reform of the Code of Criminal Procedure. The revision of the criminal procedure institute is related to the *non bis in idem* institute, stipulated in Article 31, paragraphs 2 and 3 of the Croatian Constitution, which provides that a revision of the criminal case can be permitted only if it is in line with the law and the Constitution [26]. There are discrepancies on this issue between the CCP and the Constitution, where the Code in article 12 paragraph 2 strictly prohibits revision of the criminal procedure for an exonerated person, whereas there is no such absolute prohibition in the Constitution. The revision of the criminal procedure is regulated in 12 articles from the CCP, where seven of them were subjected to an additional reform because of the Croatia EU accession process, and the influence of the jurisprudence of the European Court of Human Rights. The revision is done by the higher court and the Supreme Court of Croatia. Furthermore, according to Tomicic [27], although several reforms were made to the revision of the criminal procedure, the legislators failed to address the issue of which of the judicial decisions in this process are subject of substantive validity of the judgment. This means that the CCP recognizes all three types of judgments (convicting, acquiting, and rejecting judgments) as a subject for revision, and the Constitution recognizes only convicting and acquiting judgments. The CCP envisages seven types of revision: (a) improper revision—where only the sanction is evaluated; (b) Revision in cases where the indictment is rejected; (c) revision of the completed criminal procedure before the indictment; (d) Proper revision of the criminal procedure after the valid judgment; (e) Revision in *malam partem* on the detriment of the accused after acquittal; (f) Revision after the trial in absentia, and (g) Revision on the grounds of decisions of the Constitutional Court of Croatia and the European Court of Human Rights [28]. Concerning the proper revision of the criminal procedure the CCP allows the procedure to be revised if it is proven that the judgment is based on a false document, recording, or false testimony of a witness, expert, or interpreter. Also, if it is proven that the judgment was due to a criminal offense committed by a state attorney, judge, jury judge, investigator, or another person who performed evidentiary actions. Concerning the *novum*, the practice done within the Innocence Project Croatia indicates that the threshold is very high, and it is almost impossible to reach. In a specific case, the County Court of Rijeka rejected the request of the convicted person for revision of the criminal procedure even though new evidence was presented that one of the witnesses made a false statement in court. The faulty witness made a new notary confirmed statement, recanting his previous statement given in the trial, the County Court evaluated that this was not sufficient to fulfill the *novum* threshold. The Court argued that repetition would be allowed only when the witness has been formally convicted for obstruction of justice, and only then the new judgment would be considered a credible criterion for revision. No doubt that such an allegation warrants further investigation in the case, however, if any alleged fact was already known to the trial and appeal judges would not result in a *novum* [27]. Another case demonstrates how high the reaching the *novum* threshold where DNA expertise was conducted. Faulty DNA expertise is a valid ground for proper repetition of the criminal procedure [29]. In this case, the convicted was sentenced to 29 years in prison for aggravated murder and rape based on witness testimonies and DNA expertise. The defendant's appeal to the Supreme Court stated wrongfully determined factual state and wrongfully evaluated DNA expertise by the court, stating that the test results of his trousers showed DNA material belonging to a third party, and that was clearly stipulated in the laboratory report. The additional findings and expert opinions cited in the judgments stated that apart from the DNA profiles of the victim and the perpetrator, there was an epithelium of a third person on his trousers that was impossible to isolate and determine the identity of the person due to insufficiency of the material. The Supreme Court argued that although there is another epithelium that belongs neither to the victim nor the defendant, that does not exclude the culpability of the defendant, since those trousers include his and the victim's blood as well. This case demonstrates why supplementary DNA expertise is necessary, and why some form of mechanism must be established for lowering the *novum* [30].

The perception of legal practitioners is that the criterion is set very high, and further legal reform is needed, to lower the threshold for a *novum.* Furthermore, it is a positive novelty that the law does not stipulate any limitation on how many time a request can be made, regardless of whether there is an amnesty, pardon, or limitations of the crimes.

6. Conclusion

In contrast with other European countries, overturning wrongful convictions based on a revision of the procedure and proving the *novum* is still an under-researched topic in Croatia. The initially reviewed cases of the Innocence Project of Croatia have so far demonstrated that false confessions and improper forensic expertise are major contributing factors that need to be the further subject of discussion and potential reform [31]. The introduction of the Croatian Innocence Project has raised awareness of potential miscarriages of justice and has led to calls for legal changes. The revision of the criminal procedure institute has undergone reforms, but there are still discrepancies between the Code of Criminal Procedure and the Constitution on the issue of revision. The threshold for revision of a criminal procedure is considered very high, and there have been instances where new evidence was not enough to reach the threshold. The lack of research and a centralized database is not a problem only for Croatia, but for other European countries as well, as seen in this analysis. As seen from the German example, the possible conflict with the *non bis in idem* principle is not a problem at all when it comes to revision cases and establishing a *novum*. Establishing a National Exoneration Register alongside the U.S. model is highly advisable for the promulgation of future informed policy decisions. Furthermore, substantive legislation changes are needed in Croatia in terms of acknowledgment of the problem of proving a *novum*. It is a costly and time-consumed experience, as well as the convicted person, does not enjoy the liberty to collect the new evidence, as he is deprived of liberty. Therefore, The Dutch experiences should serve as an indicator, and establishing a similar body alongside the model of ACAS, where the notion of *novum* is investigated, as in the Netherlands is highly advisable.

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Conflict of interest

The author declares no conflict of interest.

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We are often confronted with unknown events that plunge us into ignorance, unpredictability, and various hardships. In such situations, it is essential how fundamental human values and rights such as dignity, freedom, equality, and solidarity are protected. Ensuring human rights in contemporary society is a complex area described in this book from the perspective of conceptualising and defining human rights, institutional responses, and practices to protect human rights, ensuring social justice and equality in contemporary society. The book is a compilation of interdisciplinary and international experiences in researching human rights, responding to human rights violations, and ensuring the enforcement of rights at the level of the daily lives of individuals, communities, and society as a whole.

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