

## CONTEMPORARY ISSUES IN HUMAN RIGHTS

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### I. THE PARAMETER OF THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The end of the Cold War and collapse of the Soviet Union have brought fundamental changes to the international system. The post-Cold War system is no longer based on a balance of terror and nuclear deterrence between the two blocs, but on moral values like democracy, human rights and rule of law, shared by all countries.

This change has led states to give prominence to human rights in their foreign policies. Human rights questions moved to the forefront of the international agenda. However, it has also created tension between the human rights defenders and governments. For some activist groups, human rights have turned into a new cult, ignoring the existing parameters of the international system in which human rights are practised.

What is this parameter? First of all, the main actors in the international system are still sovereign states which are all equal. Secondly, human rights basically involves relations within a state, between the state and individuals or between individuals or private groups living in the territory of a state. What we are trying to achieve at the international level is to internationalise an issue which is basically a domestic one. We use certain tools to this end. We have created a network of norms and standards, and mechanisms of supervision. The only way to ensure that such norms and standards are implemented is to convince states to become parties to conventions and to implement their commitments. In this respect, to cut economic relations or to apply sanctions usually produces counterproductive results. We need to establish a constructive dialogue to convince states and enhance the cause of human rights.

### II. THE INTERNATIONAL SYSTEM OF HUMAN RIGHTS

The conclusion of World War II marked a turning point in the development of international human rights law. The conduct of Nazi Germany and administrations in other countries collaborating with the German war effort regarding their Jewish nationals as well as Gypsies and homosexuals, culminating in policies of extermination, was considered a violation of any power that could be legitimately claimed by a sovereign authority. Such acts constituted punishable crimes against humanity. The Nuremberg Trials therefore marked a significant departure from the theory that states have absolute severing authority over their own nationals.

The experience of World War II was the determining factor in the evolution of human rights law in the post war era. The UN adopted the Universal Declaration of Human Rights in 1947. The document was entitled a 'Declaration' to confirm that it is not attempting to create a new law, but to declare the international law on human rights that existed before and that had been violated during World War II. Being a declaration, it was not legally binding. Therefore, to give legal force to the Declaration a series of international conventions were adopted that has formed the modern international basis of human rights law. These legal instruments have provided a set of human rights principles. Many such principles have acquired the character of *ius cogens*, which according to the definition of article 54 of the Vienna Convention on the Law of Treaties is "a norm accepted and recognised by the international community of states as a whole, as a norm from which no derogation is permitted."

Human rights law in the post war era developed at international level within the ambit of the UN and at regional level within the ambit of regional organisations.

The basic general conventions are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The leading specialised conventions are, inter alia, the International Convention on the Elimination of All Forms of Racial Discrimination,

the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child.

At the regional level, the European Convention of Human Rights, the American Convention of Human Rights and the African Charter on Human and Peoples' Rights. Within the framework of OSCE (CSCE) the Helsinki Declaration of 1975 and the Paris Charter of 1990 should also be mentioned.

These conventions have all established committees to monitor state compliance with their provisions through mandatory, periodic state reports and some committees receive complaints of violations that individuals make against states. Some committees conduct investigations by periodic visits to the member states.

These committees do not have enforcement powers. The only exceptions are the European Commission of Human Rights and the European Court of Human Rights of the Council of Europe and similar organs of the Organisation of American States.

### III. CURRENT ISSUES

#### A. UNIVERSALITY OF HUMAN RIGHTS

A major conflict on human rights is between the universalists (mainly Western powers) and cultural relativists (mainly Asian powers). The debate between the two points of view was best evidenced at the World Conference on Human Rights held in Vienna in June 1993 and at the preceding preparatory meetings.

The following statement made at the Conference by the Chinese Delegation is illustrative of the relativist view:

“The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical stages have different human rights requirements. Countries at different development stages or with different historical traditions and cultural backgrounds also have different understanding and practice of human rights. Thus, one should not and cannot think (of) the human rights standard and model of certain countries as the only proper ones and demand all other countries to comply with them. It is neither realistic nor workable to make international economic assistance or even international economic co-operation condition on them.”

The Indonesian Minister of Foreign Affairs made the following observation in his statement at the conference:

“Human rights are vital and important by and for themselves. So are efforts at accelerated national development, especially of the developing countries. Both should be vigorously pursued and promoted. Indonesia, therefore, cannot accept linking questions of human rights to economic and development co-operation, by attaching human rights implementation as political conditionalities to such co-operation. Such a linkage will only detract from the value of both.”

I think the basis for universality of human rights is both normative and moral. First of all, the basis of universality is to be found within the framework of natural law. By virtue of natural law, every individual possesses certain fundamental rights and freedoms by birth. He or she is the subject of rights. He or she is not merely a means to an end, but an end in his or herself and must be treated as such.

The normative foundation of universality stems from the universal acceptance of the human rights laid down in the Universal Declaration of Human Rights by the members of the community of states and the reaffirmation of this acceptance in various international instruments and UN resolutions.

The debate at the World Conference on Human rights of 1993 resulted in the adoption of the following paragraphs:

“The universal nature of these rights and freedoms is beyond question.”

“Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Government.”

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

The last paragraph reflects the compromise struck between the universalists and relativists. Accordingly, while universality is the rule, national and regional characteristics and historical, cultural, religious differences are not totally neglected.

We can draw the following conclusions from this:

a) As far as a norm has received international recognition, variations must not affect the essence of that norm: universal validity of human rights norms under the current state of international law, does not permit a denial of the universal character of the human rights laws.

b) When implementing human rights, within the context of the principle of universality, there is room for interpretation. The international community should define the scope or variations. This scope should be narrower as far as what we may call core rights (such as right to life, non-discrimination, prohibition of torture or mistreatment, prohibition of arbitrary detention, prohibition of slavery) are concerned. On the other hand, in case of derivative rights (such as freedom of religion or conscience, freedom of assembly, the right to education) states can have more room to interpret or, under certain circumstances, to derogate.

c) Supervision of the implementation of human rights should be conducted by impartial, independent international bodies and not by individual states, as each state has its own particular views on fundamental rights and freedoms which are shaped by different historical developments. A good example is different perceptions of freedom of expression in the USA and in Europe.

Another major development in the field of human rights is the general acceptance of the principle that human rights is no longer an exclusive domestic affair of states but a legitimate concern of the international community. This principle also reinforces the principle of universality. It is incorporated in the Declaration of the Vienna Conference which was adopted by consensus.

“The promotion and protection of all human rights is a legitimate concern of the international community.”

This provision legitimises the states' or international organisations' criticisms of human rights violations in other states. It deprives states of the defence of domestic affairs and encourages them to comply with international norms and standards. Nevertheless, it does not alter the basic fact that the relations between the states and its citizens are governed by the domestic laws of the country.

## B. SCOPE OF HUMAN RIGHTS

Traditional liberal thinking on human rights can be traced back to the 1789 Universal Declaration of Human and Citizen's Rights. The Virginia Declaration of Rights of 1776 also reflects the same liberal thinking on human rights. The 1789 Declaration envisages human rights on an individual basis. Every individual possesses rights and freedoms which are opposable against the state. One of the main

differences between the French and American systems of human rights is that the rights and freedoms are incorporated in the US constitution whereas in France they are protected by parliamentary action but not by the French constitution.

Traditional human rights are also reflected in the Universal Declaration of Human Rights of 1948 as well as in the European Convention of Human Rights of 1953.

Liberal human rights thinking was subject to criticism after the industrial revolution on the grounds that it did not cover economic rights. In response to such criticisms, the UN Convention of the International Covenant on Economic, Social and Cultural Rights came into force in 1966.

In the post-Cold War era, not only has the importance of human rights increased, but also its scope has been broadened. Human rights are no longer rights of the individual that are opposable only against the state, but they encompass rights which are opposable by the weak against the strong. Thus, women's rights, children's rights and rights of the disabled are firmly entrenched in the human rights system.

The Declaration adopted by the Vienna Conference on Human Rights contains extensive passages entitled Human Rights of Women and the Rights of the Disabled Person. There is a UN Convention on the Elimination of All Forms of Discrimination Against Women and another Convention on the Rights of the Child. These issues are systematically addressed by UN bodies and mechanism, such as the Commission on the Status of Women the Committee for the Elimination of Discrimination against Women and the UN Development Fund for Women. A special rapporteur has been appointed on violence against women. The sub-commission of the Commission on Human Rights has created another special rapporteur on Traditional Practices Affecting the Health of Women and Children.

Let us have a closer look at women's rights. There are three main questions regarding women's rights.

1. To eliminate violations of women's human rights. Such violations occur in the public and private sphere because the victim is a woman. The question involved here is how to combat and respond internationally to such violations.
2. To apply all human rights taking into account the particular needs of women. In other words, to broaden the scope of existing human rights so as to encompass women's rights. The first and foremost being the right of non-discrimination.
3. To create new rights for women. An example of such rights is the woman's right to health. The obligation of states in terms of human rights is not only to respect individual freedom and rights but also ensure access to rights. States are expected, therefore, to take necessary steps to reduce the main preventable causes of women's mortality and morbidity. It is reported, for example, that every year some 500,000 women die from easily preventable causes related to uncontrolled fertility, complications of pregnancy and child birth. The World Health Organisation is carrying out intensive work in assisting states to take action to reduce risk factors regarding women's health.

Another aspect of the woman's right to health is HIV infection. It is a fact that in many societies today, the population among which infection and AIDS are rising most rapidly is that of women of reproductive age.

The Fourth World Conference on Women in Beijing in 1995 explained that:

“HIV/AIDS and other sexually transmitted diseases, the transmission of which is sometimes a consequence of sexual violence, are having a devastating effect on women's health, particularly the health of adolescent girls and young women. They often do not have the power to insist on safe and responsible sex practices and have little access to information and services for prevention and treatment. Women, who represent half of all adults newly infected with HIV/AIDS and other sexually transmitted diseases, have emphasised that social vulnerability and the unequal power relationship between women and men are obstacles to safe sex, in their efforts to control the

spread of sexually transmitted diseases. The consequences of HIV/AIDS reach beyond women's health to their role as mothers and care-givers and their contribution to the economic support of their families. The social, developmental and health consequences of HIV/AIDS and other sexually transmitted diseases need to be seen from a gender perspective”.

### C. MINORITY RIGHTS

After the First World War, the rights of minorities were dealt with in bilateral agreements. Ethnic hostilities which emerged in the post-Cold War era, have attributed a new importance to the question of minority rights. However, this time minority rights were placed within the context of human rights.

In every human rights document prepared after 1990, one can find a minority rights section. This however has not prevented a multitude of separate minority rights instruments being prepared in the international organisations. OSCE (CSCE) adopted in 1990 the Copenhagen Document; in 1991 the Geneva report on Rights of Persons Belonging to National Minorities; in 1992 the UN General Assembly adopted the Declaration of Minority Rights; in 1994 the Council of Europe prepared a Framework Convention on the Rights of National Minorities. There are a number of other documents on minority rights in the pipeline.

The purpose of all these international instruments is to protect minorities against the state. However the zeal of certain countries in this field carries the risk of creating new minorities, fuelling ethnic nationalism and a new tribalism and thereby giving rise to new elements of instability and insecurity in international relations. It is also interesting to note that it is the very same countries who adamantly refuse to grant minority status to the foreign workers who have been living in their countries for three generations on the grounds that they have not acquired citizenship.

I will not go into the details of minority questions here as it is a separate subject on its own. I would like to confine my remarks on this subject to the discussion of whether minority rights are compatible with human rights. In other words, can minority rights be considered a part of human rights?

Human rights in the liberal tradition are recognised on an equal and individual basis, regardless of the ethnic, linguistic or religious characteristics of the individual. It does not recognise rights of groups or communities on an ethnic, linguistic or religious basis. Such a treatment is discriminatory and is not compatible with the traditional concept of human rights.

From the point of states' obligations towards its citizens too, human rights and minority rights cannot be treated on the same level. The state is under the obligation of maintaining equality and non-discrimination among its citizens to protect their human rights and to take action to ensure that all of its citizens enjoy their rights. However, the ethnic, linguistic or religious characteristics of citizens are entirely private matters that do not belong to the public sphere and do not concern the state. The state has no public obligations towards its citizens due to their belonging to a certain ethnic or religious group. The state does, however, respect and protect on an individual basis, religious beliefs or ethnic origins of its citizens.

The conceptual contradictions between human rights and minority rights are also evident in practice. The exercise of certain rights of minorities may lead to violations of human rights. Let me give some examples:

Some African tribes still retain the tradition of circumcising young female children. This by any standard is an explicit violation of human rights of the child. However, such a deplorable practice is defended on the grounds that it is part of the culture of certain tribes and minorities have the right to preserve their culture.

In 1995 during the World Conference of Women's Rights in Beijing, some Islamic countries attempted to reserve certain inequalities (such as in law) between women and men asserting that such

inequalities are part of their cultures. However, such an inequality is beyond any doubt, a violation of the human rights of women.

#### D. HUMAN RIGHTS IN THE PRIVATE SPHERE

According to the classical liberal doctrine the human rights system intends primarily to protect the individual against the state. From this point of view they constitute limitations on the power of and create obligations only for the state.

This classical reading of human rights is now increasingly scrutinised under the pressure of rapid and recent developments.

First of all, today human rights are being violated more often by individuals and groups than states.

Terrorist groups, racists and ethnic nationalists have become main perpetrators of human rights violations. This has brought the idea of *erga omnes* of human rights (human rights for all) to the forefront. Indeed, if human rights are recognised in relation to the state, they must also be recognised in relation to other persons or groups that violate them. If these rights are essentially inherent in human dignity, must they not be recognised and respected not only by states but by all?

Secondly, the broadening scope of human rights makes it difficult to retain separation of public and private spheres. Human rights are entering into the private law sphere and concern the relations between private persons. Complaints by women against their abusers, children against their parents, workers against their employers, victims of racism or terrorism against their attackers, cannot be left outside the human rights field as these rights have now been accepted as components of human rights.

Thirdly, the traditional places where human rights violations take place are being privatised on a large scale. Therefore, the protection provided in those places against the states should now equally apply to the privatised concerns.

For example, in the case of *Mr Malone v. the UK Government* which involves a complaint of telephone tapping and metering by the Post Office, the European Court of Human Rights in Strasbourg decided that this constituted interference with Malone's privacy. However, by the time the case was actually decided, the Post Office was no longer providing telephone services. It had been transferred to British Telecom.

Similarly in a case about aircraft noise near Heathrow, the airport was a public body at the time of application to the European Commission of Human Rights and privatised by the time the case was concluded.

Today, not only state hospitals, but even the prisons are being privatised. In the UK, the percentage of prisoners in the private sector is around 4.5 per cent. Private security companies are used for transferring prisoners. In the US the trend is towards private law enforcement.

In a world where the private sector is continuously expanding at the expense of the public sector, it is not possible to confine human rights exclusively to the public sphere. This is the most radical change in the history of human rights since the French Revolution and requires a totally new approach. For example, because many organisations or individuals who violate human rights are in the private sphere of human rights. NGO's have to turn their attention to this sphere.

One problem that arises is the remedies against individuals or groups who commit human rights violations. The international judiciary organs such as the European Commission of Human Rights or the European Court of Human Rights or the Inter-American Court of Human Rights cannot, under their respective conventions, be required to consider applications other than those relating to alleged breaches by states. As human rights are traditionally protected against states, no possibility of recourse to the international bodies exist against individuals or groups.

The most effective solution to this problem is to incorporate international human rights law into the domestic laws and recognise the right for the victims to bring their claims directly against the private body in the national courts.

On the other hand, the fact that there exist no direct remedies against alleged violators other than States at international level, does not mean that private persons or bodies have no duties binding on them. A number of international conventions have created duties or obligations for private persons or groups.

For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide covers acts committed also by private individuals. Whether or not the perpetrators are government officials are irrelevant. The only criteria for the offence is their genocidal intent.

It is accepted in international law that in cases of war crimes, crimes against humanity and crimes against peace, individuals can be held responsible at the international level. The Nuremberg Trials are a good example of this.

Article 30 of the Universal Declaration of Human Rights states that:

“Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

Similarly, Article 17 of the European Convention on Human Rights states that:

“Nothing in this convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth herein...”

#### E. A FLAW IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM

In the post war international instruments of human rights only ‘rights’ are mentioned. There is no reference to responsibilities or duties although this question was much discussed during the drafting of the Universal Declaration in 1947. The French delegation proposed, for example, a draft which spoke of the “fundamental duties” of human beings. However, in an environment created by massive and genocidal violations of human rights by the Nazi regime, such proposals did not find their way into the final text of the Declaration with the exception of Article 30 as mentioned above.

It was an understandable but erroneous outcome. For, in international law, rights and responsibilities (duties) are closely linked to each other. Every right brings along a responsibility. Rights exist together with responsibilities. Rights and responsibilities of state and the individual are interdependent. Today, such an equilibrium is not present in international human rights law with the few exceptions I have mentioned above.

In addition to these exceptions, one can also refer to the Bogota Declaration of 2 May 1948, where the individual's duties towards society, his family and other individuals are mentioned. In article V of the American Convention on Human Rights of 1950, the individual's duties towards his family, society and mankind are stipulated.

A remedy to this general defect of the system has gained new importance in respect of the new democracies in Eastern Europe and of the former Soviet Union. When the former communist countries gained their independence and became emancipated, a new relationship between the governments and citizens came about, the only basis of which is citizens expecting the authorities to provide for all their wants immediately. In such circumstances the concept of freedom may easily degenerate into anarchy.

These considerations prompted some delegations to the Council of Europe to propose a declaration on citizens' duties to complement the European Convention on Human Rights. It is expected that such a declaration could make it clear what is expected of the parties involved and to determine their respective responsibilities.

The risk of such a declaration is that it could be used by states to curb progress in the fields of democracy and human rights. However, given the fact that today all states in Europe or in North America are firmly based on the principles of democracy, one may be confident that governments would not see such a declaration as an opportunity to undermine the rights and freedoms of its citizens. At any rate, precautions against this eventuality can be incorporated in the declaration.

On the other hand, such a declaration may serve to strike a balance between rights and responsibilities and eliminate a major flaw of the system.

Today, human rights are in a new era. It no longer governs exclusively relations between the state and the individual, but also relations among individuals. It is therefore imperative to make human rights *erga omnes*, to protect individuals not only against violations by the state, but also by individuals. By the same token, it is also necessary to establish a balance between the rights and responsibilities of the individual. Otherwise, law would remain one more time behind the developments in actual life.