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Human Rights : The Poverty of Imagination

I-Once upon a time

Some months ago, when Australian Federal Cabinet was pondering on its belated response to the *National Human Rights Consultation Report* of 2009, the world was informed that from 1st July 2010, Finland has the provision of internet access as legal rights for all citizens. The Finnish Minister for Communication declared that " a reasonably priced and high-quality broadband connection will be everyone's basic right". A year before that, On 11thJune 2009, France's highest court, the Constitutional Court, ruled that access to internet is a "fundamental human right".

Let me leave France and Finland where they are. Let me tell you about Majid. (Majid's story).

With this brief account of Majid's life, I am not taking you to a side-trip to Christmas Island or Curtin Detention Centre. It is just to remind ourselves that more than 60 years after the adaptation of The Universal Declaration of Human Rights by the United Nations , largely as a result of moral revulsion against the horror of second World War , we continue to treat each other in violation of principles we declared to be fundamental and universal. We continue to disregard those principles as if we are suffering from historic amnesia.

II-Historical Imperative

Of course, declaration of respect for certain basic human rights is not new. One could trace aspects of it in antiquity, even though they were not referred to in terms we now understand. For example, one such declaration is recorded in the Cyrus Cylinder. A clay cylinder, dated 539 BC, in which Cyrus the Great, the Persian king, made declaration amounting to cultural tolerance and respect for the religion and customs of each territory in his vast empire. A replica of the Cyrus Cylinder in kept in United Nations Headquarter, New York, with translation of the text in all six official U.N. Languages. The U.N. promotes the Cyrus Cylinder as "an ancient declaration of human rights" .

But it is the *Declaration of the Rights of Man and of the Citizen*, the principle document of the great revolution in France that became the precursor document to international human rights instruments.

It has inspired and influenced rights-based liberal democracy throughout the world. The French *Declaration of the Rights of Man and of the Citizen* went far beyond the "political claims of American revolutionists" (1). In it, the preservation of the sacred rights of men was declared as being the *raison d'etre* of any political association or sovereignty. The critical nexus between human rights and democracy is self-evident, since the foundations of political and social democracy is located on upholding human rights.

The paramount importance of the concept of human rights in our modern world and its reach into every aspect of our social life, be it political, economical, legal, or cultural, can't be over-emphasised.

Its importance in international relations is ever expanding. Transnational corporations, pursuing profit in far flanked parts of Africa, Asia, and South America have, increasingly, been mindful about how the terms of their agreements with local governments could be touched by human rights issues. There are reported cases about large scale projects being abandoned by transnational corporations because of concerns raised on the impact of those projects on the life of people who were to be affected by them. In most cases, those concerns are raised in terms of human rights issues. Even as distant an event as Olympic Games get coloured by the reach and relevance of human rights.

We all remember how China's suitability to host Olympic Games in 2008, was questioned by those with concern over its human rights record.

In the history of development of human rights doctrine one can detect three phases. Initially, it is a claim *against* a sovereign or state. It demands civil and political rights -civil liberty, equality before the law, right to security, right to property, etc. Then it develops to incorporate claims *upon* the state – economic, social, and cultural rights, right to education, right to reasonable health care (2). And finally, it developed to incorporate the vulnerable or certain segments of the society who, for either natural, but mainly socio-historic reasons, did not and do not have the social and political means to claim their rights – women, children, prisoners, indigenous people, foreign workers, etc.

Rights, specially those of second and third generation domains, often confused with *claims*, not only by proponents of human rights but also by opponents who interpret them as *right-to* or *entitlement*. Such interpretations are based on the incorrect assumption that rights are things that could be *given* or *taken away*. This assumption, as I said, is incorrect. The evolutionary development of human rights

is no more than the articulation of *pre-existing* rights that are to be incorporated in the body of human rights jurisprudence. Three hundred years ago, who could think of radio waves or Internet being a public domain of our social life, and, hence, a human rights matter ?

Such historiography may be of interest for knowing the events or milestone that led to certain rights being shown as a particular feature of the social landscape in which it got articulated. In practice, however, the evolutionary development of human rights is inevitable because social development is bound to create new complexities in human social and political affair that are bound to either create the need for articulation of certain rights or create tensions among rights that are to be addressed and be guided by the fundamental principles of human rights. Viewed in this light, one could, figuratively claim that human rights do not exist., because it is an "evolving" thing. Yet, in our daily life, in our daily conversations or debates we refer to rights as if we know it exist and we know what it means. We can analyse them rationally, for instance, when tension arises between different rights. Furthermore, we know that all rights are interconnected. Whether declared by French revolutionaries or the Finnish parliament. One can't respect certain rights and at the same time justifiably show complete disregard for other rights.

III-Dictate of Reason

The foundation of human rights, in its European origin, is grounded in the classical *natural law* doctrine. In simple terms, the doctrine of natural law states that there is the law of nature. This law can be known by man because of an essential characteristic in his nature, namely having *reason*.

"Propositions about natural law and natural rights are not generalization from experience nor deductions from observed facts subsequently confirmed by experience. Yet they are not totally disconnected from natural fact. For they are known as entailed by the intrinsic or essential nature of man. Thus they are known by reason "(3)

"Reason" here does not refer to the practical intelligence that we have and use in performing varieties of tasks and behaving appropriately in varieties of situations, though it includes these. Neither does it refer to the capacity of man to make conclusions deductively or inductively, though it includes these. Reason here is the capacity to make moral decisions, to make moral judgments.

What is this law ? Who "made" it ? How can we know it ? How can we know that we've "discovered" it ? These are all questions beyond the scope of this paper.

Why should there be natural rights simply because there is, or believed to be, natural law ? It is because, natural law, being the ground of morality, governs human affairs, and their relationship with each other. On this ground it entails natural rights. If we ask the question : what are the "rights" of a slave ? The answer, according to natural law doctrine is that he has the right to be free because "every man is human 'by nature' ; [and} no human being is 'by nature' a slave of another human being" (4).

From this interpretation, the theory of human rights doctrine could be simplified in the following scheme :

There is natural law (governing the affairs of men).

Natural law entails natural rights.

Therefore, Man has natural rights.

We must be careful here. According to this theory, the argument begins, not with rights, but with the law (of nature). This law governs human affairs. In other words, it is a moral law. One who violates this law is acting against nature. In other words, "to say that one can obey or disobey the natural law makes no sense at all. The natural law… is an order of things (in particular, an order of persons). Such an order one cannot obey or disobey. One only can respect it or fail to respect it" (5). To repeat, "there is nothing mysterious about the natural law of human world (6). It is the law that governs the "relational" aspect of human life.

Therefore, contrary to claims made by certain opponents of human rights, the concept of human rights is not a political or social construct. Its source or seedbed is the law of nature, which entail moral law. And "human rights are logical entailment of morality as such and not contingent social constructions". (7)

What is this law ? What obligation does this law places on me ? Could it be that, I am to respect the dignity of other men ? Could it be that, I am not to harm other men ? Could it be that I am not to restrict the freedom of other men ? I leave it for you to ponder on these questions in your quiet time and, perhaps, find out why you answer them this way or that way. But, if in your meditation on this matter you come to the conclusion that your rights are to be respected no matter what for the rights of others, you are, in effect, placing yourself above the law, and thereby, waiving any claims to have your own rights respected by others. Extending this

scenario, we'll end up in the Hobbsian nightmare of "the war of all against all". This is another reason that makes binding character of human rights a logical consequence of being *rational*, having *season.*

III-Reservations

Human rights is a social doctrine. They relate to the relations between men as well as men and social institutions. It is a social phenomenon. For a man, living alone on a planet, human rights do not make sense. Like all other doctrines, human rights have been subject to critique on different fronts. Here, I briefly mention three of them :

1-It is too individualistic.

The origin of human right claims is the experience of individual. It is the experience of the individual who, perhaps suffering from oppression, degradation, and humiliation, sees the injustice in social and political condition he finds himself in, and seeks to assert his rights and, thereby , preserve and protect his dignity. His right to be free, to be the master of his own destiny. Marx saw the primacy of individual in human rights doctrine as being a liberal bourgeois path that "will destroy all ties between men other than naked self-interest, [and would eventually] resolve personal worth into exchange value" (8). Marx believed that Rights separate man from man, and he wanted to unite them-"a union that was social rather than legal and political" (9). But, social relationship, being both the source and the ground for the potentials in human nature to be suppressed or flourish, is exactly the framework in which the individual experiences both his freedom and the limitations that are imposed on it. It is precisely for avoiding the personal worth becoming an exchange value that man declares his rights whilst, at the same time, recognising and respecting the rights of others. The union of man and man, as a Messianic call, may be the echo of our inner understanding of our destiny; Whereas, "human rights constitute a realistic utopia insofar as they no longer paint deceptive images of a social utopia that guarantees collective happiness but anchor the ideal of a just society in the institutions of constitutional states themselves" (10).

2-It is just another Ideology

The term "ideology" is both elastic and slippery. It can be extended to cover divergent, sometime contradictory thoughts in a single discourse . It can be hidden in a debate, without participants being aware of it. It can, among other things, be

statements about certain desirable states of affair. It could be defined as a set of ideas that informs one's goals, (and, hence, influences one's course of action).

The Rights of Man is treated by some philosophers and social scientists as ideology. That is, a belief system that has social significance but not truth value. The assertion that human rights is but an ideology in disguise, in my view, is rather odd. Firstly because ideologies, in general, are resistant to the idea of human rights, and secondly because human rights discourse itself often constitutes a critique of ideological thinking (11). But it is not a critique of one ideology confronting another ideology. It does so from a meta-ideological standpoint. This standpoint rests on its foundation being both natural, in the natural law sense, and universal, in a logical sense. Natural rights doctrine does not have any fixed goal. It does not promote any utopian end. It is neutral in social and political preferences. It simply states rules of "social game". The rules of our social engagements. Rules that are based on natural law (of human affairs) which do have truth value. Rules that act as our moral compass to navigate the ocean of our divers desires and interests,, and chart the course of our own journey in 'pursuit of our happiness'.

3-It is not universal

Man has rights simply by virtue of being human. Irrespective of the cultural, social, or political space he finds himself to be . In other words, "human rights are the rights one has simply because one is a human being" (12). Ergo, they are universal. However, from the outset when the Universal Declaration was being drafted differences emerged on what rights should be included in the Declaration. More importantly though, the justification for the rights under consideration proved to be based on different sets of belief systems. In other words, there was no dispute about the sanctity or justifiability of certain rights. But there was no consensus on how and why that justification is valid.

In the more contemporary manifestation of this challenge, resistance to human rights is framed in terms of either (a) the continuation of colonial power and influence or (b) imposition of Western culture and life-view.

On the point of colonial influence or geopolitical intent, when concern over human rights issues are raised, particularly with regards to justification for intervention by Western powers, one can only hope that the motivation for such concern is not tainted by the usual realpolitik of international power and political relations, and the sanctity moral power of human rights remains unchallenged . On this matter,

"One need only recall the highly selective and short-sighted decisions of a nonrepresentative, and far from impartial, Security Council, or the half-hearted and incompetent implementation of interventions that have been authorized –and their catastrophic failure (as in Somalia, Rwanda, Darfur)" (13).

The reservation to the principle of the universality of human rights on cultural grounds is ultimately a philosophical issue. As noted earlier, it is not a new critique. But in recent decades, it has found support in post-modern philosophy; in particular, in moral relativism.

Different cultures may have different conceptions of social *good*. Human rights are often interpreted and incorporated within those conceptions. In this sense, human rights are the mean for certain conception of an end. On this interpretation, the reservation on cultural ground could be reframed not as a confusion between means and ends, but as designation of primacy, namely that, there is a vision of end for human existence, and human rights is part of conditions for its realization , hence the rational for human rights.

Faced with the factual pluralism of cultural practices, social structures, and religious beliefs, one has to accept the right to believe in different ends as being a basic right. Therefore, the questions that we have to ask are :

1- How can we *justify* a particular end ? (Is there any *need* for justification?)
2- Can that justification succeed without regard for human rights ?

4-Legal Concern

Here, I would like to add one more point that is not in the category of critique of human rights theory but did appear in our media for a few days when the *National Human Rights Consultation Report* of 2009 was released by Rudd government. It is what could be called the politicians' concern, even though it wasn't raised exclusively by politicians. In my view, it is a concern born out of misunderstanding. It claims that human rights laws would shift decision making to "unelected" judges. Of course, the arguments given are not as plain and as naïve as this. The assertion is that "the judiciary is an unelected, unaccountable arm of government. It should not have the power to decide what constitute a breach of human rights" (14). Considered in the cool, calm, and impartial chamber of one's moral intuition, one can't escape the conclusion that what is claimed is that the "will of people" is to be protected *against* the dictate of reason.

But apart from the alleged clash of interests (between the legislative and judiciary arms of governments), the reality is that :

1- Judges are accountable. They must issue *reasoned* judgment, which are usually open to being overturned on appeal.
2- The very fact of being unelected is likely to ensure that they are apolitical, independent and impartial

Furthermore, the advocates of this concern are afraid that human rights laws will limit the power of law-makers to act for the good of the society. But, what is the good of the society? Is it to obey, without question, laws passed by law-makers? Apartheid, in South Africa, was a law passed by law-makers ! The power of the executive arm of government needs to be checked too. Specially when it sees itself having been given the *mandate* on election day, despite rejection by majority to some of their post-election decisions.

This year, in September, in the annual human rights and social justice lecture of the University of Newcastle, the President of Human rights Commission, Catherine Branson QC observed : "there is, I suggest, a deficit in Australian present democratic processes in that currently our law and policy makers are not required even to give consideration to human rights" (15).

Law-makers will continue to make laws until the last man on earth. And that is how it should be. But those laws are made in the background of a socio-historic context. They need justification for their validity, and the justification must come, not from within, but from without the socio-historic contingencies of law itself. Laws made by chambers of law makers are called *positive* law. They change as the societies change, as circumstances change, as politicians change. Natural rights and human rights laws are not of the same category. Their guiding principle is not within the changing frameworks of positive laws. Their source is natural law governing human affair.

IV-Concluding Remarks

The famous slogan of French Revolution, *Liberte, Egalite,* and *Fraternite*. will remain the 'holy trinity' of a sane society.

Freedom and equality are the foundations of human rights. They are the fundamental human rights. All other rights (civil, political, economical, social, cultural, etc) are secondary. They get their validation from these two fundamental

rights. But it looks to me that, in their passion to radically transform their society, the French revolutionaries somehow realized that declaring and proclaiming these two rights is not enough. They saw the tension that is inherent in these rights. Where and how do we limit our freedom in order to ensure the equality of the Other? How do we ensure the equality of the Other without self-imposing limits to our own freedom? Furthermore, accepting that man is a social being and, as such, will take different social roles may cause a confusion between his rights . It may prompt him to take his rights and obligations as a *Citizen* in ways that may not be harmonious with his rights of a *Man*. Perhaps, that is why the French revolutionarries titled their declaration as *The Right of Man and the Citizen*; the two being distinct.

The revolutionaries felt that something else is needed. For them, that was *fraternity*. A term that has a moral connotation, and implies moral obligation. It was seen as being the catalyst that dissolves that tension. The other two, *liberte* and *egalite* recognised individuality, but *fraternite* pointed to union, to community. When the man in street is seen not just the Other but my brother, my demand for freedom and equality somehow becomes secondary. He is my brother. He is part of that whole that we make together. Nevertheless, I must add that, in becoming united with my brother, rights do not become superfluous. It just makes the recognition of the unique contribution of each of us in the enrichment of that whole, that mutuality, more visible. Love and rights have a mutually fulfilling relationship.

Five hundred years before French Revolution, the Persian poet Saadi wrote a poem that centuries later became a motto on the entrance to the Hall of Nations of the United Nations building. Saadi, eloquently declared that :

The Sons of Adam are limbs of each other,
Having been created of one essence.
When the calamity of time affects one limb,
The other Limbs can not remain at rest.
If thou hast no sympathy for the suffering of others,
Thou art unworthy to be called by the name of a human.

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