

FOCUS

Law and Our Rights

Fifty Years of the Universal Declaration of Human Rights: A Review

by Dr Kamal Hossain

"Pending universal ratification of the Covenants and other treaties it is the Universal Declaration of Human Rights that most people will look to find the minimum rights to which they are entitled. Legally, politically, and morally, the Universal Declaration remains even more significant today than when it was adopted in a half-century ago."

As we celebrate the fiftieth anniversary of the Universal Declaration of Human Rights across the globe, a stock taking is underway. In a world emerging from the devastation of a World War, in which gross human rights violations and unprecedented acts of inhumanity had been perpetrated, the peoples of the United Nations in the Charter adopted by them in 1945 reaffirmed their "faith in fundamental rights, in the dignity of the human person and in the equal rights of men and women, and of nations large and small."

The Universal Declaration adopted in 1948 by the UN General Assembly, with 48 votes in favour, none against, and 8 abstentions, was truly an act of faith, of a shared conviction in human rights "as the foundation of freedom, justice and peace in the world." The existing global reality at the time was one in which the majority of the world's people remained deprived of their human rights. They still lived under colonial rule and a strident apartheid continued aggressively to promote racial discrimination. Authoritarian regimes continued to oppress peoples.

The Declaration was thus a bold expression of resolve to change the existing reality, as it proclaimed in the opening words of its operative part that the Declaration would serve:

"...as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

It was thus a pledge to strive, at the national and international level, to promote the observance of human rights the world over.

In the subsequent decades, popular movements for democracy and independence across the world invoked the Universal Declaration as they struggled for their rights. Women and men of different faiths, races and cultures were inspired to challenge colonial and authoritarian regimes and to vindicate their human rights. They reaffirmed this commitment in their new constitutions which invariably relied upon the Universal Declaration and the UN human rights instruments in formulating their own bills of rights. This is something to which I can testify from my own experience when I chaired our constitution drafting committee in 1972, after Bangladesh gained independence through our war of liberation in 1971. In drafting the

constitution, we drew upon universally recognised formulations of human rights derived from international instruments. This expression has been repeated in the creation of other recent constitutions. In Nepal, an absolute monarch who had the status of a deity, was transformed into a constitutional monarch and a bill of rights was included in the constitution. I recall suggesting to the Nepalese constitution-makers that the best precedent of how an absolute monarchy could be transformed into a constitutional one was provided by English constitutional history of the seventeenth century. No reservations were expressed about including universally recognised formulations in their charter of rights. No qualifications were introduced on the grounds of religious or cultural diversity. The new South African constitution unequivocally assures universally recognised human rights to all in a multi-cultural, multi-religious society.

This is the common experience of the majority of the states cutting across all the continents. This is why the notion encapsulated often in the phrase "Asian values" which suggests that human rights derive from an alien ideology exported to Asia (and Africa) from the West with roots in a particular religion, is a misreading of history. While respect for human rights itself calls for respect for cultural and religious pluralism, neither history nor anthropology validates the claim of any particular religion or geographical region to be treated as the exclusive fountain-head of civil and political rights. Those who in Africa or Asia, in Nigeria or Burma, violate these rights use the alien ideology argument in a self-serving way to justify their violations. In doing so, they deny history as well as their violations. In doing so, they deny history as well as their own religious and cultural traditions. Muslims, Buddhists, Hindus, and Sikhs had fought along with Christians and Jews against fascism, during the Second World War. Human rights had been invoked by Asians and Africans, of different faiths and cultures in their sustained, and ultimately successful, movements for independence against colonialism and against apartheid.

The fact that many African and Asian nations were not represented in San Francisco when the Charter of the United Nations was adopted, or were not present when the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948, does not detract from the universal recognition since accorded to them by the peoples of all nations. This was reaffirmed in the World Conference on Human Rights in Vienna (1993) by representatives of governments, and even more

powerfully by members of civil society present there. Their spirited participation in that Conference had made it impossible even for the hesitant among the government representatives to deny universality.

It was the non-governmental forum, specially its younger participants, from all over the world, who in 1993 breathed new life into the Universal Declaration. The Vienna Declaration recorded a global consensus on human rights issues, on which there had been divergence earlier, based on considerations of expediency of those who had special interests to protect. Thus, the Vienna Declaration proclaimed that:

(a) The universal nature of these rights and freedoms is beyond question.

(b) All human rights (civil and political as well as economic, social and cultural) are universal and indivisible, inter-dependent and inter-related.

(c) The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis, and that

(d) Women's rights are human rights.

Review of the Universal Declaration at the International Level

The work of the United Nations in the field of human rights has evolved in several different phases. (1) The first phase, which began immediately after the creation of the United Nations in 1945, was primarily concerned with standard-setting. This work has continued to the present. A UN compilation of human rights instruments published in 1993 lists 94 conventions, declarations and other international instruments on human rights. It includes the two international covenants, one on civil and political rights, and the other on economic and social and cultural rights, which together with the Universal Declaration are termed "the International Bill of Rights". Other major standard-setting instruments include the Convention on Elimination of all Forms of Racial Discrimination, the Convention against Torture, the Convention against Discrimination in Employment and Occupation (CEDAW) and, the Convention on the Rights of the Child.

The second phase consisted in discussion in UN of alleged violations of human rights in specific countries.

While early General Assembly resolution criticized the human rights situation in a few specific countries, public discussion of specific violations soon became limited (apart from questions of decolonization) to drawing attention to serious human rights violations arising out of apartheid in South Africa and Israeli practices in the territories it occupied after the 1967 Arab-Israeli war. Following adoption of Resolution 1235 by the Economic and Social Council in 1967, which authorised ECOSOC's subsidiary bodies to discuss the violation of human rights in any country, there was a significant increase in the number of country situations which came up for review. It is noteworthy that General Pinochet's military coup and the situation created by it in Chile in 1973 gave rise to a continuous series of reports of grave human rights violations. Nothing could have been better timed to coincide with the global observance of the fiftieth anniversary of the Universal Declaration than the historic judgement of the House of Lords.

The profound impact of the Universal Declaration at the national level is reflected in the constitutions of newly independent states and societies in transition from an authoritarian towards a democratic order. These constitutions invariably declare a commitment to human rights as they strive to establish a democratic and participatory system of government and to achieve significant social and economic development. The latter is particularly true in societies such as ours which have inherited poverty and social inequality as a part of the legacy of our colonial or authoritarian past.

In the Indian Constitution, a dichotomy was maintained between civil and political rights (the first generation rights) which were enforceable by courts and economic, social and cultural rights (the second generation rights) which were not judicially enforceable, by which parliaments and governments were urged to make their best efforts to implement, subject to availability of resources. Third generation rights, such as the right to development and the right to a healthy environment, had not emerged when the constitution was adopted in 1949. A directive principle was inserted into the constitution in 1976 by the 42nd amendment providing that "the State shall endeavour to protect and improve the environment..." (Article 48A).

This problem was described by one of the architects of the new South African Constitution, Justice Albie Sachs, in the following terms: (3)

The third stage consisted of creating mechanisms to implement accepted norms more effectively. These included creation of a procedure under which individual communications concerning a consistent pattern of gross violations of human rights could be considered and the appointment of rapporteurs and working

groups to investigate human rights violations in specific countries or to report on particular types of human rights violations (e.g., torture or "disappearances"). Thus, we have, among others, a UN Special Rapporteur on Violence against Women, and one on Extra-judicial and Summary Executions, as well as on countries from where gross violations are reported, such as Nigeria and Burma.

Development of the Universal Declaration at the National Level

The need for concrete measures of implementation is emphasized. The transformation of economic, social and cultural rights into positive law, whether in constitutions or in statutory law, is, however, not enough. The rights must be realized in fact, which may require comprehensive administrative measures and social action. The success of the transformation depends on the evolution of a human rights culture where individuals accept both their own rights and their duties to the community which make the enjoyment of rights possible.

The relevance of civil and political rights in the realization of economic and social rights has been acknowledged and explained in a paper presented by the Nobel laureate, Professor Amartya Sen:

"Civil and political rights give people the opportunity not only to do things for themselves, but also to draw attention forcefully to general needs, and to demand appropriate public action. Whether and how a government responds to needs and sufferings may well depend on how much pressure is put on it, and the exercise of political rights (such as voting, criticizing, protesting, and so on) can make a real difference. For example, one of the remarkable facts in the terrible history of famines in the world is that no substantial famine has ever occurred in any country with a democratic form of government and a relatively free press."

Societies engaged in transition from an authoritarian to a democratic political order face a formidable challenge. The institutions, values and mind-sets which are the legacies of the past persist. Traditions of arbitrariness, secrecy, decision-making without consultation or open debate, and lack of accountability impede the building of a framework of good governance in which democratic institutions and human rights can be nurtured under the rule of law.

The positive lesson is to re-

main steadfast in the commitment to the core human rights values — so as never to compromise these values for short-term political or commercial advantage, or in response to narrower parochial, partisan or communal loyalties. Indeed even more substantial are the lessons to be learnt from those who are being innovative in designing constitutional provisions and participatory institutions which inspire and enable ordinary citizens — women and men — to be pro-active in promoting and protecting human rights — their own and those of other women and men — and in the exercise of their rights as citizens.

The global human rights movement, which draws sustenance from the Universal Declaration, has promoted the strengthening of national institutions for the implementation of human rights. It has provided the impetus for setting up national human rights commissions, women's commissions and the office of ombudsman. Judicial activism has been encouraged through resort to public interest and social action litigation. National courts are generating a rich human rights jurisprudence drawing upon the Universal Declaration and other international instruments. Our Supreme Court has in recent cases referred to the Rio Declaration, to CEDAW, the Genocide Convention and the Convention on the Rights of the Child. The reports of the Commonwealth Judicial Colloquium refer to the increasing number of cases in which national courts have applied international human rights norms. The Universal Declaration has been used to interpret and develop human rights norms in a growing number of countries.

Equal when every day we read or hear about the gross human rights violation in different parts of the world — committed in defiance of the international human rights norms — disregarding the Universal Declaration, this should underline the need for greater international cooperation involving both state and non-state actors in promoting and protecting the human rights nationally and within regional and inter-regional organizations, such as the Commonwealth, and globally. In this way we can build on the not insignificant progress made both at the international and national level since the Universal Declaration was adopted 50 years ago, encouraged by the scholarly assessment in a recent study which concludes: "Pending universal ratification of the Covenants and other treaties it is the Universal Declaration of Human Rights that most people will look to find the minimum rights to which they are entitled. Legally, politically, and morally, the Universal Declaration remains even more significant today than when it was adopted in a half-century ago."

The new South African Constitution adopted last year has in addition to providing for an independent Human Rights Commission and a Constitutional Court, has a number of provisions which secure for members of civil society access to information, access to the courts to enforce fundamental rights, and access to the legislative process itself. Thus, Article 32 provides that everyone has the fundamental right of access to any information held by the state. Article 38 provides that any person may approach a competent court for enforcement of fundamental human rights and any person acting in the public interest, or anyone acting on behalf of another person who cannot act in his or her own name, or anyone acting as a member of or in the interest of a group or class of persons — thus elevating public interest or social action litigation into a constitutional remedy. Article 59 guarantees public access to the legislative process by providing that the National Assembly must facilitate public involvement in the legislative and other processes of the As-

sembly and its committees, and must conduct its business in an open manner and hold its sittings, in public. This faith in the people and in civil society is a fundamental pillar of the constitution.

Concluding Observations

I would like to conclude by recalling the statement made while introducing the Indian Constitution, by its architect Dr Ambedkar, who emphasized the imperative of using political freedom to bring about economic and social change that is, to use civil and political rights to achieve economic and social development, thus:

"We are going to enter into a life of contradictions: in politics we shall have to live in contradiction and in social and economic life, we shall have inequality. We must remove this contradiction at the earliest possible moment... If atrocities against the impoverished and oppressed do not stop, I would myself like to burn the Constitution".

Sometimes many of us may have shared this sentiment, when we see provisions in constitutions (or international instruments) which purports to guarantee fundamental rights, including economic and social rights, reduced to mere paper pledges. The proper response is not to burn constitutions (or international instruments), but to make them living realities, through women and men resolving to play a pro-active role as members of a vibrant civil society.

Equally when every day we read or hear about the gross human rights violation in different parts of the world — committed in defiance of the international human rights norms — disregarding the Universal Declaration, this should underline the need for greater international cooperation involving both state and non-state actors in promoting and protecting the human rights nationally and within regional and inter-regional organizations, such as the Commonwealth, and globally. In this way we can build on the not insignificant progress made both at the international and national level since the Universal Declaration was adopted 50 years ago, encouraged by the scholarly assessment in a recent study which concludes: "Pending universal ratification of the Covenants and other treaties it is the Universal Declaration of Human Rights that most people will look to find the minimum rights to which they are entitled. Legally, politically, and morally, the Universal Declaration remains even more significant today than when it was adopted in a half-century ago."

The writer is a senior Advocate of Bangladesh Supreme Court. This is the full text of his paper presented in The British Bangla Law Week (29 November-5 December) 1998.

Law Lords on Pinochet

A Good Day for International Law

by Ahmed Ziauddin

Pinochet episode has a sub-text for Bangladesh. In 1971, in Bangladesh, all kinds of crimes under international law were committed; genocide, war-crimes, crimes against humanity etc. Many of the planners and perpetrators are still enjoying their lives and freedom, whereas their victims and their families still had been crying for justice. As this essay contains, general amnesty to the criminals was an invalid decision under international law. General amnesty therefore has not given any immunity to the perpetrators or collaborators and thus, in law, criminal proceedings, both at home and abroad, can yet take place.

ture directed by the workers which, in servicing interests of the majority, is laying the foundations for a pattern of growth which spells genuine development. The workers are replacing the privileged groups politically and economically, both in the work places and in the communes and the State itself. This is the revolutionary content of the process now being experienced by my country today: the replacement of the capitalist system and the opening of way towards socialism.

Allende Government

President Allende, though elected on his Popular Unity (UP) programme, faced enormous difficulties from all branches of government. When government took over factories, companies, mines etc. on numerous occasions the court ordered the government to hand back the properties. Police and the administration did not carry out such orders. When the judges requested assistance of such public force, the orders were not obeyed. Allende's party claimed that the courts were opposing and sabotaging revolutionary process which their bourgeois class justice.

Judiciary and the Presidency reached at loggerhead when in October 1972, the Supreme Court sent an official letter to the President informing him of the absolute necessity of instructing his cabinet to instruct in turn their subordinates to adhere strictly to the decisions that, in the exercise of their constitutional attributions, emanate from the ordinary court of justice. In this letter the Supreme Court also called on the President to instruct his subordinates to show the judiciary the courtesy of

examination, and if considered illegal, the decree became unenforceable. However, in extraordinary circumstances, Contraloria allowed immediate enforcement prior to its approval.

The law provided that in the event of disagreements between the executive and the Contraloria concerning legality of a decree, the decision of the executive was to prevail provided a new decree was issued, signed this time not only by the President but all his ministers as well, insisting that Contraloria approve the decree, and permits its enforcement. This decree was called a Decree of Insistence. Once issued, the Contraloria could not reject the decree, but had to send all relevant documents to the Chambers of Deputies. If the Chamber determined that the executive had violated the law and that Contraloria was correct, it could then initiate impeachment proceedings against the minister, some of them, or the President himself.

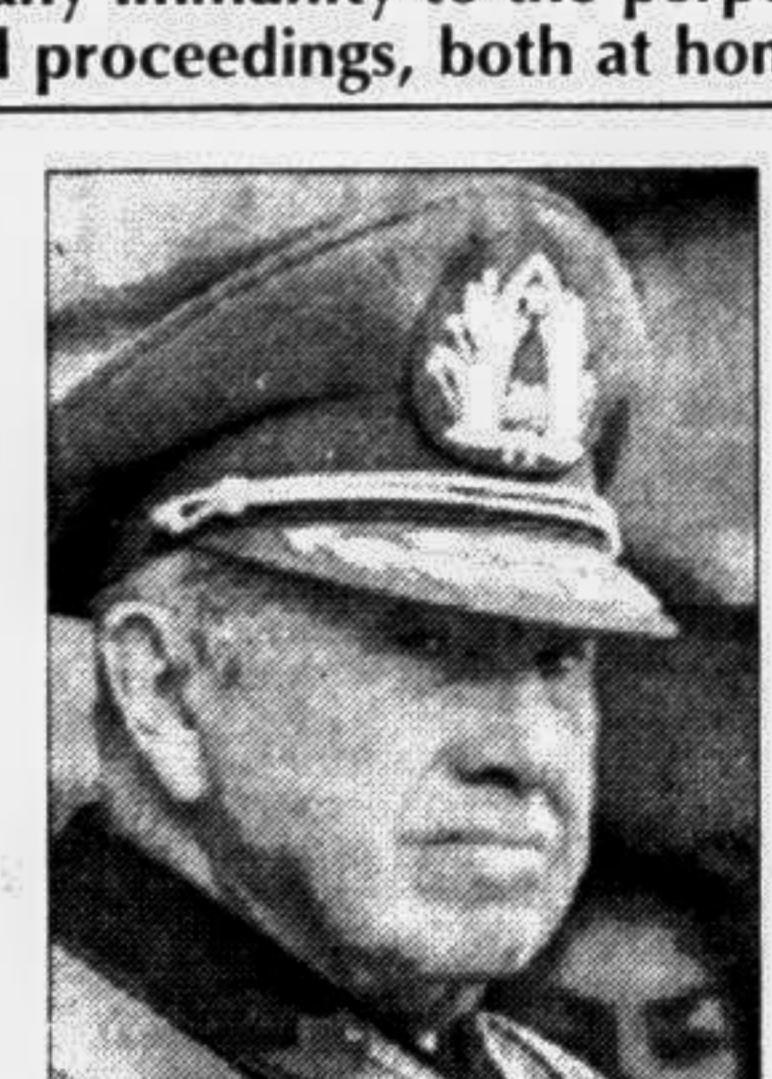
Allende used Decree of Insistence to acquire factories, mines etc. as the Contraloria frequently rejected these decrees for being illegal, which occurred with increasing frequency.

According to Chilean law, only way of legally expropriating private companies was after formation of Asocial area and after paying just compensation. The Congress unanimously approved to nationalise great American owned copper mining companies, but other expropriations were not sent to Congress. The President issued decrees. Opposition Christian Democratic party instituted constitutional amendments to stop the process, which was approved by both Houses. The President vetoed the bill. In reply, the President answered with a long and harsh letter in which he made serious charges against the Supreme Court for some of its decisions and accused it of partiality and insensitivity with respect to the claims of the poor while efficiently taking care of the rich.

The problems with Congress were of equally serious nature. In Chile, the Constitution provided an institution known as a Contraloria General, an autonomous institution to exercise preventive control over the legality of executive acts and to supervise and approve of public funds in accordance with the law. Every Presidential decree had to be sent to Contraloria for

the nation's recovery of its basic resources and the freeing of our country from its subordination to foreign powers constitute the culmination of a long historic process to win political and social freedoms.

Allende then said, the old structure based on the exploitation of the worker and the domination of the means of production by a minority was being superseded. Its place, he said, was being taken by a new structure



Augusto Pinochet

acquired through Freedom of Information act request, catalogues extensive US conspiracy, participation and money in destabilising Chile. President Nixon had ordered the CIA to Amake the economy scream in Chile to Prevent Allende from coming to power or to unseat him.

The documents include, cables written by US Ambassador to Chile, Edward Korry, after Allende's election, detailing conversations with the outgoing President Edward Frei on how to block the president-elect from being inaugurated. The cables contain detailed descriptions and opinions on various political forces in Chile, including the Chilean military, the Christian Democrat Party, and the US business community.

CIA memoranda and reports on a Project FUBELT - the code-name for covert operations to promote a military coup and undermine Allende's government. The documents, including minutes of meetings between Henry Kissinger and CIA officials, CIA cable to its Santiago station, and summaries of covert action in 1970, provide a clear paper trail to the decisions and operations against Allende's government.

US National Security Council (NSC) strategy papers which record efforts to destabilise Chile economically, and isolate Allende's government diplomatically, between 1970 and 1973.

US State Department and NSC memoranda and cables after the coup, providing evidence of human rights atrocities under General Pinochet. The documents at George Washington University's National Security Archives on events in Chile between 1970 and 1976, including summaries of prison

letters written by DINA agent Michael Townley, provide evidence on the bombing assassination of Orlando Letelier and Ronal Moffit in Washington D.C., and the murder of Chilean General Carlos Prats and his wife in Buenos Aires, among other operations.

Pinochet's Reign of Terror

One observer of Chilean politics summarised what happened since 11 September 1973 when darkness fell on Chile. Soldiers of Pinochet stormed presidential palace. He wrote, in Pinochet's Chile you can be arrested at home, at work, on the street, in a bus, or in a coffee shop. You can be picked up because you are a relative or friend of a political prisoner or suspect. Arrests are often made on the basis of anonymous denunciations and weeks or months passed before the authorities even acknowledge that a detention has been made. A not-so-subtle web of surveillance and police control has entangled the schools, the shanty towns, factories, farms and public administration. Pinochet reportedly said, we will continue to maintain the intelligence services because it is the only way to provide tranquillity for the citizenry.

All basic rights and freedoms guaranteed under the 1926 Constitution was suspended. Decree Law no.4 appointed military commanders to provinces and departments covering the whole country. All political parties were suspended and those of left-wing tendencies declared illegal. No political activity of any kind was allowed. No one was allowed to demonstrate and no free assembly took place. One half of Chile's union leaders were removed from their posts. Many

were killed or disappeared. Academic freedom was abolished. The universities were brought under control of the military. Some departments of sociology were closed on the grounds that the teaching was subversive, and the degrees conferred by them were retrospectively annulled. Teaching and administrative staff were widely dismissed. Government informers were installed in the classrooms. Students were required to re-register and many of them were eliminated.

A nation-wide youth organisation ran by the government added to the control over all schools and gave the military the capacity to regiment the country's youth. Private houses were searched by the military at any hour without a search warrant. Freedom of movement was severely restricted, internally as well as externally. Torture, extra judicial executions and enforced disappearance had, thus, been Pinochet's hallmark.

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