HUMAN RIGHTS *analysis*

Human rights in the 'Third World'

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HUMAN rights are not merely the claims that individuals have against the state or other citizens, but are ways of ordering life in the human ancestors so as to ensure dignity for all its members. This image of human rights is sometimes lost in the scrimmage of ideological debate. The heart of the doctrine of human rights, as it has developed in the West, is that the sovereign was subjected to the higher law conceived as the guarantor of the inalienable rights of man. This "first generation" of human rights, is concerned with the civil and political rights of the individual. It is fretful with the freedom of the individual from interference by the State; with what are often called "negative rights" for they involve assertions of what the government cannot do. These rights dominate the text of the Universal Declaration of Human Rights and are set forth in Articles 2-21, which include: the right to life, liberty; right to a fair and public trial; freedom of opinion and expression etc.

The history of human rights thought on the continent of Europe is somewhat different. In 1789 the citizens of France were confronted by intractable social and economic forces causing impoverishment and hunger. Economic growth, with more fairness of distribution is the reigning value, and human rights depend upon governmental management, improved for the purpose by ridding itself of archaic involvement with religious preoccupations and institutions. Thus, the French Constitution of 1791 provides for public relief for the poor and free public education, rights that were not protected in early American constitutions and in international law today are described as economic and social rights.

Communists/ Socialists were quick to point out that Western liberal notions of rights had developed in the particular economic and political circumstances of the seventeenth and eighteenth centuries. As these circumstances changed in the nineteenth century, liberal theory was unable to respond to the need for state action to secure fundamental human rights and freedoms for citizens. Socialist theories of rights, often described as the "second generation" of human rights, emphasize economic, social, and cultural rights.

The incorporation into the concept of fundamental rights of the economic, social and cultural rights that assume the egalitarian component which harmonizes completes and makes freedom more real, also creates a new dimension which is that of solidarity, synonymous with the fraternity of the trilogy of the French Revolution. Thus, the concept of social and economic rights advanced within the socialist tradition is included in the Universal Declaration and not entirely absent from the liberal tradition. In the same way, not all second generation rights can properly be described as "positive rights." However, certainly the emphasis of second generation rights is on claims to social equality; and so state intervention is essential in the allocation of resources required to enforce these rights.

In its second phase (1960-73) the socialist countries joined forces with '3rd' world countries to champion the right of peoples to self-determination and to economic and social rights. Rather than resisting the development of human rights instruments, socialists now saw in international law the possi-

bilities of promoting the very concerns for economic and social justice that had prompted their original opposition. It is no accident that both the ICESCR and the ICCPR begin with the same first article. The challenge to realize a "'3rd' generation of human rights" was first articulated in the 1974 Charter on Economic Rights and Duties of States. This established as a priority for the future work of the UN Commission on Human Rights. This in recent times shifted to Human Rights Council.

Political freedoms are not possible without primary social development and conflicts are resolved in terms of the welfare of society as a whole. The basic rights to survival and food are asserted both as qualifying civil and political rights and as depending upon them. In the '3rd' World human rights are understood to embrace political and religious concepts as well as indigenous traditional values. Human rights are conceived as elements of the right to self-determination, which protects the rights of peoples to their cultural traditions and language, as well as their right to development.

Although socialist concepts may seem to predominate in the '3rd' World, human rights advocates argue that civil and political rights are not subordinated to economic and social rights. In the '3rd' World the right to self-determination, which is an internationally recognized right of long and dubious standing is being given a new shape. This is reflected in the Algiers Declaration of '3rd' World Peoples, adopted on July 1976, which attributes violations of human rights directly to the structures of the international economic system. Almost all '3rd' World states have constitutions including bills of rights, most of which were drafted after World War II on the model of the U. S. Bill of Rights, the French Declaration, the Universal Declaration of Human Rights, or the European Convention on Human Rights.

What is also clear is that these reactants are being catalyzed by the cultural values of '3rd' World peoples. In the crucible of the '3rd' World there is not merely a reformulation of liberal and socialist doctrines of human rights-the first and second generations of human rights-but at the same time a reassertion of traditional values. If diverse cultural contexts in the '3rd' World make the traditional distinctions between individual and group rights less clear, the oppressive character of many governments renders the debate between liberals and socialists a luxury.

In Latin America it is understood as natural and necessary for church leaders to defend human rights and for many church programs to be devoted entirely to human rights advocacy. Where political systems are open it is not necessary to appeal exclusively to concepts of human rights in order to struggle, as people always have, for bread, freedom, land, a greater voice in the decisions that direct their lives, and overall human dignity. For the present, the very fact that there are suddenly thousands of people proclaiming and writing about human rights indicates that political systems in most countries are far from open. In Latin America, as in Africa and Asia, human rights claims are a means of affirming basic moral values in the face of severe oppression.

The breadth of the concept of human rights is an asset in this respect, for it encompasses different social, political and ideological perspectives and is therefore useful to the political left, right and center, to religious and secular humanitarian associations and to victims of the many forms of repression. The ambiguity of human rights language, as well as its association with established legal and religious institutions, allows a certain amount of protection for those seeking redress for their grievances, as they would be more vulnerable using ideological or political language.

Nothing is to be gained by arguing for the distinctively Western character of human rights. If you win the argument, you lose the battle. That is, if you claim some special distinction for the West in this respect, or assert some inherent lack on the part of Asians, you are probably defining human rights in such narrow terms as to render them unrecognizable or inoperable for others. The synthesis of human rights concepts in the '3rd' World is to be embraced rather than resisted, for it means that the possibility of a truly global standard for human dignity is becoming a reality. In the '3rd' World, faith in human rights is a way of living, in the face of renewed barbarism and systematic oppression, with hope for the future of the human family.

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LAW *vision*

Is prerogative mercy immune from judicial review?

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ON January 13, 2005, the then President granted pardon to a double murder convict, Mohiuuddin Zintu. The incumbent President has recently forgiven Shahadab Akbar who was sentenced to 18 years' imprisonment and fined Tk 1.6 crore in *absentia* in four cases filed by the Anti-Corruption Commission and National Board of Revenue during the tenure of the last caretaker government. Without surrender to the court, his sentences and fines are pardoned. In both the time the matters attracted serious public criticism and debate. Here is my purely academic endeavor to discuss the scope of prerogative mercy of the president within the constitutional ambit.

Article 49 of our Constitution confers on the President power of granting amnesty. The article runs: "The President shall have power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority". But this power is to be exercised in accordance with ministerial advice and not by exercise of the President's individual discretion because of article 48 (3) of the Constitution, which provides "Save only that of appointing the Prime Minister and the Chief Justice, the President shall act in accordance with the advice of the Prime Minister." So, the President cannot act independently in exercising the prerogative power of mercy.

No one so far challenged the legality or validity of the tender of pardon by the President and we are yet to have the view of our apex court on this point. There might be an interpretation of article 49 of our Constitution by the Supreme Court. As per article 48 (3) of our constitution, the prerogative power of mercy is to be exercised by the President in accordance with the advice of the Prime Minister through the ministry of law and parliamentary affairs (Rule 14 of the Rules of Business of 1996) and he cannot apply his individual discretion. It shows that there is scope of abuse or arbitrary exercise of prerogative power of mercy from political viewpoint. I would argue that the President can exercise this power independently without any advice from the Prime Minister. But does it ensure that the President will exercise this power rationally? The election procedure to Presidentship in Bangladesh would lead us to answer the question in the negative.

There is no guideline for the exercise of prerogative power of mercy

Article 49 of the Constitution that empowers the President to grant 'mercy' does not explain the situations under which the President may exercise his prerogative power. It was imperative that this power should be exercised judiciously and should be offered to one with the highest degree of remorse in addition to service to the nation or mankind. The commutation of death penalty of Col. Taher, a wounded and decorated hero of our war of national liberation, imposed by a martial law court could have been an ideal case to follow the letter and spirit of the constitutional prerogative power of mercy.

The rationale of the pardon power has been felicitously enunciated by Justice Holmes of the United States Supreme Court in the case of *Biddle* v. *Perovich* in these words [71 L. Ed. 1161 at 1163]: "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed". So, the test of tendering pardon is public welfare. At the time of granting pardon, the President is to examine many factors. Because, this power is given to use in extraordinary cases and where there is no other option open to the convicted person or to his family.

Prerogative Power of Mercy in India

Articles 72 and 161 of the Indian Constitution confer this power on the president and the governor, respectively. It is settled law that this power is to be exercised in accordance with ministerial advice and not by exercise of the president's or the governor's individual discretion. Though the President or Governor is required to grant pardon in accordance with the ministerial advice, but there are some grounds upon which this power can be exercised by the President or Governor. In India, judicial decisions, law books, reports of Law Commission, academic writings and statements of administrators and people in public life reveal that the following considerations have been regarded as relevant and legitimate for the exercise of the power of pardon. Some of the illustrative considerations are: a. interest of society and the convict; b. the period of imprisonment undergone and the remaining period; c. seriousness and relative recentness of the offence; d. the age of the prisoner and the reasonable expectation of his longevity; e. the health of the prisoner especially any serious illness from which he may be suffering; f. good prison record; g. post conviction conduct, character and reputation; h. remorse and atonement; i. deference to public opinion.

In *Epruru Sudhakar & Another*. v. *Government of Andhra Pradesh & Ors. Case* [Writ Petition (Crl.) 284-85 of 2005] setting aside a decision of then Andhra Pradesh Governor Sushil Kumar Shinde, remitting the sentence of a Congress activist who faced ten years in prison in connection with the killing of two persons including a TDP activist, the SC bench of Justices S H Kapadia and Arijit Pasayat expressed their view that "Politics can't be the factor in pardon."

Judicial review of the exercise of power of pardon

In Bangladesh it is not settled whether the exercise of tender of pardon by the President is subject to judicial review or not. Presidential pardon granted to Zintu was the first appropriate case for challenging the pardon's validity.

In India, it is well settled that the exercise or non-exercise of pardon power by the President or Governor is not immune from judicial review. Indian Supreme Court in the case of *Maru Ram* [1981 (1) SCC 107] held that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide. , The Court ruled that considerations of religion, caste, colour or political loyalty are totally irrelevant and fraught with discrimination. Again, the Indian Supreme Court in *Kehar Singh's* [1989 (1) SCC 204] case has unequivocally rejected the contention of the Attorney General that the power of pardon can be exercised for political consideration. It was also submitted on behalf of the Union of India, in *Kehar Singh's* case, placing reliance on the doctrine of the division (separation) of powers, that it was not open to the judiciary to scrutinize the exercise of the "mercy" power. In dealing with this submission on behalf of the Union of India, the Supreme Court held that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

Conclusion

From Indian case laws, it is clear that President's prerogative of mercy is not immune from judicial review. In determining the question of legality (if anyone challenged) of the exercise of tender of pardon by the Presidents, the court may lay down the grounds or conditions upon which President could exercise his prerogative power of mercy. Otherwise, the legislature can think of amending article 49 of our Constitution in order to prevent any possible miscarriage of justice.

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FOR YOUR *information*

What is climate justice?

- Affirming the sacredness of Mother Earth, ecological unity and the interdependence of all species, Climate Justice insists that communities have the right to be free from climate change, its related impacts and other forms of ecological destruction.
- Climate Justice affirms the need to reduce with an aim to eliminate the production of greenhouse gases and associated local pollutants.
- It affirms the rights of indigenous peoples and affected communities to represent and speak for themselves.
- It affirms that governments are responsible for addressing climate change in a manner that is both democratically accountable to their people and in accordance with the principle of common but differentiated responsibilities.
- It demands that communities, particularly affected communities play a leading role in national and international processes to address climate change.
- It opposes the role of transnational corporations in shaping unsustainable production and consumption patterns and lifestyles, as well as their role in unduly influencing national and international decision-making.
- It calls for the recognition of a principle of ecological debt that industrialized governments and transnational corporations owe the rest of the world as a result of their appropriation of the planet's capacity to absorb greenhouse gases.
- Affirming the principle of Ecological debt, Climate Justice protects the rights of victims of climate change and associated injustices to receive full compensation, restoration, and reparation for loss of land, livelihood and other damages.
- It affirms the need for socio-economic models that safeguard the fundamental rights to clean air, land, water, food and healthy ecosystems.
- It calls for the education of present and future generations, emphasizes climate, energy, social and environmental issues, while basing itself on real-life experiences and an appreciation of diverse cultural perspectives.
- It affirms the rights of unborn generations to natural resources, a stable climate and a healthy planet.

Source: Bali Principles of Climate Justice, International Climate Justice Network, August 2002