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Review

Nature, feature and enforcement of human rights: A comparative study

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In the contemporary world, human rights have become dominant ideology as it received almost universal recognition by all societies and people of all creeds. Human rights are now considered as *sine qua non* for the holistic development of human personality. Human dignity and autonomy remain the essence of human rights. Indivisibility and unity of the human person in the physical, intellectual and spiritual sense serves the main philosophical basis upon which human rights are premised. The quest for human rights and human dignity is universal. From a philosophical perspective, the concept of dignity derives from reason and autonomy of human being. Thus, the realisation of human rights eventually safeguards human dignity. In this paper, an attempt will be made to annotate the nature, feature and enforcement of human rights and compare them with the existing situation in Bangladesh.

Key words: Human rights, judicial activism, judicial enforcement, ICCPR, ICESCR, UDHR.

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INTRODUCTION

It is stiff to find a period in the history of mankind when the question of human rights has had a greater moral significance in study and practice than the period from 1948 to date. There have been times when the issue of human rights held capital importance in one country or another, but never has it attracted such wide attention and engrossing interest throughout the world as at present in this decade and not only for the intellectuals and the elite, but also for the large masses of people inhabiting the globe (Rahman, 1995). Even during the period since 1948, major shifts have taken place in the attitude of nations and peoples towards the basic aspects of human rights. While some four decades ago, the prime concern of human rights law was the implementation of the rights of peoples and nations to self determination, today the essence of human rights evolve round the question of protection of rights from encroachment by one's own state and rulers belonging to the same community (Rahman, 1995). Obviously then, while in post 2nd world war scenario 'human rights' were directed against foreign colonial rule, domination and subjugation, today the thrust of human rights is directed against the internal foes, i.e. the tyrant and undemocratic regimes and rulers. Contemporary political developments in many parts of the globe bear testimony to this. Thus human rights were fervently pursued when peoples have suffered oppression. On such occasions, the cry of the oppressed has been for freedom from the sufferings inflicted on them-or, put another way, for vindication of their rights not to be oppressed (Sieghart, 1988). Resentment or struggle against foreign oppression and domination was presumed to be justified *ipso facto*, but under conditions of self rule, the only shield that could now be used against tyranny and oppression of the state or the national government was provided by human rights (Upandra, 2006). Thus human rights became the touch stone of protection of individual's freedom and liberty. The ambit of human rights has expanded so much that it is no longer restricted within the territorial boundaries of any particular nation state, and the status of human rights in any state is today a matter of truly international concern. Thus human right's is transgressing the national frontiers by interlinking all the members of the International community through a bridge; the bridge that today can only be identified with human rights (Rahman, 1995). The objective of the study is to show the nature of human rights and the way of enforcing them in domestic court of different legal system by constitutional obligation.

FIVE-POINT INTERSECTION/NATURE/FEATURE OF HUMAN RIGHTS

Human rights have the following distinctive features:

1. Human rights are inherent since they inhere universally in all human beings throughout their lives in virtue of their humanity. Human rights are inherent as all human beings claim their inherent human rights by virtue of the common humanity (Upandra, 2006).
2. They are universal. Human rights are universal in the sense that they belong to every human being in every human society. Human rights are universal in contrast to the rights of particular persons or types of person, or at particular times or places. The subject of human rights is the universal citizen not the political citizen defined by the nation-state. It also denotes that human rights do not differ with geography, or history, culture or ideology, political or economic system, or stage of societal development (Henkin, 1999). All human beings possess them equally by virtue of their humanity-regardless of gender, race, age, social class, ethnic origin, and regardless of wealth or poverty, occupation, talent, merit, religion, ideology or other commitment (Henkin, 1999).
3. Human rights are inalienable. Human rights are inalienable and imprescriptible as they cannot be transferred, forfeited, or waived (Henkin, 1999). Inalienable nature of human rights refers to human dignity as founding values upon which human rights are based (Man and Karen, 2008). In other words, they are unconditional.
4. Human rights are indivisible. The indivisibility of human rights means that all human rights should be enjoyed by all people, at all times and that no one set of rights can be enjoyed at the expense of others. It also refers to the fact that all human rights have equal status, and cannot be categorized in a hierarchical order.
5. Human rights are self-evident in nature. Self-evident nature of these rights can only be grasped by reflection on the nature of a person as a person; namely as a rational, autonomous, emotional, imaginative and creative being (Cranston, 1973). Self-evidence cannot be empirically demonstrated or verified but suggests that it should be viewed as an attribute of rationally acquired knowledge (Cranston, 1973).

Human rights are considered as legal entitlements, they are not merely aspirations, or assertions of the good or charity or mercy. The idea of rights implies legal entitlement on the part of an individual in the legal order of a political society (Henkin, 1999). States and public authorities have primary responsibility to protect these rights. Human rights should be enforced by courts, and there should be procedures and remedies by which a person's rights can be upheld. The State must develop institutions and procedures and must mobilize resources as necessary to satisfy the claims of human rights by individuals. It means that State must act to protect the individual rights against human rights violation by private or public entity.

A distinction is often made between negative and positive obligations in relation to human rights (Milne, 1968). Such a distinction is useful to understand different categories of rights such as civil, political and economic, social, cultural rights. Negative obligation requires a state government to take action when human rights are violated or enjoyment of human rights of one individual is interfered with by another or state agency. This is usually attributed to civil and political rights. Positive obligation requires State to undertake actions, usually involving the expenditure of resources available to it. It generally refers to implementation of economic, social and cultural rights. In other words, positive right imposes an obligation to implement it, while a negative right merely obliges others to refrain from interfering with someone's enjoyment of right.

Human rights are sometimes distinguished from legal rights. Legal rights can be created by statute, contract and other legal arrangement. Legal right is an interest recognized and protected by law. Legal rights can be claimed on legal basis and the violation of legal rights can be vindicated through legal remedies. But human rights are not creation of statutes or state as they exist independent of state system or legal order. Human rights are essentially claimed against State instead of individuals.

Sometimes human rights are identified with fundamental rights. When certain human rights are incorporated in a constitution of a country and are protected by constitutional guarantees, they are called fundamental rights. In this sense, all fundamental rights are human rights but all human rights are not fundamental rights. While fundamental rights have territorial limitations, human rights have no such territorial limitations and they have universal application. Finally, fundamental rights are mainly enjoyed by the citizens but human rights are applicable to all human beings.

While human rights are meant for individuals, people are not identical and static in their wider range of needs, want and attributes in terms of physical, psychical, social and cultural aspects. Therefore, some special rights are granted to some group of people depending on their specific needs apart from universal human rights. Such special rights are borne by particular classes of people such as rights of persons with disabilities, the rights of child-bearing women which may be predicated on their biological needs. Minority groups, indigenous people can also claims such special rights.

CIVILISATIONS AND RELIGIONS AS A SOURCE OF HUMAN RIGHTS

Religions and ancient civilizations have contributed much to understandings of human dignity and evolution of human rights. Thus, human rights are not entirely product

of western civilization. Religion as a source of human rights is often contested since most of the religions speak about duties instead of rights of human beings. Religions lay down broad values and standards, which clearly endorse the spirit and purpose of the human rights though religion does not pronounce verbatimly on the specific issue of human rights. Nevertheless, modern notion of human rights is indebted to a worldwide spectrum of secular and religious traditions. Many religions preach values which have universal appeal. The notion of rights, justice and fairness has heir ancient linkages to religions and philosophies. For example, the concept of proportionate punishment and justice was first propounded by the Hammurabi Code of ancient Babylon. The Hindu religion based on Vedic and other texts preaches Dharma as the supreme value that talks about social order, patterns of behaviour and regulation of individual conduct based on the principle of harmony, happiness and justice (Iyer, 1999). The Bible tells us about the sanctity of life and reciprocal entitlements. The Buddhism preaches about universal brotherhood and equality. Confucian philosophy emphasizes on goodness, benevolence, love and human-heartedness. Islam emphasizes on common humanity and equality of all of humankind. The Holy Quaran preaches about justice, the sanctity of life, personal safety, freedom, mercy, compassion, and respect for all human beings (Khan, 1967). Although it is often claimed that human rights is seen as product of western intellectual tradition, the core values of human rights are also influenced by earlier ideas of law, justice, and humanity from ancient civilizations.

However, the view that religion is a source of human rights is oversimplification of fact since there is ample evidence that religion has been used to fuel many violent conflicts and hence human right violation (Kelsay and Twiss, 1994)

Religions serve an important purpose of providing identity of individuals. Personal and group identity on the basis of religion can be an important source of violence as manifested even in modern times. Nevertheless religion should be viewed as an important source of man norms and values associated with the concept of human rights. The religion based identity cannot alone explain the contemporary form of violence. Individuals may have other identities involving class, gender, profession, and language (Amartya, 2006). Even there can be vast differences in the social behavior of different persons belonging to same religion (Amartya, 2006).

THREE GENERATION OF RIGHTS

The historical evolution of human rights is sometimes identified with three generation indicating three distinct periods of their development. The terminology of ‘first’ generation rights is applied to civil and political rights which evolved much earlier than other category of rights and are, by and large, concerned with freedom of individuals from state interference. The notion of second generation rights refers to economic, social and cultural rights, which require the state to act positively to promote the well-being of its people.

Third generation rights cover collective or developmental rights. These rights have been developed within the framework of the United Nations by developing countries in the context of decolonization process which started after 1945. The philosophical basis of the collective rights rests on a primary commitment to the welfare of the community over and above the interests of particular individuals. These rights include the right to self-determination, right to healthy and safe environment, right to humanitarian assistance, and right to peace. These rights are called group rights because they are not usually exercised by individual alone or in isolation but collectively. The implementation of such rights depends considerably upon international cooperation and not merely domestic legal and constitutional measures (Davidson, 1993).

The distinction between three sets of rights follows the historical struggle for them, the appearance of the separate international instruments that protect them, the philosophical arguments concerning their status and the methodological issues surrounding their measurement (Landman, 2006). While it is convenient to categorize rights of a particular generation, there is also continual expansion of the scope of rights within each generation. This generational classification, however, should not be interpreted to contradict the very idea of indivisibility of human rights (South Asia Human Rights Documentation Centre, 2006).

UNIVERSALISM VERSUS CULTURAL RELATIVISM

The notion that human rights are universal in nature has been subjected to criticism. A powerful challenge to universality of human rights is cultural relativism. Cultural relativism is explained by the profound divergences in the philosophical, cultural and religious conceptions of human rights. The argument that human rights are culturally specific means that the content of human rights should differ between cultures. According to the proponents of cultural relativism, each country should be left free to adopt the institutional arrangements and political system most congenial to it. Each State may place restrictions on the fundamental freedoms and rights of its citizens for reasons dictated by requirements of public order or national security, morality or health. Cultural relativism has two-fold claim about the limits of international human rights norms and processes. In the first place, there is the idea that human rights are Western constructs, with no universal validity. Second, each State has the right to choose its own economic and

social system convenient for it.

For example, many Asian countries asserted the Asian values to highlight the particular social practice. Such thinking was particularly reflected in the Bangkok Declaration of 1993, where western notions of human rights were seen as excessively individualistic, as opposed to collective values of Asian societies.

Cultural relativism in the realm of human rights is expressed in three ways: first, State's right to make reservation to the human rights treaties on religious and ideological grounds. Second, divergences can be noted in the way States apply the derogation clauses in order to allow themselves room for manoeuvre. These clauses allow for suspension of obligations for reasons of public order, national security, morals and public health. Third, development of regional mechanisms for human rights that allows norms, institutions and processes to be designed to fit the distinctive characteristics of the region.

However, cultural relativism must not be promoted in such a way as to undermine universalism and deny universal value of human rights. Cultural relativism is only relevant in the realm of implementation of human rights. Human rights are universal but the conditions of their application vary from state to state. According to Upendra Baxi, the attempt to describe human rights values as 'Western' leads to massive distortions in both the history of human rights and social theory of human rights (Upendra, 2006). The Vienna Declaration on Human Rights, 1993 also rejected cultural relativism. The Declaration, its paragraph, reaffirms the solemn commitment of all States to fulfill their obligation to promote universal respect for and observance and protection of all human rights and fundamental freedoms for all. It stressed that "The universal nature of these rights and freedom is beyond question." However, it refers in its para. 5 to the need to bear in mind "the significance of national and regional particularities and various historical, cultural and religious backgrounds, when considering human rights".

But mentioning of cultural specificities or regional particularities should be taken into account in the promotion and protection of human rights and should not be interpreted as a sort of escape clause for not complying with human rights standards (Symonides, 1998). Sometimes, cultural relativism has been used as an excuse for gross violations of human rights. Therefore, the existence of cultural relativism should not lead to the rejection or non-observance of any part of universal human rights or fundamental principles such as the principle of equality between women and men (Symonides, 1998).

NATIONALITY AND UNIVERSALITY OF HUMAN RIGHT

The belief that each human being has certain rights, which all governments (and all other human beings) have a duty to respect, owes little to the influence of theorists and philosophers; it is the instinctive response to a feeling of revulsion occasioned by acts of political, religious or economic repression. The consciousness that human rights are universal is, in essence, a feeling of moral outrage, not of philosophical conviction. This conscious draws on the moral resources of man's belief that "there is an underlying universal humanity, that it is possible to achieve (or at least to strive for) a type of society which ensures that basic human needs and reasonable aspirations of human beings all around the world are effectively realised" (Nariman, 1993). Initially, this concept of universal humanity operated upon and was dependent on moral claims: people said that they ought to have such rights and freedoms, and were being wrongly denied them. Moreover, the claim was that everyone ought to have these rights and freedoms, that they were fundamental to all human existence, that "they did not derive from the gift or arbitrary whim of rulers, however powerful, and that rulers could neither deny them nor abridge them, nor could they treat them as forfeited because of some offence which the individual had committed in their eyes, or even against their law's. In short, these rights were inherent; that is, every human being had them, without distinction, simply by reason of being human, and they were also inalienable; that is, no one could take them (or even give them) away (Buergenthal, 1988).

In the struggle for human rights, the victors usually ensured that the rights and freedoms for which they had fought were transformed into legal rights and freedoms, formally recognized and protected by new laws. However, there also had to be safeguards against any attempts by future rulers or governments to deny or abridge them again, and this was most commonly done by two mechanisms "entrenching" the rights themselves (sometimes in the form of a Bill of Rights) in the Constitution; a paramount law from which the government itself derived its powers, and which it could not therefore unilaterally amend or abrogate and independent courts where wronged individuals could seek redress against the government if it again violated their fundamental rights or freedoms (Howard, 2007).

TOWARDS AN INTERNATIONAL HUMAN RIGHTS LAW

The story of human rights as we understand it today begins with the Charter of the United Nations which included, as one of the basic principles, promotion, encouragement and respect for human rights and freedoms (Article 1, UN Charter). Article 55 of the UN Charter provides that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms. This prime concern of the United

Nations was translated in the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly on 10 December, 1948. The Universal Declaration embodied the hopes and aspirations of mankind (Ghandi, 1998). It articulated a new vision of humanity for a national and international order where man will be able to find fulfillment of his true self; where there will be no inequality of race, sex, power, position or wealth and where every human being will be entitled to share equally in the social, material and political resources of the community. In the words of Justice Bhagwati, “It was designed to ensure the dignity of the human being and promote individual freedom with social good” (Bhagwati, 1995).

The relevant instruments brought into existence after 1945; The UDHR, the International Covenants, the large number of conventions, etc. (Werner, 1991) have helped to individualize human rights, more than these, they have given the concept of universalization of human rights a legal status in the law of Nations. This point has been aptly underscored by Sir H. Lauterpacht:

> “The individual has acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right ... [The Charter and the UDHR] have transferred the inalienable and natural rights of the individual from the venerable but controversial orbit of the law of nature to the province of positive law” (Sir H. Lauterpacht).

Protection of the fundamental rights and freedoms of an individual has now become “one of the basic principles of modern international law” (Tunkin, 1986).

The UDHR was proclaimed “as a common standard of achievement for all peoples and all nations”. And today it may be emphatically said that the UDHR has become part of binding international law, whatever may have been the intention of the member states of the UN when its General Assembly adopted it (Tunkin, 1986).

However in 1948, pragmatism of the UN dictated to proceed with the work of transforming its 30 articles into a code of binding international law through the adoption of multilateral; often referred to as-'law-making'-treaties. Eventually in 1966, the texts were finalized and adopted. By then, the material had been parceled out into two separate treaties, both to be called covenants: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It took another ten years before these two treaties entered into force (Harris, 1997).

These covenants now constitute the core of international human rights law. They set out, with considerable precision, definitions of all the universally agreed human rights and fundamental freedoms of all human beings, and also define the obligations assumed by the state parties to these treaties in respect of these rights and freedoms (Sieghart, 1988).

When all the conventions and declarations relating to human rights are added up, it would be difficult to imagine the human rights of any individual or group of individuals remaining unprotected, especially, when some highly specialized conventions aimed at special groups of people or fugitives are added. Thus, one of the characteristic features of international human rights law is that a number of human rights are not rights of individuals, but collective rights, i.e. the rights of groups or peoples. This is clear so far as concerns the right of self determination which has been considered as one of the cardinal principles of human rights law (Hamid, 1994). Apart from this right, there is the right of an ethnic group or of a people to physical existence as such, a right which is implicit in the provisions of the Genocide Convention of December, 1948. Then also there is the right of certain groups or minorities to maintain their own identity. Thus article 27 of the Covenant on Civil and Political Rights provides

> “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language” (Human Rights: A compilation of International Instruments, 1988).

It is intriguing to notice that notwithstanding huge number of international instruments on human rights, the real focus has always been on the two covenants of 1966. But then again, these two covenants were/are interpreted from different angles.

Civil and political rights represent basically individual rights against the state and the western approach to human rights focus principally on implementation and enforcement of civil and political rights. These rights of an individual, according to the western approach, are inalienable and imprescriptibly rights impenetrable to state action. They are essential attributes of every human being by virtue of his being a human and they rise above the state and above all political organizations. They are rights and freedoms assertable against the state in order to protect the individual against state action which is in violation of certain basic norms accepted by the international community as essential to civilized existence. They are, as Justice Bhagwati puts it, individualistic rights (Rhona, 2007).

The western concept of human rights is based on the existence of political structures organized on the traditional democratic formula. This formula accepts political and ideological pluralism and multiparty systems. It presupposes electoral confronted claims tailored by non-discrimination of any kind; either personal or ideological (Steiner and Alston, 2000).

However, it was soon realized that unless social, economic and cultural rights are made effective, civil and political rights will have no meaning and they would remain simply lifeless formula without reality for the underprivileged segments of the society. This realisation came on account of the pressure generated by newly

independent developing countries inspired by the socialist states which laid great emphasis on realisation of social, economic and cultural rights (Kelsay and Twiss, 1994).

Today, it is universally accepted that both set of rights are vital to the existence of the democratic structure and they are interlinked with each other and one cannot coexist without the other. Setting aside the ideological differences, the fact remains that whenever human rights have been violated on any scale, the violations have entailed some kind of discrimination against the victims; whether on the grounds of their race, their religion, the color of their skin, their language, their national origin or some other factor which has made them unpopular with their rulers. This is why, both the covenants, in imposing obligations on their state parties in Article 2, add the identical words, taken directly from the UDHR:

> ".....without distinction of any kind, such as race, colour, sex, languages, religion, political or other opinion, national or social origin, property, birth or other status' (Kelsay and Twiss, 1994).

Thus protection of human rights, both individual and collective, came to be identified with the cardinal principle of non-discrimination (Manoj, 1999).

HUMAN DIGNITY: THE CORE THING

Prof. Sieghart very correctly observes that human rights law does not treat individuals as equal; on the contrary, it treats them as so different from one another as to make each of them unique; and for that very reason entitled to the equal respect that is due to every unique human being (Manoj, 1999). Consequently, in the changed world scenario, principle of non-discrimination fails to grasp the entire essence of human rights. Today, it is submitted that, the single principle that is able to reflect the philosophy and reality of human rights is the concept of preservation of "human dignity". Human rights today may precisely be construed as preservation of human dignity (Iyer, 1999).

It is suggested that for a better comprehension of human rights, a clear understanding of the concept of human dignity is indispensable. Further, the importance of the concept of human dignity is well exemplified by its inclusion, in the national and international basic legal texts. The UDHR mentions 'dignity' twice in its preamble and thrice in the articles (Arts. 1, 22, 23 of UDHR). Similarly, the ICESCR has also mentioned it twice in its preamble and in the article, (Art. 10, ICCPR) and the ICCPR mentions it twice in its preamble (Preamble, ICCPR).

Despite its heightened importance, a study of the literature in the field reveals an alarming lack of agreement concerning the meaning of the term "human dignity". The term appears to be not yet comprehensively understood by the interested quarters. The dictionary meaning of the term 'dignity' denotes a quality, an honour, a title, station or distinction, of honour (Black, Law Dictionary, 1989) but this meaning is not applicable for the great masses of mankind or when we talk of the average person's dignity. Hence, we need to look elsewhere for a purposeful meaning of human dignity.

Emphasizing the inviolability of human dignity, in Kesavananda vs. State of Kerala, (AIR, 1973) Sikri C. J. observed that the basic structure of the Indian Constitution is built on the basic foundation, i.e., the dignity and freedom of the individual which, cannot be destroyed by any form of amendment (AIR 1973). In Minerva Mills Ltd. vs. Union of India, (AIR, 1980) Chandrachud, CJ said that the dignity of the individual could be preserved only through the rights to liberty and equality. In Francis Coralie Mullin vs. Administrator, Union Territory of Delhi, (AIR, 1981) the court observed:

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In his dissent in Bachan Singh vs. State of Punjat, Bhagwati, J. turning to the Indian constitution found that it is a human document which respects the dignity of the individual and the worth of the human person and directs every organ of the state to strive for the fullest development of the personality of every individual. Undoubtedly . . . the entire thrust of the constitution is in the direction of development of the full potential of every citizen and the right to life along with basic human dignity is highly prized and cherished and torture and cruel or inhuman treatment or punishment which would be degrading and destructive of human dignity are constitutionally forbidden' (AIR, 1982).

In Neeraja Choudhury vs. State of M. P.. (AIR, 1984) Bhagwati, J. again reiterated:

> It is obvious that poverty is a curse inflicted on large masses of people by our malfunctioning socio-economic structure and it has the disastrous effect of corroding the soul and sapping the moral fibre of a human being by robbing him of all basic human dignity and destroying in him the higher values and the finer susceptibilities which go to make up this wonderful creation of God upon earth, namely man.

A close scrutiny of the above excerpts leads us to believe that, so as to be part of the world civilization, which we claim to be, human dignity should be understood at least in the following two senses (Mishra, 2002):

(i) The dignity of the individual can only be preserved if his rights to liberty and equality are not infringed.
(ii) The word dignity should be identified with the bare necessaries of life such as adequate nutrition, clothing, shelter and facilities for education. Accordingly, these

basic essentials go to make up a life of human dignity.

The birth of Bangladesh is associated with the pledge of the nation and the Republic to ensure human dignity. The proclamation of Independence, inter alia, declares the following as main objective of liberation struggle:

> "....in order to ensure for the people of Bangladesh equality, human dignity and social justice ....." It is heartening to note that the Constitution of Bangladesh is also based on the premise of preservation of human dignity (Art. II).

Dignity of a person cannot be guaranteed, for what is guaranteed may be withheld. Dignity, being inherent in a person as either assured or recognized or respected. Thus human dignity, being an inherent quality of every human person, is common, to all civilizations, and human rights interpreted in terms of respect for human dignity can bring together all nations and peoples transgressing all borders.

IMPEDIMENTS TO UNIVERSALIZATION OF HUMAN RIGHTS

In the aftermath of the UDHR and in a world divided into blocs on ideological basis, one could always hear a loud, clear and strong voice against full universalization of human rights. As a matter of fact, it had been the official approach that "the emergence of the principle of respect for basic human rights and freedoms of man and the emergence of other norms and standards of international law relating to human rights does not mean that these rights are regulated by modern international law directly and have ceased to be an internal affair of states, securing human rights remains and will continue to remain primarily an internal affair of states . . . The international protection of human rights, implemented chiefly by international legal means, is, although important, nevertheless, an auxiliary measure for securing these sights (Tunkin, 1986). One can very easily detect in this approach, a deliberate intention to undermine the 'universal' or 'international' aspects of human rights.

At a more fundamental level, the problem boils down to the dichotomy of monism and dualism in international law, and though the specific relationship between these two depends on a particular legal system, the tilt in favour of international law supremacy is now generally recognized. However, this problem was given excellent exposition by judge Tanaka in his dissenting opinion in the South West Africa Case, 1966 (Brownlie, 1981). In the words of Judge Tanaka:

> "The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. Then existence of human rights does not depend on the will of a state, neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or a tacit will of a state constitutes the essential element . . . A state or states are not capable of creating human rights by law or by convention, they can only confirm their existence and give them protection. The role of the state is no more than declaratory (Brownlie, 1981).

In the changed world scenario, even the protagonists of subordination of human rights protection to state jurisdiction have fundamentally shifted away from their position. Russian scholars Vreshchetin and Mullerson have written that human rights activity is one of the most important components of a comprehensive system of international security and that the role of the individuals is "primary. ("International Law in an Interdependent World, 28 Columbia Journal of Translational Law, 1990).
In particular they have stated that:

> Soviet legal scholarship has always emphasized that international human rights treaties obligate signatories to ensure the applicable rights and freedoms. However, until now, Soviet scholars have unjustifiably advocated that these documents do not represent rights directly enforceable by the individual. This approach has been excessively legalistic. A citizen of a state based on the rule of law has the right to demand that state agencies observe voluntarily adopted international obligations which directly affect the individual interests. Human Rights treaties establish state obligations to citizens, not just to other state parties to the international agreements (Sieghart, 1988).

This creates some apparent anomalies, for it is against the inherent interest of rulers to constrain their own powers over those whom they govern. Rulers" have few incentives to enact laws to protect their subjects from them (Sieghart, 1988). That is precisely why some constraints must ultimately be imposed on the state at some level superior (or at least external) to itself; and the only such level that we have is that of the international community. Consequently, the real problem of universalization of human rights through their implementation and enforcement must be carried by international organizations because in the majority of cases, an individual's rights are violated by his or her own state, and so he or she can hardly count upon that state for satisfaction (Sieghart, 1988).

For purposes of protection of human rights, some authors made an attempt to distinguish between rights having international nature and rights having internal/domestic nature, and on this basis it was submitted that all violations except involving the rights of the first category are essentially a problem of municipal law of every state concerned and therefore, state liability in case of violation can be determined only in accordance with the national laws of that particular state (Rahman, 1995).

Today, any national law of human rights must be shaped under direct influence of the international bill of rights and other human rights norms (Rosalyn, 1993). However, impediments to such universalization of human

rights enforcement have been correctly identified with two fundamental aspects of contemporary international law: its statism and the centrality of the sovereign state in the international legal system, and their consistency with the realities of the present day world has been justifiably contested. Enter human rights considerations, and the view of international law that regards state sovereignty as a function of political power, rather than justice, rather than the judgment that a government justly represents the people, becomes evidently unacceptable. Similarly, the notion of centrality of sovereign state reflects the understanding that despite the growing cast of characters on the international scene, the state continues to be the only actor in international law that really matters, is also not tenable in logical scrutiny. As alternatives to statism, it may be proposed that statehood in contemporary international relation should be defined in terms of observance of human rights by that entity, and only a state that represents the people is legitimate (only a state that respects human rights and the principle of democratic representation is legitimate) and therefore entitled to represent its citizens internationally. In a similar way, it is argued that the concept of centrality of the state has been shaken by different existing and emerging alternatives, like international civil society, (Szymon, 1989) international NGOs and other inter-national institutions and organizations. These emerging trends in international relations may be the remedy to the impediments to universalization of human rights posed by statism and centrality of the state. The main factor which induced such fundamental changes in the theory of international law is human rights (Clapham, 2005).

APPLICATION OF INTERNATIONAL HUMAN RIGHTS IN BANGLADESH

Not all the international human rights norms are dependent on treaties. The right to life, to freedom from torture, to freedom of religion, for example, is surely by now general principles of international law which do not owe their existence to treaties. The fact that Bangladesh has not ratified the convention against torture, for example, does not leave it free, as no-treaty party, to torture its citizens. Undoubtedly, participation in the international treaties is the most important building block for human rights (Clapham, 2005). This is because the treaties not only identify the rights, but provide for a variety of procedure and ancillary obligations to make the international commitment effective. Human Rights norms consist of both substantive rights and the means to guarantee them, and whatever might be the international dimensions of human rights, it need not be emphasized that the procedural guarantees as much as the substantive rights require implementation at the domestic level (Clapham, 2005). Generally, this is done through the guarantees provided in the state constitution.

In this respect, Bangladesh may well take pride in the existing legal framework for implementation of human rights. As one of the primary objectives of the emerging new state, the Proclamation of Independence of Bangladesh declared to ensure for the people of Bangladesh equality, human dignity, and social justice (Clapham, 2005). The same principle is further reiterated in article 11 of the constitution of Bangladesh:

> The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed and in which effective participation by the people through their elected representations in administration at all levels shall be ensured. This article guarantees those rights which we have identified in preceding sections as instituting the edifice of human rights jurisprudence, namely, human dignity, participatory democracy and truly representative character of government. In addition to this, the constitution contains fundamental principles of state policy consisting basically the social, economic and cultural rights (Art 8-25) and a separate chapter on fundamental rights consisting mainly of the civil and political rights of the citizens (Art. 26-41).

If these constitutional provisions are interpreted in the light of article 7 (2) which declare that:

> This constitution is, as the solemn expression of the will of the people the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void', it appears that a sound basis for human rights protection and enforcement exists in the country. The reality, however, tells a different story.

In our recent past history, on occasions of extra constitutional takeover of the state power, our judges have been haunted by the 'Ghost of Kelsen and more often than not, legitimized the extra- constitutional regime at the cost of the supremacy of the constitution (Kamal, 1994). In state vs. Haji Joynal Abedin, the Appellate Division of the Supreme Court observed, inter alia:

> The moment the country is put under martial law, the above noted constitutional provision along with other civil laws of the country loses its superior position. Martial Law courts being creatures either of the proclamation or Martial Law Regulation, have the authority to try any offence made triable by such courts' (32 DLR). Even the dissenting judge could go as far as to mention that the Constitution and the Martial Law are co-extensive and that the Constitution is not subordinate to the Martial Law. With this interpretation of the constitution, human rights guarantees remain a mirage.

JUDICIAL ACTIVISM

The judges can and must so interpret the constitutional guarantees as to expand their meaning and content and widen their reach and ambit (Tunkin, 1986). And the efforts of our highest judiciary, in this respect, has not been totally insignificant. Today, the old concept of locus standi is dying its death, though natural but not without aid from the Supreme Court. In Kazi Mukhlesur Rahman vs. Bangladesh (26 DLR, 44) the Supreme Court

observed, inter alia:

> It appears to us that the question of locus standi does not involve the court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the court exercises upon due consideration of the facts and circumstances of each case (emphasis added-M. R.).

In each case, therefore, it is for the petitioner to establish his competence to claim a hearing and to prevail upon the court to exercise the discretion in his favour. It was the first attempt to legitimize public interest litigation in the sub-continent (Rahman, 1995).

Article 32 of the Bangladesh constitution establishes that "No person shall be deprived of life or personal liberty saves in accordance with Law. But, what, if the law is violative of the human rights? Today, through judicial interpretation in Maneka Gandhi's (1978,1 SCC 248) case we know that it is not sufficient merely to have a law in order to authorize constitutional deprivation of life and liberty but such law must prescribe a procedure and such procedure must be reasonable, fair and just. Thus, an active judiciary can play a crucial role in advancement of human rights provided the judges are committed to the cause of human rights and are not timorous souls and they have the requisite craftsmanship to mould and shape the provisions of the constitution and the law so as to bring them into accord with the international human rights norms (Rahman, 1995).

In a series of landmark cases, the courts in Bangladesh have established a silver lining of hope by progressive interpretations of the statutory provisions for an expanded protection of human rights. While Nazrul Islam's case (Re Nazrul Islam, 1993) and Alam Ara Hoq vs. Govt. of Bangladesh (42 DLR 98) expanded the horizon of political righs, Nelly Zaman vs. Ghiyasuddin, (34 DLR 221) Abu Bakar Siddiq vs. AB Siddiq, (38 DLR 108) Hasina Ahmed vs. Syed Abul Faza (32 DLR 210) and Hefzur Rahman vs. Shamsunnahar Begum & others (47 DLR 54) etc. provided a few examples of enforcement of personal laws in hitherto unknown dimensions.

PARTICIPATORY DEMOCRACY

No human rights can be effectively enforced without the participation of the people who are the victims of violations of human rights. If human rights are to prove meaningful to those who most need them, it is vital to adopt a participatory approach for the development of human rights and their enforcement. This is also the message that flows from article 7 of the constitution read along with article 11. Article 7 is the guiding star of the constitution and the yardstick to ascertain the legitimacy of the government as well as to determine whether a democracy is a truly democratic one. Few governments are universally popular with their own citizens, but most citizens will accept even an unpopular government; provided they regard it as legitimate.

Today, democracy is essentially a combination of governmental system and community attitudes which is possessed and sustained by its people rather than by a ruler or rulers. A democracy will be maintained and improved only if its people in the various areas of activity do what is necessary to maintain or improve it. It subsists and advances if the attitudes and capacities of citizens in those areas impel them of their own initiative to do the things that will preserve and enhance the democracy. A democracy has no entrenched ruler or rulers to tell them to do this or how to do it'.

In such a democratic environment, it is the human rights performance of a government which provides one of the most important criteria for its legitimacy. And if that legitimacy begins to become undermined, it becomes transferred to the government's opponents; as their claim to legitimacy increases in the measure that the government's diminishes it also becomes increasingly legitimate for others outside the country to support them, until the offending government is finally overthrown (Rahman, 1995). This is also the essence of UDHR, which in Article 21(3) states:

> The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures (Brownlie, 1978). Consequently, non-existence of a mechanism to ensure free and fair election coupled with distrust of the people in the electoral process because of its non-transparency may be construed as elements reflecting the eroding legitimacy of a government.

CONCLUSION

Under the new international order which now reigns in the field of human rights, the domestic human rights record of every country is already the legitimate concern of the whole of the international community. But what's about the 'disparities in a society like Bangladesh? With slight adaptations Ambedkar's remarks made in the Indian Constituent Assembly almost half a century ago, may sound applicable to Bangladesh:

> "We must begin by acknowledging the fact that there is a complete absence of two things in our society. One of these is equality. How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we shall do so by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those suffering from inequality will blow up the structure of political democracy which we so painstakingly built up (Dhavan, 1994).

It requires more emphasis on the socio-economic development of the state, which process itself is a transnational one. Thus international development must accompany international human rights and vice-versa. Indeed, the realization of our collective human right to

development can provide new and much needed avenues for national and regional human rights activism and international human right cooperation and only then, the perception of human rights as a bridge across borders would become a reality (Dhavan, 1994).

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