

FROM HUMAN RIGHTS TO HUMAN DIGNITY – AN UNENDING STORY

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The story of Human Rights is an unending story of human kinds search for absolute values and its failure. The twenty five hundred years of struggle for Human Rights can be summed up as follows:

From exploitation to exploration

From exploration to proclamation

From proclamation to Declaration

From declaration to protection

From protection to perfection

The expression human rights is a usage that emerged during the post second world war period from international Charters and Conventions. The first documentary use of the expression 'human rights' is found in the Charter of the United Nations, which was adopted after the Second World War at San Francisco on June 25, 1945. The Preamble of this Charter declared its object to reaffirm faith in 'fundamental human rights'. It was not a binding instrument. The first concrete step in formulation of human rights is the UN Declaration of Human Rights, which was proclaimed in 1948 as a common standard of achievement for all peoples and all nations.

Broadly this document deals with a wide range of civil, political, social, economic, and cultural rights. The Declaration is now accompanied by the two international covenants (The Covenant on Civil and Political Rights, The Covenant on Economic, Social and Cultural Rights)

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of 1966, which in dealing with civil and political rights and with economic, social, and cultural rights, in a sense linked the opposing ideologies in the world over. The two covenants

Two covenants came into force in December 1976, after requisite number of members States (35) ratified them. These covenants are legally binding on all member States who ratified them. In 1950 a group of States who were members of the Council of Europe adopted a European Convention for the Protection of Human Rights. It is binding on 18 States which ratified it. It came into force in 1953. The Convention also set up a European Court of Human Rights in 1959, to determine disputes arising from the enforcement of the Convention and its decisions involve interpretation of the text of Convention and pronounced in the form of legal judgments. The European Court contributed towards affirming and implementing Human Rights in a large variety of cases including; Detention and Pre-detention trial; sex discrimination; Abolition of Capital Punishment; Fair Trial; Freedom of Expression, Freedom of Association; Against degrading treatment; Property Rights; Respect for family life; Respect for private life; Right to life and many more areas of its application. The UK has changed its 11 primary legislations in response to adverse findings of Courts while implementing the Human Rights under the European Convention.

In 1969 the Organization of American States adopted the Convention on Human Rights, a legally binding convention. It also has set up Inter-American Commission on Human Rights. The Heads of the Governments of Commonwealth Countries met at Singapore in January 1971 and declared certain human rights fighting against racial prejudice, colonial domination and racial oppression. The Lusaka Declaration 1979, emerging from meeting of Commonwealth Heads of Government rejected 'apartheid' in South Africa.

The 1948 Declaration and the 1966 covenants, according to Sieghart, (1986), may be said to be the core instruments of the international human rights code, which demonstrates a clear bias in favour of the kind of society that displays a specific coherent set of civilized values;

tolerance of diversity; plurality of belief, ideas, and culture; reasonableness and rationality; the peaceable resolution of conflicts under the rule of law; and above all, respect for the dignity, autonomy, and integrity of every single one of its individual members.

Human Rights as we understand today, are the rights, which apply to every individual exclusively from the fact of one's being human irrespective of nationality, sex, marital or material status, occupation or any particular social or cultural characteristics. The evolution of human rights can be divided into four stages namely, the first generation rights of civil and political rights, the second generation of social and economic rights, the third generation of solidarity rights as demanded by various groups on the basis of age, ability, community, gender, etc. and the fourth generation rights are the rights of self-determination demanded by indigenous populations or specific groups.

A. First generation rights

By virtue of being a member of the human family, the persons should have certain minimum rights. They are generally available and enforceable against the state or any other public authority. There exist certain inherent, inalienable, immutable and unavoidable freedoms and rights of man. This recognition is the basis of the origin of Fundamental Rights. The civil and political rights also have evolved out of this view.

B. Second generation rights

Then the scope of human rights gradually expanded to make living a better affair. As the human rights are derived from the inherent dignity of human person, they are expected to cover every aspect of life and not just a small number of guaranteed freedoms against the state. These civil and political rights are undoubtedly precious and indispensable but they are not within the reach of the poor, downtrodden and economically backward classes of the people who constitute the majority of the population in the developing countries. It is only through the realization of social and economic rights the civil and political rights can become meaningful to the large masses of people. These are regarded as second generation rights.

C. Third generation rights

Third generation rights include right to self-determination, right against apartheid, right to environment, right to immunity from nuclear

proliferation, immunity against genocide, right to peace and the recent declarations of rights of people to development.

D. Fourth generation rights

The Fourth generation rights are the rights of self-determination demanded by indigenous populations.

One thousand years of history of human rights development has centered on the stage of Sovereign States where governments and citizens pulled and pushed each other. What we need at this juncture is the re-institutionalization of human rights protection to adopt to the more and more differentiated and complicated post modern social frame work, which includes identification of judicially accountable objects of human rights, recognition and facilitation of access right to social net work of all kind and strengthening of international Co-operation on this subject.

The human rights as an expression refers to a wide range of rights some of them directly guaranteed by the Constitution of India, some of them inferred through the elaboration of legal and constitutional provisions by the higher courts, and some exist only as an ambition, dream, ideal or concept.

They include

- (a) fundamental rights pertaining to life and liberty, which are civic, political and religious rights,
- (b) the right of children against abuse of their tender age in hazardous employment
- (c) the right against untouchability and forced labour,
- (d) protection to minorities and socially disadvantaged sections like dalits, women and tribals,
- (e) the rights in criminal law that ensure protection against forcible extraction of confessions and a fair and reasonable procedure for the investigation and trial of criminal offences,
- (f) the rights of workers elaborated in labour and industrial legislation,
- (g) the rights of women to maintenance and protection from marital harassment and physical abuse at the hands of men;
- (h) the rights of dalits and adivasis against mental and physical abuse by dominant sections,
- (i) the right to a clean and pollution-free environment;

The list is unending. Rights do emerge out of life, for, to live is a right and life includes innumerable varieties of aspects required for living. Some of these rights are guaranteed under Part III of the Indian Constitution. The rights recognized and guaranteed by the Constitution clothes them with constitutional status. Some of them are guaranteed by different law and such rights are legal rights. Most of them or all of them are abused, violated, ignored or infringed upon by those with power, muscle, money and influence.

The rights, which are required for ordinary living of human beings, are the human rights. Human rights include natural rights, and legally or constitutionally recognized rights.

Personal and political rights form important parts of human rights. Certain personal human rights are basic like life and personal liberty, which include-

1. Right to freedom from detention without trial,
2. Right to freedom from torture,
3. Right to freedom from extra-judicial execution, and
4. Right to subsistence.

It is the experience of the people were prosecuted and met with repression from different regimes. A wave of killing and disappearance followed by large numbers of people being arbitrarily detained or tortured by paramilitary forces and death squads, which the authority always uses in any political struggle. Every political oppression results in en mass violation of human rights. Thus all those fundamental rights, which are essential for life and existence of civil society, emanate from human rights. As the civilized society or the State recognizes them they get positivised and thus become enforceable fundamental Rights enshrined in Higher law i.e. constitutional law and the source of such, as Monists believe, are the International Instruments drawing their force from United Nations Charter.

Commentators such as Weissbrodt and Vasak state unequivocally that human rights have become a universal ideology. A pertinent question in this regard is whether the Chinese or Indian or Hindu concept of human rights the same as Western, Islamic or African concepts. The question whether economic, social and cultural rights are true rights or simply aspirational targets. In case of latter the government is under no obligation to accord those rights through a programme of progressive implementation.

Human Rights represent a powerful discourse that seeks to overcome divisiveness and sectarianism and to unite people of different cultural and

religious traditions in a single movement asserting human values and the universality of humanity, at a time when such values are seen to be under threat from the forces of economic globalization. The idea of human rights, by its very appeal to universally applicable ideas of the values of humanity, seems to resonate across cultures and traditions and represents an important rallying cry for those seeking to bring about a more just, peaceful and sustainable world. The idea of human rights readily endorsed by people from many different cultural and ideological backgrounds and it is used rhetorically in support of a large number of different and sometimes conflicting causes. Because of its strong appeal and its rhetorical power, it is often used loosely and can have different meanings in different contexts.

The idea of human rights is largely a product of Enlightenment thinking and is therefore inevitably contextualised within an essentially western and modernistic frame-work. This has led to the criticism that human rights thinking and rhetoric are simply another manifestation of colonialist western domination, and to the suggestion that the concept of human rights should not be used. While it is true that much of the contemporary understanding of human rights has been shaped by western Enlightenment thinking, the same can be said of many other concepts that are frequently used in political debate, such as democracy, justice, freedom, equality and human dignity. To stop using such words simply because of their western enlightenment associations would be to deny their power and importance across cultures and would lead to sterile and limited political debate. The task therefore should be to loosen them from the shackles of western modernism and to reconstruct them in more dynamic, inclusive and cross cultural terms. Sometimes human rights become nothing more than a new language for consumerism and self indulgence. The other criticism is that claims of human rights can conflict with each other and therefore one is left with the problem of reconciling competing claims. The universality of human rights must not be confused with a static and unchangeable notion of human rights. Human rights must be seen as constructed, rather than objectively existing, the important thing is the process of dialogue, discussion and exchange that seeks to articulate such universal values.

I. HUMAN RIGHTS AND GLOBALISATION

The current experience of globalization is very one sided. It is to do largely with economics and in fact is little more than the imposition on a global scale of the kind of economic fundamentalism that has dominated western economic policies since the early 1980s. The identification of this economic fundamentalism behind the current experience of globalization is critically important. Much of the reaction against globalization, including the activism of many consumer groups, human rights groups and other

internationalist bodies, has been a reaction not so much against globalization that brings the world closer together, but against the economic fundamentalist form of globalization that has so dominated the international agenda for the last two decades. The idea of human rights has been an important rallying cry for those who oppose the current processes of economic globalization. Human rights are commonly regarded as universal, and hence represent an alternative formulation of a universal ideal of humanity that rejects economic fundamentalism and asserts that human values, some idea of a common shared humanity and a construction of global citizenship (implying both rights and responsibilities) should occupy the core of a "new world order" brought about by new communications and information technologies. This resonates with the idea of "globalization from below" as distinguished from the globalization as currently experienced which is characterised as "Globalization from above" which is in the interests of rich and powerful and with little or no democratic accountability. The field of human rights is fraught with conceptual ambiguity: it raises some of the most fundamental questions of social and political philosophy.

In contemporary society, fundamental and human rights are directed not only against state action, but also against the intrusion of other expansive social systems, such as economy, mass media and religion. Historical and sociological processes make human rights emerge as a central feature of modern society. Fundamental freedoms and human rights are not merely to be considered transhistorically but to be related to the specific and dominant structure of modern society. By institutionalising fundamental freedoms and human rights, the modern society protects its own structure against self-destructive tendencies towards dedifferentiation. At the same time human rights protect the fragile position of the individual within societies like modern India. Without institutional mechanisms that enable and fortify the co-existence of highly individualised persons and autonomous function systems, the risk of regression or dedifferentiation is real. Human Rights protect and strengthen modern individuality, which is no longer constituted by "total inclusion", in a family, corporation or state. Human rights constitute a socio-economic institution which protects functional differentiation against its self-destructive tendencies thus guaranteeing a decent life and equality of access to all state and social institutions.

Structural adjustment and policies implemented in India since 1991, have had far reaching consequences to the basic human rights of the poor in India. Structural adjustment policies essentially implied liberalising the economy in favour of free market and free trade. It has involved restructuring in the form of shift from an economic organisation dominated by Private sector towards the primacy of the Private sector. In the production sector the structural adjustment policies implied a movement from capital goods production to that of consumer goods. In the process of structural

adjustment and globalisation large scale privatization of public sector took place resulting in casualisation of employment and increase in the incidence of unemployment.

The realisation and the protection of human rights will not be achieved without a struggle. Despite an apparent consensus on the importance of human rights (who would argue against them?), it is nevertheless true that there are powerful forces with an interest in not following a human rights agenda too closely, and indeed considerable profits are being made because of the denial or violation of the human rights of large numbers of people, particularly in poorer countries. It is not simply a case of moral suasion. The history of human rights has been a struggle, often against the odds, by people who have stood firmly and courageously on the side of humanity and dared to resist the forces of oppression and domination. The struggle, inevitably, will continue. Human rights are not simply defined, they have to be struggled for and are hard won. Then once won, there is a continuing struggle to protect them. The human rights struggle is one that, in all probability, will never end.

A human rights discourse is, by nature, a discourse of hope. It concentrates not only on what is wrong (characteristic of so much social and political analysis) but also articulates a vision of what is right, of where we can be heading, of the human ideal. We may never get there, but that should not diminish the strength of the vision. Such a discourse of hope is significantly lacking in the social and political discourse at the dawn of the twenty-first century. The only optimistic vision in the general public domain seems to be the naïve and simplistic 'get rich quick' consumerist ideology of the free market, which has been shown to be both fundamentally inequitable and fatally unsustainable. Whether a discourse of human rights can provide a more tenable and sustainable hope remains to be seen, but the promise is certainly there. Law profession is, arguably, the core human rights profession, given its value base and its encompassing of all four generations of human rights within its practice.

II. DIMINISHING STATES

An activist state is one which takes interest in all forms of the activities of their subjects sometimes leading to undue interference. Presently most of the countries are very conscious of the crises of 'ungovernability'. To adopt to the new structure of Societies governments have chosen to delegalise and deregulate and often transfer most of the State's dominant sphere to the private. The old sovereign States shrunk largely in the process of regionalisation as well as globalization. These in total give a picture of diminishing state. What we should learn from this unanticipated paradigm shift at the

beginning of the millennium, especially developing countries, endeavouring to achieve better levels of economic and political living without repeating the whole dialectic process?

While constitution is the process by which the governmental action is effectively restrained and is understood as the process of the function of which it is not only to organise but to restrain, Constitutionalism refers to limits on majority decisions, more specifically to limits that are in some sense self-imposed. Constitutionalism is an end and means. It is both value-free and value-loaded. It has both normative and empirical dimensions.

Because of globalization, besides the increase of massive Trans-border exchange and interactive relations in economic, cultural and information exchange processes including Cross-border transmission of pollutants, more and more non-governmental factors are operating at a transnational level quite independently of sovereign states. This is followed by the progressive loss of power of those states in the process of becoming democratic. Decisions involving states future are taken outside governmental institutions which ultimately lead to national deregulation and Privatization. The interaction of the outside and inside elements accelerates the diminishing of State.

III. CHALLENGE TO BASIC HUMAN RIGHTS

Last century witnessed genocide and atrocities. The recognition of humanity is never fully guaranteed. The fundamental rights are not just constitutionally 'proclaimed' but also 'protected'. The normative context of some liberty-rights, going beyond the 'subjective' right includes institutional guarantee. The constitutional rights can be jeopardised if proclaimed rights like dignified existence, Medicare, Education, livable environment etc., are not properly met or resources adequately distributed.

The thesis of 'more market, less state' and the anti-thesis of the Constitutional call for Social Solidarity and Welfare seem to merge into a synthesis. The object of fundamental rights should expand to all those who share the State's responsibility either this way or that way.

The Government is small but clever. It gives up costly micro social intervention, but in its place promotes macro-social stability and progress. Its success relies very much on the experience of regulation, knowing exactly when and where it should abstain from intervention. Communities must be strong and willing to share States responsibility. In short, this synthesis pre-supposes practising experience of both liberal and social democracy. If

the State has never been strong further shrinkage of Government will only make it weaker.

Emerging human rights problems are becoming big. The term human rights is vague and ill defined. Human Rights are those minimal rights which every individual should have by virtue of his being 'a member of human family'. The desirability of human rights overlooks the fact that rights are not fundamental by nature. It is relative. What appears fundamental in one historical epoch is not so in another time and place. Kant's prophetic concept of History and Mainers 'status to contract' emphasise transformation of ideas from society to individual. From Locke onwards the doctrine of natural rights presupposed an individualist concept of society and, therefore, of the state. This is in opposition to the much more solid and ancient concept of society as an organic whole more important than the constituent part (GESTALT).

IV. INTERNATIONALISATION OF HUMAN RIGHTS

Human Rights are not invented today. Sophocles wrote about them some 2500 years ago when he had Antigone declare that there were ethical laws higher than the laws of Theban Kings. P.C. Chang, who helped draft the Universal Declaration, pointed out that Confucius articulated them in ancient China. The belief that we must respect our neighbours as we would respect ourselves resides at the core of all the major religious faiths of the world. These values in the Universal Declaration are not constructed but they are revealed.

The seven provisions relating to Human Rights became a central feature of the United Nations Charter. In an authoritative interpretation of the UN Charter, U. Thant said it was the Magna Carta of mankind. NGOs played a crucial role in getting the Human Rights incorporated in the UN Charter. "Human Rights movement is the result of world war II and 50 million deaths led to UN Commission on Human Rights headed by Eleanor Roosevelt, to draft the Universal Declaration. Within ten days they did it. With the end of 20th century began the active involvement of NGOs and in every aspect of Human Rights it has grown extraordinarily. Some are risking their lives and livelihood. Still others are working to influence international financial institutions, limit child labour, promote development, ban landmines and eliminate trafficking in women and girls. In 1948, when the Universal Declaration was adopted vast number of people believed in autocratic ideologies; colonialism was prevalent, racism endemic and sexism barely challenged. That all these evils are now questioned by increasing numbers of people around the world is testimony as to how far we all have come.

The European Court of Human Rights established under European convention on Human Rights 1953, played an important role during 60's and 70's. The Court has become the constitutional Court of Europe with the collapse of the Soviet Union. Vienna Declaration 14-25 June, 1993 succeeded for the first time in the recognition and reaffirmation of the interdependence between democracy, development and human rights and human rights and the universality, indivisibility and interdependence of human rights.

V. LIMITATIONS OF LIBERAL DEMOCRACY

It is within the discourse on rights, that responsibility of the individuals towards other individuals and perhaps towards the State are a new challenge. With the universal proclamation of human rights in the 20th century, the evolution of idea of human rights seems to have been completed. Human rights have evolved into universally applicable norms, the self evident status of human rights seems to have come to an end. The belief that human beings not only have human rights but also duties and responsibilities deserve more attention from scholars.

Constitutionalism or Rule of Law and democracy are the central pillars of Government. Liberalism has become the triumphant ideology which is no longer challenged by rival ideologies. Most of the former communist countries have adopted constitutions based on democracy and rule of law. A consequent increasing globalization coupled with decreasing attention to the national sovereign State has taken place. Later half of last century demonstrated universal acceptance of Constitutionalism and democracy. Constitutional law is based on theories of rights. The declaration of human responsibilities focuses attention on alternative moral perspectives which may lead to a reconsideration of the place of duties and responsibilities in constitutional law. While liberalism stresses the idea of individual liberty and entailing rights, Communitarians underline the importance of community, solidarity and responsibility. Communitarians are a group of ethical scholars, social philosophers and social scientists who came together in Washington DC in 1990 for the first time.

VI. NON-STATE ACTORS AND TRANSNATIONAL NETWORKS

The shape, direction and nature of state responses to human rights problems have dramatically altered. Non-state actors and transnational networks now play an important role in the promotion and protection of human rights in local, regional and international arenas. The increase in non-state participants (Northern Alliance in Afghanistan) and the emergence of transnational civil society have opened a new domain within which the rights

enumerated in the Universal Declaration and other International Human Rights documents may be realized.

Transnational Civil Society: The Fifth Estate:

Transnational Civil Society refers to 'a set of interactions among an imagined community to shape collective life that are not confined to the territorial and institutional spaces of state'. Law plays a central role in civil society which cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government. Legal associations play a central role in the development of civil society by supporting rule of law mechanisms that permit the independent existence of non-governmental entities and by encouraging the development of institutions that foster their growth. A strong civil society also demands and oversees legal constraints on state power and the accountability of state actors. The words 'civil society' means the space of uncovered human association and also the set of relational networks-formed for the sake of family, faith, interest and ideology- that fill this space. Ideally the associational life of civil society is its capacity simultaneously to resist subordination to state authority and to demand inclusion into state political structures. Human Rights advocates argue that civil society creates a 'setting of settings'. The risk of civil society presents a paradox to human rights advocates. On the other hand, civil society can promote human rights norms and raise the concerns of unheard voices, including those of people oppressed through violation of core principles of international human rights. The inclusive and pluralistic nature of associational groups promotes what is seen as the 'emerging right of democratic governance. Some view the very existence of a robust civil society as a pre-condition to democratic governance and to the realization of human rights. On the other hand, transnational civil societies may undermine this norm of democratic governance since voluntary associations are wholly unaccountable to any sovereign, and thus, may act in a manner contrary to democratic principles.

VII. TERRORISM GLOBALISED

In the context of globalization, the status of 'diminishing state' became glaringly visible as terrorism grew its tentacles beyond borders, cutting across all the political and geographical limitations. Besides the symbols of sovereignty like WTC towers in United States on September 11, 2001 and the Parliament of India on December 13, the human rights are gullible victims of this terrorism of international dimensions. The role of non-state entities is obvious in growing influence of terrorism, besides sponsoring by some states in Asia. Whether the transnational civil society is united or not, the transnational underworld had developed the strong unison roots

challenging the state-hood anywhere or everywhere. If not, the superpowers (US and UK) would have never been in an international conflict with a non-state terrorist power (Osama Bin Laden), sheltered under a meek Government (Taliban). The entire equilibrium of inter-state-conflict or possibility of application of humanitarian law or any other international convention had been upset with this new equation, raising fundamental questions like, how does Muttawakil, surrendered foreign minister of fallen Taliban regime, would be treated- is he a prisoner of war, or criminal wanted by US?

This new development has changed the very concept of human rights and advocacy for livable conditions for human beings. With states getting diminished in their hold and status, and non emergence of strongly matching international regulatory regime, the 'Human Responsibilities (in contrast to Human Rights) concept' assumes greater significance and necessitates much stronger transnational civil society as the "Fifth Estate". International Terrorism is the result of unprecedented unity of non-state entities with homogenous society with common aim of destruction of human rights and humanity, and thus poses a very serious challenge to fifth estate to be more responsible in protecting its own existence.

Whether supported by underworld, or cross-border state sponsors or intra-state ideological sporadic groups, the terrorism poses a grave threat to human rights as a whole, and humanity as such. If the world community cannot visualise the need of duty to protect rights, the victims are themselves. The effort to infuse the sensitivity of duties by inserting Article 51-A in Indian Constitution, though out of democratic crisis created by an autocratic rule, was gradually diffused by over-enthusiastic judicial interpretations of religious norms giving supremacy over proclaimed national responsibilities. This again emphasizes the need for emancipation of duty bound fifth estate. At least now, the Charter of Human Responsibilities has to synchronize with the fifty four year old Declaration of Human Rights, through Fifth Estate.

Human Rights can be divided into two categories viz. subjective and institutional. (See generally Costas Douzinas - The end of human rights). Institutional human rights serve the self-interest of sovereign states and help constitute the legal subject as both free and subjected to law. They can produce just results but tend to serve the status quo rather than the claimants of right - such as refugees and stateless persons - whose very existence puts the status quo in question; thus, human rights are always in danger of becoming merely rights that is, transfigured by politics into a liberal conception of legalised rights. Subjective human rights, however, are the peoples utopian hope; they are a standard of right outside of institutions and

they fuel the political experience of freedom, the expression of the battle to free individuals from external constraints and allow their self-realisation.

At the time of their birth, human rights, were a transcendent ground of critique against the oppressive and commonsensical. It is a historic shift from transcendence to immanence or in less philosophical terms from Natural Law's external standards to positivism's self founding man-made laws. Natural law was replaced by liberalism. The impact of this shift can be discerned in the move from the view that law as a mode of living together to law as a set of rules posited by the state.

The weighty human rights paradox is that the state is set up in order to guarantee human rights and yet often the idea of 'human rights' is called upon to justify resistance to or request from that very state. Human rights function as a telos of sorts, a possibility of a world of justice and an idea of absolute good.

Douzinas emphasises that Utopia is impossible because it is an ideal and it is necessary because it is an ideal. Debates from Hobbes and Aristotle/Aquinas to Hart and Fuller or Rawls and Dworkin, show that the conflict between origins and ends has never ceased to be a contentious one in theories of justice. Liberal theories of rights and of a law to which its subjects consent at its origin have largely replaced natural law and its telos in the modern world. Natural right was written out of law because of its critical potential.

Neither natural law - even a reformulated 'radical natural law' nor liberal theory can make human rights, a transcendent principle capable of both guiding behaviour and changing over time to accommodate the evolving demands of justice. Emmanuel Levinas, the contemporary (perhaps post-modern) philosopher par excellence of transcendence, would be the first to tell us that transcendence, if it is to have any meaning, requires a positive principle, something with content, in order that content be the measure of the injustice it results. That is what is at stake in transcendent standards, and they become monoliths just as easily as can liberal ideologies and positivist systems. Subjective human rights must be saved from their destruction by institutional use.

Transcendence in the form of 'subjective human rights' must have some content if it is to have any meaning. Yet the debates between origins and ends will continue. Natural law ideas have never completely left the scene of law under positivism nor has transcendence disappeared. If Natural law, transcendence, and teleology were somehow to regain hegemonic power liberalism, immanence, and concern with law's origin would not disappear either. The discourse of rights has lost its earlier coherence and

universalism. The post modern writers like Jill Stauffer somehow do not agree with Douzinas, when he emphasises that "reason and human rights are universal, they are supposed to transcend geographical and historical differences" since post modernism does not believe in the universality of anything.

The Universal Declaration is intended as a minimum standard which should find universal acceptance in order to prevent the expected "clash of cultures and civilizations". One of the consequences of rights being the point of departure for constitutional law is that phenomenon like social rights (which are in fact duties or responsibilities of the states) have been drafted as individual claims in national constitutions despite their non-justiciability (e.g. Directive Principles and Fundamental Rights). Hardly two decades later, the Universal declaration gained the status of an obligatory (albeit non-justiciable) document for all the countries of the world.

Brian Berry has ably demonstrated why Rawls theory of "justice as mutual advantage", being inadequate to consider the intergenerational question, must be expanded to include the notion of "Justice as Impartiality". Prof. Amartya Sen acknowledges the influence of Theory of Justice had extended by the early 1980's, beyond the realm of political philosophy to that of welfare economics. Rawls' conception of justice should include the internal justice of the family and the individual, assuring adequate protection of Human Rights, in his wider conception of moral development. The irony of the Rawlsian legacy is that the difference principle and the pragmatic conception of 'overlapping consensus' aroused maximum interest in countries where social welfare policies and human rights protection have been the most developed - whereas in developing countries like India this aspect of Rawls' early work has been virtually ignored.

Prof. Amartya Sen emphasizes on Content and viability for the assertion of Human Rights. He further says:

1. Ethical assertion is about the critical importance of certain freedom: freedom from (torture) and correspondingly about need to accept some social obligation to promote or safeguard these freedoms.
2. Open impartiality – open and informed scrutiny.

Viability in impartial reasoning is central to the vindication of Human Rights even if such reasoning is ambiguous or dissonant as in the case of American declaration, French Declaration, Universal Declaration of Human Rights. The focus is on fresh legislation.

The acceptance of a class of human rights will still leave room for further discussion, disputation and argument that is indeed that nature.

discipline. The validity is ultimately dependent on the presumption of the claims survivability in unobstructed discussion. It is extremely important, as Prof. Sen puts to understand this connection between human rights and public reasoning especially in relation to demands of objectivity.

'Je Suis Charlie' and 'Je Suis Perumal Murugan' are two recent instances where freedom of expression as a human rights was put to test and the authors were punished for exercising the same. Arguments can be advanced from both sides but to balance them is a difficult task indeed.

Freedom is important; Happiness is important; Autonomy is important are all ethical assertions. Assessment of viability depends on public scrutiny – validation of ethical claims from other types –utilitarian, Rawlsian or Nozickian. People speak of moral rights while advocating their incorporation in a legal system. Self-legislative will of Kant comes as justification for such limitation. Uncurbed critical scrutiny is essential for dismissal as well as for justification. Individual voice vs. social choice of Prof. Sen and Martha Nussbaum's – capabilities approach assured significance in modern context. Hindu philosophy of karma denies *defacto* recognition of Human Rights.

Sophocle's Antigone and Confucius principle of neighbour as Human Rights were conceived 2500 years ago and were later articulated by subsequent philosophers.

Martha Nussbaum's approach addressed to Constitution makers offers a most versatile conception of constitutionalism. She offers us a rather thick (as compared with the thin Rawlsian) version of the original position from which the basic structure of the Constitution stands derived. Constitutions ought to deliver (...) the social basics of these capabilities (Women and Human Development). Martha insists that constitution ought to espouse capabilities as a "Central goal" such that citizens stand endowed with choice whether to pursue the relevant function or not to pursue it. Constitutional design ought to respect "citizen's power of choice" and traditional, civil and political liberties. The principle of 'Multiple realizability' of Central human capabilities is exposed to a whole variety of individual tastes, local circumstances and traditions. Implementation of the capabilities principles must be left, for the most part, to the internal politics of the nation. Nussbaum further states that International agencies and other governments are justified in using persuasion - and in grave cases of economic and political sanctions to promote such, developments which must presuppose a theory of global justice.

The twin ideas viz. multiple realizability and constraints on implementation combined together justify constitutional arrangements that, for example,

employ all kinds of trade-offs between civil and political rights on the one hand and social and economic rights on the other hand. Prof Upendra Baxi maintains that the trade off that the Indian Constitution sculpts by its distinction in Part III (enshrining fundamental rights enforceable by courts) and part IV (the Directive Principles of State Policy that cast obligations, not so enforceable, on the legislature and the executive) violates, centrally, the list of central human capabilities. While we may all applaud with Nussbaum the rare examples of public policy that have developed political action to fulfil some Directive Principles, this is beside the point; the point being the justification of constitutional design that legitimates such trade offs in the first place. The multiple realizability principle does not navigate Constitution making to any safe harbour; but obviously, what Nussbaum has in view is more substantive than a wish list.

Constitutions, on Martha Nussbaum's approach, are all about the delivery of basic human capabilities; if so, the two principles she advances give away far too much, despite the well-meant insistence that the 'political implementation must remain to a large extent the job of the citizens. The 'irreducible plurality' of her list is a justified response to 'worries about universalism. But when this principle addresses the goal of limiting trade-offs among capabilities, its runaway generality becomes problematic. The constitution is the process by which the governmental action is effectively restrained and is understood as the process of the function of which it is not only to organize but to restrain.

Indian experience can be viewed as a conflict resulting from a search for a balance between the use of law by elites for purposes of domination and the use of law to moderate elite domination by providing avenues of participation for the disadvantaged. The existence of this duality is perhaps the result of the failure of the masses to understand their legal rights, the restricted access of the masses to the legal system in terms of time and/or financial constraints. The 'civic revolution' as a model of social transformation would make it a logical necessity that law as an instrument of social change is held under constant review (Prof. Yogendra Singh). The efforts of the three wings of the State, viz., Legislature, Executive and Judiciary and the efforts of the public organisations and enterprises working to advance the movement of democratic law and social change must be linked for more effective implementation.

The Universal Declaration is intended as a minimum standard which should find universal acceptance in order to prevent the expected "clash of cultures and civilizations". One of the consequences of rights being the point of departure for constitutional law is that phenomenon like social rights (which are in fact duties or responsibilities of the states) have been drafted as individual claims in national constitutions despite their

non-justiciability (e.g. Directive Principles and Fundamental Rights) Hardly two decades later, the Universal declaration gained the status of an obligatory (albeit non-justiciable) document for all the countries of the world.¹

The two discursive traditions unite on human aspiration towards human justice. In his characteristic way Prof. Baxi concludes his lecture on Human Flourishings saying - that these aspirations are simply stated: Make Power (in all its manifestations) accountable, governance just, and state ethical. Not to strive towards this is to encode constitutions and laws as massive restatements of adaptive preferences. Justice, as Rawls says is a way of distributing the rights, duties benefits and burdens among individuals within society. This form of distributive justice should be implemented to empower the people through Rights to make them human.

VIII. HUMAN RIGHTS IN 21ST CENTURY

The developments of new technologies press us with the urgency of ethical thought (trans-biology – signifies biology that is not only born and bred or born and made but made and born is indeed today more a norm than an exception. We are observing a shift away from “the translation of the world into a problem of coding” and toward translation of the problem of coding into one of context. We are theorized and fabricated hybrids of machine and organism – Cyborgs.

Both the wars – war of and war on terror prefigure a new International Law now in the making. The new terror wars herald future histories of terrorism (both insurgent and state terrorism and an epoch of endless reproduction of human suffering and rightlessness. How international proponents of Human Rights make sense of the relationship between terror and Human Rights is raised by proponents of both wars. Is deliberate infliction of indiscriminate violence by insurgent non-state actors against civilian populations and sites ever justified as a means of restoration of their Human Rights and making these secure for the future [See *Nandini Sundar v. State of Chhattisgarh*¹ - July 5th 2011] - (Salva Judum) and autonomy logic of statehood for Gorkhaland, Greater Cooch Behar, Kamtapuris, Tripura etc. Right to development, reasoned arguments have their place but only when other side is reasonable. Sentiments like once upon time logic, may come for Greater Jharkhand – tribals and ethnicity, again as human rights with incredible advances in techno-science we are moving away from Homo-sapiens to robo-sapiens.

The ‘constitutive partnership’ amongst ‘companion species’ or implicated frameworks of ‘cognisphere’ distributed intelligence invite on the part

¹ (2011) 7 SCC 547.

of the human rights theory and movement some further engagement with the question of rights, entitlements and obligations of artificial intelligence (AI) or intelligent machines, or more generally artificial forms of life (AL). Artificial Intelligence replaces all Human Rights since human being ceases to be theological and cosmic entity. From a human rights perspective, the question is whether certain kinds of human rights and responsibilities may extend to such entities/beings. Already, in technical legal terms, AI/AL thrive under the WTO/TRIPS regimes which authorize endless intellectual property protection for their 'capabilities' and 'flourishings'.

It remains tolerably clear that some recent movements concerning the human rights of robots, and the prevention of cruelty to artificial forms of life, begin to make sense only on a post human landscape. Already the American Society for the Prevention of Cruelty to Robots (ASPCR) founded in 1999, is urging on the platform, however hastily assembled, of a new global social movement urging that 'any sentient being (artificially created or not) has certain unalienable rights endowed by its CREATION (not by its Creator), and that those rights include the right to Existence, Independence, ' and the 'Pursuit of Greater Cognition'. For the Association's purposes, a robot is one that 'actually has intelligence, not just the appearance of such'. A robot (here inclusive of nanobot progeny) need not, as already noted, incarnate itself (and actually do not) in a 'humanoid form, or even in physical form at all...' It remains the agenda of ASPCR to provide protection for all artificially created intelligences, whether they reside in a metallic humanoid form (the classic robot), in a non-humanoid form (self-aware space stations, for instance), or in non-physical form (a non-localised neural net, for example). On this view, [R]obots, and all Created Intelligences, will most likely go through an initial period of being considered "property" before they are recognized as fully sentient beings, with all attendant rights. [Prof. U. Baxi].

IX. HUMAN DIGNITY – CONTEMPORARY CONSPECTUS

Answering certain questions posed by him which Human Rights theory should address, Prof. Amartya Sen focuses on *inter alia* "the universality of human rights relates to the ideas of survivability in unobstructed discussion - open to participation by persons across national boundaries. Partisanship is avoided not so much by taking either a *conjunction*, or an *intersection*, of the views respectively held by dominant voices in different societies across the world... but through an *interactive* process, in particular by examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view".

Human Rights are seen by Sen as "pronouncements in social ethics, sustainable by open public reasoning". And he emphasizes that "the understanding and viability of human rights are..... intimately linked with the reach of public discussion, between persons and across borders". (Philosophy and public affairs (2004). In hard cases viz. embryo research, abortion and euthanasia, Sen says it is difficult to make ethical judgments.

For Kant the core of what makes judgment possible is our "common sense" shared by other judging subjects. Common sense that shared understanding – is not static. It is this shared sense that allows us to exercise on 'enlarged mentality' by imagining judgments from the stand-point of others which is similar to his concept of 'categorical imperative'. Think of the way "common sense" about slavery, about black people, women, children and the disabled has changed. In each case it has taken the efforts of moral entrepreneurs to create new common senses.

Human Rights must not be seen as a gift of the west to rest, a tool of power: rather as an element of shared common sense. It is necessary to participate in dialogue that seriously engages local perspectives. It is necessary to pen channels of communication.

The Right to health is fundamental human right but not to a right to be healthy. The state cannot be expected to provide people with protection against every possible case of ill-health or disability, such as the adverse consequences of genetic diseases, individual susceptibility, and the excess of free will by individuals who voluntarily take unnecessary risks, including the adoption of unhealthy lifestyles (smoking, for example). The right to health contains both freedoms and entitlements. Freedom includes the rights to control of one's own body and the right to be free from non-consensual medical treatment and experimentation.

Today freedom of speech and expression are recognized as international and regional human rights law. When a Danish cartoonist drew a cartoon of the prophet Mohammed with a bomb to his turban there were violent reactions from Muslims worldwide. A similar fate greeted Salman Rushdie when he published his Satanic Verses. Should such publications be permitted or banned? (Charlie Hebdo and Perumal Murugan – An author is dead)

Liberals defend pornography. Thus, Ronald Dworkin has maintained that negative liberty is "freedom to offend" and this applies to the "tawdry as well as the heroic". Liberals defend pornography even though they despise it. They follow a dictum attributed to Voltaire: "I despise what you write: but will defend to the death your right to write it. Holocaust denial was criminalised in several European countries. Some argue that "Hate Speech" degrades people because of their race and religion targeting minorities

intended to compromise the dignity of those who are targeted. It can only be countered by more speech citing Nazi march in Chicago which was held as protected under 1st amendment freedom. Some liberals believe that this is price to be paid to uphold the cherished principle of free speech.

Human Rights developed as a concept mainly within Western societies. But Beitz emphasises that justification needs to be "valid across the religious, moral and political societies in today's pluralistic world". (C. Beitz 2009)

X. HUMAN DIGNITY IN POST-MODERNITY

James Griffins personhood-based justification for human rights emphasises "deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves". If we accept his premise that people are moral "persons", that is they have normative agency, then we shall appreciate that his moral personhood needs to be protected. As Griffin understands freedom is made up of autonomy and liberty which are the only interests capable of grounding human rights. It is by reference to these interests that we should make sense of human dignity. (Cf. J. Tasoulas- 2012).

There are two main approaches to the question: why are human rights valid?

Much discussion of dignity goes back to Kant, but between his day and ours there was very little discussion of "dignity", until recently. Several books have been published in the last few years, and the relationship (if any) between human rights and dignity has emerged as a subject for discussion. Tobin argues that human rights protect human dignity (2013). Klug believes that concept of dignity has replaced "the idea of god or nature as the foundation of 'inalienable rights'". Dworkin in *Taking Rights Seriously* referred to the "vague but powerful idea of human dignity". There is "pious lip-service to slogans that have dignity. There is also uncertainty of its relevance to practical issues, for example in medical care and in bioethics.

Human dignity raises many issues such as whether human dignity be understood in purely secular terms or is it "ineliminably religious"; whether it is subjective or objective; can there be shared meaning of human dignity when there is religious and ideological pluralism; does human dignity attach to some rights more than others; is human dignity absolute or can it be balanced against other values; does human dignity apply essentially only to humans, or can it apply to animals, fetuses; can a person waive his/her dignity. A Delhi High Court judgment declared that Birds also do have

fundamental Rights (18.05.2015 Hindustan Times). A whole jurisprudence syllabus could be created just on "dignity". (Mann)

The Child Rights Charter which recognized many legal rights for children lacked a coherent philosophy. Guggenheim says children's rights have no "intellectual foundation". The most common reason posited for denying children rights is the will or choice theory. Thus, Brighthouse argues that the "further an agent departs from the liberal model of the competent rational person, the less appropriate it seemed to attribute rights". And, in his view, children (certainly young children) do depart from this model. Griffin too denies "infants" human rights because they are "not normative agents". They are "potential" agents, not actual agents. Children's vulnerability does not justify rights, but imposes "substantial obligations on us not imposed by those able to look after themselves". To recognise human rights only for agents may be thought wrong for several reasons. Children are entitled to human rights, whether or not they are capable of exercising them. As Tobin explains, "it is their *interests*, not their *capacity*, which form the foundation of rights under an interest theory".

He does not seek "a uniform ethical system", but a "necessary minimum of shared ethical values". "When a state utterly or egregiously fails to protect the rights of the people residing within its jurisdiction the rest of humanity must have capacities to do more than sit idly by until the slaughter is finished or merely assist the victims after they are violated....."

Others committed to moral cosmopolitanism also explore its implications such as the institutions which will result in world government and the states being given only "conditional sovereignty". Pogge offers us the fullest exploration of institutional cosmopolitanism, Falk presents the most convincing case for international humane governance.

James Nickel in making sense of Human Rights defines Human Rights as basic moral guarantees that people in all countries and cultures have simply because they are humans. Tobin says Human Rights protect Human Dignity. Human Rights are interdependent and indivisible.

As Camus suggested there does not seem to be an absolute meaning to life, for human beings, to find something useful to do and some reason to live. The post-modern future will be one in which our idea of justice will be reformed so as to reflect a world of 'small contingent facts' rather than an ephemeral illusion of large necessary truths (Rorty). Rorty's post-post modernism or post-Nietzschean world will not be quite so ironic or whimsical or playful as its post-modern predecessor. The stakes in terms of human sufferings are too high and too immediate as can be seen with the rising of 'ethnocentrism'. Rejection of absolute contingency of Nietzschean

post-modernism leaves one with either Kantian universalism or some kind of murky middle ground. Ethnocentrism represents privileging of localized group moralities and political values which is dangerously anti-liberal and liable to justify any number of undesirable and un-liberal ethnocentrism forms of exclusionary politics. However, both Unger and Rawls seem to support ethnocentrism. But such danger can be avoided, as Rorty suggests, by employing strong liberal political institutions which can preserve procedural justice and thereby prevent the state from slipping into a kind of modernist liberalism of Kant.

But ethnocentrism offers the best hope for pragmatic liberalism because it redefines freedom as 'interdependence' and as constituent of 'solidarity'. This idea of pragmatic or relative solidarity, Rorty uses as a model with which to describe a non-foundational idea of human rights – one that bears a striking resemblance to that advocated by the likes of Douzinas. One feels clearly the pull of contemporary anxieties regarding the need to devise some kind of philosophy for the emergent 'new world order'. Such a non-foundational human rights is a human rights of consciousness a response to hearing sad and sentimental stories rather human rights founded on moral knowledge or any other illusion. It is, Rorty adds, a human rights that might be Kantian in spirit, but which is Derridean in execution. What matters to for pragmatists is devising ways of diminishing human suffering and increasing human equality increasing ability of all human children to start life with dignity.

In the 'End of Human Rights', Douzinas impressed the natural progression from the politics of critical legal studies to the aesthetics of post-modern legal thought. The problem with jurisprudential conceptions of human rights, at least in the modernist tradition, is their overzealous interest in 'rights' at the expense of the human. While the identity, the social imaginary supports a social organization in which human relationships will respect and promote the uniqueness of the participants. The idea of a 'human rights imaginary' impresses the non-essential nature of rights. Rights are merely instruments.

What has essence is humanity, the mutually determining relations of 'self' and 'other'. The Derridian resonance is obvious, perhaps never more so when Douzinas acknowledges that such a humanism must focus once again on the nature of love and affection, 'pity and friendship' as political concepts (Eg. in cases of Iraq, Afghanistan, Syria, Libya, Yemen and recently abandoned Rohingya Muslims, Minorities etc.).

Aruna Shaunbaug, lying in a Permanent Vegetative State (PVS) for 42 years, since a brutal sexual assault in 1973 who became the face of India's Debate on passive euthanasia passed away on 18th May, 2015. With no

statutory provisions in India on withdrawing life support to patients on PVS, the Supreme Court said passive euthanasia may be permitted in certain situations defining what will be seen as Aruna's biggest legacy to Indian Medico, legal practice. Justices Markandey Katju and Gyan Sudha Mishra, taking a middle path ruled "it cannot be said that Aruna is dead. Her brain stem is certainly alive". 42 years of Vegetative State raises the question of living with 'human dignity' as right to life or right to die as a human right brings into focus. A popular but controversial Australian Medical practitioner Philip Nitschke continues to lead the debate on human dignity and right to die. Though love, compassion, sympathy and empathy are humane but have little to do with decades of suffering with no sight of cure under permanently vegetative state and compromised Aruna's human dignity by a crucial fact of socialization. Right to human dignity shall include right to die with dignity. In Switzerland assisted suicide is not illegal and public opinion does not favour its banning or criminalization thus keeping in conformity with the acknowledgement of right to die with dignity as a human right.

The last century, despite its extra-ordinary scientific and technological achievements has been one of the most lethal in human rights performance. A disturbing feature of the contemporary times is the revival of religious fanaticism which is posing a major threat to the humanity. It is therefore necessary to reinvent, to rearticulate the foundational principles to save the world from holocaust. It may not be out of place to reinvent the principles of Vedanta of Hindu philosophy which suggest some fundamental and foundational principles for preservation and ensuring Human Dignity by injecting the following universal truths into the human minds.

- i) अमृतस्य शिशुः - 'Amrutasya Sishu'- children of immortality.
- ii) वसुधैव कुटुम्बकम् - 'Vasudhaiva Kutumbakam' - The entire world is a family
- iii) सर्वेजनाः सुखिनो भवन्तुः - 'Sarve Janah Sukhinobhavantuh' - Welfare of all beings.