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# THE HUMAN RIGHTS DISCOURSE AND POLICY IMPLICATIONS

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## INTRODUCTION

This paper seeks to examine the human rights discourse and policy implications for India. It seeks to do this by broadly classifying human rights as first generation human rights mainly civil-political; second generation human rights mainly economic and social; and third generation rights mainly demanded by Feminist and Deviant Groups. However, before we do this we need to take a philosophic or ideological stand regarding human rights and pose the question are human rights sacrosanct?

## ARE HUMAN RIGHTS SACROSANCT?

Human rights can be deemed to be sacrosanct if we believe they are desirable values or ends in themselves and not derived from any other higher value or end like the Common Good or Public Interest. I take the stand that there are certain human rights that are sacrosanct in the sense of being individual claims made against governments and majorities, which approximate to being self-evident. Human rights (like right to freedom of-speech and expression, worship, etc.) are presumed to be self evident because in their absence, individual human beings cannot live a life of dignity. Such rights logically speaking, if

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not historically, are prior to the state/government; and, the state or government is established primarily to recognize, protect and promote these pre-existing natural rights. I feel somewhat uneasy in the company of those who advocate the concept of Common Good as sacrosanct. Such advocates generally believe in a sovereign state that first determines the Common Good or Public Interest and then proceed to recognize those individual human rights that promote the establishment's version of the Common or Social Good.

Why am I uneasy in such company? Because, after all who defines the public good or common interest? It is the ruling establishment: either the dominant or powerful elites or an elected majority? If an aristocracy, theocratic regime, or parliamentary majority are given an unfettered freedom to decide what is the common good and force individuals to abide by it, we might as well end up with a regime justifying in the name of the Common Good, slavery and restricted women's rights as Plato had done; or, with a regime justifying in the name of the Common Good, a varnashram dharma polity based on hereditary professions, as Manu had done; or, with a regime justifying apartheid in the name of the Common Good, as the South African white minority racist government had done. When put on the defensive the South African white minority racist regime did not hesitate to say that the principle of apartheid, based on the doctrine of "equal but separate", far from violating human rights, was promoting the Common Good by preventing an unhealthy mixture of separate and distinct races and cultures, the black and the white. A fairly similar argument is put forward in contemporary India by the Hindu, and more particularly Parsi, orthodoxy, who preach against inter-varna or inter-faith marriages. These advocates of religious orthodoxy claim that by discouraging such marriages they are promoting the social or communal good, viz. preserving the purity of the race or the faith, or, preventing the birth of inferior progeny and a chaotic society. For these advocates the perceived communal or social good takes precedence over the human

right of an individual to pursue his/her happiness by marrying a person of his/her choice.

To drive home the dangers inherent in advocating a government proclaimed Common Good as sacrosanct and not individual human rights as sacrosanct, we can give an imaginary/ exaggerated example. Some future government may as well proclaim that the aged and the disabled should be left to fend for themselves, or, better still be put to a swift death, since they are unable to promote the common good by contributing to increasing the nation's wealth or GDP; but instead are a burden or a drag on the nation's wealth. Shades of this argument are implicit in the writings of the extreme advocates of free markets, who swear by unrestricted global competition and unlimited right to retain all the fruits of honest competition. If asked. What about the untalented, they would respond by saying only the fittest ought to survive.

What policy implication follows from this ideological/ philosophic stand that only individual human rights are sacrosanct and not any concept of the Common Good as advocated by a philosopher or the government of the day? The policy implication that follows is that rather than allow a philosopher or government to postulate a common good from which individual rights are derived; we should encourage the reverse process and argue that a government and society that respects individual human rights and human dignity, should be deemed as truly promoting the Common Good.

## FIRST GENERATION HUMAN RIGHTS AND POLICY IMPLICATIONS

Having made clear our philosophic stand, we may now proceed to discussing the first generation human rights and their policy implications.

The various civil and political human rights are termed as first generation human rights because they preceded the second generation economic human rights brought into sharp focus by Marxist and Socialists and the third generation human rights

which have not yet found a place in the Universal Declaration of Human rights but are struggling to find recognition and inclusion in the Charter.

What are the first generation civil-political human rights? These include not only the fundamental rights to freedom of speech and expression, association, to elect a government, stand for public office, etc., which constitute the essence of a democratic way of life; but equally importantly those human rights that protect the individual from arbitrary and oppressive government action. What are these arbitrary government actions? I would make specific reference to three.

Firstly, every human being is entitled to the right to life, liberty and security and hence there can be no arbitrary arrest of an individual. The government must show valid reasons in law for arresting an individual and produce him/her before an independent court for a fair trial. Secondly, a person has a natural right only to be punished for an offence under an existing law and not under any law passed with retrospective effect. In short, the state is barred by the doctrine of human rights from passing ex post facto laws. No government can pass a law today making it an offence to preach or advocate human rights with effect from last year and then proceed to punish me this year for having advocated them last year. A law that respects human rights can only be passed after due discussion and with prospective effect, that is to say, from a clearly stipulated future date. Thirdly, as human beings entitled to live with dignity, we have a natural human right not to be subjected to oppressive and intimidating government actions; specifically spelt out this means no unreasonable searches and seizures, no freezing bank account of the accused, no custodial torture and no forcing the individual to be a witness against himself. Articles 3 to 5 and 9 to 12 of the Human Rights Charter not only imply these rights but explicitly forbids arbitrary interference with a person's privacy, family or correspondence.

Now what are the policy implications of these civil-political rights? Does our constitution enshrine them? In this context

we need to examine the strength and weaknesses of articles 20 and 21 which guarantee us the human rights to life and personal liberty.

Art 20 protects us against double punishment; it protects us against ex post facto legislation and it protects us against self-incrimination. However, one major weakness of article 20 is it does not protect us against double jeopardy. In the USA, the accused enjoys protection against double jeopardy, that is, once the accused is tried and acquitted (set free) by the court, then neither the state nor the police can re-open the case, even on the grounds of fresh evidence. The logic behind this stand is the American belief that the police must be able to scientifically investigate and prove an accused guilty within a reasonable time frame. If the American police fail to prove the accused guilty and the court acquits the accused, he can, never be tried again for the same offence. Thus the acquitted person in the USA enjoys the human right of living the rest of his life in peace and security free from the jeopardy or fear of the state ever being able to try him again for the same offence. In India things are different. Even after the Court has acquitted an accused, the state or police can re-open the case on the grounds that they have unearthed fresh evidence. Thus the acquitted person can never enjoy peace & security for the rest of his life. There have been instances in India, where the police knowing that the Court will acquit the person, because of poor, weak, or untenable evidence have waited outside the Court premises with a fresh arrest warrant, citing they have new evidence & re-arrested the person. Not enjoying double jeopardy, the accused is made to face trial once again for the same offence. The Court may even find the "fresh" evidence flimsy, untenable or even fabricated and once more acquit the person. But nothing stops the vindictive authorities from once again re-arresting him & re-opening the case for the third time again on the specious plea of new evidence. Theoretically this kind of harassment/vindictive game can be played endlessly by authorities bent on revenge, thereby depriving the acquitted

person of his Natural Right to security and personal liberty. In the interest of promoting the human right to personal liberty and security, we could think of amending article 20 so that it makes a specific reference to protection against double jeopardy, along side protection against double punishment.

Let us now turn to examine the other article dealing with the natural right to life, personal liberty and security, viz. article 21. Article 21 explicitly states that no person shall be deprived of life or personal liberty except according to procedure established by law. However, the principal weakness of article 21 is the built-in ambiguity between this article and article 19 which guarantees us the seven fundamental freedoms of speech, association, movement, etc. The ambiguity may be expressed thus: article 21 simply requires a legal procedure to be laid down in order to deprive a person of his personal liberty. Now what happens if the procedure laid down in law results in a deprivation of a person's Fundamental Freedoms of speech, association, movement, etc. enshrined in Article 19? This in fact happened in the very first law enacted under article 21, the Preventive Detention Act of 1951. The state proceeded to deprive Mr.Gopalan of his personal liberty by laying down a procedure in law (the PD Act) for detaining persons, not for offences actually committed by them, but for offences they were suspected of likely to commit. To Mr. Gopalan's misfortune, the Supreme Court took the stand that when the state proceeds to act under article 21 to deprive a person (in this case Gopalan) of his personal liberty or freedom, article 19 (guaranteeing fundamental freedoms) is to be deemed irrelevant. However, fortunately for the advocates of human rights, in 1978, the Supreme Court itself felt that deeming the fundamental freedoms in article 19 as irrelevant, when the state acted under article 21, to deprive a person of his personal liberty, was a clear case of denial of human rights. The Supreme Court itself therefore sought to redress the situation by introducing an element of protection of human rights in 1978. In its 1978 judgment, delivered in the Maneka Gandhi case, the Supreme

Court argued that the procedure to be laid down by law for depriving a person of his life or personal liberty under article 21 must itself be reasonable. The Supreme Court thus introduced the US type procedural due process, and today the court can intervene whenever it feels that any enactment under article 21, is seriously impinging on the fundamental freedoms guaranteed under article 19. Despite judicial activism which may seek to remove the ambiguity or built in contradiction between articles 19 and 21, I think we need to have a constitutional amendment to do it. We can seriously consider an amendment which unambiguously stipulates that when the government proceeds to deprive an individual of his life or personal liberty under article 21, it cannot deem irrelevant the fundamental freedoms guaranteed to us under article 19.

Certain other policy implications pertaining to India if it desires to sincerely comply with the first generation civil-political rights may also be mentioned. Firstly, it is a violation of human rights to mete out degrading treatment to prisoners. Even prisoners have a right to dignified treatment, especially the custodial detainees. Hence the reported practice of shackling or chaining under trials in prison cells which denies them freedom of movement within the cell is inhuman and a violation of human rights. Secondly one can raise the question whether arbitrary solitary confinement is not violative of personal liberty? Is it not a denial of human dignity that a prisoner or under trial is entitled to, if he is not allowed to be visited by his wife or children or relatives, as is, again, often reported in the Indian media? A third related question, again arising from press reports, can be raised: is it not humanly degrading to deny an educated detainee/prisoner the right to have access to newspapers and books, or to deny an educated detainee or prisoner the right to have paper and pen, write a book or prepare for an examination?

However, the most important policy implication of recognizing the civil-political human rights relates to the right to dignified treatment while under custodial interrogation. The obvious corollary that follows from this human right is that

torture of the accused while in police custody for inquiry/ investigation, cannot be considered a customary method of investigating a crime. A common place method is to call the accused for interrogation in the evening and keep him hungry and anxiety stricken till midnight, when generally the investigation would begin. The interrogation would generally be conducted in a darkened room, with only one dim bulb lit over the head of the accused and with the interrogating officers sitting in the dark or standing behind. The interrogation would go up to early morning, 4 am or 6 am. During interrogation detainees have reportedly been denied common human facilities like visiting the toilet or drinking water. Exhausted, sleepy and frightened, the detainee would have only one thought uppermost in his mind, to be back home with his dear ones, at the earliest possible, and for this would often finally succumb and agree to sign on whatever (often self-incriminating) document was placed before him. Respect for human rights demands that the police adopt scientific investigative methods to prove guilt, and not resort to torture to get signature on self-incriminatory documents. Respect for human rights also demand that interrogation be done at daytime. There is no reason why it should be done at night and deliberately in an atmosphere intended to overawe, frighten and intimidate the person being interrogated.

There is urgent need to sensitize the police to human rights issues as much as there is to train them in methods of scientific, unobtrusive investigation. In addition, the NGOs must be permitted and encouraged to act as watchdogs for safeguarding human rights. It was a foreign NGO, the UK based Amnesty International that took a leading role in trying to expose violations of human rights of Muslims in the Gujarat riots that followed the Godhra train episode in which many Hindu karsevaks were burnt to death. Amnesty's Secretary General wanted personally to visit India to examine the allegation of violations of human rights of Muslims in the Gujarat riots, but Amnesty was denied visa. Amnesty nevertheless stood by its 2003 Report which

had condemned the Gujarat government and police for complicity and inaction during the riots, in which many Muslims were massacred. Amnesty has also been traditionally critical of violations of human rights of women in India and the violations of human rights of tribals displaced by development projects like the Narmada project. The NGOs (global and Indian) may not be directly involved in enforcing human rights; but their reports, commanding wide readership and respect, do impact governments. The concerned governments are often forced to take redressal action and be on their guard regarding future behaviour.

## THE SECOND GENERATION HUMAN RIGHTS AND POLICY IMPLICATIONS:

Let us now turn our attention from the first generation civil-political rights to what are termed as the second generation economic human rights. These were forcefully advocated by the Soviet delegate at the time of drafting the Universal Declaration of Human Rights by the Human Rights Commission that was set up under the aegis of the U.N. Economic and Social Council. These rights include the right to work, to fair wages, equal pay for equal work, right to education, right to healthcare, etc. In the absence of these rights being first ensured/realized, the Soviet delegates argued, the civil-political rights were a mere formality, mere empty rights. It is a cruel joke to tell starving, undernourished people, whose crying need is food, shelter, clothing, education and health care that they have a natural right to vote or to stand for election and form government. Had not Gandhi said that to a starving man, even Goad appears as bread?

However, at the time of drafting the Declaration, the West took the position that civil-political human rights were more important than economic rights because the violations of civil-political rights like committing genocide or denying religious freedom or establishing tyranny, were easy to monitor.

According to the US delegate it was also easy to identify those guilty of violating these human rights and punish them, by imposing diplomatic, economic and in the last resort even military sanctions against them. This was not so in the case of economic rights. Further, the Western nations argued: how a poor nation can be penalized for not being able to provide to all citizens the right to work, or education, if it lacked adequate resources? The U.S. delegate went on to say that the poor nations can only be assisted by the UNO in generating adequate resources in order to provide economic human rights through such global agencies funded by rich nations, like the World Bank, IMF, WHO and ILO.

There is considerable evidence to show that economic liberalization and globalization are resulting in jobless growth (a rise in GDP accompanied by increasing unemployment) and widening disparities between rich and poor. If India's growing economic power is accompanied by growing alienation of those rendered unemployed or marginalized; then such alienated & marginalized individuals and groups can become soft targets for recruitment by religious fundamentalist and terrorist groups. It is therefore in our interest not to ignore the promotion of economic human rights. The increase in number of religious fundamentalist groups and naxalism can be related directly to the neglect of human economic rights like to work, fair wage, education and healthcare of the poor and vulnerable sections of our society.

Attempting to spell out the policy implications of promoting economic human rights in India, we may say they are the following. Firstly, we have to provide, as Amartya Sen had observed, a safety net for the vulnerable sections of society as we proceed rapidly down the path of economic globalization and liberalization. In our opinion, the state's primary responsibility still remains to provide full employment, affordable education and healthcare to all. If private manufactures and service providers can do this and do it better than bureaucratic state enterprises, fine. But if the civil society

fails to throw up manufacturers and service providers who will attend to and meet the needs of the poor and those below poverty line, then the state has to step in to ensure that affordable products and services are provided to all. We simply cannot lapse to the age of laissez faire which legitimized only the survival of the fittest.

Secondly, the state must ensure balanced regional development by offering fiscal and other inducements to private players to set up mega industrial units in backward states and regions and in the last resort set these up itself if the private sector finds it unprofitable to go to backward regions and rural areas. The entire edifice of public sector cannot be dismantled in name of privatization, free trade and deregulating markets.

Thirdly, subsidies, cross subsidies, even reservations and other protective discrimination measures, will have to be contemplated to ensure that the underprivileged and socially discriminated are enabled to come up. These are only a few policy suggestions. Many others can be worked out, if we want to sincerely work to help realize economic human rights for all.

## PASSING REFERENCE TO THE RIGHT TO SELF- DETERMINATION

A passing reference to the right to self-determination and its policy implication may be made, before finally passing on to discussing the third generation human rights. This human right to self-determination does raise many tricky and complex questions at the level of policy making. Should the right to self-determination be made available to every group of individuals that feels it has a distinct identity and is oppressed? If yes, then what of the disruptive effects of recognizing such a right? If every group that feels it is an oppressed group or has a distinct identity, clamours for self-determination, will it not prove disruptive of world peace and stability? Today the concept is acquiring new and perhaps even dangerous implications, with some scholars speaking of the rights of

indigenous people and of every tribal or aborigine group being entitled to the human right to self-determination.

## THIRD GENERATION HUMAN RIGHTS AND POLICY IMPLICATIONS

Finally, we turn to the third generation human rights and their policy implications. The third generation human rights, as stated earlier, are contemporary claims made largely by feminist and deviant groups for recognition by state and society.

First a word on the general right to gender equality and the claims of the natural right of women to participate in politics. Art 21 of the Universal Declaration of Human rights says, "Everyone has the right to take part in the government of the country directly or through freely chosen representatives...A proper representation of women in political affairs will ensure their views and needs are reflected in public policies that affect their lives most". The obvious policy implication of this natural right is to provide reservations for women in parliament. However, while this may be of some help in attaining dignity and equality for women, the more important policy implication is to work for attitudinal and behavioural changes at the family and government level towards women. This implies fighting sexist bias in society, government, men and even women themselves. Men in family need to realize that there is an equal responsibility for both sexes in social life – in caring for the young, sick and old. It implies shared parenting and shared caring of the elderly; while men in government must shed the bias that politics is an exclusive male bastion. This male attitude towards women is best revealed by the statement made by Pakistan's Finance Minister Ghulam Ishaq Dar in 2000. Mr Dar while explaining the robust growth of the Pakistan economy in the preceding nine months, said,"I think the performance seems to be a male and not a female". The gender bias implicit in this statement is disturbing and explains why politicians of all hues seem to be dilly dallying over reservation of seats for women in parliaments. Civil society will have to change if

abiding gender equality is to be realized as natural. This may partly be attempted by reservations, but will primarily have to be the work of a slow process of social education.

More controversial than the women's right to participate in politics contained in article 21 of the Charter, are what be termed the truly third generation natural rights. These are contemporary demands (not yet listed in the Charter) made by feminist and deviant groups regarding right of women to abort, single motherhood and same sex marriage; also included in this category is euthanasia or the right to death. These human rights have innumerable policy implications which all arise mainly from the fact that different countries, faiths and cultures perceive them differently, ranging from open welcome to open hostility. Hence we can only make a tentative attempt at drawing policy implications

Regarding abortion, I would say, that a woman cannot claim it to be her natural right to abort simply on the ground that she has to carry the baby for nine months and suffer the birth pangs. The husband too has a say and the right should be made contingent to both the husband and the wife approving of abortion. What happens if both parents agree, but if the priest, maulvi or pandit says it is against the faith? Well, we should then leave it to the parents to decide whether to give weightage to the views of their respective religious beliefs or faiths. Where a woman has an unwanted child from rape, I think we should concede to her the right to decide for herself whether to abort or not.

Regarding single motherhood, this is a human right demanded by a woman who wants to live single with her child. Such a situation may arise after divorce, with the woman insisting on having the child's custody. It can arise after a virgin is raped but decides to retain the child and live as a single mother. It may arise after a sexually promiscuous woman gives birth to a child, does not even know who the father is but nevertheless wants to live singly with the child. The question currently being hotly debated by the church and various human

rights scholars and activists, is, should such situations be allowed to arise and recognized as human rights? Here I would not like to stick my neck out. I will only say that civil society tends to develop on its own, and there is little you and I can do, if a particular civil society becomes increasingly permissive and liberal and approves of the natural right to single motherhood.

Regarding the human right to same sex marriage, almost all faiths disapprove of it as sin and unnatural. However, modern medical and biological researches show it is natural, though confined to a minority not exceeding five to ten per cent of the total population. Researchers also show that the fear of aids and other sexual diseases is not specifically and only related to same sex relations. There has to be safe same-sex relations, just as there have to be safe heterosexual relations. The question that now arises is should the view of religious faiths, be given precedence over the view of scientists, doctors and researchers who claim that a handful of people born or created differently have a natural right to live differently?

Finally, regarding euthanasia or the right to death, advocates of this human right claim that if a human being is truly deemed to be a rational, morally autonomous being, then he should be entitled to exercise the right to death that is choose for himself the time and manner of his death. I think a case does exist for euthanasia or the right to death in two unique situations. Firstly, when a human being is living in a state of incessant, agonizing pain as in terminal stage of a disease like cancer, I think he has a right to opt for requesting medical assistance to put an end to his incurable and unavoidable agony. Secondly, if a person considers that after having lived a full life and having fulfilled all his responsibilities and obligations, would now no longer like to suffer living a lonesome life, burdensome to himself and to others, then in such cases the person may be conceded the right to death and be allowed to choose the time and manner of his death. A noted advocate of euthanasia, Mr K.Chittilappily, of the V-Guard Group, considers seventy to be an age after

which a person should have a right, to quote him, "to a neat legitimate dispatch" (Times of India, 26/2/06, p. 13). However, if we do concede the right to death in these two unique situations, it should be fully in accordance with the individual's wish and free volition and in no case can an individual be induced to opt for exercising the right to death. It may be noted here that some states in USA like the state of Oregon, and Netherlands have already legalized mercy killing. Five or six other states (in USA) are waiting to do so.

## CONCLUSION

No paper dealing with the human rights discourse and attempting to draw there from policy implications for India can satisfy every reader, still less every scholar. Since a human right is a rational claim made by an individual (or group of individuals) who thinks the right should be universally recognized, by governments and civil society alike, they are bound to generate much discussion and debate. It is necessary that we be fully aware of this. This will instill in us humility and tolerance when discussing human rights. It will also make us realize that the struggle for human rights, in this sense, will always remain an open discussion.