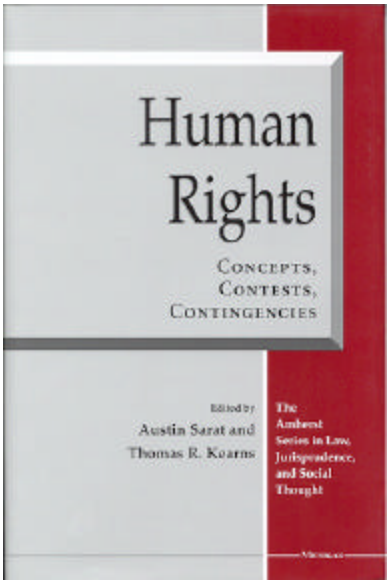

Defending the Universality and Timelessness of the Universal Declaration of Human Rights: A View from the 'Developing' World

By Shaista Shameem

A review of Human Rights: Concepts, Contests, Contingencies edited by Austin Sarat and Thomas R. Kearns. Ann Arbor: University of Michigan Press, 2001. 144pp.

Introduction

At the outset, I should declare my position. I was not a neutral, objective reader of this book, Human Rights: Concepts, Contests, Contingencies. I am a human rights lawyer, working as the Director of the Human Rights Commission in Fiji, a "developing" country. As such, I have every interest in ensuring that fundamental rights and freedoms are not diminished by motivations of States who question the universality, indivisibility and inalienability of human rights by using the excuse of cultural values. I therefore read this book with a great deal of intellectual skepticism at what I perceived to be a collection of American theorists' displaced ideas about first, the nature and content of human rights and second, the application or misapplication of the notion of rights in "other" world contexts. My review of this book therefore will address the main points of the chapters and then go on to examine whether it is possible to see the contributions as relevant in contexts where "human rights" is another name for justice and fairness, in a supra-cultural and supra-liminal sense.

Survey of the Main Ideas

The authors of this book are all eminent scholars and my review should not detract the reader from seeing the importance of their work in attempting to identify the specificities of human rights as a contested subject; that is, its contiguous position historically as a western-based philosophy emerging in a regulatory but somewhat hesitantly inclusive framework in the 20th century through the Universal Declaration of Human Rights.

Firstly, the editors, Sarat and Kearns, alert the reader in their "Introduction" to the "unsettled status" of human rights, meaning that not only is the concept of human rights undecided but that its positionality in societies is as diverse as the societies themselves. They suggest that, as a

consequence, the concept of human rights can be captured by political, legal (and legal imperialist), cultural (and cultural relativist), multi-dimensional, social, global, and local/individual realities at any given moment. For these reasons the status of human rights in today's world is unsettled.

Secondly, Iris Young, in "Two Concepts of Self-Determination," introduces the idea that self-determination as a single concept needs reviewing. The definition of self-determination needs to move away from "sovereign independence" and "non-interference" to "non-domination." The role of institutions is to ensure that relations of non-domination are regulated. The right to be free from external interference, that is, to autonomy, requires non-domination rather than non-interference. Introduction of group rights ideology in the international context is sometimes posed in defiance of individual rights and therefore a single concept of self-determination is not sufficient to explain the negotitations that take place to establish relations of non-domination.

Thirdly, Homi Bhaba, in "Cultural Choice and Revision of Freedom," writes that freedom has the ability to form and act upon one's own conception of the good and the ability to revise that conception over time. Similarly, cultures' choice of values may be adopted but contains within it the conditions of revision or change. Therefore, in order to understand the phenomenon of "freedom" or "values," the middle ground must be the site of attention, to avoid the binarism of universal/particular and self/other that characterizes the current dilemma on human rights.

Fourthly, Jane Collier, in "Durkheim Revisited," using the examples derived from ethnographic research in Mexico, suggests that "human rights" concepts can be used creatively to mobilize support for changes to rampant commercialism or capitalism in "developing" world contexts. But she notes that human rights commissions may be used as pawns by proponents of neo-liberal reforms to liberalize economies and, simultaneously, to protect civil and political rights of citizens.

Finally, Abdullahi A. An-Na'im, in "The Legal Protection of Human Rights in Africa: How to do More with Less," calls for a shift in human rights emphasis, from legal protection to political mobilization, in accordance with local conditions as appropriate. The failure of human rights to rise above and beyond its original rationality as an ideology of independence (at least in Africa) has resulted in little achievements in the broad human rights areas or in self-determination. He asks whether the emphasis on legal protection of rights has prevented societies from being able to address the violations and vulnerabilities faced by the vast majority of peoples every day. Therefore it is politics and popular resistance and activism that must be examined for answers, and not human rights as a legal concept.

It seems to me that all the chapters in Human Rights: Concepts, Contests, Contingencies, suffer from one disadvantage: the assumption that Human Rights as a subject is extraordinarily difficult for "developing" nations. The idea underpinning the chapters is that human rights as determined by the Universal Declaration of Human Rights are limited in their full application by geo-political and social contexts and "contingencies." The authors adopt the standpoint that human rights have limited value without revision because they were defined mainly within a western, liberal, capitalist framework. This presumption is present as a sub-text in all of the chapters in the book under review. Whether this is in fact true for people living and working in human rights areas in "developing" contexts is examined below.

Human Rights: Universal, Local, Discursive and Multi-layered

Human rights as a concept did not originate in the 20th century as is often thought, nor did it emerge during the Enlightenment period in Europe. A western assertion of rights appeared as far back as 1215, when the Magna Carta was presented to King John as a document of "rights." It contained a Preamble and 63 clauses logically arranged. Clause 1 states:

> *The King declared that the Church should be free with all rights and liberties inviolate, and granted to all freemen in the Kingdom certain liberties.*

Clause 13 is very interesting:

> *The City of London should have all its ancient liberties and free customs and so of all the other cities, boroughs, town and ports.*

As are Clauses 7 & 8 (summarized):

> *A widow should receive her dower and inheritance within 40 days of her husband's death and should not be forced to remarry.*

Clause 20 states:

> *A freeman should only be amerced for a small offence after its manner, and for a great crime according to its heinousness.*

Clause 35 should also be noted[1]:

> *There should be one standard of weights and measures throughout the kingdom.*

The Magna Carta contains most, if not all, of the rights now found in the Universal Declaration and expanded in the subsidiary instruments, such as the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR). Indeed, the clauses noted above show that there was an early understanding of human rights principles such as the right to equality and the right to a fair trial, as well as the right not to be imposed a punishment disproportionate to the crime. Furthermore, clauses 7 and 8 can easily be interpreted as expressing feminist principles!

Yet the Magna Carta is rarely considered these days as a human rights document. My examination of some of its clauses here serves to illustrate that we have a limited understanding of the timeless nature of justice and fairness that human rights as a concept represents. The Magna Carta is of course an English example and critics might say that it just proves the point that human rights is a western concept.

On the contrary, justice and fairness are not western concepts. To believe that would be to accept the view of early anthropologists who studied "primitive" societies, that human society was evolutionary in nature moving from "beast" to "man." By extrapolation, this meant social and

[1] This clause recognized the request by the barons to have a standard measurement throughout England, i.e. an argument for equality and fairness in dealing with the sale and purchase of grain and other commodities. In India a few centuries later, the issue of standardisation became important when the landowners used one set of weights and measures and the tenant farmers another, leading to an unfair distribution of the proceeds of sale, which led eventually to riots and other social upheaval.

technological superiority of one group of people compared to another, and presumably also illustrated that some societies had a more developed consciousness and sense of justice than others.

This view was demolished long ago as a colonial ideology. We now know that justice and fairness are non-western concepts too, and that smaller societies have as many complex ways of delivering justice and fairness as larger societies.

A good example is traditional Indian society, which has used the "panchayat" concept for centuries in making just and fair decisions about issues as diverse as social conflicts and criminal activity. Other societies have different ways of resolving rights issues, emanating variously from spiritual beliefs, religious dicta, established and ancient courts procedures or from other sources particular to the culture(s) concerned. Some of the core rights in hierarchical non-western contexts are (1) the right to know the case against you; (2) the right to a defense; (3) the right to personal property; (4) the inherent right to life and, unless this has an occupational limitation such as priesthood, (5) the right to marry and found a family. I know of no culture, even with the most despotic regimes, where the above rights are not realized in some form or other. The survival of a people or community in a physical sense depends on realization of these basic rights.

Rulers like to be thought of as being just and fair, even if objectively they are not, and thus rights are sometimes saved in the most rudimentary forms if for no other reason than the egoistic and narcissistic self-delusions of despots. Such rudimentary rights can be built upon block by block by people within those cultures and these can sometimes serve as a connecting point with other peoples and other sets of rudimentary rights. Documents like the Universal Declaration of Human Rights as a set of universal principles would have been accepted only if different peoples and cultures "recognized" the principles therein. Indeed, any document drafted in another country with totally different conditions would not have been accepted blindly by "developing" countries as pertinent to them; it would have been seen to be as relevant as the Constitution of Weimar Germany, and as obsolete.

From this perspective, there are problems in seeing the Universal Declaration and other human rights as irrelevant or impractical in traditional and communal societies. There is an understanding in traditional societies of a very simple fact; a person comes into the world alone and leaves alone. People are not clones of each other, neither are they always in a group. There is always place for the reclusive, the hermit, the shaman or equivalent, and a whole variety of individual behavior and preferences. So why should individual rights as a principle, based upon the significance of the individual as a fact of life, be incomprehensible in communal societies?

Conversely, we know that rights in western politico-legal systems are not defined as those based on exclusive individualism. Rights are inevitably packaged as an individual/society dichotomy or binarism. For example, the right to free speech is limited by the right of others not to be defamed. Similarly, the right to privacy can be limited for national security reasons to allow others' safety to be assured. Thus, even in western legal systems, the rights of the group (society) are acknowledged just as an individual is protected from a violation of individual rights. Of course, this individual/society dialectic is constantly shifting and changing according to geo-political and social/historical conditions. It is a fluid, rather than embedded, dialectic; sometimes grounded, at other times free flowing, taking meaning, form and shape from dimensions of space, time and context. It would be as wrong to say that western societies, with their entrenched sets of rights in a legal framework,

respect individual rights only without a concept of community rights as it would be to think that non-western societies have no concept of individual rights, or worse, no concept of rights at all.

The concept of rights is therefore universal if taken to mean justice and fairness for both individuals and communities. From this standpoint, it is thus easy to see how rights can be simultaneously local, discursive, and multi-layered.

Human Rights in Action, or How Human Rights Can Be Used to Make a Difference

While the Universal Declaration of Human Rights was only drafted as a "common standard of achievement," international conventions such as the ICCPR (through the Optional Protocols) and the Convention on Torture have been able to provide avenues for legal redress. In the last 30 years or so, many countries have also put into place constitutions that include some measure of rights and responsibilities capable of being used in the courts to determine individual and collective rights. While the judiciaries in some countries continue to grapple with the challenge of rights jurisprudence, others have played an activist role in defining civil, political and economic rights within particular contexts.

Some examples from Fiji would be appropriate at this point. The Constitution of the Republic of the Fiji Islands (in the South Pacific) contains a comprehensive Bill of Rights chapter that includes all the rights in the international instruments. In addition, Section 43 (2) makes it mandatory for a court to examine international human rights law if relevant to a case before it. The Constitution uniquely contains a measure of economic, social and cultural rights, as well as the usual civil and political rights. Group rights, as well as individual rights, are similarly protected. The Fiji Human Rights Commission is given the constitutional responsibility to be the guardian of these rights and to take questions of interpretation, as well as cases on rights violations, to the courts for determination.

In the past two years, the courts in Fiji have "made" the following human rights law:

- Mandatory sentencing for drugs offences is a violation of a person's right to a fair trial (including the right to mitigate) and a violation of judicial independence and separation of powers doctrine.
- Corporal punishment in schools and prisons contravenes the right to be free from cruel, degrading and inhuman treatment or punishment.
- The incarceration of remand prisoners awaiting trial for more than 12 months in a remand cell constitutes a violation of the right to be free from cruel, degrading and inhuman treatment or punishment and international standards on treatment of prisoners
- Reduced diets of prisoners who offend against prison rules violate the right to be free from cruel, degrading and inhuman treatment or punishment
- A suspect's right to a lawyer includes the right to consult a lawyer without delay.

These are just some of the cases determined in favor of human rights by the Fiji courts. It would be unfortunate if these rights were not permitted to become part of Fiji law as a result of a political decision that rights were western in nature and had no place in the Fiji context. Irrespective of cultural context, rights are useful and, in the long term, serve to politicize individuals and communities into transforming society as a whole. Consideration for others, respect for rule of law, and good governance through democratic processes can all be taught through the application of human rights law in local contexts. For people able to benefit from the determination by courts of these rights in third world contexts, the relevance of human rights is self-evident.

Conclusion

I started this review by implying the obvious; that people in western contexts sometimes assume that their benefits must be our burdens. The contributors to Human Rights: Concepts, Contests, Contingencies perhaps think that the ideologies of cultural relativism and self-determination sweeping through the world at present have the kind of validity that requires a serious response from us all. Maybe they do in the western world where attempts made by some nations to undermine fundamental human rights principles (even in their non-deterministic manifestations) on the basis of ideas such as "Asian values" or "prior rights" have taken root quite quickly.

But for most human rights defenders living and working in "developing" contexts, sometimes in very fragile democratic states and at other times in places where even the basic needs of people are not met and where corruption (and not cultural specificity) is the reason for impoverishment of the people, it is difficult to accept the notion that human rights need revising. The Universal Declaration of Human Rights, in my view, can accommodate the challenges of a changing world where cultural diversity, shifting international and domestic realities, and individual struggle constantly compete for space. This is as true for the United States as it is for Fiji and other "developing" countries in the region. We must be able to recognize the Universal Declaration and subsidiary international human instruments as representing a very important framework for expressing the rights and responsibilities of both citizens and the state in any social and political context.

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