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Justice must be seen to be done

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Human rights as a concept, as a principle of jurisprudence, as a code of conduct governing the nations of the world, will be completing 50 years on 10 December 1998. The atrocities committed by the Nazis and Fascists in the governance of the people living under them and against the people, combatant and non-combatant, in the territories occupied by them during the Second World War were the principal motivation of all the victorious nations to proclaim the Universal Declaration of Human Rights.

Instead of imposing treaties on the vanquished, the United Nations (UN) Charter signed in 1945 set out to establish an international legal order with the object of outlawing aggressive wars. Towards that end it set down guidelines to defuse conflicts by stipulating that disputes should be settled in conformity with justice and international law. Friendly relations among nations is a mandatory requirement. The operating principle among nations should be based on respect for equal rights and self-determination of peoples, as well as respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. However, the Charter, which talked about human rights and fundamental freedoms, didn't define, describe or enumerate these rights and freedoms. To remedy these defects the UN drafted the famous Universal Declaration of Human Rights which was adopted on 10 December 1948.

The setting up of the Nuremberg and Tokyo War Crime Tribunals has some relevance here. Justice Jackson of the US Supreme Court appearing as the Chief Prosecutor pointed out, "that four great nations, flushed with victory and stung by injury, should stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason". But these tribunals were constituted by the victorious nations and therefore the USA was not indicted for an horrendous violation of human rights, namely, the explosion of atom bombs on Hiroshima and Nagasaki. It is not enough to have an exclusive Holocaust Museum as a grim reminder to posterity of what power can do. There should be an exclusive museum depicting the bombing of Hiroshima and Nagasaki and the continuous after-effects. This, I believe, the USA owes to the people of the world.

These events, the subsequent witch-hunt of suspected communists during the McCarthy period, and the persecution of Viet Nam war dissenters and draft-card-burners underscore the necessity of a strong and enforceable human rights code. During the whole period after the Second World War, what was highlighted was the absence of human rights in the Soviet Union and the Eastern European countries and not the paranoid response of the USA and the consequent large-scale human rights violations. In 1988 George Bush began his presidential campaign by attacking the Democratic Party's candidate, Michael Dukakis, as a card-holder of the American Civil Liberties Union (ACLU) as if it was treason to be a member of the ACLU.

All these trends did not halt the progress of the human rights movement. In fact, the Nuremberg and Tokyo Tribunals provided the international body with the impetus to set up a permanent International Criminal Court to try large-scale human rights violations. Nonetheless, the Nuremberg and Tokyo Tribunal trials were the earliest attempt to try as crimes human rights violations.

Since then, efforts have been made to establish a permanent international criminal court. When, at the behest of the UN General Assembly, the International Law Commission prepared a Draft Code of Offences against Peace and Security of Mankind, the international body took the first step to universalize the concept of the rule of law. The effort did not receive attention until 1990 when the International Law Commission resumed its work on the setting up of a court with international criminal jurisdiction for dealing with crimes against humanity.

The idea of a permanent court took root after the break-up of the former Yugoslavia. It was only after the outbreak of internecine violence between the constituents of the former Yugoslavia that the International Law Commission set up a working group which brought out a comprehensive Draft Statute for an International Criminal Tribunal and in 1994 a revised Draft Statute for an International Criminal Court. The Yugoslav Tribunal set up by Resolution 827 and the Rwanda Tribunal set up by Resolution 955 of the UN Security Council may be regarded as the important step, as pilot projects preparatory to the setting up of a permanent court. Realization of this project requires a major cultural shift in the field of politics, law and jurisprudence. This means a redefinition of concepts subordinating power, authority and sovereignty to the requirements of human rights. The very acceptance of the idea of a permanent court is itself an indication of the cultural shift that is taking place and these developments do offer some solace, some hope.

At the national level, we in India have not witnessed any significant reduction in human rights violations, more particularly in areas of political turbulence (and armed conflict) such as Jammu & Kashmir state, states of the northeast region and Andhra Pradesh state. In Bihar state we are witnesses to violence by private armies of groups based on caste. The caste system adds another dimension to the human rights issue in India.

In the state of Andhra Pradesh, after human rights activists battled for over two and a half decades, in 1995 the State High Court in a case of the alleged extrajudicial execution by police, or, as it is termed in India, “encounter killing” of one Madhusudhanraj Yadav, held for the first time that killings in so-called “encounters” are homicides and have to be investigated and prosecuted. Around the same period the National Human Rights Commission of India (NHRC), in an inquiry into “encounters” in Andhra Pradesh, arrived at a similar conclusion and ordered prosecution of police officials. These have had no effect on the state government and “encounters” are a daily feature. Neither the rulings of these bodies nor the Protection of Human Rights Act 1993 (which established the NHRC) has made any difference. The High Court has ordered inquiries by investigative agencies in some cases of “encounters” and in others directed the filing of private complaints against the police. The Tamil Nadu High Court, in early 1997, held that a complaint could be directly lodged before a sessions court (a lower court) which can be nominated as a human rights court under section 29 of The Human Rights Protection Act 1993. This, for us, is a positive gain, because every district has a human rights court which is easily accessible to the people. The acceptance by the premier democratic institution — the courts — that killings and torture are unlawful and in breach of international covenants would amount to the constitutional entitlement of the victim’s dependants and the victims to damages; and has enriched the concept of the rule of law.

If governments ignore judge-made law, governance will sooner or later suffer erosion of legitimacy. Such erosion of legitimacy is already visible in areas of political turbulence. Notwithstanding the indifference of political governments, courts have gone ahead and are holding that international covenants have acquired the status of customary law.

We do not hear the outcry that the sovereignty of a country is in peril. We have witnessed governments coming forward with proposals for and the consequent establishment of human rights commissions. The existence of these commissions is an admission of guilt. A variant of these is the Truth and Reconciliation Commission in South Africa. These have no powers to punish the perpetrators of horrendous human rights violations. But they do serve the purpose of superseding the existing authoritarian culture.

After a long and continuous innings of around two and half decades as a defender of human rights, I believe that there is a possibility to arrive at a broad consensus on human rights and implied in this very possibility is the assurance of the presence of democracy in governance.

This article is one of a series of opinion pieces written for Amnesty International's campaign to celebrate the 50th anniversary of the UDHR. The views expressed do not necessarily represent Amnesty International's position.

Find out more about Amnesty International's campaign to mark the 50th anniversary of the Universal Declaration of Human Rights — visit www.amnesty.excite.com
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