

HUMAN RIGHTS AND BASIC NEEDS: THEORY AND PRACTICE.

*Editors: Mahendra P. Singh, Helmut Goerlich and Michael von Hauff. Universal Law Publishing Co., Delhi, 2008. Hard Cover, Pages xxviii - 339. Rs. 425.*

The moral and conceptual underpinnings of human rights have been the subject of study starting from the time the idea of universal rights, natural or human, were put forward. The extents to which such underpinnings are present in countries with differing religious, cultural and social traditions have been a matter of debate. In recent years we have seen strong opposition concerning the universalism of human rights from those who defend the cultural relativism of rights and who deny the moral right to enforce such universal human rights. A related question has also been whether the ideological basis of human rights discourse is specific to the Judeo-Christian tradition and whether it could be adequately justified in other traditions.<sup>1</sup>

The location of the individual in each tradition, the conceptualisation of the state, the nature of the legal system, and the religious, historical, social and economic development of a country are important constituents in constructing this tradition. The Westphalian state as it emerged in Europe was deemed all-powerful in the temporal sphere. The rise of individual rights against such a powerful state is the narrative of the development of modern human rights. The discourse around human rights has had to examine whether this narrative of the emergence of the state and its relationship vis-à-vis individualism and their liberties is a meta-narrative for the course of development of all countries in the world. The book under review seeks to locate the roots of human rights thinking in indigenous, country-specific traditions. Using India, Britain and Germany as representative of diverse traditions, the book uses a comparative approach to understand whether the notion of rights has been central to the legal and moral traditions of these countries. The book is a result of a series of conversations that began at a meeting at the Institute of Advanced Studies, Berlin in 2003.

In a thought-provoking, opening chapter that sets the tone for much of the book, Professor Mahendra P. Singh points to the divergences between the Judeo-Christian tradition and the Indian one. Whereas in the former, God and man are seen as distinct entities, the latter sees the human as a manifestation and even a part of God. The implications of this view as developed by him are that there is no 'other' in the Indian tradition and consequently no demonization of the 'other'. Rather, there is acceptance and accommodation of alternate traditions paving the way for mutual respect and hence for the acceptance of the universality of rights. Another idea taken up in the essay and that has been the site for much debate, is the notion of a single Indian tradition, as a secular idea, free of all religious overtones. Professor Singh is conscious of the implications of locating a tradition solely in terms of its religious pedigree and the distinct possibility of creating

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<sup>1</sup> See ARVIND SHARMA, ARE HUMAN RIGHTS WESTERN? A CONTRIBUTION TO THE DIALOGUE OF CIVILIZATIONS (2006).

division across the social fabric. How one could steer such an articulation of a pan-Indian tradition, without the consequent political and social agenda of homogenisation and marginalisation of all other pluralities from the discourse remains problematic and a matter of concern. While this aspect is not addressed explicitly in this essay, Professor Singh is justifiably cautious in holding, “it is unsafe and inadvisable to base the idea of human rights in religion” (p. 6). The manner in which the idea of an Indian tradition has been used by the BJP through the conception of *dharma rajya* in recent years has been addressed by Dr. Michael Schied in a later chapter to argue that such an ideology has lowered the position of the individual and only served to strengthen the executive arm of the state (p. 140-4).

Developing his theme further Professor Singh argues that the caste system as it emerged in India is a deviance from its ethos of acceptance and accommodation, and hence inequality based upon the caste system cannot be used to deny the deep roots of a human rights strand within the Indian tradition. This idea itself is strongly questioned in a later chapter in the book by Professor BB Pande, who asserts that, “A society that holds divine destiny or the past *Karma* responsible for the existential plight of the poor and needy sections would feel neither morally nor socially bound to meet the needs or the basic necessities of the fellow beings.” (p. 159).

Some like Professor Singh, have presented the idea of *dharma*, the *sadharana dharma* (as a counter point to high culture, perhaps?) with its focus upon the obligation or duty incumbent upon every individual, as laying part of the foundation for human rights in India. It could be argued that this duty-centric idea of a correct conduct, one that is focused upon the self and not centred on being judgmental vis-à-vis others, forms the basis for nourishing India’s diversity. Yet how much of the laws as described in the ancient texts were the basis for day-to-day life historically is difficult to surmise. As Robert Lingat has commented, “It would be presumptuous and vain to attempt to draw from it any picture of the law actually in force at any given period.”<sup>2</sup> If the texts are ‘ideal-type’ situations and the reality drifts away from the normative text, could the fact of hostility and non-respect for those not part of one’s caste or religion be explained away as only a historical distortion and one that the *Bhakti* movement sought to reverse? Many would argue that the caste system is not a distortion but a manifestation of the inherently hierarchical reading of the act of creation, the *Purusha Sukta* of the Rig Veda; and that not merely inequality, but graded inequality, as Dr. Ambedkar described it, is a component part of the caste system. The intersection of caste, religion, gender and region in the enjoyment of human rights and realisation of basic needs is however not built upon later in the book

The essays in the book provide an interesting set of perspectives about which branch of the State is the critical branch for the realisation of human rights, in particular the ones relating to basic needs. This analysis is interesting

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<sup>2</sup> ROBERT LINGAT, *THE CLASSICAL LAW OF INDIA*, 259 (1998).

because it is often assumed that the judiciary has a larger role to play in the enforcement of socio-economic rights since they are often-times not claim-rights in a Hohfeldian sense. The essays also bring out the contrasting constitutional styles and ideas of statehood. The chapter by Professor Mahendra P. Singh makes an important contribution towards developing further the theory of statehood within the Indian tradition. The nature of the state as conceived in Indian political thought, is not conceived as illimitable in its powers (it is certainly not an Austinian state) but circumscribed at all times by its duties towards humans, other living creatures and god. This notion of the State in Indian political thought sees the idea of *dharma* as placing the present day contours of 'limited government' and constitutionalism upon kingship in the classical Indian tradition. The absence of an absolute ruler, he notes, was the reason why the trajectory of growth of individual rights seen in Europe was not to be found in India. This theory of statehood, he argues, was instrumental in India taking the decision to become a democratic republic in the twentieth century with an agenda for social and economic transformation. What remains problematic in this outline however is the linear, non-conflictual presentation of the Indian tradition as also the assertion that historically, including in British times, "society in general, mostly rural, did not come much in touch with the state." (p. 34).

The counter-example to the idea of statehood discussed above is presented in the chapter by Ralf Brinktrine on the British example. He traces the residual character of civil rights in UK constitutional law. The tension between the individual and the State and the struggle to impose duties upon another, including the State, has resulted in the weak position of human rights within the constitutional discourse there. He argues that despite the broadening of judicial interpretation, "it could not change the status of liberties into becoming positive or material rights." (p. 52). Despite the growth of international instruments and Charters which impose obligations upon the state in international law, they do not confer enforceable rights upon individuals within a state that is signatory to such instruments. He thus argues that in the absence of human rights readily flowing from such instruments, there is a need to secure basic needs through domestic legislation. This remains the case even after the Human Rights Act, 1998 came into force since it does not extend to basic human needs and focuses instead upon classical civil rights.

In contrast to the British position, the German experience is instructive. Professor Helmuth Schulze Fielitz points out how the German Basic Law confers positive rights upon an individual to enforce his or her rights. He traces the basis of the right to enforceability as a reaction to the ineffectiveness of human rights under the Nazi regime. He also notes the differences between what he terms the Second and Third Dimensions (Generations) of human rights. He subscribes to the view that civil and political rights require State restraint and no overt action. We must note however, that this view of the first generation rights being 'costless' has been challenged by several human right theorists in recent times to argue that the chasm between the different human rights dimensions need not be seen as acute. Fielitz argues that different human rights need not be pitted one against the

other. But he is of the view that the appropriate arena for enforcing human rights pertaining to economic and social rights needs to be the political one since it is here that questions of policy on allocation of scarce resources are handled.

This theme is further elaborated in the chapter by Professor Helmut Goerlich who links the enjoyment of human rights to the system of governance and posits the need to recognise the right to democratic governance as a human right. He draws attention to the inherent conflict between liberty and equality. He argues that the judiciary is not necessarily the appropriate branch of the State to actualise basic needs since these require budgetary allocations and implementation. In a Dworkin-like sense, he could be said to hold that actualisation of socio-economic rights and basic needs is a matter of ‘matter of policy’ rather than principle. He states that it is the legislative and executive branches that need to initiate legislation for the actualisation of these rights. The contrast of this perspective from the Indian experience is certainly one that is of interest to the comparative scholar. Rolf Künnemann elaborates this approach in concrete terms when he puts forward the need to not merely have a legislative framework but a framework law to operationalise the right to food in India.

The latter part of the book surveys the human rights track record in India and the crying need to deliver basic needs for the vast majority of people. A hard-hitting chapter by Dr. Michael Schied traces the emergence of the concept of fundamental rights during the Indian independence movement. In an analysis of the constitutional text and practice, he demonstrates how the imposing of ‘reasonable restrictions’ in the freedom rights nullified these essential rights. He points out that the Indian constitution did not rule out preventive detention and martial law, and had in fact codified emergency provisions. The political and constitutional development resulted in “the recognition of exceptional law as standard law” (p. 136) and the high rates of preventive detention, emergency powers and security legislation demonstrate that to characterise India as a soft state would be inaccurate. The unfolding of political and constitutional developments has resulted in the “an extension of executive powers and not by a balanced growth of all governmental branches” (p. 135).

The important role played by the judiciary in helping the citizen acquire a modicum of basic needs is brought out in several chapters in the volume. Professor BB Pande details the “ambivalent” judicial journey to create a proto-right to food in India. Professor Parmanand Singh in his essay on public interest litigation perceptively points out that “a judge may talk of right to life as including right to food, education, health, shelter and a horde of social rights without exactly determining who has the duty and how such a duty to provide positive social rights can be enforced.” (p. 322). Both the authors are cautious about the extent that one could expect the judiciary to deliver access to basic needs. Charu Sharma tracks the important contribution made by the Supreme Court in strengthening the right to environment in India and the varieties of remedies it have been imaginatively able to fashion. Chapters by Professors Amitabh Kundu and Michael von Hauff in the book describe the position with respect to basic amenities and informal

employment respectively. These essays are rich in economic analysis and the extent to which deprivation of basic needs impacts the poor.

The volume as a whole is an important contribution to the theorisation of human rights and the need to situate it in Indian political thought, both historical and contemporary, and will hopefully trigger broader debate on the human rights and “Indian values”. It also addresses the contemporary debate on the extent to which socio-economic rights can be enforced. Dealing with deprivation and the need to access human rights, the essays in the book offer a wealth of perspectives that would be welcomed by policy makers, political activists, lawyers, scholars and all those concerned with the future course of developments in India.

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