

ATR/89:1

The New Democracies and the Challenge of Human Rights

N. BARNEY PITYANA*

Human rights have a special role to play in contemporary developments that seek to sustain democracy. All human rights must be seen as “universal, interdependent and inter-related,” despite many of the ways in which globalization is pursued. The problems endemic to a globalized economy—inequality, unemployment, and poverty—need not be seen as overwhelming. Signs of change can be found in recent international discussions and in the eagerness of leaders in the developing nations of Africa to address these inequities at a systemic level. The reciprocal duties that accompany claims to rights have been taken on to some extent by individuals, states, and international bodies. Still, positive change is endangered by the problems of weak or failed states, and by the tendency of powerful nations to act unilaterally. The initiatives of regional institutions such as the African Union open up opportunities for national cooperation and wide-ranging coalitions, and fuel the amazing vibrancy currently evident in Africa.

Contemporary politics is founded on the ideal of democracy. There is hardly a statement made by world leaders without stress being placed on democracy or good governance or economic responsibility. Often this is mentioned as if we are all talking a language of common understanding. I have no desire in this paper to get into an in-depth political and historical analysis of democracy. Suffice it to say merely that democracy has become one of those political systems that have come to be taken for granted.

Democratic governance includes the means by which the popular will is tested and reflected in the programs and leadership of government. Democracy and all the mechanisms of government are regulated by the constitution and by law. The constitution is the basic law

* The Rev. Dr. N. Barney Pityana is Principal and Vice Chancellor of the University of South Africa and Professor in the Department of Constitutional, International, and Indigenous Law. He is a lawyer and theologian with a lifetime commitment to human rights. This paper was the conference keynote address.

of the land and provides for a system of checks and balances, and it sets out the powers and responsibilities of every organ of government. Constitutions are by their nature permanent documents that reflect the principles of government and the aspirations of the people. Society is destabilized if the constitution is constantly amended at the whim of the government of the day in order to remove those aspects of it which those in power consider to be standing in the way. The constitution is there precisely to check against the excessive, unregulated exercise of power.

I am, however, required to address the question of new democracies. Presumably, this refers to the systems of government that have emerged following the end of the cold war that had a domino effect in Eastern Europe, Africa, Latin America, and Asia. They are new because they are democratic systems born out of the collapse of communist totalitarianism and of the vassal states defined by allegiance to either the Eastern or Western block of nations. This bipolar arrangement had defined international relations since the end of World War II, and it held in a state of paralysis multilateral relations through the United Nations. The Cuban missile crisis and the Berlin wall, perhaps, marked the two dimensions of the cold war: preparedness for war and the maintenance of peace.

The other meaning of new must surely refer to understandings of democracy and its management that sought to define relations between state and people in new and different ways. With a history of atrocities against their own peoples, and with an experience of being held hostage by the strong arms of cold war alliances, many of the new democracies sought to break free and define their democratic ideals afresh. Constitutionalism, I suggest, got a new lease on life following the collapse of the Berlin wall. Not only did we see the spectacle of public demonstrations, flower power or green revolutions; it suddenly seemed possible that by sheer popular will governments could be changed. That possibility for change gave added impetus to democratic governance because popular sentiment became wide open to be tested and influenced.

Finally, democracy became new through international relations. The international multilateral systems in various formations set out guidelines about elections and made available training and resources for capacity building. International consensus on what was required to establish sustainable governance systems was established. And so the phenomenon of independent electoral systems and international

NEW DEMOCRACIES AND HUMAN RIGHTS 47

observers was born. Interestingly enough, there was a presumption that the established democracies had no need of observers, no need to have their own systems tested against the established democratic consensus—that is, until the Florida debacle in the United States in 2000. It has now become evident that the gentlemen's agreement that popular sentiment represented through only two main political parties was falling apart in countries like the United States, the United Kingdom, and many European countries. We have now become conscious of the fact that the many vocal democratic governments merely represent the majority of the 40 percent or so of the electorate in their countries who exercise their right to vote. We have also become sensitive to the fact that much of the democratic exercise that had been lauded for so long had some fundamental shortcomings. It became clear that the first past the post system presumed a greater degree of coherence than many of the new democracies actually enjoyed. And therefore various experiments in proportional representation have emerged as a more reliable barometer of political opinion in many countries.

In Africa and Eastern Europe, the new democracies have brought with them the unraveling of the nation-state and the threads that hold nations together. Somehow ethnic sentiments, language, and religion are no longer the glue that holds nations together. Besides, many nations have become conscious of the fact that through historical and political developments, nations were formed through systems of migration and conquest. The emerging and resultant new nationalisms have often posed a threat to any democratic ideals that the emerging states had hoped for. Instead, social instability has become common. That is the phenomenon that bedevils politics in Africa—the Democratic Republic of the Congo, Côte d'Ivoire, the Sudan, to name only a few. There is, in a sense, the rebirth and reformation of these states, and it is a painful process. And so, democracy is now no longer advanced by policies and principles that have international currency. They also have to be supported by international oversight and monitoring and, even more, by international investment in peace settlements and peacekeeping.

Because of the state of dissatisfaction with the formalities of democracy, political analysts have developed criteria that give content to the shell of democracy. For example, it is self-evident that democracy cannot be defined simply by the holding of elections periodically—say, every five years. It has now become international practice that

reputable international observers pronounce such elections free and fair. Even if such elections are considered free and fair, the government so elected is required to observe certain standards of democratic conduct: constitutionalism, especially as pertaining to the respect for the separation of powers; addressing corruption; the rule of law; and popular participation in systems of governance through consultative mechanisms, legislative rigor and a role for the opposition, including financial support provided by state for political parties. Other standards are independence of the judiciary; freedom of expression and a free media; and freedom and equality for all. Further, democratic conduct requires an intellectual climate and robust debate that eschews a climate of fear. And it requires public accountability, especially respect for watchdog bodies like the National Human Rights Commission and the ombudsman. On this basis, democracy has a vibrancy that is not simply tested by regular periodic elections, but by the extent to which regular processes of government uphold certain values that form the core of democracy.

Whereas democracy has come to be understood as the mechanisms, systems and procedures by which the democratic will is tested and honored, good governance has come to be associated with practices of government that are considered accountable, transparent, and responsive to the needs of the people. Good governance tests the daily practices of government against certain principles and policies. It defines the limits of power. Good governance has become a test of democracy.

In this paper, therefore, we examine contemporary developments that seek to sustain democracy. Of special interest is the role of human rights in upholding and sustaining democracy.

Human Rights and Globalization

A critical element in the rebuilding of societies and the new democracies following the end of the cold war has been in the promotion, monitoring, and defense of human rights worldwide. This has been so because of the belief that, following fifty years of the establishment of human rights norms and standards beginning with the United Nations Universal Declaration of Human Rights (1948), universal principles of the conduct of states are now available. With fifty years of standard-setting, the universal human rights system, however, has been less than successful in preventing human rights violations

NEW DEMOCRACIES AND HUMAN RIGHTS 49

and dealing effectively with perpetrators of human rights violations. Traditionally, international action has been unsuccessful because the international community has not been able to act decisively, consistently, and with equal resolve to address violators of human rights. Apparently, with the end of the cold war, in a unipolar world, the United Nations and other multilateral institutions have fared no better in delivering a safer and a freer world. Instead, we have seen the modern world's greatest failure of multilateralism when the United States and United Kingdom blatantly undermined universal consensus and proceeded with their coalition of the willing to execute their war on terror.

What we have, though, from the Vienna World Conference on Human Rights (1993) is the ringing statement that "all human rights are universal, interdependent and interrelated." This was an important statement at the time that sought to bridge the yawning divide and its entire apologia between civil and political rights as well as economic and social rights. It also sought to address once and for all the cultural exceptionalism that had become the camouflage for all sorts of human rights violations with which the treaty bodies within the United Nations system are constantly confronted, challenging their effectiveness as monitoring and implementing agents. United Nations Secretary General Kofi Annan's recent reform proposals of the United Nations Human Rights machinery, *In Larger Freedom*, go to the heart of the disillusionment with the United Nations and its system of human rights, including the prevailing cynicism about the UN's ineffectual and highly politicized mechanisms. The Secretary General argues cogently to the Commission on Human Rights:

We will not enjoy development without security, or security without development. But I also stress that we will not enjoy either without universal respect for human rights. Unless all these causes are advanced, none will succeed. And unless we remake our human rights machinery, we may be unable to renew public confidence in the United Nations itself.¹

This, of course, echoes the integrative view associated with the Nobel Prize-winning development economist Amartya Sen, who

¹ Kofi Annan, *Address to the Commission on Human Rights*, April 7, 2005, <http://www.un.org/apps/sg/sgstats.asp?nid=1388>.

asserts that all rights are interrelated and interdependent. Indeed, Sen's research shows that no functioning democracy has ever had a widespread famine, so that "Political rights, including freedom of expression and discussion, are . . . pivotal in inducing social responses to economic needs."² Commenting on the Secretary General's reform proposals, the influential think tank International Council on Human Rights Policy (ICHRP) welcomes the proposals as offering a momentum that can only gather pace, saying "those who wish to strengthen the UN human rights system should seize this chance to press not only for improvements in the Office of the High Commissioner for Human Rights and the Commission on Human Rights but for a larger and more relevant role for human rights throughout the UN and international system."³

These considerations cannot meaningfully be considered outside of the onward march of globalization and a world trade system under the hegemony of the world's largest trading nations. Simply put, globalization refers to that body of systems and mechanisms that proceed from the conviction that economic prosperity for all nations can only flow from the ability of nations to trade with one another freely and without impediment and restrictive regulations. In other words, goods, persons, and capital must be free to enter markets unhindered. But the reality has been different. The major trading partners have inordinate power in the world trade forums. Unless developing nations guard their own interests, the rules of the World Trade Organization (WTO) have been anything but beneficial to the nations that need support most. The rules of the game invariably favor those who have set the rules and who have done so to favor their own interests. Power relations in these forums remain unequal. Further, in a world where modern technology plays a very determinant role in trade relations, nations that lag behind in the digital divide continue to be disadvantaged.

It has now become evident that developed nations have protectionist measures together with subsidies for their strategic industries like agricultural products. They demand the lowering of barriers with regard to commodities and oil, with tariffs into their own markets that they control—to the point that the entire system is in danger of being

² Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999) 154.

³ International Council on Human Rights Policy, The Flowerhill Exchange, "Notes on UN Human Rights Reform." 2005, 3, http://www.ichrp.org/paper_files/130_2_03.doc.

NEW DEMOCRACIES AND HUMAN RIGHTS 51

discredited. It has been observed that “by 1992, these globalized market restrictions and unequal partnerships were costing developing countries about \$500bn—an amount equal to about 20% of their combined gross national product (GNP), and more than six times their total amount spent on development priorities, such as basic education, primary health care, safe water and the elimination of malnutrition.”⁴ In the face of such a system the UNDP concludes:

In the real world, as distinct from the imaginary one inhabited by free traders, survival in the agricultural market depends less on comparative advantage than on comparative access to subsidies. Liberalizing local food markets in the face of such unequal competition is no prescription for improving efficiency, but a recipe for the destruction of livelihoods on a massive scale.⁵

It is accordingly not surprising that commentator Ethan Kapstein observes “the global economy is leaving millions of disaffected workers in its train. Inequality, unemployment, and endemic poverty have become its handmaidens.”⁶

The danger with this critique of globalization is that it gives way to paralysis, springing from the idea that the odds are overwhelming, which is followed by the resultant crazy notions of Africa going it alone. On the other hand, the collective realism of the New Partnership for Africa's Development (NEPAD) and the proponents of the developmental state are carving an African standpoint and advocacy with the developed nations. This approach surely has yielded some ground at the recent Gleneagles Summit in that 40 billion dollars in debt repayments have been cancelled—not enough, by any means, but sufficient to alleviate the burden for the nations most affected. The issue of trade tariffs and subsidies will be referred to in the next Doha round of the WTO.

The Gleneagles G8 Summit (Scotland, July 2005) was preceded by the publication in March 2005 of the Report of the Commission for Africa set up by British Prime Minister Tony Blair. The report, “Our

⁴ Rob Davies, “Globalisation: The Challenge Facing South Africa” *Umrabulo*, Vol. 3 No. 5, 1998, 3.

⁵ United Nations Development Report, “Report 1997” (New York: Oxford University Press, 1997), 86.

⁶ Ethan Kapstein, “Workers and the World Economy: Breaking the Postwar Bargain” *Foreign Affairs*, vol. 75, No. 3, May/June 1996, 16.

Common Interest,” put forward a series of proposals called the “Coherent Package for Africa” for consideration by the Group of 8 developed nations. The report has identified Africa as the continent that has benefited least from the democracy dividend and the prosperity that has marked the world economy in recent years. The report recognizes that failure to address the prevalent disadvantage of Africa could sow the seeds of further destabilization and conflict in the world. Clearly the climate was right for the world community to respond positively to Africa’s own initiatives, typified by the NEPAD and the peer review mechanism, and by the advances in the African Union (AU) and its role in peacekeeping on the continent. Also of note is the presence of leadership on the continent that clearly aspires to take responsibility for the development of the entire continent, espouses good governance, tackles poverty and corruption, and advances universal human rights.

A feature of the Blair report is its acknowledgment of the complexity of the Western nations in the sad plight of Africa today, and an acknowledgment by Africa’s leaders likewise that a constellation of forces has kept Africa deprived and prevented it from benefiting from the boom in international trade and resources. It also notes that there is a new momentum in Africa’s affairs and those of the world that points to a meaningful partnership that is likely to bring success with it. The outlook of the report is much more positive about Africa than anything one has seen in recent times.

Among the proposals for a new deal for Africa, much is made of the need to create an environment for peace, stability, and security, with good governance and capacity building. Transparency and accountability, tackling corruption and building civil society, and investing in the people are key elements. The report argues that a new mindset is demanded, one that will give Africa an authentic place in multilateral institutions, reform of those institutions and a partnership based on solidarity. The report ends:

Ultimately it is the people of Africa and their fellow citizens in the rest of the world who must insist on action; action which is based on their shared goals and on the solidarity that is rooted in a common humanity. . . . That power will provide the energy and commitment that will force the changing of ways that is fundamental to Africa’s resurgence.⁷

⁷ Commission for Africa, “Our Common Interest: Report of the Commission for Africa” (March, 2005), 384.

Ethics and Rights in Democracy

I watched the June 2005 *BBC Newsnight* report on the demolitions of informal settlements and informal—perhaps illegal—traders in Zimbabwe under President Robert Mugabe's "Operation Drive Out Trash." What struck me was that the presenter, Kate Hoey, a Labor MP who claims that the film was shot illegally inside Zimbabwe, the opposition MDC (Movement for Democratic Change), and other commentators insisted that President Thabo Mbeki of South Africa had to be blamed for the situation in Zimbabwe because he is propping up the Mugabe regime and has not done enough to apply pressure on Mugabe. In discussions with Kate Hoey, I tried to understand the rationale for such an assertion. In other words, was there a legal duty or a moral obligation binding the president of a neighboring state? Indeed I tried to inquire what action could reasonably be expected of the President of South Africa. Should he send troops to Zimbabwe? Could he apply sanctions? Or should he take to a soapbox and denounce Mugabe? That may give him some moral satisfaction, but Human Rights Watch and Amnesty International have perfected the art of doing that.

In fact, nobody clearly articulates what a neighboring state should be doing. Relations between states continue to be guided by set international norms and unilateral economic sanctions, and the United Nations Charter guides and circumscribes any military intervention. There is no country that should assume the role of an international policeman. Clearly there are difficulties in suggesting that President Mbeki ought to pressure the president of a neighboring nation. Sometimes, I sense an abdication of responsibility in such suggestions, as if the people of Zimbabwe cannot make their own choices, and in good conscience take responsibility for them. Zimbabwean civil society, and some international actors, it appears, can only be compelled to specific forms of action by a Mbeki. That is not the way international relations works.

Perhaps there is a more profound point that is being made here. In the global world and moral universe in which we live, individuals as well as states acquire certain duties to act, and others bear certain rights. For every right there is a reciprocal duty. It is interesting that in recent times, international human rights discourse has been couched in moral terms. That is because there has to be a combination of impulses that propel human nature to respond. One impulse is the conjunction of inner conviction with the sense of revulsion at certain

forms of behavior or the impact thereof. Individuals so concerned, we are made to believe, can within the extent of their capabilities, and to the extent of their knowledge, act to alleviate suffering. We are, after all, our brother's keeper! There is an impressive array of mobilization by large numbers of ordinary people across the globe under the banner of making poverty history; there are protesters who invade sessions of the G8 and sessions of the WTO; and there are the concerts organized by Bob Geldof and Bono, as well as the 466654 Concerts associated with Nelson Mandela's campaign against HIV/AIDS. There is a remarkable groundswell of public opinion against poverty, HIV/AIDS, and an unjust international economic system. Individuals can do so much, but often not enough, on their own to change the world.

One extension of the argument is, however, that acting out of moral revulsion can never be enough, especially in international affairs. Therefore, for fifty years, a process of standard setting was undertaken within the UN system, and treaty bodies established to monitor, ensure accountability, and enforce treaty obligations. Indeed, in the worst cases of crimes against humanity—genocide, and so on—an International Criminal Court is now in place whereby an international criminal jurisdiction has been established to try culprits from Milošević and Karadžić in the former Yugoslavia to the genocides of Rwanda. But there is a sense that most human rights violations do not rise to the level of seriousness required by international law. As Kofi Annan has found, some of these options have been be-deviled by selective actions and moral outrage by nations and states that have undermined effective international action.

Even so, what is emerging to an impressive degree is international action that brings a combination of the powerful and rich nations of the world together with the moral stature of Third World leaders. Following the evident futility of the unilateral actions of George W. Bush and Tony Blair in Afghanistan and Iraq, it has become necessary to rescue the credibility and integrity of international multilateral actions, and look for more lasting solutions. This new consciousness, it seems to me, has been foregrounded in the recent publication by the International Human Rights Policy Council (ICHRP), *Duties sans Frontières* (2003). The ICHRP, like many human rights activist groups, has become weary of the futility of moral appeals to responsible international action, and has observed the ineffectual human rights system at work. Many are looking for compelling language that could bring together both the language of values and ethics as well as establish a consistent and effective system of international law. The report concludes:

The strongest case for long-term international co-operation to reduce violations of economic, social and cultural rights (ESC) can probably be made, in fact, when moral obligation to act is supported by a commitment that draws on human rights law, and arguments that are based on ethical or deferred interest. Activists and officials who seek to persuade richer countries to act abroad in more effective ways to end violations of human rights across the world should no doubt aim to accumulate positive arguments of all three kinds.⁸

The language of international relations is changing. The Report of the Commission for Africa articulates a different way of understanding national interests in this new global environment. Indeed, the NEPAD principles and the African Peer Review Mechanism (APRM) bring together responsibility and accountability. This sets the tone for a demand from the nations of the world to change the way in which business is done. We now know that the nations of the world cannot operate in isolation. Third World poverty undermines human development. The spread of preventable diseases like HIV/AIDS threatens the capacity for the nations of the world to do business with one another. And poor countries and illiterate communities are prone to social instability and rule by authoritarian regimes. Trade and investment decisions in one capital of the world may well affect the well-being of people in villages miles away, through job losses, public expenditure priorities, environmental sustainability, and so on. According to international norms, it is clearly not enough for world leaders to act ostensibly in their national interests, if by so doing they violate the rights of others and breach international standards. There is a moral compass that guides world affairs, and the world can only be a better and safer place as a result.

Conclusion

Different levels of action are already being undertaken to shape a shared value system in the world. It is incredibly difficult, though, for any of these efforts to be sustained in the face of bombs in various capitals of the world, especially when the bombers claim religious inspiration. Likewise, this new movement in world affairs is made more difficult to achieve when there are weak or failed states as in Iraq,

⁸ International Council on Human Rights Policy, "Duties Sans Frontières Human Rights and Global Social Justice," (Versoix, Switzerland, 2003), 84.

Afghanistan, Somalia, and elsewhere that are unable to maintain a modicum of legality and appear to be at the mercy of lawless brigands. (Actually, I count Israel as among such failed states, because without the enormous injection of capital and arms from the United States and from the European Union, the state of Israel is frankly not viable.) When states fail, non-state actors often fill the void, without any accountability in international law.

The second imperative is that in a unipolar world, powerful nations should not assume the right to engage in cowboy activities beyond their jurisdictions. The multilateral role of the United Nations must be asserted, and common actions of world leaders in the form of the G8 nations must be encouraged. What such action does is to apply some pressure on the powerful nations to act within certain rules of engagement for fear of international opprobrium. It matters that African leaders are these days invited as guests at these meetings. There must remain a concern, though, that such meetings may well signal the inclination of the powerful nations to act outside of the set multilateral platforms.

Third, the strengthening of African initiatives is critical. The African Constitutive Act 2000 sets a framework for African nations to be mutually accountable in a manner that the previous Organization of African Unity (OAU) Charter did not. Nations that violate the Constitutive Act can now be suspended from the councils of the African Union. The principles set out in the Constitutive Act express in unambiguous terms a commitment to democracy and good governance, and to upholding international human rights norms, as well as mutual accountability. That explains why the AU now has peacekeeping forces in different trouble spots on the continent. It explains also the remarkable achievement of African leaders acting together to resolve all forms of conflict in Africa.

The authority of the AU is now broadly accepted, and the stature of the Pan-African Parliament has grown. With it, other African institutions and initiatives like the African Peer Review Mechanism and NEPAD have become influential measures of the seriousness of Africa to find solutions to African problems. Notwithstanding the slow delivery and the impatience with NEPAD among various African leaders, NEPAD has clearly established Africa's bona fides in advancing the African human development agenda.

As part of this, the AU has undertaken several initiatives like the gathering of the African intellectuals and the diaspora in Dakar in

NEW DEMOCRACIES AND HUMAN RIGHTS 57

October 2004 and in Kingston, Jamaica, in March 2005. The idea is that African intellectual capital can be galvanized for peace, security, and prosperity in Africa. It is then possible to form coalitions with other nations and peoples of African ancestry. These coalitions will enhance contributions to research and development, and build capacity and training for a technological society, thereby taking common action to eradicate poverty and disease.

Finally, civil society in Africa is organizing around the themes expressed in this paper. Two major initiatives come to mind. The African Governance Institute will be established later this year. Here, research and programs to advance good governance in Africa will be established by Africans themselves. The Institute for African Humanitarian Action, on the other hand, will be at hand to train African governments and other actors to anticipate disasters, plan for disaster relief and management, and mobilize humanitarian actions to bring resources and knowledge to end human suffering. The situations in Darfur and Zimbabwe notwithstanding, there is an amazing dynamism and vibrancy in Africa—and indeed, hope about Africa and its future.

