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The International Human Rights Movement Today

BALAKRISHNAN RAJAGOPAL*

I begin by asking: is there such a thing as an International Human Rights Movement? I would like to raise that as an issue that we need to address, whether there is one movement or multiple movements within the human rights tradition, and whether there are in fact movements that might be part of the human rights tradition but nevertheless do not use or rely on the discourse of international human rights. In other words, diversity and contradiction within the Human Rights Movement is a theme that I think we need to focus on and problematize. And we should also start by recognizing that ‘international human rights’ is a language, a language of both power and resistance. It is a language of hegemony and counter-hegemony, and we need to recognize the multiple uses to which it is put and the fact that it is a terrain of contestation, as I have argued before, for multiple deployments of both power and resistance.¹

I also think we need to start by problematizing the ‘origins’ of the International Human Rights Movement. To say that we should talk about international human rights “sixty years on” is to tie us to a particular era with a beginning from the Universal Declaration of Human Rights, and to a privileged type of expertise, especially law,

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1. BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003) [hereinafter RAJAGOPAL, INTERNATIONAL LAW FROM BELOW]; Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 THIRD WORLD Q. 767 (2006) [hereinafter Rajagopal, *Counter-hegemonic International Law*].

as the mechanism through which this particular language expresses itself. Some of the biggest issues in today's Human Rights Movement in fact raise questions both about the political consequences of rights, as well as the nature of the type of expertise that is deployed in realizing human rights claims.² So I want to make three points briefly, and then leave the reader with three questions, which I think are very important for both scholars and practitioners of human rights today.

The three points that I want to make are as follows. First, I want to talk about what I shall call the "birth defect" of the International Human Rights Movement, as well as the nature of the relationship between what I will call 'counter-narratives' of human rights and the official narratives of human rights. By birth defect, I mean both the well-noted challenge to the official beginnings of the international human rights regime in terms of its representativity,³ and its being able to speak on behalf of all. Various scholars and writers have examined this at length,⁴ so I will not belabor the point but will simply note the absence of particular cultures and communities and viewpoints in the making of international human rights. We need to recognize and be honest about such absences. The birth defect of international human rights was never fully cured in a sense, partly because of the way in which it responded, in my view, to the most dominant political question of the second half of the 20th century, which was not the Cold War, but colonialism.⁵ Colonialism was the larger story in which the Cold War was, of course, one of the plots. But colonialism was left in place by human rights, ostensibly the leading moral discourse of the day.⁶ The structures of colonialism, as well as the structures of the economic order that colonialism supported, were left in place, and international human rights did not rise up to be the language through which such structures were going

2. See generally Martti Koskenniemi, *The Effect of Rights on Political Culture*, in THE EU AND HUMAN RIGHTS 99 (Philip Alston, Mara Bustelo & James Heenan eds., 1999); David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463 (2001).

3. See, e.g., Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

4. See, e.g., COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (2000); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2002).

5. RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 1; see also ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

6. See generally RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 1.

to be challenged.

But I also think that we need to recognize the nature of the counter-narratives of human rights that arose and pushed back the official version's blind-spots and biases. These counter-narratives of human rights, as I have argued, should not be seen simply in terms of a traditional analytical lens of state politics, but instead, through the theory and practice of social movements.⁷ Looked at this way, the origins of international human rights could be extended back further into the struggles of labor in the 19th and early 20th centuries, the human rights rebellions of women and slaves, and a range of anti-colonial movements.⁸ The point is simply that you could seek any number of beginnings of human rights, and those beginnings are, of course, not part of the official history of 'international human rights.' They are certainly not part of law schools' curricula when they teach international human rights law. It is by now well recognized by mostly everyone except the narrowest legal experts that the politics of human rights was and is in many ways generated by a range of social movements or ordinary people, not only by states and elites. Of course states played a role in the formal creation of texts, but I think it is a mistake to focus our attention only on states. These movements were both local and global at the same time, such as the African-American movement,⁹ and not simply global alone. And they were not particularly law-centric or law focused in any easy or particular way.¹⁰ Recognizing this raises the question in very significant ways of what role law plays in the International Human Rights Movement. This is a question that many of us are grappling with at this stage,¹¹ as well as with the consequences of what has been termed 'over-legalizing' human rights,¹² a topic to which I will come.

7. Balakrishnan Rajagopal, *International Law and the Development Encounter: Violence and Resistance at the Margins*, 93 AM. SOC'Y INT'L L. PROC. 16 (1999); RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 1.

8. See MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* (2004).

9. See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003).

10. See e.g., SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

11. See, e.g., Martti Koskenniemi, 'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law, 65 MOD. L. REV. 159 (2002); Rajagopal, *Counter-hegemonic International Law*, *supra* note 1.

12. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM.

At this stage, it is striking that many of us are rejecting some of the easy consensus positions of the past, which are that international human rights has a monopoly on truth, justice, or resistance, or the idea that international human rights is a kind of totalizing language of emancipation. Instead, I want to recognize that languages of emancipation are multiple, and have a contradictory and sometimes uneasy relationship with what we call “international human rights.” And further, the successes and failures of what today we call international human rights are directly the consequence of both its birth defects as well as the influence of the counter-narratives on the official human rights discourse, and the way in which the official human rights discourse has interacted with or ‘received’ these counter-narratives. That relationship is a problematic one, and we need to try to understand the ways in which it is problematic.

The second point I want to make is about the role of Third World states in international human rights. I think that we can all agree that international human rights has been, by and large, about Third World states. And I think that it is fair to say that international human rights is what it is because of Third World states. I say this in two senses, both a negative sense as well as a positive sense. The negative sense is in terms of what Makau Mutua has referred to as a metaphor of human rights, of “savages, victims and saviors.”¹³ The savages being, of course, the Third World dictators, the victims being the poor Third World people, as well as anyone not like us, and, of course, the saviors being those of us, the heroes in the West, who work to rescue them. The moral and political implications of this notion need to be talked about.

The second—positive—way in which international human rights has been influenced by Third World states is less recognized, that is, in terms of the way in which many of the most significant advances in human rights that we take for granted these days arose from the issues that were put on the global agenda by Third World states. Particularly, I am thinking of the politics of the U.N. at the Commission on Human Rights in the 1960s and '70s. It was the Third World states that put the biggest human rights issues on the agenda, including that of colonialism, racial discrimination and apartheid, and

L. REV. 1832 (2002).

13. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001).

later economic, social, and cultural rights. In other words, the issues that actually matter for the bulk of the world's population were put on the human rights agenda by Third World States.¹⁴ India's role, to offer an example, in putting racial discrimination against its own nationals in apartheid South Africa on the U.N. Agenda in 1946 was a kind of door-opening moment in the international human rights field. There is also, of course, the historical irony that now India is often on the opposite side of the fence on human rights at the U.N. on a number of issues. But to recognize these contradictory positions is to recognize that today international human rights needs to be understood through the political economy of state formation in the Third World. Why is it that these changes have taken place, and how do these changes relate to internal changes within nation-states? On this matter, the point I want to leave you with is simply that contrary to how we imagine the official history of international human rights, Third World states have played a major role in its making and they also constitute a principle domain of its deployment. I do not think this is a sense that is actually taught or problematized in much of human rights teaching, particularly in law schools.

The third point that I want to make has to do with the fact that international human rights today is not just a language of resistance, but it is also a language of power. It is a language of management in conflict and peace studies, for example. It is even a language of profit that companies deploy to give themselves brand names. I think that there are several dangers associated with this repositioning of human rights. I want to call this the danger of Constitutionalizing international human rights, with a capital "C."

There are three senses in which I think that international human rights is getting Constitutionalized.¹⁵ One is a kind of global constitutionalism, in which there is a convergence, both in the popular-culture sense, as well as in the institutional sense of, for example, revisions of legal texts and constitutions, and the practice of constitutional courts converging on what you could call a similar reading of a dominant script called international human rights. I do not think that there is something bad in convergence *per se*, because I

14. See Balakrishnan Rajagopal, *Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council Through Historical Reflection*, 13 *Buff. Hum. Rts. L. Rev.* 7 (2007).

15. See generally Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771 (1997).

do not have any evidence to show that convergence would be in fact a bad idea on empirics alone, nor do I have evidence that textual convergence actually produces convergence in practice. What I am also worried about is the nature of the backlash that such a convergence would produce, and is producing in a number of areas, which I think international human rights advocates do not appreciate much. For example, in U.S. domestic law, you can think about *Roe v. Wade*¹⁶ as a success or you could think about it as success at a given moment that produced a backlash in the next two decades, which ended up in fact problematizing not just the politics of the body or sexual relations, or the question of women's rights, but the whole structure of women's rights in many different ways.¹⁷

The second way in which international human rights is getting Constitutionalized is the way in which it is increasingly being used as a kind of Archimedean point to judge the effectiveness or the legitimacy of policies in a range of fields, such as development, security, humanitarianism, and social policy.¹⁸ I think that there are many problems with this, including the possibility that it could end up importing the biases of international human rights into many of those other policy areas.

The third sense in which there is a problem with Constitutionalizing international human rights has to do with the over-legalizing of human rights, which I think is a danger, while ignoring its moral and political dimensions. Given the great proliferation of global norms and courts, there was for many years a systematic sidelining of local democratic experiments as laboratories of rights. There is now an urgent need to talk about how to increase the politics of the local in international human rights, and to figure out how to write this resistance of the local into international human rights. In my own work, I have argued that one way in which this could be done is by engaging the counter-narratives of social movements and their alternative readings of human rights.¹⁹

I want to conclude by saying that in many ways international

16. 410 U.S. 113 (1973).

17. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373 (2007).

18. See Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347 (2008).

19. RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, *supra* note 1.

human rights today at sixty is like many people who are sixty years old. It is recognizing many of its problems: it is a little bit overweight, and it has ballooned in size, but the very expansion in size brings about problems. It is time for us to go for a visit to the doctor. I think there are many issues that arise from the troubled relationship between international human rights, with its privileged language of law, and the counter-narratives of social movements and other actors. I would frame them in the form of three questions and leave them for exploration and discussion. First, can we vernacularize human rights without excessive legalism, particularly in understandings of resistance? Second, can we legalize without constitutionalizing human rights, with a capital “C”? Particularly, can we escape past institutional forms that would reproduce past patterns of power and domination? And third, can we critique legalism itself without surrendering to symbolism in some ways, for example, of soft-law standards in corporate codes? In other words, is there perhaps a downside to giving up on the law too much? These are questions with which many of us grapple, both in terms of our activist orientations, as well as in scholarly engagement.