# RACIAL DISCRIMINATION AND HUMAN RIGHTS

> The problem of the 20th century is the problem of the colour line, the relation of the darker to the lighter races of men in Asia and Africa, in America and in the islands of the sea.
>
> *W.E.B. Dubois.*

WITHIN THE Commonwealth and at the United Nations, *discrimination was first noted in connection with Indians living in South Africa.* Apartheid was inscribed on the agenda of the General Assembly in its very first session. On 10th December, 1948, the General Assembly adopted the Universal Declaration of Human Rights.

The General Assembly adopted on 19th December, 1968, resolution 2446 (XXIII) on measures to achieve the rapid and total elimination of all forms of discrimination in general and of the policy of *apartheid* in particular. While noting the irony of the situation, *viz.*, that during 1968 itself which was observed as the *International Year for Human Rights* large-scale violation continued to take place in South Africa, Portugal and South-Rhodesia, *etc.* The world must be tired by now of the U.N. instruments in the field of human rights being invoked without result and of the cynical acceptance by the governments of 'the credibility gap'. The latest accord between U.K. and Rhodesia offering 5 million victims guarantees against racial discrimination and the possibility of eventual political control left power firmly in the hands of the country's white minority for considerable time to come. Naturally, this has been hailed as giving racialism an international certificate of respectability and is likely to strengthen the demand for continuation of the current U.N. sponsored embargo on trade with Rhodesia.

It is only when the countries freed from the bonds of colonialism joined the United Nations that the world recognised the need for legislation in the area of racial discrimination. Significantly, the Asian-African conference in Bundung, Indonesia in 1955 is still remembered for having focussed the fight against racialism being the "first inter-continental conference of coloured peoples in the history of mankind". The United Nations have, no doubt, attributed legal guilt to South Africa, Rhodesia and Portugal. But *the question now is*: *how the United Nations law has 'affected' the victims of racial discrimination and their oppressors ?* And what is the United Nations' law on racial discrimination in the context of human rights ? Articles 1(3), 13(1), 55(*c*), 56 and 76 (*c*) of the U.N. Charter embody the principle of non-discrimination on grounds of race. There are other provisions such as article 2(7) and chapter VII of the charter which relate to racism and threat to peace. The Convention on the Elimination of All Forms of Racial Discrimination came into force in

January, 1969. Forty nations were parties to the treaty. In effect this treaty creates ombudsmen in racial discrimination : a Committee on the Elimination of Racial Discrimination — *ex-officio* experts who have the power to investigate and to criticise what government do about racial discrimination. We have also the I.L.O. Discrimination (Employment and Occupation) Convention 1958 and the UNESCO Convention against Discrimination in Education, 1960. We have also treaties *not yet in* force, *viz.*, the 1966 Covenant on Civil and Political Rights and Covenant on Economic Social and Cultural Rights (*e.g.*, article 2 of each covenant; articles 24-27 of the Civil and Political Covenant), Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968. Among the important U.N. declarations we have, of course, the Universal Declaration of Human Rights, 1948 (*e.g.*, articles 2 and 7), Declaration on the Elimination of All Forms of Racial Discrimination *vide* resolution adopted by the U.N. General Assembly at its meeting of November 20, 1963 as also numerous pronouncements of the General Assembly, the Economic and Social Council, the Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities and other Groups. We may also refer to the various U.N. organs and procedures that have been established specifically to deal with *apartheid* such as the *Ad Hoc* Working Group of Experts, the Council for Namibia, the Trust Fund for South Atrica, *etc.* But there was a set back in the international protection of human rights which occurred in October 28, 1969 when the Secretary General of the United Nations directed 51 U.N. Information Centres to discontinue the practice of receiving and forwarding communications on human rights matters to it. Thus, a vast majority of the peoples of the United Nations have no effective means, formal or informal of raising human rights complaints. The chairman of the U.N. Special Committee on the Policies of Apartheid himself stated on February 26, 1970 that "too many resolutions and too little action" is all that the United Nations can show after having dealt with the problem for 25 years. In this period all peaceful procedures for settling this issue, *outside of those provided by* chapters VI and VII of the charter, have been tried but to no avail. There is no denying also that article 2(7) has been used as a shield to cover up a country's failure in meeting the standards of the Universal Declaration of Human Rights.

Serious deficiencies have been pointed out in the main constituent of the United Nations' law, *viz.*, the Convention on the Elimination of All Forms of Racial Discrimination. The convention permits reservations. These relate primarily to the ultimate authority of the International Court of Justice; they suggest that the court is not really a court but merely an arbitration body. There article 14(1) establishes that complaints from individual victims may not be received by the Committee on the Elimination of Racial Discrimination unless the state party recognises the competence of the committee. In other words, the remedies are not available unless the victim can get a state other than his own to make a complaint against

his government : obviously this is not conducive to the interest of the victim. There is also no requirement to set up an internal body referred to in article 14(2). Unfortunately, the Racial Discrimination Treaty does not insist that such a body be established within every ratifying state. Besides, in terms of articles 11 and 12, the committee lacks investigative and fact-finding power. Lastly, the convention gives rise to contradiction between many rights and freedom, *e.g.*, the conflict between the freedom of expression and the right to be free of discrimination based on race. The true requirement for effectiveness of United Nations' law is that 'the implementation machinery of the said convention must convert article 14(2) from an option into an obligation'. Secondly, failure to accede to the supplementary legislation must not permit a state to give up the pursuit of the aims or purposes of the Charter of the United Nations.

In most countries there appears to be no end to the harsh polemics of revolt and repression. As a distinguished witness before the National Advisory Commission on Civil Disorders in America said :

> I must again in candor say to you members of this Commission —it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recognitions, and the same inaction.

On November 26, 1968, the General Assembly of the U.N. adopted the Convention on the Non-Applicability of Statutory Limitations to War as inclusive of inhuman acts resulting from the policy of apartheid even if such acts do not constitute a violation of the domestic law of the country in which they were committed. The merits of the convention are many. Individual criminals, whether as participants, accomplices, conspirators or state authorities who tolerate the commission of the crime are covered by its provisions. But voting support for the convention was not large and it betrays a curious pattern of ambivalence. The convention relates to crimes to which statutory limitation already applied. It has been argued that the basic human rights of accused persons are eroded by its endorsement of retroactivity, a concept hostile to most legal systems. While it is not clear why we should bother about human rights of those who trample on human rights, the fact remains that it is not likely that the convention will work very effectively.

One could not depend either on judicial independence for upholding human rights. The Supreme Court of Africa adopts an essentially positivist conception of its own task : courts of law are not concerned with the question whether an act of Parliament is reasonable or unreasonable; politic or impolitic. The court thought that discrimination in the form of separation on a racial basis is valid so long as there is equality of treatment. By contrast the Supreme Court of the United States slowly approached the overriding of 'separate but equal' formula in favour of an 'unseparated' equality.

But the extent of the guarantee in law tends to contract or expand according to the society's own 'impulse' contract or expand.

A Supreme Court would be useless unless it works with police power, an Advocate General and effective sanctions. It has been argued on this basis that a world Supreme Court cannot be set up till institutions of narrower scope (*e.g.*, international fact-finding bodies) and more responsive internal institutions are established. Also, in the light of imperialist interventions, total non-intervention has been accepted by the United Nations as one of the highest of principles. But I would like to believe that a still higher principle is that which overrides the right of internal self-determination and invalidates the obligation to abstain from interference in what would otherwise be the domestic affairs of other states. This principle is covered in the declaration on non-interventions by the injunction that 'all states shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations'. The special Committee on Friendly Relations has, however, combined in the declaration adopted on 15th September, 1970 the assertion of equal rights and self-determination of peoples and the duty of states to eliminate all forms of racial discrimination. Perhaps the U.N. Charter could not by itself furnish yet the answer as to whether article 1, para 3 or article 2, para 7 takes priority. But the contradiction between the doctrine of non-intervention and the attack on apartheid must be removed as otherwise continued white minority rule as in southern Africa, *etc.*, will keep the cause of self-determination alive.

I believe it would help if we really concentrate our efforts on securing implementation of the declaration on the promotion among youth of the ideals of peace, mutual respect and understanding between peoples. The battle is truly won if the youth of the world community are trained to acquire higher moral qualities.

As I conclude, the resonance of recognition gained by Bangladesh is all too clear to be missed by the world community; Bangladesh, the first courageous act of self-determination to *implement* non-discrimination and affirm human rights.

*S.K. Das Gupta**

* Lecturer, University College of Law, Calcutta.