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Ed Ratushny

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Résumé de l'article

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Au niveau du droit interne, la classification des droits de l'homme et le degré de protection accordée à chaque catégorie de droits, individuels, collectifs, économiques et sociaux, traduit la nécessité de tenir compte de réalités concrètes spécifiques.

L'auteur examine l'approche canadienne des droits de l'homme et les grandes étapes ayant marqué la reconnaissance de ces droits avant qu'ils ne soient consacrés constitutionnellement. Enfin, l'auteur situe les grandes catégories de droits humains dans le contexte canadien et porte un jugement de valeur quant au degré de protection qui leur est respectivement accordée.

The Need for a Common Perception of Human Rights in a World of Diversity : A Canadian Perspective

Ed RATUSHNY *

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* Director, Human Rights Centre, Ottawa Law School.

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Introduction

In spite of the existence of international declarations and covenants on human rights, the problem of their definition persists. For example, in a recent article, B.G. Ramcharan of the United Nations Centre for Human Rights raised the following controversial questions:

Do human rights pertain solely to individuals? May they appertain to groups or to peoples as well?

Do human rights embrace only traditional civil and political rights or do they also embrace economic, social and cultural rights?

Do newly asserted rights, such as the right to development, exist?

Are they capable of existing as human rights, and, if so, again, would they appertain to individuals only, to groups, to peoples or to a combination of these?¹

The author concludes that the recognition of human rights is essentially a normative process requiring recognition by a competent organ. Nevertheless, there is an evolution in the stock of human rights:

It is fallacious to confine the definition of human rights only to traditional categories or criteria. There are ongoing processes of discovery recognition; enlargement, enrichment and refining; and adapting and updating.²

At the same time, the legal and moral force of laws and legal principles will be diminished if they can mean completely different things to different people and, in the international sphere, to different countries. The integrity of international structures for the promotion of human rights, therefore, requires a common perception of the meaning of human rights.

How can this be achieved in a world of ideological, economic, cultural and religious diversity? People from lesser developed nations have often stated that traditional civil and political rights have no significance in the face

1. "The Concept of Human Rights in Contemporary International Law", (1983) 1 *Can. H.R. Yearbook* 267, at 268.

2. *Ibid.*, at 280.

of starvation or dominance by outside forces. Often members of ethnic minorities and indigenous peoples see their hopes and aspirations as being more crucially dependent upon the vitality of the collectivity to which they belong than to their civil and political "freedom" as individuals. These are fundamental concerns which must be recognized in any discussion of human rights.

However, in my view, it is regrettable that too often discussions in this area become a debate on the relative merits of individual rights *versus* collective or peoples' rights. Such an approach leads to the separation of rights into water-tight compartments and forces people to choose to support one category in favour of another. Geographical distinctions are often emphasized and the discussion may become a debate of social, economic and political ideology.

Such an approach is unfortunate because the concept of human rights should transcend such ideology. Human rights should represent a core of fundamental and universal human values which every political ideology should respect, protect and foster. All human rights have as their foundation the "inherent dignity" of all persons. This central phrase is embedded in the first line of the Preamble to the Universal Declaration of Human Rights. All human rights can be viewed as no more but, of course, no less, than the basic requirements for ensuring the preservation and enhancement of the human dignity of all persons³.

If this approach is accepted, how can it be argued that one category of rights is more important than another? Indeed, how can there be any justification for maintaining classifications at all? The real goal should be the implementation of human rights while over-emphasis upon classification can become a tedious and sterile exercise. On the other hand, there is a need for a clear understanding of what different human rights encompass in order to address specifically the manner in which their protection and promotion might be achieved.

One reason for classifying human rights is the variety of contexts in which they must be considered. The intrinsic validity of a human right does not change. However, the manner and degree to which human dignity is most seriously offended will vary from one society to another. In Canada, for example, the most serious violation of human dignity may be the collective situation of the aboriginal peoples. Greater emphasis must be placed upon the amelioration of this situation. However, in doing so, care must also be taken

3. See, generally, the discussion by Schacter, "Human Dignity as a Normative Concept", (1983) 77 *Am. J. Int. L.* 1.

not to jeopardize the rights of others, such as women. These different interests should not be seen as being mutually exclusive. Rather, the importance of both must be recognized and an appropriate balance reached depending on the context. A variety of historical, social, cultural and economic considerations may come into play in determining not only how human dignity may be most seriously offended, but also the manner in which it can best be preserved and enhanced.

This leads to a second justification of discussing categories of human rights. Such classification can suggest the kinds of approaches which will be most functional in the promotion of human rights. Different societal responses may be necessary for different categories of rights.

If I am correct in suggesting that it is desirable to examine human rights in a concrete context with the goal of seeking their greater protection and enhancement, it may be useful for us to examine these issues from a Canadian perspective. Let me warn you beforehand that the categories which I suggest do not fit neatly into existing international documents. However, they do emerge from the Canadian reality. I suspect that the same may be said of the experience of some other countries as well.

I propose briefly to canvass the Canadian approach to human rights with a view to illustrating both the contextual and the functional implications of our experience. Since this is an International Conference and the papers will be diffused abroad, I have included some factual information and references which may be of rather elementary familiarity to Canadian scholars but of considerable interest to others.

There are two broad themes. The first is that there has been a progressive development in our history of tending to deal with human rights issues first in a political context, then in a legal context and finally on the level of constitutional principles. The second is that societal recognition of collective rights has been extremely important to the creation, as well as to the evolving maturity, of Canada as a nation. In fact, close scrutiny of the entire Canadian experience and actual practice renders it difficult to suggest that any category of human rights has prevailed over another. Finally, an attempt is made to give meaning to the concept of "Peoples' Rights" from a Canadian perspective but with a view to finding common ground with those in other parts of the world who have been more preoccupied with this concept than Canadians.

1. Individual Rights in Canada

The approach to individual rights in Canada largely derives from our adoption of a constitutional system similar in principle to that of the United

Kingdom. The essential features of such a system for the protection of individual rights involved a Parliamentary system of government and the Rule of Law including an independent judiciary.

Thus our basic constitutional document on achieving nationhood in 1867 contained no charter of the civil or political rights of individuals⁴. Perhaps the most relevant protection in relation to legal rights was a provision in our *Criminal Code* which specifically incorporated "Every rule and principle of the common Law" of England which established justifications or defences to criminal charges⁵. It may be notable that both before and after the constitutional adoption of the British tradition, Canada avoided the influence of the American and French documents of the Eighteenth Century in spite of both geographical proximity to the United States and considerable linguistic affinity with France.

It was not until almost one hundred years after nationhood, in 1960, that the Government of Canada formally recognized individual rights in the form of the *Canadian Bill of Rights*⁶. However, this document was a statute of the federal Parliament, not binding upon the provinces in areas of their legislative jurisdiction. Moreover, it was not treated as a fundamental constitutional document by the courts and, therefore, was largely ineffective as a basis for challenging other legislation. It was less than four years ago, on April 17, 1982, that the *Canadian Charter of Rights and Freedoms*⁷ came into force, finally entrenching individual rights in our Constitution.

Individual human rights were largely respected in practice in Canada through a variety of specific laws such as those related to criminal procedure and through the application of common law principles. The essential safeguards in our experience were: 1) a system of government responsible to the people through Parliament; and 2) an independent judiciary. Nevertheless, it was only recently that individual human rights, as such, received legal and then constitutional recognition in Canada.

However, individual rights were never considered to be absolute in Canada and many judicial decisions in our history are deferential to state authority. Nor have these safeguards always been effective. For example, the internment and confiscation of the property of Japanese Canadians during the Second World War was recently recognized formally by the Canadian

4. *British North America Act, 1867*, 30-31 vict., c. 3 (U.K.).

5. R.S.C. 1970, c. C-34, s. 7.

6. R.S.C. 1970, c. B-11. However, the Province of Saskatchewan enacted the first such statute: *Saskatchewan Bill of Rights* S.S. 1947, c. 35.

7. *Constitution Act, 1982*.

Government as a violation of human rights. Similarly, in retrospect, the invocation of the *War Measures Act*⁸ in 1970 is considered by many to have been an over-reaction.

Perhaps the greatest threat to individual rights is in the coercive powers of the state and its institutions. Protection against such threats, therefore, requires some mechanism independent of the state to inhibit arbitrary encroachments upon human dignity. The function of such a mechanism is not proactive but responsive. It is available to be invoked when an encroachment occurs, but its prophylactic effect is soon lost if it does not have authoritative power to impose punishment or remedies for abuses. The Canadian judiciary has been reasonably effective in this respect. However, in Canada, the most serious shortcoming of this traditional approach to individual rights is its limited effectiveness in responding to the rights of certain collectivities.

2. Collective Rights in Canada

The term "collective rights" is not used here to describe the rights of all of those present within a state. Rather, it is used to identify a group of individuals within a state who share common needs as a group which are essential to the inherent dignity of those individuals. They may also be described as "group rights". As applied to aboriginal peoples they might be described as peoples' rights.

Such rights may be distinguished from individual rights in the following way. Individual rights are largely protected when individuals are simply left alone to participate in society in the same manner as everyone else. Collective rights may require more. If simply left alone, the collectivity will be submerged by the larger society. Therefore, the state must take special steps to recognize the special human rights of the collectivity. It is only after special constitutional or legislative provisions have been enacted that mechanisms such as the courts can be invoked for protection of these rights. However, even with such provisions, a proactive governmental response may be necessary to ensure that collective rights are fully protected. Special governmental departments, programs or agencies may be appropriate.

Our constitutional document of 1867, specifically recognized certain collective rights. Section 93 preserved existing rights and privileges in relation to some religious denominational schools. Section 133 established the equality of the English and French languages in parliamentary and the Québec legislative assemblies and in court proceedings. These provisions can

8. R.S.C. 1970, c. W-2.

be seen as reflecting the concern of a French Canadian collectivity about losing its religious and linguistic heritage. The federal structure itself with the French Canadian population forming a majority in the province of Québec, was a form of protection for the rights of this collectivity. It is notable that the human rights of another significant collectivity, the indigenous peoples of Canada received no recognition at this time⁹.

The cultural, linguistic and political rights of French Canadians did not diminish as a controversial issue in Canadian society over the decades following Confederation in 1867. The controversy ultimately led to the "October Crisis" of 1970, the murder of a Québec Cabinet Minister and the invocation of a state of emergency. In 1976, the separatist *parti québécois*, formed the Government of Québec and in 1980 it held a referendum to determine whether Québécois were in favour of negotiating a new political-economic relationship with the rest of Canada. The referendum proposal was rejected.

Nevertheless, during this period, a very clear need was demonstrated for the federal Government to respond to the fears, aspirations and basic human rights of French Canadians throughout Canada. Such a response included a massive affirmative action program for the increased representation of French Canadians at all levels of federal institutions as well as the legislative establishment of both French and English as official languages of the federal Government. The official languages of Canada were subsequently entrenched in our Charter, not only at the Federal level but also for the province of New Brunswick and for the Yukon and Northwest Territories. In addition, minority language educational rights were constitutionally entrenched for both French and English in the *Canadian Charter of Rights and Freedoms* in 1982.

In contrast, apart from pre-Confederation documents, the collective rights of Canada's indigenous peoples were recognized only very recently with their organization in the early 1960's as a political force¹⁰. In Canada, the term "aboriginal" is used to describe our indigenous population which is composed of the Indian, Inuit and Métis. The chronic unemployment, under-employment and economic deprivation of the Native people date from the turn of the century, when the sometimes unlawful process of banishing many of them to ghetto-like reservations was completed and Native people came

9. Apart from assigning legislative responsibility for Indians specifically to the Federal Government by s. 91(24) of the *British North America Act, 1867*, *supra*, note 4, No other "people" were singled out in this manner.

10. Although certain legal rights were recognized by some earlier statutes such as the *Manitoba Act 1870*, R.S.C., App. II, No 8.

under the jurisdiction of the *Indian Act*¹¹. Disease, alcohol, separation of children from their families for schooling and the abolition of cultural practices such as the *potlatch* led to demoralization.

In 1969, the federal Government issued a White Paper outlining a policy of repealing the *Indian Act*, the phasing-out of the reserve system and, essentially seeking the integration of Native people into the "mainstream" of Canadian society. The policy reflected a goal of enhancing individual rights, but with potentially disastrous effects for the aboriginal collectivity. Protests from the Indians, Métis and Inuit, persuaded the government to withdraw the policy in 1971.

Not long afterwards, the Supreme Court of Canada denied a claim by the Nishga Indians for aboriginal title to their traditional homelands but, in doing so, established that aboriginal title was a legally enforceable right in certain circumstances¹². The federal Government also reversed its policy in this respect and began to negotiate the settlement of claims to aboriginal rights.

Today the *Canadian Charter of Rights and Freedoms* specifically recognizes and affirms "the existing aboriginal and treaty"¹³ rights of the Indian, Inuit and Métis peoples of Canada. While agreement on the precise scope and content of these rights could not be reached, a process is in place for that purpose. After decades of neglect, it may not be surprising that some time will be required to reach an acceptable definition. What is significant is that the Government recognized an injustice and first sought to respond by seeking greater equality for individuals. When that response was rejected, because it did not address the collective human rights of aboriginal peoples, a more appropriate approach was taken which resulted in constitutional recognition of the aboriginal collectivity.

A crucial component of the current process is the direct participation of aboriginal peoples, themselves, in the formulation of the constitutional protections which will ultimately affect their destiny. It is, of course, becoming increasingly recognized that the participation of all persons in economic and political decision-making is essential to the full realization of economic, social and cultural rights.

The ethnic composition of Canada has changed dramatically since 1867. Subsequent waves of immigration from almost every part of the world

13. Section 35. Section 25 also provides that the Charter guarantees are not to be construed so as to abrogate or derogate from aboriginal rights.

11. R.S.C. 1970, c. 1-6.

12. *Culder v. A-G.B.C.*, [1973] S.C.R. 313.

formed a potent "Third Force" to balance the countervailing interests of the Anglo-Saxons and French Canadians. While not in a position to claim specific linguistic or educational guarantees, it did gain recognition of the multicultural reality of our country. This grouping of a variety of minorities who had immigrated to Canada over the last century, came to be recognized as forming a third collectivity in addition to the French Canadians and the aboriginal peoples. A separate Cabinet portfolio was created and, in 1975, the Minister of Multiculturalism began to shift attention from an emphasis on language and culture to group understanding. Section 27 of the *Canadian Charter of Rights and Freedoms* now provides that it shall be interpreted in a manner "consistent with the preservation and enhancement of the multicultural heritage of Canadians".

3. Economic, Social and Cultural Rights in Canada

In Canada, Economic, Social and Cultural Rights are viewed primarily as reflecting the obligations of the government of a state to all of the people within that state. Among others, these would include the development, deployment and distribution of the resources of the state in an equitable manner. Again, the basic objective of permitting all persons to live with human dignity does not change. However, it is perhaps with this category that both the context and the functional approach towards achieving the goal become most significant.

In Canada there exist universal legislative programs for public education, unemployment insurance, medical treatment and hospitalization, old-age pensions, family allowances and others. These were all achieved through political and legislative rather than judicial processes and, perhaps as a result, Canadians tend not to speak of them in terms of "human rights". They are not included in the *Canadian Charter of Rights and Freedoms*¹⁴. This may be viewed as ironical in light of Canada's ratification of the *International Covenant on Economic, Social and Political Rights* as well as several Conventions of the International Labour Organization. Canada has also played an active role in institutions such as the I.L.O. and the U.N. Human Rights Commission.

Nevertheless, the adoption of some of this domestic legislation evoked the kind of ideological rhetoric which was alluded to earlier. For example, the first socialist government in Canada, in the province of Saskatchewan, was

14. Apart from section 6 relating to "mobility rights" or the right to move from province to province "to pursue the gaining of a livelihood".

also the first to introduce a comprehensive medical care program. A fierce political battle ensued in which many medical doctors claimed that their compulsory participation in such a plan infringed upon their livelihood rights to be free to sell their services at a price which they would determine. The government saw its responsibility as providing accessible and affordable medicare to all citizens. A number of doctors moved out of the province and some moved out of the country. However, the program was established and eventually adopted throughout Canada.

While there is no constitutional guarantee of medical treatment, it is difficult to conceive how any government in Canada could now eliminate the system. It has probably gained the status of a fundamental feature of our society. A recent example along the same lines involved an attempt by the current federal Government to cut back on the program of old age pensions. There was a political outcry including public protests and the Prime Minister soon reversed the Government's position.

In my view, many of these programs have already reached the stage in public recognition where they constitute basic human rights in Canada even though they tend not to be described as such. It is simply a matter of time before they achieve formal constitutional recognition.

I fully recognize that the examples which I have provided may not constitute the areas of highest concern for some societies. It is important to recognize that the state of implementation of this category of rights is bound to vary more greatly because it is so directly dependent upon the resources available to the state in question. Article 2 of the *International Covenant on Economic, Social and Cultural Rights* speaks of each State Party "taking steps", "to the maximum of its available resources", "to achieving progressively" the full realization of these rights. Thus the importance of context is specifically recognized in the Covenant, itself.

While, in my analysis, the prime mechanism for achieving these rights is through the direct action of the state, the context of limited resources may make achievement of an acceptable level of progress impossible. Nevertheless, that situation should not be used to justify the derogation of other rights which are unrelated. Nor should it relieve a state of the obligation for the equitable development, deployment and distribution of those resources which are available. I believe that this obligation is not only implicit but also explicit in the *International Covenant on Economic, Social and Cultural Rights*.

4. Peoples' Rights

The notion of Peoples' Rights as a separate category of human rights has not been prominent from a Canadian perspective. As with Economic, Social and Cultural Rights, it finds no expression in our constitution¹⁵ or laws or even in our normal vocabulary. Nevertheless, if the same analysis (of actual practice rather than form) is applied to this category as to the previous one, it is possible to discern an emerging concept of international obligation which can be linked to a corresponding human right.

I began by suggesting that all human rights are related to the basic concept of the human dignity of every person. The context may vary, requiring emphasis upon one category of rights rather than another in order to achieve that basic goal. However, the concept itself is indivisible and universal.

If that is the case, then the objective of protecting and enhancing human rights cannot stop at national boundaries or regional affinities. When a state has acted equitably to develop, deploy and distribute the resources of that state, yet those resources are still inadequate to achieve a basic level of dignity for its citizens, those citizens must have a right to look to the international community for assistance in achieving the common goal which underlies all human rights. I believe that the obligation to provide such assistance falls most directly, not upon international institutions nor upon national governments, but upon every individual. Again, the basis of that obligation must be that if some human beings are required to live in sub-standard conditions of human dignity, then the human dignity of all human beings is diminished. As the International Labour Organization has proclaimed: "Poverty anywhere is a threat to prosperity everywhere."¹⁶

Indeed, new approaches to International Law depart from the more traditional view that only states are its subjects. It is now becoming increasingly evident that individuals must form a central focus for international human rights law.

Of course, individual action frequently will be expressed through the instrument of a state government and the general obligation should be recognized and asserted as such by every government. Similarly, concerted action may be undertaken through international institutions. However, the source of the obligation is in sharing a common humanity and, in some

15. Apart from Section 35 of the Charter which refers to the rights of the "aboriginal peoples of Canada". It has already been suggested that this falls within the category of a "collective" right.

16. *Declaration of Philadelphia, 1944*, and now embodied in the ILO Constitution.

situations, the most effective assistance may occur through non-governmental organizations.

In Canada, there appears to be a growing recognition of this obligation of citizens to share the responsibility for the protection of human rights beyond our borders. Non-governmental organizations such as the Canadian Section of Amnesty International, Oxfam and church organizations are receiving increasing public support for their efforts to help less fortunate persons in other countries. The cause of peace and disarmament is highly respected and widely supported today. Environmental issues such as acid rain have given Canadians the clear message that the environment is an international concern that affects every individual. The present Government is currently reviewing aspects of Canada's foreign policy which will include its role in the international protection of human rights.

Canadians have come to recognize that we live in a world in which the rights of all of its Peoples are inter-dependent. This growing perception can be viewed as a form of "solidarity" which is a natural consequence of sharing that common humanity. It can be manifest in sharing the responsibility of achieving development throughout the world, in pursuing peace and disarmament and in ensuring a safe and healthy environment. Of course, it is difficult to articulate precise standards for this category of emerging human rights. However, it might be appropriate here to incorporate a similar approach to that which is expressed in the International Covenant on Economic, Social and Cultural Rights. That is to strive for progressive achievement by appropriate means based on available resources.

This notion of solidarity cannot be restricted to any category of human rights. If the obligation flows from the indivisibility of human dignity then the obligation cannot distinguish between political, civil, collective, economic, social or cultural rights. The concept of solidarity must extend to every category and the obligation to act must relate to every form of violation.

It is, of course, important in this context constantly to remind ourselves that solidarity with the peoples of the world in enhancing human dignity through the protection of human rights must not extend to any interference with the right of such peoples to determine their own destiny. Such self-determination is also an essential aspect of human dignity. The obligation to assist in the achievement of human rights bears no license to undermine the sovereignty of any state or to attempt to establish priorities or agendas for others.

Conclusion

There are many difficulties in attempting to classify human rights. I have not mentioned the Canadian Charter's "equality rights" provision, but it may be of some interest because of its breadth. It provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision is expressed in terms of an individual. However, it may be equally effective in protecting the rights of a collectivity. Moreover, its real value is in ensuring access to economic, social and cultural opportunities. It, therefore, encompasses all of the first three categories which I have suggested and certainly has relevance for the fourth category as well.

It was expressly recognized in the same section that an individual approach to problems of discrimination could not be totally effective. Provision was made for attacking "systemic" discrimination through programs of "affirmative action":

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Incidentally, the examples of collectivities which were given earlier all involve ethnic minorities. It is interesting to consider whether that is an essential characteristic or whether other groups such as disabled persons or elderly persons should also be considered to be a "collectivity". May a majority group which suffers discrimination, such as all of the women in a society, constitute a collectivity for legal purposes?

In spite of the difficulties, categorization may serve a useful purpose in identifying the kinds of human rights which are most urgently in need of attention in a particular context. The particular category might then indicate the kind of response which is necessary.

To summarize, the Canadian experience might be categorized as follows.

(1) Individual Rights. The traditional political and civil rights were introduced through the British common law and have been constitutionally entrenched only recently. Since their greatest threat may be from Government and its institutions, they have been protected largely by the responsibility of Government to an elected Parliament and the availability of an authoritative and independent judiciary for adjudicating alleged violations.

- (2) Collective Rights. These were recognized in our basic constitutional document at the time of nationhood. Over the years, political and legal recognition of collectivities in addition to the French Canadians of Québec, led to constitutional entrenchment of broader linguistic rights for both French and English, as well as the recognition of aboriginal rights and the multicultural heritage of Canada. With legal and constitutional recognition, these rights may now be pursued through the courts. However, in order to ensure the continued existence of collectivities, these rights have been supplemented by catalytic programs of Government and its agencies.
- (3) Economic, Social and Cultural Rights. This category has received virtually no entrenched constitutional recognition as an essential component of basic human rights. However, a historical and current survey of the relevant areas, indicates a high level of both public expectation and of governmental response through legislation. Since this category essentially involves the obligation of a State to its inhabitants, it is through direct government programs and legislation that these rights are most likely to be achieved. Nevertheless, public recognition and government commitment are moving towards a time when this category might well find express recognition in the *Canadian Charter of Rights and Freedoms*.
- (4) The Rights of Peoples Beyond Canada. Evolving Canadian governmental policy and non-governmental initiatives by Canadians suggest a growing recognition of an international obligation to respond when the human dignity of others is threatened by the inability of another state to protect the economic, social and cultural rights of its citizens. There is also growing recognition of an equal obligation to respond to violations of the rights of individuals and of collectivities of persons beyond Canada's borders. Such an obligation has not been conceptualized as a human right in Canada. Nevertheless, one can envision a day when it not only finds expression in government policy and practice, but also receives explicit articulation as a constitutional norm reflecting a fundamental value of Canadian society.

In conclusion, I believe it to be important that efforts be made to develop and crystallize a common perception of the meaning to be given to the various categories of human rights. We must strive, together with lesser developed nations, to give more precise meaning to emerging new concepts of human rights. The variations of context will permit different emphasis to be given but inherent human dignity which is at the core of all human rights must always be respected.