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Amartya Sen and Human Rights

1. THE NEED FOR A 'THEORY'

Amartya Sen's much awaited comprehensive statement concerning a theory of human rights is now at hand in his 'Elements of a Theory of Human Rights[1]'. Of course, Sen had lots to say earlier concerning rights and said it with inestimable perspicuity[2]. His most recent statement reiterates many of his earlier stances. However, the 'Theory' affirms more resolutely than before 'the need for a theory' (p.317) of human rights. Descried variously as 'general' theory that offers to view the 'constitutive characteristics of human rights' (p.319) and as well 'the general *discipline* of human rights,' a discipline which holds creatively together ever proliferating 'internal' disagreements at the service of the ethical idea of human rights (p.323), the 'Theory' offers an instance of 'writing philosophy.' Its metaphysical intent is to produce/ install 'scientific/scholarly truths' of human rights, or 'truths shored up by arguments[3].' At the same time, Sen offers a general *social* theory of human rights,' which takes account of the forms of interactive understanding of social reality produced by the 'commonsense knowledge of everyday life', as Schutz says, 'sufficient for coming to terms with fellow-men, cultural objects and social institutions[4].' The 'Theory' oscillates between the 'metaphysical' and the 'social' theory genre. My response here, perhaps not entirely unfairly, regards the 'Theory' more as exemplifying the latter.

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[1] *Philosophy & Public Affairs* (2004) 32:315-356. This article is hereafter cited as 'Theory.' Dr. Sundhya Pahuja (Melbourne) and Dr. Samuel Adleman (Warwick) read undeterred the raw early draft of this essay; their comments have been considerably helpful overall.

[2] See, especially, Amartya Sen, 'Rights and Agency,' *Philosophy & Public Affairs* 11:1-39(1981); 'Rights and Capabilities' in *Resources, Values, and Development* (Delhi, Oxford University Press, 306-324. The former contribution is hereafter cited as 'Sen, *Agency.'*

[3] I deploy here the phrase –regime of Gianni Vattimo, *Nihilism & Emancipation: Ethics, Politics & Law* (New York, Columbia University Press, 2004) 24.

[4] Alfred Schultz, 'Concept and Theory Formation in the Social Sciences,' *The Journal in Philosophy* (1954) 257-273 at 271.

At the outset, then, a general social theory of human rights [TOR] needs to differentiate itself from social theories *about* human rights [TAR[5].] TOR eminently address the tasks of explication of the ethical nature of the idea of human rights and its possible justifications, thus negotiating the contested terrains of 'universality' and cultural specificity in ways that still promote a distinctive ethic of human rights. TAR, more or less, proceeds from a perception that the tasks of justification remain rather well done; it engages with, among other matters, understanding and explaining the historical origins and contemporary provenance of human rights norms and standards, the *nature*, *number*, *limits,* and *types* of human rights in their interrelationships[6], and comparative histories of enunciation, interpretation and implementation of rights by the ensembles of state and non-state actors.

TOR addresses many a foundational question concerning the meaning of *being* and *remaining* distinctively 'human' and 'having rights.' I here identify illustratively the following. First, the *ontological* question: Is the idea of being and remaining 'human' flawed or incomplete without reference to a set of human rights and fundamental freedoms? *Second*, and related, the *species- being* question: how, and for what good reasons, may the construction of 'human' escape the indictment of anthropomorphism? How may this doing conceptualise human rights as extending to the survival, dignity and suffering of sentient forms of non- human entities (such as animals and plants) and insentient entities in nature (such as forests, rivers, mountains?) In short how the conventional languages of human rights may develop the notions of distinctly 'human' without any scrupulous regard for the rights of other sentient non-'human' beings or entities? Third, the *ethical* question concerning *justice* of human *rights*: how, and what grounds, may one say that any particular normative

[5] I apologize for this dreadful abbreviation, which at the same time serves the ends of 'sustainable development.'

[6] By 'nature' I mean here primarily distinctions made between 'enforceable' and not directly 'justiciable' rights. By 'number,' I refer to the distinction between 'enumerated' and 'unenumerated' rights, the latter often articulated by practices of judicial activism. By 'limits' I indicate here the scope of rights thus enshrined, given that no constitutional guarantee of human rights may confer 'absolute' protection. The 'negotiation' process is indeed complex; it refers to at least three distinct though related aspects: (1) judicially upheld definitions of grounds of restriction or regulation of the scope of rights, (2) legislatively and executively unmolested judicial interpretation of the meaning, content, and scope of rights and (3) the ways in which the defined bearers of human rights chose or chose not to exercise their rights, this in turn presupposing that they have the information concerning the rights they have and the capability to deploy them in various acts of living.

distribution of human freedoms via human rights may itself be liable to be regarded as unjust[7]? How may any TOR 'justify' the hierarchies of rights that elevate some preferred freedom over others less so? Fourth, the *obligations* question: What kinds of obligations ought human rights to create? How may we understand, explain, and justify distinctions between 'perfect' and 'imperfect' obligations? To what spheres of social relations may such obligations extend? What ethic ought to inform our constructions of the range of the bearers of human rights obligations? Fifth, the *compatibility/commensurability* question: How may human rights languages and logics relate to kindred ethical languages of human duties or responsibilities, of virtue ethics, of justice, or of capabilities and flourishings? Sixth, remains crucial the contrasting logics/ paralogics of human rights *reason* contrasted with those of human rights *sentiment/ passion*. Posing this range of questions helps us towards some best possible reading of the 'Theory.'

The TAR 'territories of thought' (to invoke a Deleuze- Guttari type description) elevate the distinctly juridical over the ethical and pursue other diverse, but related, aims. *Analytically*, TAR clarifies different usages of the notion of 'right' and trace relationships between allied notions[8]. *Doctrinally*, TAR concerns itself with the evolution of the forms of standards, principles, maxims, and precepts, enunciated in positive law (human rights declarations, treaties, and constitutional texts) and instituted by the traditions of natural law/ rights discourse. TAR seek thus to provide frameworks of knowledge about the comparative standing of human rights in terms of their codification by international, supranational, regional and national law regimes. *Historically*, TAR narrate the diverse origins of institutionalised development of human rights ideals and ideas as also explore the hermeneutic powers of concerned interpretive communities which may proceed either to give human rights a kiss of life or to put them to sleep. *Normatively*, it seeks to provide ways of relating,

[7] See, for a recent analysis, Robert Hockett, 'The Deep Grammar of Distribution: A Meta-Theory of Justice,' *Carodzo Law Review* 26: 1179-1322 (2005.)

[8] As W.N. Hohfeld achieved most notably by distinguishing eight notions: 'rights,' duties,' 'privileges' 'no rights', 'powers', 'liabilities', 'immunities' and 'disabilities Hohfeld then proceeded to establish types of relationships, of complementarily and of opposition, between these eight notions. See, W.N. Hohfeld, *Fundamental Legal Conceptions…*; Julius Stone, *Legal Systems and Lawyer's Reasonings* (1963, Sydney, Maitland, 1964.) Although Hohfeld's principal aim was to clarify the notion of legal rights, the schema of distinctions remains relevant to ethical analysis. For example, his notion of capabilities addresses not just rights-duty relationship but also privilege-no right, power- liability, and immunity –disability type considerations.

as well distinguishing, TAR distinguishes ethical ideas from the specifically legal ideas concerning human rights. I do not further elaborate these distinctions between two types of theory save to say that *making sense of human rights*, their (within and across nations) aspirational and actual life cycles entails scrupulous regard for both.

However, Sen proposes that we attend to the task of theory formulation an endeavour at construction of an ethic of understanding itself. Such an ethic accentuates 'fulfilment and nonfulfilment of rights- rather than the exclusion of nonright considerations—in the evaluation of states of affairs[9].' Overall, then it focuses on 'the inadequacy of moral systems that do not give rights-based considerations any role in outcome judgments[10].' For Sen, this explicitly means and signifies the problem of introduction of considerations regarding 'fulfilment or nonrealisation of rights' in forms of actions, conduct, and policy performances within a welter of 'nonright values (if any)[11].'

The ethic of understanding further remains dialogical rather than monological production about the truths of human rights. Thus, understanding human rights remains impossible when based on the 'claim of magnificent uniqueness, and of superiority (p.351) and the 'status' of the 'ethical' claims of human rights 'must be dependent ultimately on their survivability in unobstructed public discussion' (p.349.)

Both epistemic humility and epistemic egalitarianism remain canonical virtues for the tasks of construction of a theory *of* human rights. Humility suggests that no one apodictic approach may ever fully respond to the infinite complexity of rights-talk; egalitarianism counsels that we take plurality and multiplicity of voices and concerns seriously in any THR construction, always consistent with the cultivation of the practice of the virtue of analytical, conceptual and communicative, clarity.

An ethic of understanding suggests the need to develop a general 'theory' necessary, as well as desirable, for several important reasons. The 'colossal appeal of the idea of human rights to confront intense oppression or great misery' makes it all the more necessary to 'remove conceptual doubts' (p.317) concerning social origins of human rights and the range of responsibilities they create. Not every human right

[9] Ibid.

[10] Sen, *Agency*, at 38. However, the issue is more complex, as suggested by Arthur Isak Applbuam, 'Are Violations of Rights Ever Right?' *Ethics* 108:340- 366(1998.)

[11] Sen, *Agency* at 15.

enshrined in declarations, treaty, or legislation carries with it corresponding specific obligations. Human rights, as known today, constitute a whole series of 'imperfect obligations' (pp. 338-342.) Nor, may we add, are the communities of bearers of human rights obligations easy to identify, once we depart from the idea that human rights obligations are primarily owed by the state[12]. The paradigmatic justifications offered for civil and political rights as a corpus of just restraints on sovereign power do not always automatically extend to social, economic, and cultural rights. However, TOR must remain inclusive of both kinds of human rights concerns. Sen specifically sets up as the 'aim' the construction of 'justification of the general idea of human rights and also of the includability of economic and social rights within the broad class of human rights' (p.317.)

A 'theory *of* human rights' Sen insists, ought to address six questions. These concern: [1] the 'kind of a statement [that] a declaration of human rights makes'; [2] the claims concerning the 'importance' of human rights; [3] the 'duties and obligations' thus arising; [4] ' the forms and actions' through which 'human rights may be promoted'; [5] how far may we justifiably include 'economic and social rights' within 'human rights' and [6] how best may one justify 'within 'a world with much cultural variation and widely diverse practice' the claims for 'universality' of human rights (pp.318-319.) A theory *of* human rights, in this view of it, is an exercise in practical reason, which also takes full account of the issue of the 'idea of survivability' of human rights 'in unobstructed discussion' within and across national boundaries (pp. 318, 348-353)[13]. We notice later (in Section V) the ten features of the theory *of* human rights developed in the 'Theory' and some difficulties associated with these. At the outset, however, I deal with three general areas: the problem of 'includability,' of social and economic rights, the problem of understanding the 'nature' of a variety of human rights declarations, and the virtue and limits of analytical clarity.

[12] Indeed, as human rights treaties like the Convention on the Elimination of Discrimination against Women (CEDAW) or the Convention on the Child Rights (CRC) eminently illustrate not just the state but also the institutions of civil society and cultural groups also owe wide-ranging duties.

[13] I leave aside in this comment the issue whether Sen's endeavour remains co-Habermasian or post-Habermasian.

11. MARGINAL NOTES CONCERNING THE PROMISE AND THE PERIL OF CLARITY

For Sen's 'Theory' the leitmotiv is conceptual clarity. This alone may service human rights and sustain sustainable human futures. Put another way, ineluctable deliberative complexity must after all be presented to the publics/ counterpublics in some lucid ways if the ethical idea of human rights, and the norms of and for conduct that flow from these, is to survive 'unobstructed public discussion' everywhere, at every site. Clarity is both a resource for erudite reflexive practices and the very basis for the practice of epistemic egalitarianism. The ethics of human rights is dialogical or *not at all.*

All this fully said, I believe that any TOR genre ought to recognize that the ethical platforms from which we may pursue dialogical 'clarity' remain extraordinarily diverse. With Alain Badiou 'ethics' emerges as a ' servant of necessity[14]' which also inflects 'the foundations of the ethic of human rights[15]. A sovereign human rights ethics thus constructs 'an ideology of insularity' under which 'islands of law and liberty' valorise 'throughout the world and with complacency of intervention…the gunboats of Law[16].' In contrast, with Sen we enter a wholly different realm of an ethics of 'clarity' in terms of a development ethic struggling to limit the scope of 'non-rights' considerations in the making of a new global public policy/ public goods regimes; these stylised contexts of 'clarity' elegantly traverse, with the edge of poignant cogency the arenas of high formal theorizing and acts of global public advocacy for human rights[17], for which Badiou seems to have little use.

We come across different genres of clarity with the gifted teacher Emmanuel Levinas who wrote:

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[14] Alain Badiou, *Ethics: An Essay on Understanding Evil* (2002, London, Verso) at 30-39

[15] Id., at 8-17.

[16] Id. at 33 (emphasis added.)

[17] Amartya Sen shows how different kinds of conceptual clarity are important. High level formalizing theory marks his early work on rights: see, Sen, 'Rights and Agency,' *Philosophy & Public Affairs* 11: 1-39 and the discussion concerning 'game form' approach to human rights in Sen, 'Minimal Liberty,' *Economia*, 59 (1992.) His later work seeks clarity in terms of 'goal rights' that national, post-national, supranational, and global policymakers and human rights and social activist may co-equally pursue. See Sen, *Development as Freedom* (Oxford, 1999.)

> … the coming of the Son of David demands ,perhaps, that the union is made beforehand, the Western union—not straight according to the law inspired by the love of the other man but already on a preparatory basis *according to the law where evil will give itself the appearance of good.* A world organized entirely around the Law, which politically have a hold over it. *The necessity of a planetary West for the coming of the Messiah*[18].

Or try reading Sen alongside with Derrida, who suggests clarity as form of constant anxious invigilation when he writes:

> We must (*il faut*) more than ever stand on the side of human rights. *We need* (*il faut*) *human rights*. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient. Which alone suffices to remind us that they are not natural. They have a history—one that is recent, complex, and unfinished. . . To take this historicity and this perfectibility into account in an affirmative way we must never prohibit the most radical questioning possible of all the concepts at work here: the humanity of man (the "proper" of man or of the human), which raises the whole question of nonhuman living beings, as well as the question of the history of recent juridical concepts or performatives such as a "crime against humanity," and then the very concept of rights or of law (*droit*), and even the concept of history[19].

Levinas presents the enunciative ethic of human rights responsibility, as an affair of justification of human rights grounded in the exercise of 'difficult freedom[20].' There also remains fully at hand the feminist and post-feminist discourse concerning 'justice as care.[21].' Reading Sen alongside Badiou, Levinas, and Derrida alerts us to the fact that what we choose to be clear' about, or how wish pursue the

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[18] Emmanuel Levinas, *Beyond the Verse: Talmudic Readings and Lectures* (Bloomington, Indiana University Press, 1994; Gary D. Mole trs.) 66-67.

[19] See "Autoimmunity: Real and Symbolic Suicides: A Dialogue with Jacques Derrida," trans. Pascale-Anne Brault and Michael Naas, in *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, ed. Giovanna Borradori (Chicago: University of Chicago Press, 2003), 132–33.

[20] See, for example, Sharon Todd, *Levinas, Psychoanalysis, and Ethical Possibilities in Education: Learning from the Other* (Albany, State University of New York Press, 2003.)

[21] See Virginia Held, ed., *Justice and Care: Essential Readings in Feminist Ethics* (Colorado, Westview Press, 1995.)

virtue of clarity, it remain sedimented by thought-traditions. Surely, the pursuit of clarity (whether normative, or communicative) as a *necessary* condition for any production of communicative 'truths' concerning human rights emerges differently within the Euroamerican thought-traditions.

In fact, the A- to- Z (Arendt to Zizek) human rights discourse suggests how the effective histories of the practices of clarity actually accomplish the demotion of the subjects of human rights into the objects of human rightlessness. Some extraordinary ways of being 'clear' after all mark the perfectibility of cruelty of violent social exclusion of the enemy, the undocumented alien, the asylum seeker, the 'black', the barbarian, among the many dangerous others and the means to deal with them. Further, the TAR furnish an encyclopaedia of knowledges concerning why this *necessary* condition may never be regarded as a *sufficient* condition for any such production. TAR suggests plentifully an *intimate association between the politics of cruelty and the logics of clarity*.

111. THE PROBLEM OF INCLUDABLITY

It is not at first sight entirely clear why Sen, writing as late as 2004, may still want to assign such a special place to the problem of 'includability' of certain classes of rights for a TOR, in particular those he names as 'social and economic rights,' with a rather puzzling exclusion the 'cultural[22].' The includability 'thesis' puzzles because the 'Theory' illustrates many ways in which the once voguish distinction contrasting 'negative' versus 'positive' liberties has lost its critical, and as some will say, ideological edge[23]. International lawpersons have already fruitfully addressed the 'includability' problem by deconstructing the contrast between violation' and

[22] The shorthand itself fractures the category of inclusivity and thus raises a peculiar question: why is the case that so astute a thinker as Sen has so little to say concerning 'identity' rights, especially some entire clusters of concerns posed by the assertion of human rights of civilizational and cultural rights of indigenous peoples, the millennially or contemporaneously constituted 'minority' groups? The 'Theory' of course appeals to the rights to conscience and religion as these bear upon universality or universalisability of the idea of human rights and their 'survivability' in public discussion.

[23] Historians of ideas may explain this partly in terms of the end of the Cold War which liberates situated thinking from any emancipator world historic claims made earlier on behalf of 'negative freedom.'

'enforcement' of the civil and political rights and 'progressive implementation' of the social, economic, and cultural rights[24].'

The 'Theory', perhaps, makes an important move by the insistence that the ' "imperfect obligations' firmly correlate in the same way as fully specified "perfect obligations" do, with the recognition of rights' (p.341.) The division of some rights as civil and political, and others as social, economic, and cultural, on this view, does not affect their status as human rights, though the nature of corresponding obligations varies. The TAR languages have, however, already developed the 'logic' of imperfect obligations in terms of the specific obligations to 'respect', 'protect', and 'fulfil' these rights[25]. In neither discourse the imperfectness of obligations poses any insurmountable difficulty in recognizing social and economic rights as human rights; in both stand raised some important and interesting issues arising from non-scalar approach to imperfect obligations which 'can give agents different kinds of latitude' – of 'time, place, number of act-tokens, object, and manner', without detracting from their character as obligations[26]. Both TOR and TAR still ought to remain aware 'that any real person has ever had a completely perfect obligation[27].'

Why then does Sen focus so heavily on the includability problem? However, the 'Theory' situated almost entirely within the discourse of development ethics[28] obviously needs to address many governmental and policy actors that still continue to insist, in silly, or at times even wicked, ways that rights which do not prescribe 'a legal sanction for non-performance[29]' are not rights properly so-called[30]. Perhaps, he

[24] See, for example, the excerpts and comments in Henry J. Steiner and Philip Alston (ed.) *International Human Rights in Context: Law, Politics, and Morality* (Oxford, Oxford University Press, 2000; 2nd ed) at 275-320.

[25] The United Nations Committee on Economic, Social, and Cultural Rights postulated these duties: se U.N. Doc. E/C.12/1999, Para 15. The duty to 'fulfil' extends to 'both an obligation to *facilitate* and an obligation to *provide* (italics in original.)

[26] George Rainbolt, 'Perfect and Imperfect Obligations,' *Philosophical Studies* (2000) 98: 233-256 at 243 *et. seq.*

[27] Ibid, at 241.

[28]See, for an overview, Des Gasper, *The Ethics of Development: From Economism to Human Development* (Edinburgh, Edinburgh University Press, 2004.)

[29] J. L.Austin, *The Province of Jurisprudence Determined* (1954, New York, Noonday Press), 27.

has in mind a microscopic minority of Benthamites who grew up pondering Jeremy Bentham's trenchant indictment of the idea of human rights as 'no more than "bawling upon paper"' (p. 316)[31]. Perhaps the concerns of 'Theory' remain also addressed to those practitioners of human rights weariness and wariness [32] for whom the enunciation of social and economic rights, or the right to development, remains mired in the *Realpolitik* of the Cold War practices of human rights enunciation and for many a critic of postcolonial constitutionalisms who interrogate the relegation of social and economic rights to the status of directive principles of state policy[33]. [Incidentally, I cannot resist mentioning how all these references thus already rather promiscuously fuse the TOR with the TAR genre!]

Going beyond these possible reasons, Sen's insistence on the includability problem emerges as an integral component of ethic of understanding of human rights. Sen, rightly, insists that we owe a whole lot, to others whom we may not have actually harmed or hurt by our individual conduct. 'The territory of human rights' begins with an acknowledgement that 'if one is in plausible position to do something effective in preventing the violation' of the human rights of the Other 'then one does

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[30] The United States government mentioned in relation to the ongoing progressive codification of the Right to Development that the "most fundamental flaw" in the approach concerning the development compact 'is the idea that economic, social and cultural rights are entitlements that require correlated legal duties and obligations.' At best, economic, social and cultural rights are "goals" that can only be achieved progressively, not 'guarantees'. 'Therefore, 'while access to food, health services and quality education are at the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development, rather than subjects in control of their own destiny.' This further meant that that States had the primary responsibility for creating conditions conducive to development and 'the workings of the free market, supported by clear property rights and the rule of law, have proved worldwide to be the best and fastest way to achieve these development goals.' See, the dispatch by Chakravarthi Raghavan, Third World Network, Geneva, 30 March 2001.

[31] See, for example, the materials in Henry J. Steiner and Philip Alston (ed.) *International Human Rights in Context: Law, Politics, Morals* (Oxford, Oxford University Press, 2000; 2nd edition) at pp. 275-320.

[32] See, for this distinction, Upendra Baxi, *The Future of Human Rights* (1st edn, Delhi, Oxford University Press, 2002) at 51- 56 and the 2nd edition (2006) at 81-89 (hereafter referred to as *Future 1 and 11)*.

[33] Initiated by the Republic of Ireland Constitution but fully blossomed by the Indian Constitution and later affecting writing of many constitutions in South Asia and Anglophonic Africa. I here abstain from massive citations, including rather unfortunately my own writings!

have an obligation to consider doing just that' (pp340-341.) This at least means that all theorists *of*, and *about*, human rights, as pedagogues of, and for, human freedoms ought present the tasks of 'theory' in terms which demonstrate the incoherence of the hierarchies of human rights, and carry further with dignity the duties of clarification of 'conceptual doubts' concerning 'includability' of rights other than the civil and political rights.

Such hierarchies prevent us from re-imagining the tasks of conceptualisation of human rights as interweaving 'freedom from poverty, hunger, and starvation' as 'freedom restricting conditions' and creating obligation of respect, promotion, and protection obligations on all governments[34]. The capabilities approach, as is well known, elaborates 'what actual opportunities a person has, not over the means over which she has command', an approach that typically 'allows us to take into account the parametric variability in the relation between the means on the one had, and the actual opportunities on the other' (p.332.) This dense prose remains happily unpacked in the important footnote 29 of the 'Elements,' which invites the reader in to the various tasks of repeated re-reading.

However, this precious order of freedom to *do* and to *be* postulates *no* Levinasian idea of ethics as the non-negotiable commitment and responsibility to the Other[35]. Rather, it issues a more moderate, amicable, and pragmatic, summons to the duties of 'reasonable help to others suffering from particular type of transgressions' (p.342.) Sen counsels that duties of 'reasonable help' ought not to 'translate 'into preposterously demanding commands' (p.340.) The ethic of 'Theory' urges us all to take seriously into consideration what 'we should reasonably do, taking note of the parameters of the cases involved,' with a versatile range of solicitude for 'the parametric variability of the reach and force of reasonable consideration' (p. 340)

[34] Polly Vizard, 'The Contributions of Professor Amartya Sen in the Field of Human Rights,' CAS Paper 91, London School of Economics, January 2005. This admirable analysis while tracing Sen's debts to Isaiah Berlin remains ungenerous to the Rawlsian contribution, via the famed difference principle, towards a resolution of the problem of includability.

[35] See, Sharon Todd, *Learning From the Other: Levinas, Psychoanalysis, and Ethical Possibilities in Education* (Albany, SUNY Press, 2003); Simon Critchley, ' Five Problems in Levinas's View of Politics and The Sketch of A Solution to Them,' *Political Theory* 32: 172-185, 2004.

All this at once suggests 'the germ of doubt gnawing at the heart of conviction' (to use the expression of the South African novelist Goetz) of includability.

The question is: What do we do after we manage to convince the sceptics that 'social and economic rights' are not a class apart from the 'political and civil?' How far a fine regard for includability re-negotiates the borderlines between 'preposterousness' and 'reasonable' the earlier effort that institutionalised the dichotomy in the first place? In any event, how *after* 'Theory' may this re-negotiation take place? It may be helpful here to mention the current trend towards evolution of ' reasonable help' now embodied with poignant salience in the discourse of the Millennial Development Goals that develops with further precision the ways of making *more* 'imperfect' even an antecedent order of imperfect obligations[36] and promotes a new kind of human rights minimalism.

Consistent with the highest respect for the author of *Famines, Development as Freedom,* an inaugural figure of capabilities approach and the effective author of the UNDP Development index, it still remains possible to say that all this concern with includability in 'Theory' leaves the situation no further redressed. Even a momentary juxtaposition, for example, of the corpus of Amartya Sen and Thomas W. Pogge marks and measures a chasm concerning the eminent practice of virtue of clarity as servicing includablity[37]. I attend later in this essay to the kind of 'ethic' underlying 'Theory.'

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[36] See, for an excellent recent example, Philip Alston, 'Ships Passing in the Night: The Current State of Human of Human Rights and Development Debate Through the Lens of the Millennial Development Goals' *Human Rights Quarterly* 27: 2005,755-829. See also, Carol Barton, 'Women's Movements and Gender Perspectives on the Millennium Development Goals,' UNDP (2005.)

[37] Both remain concerned with the issues raised by the contrast between the civil and political rights (achieving clarity concerning some here and now enforcement of some human rights norms and standards) and aspirational enunciation of the ethic of human rights, an ethic of programmatic clarity for social, economic, and cultural rights subject to the vagaries of medium and long term policy ladders through which some types of human rights may be 'progressively realized'. However, devising the appropriate postures of global social polices vary rather drastically across Sen and Pogge. I here do not burden the text with the rather well known corpus of Pogge save now to refer to his most recent narrative, 'Real World Justice,' *The Journal of Ethics* 9: 29-53 (2005.).

1V. WHAT KIND OF STATEMENTS HUMAN RIGHTS DECLARATIONS MAKE?

This raises some difficult concerns. It is not entirely clear what Sen may wish or want to mean by the phrase 'declaration of human rights' but from the examples he frequently invokes, he seems to have in mind the standard declarations concerning the 'Rights of Man' or the Universal Declaration of Human Rights. Thus excluded enunciative cultural specificity still emerges in ever-so proliferating declarations at regional or supranational levels such as, for example, the Inter-American, the African, and the Arab human rights charters and declarations. These not merely more specifically resituate human rights already enunciated by universal declarations within the regional and national contexts but also expand and innovate norms an procedures. Thus, to take a most recent example, the Additional Protocol to the African Charter of on Human and People's Rights on the Rights of Women in Africa, 2004, goes much beyond the obligations fashioned by the United Nations sponsored declaration and treaties[38].

But there exist other kinds of declarations of human rights, under the auspices of, various people's movements. I may here refer, by way of example, to Ken Saro Wiwa Declaration of the Human Rights of the Ogoni Peoples, the Zapatista Declaration concerning the universal human rights of the indigenous peoples, or the various anti-corporate/anti–globalization protest movements declarations insisting that 'Other Worlds are Possible,' worlds that prefigure different orders of relevance of the promise and pertinence of human rights. However, the histories of ethical declarations concerning human rights are longer and larger than a mere reference to some 'new' social movements may suggest[39]. These speak to moral inventions of new human rights values and goals, not to their discovery (appropriation) and rediscovery (re-appropriation[40].)

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[38] Mashod A. Baderin, 'Recent Developments in the African Regional Human Rights System,' *Human Rights Law Review* 5: 117-149 at118-124 (2005.)

[39] These inventions, to take but just one example, fashion in revolutionary ways the right to self –determination or liberation from the colonial yoke, destroying the very foundations of the asserted collective Divine Right to Empire claimed for far too long by and on behalf of the 'civilized peoples.'

[40] See Baxi, *Future1* pp. 24-41 and *Future 11* at pp 33-58.

Given the core emphasis on 'pre-legislative' standing of human rights in 'Theory' and accentuation of the ethical requirement of 'unobstructed discussion,' it is surprising that Sen fails to accord the same dignity of discourse to statements made outside the intergovernmental or state auspices and in fact quite often opposed to these. Moreover, people's declarations speak to tasks of construction of orders of ethical demands that concretise imperfect duties very differently than do the state sponsored ethical declarations of human rights. Further, human rights ethical claims, or declarations, that do not survive a specifically historic moment yet manage to live on, and speak to, both the future of the idea of being, and remaining, human and to the idea of having human rights.[41]

This is so because people's declarations interrogate the dominant human rights discourse hat defies attributes that characterize the 'human' in many different modes. It makes clear who may count as fully human and why. In the era of slave mode of production, people bought and sold in chattel slavery were considered less than human. In the colonial era, the savage, the heathen, and the barbarian were considered human only in so far these remained open to religious conversion or colonial cultural assimilation that fostered the capabilities to develop into 'loyal subjects.' During the many histories of holocausts, some ethnically designated minority populaces were not considered worthy of even, of what Agamben poignantly describes as 'bare life.' In various apartheid societies and states, sometimes specifically named (such as the pre-liberation South Africa), and often not so named (such as the classical Hindu caste formations or the ante, as well as post, bellum United States) the possibility, the potential, of being human depended on the ways in which skin pigmentation defined one's eligibility for the fullest access to human rights. Women, though universally considered as 'human' were also so universally constructed as 'inferior' as to have a very limited estate of human rights. The distribution of human rights thus depended a great deal on who counted as fully 'human' and for what 'good', or indeed, 'bad,' reasons[42].

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[41] For example, the right of the colonially subjugated peoples remained for long periods of history simply unsustainable on the versions and vision of the 'White Men's Burden' or *mission cvilistarie.* So did in the heyday of the Cold/Hot War the notions concerning radical socialist self-determination opposed to the praxes of Global Capitalism, both of which denied the people's voice claiming a different ethicality of, and for, human rights.

[42] It is unnecessary to multiply examples save to underscore the point that even contemporaneously some elementary forms of being 'human' continues to invite furious

Aside from these concerns, reading human rights statements also invites attention to scale. One may usefully refer to three types of human rights declarations and instruments in terms of their enunciative reach. Macro- statements of human rights such as the Universal Declaration, the Right to Development, the principles of Sustainable Development, the regimes of 'progressive implementation' of social, economic, and cultural rights, for example, aspire to (in a Hegelian idiom) to 'abstract universality.' Meso – statements concerning human rights such as, for example, that outlaw racial, disability and sex\ gender based discrimination or apartheid, the right to 'life,' immunity from torture and from hunger\malnutrition articulate 'abstract particularity.' Micro-level articulations of human rights 'truths' pertain to the realm of 'concrete universality.[43]' Surely, then, any response to the question: 'what kind of statements human rights declarations makes?' needs by way of a fuller response more detailed, and principled, attention both to the rich narrative histories marking enunciative formations as well as to the level-of-analysis type engagement? On this register, the 'Theory' needs to be supplemented by some narrative empoltments concerning the 'hard' and 'soft' regimes[44]. These surely leaves 'open' to serious contestation at least three issues: first, 'the attention that is owed to human rights that may best be paid'; second, the issue concerning the weighing/ weight of 'against each other and their respective demands integrated together', and third, and related, to the tasks of the consolidation 'with other evaluative concerns that may also deserve ethical consideration' (p. 322.)

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contention in the recent history of debates concerning whether the foetus is fully human at the moment of conception or only so after the first trimester of pregnancy, or whether embryonic stem cell research violates the human right to life. The extension of the languages, logics, and paralogics of 'human rights' to other non-human yet still sentient beings continues to evoke impassioned conflict and contention, whether manifest in the discourses concerning the animal rights or the rights of natural objects such as, for example, the trees, mountains, rivers, oceans, and rain forests. See, *Future 11*137-147.

[43] For an elaboration of the Hegelian distinction, see Baxi, *Future 1*at 93-97 and *Future 11*at 167-175.

[44] These stand emplotted in the TAR genre that anxiously and variously distinguishes what we may call 'aspirational' from the 'operational' dimensions of such declarations in terms of 'hard' and 'soft' normative regimes. These note the ways in which 'soft' regimes may be hardened over time and in which 'hard' regimes may indeed be softened. Put another way, these trace the plotting of the graph in which previously 'operational' human rights norms and standards, and historically wrestled human rights of the proletariat (for example, as developed in terms of the rights of organized and un-/ dis- organized workers) now become merely 'aspirational' in the current halcyon days of economic globalization that now promote merely the discourse of the so-called 'ethical' or 'fairer' globalization.

V. TEN FEATURES OF A THEORY *OF* HUMAN RIGHTS

While it would be an overstatement to say that no one before Sen anticipated the tasks of theory of human rights in this way[45], there is no manner of doubt that the 'Theory' offers some interesting points of departure.

First, a general theory of human rights directed to offer justifications for the idea of rights requires at least a cogent articulation of the 'relationship between the force and appeal of human rights, on the one hand, and their reasoned justification and scrutinized use, on the other' (p. 317.) *Second*, 'reasoned justification' must address forms of 'specialized scepticism,' or 'discriminating rejection' (p.316)[46] concerning the ideals, ideas, and languages of human rights, extending especially to 'newer inclusions' such as social, economic, and cultural rights[47].

Third, a general theory formulates 'human rights' as primarily ethical demands' (p.319.) Their translation into legislation is a problem for theories *about* human rights.' A theory *of* human rights should concern itself with the 'pre-legislative standing' of such claims. *Fourth*, this further opens up the question concerning whether legislation is the pre-eminent or even necessary route through which human rights can be pursued' (p.318.) Legislations embodying human rights of human rights are, of course, important but they remain, at the end of the day, 'a further fact, rather than constitutive characteristic of human rights' (p.319.)

Fifth, and more specifically, the question of justification entails reflexive analysis of the 'significance of the freedoms that form the subject matter of these rights' (p.319.) *Sixth*, for this reason, human freedoms articulated by languages of contemporary human rights[48] need careful, even anxious, deliberation and reflection by erudite as well as organic thinkers[49]; there is no room here for any sharp division

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[45] See especially Alan Gewirth, *The Community of Rights* (Chicago, University of Chicago Press, 1996.).

[46] I articulate these forms, both in terms of theory and activist stances, as 'human rights wariness' and 'weariness': see *Future 1*, 42-66; and *Future 11* 81-85.

[47] And I here add the 'rights' to 'sustainable development' and the rights of peoples and states to development.

[48] See *Future 1*, 24-41 and *Future 11*, 33-59 *for* the distinction between 'modern' and 'contemporary human rights.

[49] To borrow here the terms of distinction that Antonio Gramsci first enunciated and Michel Foucault further developed. I here desist from acts of voluminous citation.

of labour among the communities of thinkers and theorists, policy actors at national, supranational and global levels and human rights activists; all must address the issue of 'conceptual justification' for human rights and resolve 'conceptual doubts' that promote via 'a secure intellectual understanding' the forms of 'reasoned loyalty' to human rights (p.317.) A general theory *of* human rights is by definition an exercise in *analytic reason*, not a theory *about* political *unreason* (that is, political passion or the politics of desire.) Even activist 'agitation' ought to be fully guided by the imperatives of 'conceptual clarity,' which remains 'critically relevant for understanding of the concept and reach of human rights (p.356.)

This is so, *seventh*, providing justification also at the same moment 'generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms' (p.319.) In this context, 'imperfect obligations' remain as crucial as the 'prefect' ones. *Eighth*, human rights talk \ discourse ought to remain multicultural, even multi- civilizational (pp.311-354) because the very idea of the 'universality of human rights relates to survivability in unobstructed discussion - open to participation by persons across national boundaries', thus by a 'free flow of ideas and uncurbed opportunity to discuss differing point of view' (p.320.)

Ninth, the 'Theory' stand thus offered as gradients of a 'theory' of 'the general *discipline* of human rights,' a discipline in which proliferates 'internal' disagreements testify to the strength rather than vulnerability of ongoing human rights discourse (p.323.). *Tenth*, the Capabilities Approach provides the best possible way towards such theory construction because of 'its richness' (p.323.)

This summary overview, I hope, does no great disservice to the authorial intendment. I share Sen's profound ethical belief that a world rife with the ethical languages of human rights is a morally superior world than the one that lacks the alphabet, the vocabulary, and the grammar of human rights. The power of human rights languages to name states of radical evil (and even invent the ways to combat it) depends on our collective labours to clarify as well as justify the very idea of human rights[50]. Sen's call to arms to 'achieve conceptual clarity' (p.356) thus overall remains important both for the theory and practice of human rights.

[50] See *Future 1* at 18-23; and *Future 11*at xiv-xxiv, 27-32.

Clearly, then, any endeavour to construct the 'general *discipline* of human rights, including the underlying theory' (p.323) signifies a high degree of conceptual commitment to analytic and practical reason. I do not here pursue (for reasons of space) any possible critique of an over-rationalized perspective of human rights theory, already contested, for example, by a variety of Lacanian approaches[51]. Instead, staying within the discursive universe of the 'Theory,' I address briefly some textual, and paratextual moves made by Sen, and the contrast her offers between the 'legal' and 'ethical.'

V1. THE SEN-SUALITY OF THE 'THEORY'

Even when directed to cultivate theoretical reflexivity, a theory *of* human rights should speak beyond the charmed circle of philosophers, and address multiple communication-constituencies or publics/counterpublics[52]. Whatever be the range of its meta-ethical concerns, its task is to persuade everyone: human rights sceptics and human rights evangelists; moral philosophers as well as development experts; states as well as supra-state agencies, networks, and actors, grassroots as well as Astroturf human rights activists and the 'new 'social movements. The rhetorical moves thus remain complex and Sen's engaging and seductive style of writing is so distinctive as to merit a new genre of worthy of being named as 'Sen-suality.'

Several crucial textual and paratextual moves animate the 'Theory.' A first move liberates a theory *of* human rights, as already noted, from theories *about* human rights. A second move liberates the tasks of theory construction from any detailed or even principled engagement with the law and jurisprudence of human rights; this stands mightily accomplished by naming 'human rights' as 'quintessentially ethical,' and in particular *not* as any 'putative legal claims' (p. 321); the proclamations, pronouncements, or enunciations of human rights 'are to be seen as ethical demands,' not as "principally "legal", "proto-legal", or "ideal- legal commands" (p.320.) Thus liberated, a third move constructs the tasks of

[51] See, Malcolm Bowie, *Lacan* (London, Fontana, 1991); David Caudill, S. *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory* (*New* Jersey, Humanities Press, 1997); Peter Goodrich., *The Law and the Postmodern Mind*, (New York, New York University Press,…; Jeanne L Schroeder, ' Fear of Freedom: A Polemic Against Policy Scholarship,' Cardozo Law School, Jacob Burns Institute for Advanced Legal Studies, Working Paper Series No. 35 (2001.)

[52] Concerning this notion, see the rich collection in Michael Warner (ed.) *Publics and Counterpublics* (2002, New York, Zone Books.)

deliberative complexity in terms of a whole variety of complex understandings that relate, for example, to 'rights, freedoms, and social influence' (pp.328-330), 'process, opportunities and capabilities' (pp.330-338) and 'imperfect obligations' (pp.338-342). A fourth move deftly suggests that construction of approaches to the 'universality' of human rights must remain an exercise in dialogical reasoning across cultural and civilizational traditions. The vaunted truths, or to vary the metaphor the celebrated lies, of human rights must always be subjected to the imperative of 'survivability' in an unobstructed' dialogue among communities of epistemic and activist actors that somehow go beyond their quotidian and contingent location and linkages within many a border and boundary. This accomplishment, fifth, in turn entail a series of textual and paratextual moves that reconstruct deliberative complexity as constitutive of the mastery, or at least familiarity, with the lineages of Anglo-American economic and political theory ruptured by some munificent but still unequally suggestive invocations of some Asian thinkers (pp.352-353), even as all this may elide the problematic of juxtaposition of incommensurate thought-ways[53].

Even so, the persuasive aggregative appeal of these moves traverses several communication constituencies. Moral philosophers are here urged to move, though very grudgingly, beyond the archetypical Jeremy Bentham, and some of his equally rights -sceptic illustrious latterday followers. Historians of human rights stand summoned to explore the 'pre-legislative standing of human rights'; likewise theorists *of* human rights are required, to reiterate, now to think 'a theory of human rights cannot be sensibly confined within the juridical model within which it is often incarcerated' (p.319) because human rights can in this way 'include significant and influenceable economic and social freedoms' (p.320.) Those who perform heavy- duty labours in the field of development ethics now stand urged to find fresh grounds for hope in the appeals to the core ethicality of dialogue and participation and the 'connection' between 'human rights to global public reasoning' (p.320.) Comparative thinkers should find also sources of renewal of their discipline by the celebration in 'Theory' of Adam Smith's taught virtue of 'examining moral beliefs, inter alia, from "a certain distance" (p.309.)

[53] Only by way of a perfunctory note, I mention here an exemplary lack in the 'Theory' -- the near total-absence of the First World (the indigenous peoples of the earth somehow still surviving globalization at least in terms of that complex entity that Emile Durkheim, in a different context, named as *conscience collective*.) Further, these moves remain relative strangers to a formative global ethic that so fully organizes historic amnesia concerning their human rights of immunity from physical and cultural/ civilizational extinction.

Above all, some activist communities who already ambivalent concerning the implementation through the law of human rights are expected to remain enthralled with Sen's emphasis on politics and practices of 'public recognition and agitation', among these discussion and advocacy (p. 319) of what emerge contemporaneously as lost causes but at the same time suggest in the eye of the future history may, after all, occupy the commanding heights of human rights achievement[54]. And, without being exhaustive, a proposed general theory of human rights co-equally honours the names of Mary Wollstonecraft and Rosa Luxemburg, alongside with such contemporary feminist theorists such as Martha Nussbaum and Susan Moeller Oikin warms the hearts of those who labour to feminize human rights and development ethic.

This is vintage 'Sen-suality' indeed, a form of writing that celebrates 'something for everyone' type offerings. No one coming to the doorstep, as it were, of a general theory or discipline of human rights should be denied the grace of hospitality. In this sense, the 'Theory' remains a text endowed with great cosmopolitan appeal, in the very best sense of that word.

V11. WHAT MAY WE MEAN BY 'HUMAN RIGHTS?'

The rather versatile expression 'human rights' requires careful conceptualisation. There are many ways of talking about human rights[55]. Typical among them remain the distinctions between natural and moral rights on the one hand and legal rights on the other; the 'Theory' elevates the *idea* of human rights as distinctively ethical. Carefully subjected to the imperative of 'universality' here understood as 'survivability' in reasoned dialogue, 'human rights' emerge variously as *ideals* to be pursued, *values* to be fostered, policy *ends* to be achieved, and *virtues* to be cultivated in individual and collective behaviour, economic activity \ enterprise, and political conduct in the pursuit of human and social development (that is as an aspect of varieties of 'development' ethics as well as virtue ethics.)

In this narrative the specific embodiments of juridical ideas of, and about, human rights, and their different histories in legal development, do not occupy any commanding height for a

[54] It would be perhaps churlish in this context to raise issues concerning 'agitation,' a term that *prima facie* does not necessarily include struggles, often violent and insurrectionary kind.

[55] I identify inter alia, *these* under the following rubrics: human rights as ethical imperatives, as languages of governance and of insurrection, as diverse acts of juridical production, and as marking some difficult passages between human rights movements and markets: see, *Future 1* and 11, respectively at 7-13 and 13-22. See also Rhonda K.M. Smith Anker, ed., *The Essentials of Human Rights: Everything You Need to Know about Human Rights* (London, Hodder-Arnold, 2005.)

theory *of* human rights[56]. The 'Theory' of course makes ample space for Bentham and Adam Smith and the fables of human rights put to some instrumental uses (pp.352-354.) We consider later what kind of ethics Sen endorses and wants all human rights folks to eventually endorse. But for the moment we ought to attend somewhat in detail the way in which the 'ethical' stands negatively constructed as opposed to distinctively legal and within this realm what concept of law may guide the construction of legal.

(a) The Proto-Legal

The 'Theory' when referring to 'law' frames the concept of law troublesomely in terms of commands. Sen distinguishes between "legal," and "proto-legal," or "ideal-legal' *commands*' (p. 319, emphasis added[57].) We do not unfortunately learn from the 'Theory' what complex cargo of meanings these three terms may carry. 'Legal' for Sen primarily denotes legislation (the laws enacted by the competent legislature.) And the 'ethical' suggests imperatives for conduct that arise independently of legislation and remain both antecedent to, and autonomous, from it. The 'ethical' thus pre-exists the 'legal.' The 'ethical force of human rights' may provide 'inspiration for legislation' (p.327) but it remains independent of what legislation may or may not achieve.

Two distinct and difficult observations remain pertinent. First, human rights may exist 'in the absence of any legal standing generated by an ethical recognition of rights without any legislation or interpretation' (p. 326.) Second, the 'ways and means of implementing human rights need not be, thus, confined only to making new laws (even when legislation may indeed turn out to be the right way to proceed' (p. 327.) Crudely summated, *no trace of law* (conceived here comprehensively in terms of

[56] Although Sen incidentally offers some interesting insights for TAR, for example, via the recognition of 'agitation route,' that is the role played both by the Old and New social movements in this production, an aspect we explore shortly

[57] The idea of law as commands itself bypasses some acute jurisprudential controversies concerning the concept of law. This reference to 'commands' imparts a strong positivist flavour, of the type celebrated by John Austin. Even in his reference to H. L. A. Hart, Sen seems concerned with an understanding of 'coercive legal rules (pp.326-327.) But as we all know Hart's enduring contribution was to take us beyond the 'gunman' model of law and to remind us of such profusion of the variety of rules as to problematic the concept of law as a set of coercive rules. The 'legal' from which the ethical idea of human rights is to be distinguished stands poorly described or understood in the 'Theory.'

legislation, interpretation, and implementation) stands entailed in the idea of human rights as ethical statements. Human rights thus constitute as well as represent state/ *law* free ethical spaces.

A nuanced summation suggests a different storyline. Sen makes room for saying that specifically human rights legislations carry 'obvious status' (p.318) because 'acknowledged human rights must be given ethical recognition' (p.326.) This gesture suggests that at least some human rights legislation may precede the 'ethical' and in turn require further ethical 'recognition' or validation. If so, the 'proto-legal' and the 'ideal-legal' re-construct rather than validate any pre-existent 'ethics.' In sum, then, and all over again the well-worn jurisprudential theme concerning the analytic of segregation between law and morals rather fully re-emerges in the 'Theory[58].'

However, Sen proposes two pathways: the 'agitation' and the 'recognition' route. The 'agitation route' –advocacy, support, activism—invoke rights that 'may or may not have any legal status in the country in question' but this fact does not render these 'necessarily… useless' (p.344); the 'recognition' route acknowledges human rights but not necessarily any legalization or institutional enforcement of a 'class of claims that are seen as fundamental rights' (p.343.)

Put together, these statements raise at least three related but distinct questions for TOR. First, the *existence* question: In what ways the 'ethical force' of human rights may be said to *exist*? Second, the *relational* question: How may the ethical force inspire enunciation of regimes of human rights 'law' and in turn how may the 'law' reconstruct that ethical force? Third, the *definitional* question: How may we proceed to construct the notions of 'ethics' and of 'human rights'? I address, as a first step, the last two questions in terms of the distinction between 'legalization' and 'juridicalization.' Even so, the first question warrants some threshold reflections.

The pre-/ post 'law' existence of the 'ethical force' of the idea of human rights remains rather inseverable from thought-traditions of theistic and secular natural law. In the former genre, *being* human and *having* rights emerges as God's gift, which may only be deciphered by the hermeneutic of piety. But this remains an accursed gift

[58] H. L.A. Hart, for example, formulated this famously in his *The Concept of Law* contrasting the different realms of *contingent*, contrasted with any *necessary* relationship between 'law' and 'morality.'

because there are no easy ways of designating God's *will* from His *reason*. Before the divine will, any gesture of interpretation remains not just *impious* but *sinful*. If, however, the issue stands presented in terms of divine reason that ordains the full use of human reason (also a the gift of Gods) we arrive at a tableau of what Rudolph Stammler memorably described as 'natural law with a changing content.' The rationalist, opposed to voluntarist, conceptions and traditions of natural thought remain surely relevant to any reading of the 'ethical force' of human rights.

These alternate ways of reading remain fateful for any stories that trace the itineraries of the 'ethical force' of human rights. To take a contemporary poignant example, the Shiite conceptions, overall, justify forms of martyrdom (via suicide bomber figuration) as performatives of fidelity to Divine Will. In a radical contrast, the classical Sunni traditions, at least till now, disfavours such militant forms of mass indiscriminate violence[59]. On an allied register lie some tormented narratives of the Anglican Synod, confronted now with the structural adjustment, as it were, of God's reason with a fidelistic call of answerability for the inclusion of 'gay' priesthood. If it were necessary at all, one may here compendiously name further the 'ethical force' of movements that so insistently position the right of the unborn arrayed against the reproductive human rights of women, and the heavily contested right to physically-assisted forms of termination of life, or the cultural embodiments/ disembodiments entailed in female/ male genital circumcision. Shortly put, the 'ethical force' may not altogether be divested from the 'spiritual' in any narrative empoltments of a general theory *of* human rights.

In secular natural law genre, the ethical force of human rights idea emerges as cosmically/spiritually orphaned, yet also firmly terrestrially grounded. Against the grain of *revealed* truths of theistic natural law, secular natural law genera variously craft the idea of human rights as *secular* productions of political truths *somehow* marking some inherent limits on the 'reason of the state.' The languages of sacred *covenant* with God now get translated as variegated forms of social *contract*. All this is rather well known and I here desist further elaboration save saying that the 'ethical force' of the idea of human rights, far from being freestanding, remains mired, as well

[59] See, B.K. Freamon, 'Martyrdom, Suicide, and the Islamic law of War: A Short Legal History,' *Fordham International Law Journal* 27: 299-369.

as mirrored, in these diverse genera. That 'force' enacts future human histories *as if human rights existed*[60].

To revert to the principal issue: In what way may we say that 'ideal-legal' is different from 'ethical?' How, indeed, may the Universal Declaration of Rights be read: as legal or proto-legal or ideal-legal set of commands? Is it to be read partially or wholly as a statement of moral or natural rights[61]? May we say the same about the 1986 United Nations Declaration on the Right to Development and kindred declarations? How may we speak, in these terms, to some extraordinary international legal developments that address the criminalization of 'mass atrocity'[62]? Or to the now entrenched, even if troublesome distinctions, between the regimes of 'hard' and 'soft' international law of human rights[63]? Where on this landscape may one situate some extraordinary feats of national, regional, and supranational adjudication, summated by a complex description' judicial activism? I raise these questions to suggest that the relation between the 'legal' and 'ethical, may turn out to be far too complicated than the narrative moves in the 'Theory' suggest.

(b) The Realm of the Distinctively Legal

[60] Thus, the ample terms of descriptive realism celebrate Mohandas Gandhi, Nelson Mandela, Frantz Fanon, Martin Luther King Jr. (amidst their equally luminous feminist others) that engaged 'agitation route' in ways that variously divested colonialism, racism, and patriarchy of the very last hegemonic/despotic vestiges and disrupted altogether the lineages of human rights idea in the European Enlightenment. Precisely for this reason, I suggest, that any theory *of* human rights needs to be more securely anchored in the actual histories of struggles, which leads to a larger analytical recourse than suggested by the 'recognition' and 'agitation' routes and itineraries.

[61] As Sen, here following Bentham regards rights invoked by the American Declaration of Independence (p.327.)

[62] See Mark A. Drumbl, 'Collective Violence and Individual Punishment; The Criminality of Mass Atrocity,' *Northwestern University Law Review* 99:539-620 (2005.)

[63] David Trubek and Louise Trubek "Hard and Soft Law in the Construction of Social Europe: The Open Method of Coordination", 11 *European Law Journal* 343(2005); id. *Hard and Soft Law in European Integration* forthcoming in Scott & de Burca, *Law and New Approaches to Governance in the European Union and the Unites States* (Oxford, Hart); Upendra Baxi, 'Politics of Reading Human Rights: Inclusion and Exclusion within the Production of Human Rights, in Saladin Meckled-García and Basak Çali, ed., *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (London, Routledge, 2006) at 182-200.

The 'legal' as thus far contrasted with the 'ethical' remains problematic when equated entirely or even eminently with ideas, values, and norms, which are enforced or coercively implemented by the state. The idea of the distinctively 'legal' is no longer paradigmatically focused on Benthamite or Austinian notions[64]. Further, a whole body of social theory of law educates us in the distinction between 'symbolic' and 'instrumental' legal (that is legislative, administrative, and also judicial) decisions[65]. And the distinctively 'legal' stands complicated in the various productions of international human rights law because normative international law as a whole remains a paradigmatic instance of 'law without sanctions[66].' This is scarcely the place to elaborate these and related truisms further but they lead to the conclusion that the idea of the legal in the 'Theory' is to say the least under- developed.

(c) Legalization and Juridicalization

The 'Theory' further conflates two distinct, though related, notions, 'legalization' and 'juridicalization.' Sen's notion of legalization, as already noted, refers primarily to legislation and although he does refer to legal interpretation, this aspect remains entirely marginal to his exposition of the 'legal'[67]. But is the 'juridical' entirely assimliable with the 'legal?' Legalization of human rights becomes even a more complex notion, once we insert the category of constitutionalization of human rights[68].

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[64] It is now household jurisprudential wisdom that the idea of law (or as Roscoe Pound described it 'the authoritative legal materials') goes much beyond the idea of coercive commands. As H.L.A. Hart demonstrated much law comprises facilitative rules, rules that afford various ways of exercising basic freedoms.

[65] A symbolic law aims at producing attitudinal change over time rather than behavioural conformity here and now which remains the domain of instrumental law; enforceable sanctions remain conspicuous by their absence in the enunciations of symbolic law.

[66] As Hans Kelsen long while ago pointed out there exists in international law spheres, no *force monopoly*, despite the contemporary conjuncture, comparable to municipal or national law within a territorially bounded state or political community.

[67] Because of the entirely unnecessary, and distracting, discussion concerning whether the rights are the child or the father of law (pp.326-327.)

[68] I name this to draw attention to some uncanny anticipation by constitutionalisms of the logics of international human rights. For example, the makers of the Indian Constitution inaugurated the distinction between civil and political rights (Part 111), which were judicially enforceable, and the directive principles of state policy (part IV) which while not so enforceable cast a paramount constitutional obligation on the state to progressively implement these in the making of laws and policies. It was this distinction, which, I believe, influenced

In any event, the contrast between the 'legal' and 'juridical' may be drawn at several levels. At the level of *origins*, the juridical concerns the very idea of law, its purposes, values and goals. On this register, the juridical is pre-legal in the sense that that thinking through these matters is primarily the affair of *unofficial minds* that is state-free, rather than state-dependant, thinking and reflection. The juridical has many histories as the variety of discourses concerning natural law so richly illustrate[69]. It also contemplates the co-possibility of the lawness of people's law formations[70]. It is the juridical, rather than the legal, which furnishes, for example, the archives of conceptions, and contentions, around the values of the 'thick' and 'thin' conceptions of the rule of law, the problem of obligation to obey unjust law, theories concerning justice according to, and beyond, the law.

The juridical remains decisive to the form and function of the state law formations. The creation of modern international law provides one example of the jurisgenerative force of the juridical; almost all of its basic and still governing norms and doctrines owe their foundational enunciation to jurists rather than states[71]. The same is true of systems of 'law' which were for the most part based on the labours of the jurist (such as for example Islamic, Hindu, and Rabbinic law) and of the jurist and the judge (such as the 'common law.') At least on this plane, the ethical and the

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the International Bill of Rights enunciated divisions between civil and political rights on the one hand, and economic, social, and cultural rights. This constitutional invention impacted on the making of several postcolonial South constitutions. Likewise, the Constitution provided an area for the 'agitation route' by its provisions of fundamental rights to freedom of speech, expression, assembly, and association. Over a period of time human rights and social activist practices enabled the Supreme Court of India to develop styles and habits of judicial activism that resulted in judicial enunciation of hitherto unscripted constitutional rights and also the transference of Part IV obligations into Part 111 type fundamental rights. I desist, for reasons of space, here citing the relevant literature.

[69] A good source, in terms of history of ideas, stands provided by Julius Stone, *Human Law and Human Justice* (Sydney, Maitland Publications, 1965.) And the 'Theory' in its illuminating footnotes also refers to some of the leading juridical thinkers.

[70] That is, it recognizes as law the varieties of non-state, informal, and customary legal orders; the herein of legal pluralism countering legal centralism. I desist again from voluminous citations concerning this point.

[71] To take a complex example, Ambassador Padro (Malta) inaugurally initiated the idea of 'the common heritage of (hu)mankind' which animated the realization of the innovative regime of the United Nations Law of the Seas Convention; it proliferated further in the Rio Principles concerning biodiversity and informed the constitution of the regime of sustainable development; it now spreads further in the declarative realms that seek to regulate research and appropriation of the Human Genome Projects.

juridical co-mingle to a point where a narrative in terms of history of ideas must at least pay equal attention to resultant histories of complex origins, certainly not to be summated in terms of the Procrustean bed type legacy of Bentham concerning whether rights are the 'children' or 'parents' in law, and beyond the law.

At the level of *forms*, the juridical invites attention to the diversity of authoritative legal materials. As early in the third decade of the Twentieth Century, C.E., Harvard Law Dean Roscoe Pound demonstrated that the mass of 'authoritative legal material' was not all produced by legislation and it furthermore vastly varied in the levels of generality. The authoritative legal materials comprised in an ascending order of generality: rules, standards, principles, precepts and maxims, doctrines, goals, and ideals[72]. Not merely was the hierarchy thus established important; equally so were the multiplex relationships among these forms. The heterogeneous normative mass called 'human rights', whether regarded legal or as quintessentially ethical, requires refined sensitivity to Pound's analytic even today. The tasks of fostering freedoms to which human rights correspond to, and further refining articulations of any wholesome loyalty to human rights as ethical ideas, or even imperatives, ought in my belief to attend to the different moments wherein 'human rights' as such assume different visages of rules, standards, principles, precepts, maxims, doctrines, goals, and ideals.

The notion of the juridical in a sense stood confiscated in Bentham's dismissal of this realm of '*imaginary* law' and '*imaginary* rights' (p.325.) Sen rightly contests this contrast between the 'imaginary' and the 'real' in terms of human rights as ethical claims that transcend 'legal or institutional force.' However, he misses to note the ways in which postmodern jurisprudence have used the fecund Lacanian distinctions among the domains of the Symbolic, the Imagery, and the Real[73]. For Sen, this discourse remains surprisingly irrelevant. So also remains the intransigent fact that Jeremy Bentham, who flourished a long time ago and wrote in the context of *scarcity*, not any *superabundance*, of human rights enunciations and discourse. Benthamo-phobia marks in 'Theory' several anachronistic spectral textual presences (what

[72] Roscoe Pound, *Tulane Law Review* 7:475(1933.)

[73] See, note 51, *supra*.

Derrida summates as frames of hauntological presence[74].) This does sparse justice to theoretical approaches to human rights in the past few decades.

Regardless, and on a related register, it is just not correct at the level of descriptive ethics, or the history of ideas, to say that 'legal' ideas about human rights always *follow* but never *lead* the ethical. I do not here enter this vast, and profoundly, contested territory. Sen here specifically instances the Universal Declaration of Human Rights and the Right to Development as making the ethical force of human rights 'more powerful in practice through giving it social recognition and acknowledged status even when no enforcement is instituted[75]. That 'ethical', however, here is and remains, also irredeemably juridical.

Surely, the originary (non-state) authors of contemporary human rights did not regard the presence or the absence of 'legal or institutional force…' as 'quite irrelevant' to theory or practice of human rights. My 'favourites' include: the legendry Ralph Lemkin, who invented the term 'genocide' who worked himself to penury and death to promote the idea of legal prohibition of genocide[76], Martin Luther King Jr., and Nelson Mandela who variously sculpted a human right against apartheid, activist jurists who toiled hard for over 150 years to realize the now, even if not fully realized, creation of an International Criminal Court, and the pioneers of movement proclaiming 'Women's Rights are Human Rights' (to take here somewhat large historic narratives as exemplary).' Clearly, the jury is still out, as it were, on this

[74]Jacques Derrida *Sceptres of Marx, The State o f Debt, the Work of Mourning, and the New International,* trans. P. Kamuf (London, Routledge. 1994.)

[75] Very many legal \ juridical ideas of human rights actually innovate 'ethics.' The United Nations Charter prohibition on use of force among the community of states, the tripartite procedures of the International labour Organization (giving equal voice to industry, labour, and state,) the UN Conventions on the law of the Seas giving rights to access to coastal maritime spaces for the landlocked countries, with the associated or rather underlying notion of the 'common heritage of (hu)mankind,' and the Declaration on the Right to Development celebrating the value and virtue of agency and participation , to take but a few salient examples, even when somehow said to be anticipated by 'ethical' thought or theory innovate both the procedures and content of ethical normatively.

[76] See, Samantha Power, *'A Problem from Hell: America and the Age of Genocide* (New York, Basic Books, 2002.)

'strong' claim stressing the need for any radical disassociation between human rights as ethical and as legal demands[77].

In any event, the discursive worlds of human rights have undergone massive significant changes since the eighteenth century type critique of the 'idea' of human rights[78]. In these terms at least, I believe that any form of Bentham-fetishism fails to provide either any starting point, let alone a terminus, for understanding human rights in the early years of the 21st Century C.E. Nor do forms of contemporary scepticism concerning human rights necessarily remain tethered to any Benthamite legacy (as, for example, serious readers of Alistair McIntyre, Richard Rorty, Michael Walzer, or even Jacques Derrida would surely know.) Further tracing itineraries of histories of the ethical idea of human rights more fully invites us to go beyond Bentham[79]. Sen's relentless focusing on Jeremy Bentham and Adam Smith does not do justice to subsequent histories of juridical ideas concerning human rights and thus provides at best only a partial listing of any 'constitutive' elementary histories towards a general theory of human rights.

V111. WHAT ETHICS?

I have already at several places indicated the distance between the notions of ethics as emergent in Sen, and as more explicitly articulated ,for example, by Emmanuel Levians and Alain Badiou. It now remains necessary to more severely focus on the type of 'ethics' that animates the 'Theory.' This inescapably also raises the question: 'Whose ethics?

[77] And one cannot but fail to note that the 'Theory' does indeed recourse to juridical ideas in the field of human rights law; thus for example, 'the social and economic rights' or the 'three generations' of human rights

[78] I state this merely in terms of descriptive ethical realism, a form of thought that fully takes account of the fact of the actually existing and accurately describable transformations in moral practices and ethical standards of various agents, entities, and agencies.

[79] This task at least requires an equally fine regard for enterprises of thought such as fully illustrated (and I here only mention some contemporary Eurocentric legacies) by Hannah Arendt, Walter Benjamin, Emmanuel Levinas, Michel Foucault, Jacques Derrida, Reinhardt Kosselleck, Rene Girad, Giorgio Agamben, and Alain Badiou, (among significant others.) All these thinkers focused, in related but distinct ways, on the foundational and reiterative nature of violence, even terror, of law's ways of reproduction of human rightlessness.

As concerns the first question The 'Theory' broadly invokes the ethical idea of human rights in terms of some contemporary liberal secular versions of cosmopolitan ethic. It is secular in the sense that justifications for human rights are not based on diverse traditions of theistic natural law (whether based on God's will or reason) nor, at least entirely , based on traditions of secular natural law that posit human rights as natural rights. The constitution of the 'liberal' may for the resent moment may be read as a narrative gesture exclusive of the traditions of ethical thought in pre- capitalist formations on the one hand and even post-capitalist\ socialist notions, on the other, concerning what it means to be human and to have human rights. It is, moreover, cosmopolitan in the sense that it postulates duties of 'reasonable' help towards the fulfilment of human rights. It is contemporary in the sense of that the ethical in 'Theory' is primarily framed in terms of an overarching global development ethic, which differentiates itself from Habermasian discourse ethic and Rawlsian 'public reason.'

More specifically, then, the 'Theory' continues to reiterate a liberal idea of human rights, relatively independent of the utilitarian and deontological approaches. Sen has been unwilling, as early as 1981[80], to endorse these approaches and has instead proposed a 'goal rights systems,' or more simply the idea of rights as goals, a 'moral system' under which

> …fulfilment and nonrealization of rights are included in among the goals, incorporated in the evaluation of the states of affairs, and then applied to the choice of actions through consequential links… [81]

Goal rights systems then 'require consequential analysis, though they may not fully conseqentialist[82] 'at least in the sense that justifies the pursuit of entirely 'rights-independent goals[83].' Such systems also disfavour the 'constraint-based

[80] Amartya Sen, 'Rights and Agency' *Philosophy and Public Affairs,* 11:3-29(1981), hereafter cited as Sen 1981.

[81] Sen, 1981at p. 15.

[82] Sen, 1981 at p. 3; for a different take on this position, see Phillip Petit, 'The Consequentialist Can Recognize Rights,' *The Philosophical Quarterly* 38:42-55 (1988.)

[83] Sen, 1981, at p. 4.

deontological' 'view 'in which violating rights is simply wrong.'[84] Rights as goal systems instead regard as of paramount importance 'the inclusion of fulfilment and nonfulfilment of rights… rather than the exclusion of nonright considerations[85]'. In particular, in such systems the crucial concerns arise in relation to 'what rights to include among the goals… the form in which they are to be included, what nonright values (if any) are to be admitted, what "weights" to use, how the choice of actions be related to the evaluation of outcomes'.[86] 'In examining the role of human rights,' then we 'have to take note of the constitutive as well the instrumental importance of civil and political freedoms'[87].

But this 'taking note' does not, in sum, involve any endorsement of rights as Nozick paradigmatic 'side constraints' nor the Dworkinian 'trumps'[88]. Rather, human rights are goals that advance capabilities and freedoms. In that sense, ethical demands for rights with corresponding appropriate freedoms may only be justified when these meet certain 'threshold conditions for inclusion among human rights on which the society should focus' (p. 329.) It may thus happen that particular freedoms may not be regarded as being an 'appropriate subject matter of rights' (p.329.) The important departure that the 'Theory' now makes is the insistence that

> For a freedom to count as a part of the evaluative system of human rights, it clearly must be important enough to justify requiring that others should be ready to pay substantial attention to decide what they can reasonably do to advance it. It has also to satisfy a condition of plausibility that others could make a material difference through taking such an interest (p.329.)

In this sense, a general theory of human rights must remain an open theory in which claims to freedoms must remain open to negotiation (that is, generating 'substantial attention') and acceptance (what others could do 'reasonably' to advance the claim.) The structure of negotiation stands provided by the difficult dichotomy of 'rights' and

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[84] Sen 1981, at p.5.

[85] Ibid.

[86] Ibid.

[87] Amartya Sen, *Development as Freedom* (Delhi, Oxford University Press) 17.

[88] See, for an admirably succinct presentation, John M. Alexander, 'Capabilities, Human Rights and Moral Pluralism,' *International Journal of Human Rights* 8:451-469 (2004.)

'non-rights' considerations. Many questions arise even on the best possible of reading of the 'Theory.'

To be sure, the goal rights systems approach facilitates, in some important ways the broad inclusion, under the Capabilities Approach, of social and economic rights. Yet, it is not always clear how these are to meet the threshold condition because of the fuzziness involved in the notion of paying 'substantial attention' and 'acceptance.' No weights and measures type approach may perhaps then fully respond to the includability concerns.

This raises a related question: what claims to freedom may remain independent of the so-called 'threshold' test? What human rights values, norms, and standards ought not to remain ethically open to negotiability? Perhaps, given their 'constitutive…importance' Sen would respond that most 'civil and political freedoms' (including freedom of speech and expression, of contract and property) remain inherently non-negotiable. However, the specification of these freedom/ rights remains an intractable issue,

Any further subjects the threshold condition of acceptance and plausibility arising out of 'interactive' method of public discussion. The idea of the 'public' is not within nation society bounded but remains inherently global because 'of the inescapably non-parochial nature' of human rights 'which are meant to apply to all human beings' (p.349.) Surely, this constitutes no naïve universalism. Indeed, reasoning' because it entails 'participation from any corner of the earth' based on 'open scrutiny, with unrestrained access to information,' that eventually results in 'the widespread acceptability' (p. 354) replacing 'parochial gut reactions' by 'critical scrutiny' (p.355.)

It is thus not clear whether this 'uncurbed critical scrutiny' (p.349) extends to some basic rights that the interactive model already necessarily presupposes; such as the values (and accompanying rights claims) of freedom of speech and expression and some effective order of access to means to exercise this freedom; freedom to uncensored or unobstructed communication; and the rather full freedom of access to information. These values and claims themselves may not be thrown open to 'critical scrutiny' because if they were no such dialogical scrutiny may ever become possible.

Perhaps, we may turn to the distinction that Sen seems to make between acceptability and acceptance; he speaks of 'widespread *acceptability*, which must be

distinguished from ubiquitous *acceptance*' of some human rights claims (p.354.) Acceptability is a matter of negotiation but it may only sensibly occur when some claims to human freedom remain *acceptable* as constitutive of the ethics of human rights[89].

This version of communicative action offers n safe harbour for variously signified human rights essentialisms. It is also pragmatic in the best sense of that term. At so many places the 'Theory' remains deeply reminiscent of the work of Roscoe Pound (who following James and Dewy) developed the image of law as a structure of negotiation of conflicting interests. Like Sen, Pound rejected the notions of rights in the language of pre-commitment that constrained negotiability; equally with Sen, Pound remained confronted by endless difficulties in identifying some interests that should lie at the very core of any 'threshold test[90].' Further, Sen comes close at many points of analysis with Rorty, whose ethics of antifoundationalism needs further exploration, beyond the scope of the present essay[91].

1X. WHOSE ETHICS?

The global development ethics informing the 'Theory' does elides an allied question: *Whose* ethics should inform the constitutive and instrumental aspects of the ethical force of human rights claims? To raise this question is not at all to belittle Sen's many-splendoured achievement in the 'Theory,' which develops a universalistic ethic of human capabilities and flourishings, fashioned of course by a scrupulous regard from cross-cultural dialogism. Yet, the question remains because cultural and cilvilizational diversities continue to haunt this noble agendum.

Put another way, the question that severely haunts the 'Theory' does not quite address the problematic posed by Badiou conceptualizing ethics as a 'servant of necessity.' Phrased thus, is it the case, after all, the case that even for Sen the 'necessity' may present itself as servicing what Ulrich Beck prefers to name as) the

[89] Incidentally, we may note the difference: the *acceptable* constitutes the normative claim whereas *acceptance* yields itself to analysis in terms of descriptive ethics.

[90] I have traced this uncanny similarity in my 2001 Julius Stone Memorial Lecture, 'From Human Rights to Human Flourishings: Julius Stone, Amartya Sen and Beyond?'[mimeo version available with the author.]

[91] See, especially, *Future 11* at 175-179, 196-199.

emergent order of 'cosmopolitan corporations' and 'cosmopolitan capitalism[92] , or what Pierre Bourdieu names with a devastating felicity as constructing the 'utopia of endless exploitation,' a 'programme for destroying collective structures which may impede the pure market logic[93]?' Where, further, may we insert in the logics and paralogic of 'Theory' the languages of "Westtoxificiation' conceived, indeed, very differently by Mohandas Gandhi and Ayatollah Khomeini[94]? These now poignantly, and with enormous bloodletting, constitute the post 9\11 issues and agendum framed by various discourses of the wars *on*, and *of*, 'terror.'

Put another way, even as late as 2004, we do not quite find in the 'Theory' any reflection, concerning the constitution of the relation between 'human rights ' (as manifesting their 'ethical force') and the practices of global insurgent 'terror' and the forms of retaliatory state 'terrorism.' No doubt, at stake here remain some precious staple discourses among the 'critics of the "Western values' … or religious or cultural separatist (with or without being accompanied by fundamentalists of one kind or the other': p. 351.)

But obviously much more remains at stake than this. May I compendiously refer here to some horrendously violent formations of imaginings of what may constitute historic grasp of capabilities, flourishing, and agentative and overall conception of otherwise globally social well –being? Even if not altogether novel, the current phase of histories of 'terrorism' and 'counter terrorism' present a very distinctive global conjuncture and circumstance to which ineluctably any further unfoldment of the Capabilities Approach, in the present view, ought to carefully respond.

Reasons of space forbid further elaboration concerning the relation of 'our own rights and liberties' but also, and crucially, 'for our taking an interest in the significant freedoms of others' (p. 326.) This textual move refers to what was hitherto known as the 'conflict of rights' problematic. Sen's reflexive 'theory' of human rights suggests that individual rights-holders owe some order of communitarian \ solidarity obligations to the communities of similarly constituted rights- holders. How may we accept and advance the roots of moral and legal paternalism that even prohibits self-

[92] Ulrich Beck, 'Rethinking Power in the Global Age: Eight Theses,' *Dissent*, Fall 2001 at 99.
[93] See, http:// eutopic.lautre.net/coordination/article.php3? Id_ article= 492 (last visited March 1, 2006.)
[94] See, *Future1* at 10-122 and *Future 11* at 186-193.

exploitation under the title of conscientious regard for the 'for our taking an interest in the significant freedoms of others' to the poignant circumstance of both the suicide, and carpet bomber [95]?

X. THE DREAM WORK AND THE WORK OF MOURNIG: WAYS OF READING THE SILECNES OF THE 'THEORY?'

The 'Theory' does not breathe a word (let alone a *sigh*) concerning the perfidious performances of multinational corporations and some leading international financial institutions that wreak havoc on any, and all, of our privileged imageries of human rights in the contemporary hyperglobalizing world. This raises the issue of the identification of what, if indeed any, human rights obligations may attach to corporate governance and business conduct formed by the myriad multinational corporations and other business enterprises/ entities[96].

Sen, no doubt, attends to this dimension of human violation in his *Development as Freedom*. He there summons the logics of transparency and accountability rights, as these relate to the roles of the 'state' in correcting 'market' failures on the one hand, and on the other of the 'market' in redressing forms of 'state' failure.' But this generalized, and rather stylised narrative, remains insufficiently related, let alone integrated, with the text of 'Theory' containing nil reference to the creation of the communities of hurt and harm, and utter human rightlessness thus caused by the mass catastrophes produced by multinational corporations, of which the Agent Orange, Ogoniland and Bhopal catastrophes furnish an archetype.

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[95] The range of human rights self-destructive performances traverse, of course, beyond this immediate example in situations, presented by global criminality that fosters drug Mafiosi type cartel combinations of the state and regime condoned strategic interests that almost altogether devour agentive self-reflexivity. I do not here aggravate all this any further by reference to the agentative self destructive ethic of suicide bombers. I do, however, suggest that forms of thought that ethically 'justify' technologies of self (to borrow a term of art from Michael Foucault) via self annihilating practices of freedom should at least constitute an important agendum for a more fully fledged 'Theory' for any effort enunciating a general 'theory' *of* human rights. Put another way, a question emerges: how far may any other-regarding human rights\ capabilities\ freedoms needs to attend to the forms of self-destructive exercise of human reflexive theory of \ about capabilities and flourishing? I may not; both for reasons of space and competence further enlarge this theme.

[96] See, *Future 11*, pp.276-302.

This, indeed, raises a general question: How may a 'general' theory of human rights may attend to, and address, the specific forms of human rightlessness comprehensively caused both by the design and intention of corporate governance and business conduct? Ought such a ' theory' confine itself primarily to the state –caused forms and states of human rightlesneness, even in an era where the distinction, all over again, between that which constitutes the difference between the 'state' and 'market' remains ever so nebulous? What may then provide the justifications *of*, and *for*, the nature and scope of some self-imposed limits to such a general theory? How may the human rights claims of such pre-/ and post-disaster/ catastrophe violated peoples thus 'efficiently' produced by forms of corporate governance and business conduct be 'best' negotiated 'ultimately on their survivability in unobstructed discussion?'(p. 349), given the empirically instituted, and notorious fact, global social fact of their non-survival?

The Sen-suality type paramount concern for 'survivability' in forms of 'unobstructed discussion in 'Theory' privileges analytic/ epistemic dimensions of the 'relatively' non-violent justificatory discursivity of human rights. However, still persist some intransigent concerns regarding the role of collective political violence in the production of any, and all, human rights ethic, which all along promote the varieties of violent justifications for making the future of human rights more 'secure.' Surely, a theory *of* human rights needs to speak to the multiple constitutive ambiguities of the ongoing two 'terror' wars.'

The 'Theory' thus no doubt offers a work in progress. What remains implicated, and even decisive, is the notion of 'work.' Were we to deploy the formulation of Paul Ricoeur, in a related context, the work emerges in 'three forms': the 'work of analysis, the work of becoming conscious [the work as well as of mourning], and dream work[97],'

The 'Theory,' on a best possible construction of this text, attends to the 'work of analysis' of human rights as an ethical idea. The move ahead , perhaps, lies as well in the labours of productive imagination that co-equally attend to the work of 'mourning' and the 'dream'/ 'nightmare' work' concerning human rights languages, logics, and paralogics.

[97] Paul Ricoeur, *The Conflict of Interpretations* (London, Continuum Books, 2005) at 181.