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Law and Ethics of Human Rights

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ABSTRACT

Human rights are a set of standards that govern how individuals and groups are treated by states and non-state entities based on moral precepts pertaining to what society deems essential to a decent living. These requirements are outlined in national and international legal frameworks, which specify how to hold duty-bearers liable and compensate persons who may have suffered from violations of human rights.

The paper aims to look at the conflicts between human rights and state sovereignty after discussing the use of human rights in ethical, legal and advocacy discourse. It also focuses on the challenges to the universality of human rights, the list of rights recognised by the international community, and the tools available to translate the lofty aspirations of human rights into practice.

Keywords: *Human rights, History, philosophy.*

I. INTRODUCTION

There are many theoretical disagreements in political science, moral philosophy, and law on the beginnings, scope, and importance of human rights. Generally speaking, the use of the term "human rights" (also known as "human rights discourse" or "human rights talk") is justified by moral consideration (ethical discourse), legally or politically accepted standards (legal/political discourse), or societal mobilisation (social mobilisation) (advocacy discourse). These forms of discourse are not at all sequential even in different contexts, also depending on who the person utilizing human rights discourse is and to whom they are expressing their claims. Laws, procedures, and institutions are influenced by public reasoning based on ethical arguments and social mobilization based on advocacy goals. Hence, these three speech styles contribute to the social reality of human rights.

II. ETHICAL CONCERNS IN HUMAN RIGHTS

Similar ethical concerns about fair treatment apply to human rights, which are founded on philosophical notions of justice as well as ethical concepts like empathy or compassion in human behavior. According to philosopher and economist Amartya Sen, human rights can be understood as mainly ethical objectives. "Like other ethical claims that demand acceptance,

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there is an implicit presumption in making pronouncements on human rights that the underlying ethical claims will survive open and informed scrutiny," Sen writes. In each of the philosophical schools, a person's right is seen as something they are entitled to, either because they are people or because they belong to a certain political group (citizens). Yet, in law, a right is any legally protected interest, regardless of the social impact of the right's enforcement on the wellbeing of individuals other than the right-holder (e.g., the property right of a landlord to evict a tenant, the right of a business to earn profits). To avoid confusion, it is helpful to refer to a higher-order right that is authoritatively defined, carries the expectation that it has a peremptory character and thus prevails over other (ordinary) rights and reflects the fundamental values of the society adopting it by using the term "human right" or its equivalent (such as "fundamental right," "basic freedom," or "constitutional right").²

What one is prepared to recognise as legitimately their moral and religious beliefs determine a human right. The significance of the individual was drawn by Enlightenment thinkers from their conceptions of the condition of nature. Social contractarian's, particularly Jean-Jacques Rousseau, put the basis of legitimacy of the state on the ability of the state to ensure that natural rights are completely enjoyed by the person. It is "clearly contradictory to the rule of nature...that the favoured few should feast themselves with superfluities, while the starving throng are in need of the simplest necessities of existence," he said in *Essay on the Origin of Inequality Among Man*. Human flourishing, dignity, obligations to family and community, natural rights, individual freedom, and social justice against exploitation based on sex, class, or caste have all been used to define the ethical foundation of human rights.³ These moral justifications for human rights are all a part of ethical discussion. The conflict between different philosophers and other perspectives has been a part of the philosophical and political ambiguity of human rights ever since the dawn of the modern era. Whether human rights rhetoric is primarily political and legal or ultimately ethical and philosophical is up for debate. According to Sen, "Even while human rights can and frequently do inspire legislation, this is a further fact, rather than a constitutive quality of human rights," suggesting that the idea of human rights has inherent value regardless of what is stipulated in the law. Legal positivists disagree and hold that human rights are not declared by law, but rather are established by it.

III. LEGAL PERSPECTIVE ON HUMAN RIGHTS

According to "Legal Positivism," human rights are the product of a formal norm-creating

² Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs*, vol. 32, No. 4 (2004), p. 320.

³ D.G.H. Cole translation, p. 117.

process, which we define as the traditional formulation of the laws that govern society (national or international). Positive law rights are established by a political and legal process that ends in a statement, legislation, treaty, or another normative instrument, as opposed to "natural rights," which are unalienable, immutable, and of divine origin. They may evolve over time and be open to exceptions or constraints meant to enhance respect for human rights rather than setting a hard norm. When an authoritative body declares them, they become a part of the social order.⁴ They then progress towards greater universality due to the involvement of almost every country in the process of creating norms, which are governed by the law but also take into account compromise and historical changes.⁵ Consider the moral and legal legitimacy of sexual and racial discrimination, slavery, and other atrocities over most of human history. It follows that the results of what has withstood "open and informed scrutiny" (to use Sen's phrase) are frequently found not in journals and seminars on ethics and normative theory, but rather at the conclusion of political or legislative processes leading to the adoption of laws and treaties relating to human rights, such as the relatively recent abolition of slavery, torture, and discrimination based on race or sex.⁶

IV. HISTORICAL HIGHLIGHTS

One can view the historical background of human rights from many different angles. I'll highlight four approaches to the history of human rights at the risk of oversimplifying.

The first approach connects the earliest theological and philosophical principles found in Hinduism, Judaism, Buddhism, Confucianism, Christianity, and Islam to the deeper origins of compassion, altruism, justice, individual value, and respect for all life. Elements of human rights declarations can be found in the ancient codes of Hammurabi in Babylon (about 1772 BCE), the Charter of Cyrus the Great in Persia (around 535 BCE), Ashoka's edicts in India (circa 250 BCE), as well as the laws and traditions of pre-colonial Africa and pre-Columbian America.

Others link the development of modern human rights to the development of natural law theories in Ancient Greece and Rome and Christian theology in the Middle Ages, which culminated in revolts in Europe in the 17th and 18th centuries, philosophers of the Enlightenment, and the Declarations that sparked the French and American revolutions, combined with the 19th-century abolitionist, workers' rights, and women's suffrage movements.⁷ A third trend is to trace the history of human rights to their inclusion in the United Nations Charter in 1945 as a response

⁴ Philip Allott, *Eunomia: New Order for a New World*, Oxford University Press, 1990, p. 287.

⁵ Sen, *supra*, note 1, p. 319

⁶ William Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine*, pp. 7-8.

⁷ Lynn Hunt, *Inventing Human Rights: A History*, New York: W. W. Norton & Company, 2007.

to the Holocaust, drawing on President Roosevelt's Four Freedoms as well as the influence of the 1948 Universal Declaration of Human Rights on later national constitutions, foreign policies, and international treaties and declarations. A fourth perspective is the relatively new revisionist history, which sees human rights as unimportant in the immediate post-World War II period and only important as a movement that started in the 1970s as a counter to the dominant ideologies. The Enlightenment, the transformative impact of the French and American Revolutions of the 18th century, and the liberation of oppressed people from slavery and colonial domination in the 19th and 20th centuries are all cited as the foundations of modern human rights theory and practice, particularly in Europe and North America.⁸

The Second World War served as a turning point in the expansion of human rights internationally. *The Rights of Man or What are We Fighting For?* was written by H.G. Wells in 1940. The UN Charter established in 1945 an obligation for all members to respect and uphold human rights and established a permanent commission to further their realization. The trial of Nazi doctors defined the principles of bioethics that were codified in the Nuremberg Code in 1946. The Nuremberg Trials, in 1945-46, of 24 of the most notorious criminals, established the "four freedoms" (freedoms of speech, worship, and freedom from want and fear). Each of these World War II-related incidents has had a significant impact on modern human rights. The Genocide Convention and the Universal Declaration of Human Rights were both passed in 1948, followed by the Geneva Conventions on the protection of war victims in 1949, the International Covenants on Human Rights in 1966, and a plethora of other UN and regional human rights documents on topics like torture, children's rights, minorities' rights, discrimination against women, and disability rights. Following the Cold War's pause, individual criminal culpability for widespread human rights atrocities reappeared in the ad hoc tribunals on Rwanda and the former Yugoslavia, and ultimately in the International Criminal Court.

V. CONTROVERSIES ABOUT HUMAN RIGHTS IN THE PRESENT ERA

We need to ask (A) why governments accept the concept of human rights duties at all given that they are meant to be sovereign and can, therefore, do whatever they want within their territory in order to comprehend how human rights are part of the global agenda. Next, we'll look at (B) the list of recognised human rights in the present, after which we'll ask (C) whether these rights are consistent with universally held principles or are being imposed from without for ideological purposes. Finally, we will look at (D) and how they go from being spoken to being done, from

⁸ Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, Philadelphia: University of Pennsylvania Press, 1998; Hersch Lauterpacht, *International Law and Human Rights*, with an introduction by Isidore Silver. New York: Garland, 1950 (reprint 1973).

being an ambition to a reality.

A. Why do sovereign states accept human rights obligations?

A state's decision to adopt, interpret, and enforce its laws within its territorial jurisdiction cannot be interfered with by another state or an international body, according to the principle of state sovereignty. Does the rule that states should not interfere with their own affairs give them carte blanche to violate human rights? The promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" is one of the purposes listed in Article 55 of the United Nations Charter, which states have committed themselves to in order to join the organization. This commitment is in addition to the principle of non-intervention. So, state sovereignty is balanced with the international community's justifiable concern for the protection of human rights in all nations. Many theories of international relations have different interpretations of that balance. Only weak nations are under any pressure to permit international scrutiny of their human rights record, according to realists (a school of thought that emphasizes governments as autonomous and sovereign actors in international affairs, pursuing their national interests through the projection of economic, military, and political power, without constraints of any superior authority or global government). Even if the international system is still founded on state sovereignty, the liberal internationalist believes that global institutions and principles, such as human rights, are more important. Functionalism theories place a high value on gradual political federation, starting with social and economic cooperation, particularly through regional organizations. International organizations increasingly wield sovereign authority as these networks of interdependence expand. According to the constructivist theory of international relations, concepts like human rights form the global order, which in turn defines the goals and identities of nations. Hence, rather than national security, societal standards such as human rights can influence and eventually affect foreign policy. The concept of "responsible sovereignty," which holds that sovereignty is conditional upon the state's verifiable adherence to minimum human rights norms and capacity to protect its inhabitants, has replaced the idea of absolute sovereignty, according to Richard Falk and others.

From state-centric approaches at one extreme (where national interests take precedence over any appeal to universal human rights), to cosmopolitanism at the other end, these realist, liberal internationalist, functionalist, and constructivist ideas run along a continuum (where identity with and support for equal rights for all people should hold state sovereignty in check).⁹

⁹ See Stephen P, Marks, "The Past and Future of the Separation of Human Rights into Categories," Maryland

Regardless of their motivations, states have accepted obligations to uphold and advance human rights under the UN Charter and numerous human rights treaties. As a result, a regime has emerged in which respecting and advancing human rights has gradually become a part of accepted standards of state behavior, functioning somewhat successfully in some areas and less so in others.

B. How do we know which rights are recognized as human rights?

It is acceptable to utilize philosophical justifications or activist goals to argue that any global social issue is a human right, but it is also helpful to know which rights are formally acknowledged as such. The International Bill of Human Rights, which lists roughly fifty normative premises on which other human rights agreements have been developed, is the most trustworthy source for the fundamental principles of international human rights. Several regional and UN accords have broadened the scope of accepted human rights, notably in specific areas like the protection of workers, refugees and displaced people, people with disabilities, and victims of armed conflict.

Five group rights, twenty-four civil and political rights (CPR), and fourteen economic, social, and cultural rights are listed in the International Bill of Human Rights (ESCR). It also lays forth seven guiding principles for how the rights ought to be used and interpreted.

The International Bill of Human Rights lists three rights for ethnic, religious, and linguistic minorities (namely, the rights to enjoy one's own culture, to practise one's own religion, and to use one's own language) in addition to the two rights of peoples (self-determination and permanent sovereignty over natural resources).¹⁰

Five of the civil and political rights concern maintaining one's physical integrity (rights to life; freedom from torture; freedom from slavery; freedom from arbitrary arrest or detention; and right to humane treatment under detention). Five additional rights pertain to a person's freedom of thinking and conduct (namely, freedom of movement and residence; prohibition of expulsion of aliens; freedom of thought, conscience and religious belief; freedom of expression; and the right to privacy). Four other rights—non-incarceration for debt; a fair trial, for which sixteen more rights are listed; the right to personhood under the law; and the right to equality before the law—concern the administration of justice. Six more civic and political rights (freedom of assembly, freedom of association, and right to marriage) are related to involvement in civil

Journal of International Law, vol. 24 (2009), pp. 208-241.

¹⁰ See Terence Turner and Carole Nagengast (eds.), *Journal of Anthropological Research*, vol. 53, No. 3 (special issue on human rights) (Autumn 1997).

society.

C. Are human rights the same for everyone?

Human rights, according to the idea that they are universal, are the same for everyone since they are a part of who we are as humans and come from nature as a result (hence the phrase "natural rights"). "The inherent dignity and... equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice, and peace in the world," according to the UDHR. The French Declaration of 1789 alludes to the "natural, unalienable, and sacred rights of man," and the American Declaration of Independence declares that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights." The formal endorsement of human rights by nearly all nations that have accepted the UDHR or ratified human rights treaties is another justification for asserting that they are universal. Cultural relativists contend that rather than being universal, human rights are founded on values that are determined culturally and differ from one community to another. This position has a number of variations. One is the so-called "Asian values" argument, which contends that human rights are a Western concept and are in conflict with how Asian leaders tend to their people's needs without elevating the individual above all else, placing a higher importance on communal harmony and the good of the group. According to a related theory, Western imperialism uses the idea of human rights as a smokescreen for its political, economic, and military aspirations against the developing countries. The "clash of civilizations" theory, which claims that only the liberal West, out of the roughly seven civilizations in the world, is capable of implementing human rights because the other civilizations lack a sufficient understanding of the individual and the rule of law, is the third type of theory. Since the "Arab Spring" of 2011, when both Islamic and human rights values motivated peoples across the Middle East and North Africa to overthrow deeply entrenched dictatorships, with very mixed results, and the emergence of extremist terrorist organizations, this issue of the compatibility of human rights with various belief systems and religions has special geopolitical repercussions with respect to Islam, for example, on which views are divided.

D. How are human rights put into practice?

worldwide context through means of (1) norm-creating processes that culminate in universal human rights norms and (2) norm-enforcing mechanisms that work to turn admirable objectives into real-world actions. There are also (3) ongoing and fresh obstacles to this normative regime's effectiveness.

1. *The norm-creating process*

The process of generating norms refers to the formal recognition of particular rights and obligations in a given society as well as the definition of what is anticipated to achieve those rights in practice. A representative expressing concern about a social issue at a meeting of a political body and pushing for co-sponsors to a resolution that is ultimately adopted by that body are the traditional first steps in the norm-creating process in international human rights. Once the matter is on the agenda, a political body may then commission a study, which may then result in the creation of a declaration, followed by the drafting of a convention, which must be ratified in order to take effect, and which may then be followed by the adoption of an optional protocol containing a procedure for complaints. These phases, which lasted 10 to thirty years or more, were experienced by all the major human rights issues, including torture, women's rights, racial discrimination, disappearances, and the rights of children and people with disabilities. From the International Bill of Human Rights to the current collection of several hundred international and regional treaties, this is how the corpus of human rights rules has significantly grown. Several treaties have addressed war crimes, genocide, and crimes against humanity and called for the criminal prosecution of those responsible.

2. *The norm-enforcing process*

It is not sufficient to just define human rights; action must be made to ensure that they are upheld, promoted, and realized. Under the domestic legal system, the use of force by courts and police to enforce the law's application is prohibited. Law is not applied exactly in the same manner under the international human rights framework. For instance, the phrase "enforcement" refers to coerced compliance, which is uncommon, whereas the majority of efforts concentrate on "implementation," which refers to a broad range of supervision, monitoring, and general efforts to hold duty-holders accountable. Promotion (i.e., preventive measures designed to assure future observance of human rights) and protection are further divisions of implementation (i.e., responses to violations that have occurred in the past or are ongoing). Three types of promotion and five forms of protection can be used to sum up the means and techniques of implementation.¹¹

3. *Continuing and new challenges to human rights realization*

The more fundamental causes of human rights violations cannot be fully eliminated by norm

¹¹ For references to Responsibility to Protect (RtoP or R2P) in Security Council Resolutions, see [http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/5221-- references-to-the-responsibility-to-protect-insecurity-council-resolutions](http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/5221--references-to-the-responsibility-to-protect-insecurity-council-resolutions) (accessed 25 Apr 2014).

adoption and accountability mechanisms. The most significant obstacles to the effectiveness of human rights at the international level are the reliance on governments to take responsibility for changing their behavior, structural problems with the global economy that favor profit maximization in ways that human rights machinery has little or no influence over, and cultural norms based on patriarchy, class, caste, and ethnicity that change slowly over time as power structures and mindsets shift. Human rights are profoundly political in all of these contexts because they challenge the state, the political economy, and cultural norms to the extent that they are actually relevant to people's lives.¹² At the same time, they provide a normative framework for individuals and collectives to organize for change, ensuring that political economy is free from glaring economic and social inequities, cultural identity is preserved and valued in ways that are consistent with prevailing ideals of individual autonomy and freedom, and state legitimacy is measured by human rights performance. The community of countries and, in progressively more significant and effective ways, through networks of solidarity that have radically altered societies in the past support appeals to human rights in bringing about such change, at least rhetorically. This has led to the abolishment of systems like slavery, racism, colonialism, and exclusions of many kinds. The value of human rights as a normative and institutional guide for policy and practice will similarly continue to be put to the test by an expanding range of challenges in the 21st century, including environmental degradation, poverty, terrorism, non-representative government, and discrimination based on sexual orientation.

VI. CONCLUSION

We began by examining whether human rights could only be discussed in legal terms, and discovered that there are at least three ways to do so: legal, philosophical, and advocacy. Despite the fact that people have been fighting injustice for millennia and incorporating respect for human dignity into their ethical and religious beliefs for millennia, the enumeration of universal human rights has a much more recent history, primarily beginning in the 18th century and particularly beginning with the UDHR's groundbreaking moment in explicitly incorporating human rights into the post-World War II international legal order. We've examined what it means to be "universal" in a society full of different ideologies, faiths, beliefs, and values. We also examined the content of the normative claims made to come under the banner of "universal human rights," caution against oversimplification of the separation into two basic categories. Finally, we discussed the procedures for recognising and implementing human rights concepts,

¹² The doctrine was affirmed by the UN General Assembly in paragraphs 138 and 139 of the 2005 World Summit Outcome Document and reaffirmed in its resolution A/RES/63/308 of September 2009.

as well as some of the challenges that the twenty-first century may confront. We can expect gaps in Africa's and Asia's institutional frameworks to be filled in the coming decades, ESCR to be given equal weight to CPR, human rights standards to be clarified in regard to issues such as sexual orientation and scientific and technological advancements, and methods for promoting and protecting human rights to be improved. However, the fundamental value of human rights thinking and action is unlikely to change: it has served and will continue to serve as a yardstick for determining government legitimacy, a manual for determining the top priorities for human progress, and a foundation for agreement on what values can be shared across various ideologies and cultures.

VII. REFERENCES

- Philip Alston and Ryan Goodman, *International Human Rights*, Oxford: Oxford University Press, 2012.
- Upendra Baxi, *The Future of Human Rights*, 2nd ed., New Delhi ; New York : Oxford University Press, 2006.
- Sabine C. Carey, *The Politics of Human Rights: The Quest for Dignity*, Cambridge, UK: Cambridge Univ. Press, 2010.
- Andrew Clapham, *Human Rights: A Very Short Introduction (Very Short Introductions)*, New York: Oxford Univ. Press, 2007.
- Jack Donnelly, *International Human Rights*, 4th edition, Westview Press, 2013.
- Richard A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*, New York: Routledge, 2001.
- James Griffin, *On Human Rights*, Oxford, UK: Oxford Univ. Press, 2009.
- Lynn Avery Hunt and Lynn Hunt, *Inventing Human Rights: A History*, New York: W.W. Norton & Co., 2008.
- Micheline Ishay (ed.), *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present, Second Edition*, New York: Routledge, 2007
- Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, New York: Norton and Co., 2008.
- Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, 3rd ed. Philadelphia: University of Pennsylvania Press, 2011.
