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Human Rights

It is a common observation, and perhaps even a truism, that human beings everywhere desire to live in a world in which their individual and collective well-being is assured. It also is a common observation that this desire often is painfully frustrated as a result of exploitation, oppression, persecution, and other forms of social deprivation. Deeply rooted in these twin observations are the beginnings of what today are called "human rights" and the national and international legal processes that are associated with them.

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Historical development of human rights

The expression "human rights" is relatively new, having come into everyday parlance only since the end of World War II. It replaced the phrase "natural rights," which had fallen into disfavor in part because the concept of natural law, to which it was intimately linked, had become a matter of great controversy. It replaced as well the later phrase "the rights of Man," which was not universally understood to include the rights of women.

ORIGINS IN ANCIENT GREECE AND ROME

Most students of human rights trace the origins of the concept to ancient Greece and Rome, where it was closely tied to the natural law doctrines of Stoicism. According to the Stoics, human conduct should be judged according to, and brought into harmony with, the laws of nature. A classic example of this view is given in Sophocles' play *Antigone*, in which the title character, upon being reproached by King Creon for defying his command not to bury her slain brother, asserted that she acted in accordance with the immutable laws of the gods.

In part because Stoicism played a key role in its formation and spread, Roman law similarly allowed for the existence of a natural law, and with it certain universal rights that extended beyond the rights of citizenship. According to the Roman jurist Ulpian, for example, natural law was that which nature—not the state—assures to all human beings, Roman citizens or not.

It was not until after the Middle Ages, however, that natural law became associated with natural rights. In ancient and medieval times, doctrines of natural law concerned mainly the duties, rather than the rights, of "Man." Moreover, these doctrines recognized the legitimacy of slavery and serfdom and, in so doing, excluded perhaps the most important ideas of human rights as they are understood today—freedom (or liberty) and equality.

In order for human rights to gain general acceptance as natural rights, therefore, certain basic changes in society were necessary, changes of the sort that took place from the decline of European feudalism through the Renaissance. During this period, resistance to religious intolerance and political and economic bondage, the evident failure of rulers to meet their obligations under natural law, and the unprecedented commitment to individual expression and worldly experience all combined to shift the conception of natural law from *duties* to *rights*. The teachings of St. Thomas Aquinas and Hugo Grotius on the European continent, as well as the Magna Carta (1215), the Petition of Right of 1628, and the English Bill of Rights (1689) were proof of this change. All testified to the increasingly popular view that human beings are endowed with certain eternal and inalienable rights that were not renounced when humankind "contracted" to enter the social from the primitive state and were not diminished by the claim of "the divine right of kings."

NATURAL LAW TRANSFORMED INTO NATURAL RIGHTS

The modern conception of natural law as meaning natural rights was elaborated primarily by thinkers of the 17th and 18th centuries. The many scientific and intellectual achievements of the 17th century encouraged a belief in natural law and universal order, and during the 18th century, the so-called Age of Enlightenment, a growing confidence in human reason and in the perfectibility of human affairs led to the more comprehensive expression of this belief. Particularly important were the writings of John Locke—arguably the most important natural law theorist of modern times—and the works of the 18th-century philosophes centred mainly in Paris, including Montesquieu, Voltaire, and Jean-Jacques Rousseau. Locke argued in detail that certain rights self-evidently pertain to individuals as human beings; that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property; that, upon entering civil society, humankind surrendered to the state—pursuant to a "social contract"—only the right to enforce these natural rights and not the rights themselves; and that the state's failure to secure these rights gives rise to a right to responsible, popular revolution. The philosophes, building on Locke and others, vigorously attacked religious and scientific dogmatism, intolerance, censorship, and social and economic restraints. They sought to discover and act upon universally valid principles governing nature, humanity, and society, including the inalienable "rights of Man," which they treated as a fundamental ethical and social gospel.

Not surprisingly, this liberal intellectual ferment exerted a profound influence in the Western world of the late 18th and early 19th centuries. Together with the Revolution of 1688 in England and the resulting Bill of Rights, it provided the rationale for the wave of revolutionary agitation that swept the West, most notably in North America and France. Thomas Jefferson, who had studied Locke and Montesquieu, gave poetic eloquence to their ideas the Declaration of Independence proclaimed by the 13 American colonies on July 4, 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." Similarly, the Marquis de Lafayette, who won the close friendship of George Washington and who shared the hardships of the American War of Independence, imitated the pronouncements of the English and American revolutions in the Declaration of the Rights of Man and of the Citizen of August 26, 1789, proclaiming that "men are born and remain free and equal in rights" and that "the aim of every political association is the preservation of the natural and imprescriptible rights of man."

Ideas of
Locke

Natural
law

In sum, the idea of human rights, though known by another name, played a key role in late 18th- and early 19th-century struggles against political absolutism. It was, indeed, the failure of rulers to respect the principles of freedom and equality that was responsible for this development.

"NONSENSE UPON STILTS":

THE CRITICS OF NATURAL RIGHTS

The idea of human rights as natural rights was not without its detractors, however. In the first place, because it was frequently associated with religious orthodoxy, the doctrine of natural rights became less attractive to philosophical and political liberals. Additionally, because they were conceived in essentially absolutist terms, natural rights were increasingly considered to conflict with one another. Most importantly, the doctrine of natural rights came under powerful philosophical and political attack from both the right and the left.

In England, for example, conservative political thinkers such as Edmund Burke and David Hume united with liberals such as Jeremy Bentham to condemn the doctrine, the former out of fear that public affirmation of natural rights would lead to social upheaval, the latter out of concern lest declarations and proclamations of natural rights substitute for effective legislation. In his *Reflections on the Revolution in France* (1790), Burke—a believer in natural law who nonetheless denied that the "rights of Man" could be derived from it—criticized the drafters of the Declaration of the Rights of Man and of the Citizen for proclaiming the "monstrous fiction" of human equality, which, he argued, serves but to inspire "false ideas and vain expectations in men destined to travel in the obscure walk of laborious life." Bentham, one of the founders of Utilitarianism, was no less scornful. "Rights," he wrote, "is the child of law; from real law come real rights; but from imaginary laws, from 'law of nature,' come imaginary rights. . . . Natural rights is simple nonsense; natural and imprescriptible rights (an American phrase) . . . [is] rhetorical nonsense, nonsense upon stilts." Agreeing with Bentham, Hume insisted that natural law and natural rights are unreal metaphysical phenomena.

This assault upon natural law and natural rights intensified and broadened during the 19th and early 20th centuries. John Stuart Mill, despite his vigorous defense of liberty, proclaimed that rights ultimately are founded on utility. The German jurist Friedrich Karl von Savigny, England's Sir Henry Maine, and other "historicalist" legal thinkers emphasized that rights are a function of cultural and environmental factors unique to particular communities. The English jurist John Austin argued that the only law is "the command of the sovereign." And the logical positivists of the early 20th century insisted that the pronouncements of ethics were not cognitively significant. By World War I, there were scarcely any theorists who would defend the "rights of Man" in terms of natural law. Indeed, under the influence of 19th-century German Idealism and parallel expressions of rising European nationalism, there were some—the Marxists, for example—who maintained that rights, from whatever source derived, belong preeminently to communities or whole societies and nations.

THE PERSISTENCE OF THE NOTION

Although the heyday of natural rights proved short, the idea of rights nonetheless endured. The abolition of slavery, the implementation of factory legislation, the rise of popular education and trade unionism, the universal suffrage movement—these and other examples of 19th-century reformist impulses afford ample evidence that the idea was not to be extinguished, even if its conceptual foundations had become a matter of general skepticism. But it was not until the rise and fall of Nazi Germany that the idea of human rights truly came into its own. Many of the atrocities committed by the Nazi regime had been officially authorized by Nazi laws and decrees. This fact convinced many that law and morality cannot be grounded in any purely Idealist, Utilitarian, or other consequentialist doctrine. Certain actions, according to this view, are absolutely wrong, no matter what the circumstances.

Today, the vast majority of legal scholars and philosophers—particularly in the West—agree that every human being has, at least in theory, some basic rights. Indeed, except for some essentially isolated late 19th-century and early 20th-century demonstrations of international humanitarian concern to be noted below, the last half of the 20th century may fairly be said to mark the birth of the international as well as the universal recognition of human rights. In the treaty charter establishing the United Nations, for example, all member states pledged themselves to take joint and separate action for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Similarly, in the Universal Declaration of Human Rights (1948), representatives from many cultures endorsed the rights therein set forth "as a common standard of achievement for all peoples and all nations." And in 1976, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights entered into force and effect.

Human rights in the 20th century

Defining human rights

To say that there is widespread acceptance of the principle of human rights is not to say that there is complete agreement about the nature and scope of such rights. Among the basic questions that have yet to receive conclusive answers are the following: Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, culture, custom, social contract, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; and whether they are to be broad or limited in number and content.

THE NATURE OF HUMAN RIGHTS:

COMMONLY ACCEPTED POSTULATES

Despite this lack of consensus, a number of widely accepted—and interrelated—postulates can assist in the task of defining human rights. Five in particular stand out, though not even these are without controversy.

First, regardless of their ultimate origin or justification, human rights are understood to represent both individual and group demands for political power, wealth, education, and other social goods and benefits, the most fundamental of which is respect and its constituent elements of reciprocal tolerance and mutual forbearance in the pursuit of all other goods. Consequently, human rights imply claims against persons and institutions impeding the achievement of these goods, as well as standards for judging the legitimacy of laws and traditions. At bottom, human rights qualify state sovereignty and power, sometimes expanding the latter even while circumscribing the former.

Second, human rights are commonly assumed to refer, in some vague sense, to "fundamental" as distinct from "nonessential" goods or benefits. In fact, some theorists go so far as to limit human rights to a single core right or two—for example, the right to life or the right to equal freedom of opportunity. The tendency is to emphasize "basic needs" and to rule out "mere wants."

Third, reflecting varying environmental circumstances, differing worldviews, and inescapable interdependencies between goods and benefits, human rights refer to a wide continuum of claims, ranging from the most justiciable to the most aspirational. Human rights partake of both the legal and the moral orders, sometimes indistinguishably. They are expressive of both the "is" and the "ought" in human affairs.

Fourth, most assertions of human rights—though arguably not all—are qualified by the limitation that the rights of any particular individual or group in any particular instance are restricted as much as is necessary to secure the comparable rights of others and the aggregate common interest. Given this limitation, human rights are sometimes designated *prima facie* rights, so that ordinarily it makes little or no sense to think of them in absolutist terms.

Finally, human rights are understood to be quintessentially universal in character, in some sense equally pos-

Universal nature of human rights

Burke, Hume, and Bentham

essed by all human beings everywhere, including in certain instances even the unborn. In stark contrast to the divine right of kings and other such conceptions of privilege, human rights extend in theory to every person on Earth without regard to merit or need, simply for being human.

In several critical respects, however, all of these postulates raise more questions than they answer. Granted that human rights qualify state power, do they also qualify private power? If so, when and how? What does it mean to say that a right is fundamental? What is the value of embracing non-justiciable rights as part of the jurisprudence of human rights? When and according to what criteria does the right of one person or group of people give way to the right of another? What happens when individual and group rights collide? How are universal human rights determined? Are they a function of culture or ideology, or are they determined according to some transnational consensus? If the latter, a regional consensus? A global consensus? And if a regional or global consensus, how exactly would it be ascertained, and how would it be reconciled with the right of nations and peoples to self-determination? Is the existence of universal human rights incompatible with the notion of national sovereignty? Should supranational institutions have the power to nullify local, regional, and national laws on capital punishment, "honor killing," veil wearing, female genital cutting, and other practices? How would such a situation comport with Western conceptions of democracy and representative government? In other words, however accurate, the five foregoing postulates are fraught with questions about the content and legitimate scope of human rights and about the priorities, if any, that exist among them. Like the issue of the origin and justification of human rights, all five are controversial.

THE CONTENT OF HUMAN RIGHTS: THREE "GENERATIONS" OF RIGHTS

Like all normative traditions, the human rights tradition is a product of its time. Therefore, to understand better the debate over the content and scope of human rights and the priorities claimed among them, it is useful to note the dominant schools of thought that have informed the human rights tradition since the beginning of modern times.

Particularly helpful in this regard is the notion of "three generations of human rights" advanced by the French jurist Karel Vasak. Inspired by the three normative themes of the French Revolution, they are: the first generation of civil and political rights (*liberté*); the second generation of economic, social, and cultural rights (*égalité*); and the third generation of solidarity rights (*fraternité*). Vasak's model is, of course, a simplified expression of an extremely complex historical record, and it is not intended to suggest a linear process in which each generation gives birth to the next and then dies away. The three generations are cumulative, overlapping, and, it is important to note, interdependent.

Liberté: civil and political rights. The first generation of civil and political rights derives primarily from the 17th and 18th-century reformist theories noted above—*i.e.*, those associated with the English, American, and French revolutions. Infused with the political philosophy of liberal individualism and the related economic and social doctrine of laissez-faire, the first generation conceives of human rights more in negative ("freedoms from") than positive ("rights to") terms; it favours the abstention over the intervention of government in the quest for human dignity. Belonging to this first generation, thus, are rights such as those set forth in Articles 2–21 of the Universal Declaration of Human Rights, including freedom from gender, racial, and equivalent forms of discrimination; the right to life, liberty, and the security of the person; freedom from slavery or involuntary servitude; freedom from torture and from cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; the right to a fair and public trial; freedom from interference in privacy and correspondence; freedom of movement and residence; the right to asylum from persecution; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of peaceful assembly and association; and the right to participate in government, directly or through free elections. Also in-

"Negative"
rights

cluded are the right to own property and the right not to be deprived of it arbitrarily, which were fundamental to the interests fought for in the American and French revolutions and to the rise of capitalism.

It should be noted that these and other first-generation rights do not correspond completely to the idea of "negative" rights. The right to security of the person, to a fair and public trial, to asylum from persecution, and to free elections, for example, manifestly cannot be assured without some affirmative government action. What is constant in this first-generation conception is the notion of liberty, a shield that safeguards the individual—alone and in association with others—against the abuse of political authority. This is the core value. Featured in the constitution of almost every country in the world and dominating the majority of international declarations and covenants adopted since World War II, this essentially Western-liberal conception of human rights is sometimes romanticized as a triumph of Hobbesian-Lockean individualism over Hegelian statism.

Égalité: economic, social, and cultural rights. The second generation of economic, social, and cultural rights finds its origins primarily in the socialist tradition that was foreshadowed among the Saint-Simonians of early 19th-century France and variously promoted by revolutionary struggles and welfare movements that have taken place since. In large part, it is a response to the abuses of capitalist development and its underlying, essentially uncritical, conception of individual liberty that tolerated, even legitimated, the exploitation of working classes and colonial peoples. Historically, it is a counterpoint to the first generation of civil and political rights, with human rights conceived more in positive than in negative terms and requiring more the intervention than the abstention of the state for the purpose of assuring equitable distribution of the goods and benefits involved. Illustrative are some of the rights set forth in Articles 22–27 of the Universal Declaration of Human Rights, such as the right to social security; the right to work and to protection against unemployment; the right to rest and leisure, including periodic holidays with pay; the right to a standard of living adequate for the health and well-being of self and family; the right to education; and the right to the protection of one's scientific, literary, and artistic production.

But in the same way that all the rights embraced by the first generation of civil and political rights cannot properly be designated "negative rights," so all the rights embraced by the second generation of economic, social, and cultural rights cannot properly be labeled "positive rights." For example, the right to free choice of employment, the right to form and to join trade unions, and the right freely to participate in the cultural life of the community (found in Articles 23 and 27) do not inherently require affirmative state action to ensure their enjoyment. Nevertheless, most of the second-generation rights do necessitate state intervention because they subsume demands more for material than for intangible goods and benefits. Second-generation rights are, fundamentally, claims to social equality. Partly because of the comparatively late arrival of socialist-communist and compatible "Third World" influence in the normative domain of international affairs, however, the internationalization of these rights has been relatively slow in coming; and with free-market capitalism in ascendancy under the banner of "globalization" at the turn of the 21st century, it is not likely that these rights will come of age any time soon. On the other hand, as the social inequities created by unregulated capitalism become more and more evident over time and are not accounted for by sex or race discrimination, it is probable that the struggle for second-generation rights will grow and mature. This tendency is already apparent in the evolving European Union.

Fraternité: solidarity rights. Finally, the third generation of solidarity rights is best understood as a product of both the rise and the decline of the nation-state in the last half of the 20th century. Of the six rights in this group, three reflect the emergence of "Third World" nationalism and its "revolution of rising expectation"—*i.e.*, its demand for a global redistribution of power, wealth, and other important goods and benefits: the right to political, economic, social, and cultural self-determination; the right to economic and

"Positive"
rights

social development; and the right to participate in and benefit from "the common heritage of mankind" (shared Earth-space resources; scientific, technical, and other information and progress; and cultural traditions, sites, and monuments). The other three third-generation rights—the right to peace, the right to a healthy and sustainable environment, and the right to humanitarian disaster relief—suggest the impotence or inefficiency of the nation-state in certain critical respects.

Collective rights

All six of these rights tend to be posed as collective rights, requiring the concerted efforts of all social forces, to a substantial degree on a planetary scale. Nevertheless, each of them also manifests an individual dimension. For example, while it may be said to be the collective right of all countries and peoples (especially developing countries and non-self-governing peoples) to secure a "new international economic order" that would eliminate obstacles to their economic and social development, so also may it be said to be the individual right of every person to benefit from a developmental policy that is based on the satisfaction of material and nonmaterial human needs. It is also important to note that the majority of these rights are more aspirational than justiciable in character, and their status as international human rights norms remains ambiguous.

"INTERGENERATIONAL CONFLICT": LEGITIMACY AND PRIORITY

Liberté versus égalité. The fact that human rights have been defined so broadly should not be taken to imply that the three generations of rights are equally acceptable to everyone. Nor should it suggest that they or their separate elements have been greeted with equal urgency. The debate about the nature and content of human rights reflects, after all, a struggle for power and for favoured conceptions of the "good society."

First-generation proponents, for example, are inclined to exclude second- and third-generation rights from their definition of human rights altogether (or, at best, to label them as "derivative"). In part this is because of the complexities involved in putting these rights into operation. First-generation rights are viewed as more feasible because they stress the absence over the presence of government, and feasibility is transformed into a prerequisite of a comprehensive definition of human rights, so that aspirational claims to entitlement are deemed not to be rights at all. The most forceful explanation, however, is more ideologically or politically motivated. Persuaded that egalitarian claims against the rich, particularly where collectively espoused, are unworkable without a severe decline in liberty and equality, first-generation proponents, inspired by the natural law and laissez-faire traditions, are partial to the view that human rights are inherently independent of organized society and are individualistic.

Conversely, second- and third-generation defenders often look upon first-generation rights, at least as commonly practiced, as insufficiently attentive to material—especially "basic"—human needs and, indeed, as instruments in the service of unjust social orders, hence constituting a "bourgeois illusion." Accordingly, if they do not place first-generation rights outside their definition of human rights, they tend to assign such rights a low status and to treat them as long-term goals that will come to pass only after the imperatives of economic and social development have been met, to be realized gradually and fully achieved only sometime vaguely in the future.

This liberty-equality and individualist-collectivist debate, it must be added, was especially evident during the Cold War, reflecting the tensions that then existed between Liberal and Marxist conceptions of sovereign public order. Different conceptions of rights contain the potential for challenging the legitimacy and supremacy not only of one another but, more importantly, of the sociopolitical systems with which they are most intimately associated.

The relevance of custom and tradition. With the end of the Cold War, however, the debate took on a more North-South character and was supplemented by a cultural-relativist critique that eschewed the universality of human rights doctrines, principles, and rules on the grounds that they were Western in origin and therefore of limited rele-

vance in non-Western settings. The viewpoint underlying this assertion—that the scope of human rights in any given society is fundamentally determined by local, national, or regional customs and traditions—may seem problematic, especially when one considers that the idea of human rights and many of its precepts are found in all the great philosophical and religious traditions. Nevertheless, the historical development of human rights demonstrates that it cannot be wholly mistaken. Nor is it surprising that it should emerge soon after the end of the Cold War. First prominently expressed at an Asian preparatory meeting to the second UN World Conference on Human Rights convened in Vienna in June 1993, it reflected the end of a bipolar system of alliances that had discouraged independent foreign policies and minimized cultural and political differences among countries allied to the same superpower. Against the backdrop of increasing human rights interventionism on the part of the UN, regional organizations, and deputized coalitions of states (as in Bosnia-Herzegovina, Somalia, Liberia, Rwanda, and Haiti, for example), the viewpoint served as a functional equivalent of the doctrine of respect for national sovereignty and territorial integrity, a doctrine whose influence had been declining not only in human rights affairs but also in affairs related to national security, economics, and the environment. As a consequence, there remains sharp disagreement about the legitimate scope of human rights and about the priorities that are claimed among them.

Inherent risks of the debate. On final analysis, however, this legitimacy-priority debate can be misleading. Although useful for pointing out how notions of liberty and individualism have been used to rationalize the abuses of capitalism and how notions of equality, collectivism, and culture have been alibis for authoritarian governance, in the end it risks obscuring at least three essential truths that must be taken into account if the contemporary worldwide human rights movement is to be objectively understood.

First, one-sided characterizations of legitimacy and priority are very likely, at least over the long term, to undermine the credibility of their proponents and the defensibility of the rights they regard as preeminently important. Second, such characterizations do not accurately reflect reality. In the real world, essentially individualistic societies tolerate, and even promote, certain collectivist values, and essentially communal societies tolerate, and even promote, certain individualistic values.

Finally, none of the international human rights instruments currently in force or proposed says anything about the legitimacy or priority of the rights they address, save possibly in the case of rights that by international covenant are stipulated to be "nonderogable" and therefore, arguably, more fundamental than others (e.g., freedom from arbitrary or unlawful deprivation of life). To be sure, some disagreements about legitimacy and priority can derive from differences of definition (e.g., what is "torture" or "inhuman treatment" to one may not be to another). Similarly, disagreements also can arise when treating the problem of implementation. For example, some insist first on certain civil and political guarantees, whereas others defer initially to conditions of material well-being. Such disagreements, however, reflect differences in political agendas and have little if any conceptual utility. As indicated by numerous resolutions of the UN General Assembly and the Declaration and Programme of Action of the 1993 Vienna World Conference on Human Rights, there is a growing consensus that human rights form an indivisible whole and that the protection of human rights should not be a matter of purely national jurisdiction. The extent to which the international community actually protects the rights it prescribes, on the other hand, is a different matter.

International human rights enforcement

TREATIES, DECLARATIONS, AND AGREEMENTS BEFORE WORLD WAR II

Ever since ancient times, but especially since the emergence of the modern state system, the Age of Discovery, and the accompanying spread of industrialization and European culture throughout the world, there has developed,

The end of the Cold War