

INTRODUCTION: HUMAN RIGHTS IN THEORY AND PRACTICE

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Foreword by Rhoda E. Howard

Preface by Claude E. Welch, Jr.

Talk about human rights and the assertions and denials of human rights is commonplace today. Human rights appear increasingly as a growing universal language that has developed with extraordinary vigor in the wake of World War II. Human rights tend to structure the space, both at national and international levels, within which human beings attempt to construct a moral order of universal and global scope. Despite theoretical and philosophical debates concerning the existence, justification, and universality of human rights, the concrete violations of human beings through genocide, torture, disappearances, state policies of starvation, slavery, racism, mass rape, domestic violence against women, and discrimination-- cry out for care of, and solidarity with, victims of oppression.

The reasons for studying and teaching human rights were set forth in 1948 in the United Nation's *Universal Declaration of Human Rights (UDHR)*. Education is to be directed to the "full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms" and to the promotion of "understanding, tolerance and friendship among all nations, racial or religious groups" (Art.26,2). Thirty years later the Vienna Final Document, which resulted from the 1978 UNESCO International Congress on Teaching of Human Rights, noted that while "education should make the individual aware of his or her own rights, it should at the same time instill respect for the rights of others." Human rights must, it added, "be seen as an aspect of professional, ethical and social responsibility in all fields of research, study, teaching and work."¹ Deeply rooted in these twin concerns for the development and respect of persons, on one hand, and the professional, ethical, and social responsibilities they entail, on the other, are the beginnings of what are today called "human rights" and the legal protection and enforcement associated with them.

Human Rights In Historical Overview

The historical developments that have lead to the expression "human rights" since the end of World War II and the founding of the United Nations in 1945 are as fascinating as they are complicated. In the twentieth century, the term "human rights" has replaced earlier expressions such as "natural right" (*lex naturalis*) in classical Greek and Roman thought, "natural law" (*jus naturale*) and the "law of nations" (*jus gentium*) in Roman law and during the Middle Ages, and, since the modern era and the French and American revolutions, the "laws of nature" and the

¹ Quoted in Theodor Meron, ed., *Human Rights in International Law: Legal and Policy Issues*, Vol.I (Oxford: Clarendon Press, 1984), p.1.

"Rights of Man."

The origin of "natural right" may be traced to the Greeks' distinction between "nature" (*physis*) and "convention" (*nomos*).² The Greeks contrasted animals and humans insofar as the habits of animals were uniform, whereas the practices of humans differed according to convention. The Skeptic philosophers drew the conclusion that what was conventional could be deconstructed since there was no uniform force behind human conventions. The notion of natural right was a rebuttal to this ancient form of deconstruction. The argument for natural right held that undergirding the manifold of human manners and customs there exists a universality and permanence of nature interpreted either in terms of self-evident truths or through a particular historicity. Natural right became the determinate norm in historicity grounded in the invariant structures of human cognition.

The Stoic idea of "natural law" (the *lex aeterna, recta ratio, lex naturalis, ius naturale*) governed by a universal system of rational laws influenced the writings of the Roman philosophers Seneca, Cicero, and others, and the Roman jurists Ulpian and Gaius. To use Heinrich Rommen's metaphor, Stoic philosophy was the mother of Roman jurisprudence that "sucked in the doctrine of the *ius naturale* with its mother's milk."³ Ulpian's definition of the function of justice -- "to render each his right" (*suum ius cuique tribuere*) moved beyond the limited political standard of the Greeks. Gaius (*Institutes*) distinguished the *jus civile* from the *jus gentium*, the latter of which would legitimate the absorption into the Roman empire of peoples governed only by their local conventional law.⁴

Classic natural right teachings may be delineated along Socratic-Platonic, Aristotelian, and Thomistic lines. In the Socratic-Platonic tradition, natural right-- as justice-- is independent of law. Justice of the city consists in persons acting according to their capacity and treated according to their merits. Natural right finally transcends the city; the cosmos ruled by God is the only true city. For Aristotle (384-322 BCE), actions can be just by nature or legally just.⁵ Natural justice or right is unalterable and has the same force apart from any positive law that may embody it. That which is legally just originates in the will of the lawmaker or an act of the polis, and varies in history and time. But natural and legal justice are not mutually exclusive. There is no fundamental disproportion between natural right and the requirements of political society. A right that would transcend political society could not be the right natural to persons who are by nature political animals. Aquinas (1225-74) distinguishes the general and immutable axioms of natural right from which mutable, specific rules of natural right are derived.⁶ Aquinas works out a harmony between natural right and civil society and the immutable character of the

² Leo Strauss, *Natural Right and History* (Chicago & London: University of Chicago Press, 1953 [1950]), p.90.

³ Heinrich A. Rommen, *The Natural Law: A Study in legal and Social History and Philosophy*, trans. by Thomas R. Hanely (London: B. Herder Book Co., 1948), p.27.

⁴ L.C. McDonald, *Western Political Theory* (New York: Harcourt, Brace and World, 1968), pp.98-99.

⁵ Aristotle, *The Nichomachean Ethics*, trans. by David Ross, rev. by J.L. Ackrill and J.O. Urmsen (Oxford: Oxford University Press, 1980), Book V.7, 1134b18-1135a5, pp.124-5.

⁶ St. Thomas Aquinas, *Summa Theologiae: A Concise Translation*, ed. by Timothy McDermott (London: Methuen, 1989), pp.280-307.

fundamental propositions of natural law as formulated in the Second Table of the Decalogue and symbolized in the doctrine of *synderesis* or conscience. Like Aristotle, Aquinas emphasizes the social nature of human beings and the primacy of duties to the common good. Conscience explains why the natural law or natural right can be duly promulgated to all human beings as universally binding, despite varying societal conventions.

In classical Athenian democracy only citizens of the city-state benefitted from the natural law, and that was less than 50% of Athens' population.⁷ Even the ancient code of Hammurabi that provided certain legal protections against mutilation and torture applied only to aristocrats, whereas peasants and slaves enjoyed no protection.⁸ In Rome, the emperor ruled as the son of the gods-- or in the case of Augustus Caesar, as God. The idea of a right to recourse against the emperor's will was absurd. Roman citizens did have specific, limited rights, but it seems a small consolation today to know that a Roman citizen could not be condemned to torture or death without a trial, and that, if convicted, one would be beheaded rather than tortured to death in the public arena as non-citizens were. Moreover, as Gerda Lerner reminds us, classic natural right legitimated patriarchal structures:

By the time men began symbolically to order the universe and the relationship of humans to God in major explanatory systems, the subordination of women had become so completely accepted that it appeared 'natural' both to men and women....On the unexamined assumption that this stereotype represented reality, institutions denied women equal rights and access to privileges, educational deprivation for women became justified and, given the sanctity of tradition and patriarchal dominance for millennia, appeared justified and natural."⁹

Some human rights historians have suggested that there is no notion of human rights in the Bible. The Hebrew Bible has no knowledge of natural rights, since "where there is no philosophy, there is no knowledge of natural right as such."¹⁰ Others have emphasized the moral import of the teachings of Judaism and Christianity in the historical evolution of natural right and human rights. The Hebrews cannot distinguish the good from the just.¹¹ Yahweh's justice *is* the good. To be sure, the idea of a natural right that the individual can demand of society or government is entirely absent from the Bible. But the notion of the human person as the *Imago Dei* and the stress upon Biblical justice may be seen as a Semitic analogue to the Greek notion of natural right. The one who is active, the one who provides "rights" is, of course, always God. Human beings receive God's righteousness-- and hence "rights"-- as a gift. The normative character of the biblical material pertaining to "rights" derives from its association with the

⁷ Alan S. Rosenbaum, ed., *The Philosophy of Human Rights: International Perspectives* (Westport, Conn.: Greenwood Press, 1980), p.9.

⁸ Elaine Pagels, "The Roots and Origins of Human Rights," in Alice Henkin, ed., *Human Dignity: The Internationalization of Human Rights* (New York: Aspen Institute for Humanistic Studies, 1979), pp.1-8.

⁹ Gerda Lerner, *The Creation of Patriarchy* (New York: Oxford University Press, 1986), p.211.

¹⁰ Strauss, *Natural Right and History*, pp.81-2.

¹¹ Milton R. Konvitz, ed., *Judaism and Human Rights* (New York: W.W. Norton, 1972), p.16.

demands of justice.¹² Yahweh hears the cries of those whose justice has been denied, whose "rights" have been violated.

In the Biblical tradition individuals derive their human dignity through God's creation and liberating activity in history; there can be no conception of the autonomous individual apart from the community of which he or she is a member. Duties to others in the community are grounded in the covenantal relationship to a God that has delivered a people from slavery and oppression. These duties extend not just to the poor within one's own village or one's own nation, but also to the aliens in one's midst (Ex.23:9). There is a call to recognize the needs of human beings beyond the covenant people. Economic and material concerns dominate the biblical material relevant to rights, even though freedom rights are not excluded.

Biblical justice involves provision for food, clothing, and shelter (Ex. 22:27; Dt.10:18; Job 8:6; Ps.68:6, 146:7). One can meaningfully speak of a "right to food" as established by the law since every third year the Israelites were to bring out their tithe (Dt.14:28ff.). The alien, the orphan, and the widow are to have access to the remnants of the harvest of crops (Dt. 24:19-22; Lev.19:9ff.). The prophet Micah chides "those who devise wickedness" by raping women and oppressing "householder and house, people and their inheritance" (2:2). Extended families were to have their own landed inheritance. The Year of Jubilee significantly restricted private property rights by stressing that the ownership of the land is ultimately vested in God rather than human beings, thereby empowering the weak (Lev. 25:1-34; Dt.23:10).

Often neglected in the historical evolution of human rights is the early Christian idea and experience of community building. Early Christianity reinterpreted the natural, tribal bonds of blood, religion, language, caste, class, and religion in terms of the new community in Christ, the Kingdom of God, understood not as a personal, but rather, a social concept. Despite the real distinction between the baptized and unbaptized, the new community in Christ is essentially "the new humanity of those whose loving faith makes them one with God and their neighbors."¹³ In this respect, the teachings of Jesus have universal importance. Modern Democracy announces that each individual has an inherent human value that bestows certain inalienable rights and requires equality before the law. This later secular political philosophy is consonant with St. Paul's theological announcement that "there is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus" (Gal.3:28).

And yet, St. Paul's freedom principle serves as a constraint on claim-rights. For Paul, a right is fundamentally a freedom rooted in who people are as belonging to Christ. It is better to speak of the limitations of claiming rights for oneself (1 Cor.6:7ff.; 9:12), and instead to speak of duties that flow from belonging to Christ. Paul was, himself, not adverse to exercising his rights-- especially political rights-- when there was good reason to do so (Acts 22:25; 25:11). And yet, he was appalled when the Corinthians would exercise a legal claim to sue each other rather than relying on the judgement of the Christian community (Cf., 1 Cor.6:2-3).

The peculiarly modern idea of subjective rights is rooted in the nominalist philosophy of

¹² Stephen Charles Mott, "The Contribution of the Bible to Human Rights," in *Human Rights and the Global Mission of the Church*, Boston Theological Institute Annual Series, Vol.1. (Cambridge, Ma.: Boston Theological Institute, 1985), p.8.

¹³ Leroy S. Rouser, *To Be At Home: Christianity, Civil Religion, and World Community* (Boston: Beacon Press, 1991), p.35.

the fourteenth century, and springs from the work of William of Ockham (1285-1347).¹⁴ With Ockham, the concept of *jus* connotes the power, capacity, or the will to act rightfully in some manner conforming to right reason. Natural right is equated with positive law understood in terms of divine will. An action is not good because it conforms to nature, to being and oughtness, but because God wills it. There is no longer an unchangeable *lex naturalis* that inwardly governs the positive law.¹⁵

In contrast to Ockham, the Late Scholastics such as Vittoria (d.1546), Suarez (1548-1617), Vasquez (d.1604), and the Italian St. Robert Bellarmine (1542-1621), held to a pre-political right to property inhering in the human person rather than in the civil order. Natural rights views legitimated the slave trade on the grounds that rights inhered in the human person rather than the civil order; as such, the human person could sell them, forfeit them, or give them away. The Dominicans, under the influence of a revived Thomism, argued that people were not free to enslave themselves, and could not rightfully be traded as slaves. Their arguments against rights were arguments against the slave trade.

During the Renaissance and the decline of feudalism, the shift from natural law as duties to natural law as rights grew in strength. The *Magna Carta* of 1215 defined the rights of English barons and citizens against the crown, grounding its limitation of royal patronage and exploitation, and affirming the right to religious freedom by appeal to the authority of tradition and God.¹⁶ Hugo Grotius (1583-1645), signals the turning point away from the Scholastic tradition with his detailed study of *The Rights of War and Peace*.¹⁷ He upheld the idea that the natural law would still have validity even if one conceded "that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are no concern to Him (*etiamsi daremus non esse Deum*)."¹⁸

The seventeenth century marks the watershed for modern natural right theory. Thomas Hobbes (1588-1679) turned the premodern emphasis upon duty upside down by refuting the political or social nature of human beings, and by viewing law as an *actus voluntatis* rather than an *actus intellectus* in his *Leviathan*. Hobbes drew out the social implications of the new materialistic-mechanistic physics, grounding the human commonwealth in the fear of violent death. A social contract was necessary to maintain control and power over individuals at odds with each other in the state of nature. Deduced from the desire for self-preservation, natural right is now opposed to the natural law of the Scholastics and the earlier natural right of the Roman jurists.¹⁹

¹⁴ William of Ockham, *Opus nonaginta Dierum*, in vol. 2, *Opera politica*, ed. by R.F. Bennett and H.S. Offler (Manchester: Manchester University Press, 1963 [1330]).

¹⁵ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), p.22.

¹⁶ J.C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1969), p.105.

¹⁷ Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations*, trans. by A.C. Cambell (Washington: M.W. Dunne, 1901).

¹⁸ Grotius, *De Iure Bellie ac Pacis*, Prolegomena, §11, quoted in A.P. d'Entreves, *Natural Law*, second ed. (London: Hutchison's University Library, 1970), p.54.

¹⁹ Thomas Hobbes, *Leviathan*, ed. by C.B. MacPherson (New York: Penguin Books, 1982).

John Locke's (1632-1704) *Two Treatises of Government* legitimated the Glorious Revolution of 1688 and resulted in the English Bill of Rights of 1689. Locke presupposes an objective natural law for his political theory. His state of nature is not a state of war, but a state of "Men living together according to reason, without a common Superior on Earth, with Authority to judge between them."²⁰ The state of nature has a corresponding law of nature, reason, that is not superceded by the social contract. The natural law in Locke's *Two Treatises* is "at one and the same time a command of God, a rule of reason, and a law in the very nature of things as they are, by which they work and we work too."²¹

Like Hobbes, Jean Jacques Rousseau (1712-78) admits the right of self-preservation and also presupposes an asocial view of the human being. But contra Hobbes, freedom is a higher value than mere self-preservation, and freedom is by definition obedience to the law which one has given to one's self and which presupposes civil society. Rousseau's *Social Contract* sets out to describe what would be a genuinely free political order "taking men as they are and laws as they might be," since in his words, "Man was born free, yet everywhere he is in chains."²² The state is no longer a necessary, ethical institution, but merely the minister of rights. Natural right has no divine ground, and can no longer stand independently of willed freedom through legislation.

Immanuel Kant (1724-1804) furthered the secularization of natural right that was begun by Grotius. But Kant is the modern philosopher of the good will, and of duty *par excellence*, not of rights. The Categorical Imperative specifies the moral law governing the action of the will: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."²³ Kant set out to construct a metaphysics of morals on the basis of a priori practical principles that lie in practical human reason and exert an influence on the will to perform an action from duty. The moral worth of an action is no longer tied to the purpose or apparent natural end or desire to be achieved, but strictly to formal volition.

The eighteenth-century conception of the "Rights of Man" as embodied in the French *Déclaration des droits de l'homme et du citoyen* (26 August, 1789) and the 1798 American Bill of Rights, took Hobbes, Rousseau, and Locke's voluntarist frameworks one step further by creating a new social myth in which functional power is not the prerogative of a sovereign, but rather a citizenry of "equals," endowed with inalienable rights and liberty based on the "Laws of Nature and of Nature's God" (Declaration of Independence). The French affirmation of "Liberty, Equality and Fraternity" sealed the death certificate of the *ancien régime*.

In response to the French revolution, Edmund Burke (1729-97) sounded the alarm to the political and propertied classes in England with his *Reflections on the Revolution in France*.

Part I, Chap.14, p.189.

²⁰ John Locke, *Two Treatises of Government*, ed. by Peter Laslett, rev. ed. (New York and Scarborough, Ont.: Mentor, 1965 [1690]), Book 2, Chap.3, 19, p.321.

²¹ Peter Laslett, "Introduction," *Two Treatises of Government*, p.95.

²² Jean-Jacques Rousseau, *The Social Contract* (1743), ed. by Maurice Cranston (Harmondsworth: Penguin, 1968), Bk.I, ch.1, p.49.

²³ Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. by Lewis White Beck, with Critical Essays ed. by Robert Paul Wolff (Indianapolis: Bobbs-Merrill, 1978), p.54.

Burke rejected political and social revolution in favor of development and gradualism as achieved in England by the Glorious Revolution 1688. It was part of Burke's argument to establish the liberties of England on the basis of tradition and inheritance.²⁴ Burke admits that human beings have natural rights in the state of nature, but he delivers a critique of the modern interpretation of natural right by seeking the foundation of government not in the "imaginary rights of men", but in the provision of wants, and in a conformity to duties and virtue. Burke did not question so much the rights of sovereignty or the "rights of Man," as the wisdom of exercising those rights when divorced from prudence and when dominated by an intrusion of theory into the field of practical politics.

As a critique of Burke, Thomas Paine's (1737-1809) *Rights of Man* argued that a hereditary monarchy was contrary to nature insofar as it denied the equality of "man," and thus served the interests of the rich and facilitated the exploitation of the poor. According to Paine, Burke's appeal to antiquity did not go far enough. If one goes back far enough, one reaches "the time when man came from the hand of his Maker."²⁵ The origin of human beings and of rights is divine and grounded in creation. Natural rights are those rights which pertain to the individual by virtue of created existence, and include "intellectual rights" and all those rights to secure "comfort and happiness" that do not harm others. Civil rights are those which pertain to the individual by virtue of being a member of society, and require pre-existing natural right.

John Stuart Mill (1806-1873) made the distinction between duties of *justice* (which correspond to rights) and *acts of beneficence* or the doing of good that go beyond what justice requires (i.e., supererogatory acts). Only legal duties and rights have a definite formulation and enforceability. Mill claimed that "duties of perfect obligation are those duties in virtue of which a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right."²⁶ When we call something a right, then this means that a person has a valid claim on society to protect that right, either by force of law, or by education and opinion.

The most decisive turning away from the tradition of natural right and natural law came at the hands of skeptics like David Hume (1711-76) and utilitarians like Jeremy Bentham (1748-1832). Because human reason is a servant of the passions, Hume is led to the conclusion that there is no basis for determining the ought on the basis of an apparently objective moral order, the so-called naturalist fallacy. What the earlier philosophers called natural law or right is for Hume merely a convention of moral sentiments, and "the reason for such sentiments is not the intellectually apprehended conformity of the action with objective principles."²⁷ Bentham also ridiculed what he called the "fictions" of natural law, the social contract, and, especially, natural rights on utilitarian grounds.²⁸ "*Natural rights* is simple nonsense: natural and imprescriptible

²⁴ Edmund Burke, *Reflections on the Revolution in France* (Garden City, N.Y.: Doubleday, 1961 [1790]), p.45.

²⁵ Thomas Paine, *Rights of Man*, ed. by Henry Collins (Baltimore, Maryland: Penguin Books, 1969 [1791/2]), p.87.

²⁶ John Stuart Mill, *Utilitarianism* [1861]. In *Collected Works*, vol.10, pp.203-59 (Toronto: University of Toronto Press, 1969), pp.246-49.

²⁷ Quoted in Rommen, p.112.

²⁸ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ed.

rights, rhetorical nonsense, - nonsense upon stilts."²⁹ Natural rights are nonsense for Bentham because they do not stand for anything tangible like the concepts of law, sanction, and sovereign. Bentham once remarked that the only way one could speak meaningfully of natural rights and duties would be to refer to the natural law commands of a divine sovereign. But the revolutionaries of the Enlightenment did not link divine right with divine law.

For Karl Marx (1818-83), legal relations and forms of the state are not grasped from "the general development of the human mind," but rather have their roots in the material conditions of life and the anatomy of civil society as determined by political economy.³⁰ Natural right and rights are individualistic and abstract. Human emancipation requires ending the division between man as an "egoistic being" in civil society and man as an "abstract citizen" in the state. The so-called right to liberty is merely the right of "separation of man from man...The right of the *circumscribed* individual, withdrawn into himself" whose practical application is the right of private property, that is, the right of self-interest. The right to equality has no political significance either, but is merely a right to liberty defined in terms of every person being "equally regarded as a self-sufficient monad." The right to security is nothing more than a police concept that merely assures civil society's egoism. Marx concludes:

None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice. Man is far from being considered, in the rights of man, as a species-being; on the contrary, species-life itself--society--appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the reservation of their property and the egoistic persons.³¹

Hegel had earlier been skeptical about the "Rights of Man" as an expression of authentic freedom since rights rhetoric reduced "the union of individuals in the state to a contract and therefore to something based on their arbitrary wills, their opinion, and their capriciously given express consent."³² As the French Revolution showed, trying to construct the state on this basis could only end in terror. Though Marx agreed with Hegel in viewing isolated individualism as the guiding thread in modern natural rights theories, Hegel's call for *Sittlichkeit*, a collective ethical way of life that goes beyond the individual, did not go far enough toward the emancipation of humanity from poverty and exploitation via the proletariat. Doctrines of rights legitimate the interests of the bourgeois capitalist individual and fracture the "species being" of

by J.H. Burns and H.L.A. Hart (London: Methuen, 1982), ch.1, sect.1, p.11.

²⁹ Jeremy Bentham, *Anarchical Fallacies*, in Jeremy Waldron, ed., *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London and New York: Methuen, 1987), p.53.

³⁰ Karl Marx, "Preface to *A Contribution to the Critique of Political Economy* (1859)" in *The Marx-Engels Reader*, ed. by Robert C. Tucker, second ed. (New York: W.W. Norton, 1978), p.4.

³¹ Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader*, ed. by Robert C. Tucker, second edition (New York: W.W. Norton, 1978), p.43.

³² G.W.F. Hegel, *Philosophy of Right* (1812), ed. by T.M. Knox (Oxford: Oxford University Press, 1967), sect.258, p.157.

human beings in and through social, political and economic activity.

With the rise of the modern nation-state, the Constitution of the state took the place of divine or natural law, thus marking a shift from the earlier grounding of the *Magna Carta* (1215) in divine authority. A law became illegitimate if unconstitutional, rather than unjust because it was in violation of natural or divine law. Along with the rise of the nation state arose the doctrine of "national sovereignty" with each Prince claiming absolute sovereignty in his own domain. Legal theory divided the doctrine into "territorial sovereignty," which signifies the ruler's exclusive control of his domain, and "personal sovereignty" understood as control of the Prince's subjects within or without his domain. The concept of personal sovereignty led to the idea of "crimes under international law," or crimes punishable by rulers other than those in whose domain they had been committed. Thus one may trace a direct line of development from international prohibition of piracy on the high seas to war crimes and crimes against humanity, to genocide, apartheid, the kidnapping of diplomats, the hijacking of airplanes, and offenses involving nuclear materials.

Human Rights Today: A Global Context

In the twentieth century, the concept of "human rights" has replaced secular "natural right" theory not only because of the decline of Western natural law doctrines, but also because the language of the "Rights of Man" failed to include the rights of women.³³ By World War I few theorists would or could defend the "Rights of Man" along the lines of traditional natural law or natural right. The First Hague Peace Conference took place in 1899, and The League of Nations and the International Labor Organization (ILO) were formed in 1919 as part of the World War I Peace Settlement. Here one begins to see universally held ethical standards that apply to relations between states in the international system, despite the apparent need for states to protect their self-interests.³⁴ But with the rise and fall of Nazi Germany the modern idea of human rights had its definitive birth. Laws authorizing the dispossession and extermination of Jews and other minorities, arbitrary police search and seizure, and condoning imprisonment, torture, and execution without public trial resurrected the idea of an objective moral order apart from positive law.

Until the Second World War, most legal scholars and governments affirmed the general principle that international law did not inhibit the right of sovereign states to oppress their own subjects. Citizens subject to summary execution, torture, arbitrary arrest, and detention had no legal standing in international law unless the victims were citizens of another state. International law recognized only the rights belonging to the government of such citizens. All this would change, at least in theory, with the inauguration of the United Nations Charter on 26 June, 1945, in San Francisco, and with the adoption of the *Universal Declaration of Human Rights* by the United Nation's General Assembly on 10 December, 1948.

Since the advent of the *UDHR*, human rights have been generally viewed as universal, international, and unconditioned by race, sex, religion, social position, and nationality. As Louis Henkin notes, human rights claim that "every human being, in every society, is entitled to have

³³ Mary Wollstonecraft, *A Vindication of the Rights of Women* (New York: W. W. Norton & Company, 1975 [1792]).

³⁴ Dorothy V. Jones, *Code of Peace: Ethics and Security in the World of the Warlord States* (Chicago: University of Chicago Press, 1991).

basic autonomy and freedoms respected and basic needs satisfied."³⁵ More precisely, "if one has a human right, one is entitled to make a fundamental claim that an authority, or some other part of society, do-- or refrain from doing-- something that affects significantly one's human dignity."³⁶ Moreover, human rights are said to exist independently from the customs or legal systems of particular countries, even though they are ineffective unless legally implemented and enforced. Finally, human rights function as high-priority norms or *prima facie* rights that imply duties for both individuals and governments, even if a person's own government has the main responsibility to protect and uphold a citizen's rights.³⁷

Modern human rights scholars generally classify the contents of human rights in accordance with their evolution in modern international law. During the drafting of the Charter of the United Nations in 1945, the question of individual versus groups rights polarized many members. Should economic, social, and cultural interests be accorded the status of rights on par with the traditional liberal values of free speech, religion, press, association, etc.? The drafters decided to draw up two separate covenants, one dealing with political and civil rights, and the other treating economic, social and cultural rights. With regard to implementing machinery, states could ratify either or both conventions with no more of an obligation than a periodic report. The two main International Human Rights Covenants-- the United Nations International Covenant on Civil and Political Rights (ICCPR) and the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR)-- were eventually opened for signature in 1966 and came into force in 1976. Together with the *UDHR* and the Optional Protocol to the ICCPR, these instruments constitute the so-called "International Bill of Rights."

The International Bill of Rights encompasses an expanding range of personal, legal, civil, political, subsistence, economic, social, and cultural rights. In addition, various treaties and declarations elaborate single-issue concerns such as genocide, the political rights of women, racial discrimination, and torture. Human rights scholars generally view these rights as interdependent, and states often speak of the norms of the *UDHR* and the Covenants as binding despite the fact that states often refuse to allow strong international enforcement and even monitoring of their performance. None of the United Nations instruments says anything about the legitimacy or rank ordering of rights except for those rights that are stipulated as "nonderogable", such as the freedom from arbitrary or unlawful deprivation of life, freedom from torture and from inhuman or degrading treatment and punishment, freedom from slavery, and freedom from imprisonment for debt.

Human rights scholars speak of three "generations" of human rights within the international context. "First generation" human rights, as embodied in the ICCPR, stress civil and political rights over and against the encroachment of the state on individuals. Thus human rights were initially conceived more in negative ("freedoms from") than positive terms ("rights to"). States undertake to respect and insure right to life and personal integrity, due process of law and a humane penal system, freedom to travel within as well as outside one's country, freedom of expression, religion, and conscience, cultural and linguistic rights for minority

³⁵ Louis Henkin, "Introduction," in *The International Bill of Rights*, ed. by Henkin (New York: Columbia University Press, 1981), p.7.

³⁶ David P. Forsythe, *The Internationalization of Human Rights* (Lexington, Massachusetts: Lexington Books, 1991), p.1.

³⁷ James W. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987), p.3.

groups, the right to participate in government and free elections, the right to marry and found a family, the right to equality and freedom from discrimination. State parties that have ratified the Covenant have the option, under Art. 41, of recognizing the jurisdiction of the Covenant's "Human Rights Committee" to hear complaints from other states that have also accepted this procedure. The Committee can hold hearings and promote friendly settlement, but it cannot form an independent judgement on the merits of a given complaint. That power is reserved for cases arising under the so-called *Optional Protocol to the Civil and Political Covenant*. States adhering to the Optional Protocol give authority to the Committee to hear petitions from individual citizens alleging violations of their rights under the Covenant.

"Second generation" human rights, embodied in the ICESCR, emphasize economic, social, and cultural rights. Under this Covenant, states are to "take steps" "to the maximum of available resources," "with a view to achieving progressively the full realization" of designated rights (Article 2,1). These include the right to work, to enjoy just and favorable conditions of work, to join trade unions, the right to social security, to protection for the family, for mothers and children, the right to be "free from hunger," to have an adequate standard of living, including food, clothing, and housing, and the continuous improvement of living conditions, the right to the highest attainable standards of physical and mental health, to education, and the right to partake in cultural life. It must be admitted that these rights remained essentially moribund for the first decade of the Covenant, and the U.N. is still at an earlier stage of establishing minimum standards for disadvantaged national societies with respect to nutrition, health, shelter, and other categories.

"Third generation" human rights, the most controversial of international human rights, involve "solidarity" among developing states as a group, and among states in general. They are said to be collective rather than individual, and include "peoples' rights" to development, the right to a healthy environment, the right to peace, the right to the sharing of a common heritage, and humanitarian assistance (e.g., Art.s 22, 23, and 24 of the *African Charter on Human and Peoples' Rights*).³⁸ The notion of "peoples' rights" has not gone without criticism, and some human rights scholars find social stratification and the consolidation of political and economic power in the hands of a small ruling class--rather than Western imperialism-- to be the most enduring form of human rights abuses.³⁹ With the exception of the right to self-determination, which international law recognizes as a collective human right of peoples (See, Art.1 of both the ICCPR and the ICESCR), none of these rights exist in global treaty form nor are there established monitoring agencies to protect such rights.

The gap between international law theory and domestic human rights practice is still very wide. Global treaties such as the U.N. Charter, the ICCPR, ICESCR, and regional treaties such as European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, The American Convention on Human Rights, and the African Charter on Human and People's Rights, are all assumed as more or less binding international standards. Article 38.1 of the Statute of the International Court of Justice refers to the "sources" of international law. This Statute provides that the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" is to apply the following sources:

³⁸ Claude E. Welch, Jr., and Ronald I. Meltzer, eds., *Human Rights and Development in Africa*, ed. by (Albany: State University of New York Press, 1984), pp.26, 317-329.

³⁹ Rhoda E. Howard, *Human Rights in Commonwealth Africa* (Totowa, New Jersey: Rowman & Littlefield, 1986).

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, [which provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case"] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In short, global and regional human rights treaties, when ratified, are clearly international law under Article 38.1.a, and establish "rules expressly recognized" by state parties.⁴⁰

The International Court of Justice at The Hague is the most authoritative institution to declare what rules of international law are or are not binding *by custom*. There are four human rights protected by customary international law: freedom from slavery, genocide, racial discrimination, and torture. In contrast, the General Assembly of the United Nations and its specialized agencies have power to "recommend," but not a power to make international law. Notwithstanding, Declarations such as the *UDHR* and the American Declaration of the Rights and Duties of Man (which was drafted by the OAS and came seven months before the *UDHR*) perform similar functions to those rules and principles that we call "law." With the exception of the ICESCR, the main global and regional treaties require that states provide and enforce an "effective remedy" against the violations of one's human rights and freedoms.

Today the main tasks of U.N. Human Rights bodies are related to the work of humanitarian assistance (cf. UNICEF, UNHCR); standard-setting by means of Conventions and Declarations, and by studying particular human rights or human rights in particular places and recommending measures for their fuller realization; the promotion of human rights through advisory services, broad studies, and incipient reporting systems; and the concrete protection of human rights through the establishment of procedures for assessing information received from private persons and groups concerning possible violations, fact-finding missions, efforts to mitigate or terminate violations in particular cases, and exposure and "shaming" as principle weapons of enforcement. Despite the large gap-- some would say gulf -- that separates the theory and practice of international human rights, global human rights remain, in the words of the *UDHR* Preamble, a vital "standard of achievement for all peoples and all nations."

While human rights are viewed by some persons as a mixture of Western cultural imperialism, rampant moralism, and political selectivity, it must be admitted that the concepts of "natural right," the "Rights of Man," and "human rights" are essentially Western concepts that do not invalidate claims to their universal appropriation-- or their analogues in other cultures and societies-- in order to support human dignity, equality, and justice. The people who created UNESCO as well as the *Universal Declaration of Human Rights* certainly wanted to stress the universality of human rights, and to make it more concrete than either the French and American declarations written by national citizens. For most persons, human rights are not primarily a juridical matter, but something related to the dignity of persons and the respect and protection necessary for vulnerable persons. Indeed, much of the history of the human rights movement in

⁴⁰ Albert P. Blaustein, Roger S. Clark, Jay A. Sigler, eds., *Human Rights Sourcebook* (New York: Paragon House Publishers, 1987), pp.4-5.

this century, today a global reality, may be understood as claims by the have-nots against the haves.

Goals, Scope, and Structure of the Bibliography

Thomas Reynolds was one of the first to call attention to the "explosion" in human rights documentation.⁴¹ For college and university students or other interested readers approaching the subject of human rights for the first time, this explosion in human rights documentation and literature, now exponential in quantity, can be overwhelming. The primary goal of the bibliography, therefore, is to assist students, general readers, and concerned educators in gaining introductory access to key resources within the field of human rights.

There are several reasons for adding this bibliography to the current field of human rights documentation. First, while there exist numerous large-scale human rights bibliographies,⁴² bibliographic essays,⁴³ and even bibliographies of human rights bibliographies,⁴⁴ the march of time quickly dates all documentation. Second, the size, accessibility, and highly specialized nature of many human rights bibliographies and resources often pose daunting challenges for the student. Third, a large percentage of the many existing human rights bibliographies are, alas, unannotated or only very partially annotated. This bibliography offers extensive annotations for virtually all entries, including comments concerning a book or article's structure and contents, intended audience, main thesis or viewpoint, and whether it is supplemented or updated by another source. Special features such as illustrations, notes, bibliography, indexes, appendices, charts, maps, chronologies, and tables of U.N. instruments are also noted. The effort has been made throughout to note where a book, chapter in a book, or journal entry's organization or design is germane.

Two criteria guide the scope of the bibliography. The first has been to limit the citations primarily to English language book and monograph sources. The bulk of the entries fall between the years 1982-1993 (with some 1994 entries). The choice for this focus in scope is based on the fact that the massive topical bibliography by Martin and Henkin, *Human Rights: A Topical Bibliography*, cites book and article titles in the English language through 1981 (with some

⁴¹ Thomas H. Reynolds, "Highest Aspirations or Barbarous Acts: The Explosion in Human Rights Documentation: A Bibliographic Survey," *Law Library Journal* 71 (February, 1978): 1-48.

⁴² See Julian R. Friedman and Marc I. Sherman, eds., *Human Rights: An International and Comparative Law Bibliography* (Westport, Conn.: Greenwood Press, 1985), which covers more than 4,000 items in a variety of languages. The work prepared by the staff of the Center for the Study of Human Rights at Columbia University, under the direction of J. Paul Martin and Louis Henkin, *Human Rights: A Topical Bibliography* (Boulder, Colo.: Westview Press, 1983), contains more than 7,000 entries.

⁴³ Natalie Kaufman Hevener, "International Human Rights," *Choice* (June, 1982):1361-1366 and Claude E. Welch, "International Human Rights: A Guide to Collection Development," *Choice* (January, 1991):741-747.

⁴⁴ Richard Greenfield, Indira Jhappan, & Laurie Wiseberg, eds., "A Bibliography of Human Rights Bibliographies," in Julian R. Friedman and Laurie S. Wiseberg, eds., *Teaching Human Rights* (Washington, D.C.: Human Rights Internet, 1981), pp.98-134.

citations from 1982), albeit without annotation. A second criterion has been to narrow the overall number of references, focusing on those resources that can be obtained in most public and college or university libraries. While some United Nations documents have been included herein, the more specialized researcher will wish to consult U.N. collections found at repository institutions.

The bibliography avoids, with the exception of Chapters 8 and 10, using specific rights as a main organizational principle. Geographical regions or specific countries have also been avoided as a main organizational principle, but the reader will be able to identify resources related both to specific rights and geographical regions in the Indexes. The student or researcher will discover ample cross-cultural human rights entries and numerous country specific human rights studies in Chapters 3,4,5,6,7,8, and 9. The human rights literature organized by specific human rights or rights in particular countries is numerous and may be located through the various Country Reports and the nongeographic and geographic-specific *Human Rights Internet Reporter* Bibliographies and Directories cited in the final chapter. A rights-specific organizational structure would have inevitably taken the project far beyond its primary goal and rationale. Furthermore, neither the oldest international human rights instruments such as the *Universal Declaration on Human Rights*, nor the youngest ones such as the African Charter draw a distinction between categories of human rights. The UN General Assembly has stated that all human rights are "interdependent and indivisible." Numerous authors suggest that the ranking of rights should be avoided at all costs, as should any classification that would lead to it.

Chapter 1, "Getting Started," presupposes that students approaching the subject of human rights for the first time do well to consult broad, yet synthetic, information sources. Thus, Section 1.1 identifies key encyclopedia resources, while section 1.2 contains relevant human rights encyclopedia entries written by leading human rights scholars, as well as rights-related entries such as "Communitarianism", "Civil Rights and Civic Duties", "Duty and Obligation", "Needs and Interests", etc. Section 1.3 notes key anthologies, readers, and textbooks useful for teaching at the college or university level, as well as many well-recognized works in the human rights field.

Chapter 2, "Philosophical Foundations of Human Rights", contains entries that address not only substantive questions concerning the nature, content, and justification of rights and human rights, but also the historical development of the concept and the philosophical implications of human rights as a global moral framework. The chapter is subdivided into five parts: 2.1 The United Nations and International Perspectives, 2.2 Natural Law and Natural Rights, 2.3 Utilitarianism and Legal Positivism, 2.4 Marxism and Critical Theory, and 2.5 Liberalism, Communitarianism, Rights since much of the ethical debate between liberals and communitarians turns back on the proper role of rights and human rights in the community and civil society.

Chapter 3, "Cultural Relativism and Cross-cultural Perspectives", includes entries that treat the problem of cultural relativism, especially the implications of global cultural diversity for the legitimacy and efficacy of international standards of human rights. To what extent is there cross-cultural support or antagonism to human rights standards? Are we moving toward a universal cultural legitimacy for human rights? How has the United Nations handled the problem of cultural diversity and human rights? It is in this chapter that the reader will find works concerned with such questions, as well as numerous regional and country specific approaches whose primary concern is with the practice of promoting, implementing, and protecting human rights more effectively. Whereas the Western liberal tradition has found it difficult to accept certain collective or communal rights, such as people's rights, Chinese and Soviet-Marxist-Leninist perspectives have problems incorporating individual civil and political rights. In the wake of the ending of the Cold War, more and more countries are looking beyond this traditional human rights divide toward a shared cultural understanding of global human

rights.

Chapter 4, "Human Rights and Religious Traditions," includes selected perspectives on human rights from the world's major religious traditions. While it must be admitted that religions have frequently enshrined and vindicated hierarchy, authority, and inequality, and religious norms have frequently entrenched social inequalities that have been considered immutable and a reflection of the "natural" world, today human rights and their cross-cultural analogues have been embraced and supported by most of the world's religions. Various Christian churches have arguably been one of the most important NGO's working on behalf of human rights in places like Latin America and Africa. Hans Küng points out that there can be no survival without a world ethic, no world peace without peace between the religions, and no peace between the religions without dialogue between the religions.⁴⁵ Human rights are increasingly an integral part of this new world ethic. This chapter intends to highlight the relevance of religious traditions in the struggle for global human rights.

Chapter 5, "Basic Human Needs, Development, and Security," introduces materials that reflect a concern for the importance of basic human needs or "social goods" that are essential to human subsistence (e.g., food, clothing, housing, medical care, and schooling), the security rights of individuals to enjoy reasonably reliable prospects of survival (e.g., police protection and cultural preservation), and humane governance that implies a transformation of the political order beyond the operative code of state sovereignty as it currently exists. The term "development" raises, of course, a host of conceptual problems. Penny Lernoux insists that "development" is nothing more than "a myth invented by the industrialized nations to con the Third World into footing the bill for the American and (European) way of life."⁴⁶ Whatever one believes about "development" as a conceptual category within political science and political economy, the fact remains that both the United Nations (Declaration on the Right to Development, 1986) and numerous human rights scholars link human rights and development.

Chapter 6, "Human Rights and Foreign Policy", contains entries on books treating the role of human rights in foreign policy and international law. The chapter focuses primarily on U.S. foreign policy and human rights (6.1), but Canadian (6.2) and a selection of International perspectives on human rights and foreign policy (5.3) are also included. One of the central problems of human rights in U.S. foreign policy is how to support principles of national security and democratic and human rights. For example, is it possible for a nation to maintain an even-handed posture in the distribution of sanctions and criticism over human rights violations? At what point does the promotion of human rights become counterproductive for a given state?

Chapter 7, "International Law, Organization, and Human Rights", focuses primarily on those resources concerned with the international community's efforts in protecting human rights. The international law and United Nations literature on human rights is, of course, vast. Selections have been made in an effort to identify key works within seven major subcategories. Thus, selected works have been drawn from relevant United Nations Instruments and Commentaries on treaties and declarations (7.1), key Regional Human Rights Instruments and Approaches (7.2), literature on the International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, as well as the Optional Protocol (7.3), International Courts (7.4), International Protection of Refugees and Humanitarian Law (7.5), The International Labor Organization (7.6), and Nongovernmental Organizations (7.7). The relation between

⁴⁵ Hans Küng, *Global Responsibility: In Search of a New World Ethic* (New York: Continuum, 1993), p.xv.

⁴⁶ Penny Lernoux, *Cry of the People: The Struggle for Human Rights in Latin America-- The Catholic Church in Conflict with U.S. Policy* (New York: Penguin Books, 1982), p.33.

international law and national law is of ongoing concern today, especially for those who believe the ancient Roman maxim, *ubi remedium ibi jus*, only "where there is a remedy, there is a right."

Chapter 8, "Group Rights and Individual Rights," includes general works that address important theoretical questions concerning collective or group rights: Do needs and interests exist that imply the necessity of group rights? What type of groups might qualify for group rights? Can we establish criteria that could identify those groups with the strongest claims to group rights? For example, age, culture, gender, a shared history, language, race, and geographic "compactness" have all been proposed as criteria for establishing group rights. Recognition as a group by those within and by those external to the group, and where there has existed a history of discrimination against the group are also viewed as legitimate criteria for establishing group rights. It is on this basis that I have further subdivided the chapter, including key works on Indigenous Peoples' Rights (8.2), Ethnic, Racial and Minority Rights (8.3), Refugees (8.4), Children's Rights (8.5), and Persons with Disabilities (8.6). We are still far from balancing the conflicting claims of one group against another group (e.g., in terms of the right to self-determination among "developing" nations), and it is not entirely clear whether certain groups are able to have their rights protected through a system of individual rights alone (e.g., gay and lesbian rights).

Chapter 9, "Women and Human Rights", incorporates titles on selected international instruments, e.g., the Committee on the Elimination of Discrimination against Women (CEDAW) and the United Nations Decade for Women, and commentaries (9.1), and a broad selection of general works that address women's rights from philosophical, national and international law, historical, economic, political, and feminist perspectives (9.2). The final section (9.3) includes entries focusing on women's rights from specific regional perspectives such as the Muslim world, Europe, the Middle East, Latin America, Africa, and Asia. These divisions are merely meant to aid the reader. Women's concerns for human rights are basically similar throughout the world: violence and sexual abuse against women; the recognition that women's rights are not secondary, but rather fundamental human rights equal to other human rights concerns; the recognition that women's basic rights is key to citizenship and full participation in society; and that lack of women's citizenship is integrally linked to lack of democratic rights in the family.

Chapter 10, "Emerging Human Rights Issues," includes a selection of future-oriented works that look to the challenges of human rights for the 1990s and into the twenty-first century (10.1). Solidarity among developing states as a group, and among states in general, political diplomacy and health initiatives, new directions in international law, the future of human rights in the post-Soviet world, and the rights to peace, the sharing of a common heritage, and the rights of future generations are just some of the issues addressed. With the publication of John Passmore's book, *Man's Responsibility for Nature* (1974), philosophers began working on environmental ethics. Taking its inspiration from the utilitarian perspective of philosopher Peter Singer, as set forth in his *Animal Liberation*, the animal welfare movement was transformed into the animal rights movement in 1975. Section 10.2, therefore, includes recent titles that critically assess the shift from "natural rights" to the "rights of nature" as represented in the growing literature on environmental rights and animal rights.

Chapter 11, "Teaching Human Rights and Genocide" brings together a variety of excellent resources for teaching human rights. Section 11.1 incorporates selected international perspectives on the teaching of human rights and genocide, with a sampling of Holocaust studies resources, and section 11.2 notes other useful, unannotated curriculum and education activities resources.

Chapter 12, "Researching Human Rights," includes largely unannotated entries of selected, specialized Bibliographies (12.1), Country Reports (12.2), Directories, Guides, and

Handbooks (12.3), Yearbooks (12.4), and CD-ROM Indexes. These resources will be useful to students, teachers, and activists wishing to gain further information on the theory and practice of human rights covered in the previous chapters of the book.

The *Universal Declaration of Human Rights* and the recently published *Bill of Rights and Responsibilities for the Electronic Community of Learners* are included as Appendices. The UDHR still remains the most important international human rights document. Questions concerning human rights and responsibilities posed by the rapid pace of changes in electronic communications will be a growing concern well into the next century.

The researcher may consult the Author Index to search not only for a given author's or authors' book title or edited volume included as a main entry in the bibliography, but also to locate the names and in many cases, articles, of authors noted in the body of the annotation. The Author Index, therefore, gives the reader access to an author whose published article or writing would otherwise be inaccessible through normal search procedures. While the bibliography is not organized by specific rights, the Subject Index gives the researcher access to works whose contents focus on or include analyses of specific rights, in addition to other relevant subjects, ideas, institutions, and rights and human rights issues. Finally, the Geographical Index provides the reader with ready access to human rights resources related to continent and country-specific concerns and analyses that span all regions of the globe.