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A Short History of Human Rights

The idea of human rights is of moral rather than legal nature. Although a growing number of human rights have legal protection, human rights primarily reflect people's aspirations. They proclaim widely accepted standards for freedom, for limitations on state power, and for services that can be expected from a society as represented by the state in accordance to an underlying set of moral values.[1] Although some of these standards may be enforced by law, new ones appear and are claimed as moral postulates. Human rights are, therefore, universal moral rights of fundamental character.[2] They belong to every person in his or her relations with the state and with any other authority in a position to use coercive power against the individual. Although some moral rights can be acquired (inherited, earned, bought, received, or exchanged for something else), human rights are inherent and belong to the human being *as such*. It is believed that every person comes to existence endowed with these rights.

Let us accept this working description of the nature of human rights for now and leave the more detailed discussion for the rest of this book. The concept of human rights, as described here, consists of at least six fundamental ideas:

1. The power of a ruler (a monarch or the state) is not unlimited.
2. Subjects have a sphere of autonomy that no power can invade and certain rights and freedoms that must to be respected by a ruler.[3]

[1] "Human rights are those liberties, immunities, and benefits which, by accepted contemporary values, all human beings should be able to claim 'as of right' of the society in which they live" (Rudolph (ed.) 1985, 268).

[2] The moral character of human rights is emphasized by Feinberg (1973, 85): "Human rights are generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably."

[3] This is not the same as the preceding point. The power of a ruler can be limited, for example, by God's commandments – with the subjects still having no rights.

3. There exist procedural mechanisms to limit the arbitrariness of a ruler and protect the rights and freedoms of the ruled (points 1 and 2, above, have already transformed "subjects" into the "ruled") who can make valid claims on the state for such protection.
4. The ruled have rights that enable them to participate in the decision making (with this concept, the "ruled" are transformed into the "citizens").
5. The authority has not only powers but also certain obligations that may be claimed by the citizens.
6. All these rights and freedoms are granted equally to all persons. (This transforms individual rights/privileges into human rights).

The ideas on this list have been emerging, disappearing, reemerging and evolving throughout history, reflecting changing social conditions and serving various needs.[4] Before the concept of human rights could be formulated and adopted, a number of specific customs, legal provisions, institutions, and ideas had to emerge.

This chapter focuses on two distinct ideas: notions of individual rights that emerged by the eighteenth century and human rights, which are essentially a twentieth-century concept. Continuities and differences between these two ideas are relevant today, influencing the very understanding of the nature, the meaning, and methods for the implementation of human rights.

INDIVIDUAL RIGHTS

The Origins

Individual rights evolved over a long period of time,[5] beginning with the assertion of freedoms that characterized the "old constitutionalism" that became widespread

[4] This list can be also used as a yardstick to help gauge precisely where a given culture (or a state or nation) stands in relation to rights.

[5] The origin of rights is the subject of much debate. Some authors claim that rights are a modern idea, beginning with the industrial era (e.g., Kenneth Minogue and H. L. A. Hart, quoted by Tierney 1989, 617). Others see these origins in antiquity (e.g., Ishay 2004, 16–69; Lauren 1998, 4–36; for a critique of this view, see Afshari 2007, 4–9) despite the limited continuity between ancient times and the emergence of rights in Europe. The most common view locates the beginning of human rights in the Enlightenment and the eighteenth-century revolutions (e.g., Hunt 2007 and Flores 2008, who points, however, to roots of human rights in previous epochs). Villey (1969) and Golding (1978) claims that the first theory of rights was formulated by William Ockham in the fourteenth century. According to Tierney (1989, 625), the concept of rights "first grew into existence in the works of medieval Decretists." (See also Helmholz 2001, 2). In sum, we can talk about *antecedents* of rights in ancient cultures and about *roots* of human rights in medieval Europe.

in medieval Europe.[6] Over time, society has gradually acknowledged both individual freedoms and the scope of limitations placed on the power of rulers and governments.[7] Simultaneously, instruments of due process of law that limit the arbitrariness of governments have also grown.[8] With the emergence of kings' councils, church councils, and early parliaments, the notions of participation and representation slowly gained acknowledgment. Finally, Christian communities accepted their responsibility for the basic survival needs of all their members.[9] Such responsibility was later assumed by absolute monarchs, becoming, in fact, one of the justifications for the absolute power held by the "enlightened" monarch. Later, some of these obligations were transformed into social rights or, more precisely, into the expectation of social benefits.

Medieval rights differed substantially from today's concept of rights. Indeed, the idea of the separateness of individual identity and the notion of individualism first appeared in the medieval West,[10] but rights, as a rule, were granted to groups and not individuals.[11] Although they contained the rudiments of relief and welfare, medieval rights and immunities were not equal; they were bestowed by kings on individuals, estates, or corporate bodies. They resembled privileges rather than rights, in the

[6] See McIlwain 1947. Early constitutionalism was primarily the reaffirmation of ancient properties and the contract between the king and the nobility: privileges in return for loyalty, for serving the king with arms, or for money, as in the case of the Magna Carta in England. (See Orend 2002, 102.) A king's power was not challenged and ancient constitutions did not deal with the organization of power.

[7] Of crucial importance was the departure from "cesaropapism," which accompanied the dissolution of the Western Empire and the separation of sacrum from publicum, expressed in the "theory of two swords" formulated by pope Gelasius as early as 493 AD. "The West's separation of the sacred and the secular, the ideological and political spheres, was uniquely fruitful, and without it the future 'freedoms,' the theoretical emancipation of 'society,' the future nation-states, the Renaissance and the Reformation alike could never have ensued" (writes Szucs 1981, 300).

[8] Due process and the ban on arbitrary deprivation of property were essential for the Magna Carta and similar charters of privileges for the nobles. They were also recognized by canon law and the *ius commune*. These rights were based on "the feudal principle that the vassal could, by the judgment of his fellow vassals, obtain justice even against his own overlord and in the latter's court" (Caenegem 1995, 17).

[9] In extreme cases, such responsibilities created claims on the part of the needy. A person whose life was endangered by poverty and hunger could take what was needed for basic survival from the superfluous wealth of a rich man. The institution of *denunciatio evangelica* helped to enforce this right. (See Tierney 1989 and Helmholz 2001.)

[10] "The concern with individual intention, individual consent, individual will that characterized twelfth-century culture spilled over into many areas of canon law," writes Tierney (1989, 637). This individualism was further reinforced during the Renaissance.

[11] "Medieval political thinkers perceived such rights largely, if not exclusively, in a corporatist context that afforded little positive recognition to members of the political community as individuals. Nor was there any clear expression at the time of the contemporary notion of personal rights" (Monahan 1994, 295).

contemporary sense. It was only after the principle of equality gained acceptance that these privileges for the few could become rights for everyone.[12]

During the Enlightenment, numerous medieval ideas converged to form a coherent philosophical concept of the rights of man. This idea was directed against the absolutism of monarchs and emphasized individual freedoms and limited government. John Locke, the best known theoretical opponent of absolutism, suggested that people transfer to the state only limited prerogatives – to protect them, to administer justice, and to punish wrongdoers – while retaining all other powers as inalienable rights.[13] These inalienable rights form the basis for limited government. This means that the state cannot claim that it has powers in those spheres where individuals have retained their inalienable rights.[14] The contract could be dissolved by the people at any time if the ruler did not fulfill his or her obligation or otherwise violated the people's rights.[15] This idea provided justification for American colonists' claim for independence and became the foundation of American statehood. In England, where the absolutist king had to surrender to the revolution, the triumphant Parliament itself became absolutist. Its power, however, was limited by the Bill of Rights and other documents, by common law and an independent judiciary, by the free press, and by other institutions of a strong, independent society. In France, the idea of the rights of man and citizen provided justification for the Great Revolution of

[12] Sen has noticed the uneven growth of two basic elements of the modern concept of human rights – freedom/tolerance and equality (Sen 1997, 31).

[13] There are two aspects of Locke's notion of inalienability. One, suggested by Taylor (1999, 127), emphasizes the necessity to prevent individuals from waiving their human rights. Taylor's argument finds support in Locke's assertion that "nobody can transfer to another more power that he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another" (see Locke 1980, 70 of paragraph 135). Another interpretation focuses on Locke's theory of contract. For Locke, individuals enter the contract endowed with the full range of rights and, in the contract, they transfer some limited rights to the state authority, which they have just appointed. In other words, they alienate such rights from themselves, undertaking the obligation that they will refrain from enforcing these rights because they trust that the authority will use its powers to protect them. All other rights remain with the individuals. They are inalienable in the sense that rights cannot be given away by individuals in a contract with the state.

[14] The *Virginia Declaration of Rights* of 1776, (drafted by George Mason and amended by Thomas Ludwell Lee), justified inalienable rights in a similar way: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life, and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety" (*Virginia Declaration of Rights*, section 1, quoted in Henkin et al. 1999, 126). Thomas Jefferson added one more argument to Locke's reasoning: even if people could transfer their own rights to life, liberty, and property to the government, the present generation cannot give away such rights of future generations.

[15] Locke's theory was revolutionary but not new. All of its major elements had been discussed by medieval political theorists. For example, French Huguenot Philippe du Plesis Mornay (1544–1633) developed an elaborate theory of two subsequent social contracts with the right of resistance built into them (*Vindiciae contra tyrannos*, 1579).

1789. Although the revolution transferred power from the king and aristocracy to the bourgeoisie – as well as to the bureaucracy and the army – it did not change the absolutist character of the state. From the seventeenth century onward, the French state was in control of society and of the rights of its citizens. We can trace the consequences of absolutism's victory in continental Europe (with the exception of Holland) and the victory of civil society in the United States, Holland, and, to some degree, England – all the way to modernity.

In antiabsolutist states, people have antecedent rights that limit the government. Instead of living as mere subjects, they are on an equal footing with state officials. Independent courts protect the rights of citizens and work to ensure that the government acts within the limited powers assigned to it by the constitution. Whether written or not, it is this constitution – and not the will of a ruler – that constitutes the supreme law. In post-absolutist states, however, the government has power and the people have duties. The government is usually highly centralized and has a monopoly on most social activities, including charity. This limits potential for social innovation and change.

Two Traditions of Rights

The difference between triumphant and defeated absolutism is reflected in the two traditions of rights in the West. One emphasizes the inherent rights of the individual and the rights of the such "natural" social groups as family or church that may be claimed against a state's authorities. This tradition, best elaborated by Locke, dominated in seventeenth century England and, particularly, in the eighteenth-century American colonies that struggled against the British state. Although England has been making incremental departures from it since the eighteenth century, this tradition is still referred to as Anglo-American.

On the European continent, another tradition of rights prevailed. Andrzej Rapaczyński concludes his study of the influence of the U.S. Constitution abroad by stating that

> The American idea of a weak, divided government, restrained by judicially enforceable individual rights had only limited attractiveness in those countries, including most European democracies and the majority of countries of the developing world, in which the state has been viewed as a guardian of the common good and a provider of individual benefits, and not as a necessary evil always threatening the interests of the citizens.[16]

[16] Rapaczyński (1990, 461). For a more detailed analysis of the American and European understanding of constitutionalism and rights, see Rapaczyński (1996). "The idea of 'unlimited sovereignty' was clearly rejected by the American founding fathers in the name of a government of limited powers, subject to constitutional restraints" (ibid., 11).

Outside the United States, rights were perceived as a sort of grant given by an enlightened state to fulfill its obligations to society.[17] Among these obligations was a ruler's duty to protect the citizens and take care of them in times of need or deprivation. Understood in this way, rights existed not to protect individuals *from* government but, instead, to be realized *through* the government of an active rather than passive state. This vision of rights was embodied in the French revolutionary constitution of 1790, as well as in the second Declaration of the Rights of Man and Citizen of 1793.[18] It was also present in the General Code of Prussia of 1794, the constitution of Norway of 1815, and in the social legislation that spread throughout Europe, this time including England, in the late nineteenth century.

Louis Henkin defines the two traditions in the following way. According to the first, "individual rights protect autonomy and freedom, limit government, and provide immunity from undue, unreasonable exercise of authority. . . . But in the nineteenth century there began to grow another sense of rights, rooted not in individual autonomy but in community, adding to liberty and equality the implications of fraternity." This suggests "a broader view of the obligations of society and the purposes of government – not only to maintain security and protect life, liberty and property, but also to guarantee and if necessary provide basic human needs."[19]

Mary Ann Glendon distinguishes between the "individualistic" Anglo-American tradition of rights that has emphasized individual liberty without much attention to constraints and responsibilities and the "dignitarian" tradition prevailing on the European continent.[20]

The Second Generation of Rights

Despite these differences, the English Bill of Rights (1689), the U.S. Declaration of Independence (1776), and the French Declaration of Rights of Man and Citizen (1789) have forever remained crucial milestones in the history of freedom.

[17] In a comprehensive study of the influence of American Declaration of Independence in Germany, Horst Dippel (1977, 163–7) demonstrated that the concept of binding inalienable rights preceding the government was simply incomprehensible for a majority of European elites in the late eighteenth century. Particularly in Germany, "the way in which the bourgeoisie dealt with the declaration of human rights in the American Revolution is another example of their incapacity to grasp the problem" (ibid., 164). Also in the context of Germany, Steinberger (1990, 202) suggests that "rights were not conceived of as 'inalienable,' deriving from natural law. (. . .) They were 'grants' by the prince, who might revoke them; they were rights of 'subjects' – not of people." For factors of resistance to the idea of individual rights in Poland, see Osiatyński (1990, 296–7).

[18] The 1789 Declaration, however, belonged to Anglo-American rather than to continental tradition; this may explain why it was muted a year later and replaced in 1793.

[19] Henkin et al. (1999, 280).

[20] See Glendon (2001, 226–8).

The eighteenth-century concept of rights, however, was limited. Although some philosophers of the time used the term human rights and insisted on their universal application,[21] the Enlightenment idea of rights was limited to a handful of property owners, excluding women,[22] children, those who did not own property, and the entire non-White population of the world.[23] In the United States, the idea of rights did not prevent the extermination of native people and the continued enslavement of Black Americans.[24]

In contrast to their medieval predecessors, eighteenth-century rights were individual, in that it was an individual person rather than a group that was the locus of these rights. As they were limited to only some individuals, however, these rights were not yet "human."[25]

The nineteenth century did not provide fertile soil for the idea of rights. New concepts took over whose authors were eager to sacrifice the individual for the benefit of groups, including nations, societies, unlimited majorities, and social classes.[26] In Europe, where the social problem was growing ever more acute, the eighteenth-century idea of civil liberties and political rights was too limited. The second generation of rights emerged with the aim of offering protection of basic social and economic needs for members of an industrial society.[27] This new concept included positive obligations of the state to regulate labor relations and markets to protect workers vis-à-vis the predominant power of owners and prevent excessive

[21] See Hunt (2007, 22–34). The most comprehensive argument for universal rights was presented by Thomas Paine in *The Rights of Man* (1791–1792).

[22] This limitation prompted protests. In France, Olimpie de Gouges published *The Declaration of the Rights of Women* (1791) for which she was executed during the Revolution. In England, Mary Wollstonecraft wrote *A Vindication of the Rights of Women* (1792).

[23] Hunt suggests that, in the case of women, the deprivation of rights was much more severe: "Children, servants, the propertyless, and perhaps even slaves might one day became autonomous, by growing up, by leaving service, by buying property, or by buying their freedom. Women alone seemed not to have any of these options; they were defined as inherently dependent on their fathers or husbands," writes Hunt (2007, 28).

[24] It is worth noting that John Locke himself justified slavery (see paragraph 85 of the *Second Treatise of Government*, 1980 edition, 44).

[25] The limited character of eighteenth century rights was noted by the Executive Committee of the American Anthropological Association in its statement on human rights: "The problem of drawing up a Declaration of Human Rights was relatively simple in the eighteenth century, because it was not a matter of *human* rights, but of the rights of men within the sanctions laid by a single society. Even as noble a document as the American Declaration of Independence, or the American Bill of Rights, could be written by men who themselves were slave-owners, in a country where chattel slavery was a part of the recognized social order. The revolutionary character of the slogan 'Liberty, Equality, Fraternity' was never more apparent than in the struggles to implement it by extending it to the French slave-owning colonies" (quoted in Winston 1989, 119).

[26] Henkin (1978, 14–18) discusses these ideas under the heading "The nineteenth-century antithesis."

[27] See Flores (2008, 118–27).

exploitation. Thus, the concept of "freedom from government" was extended to include "freedom through government." Social legislation was adopted in Bismarck's Prussia and in England, where it was accompanied by the gradual lifting of property requirements for voting and by growing franchise.

This development accelerated in the interwar period with the formation of the International Labor Organization and the adoption of social policies by the United States government during the New Deal. In the Four Freedoms speech of 1941, President F. D. Roosevelt spoke of freedom – including the freedom from want – "everywhere in the world," thus embracing the continental concept of rights.[28]

Few people, however, thought in terms of human rights at the peak of colonization in a time of rife nationalism, imperial states, and class struggle. Despite the condemnation of slavery in the Paris Peace Treaty of 1814,[29] the colonization by Whites of non-White people continued and could not be reconciled with the idea of human rights.[30] In fact, colonization actually increased the popular appeal of social Darwinism and racism. Among White people, demands for better life were not justified in terms of human rights but in categories of a nation's well-being and history, the notion of the greater good for the greater number of people, social justice or humanitarian assistance. At last, with the mid-nineteenth-century abolitionist movement in the United States and international opposition to the atrocities committed by Belgian troops and entrepreneurs in the Congo, international humanitarian movements were formed.[31]

Humanitarian considerations led to the formation, in 1863, of the International Committee of the Red Cross and to the adoption of a number of international

[28] See Sunstein (2004, 9 and 80–4). The New Deal was a radical departure from the late-nineteenth century practice of the U.S. Supreme Court consequently invalidating social legislation as a violation of the constitutional right to property and freedom of contracts.

[29] "Part of the reason why racism flourished so mightily in this period is that it had no really effective opposition where one might have expected it, since it also flourished among the liberals," writes Gosset (1963, 174). John Stuart Mill in his treaty *On Liberty* wrote: "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties (. . .) Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage" (quoted in Kabasakal Arat 2006, 420). Although American liberals accepted racist theories chiefly because of their fear of immigration; in Europe, colonialism was what encouraged people to believe in the White man's superiority.

[30] In England, slave trade was banned in 1807; slavery in the British colonies was abolished in 1833. The 1884–1885 Berlin Conference, which decided Africa's division among the colonial powers, also passed a ban on the slave trade. Slavery itself was abolished in 1926 by the League of Nations Convention to Suppress the Slave Trade and Slavery (amended in 1953 and supplemented in 1956). Despite this, slavery still flourishes in a number of countries, particularly in Mauritania.

[31] See Hochschild (1998) and Hochschild (2005). See also Afshari (2007, 9–34), who claims that the abolitionists and other "single-cause" movements of the nineteenth century (e.g., women's rights, anti-imperialist, and labor movements) cannot be considered human rights movements.

conventions limiting the arbitrary application of force during armed conflicts.[32] The crisis of nineteenth-century empires led to growing concerns about the plight of minorities. Some of the great powers invoked a right to humanitarian intervention "to prevent the Ottoman Empire from persecuting minorities in the Middle East and the Balkans."[33] Minority rights were of great concern after World War I, when the multicultural Russian and Austro-Hungarian empires disintegrated into numerous new states with substantial minorities. At the Paris Peace Conference, the recognition of independent Poland, Czechoslovakia, and other states in Central Europe was made contingent on the guarantees of certain collective rights to the minorities.[34] The mechanism of protection through general constitutional provisions, peace treaties, and bilateral minority treaties[35] designed in Paris proved unsuccessful and gave way to the growth of nationalism and racism in authoritarian Germany, Italy, and a number of other countries in Central Europe.

Nevertheless, minority clauses in a number of peace treaties with Austria, Bulgaria, Hungary, and Turkey, as well as bilateral minority treaties, included provisions that concerned other groups as well. They assured protection of life and liberty to all inhabitants of the countries in question, as well as equal civil and political rights for all minority nationals in such countries. In 1922, when the states concerned protested that their sovereignty was being violated as other states were not subject to such limitations, the Assembly of the League of Nations adopted a resolution recommending that all other states voluntarily adopt similar standards with respect to their minorities. Even though no further steps were taken on the intergovernmental level, the provisions in minority clauses became the basis for proposals to codify human rights in international law.

HUMAN RIGHTS

First Proposals

Mass displacement of people after World War I and minority problems were exacerbated by the *pogroms* in Russia and the aftermath of the Bolshevik revolution. The national upheavals resulted in members of the White middle class and upper classes who had hitherto enjoyed privileges joining the traditional victims of

[32] This process had begun with the 1856 Paris Declaration, which set the rules of maritime warfare. Captured enemy soldiers and civilian populations were protected by a number of Geneva Conventions, signed in 1864, 1906, 1929, and 1949.

[33] Davidson (1993, 8).

[34] See Mazower (2004, 382).

[35] The first treaty to establish such protections was the treaty signed in Versailles on June 29, 1919 between the Principal Allied and Associated Powers and Poland.

abuse – the poor, the enslaved, and the excluded: "The fact that citizens, all citizens, had to be protected from the abusive instruments of the modern state would become increasingly clear between two wars, the period that helped to shape the vision of human rights in its current form."[36]

One such victim was Russian jurist Andre Mandelstam, head of the legal office of the Russian ministry of foreign affairs in 1917. After the Bolsheviks claimed power, Mandelstam escaped to Paris, where he taught international law. After 1926, he joined Antoine Frangulis, who had founded the International Diplomatic Academy.[37] In November 1928, the Academy adopted a resolution prepared by Mandelstam and Frangulis that generalized obligations contained in minority clauses in the form of a declaration of rights.[38] A year later, the International Law Institute in New York adopted a Declaration of the International Rights of Man drafted by Mandelstam, who admitted that the need for the recognition of human rights became manifest after "the horrors perpetrated under the government of the Soviet Union."[39] The Declaration was widely publicized in the 1930s by a number of nongovernmental organizations and academic institutions that called for the adoption of standards that would limit coercive powers of states and protect fundamental rights.[40] Protestant churches also called for the establishment of a peaceful global order centered around human rights.[41]

The awareness of the need for rights was hastened by the developments in Germany after Hitler's ascent to power in January 1933. The Nazis rejected the concept of the rule of law (the *Rechtstaat*) and sought to build a new legal order based on German traditions (*Volksseele*).[42] It was introduced in a sweeping wave of emergency decrees, based on powers given to Hitler by president Paul von Hindenburg and

[36] Afshari (2007, 39).

[37] In 1920–1922, Frangulis represented his native Greece at the League of Nations. He left Greece when the army under general Venizelos abolished monarchy. In the 1930s, Frangulis represented Haiti in the League of Nations. See Burgers (1992, 450–9).

[38] For other efforts by the individuals and nonstate institutions to generalize the protection of minorities in declarations of rights, see Simpson (2001, 151–6) and Clapham (2007, 26–9).

[39] Quoted in Burgess (2002, 24), who comments: "The use of forced labour and religious persecution were decisive for the emergence of this new *droit humain*, and a dramatic growth in support for the notion of 'universal human rights' while reinforcing the belief that state sovereignty was not absolute when it came to the respect of human rights" (ibid., 24).

[40] In the 1920s and 1930s, a number of NGOs were concerned with human rights. They included, among others, the Women's International League for Peace and Freedom, The Institute de Droit International, the Federation Internationale des Droits de l'Homme, the Ligue Pour la Defense des Droits de l'Homme, and the International Institute of Public Law.

[41] See Nurser (2003).

[42] The theory behind Nazi law was exemplified by the speeches of Hans Frank, who later became the governor of occupied Poland. Frank wanted law to "recognize the concept of 'racial comrade' (*Volksgenosse*)" (quoted in Schleunes 2002, 85). According to Schleunes, Frank rejected Roman law "because it elevated the individual person, the *civis Romanus*, to its center. In Roman law, he noted, the individual finds legitimization 'not as being part of a larger whole but in being the possessor of certain objectively assigned rights'" (ibid., 85).