Introduction to Volume IV

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> The eighteenth century, when the idea of human rights was born in Western Europe…

This common view, which still prevails in many studies, is contradicted by the very title of this volume, or more precisely by its number – the fourth. The three preceding volumes clearly demonstrate that "the idea of human rights" was not born in the eighteenth century.[1] The chapters collected in the present volume also highlight how eighteenth- and nineteenth-century authors drew on earlier arguments to elaborate their own rights theories. At the same time, the *belief* that human rights were born in the eighteenth century is so prevalent that it, too, forms part of their history. The opening quote is from P. C. Chang, delegate of the Republic of China (Taiwan) to the United Nations Commission on Human Rights, of which he was the vice chairman; he also served on the drafting committee for the 1948 Universal Declaration of Human Rights (UDHR).[2] The sense of a connection among the framers of the UDHR with the Enlightenment and revolutionary declarations of the eighteenth century influenced the final document in manifold ways.[3]

What are we to make of this assumed connection? According to some historians, not much at all.[4] From their perspective, the UDHR reflects social

1 For an influential account that does situate the "invention" of human rights in the eighteenth century, see L. Hunt, *Inventing Human Rights: A History* (New York, Norton, 2007).

2 J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 2010), p. 281; see also H. I. Roth, *P. C. Chang and the Universal Declaration of Human Rights* (Philadelphia, University of Pennsylvania Press, 2018).

3 This connection was also drawn repeatedly by the French representative, René Cassin (J. Winter and A. Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* [Cambridge, Cambridge University Press, 2013]).

4 See especially S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, Harvard University Press, 2010).

democratic ideals that were unknown to the *philosophes* or their revolutionary followers. The focus on socioeconomic rights, in particular, is often deemed original. But this assumption, too, has come under scrutiny. Far from being novel ideas, these rights were already understood in the eighteenth century as integral to the political project of building a rights-based society.[5] In this case, as well, it would be a stretch to say that the idea of public welfare or a right to education was an Enlightenment discovery. Most of the time, the *philosophes* and revolutionaries were building on older religious beliefs, such as charity. The role of the Catholic Church and other Protestant groups in the development of modern human rights doctrines continued well into the nineteenth and twentieth centuries.[6]

How are we, then, to think about the contributions of eighteenth- and nineteenth-century writers and politicians to the history of human rights? The most common argument is that they secularized human rights, freeing them from the theological framework from which they had emerged.[7] But this is a profoundly misguided claim. First, it neglects the extent to which theological arguments underpinned human rights well into the twentieth century. As Charles Beitz has pointed out, the secular vision enshrined in the UDHR is on shaky ground, epistemologically speaking. The "dignity and worth of the human person" is asserted, but hardly demonstrated; what is one to retort to those who would question it? Article 1 similarly affirms that "All human beings … are endowed with reason and conscience," relying on a passive voice that begs the question: by whom?[8] In reality, historians have shown that the metaphysical scaffolding supporting the UDHR was removed very late, and for pragmatic reasons above all. The drafters sought to exclude cultural references that might identify the Declaration with a particular tradition or religion. The UDHR may have been lifted off its theological pedestal, but its "secularization" was mostly cosmetic.[9]

A second reason to challenge the secularization narrative comes from the eighteenth century itself. The most fervent defenders of natural and human rights, among the Enlightenment *philosophes*, were Christians or Deists. But where seventeenth-century natural lawyers had "dared" to imagine

5 See S. L. B. Jensen and C. Walton (eds.), *Social Rights and the Politics of Obligation in History* (Cambridge, Cambridge University Press, 2022); and, in this volume, Chapter 3.
6 See Chapter 25 (including for bibliography) in this volume.
7 See M. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, University of California Press, 2004); J. Griffin, *On Human Rights* (Oxford, Oxford University Press, 2008).
8 C. R. Beitz, *The Idea of Human Rights* (Oxford, Oxford University Press, 2009).
9 See Morsink, *Universal Declaration of Human Rights*.

that natural laws and rights could exist even without a divine lawgiver (the famous *etiamsi daremus* argument of Hugo Grotius), their successors found it much simpler to reassert the metaphysical foundation of these categories. John Locke's system of natural rights depends on an "omnipotent, and infinitely wise maker," who "sent [us] into the world by his order, and about his business."[10] In our first chapter, David Singh Grewal demonstrates how Jean Barbeyrac – whose translations of Grotius and Pufendorf were the textbooks for eighteenth-century natural law students, and whose notes often introduced Locke's political thought to French readers – insisted contra earlier authors that even "permissible" actions were done in accordance with natural law, and thus, by extension, that every natural right was a direct gift from God. The emphasis on a divine authorization of rights was often *greater* in the eighteenth century than before.

So, what did the authors from this period add to the already lengthy history of rights? As the chapters contained in this volume illustrate, they adapted earlier arguments about rights for modern uses in a number of important ways. A first key contribution lay in the elaboration of economic theories. Rights had, of course, long been used to express economic claims. The Romans already understood *ius* both in terms of objective justice and individual possession (particularly in the context of a commercial partnership, or *societas*).[11] And it was over arguments about property that Franciscan theorists elaborated their own arguments about subjective rights.[12] But the eighteenth century witnessed the rise of economics as a social *science*. Again, this science was rarely divorced from theology, as is manifestly evident in the case of the Physiocrats (who were simply known at the time as *les économistes*). Martti Koskenniemi (Chapter 2) underscores the centrality of property, not only to their economic theory, but to their general theory of rights, which provided much of the philosophical armature for the Declaration of the Rights of Man and of the Citizen. As part of their free-market ideology, Glauco Schettini and Charles Walton (Chapter 3) remind us, the Physiocrats also devised a correlative set of social rights for the indigent. Here, as well, the theological impetus for charity was replaced by a justification that was no less metaphysical.

10 J. Locke, *Second Treatise*, in *Two Treatises of Government*, ed. P. Laslett (Cambridge, Cambridge University Press, 1988), §6.
11 See Volume I in this series.
12 See M. Villey, "La genèse du droit subjectif chez Guillaume d'Occam," *Archives de philosophie du droit* 9 (1964), 97–127; B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Atlanta, Scholars Press, 1997).

Enlightenment *philosophes* offered a second set of contributions to the modern adaptation of rights discourses. Seventeenth-century natural lawyers and philosophers had reframed the Roman *lex regia* in terms of a social contract, thereby justifying the alienation of political or civil rights. But as Céline Spector (Chapter 4) shows, eighteenth-century writers, often drawing on Locke's *Second Treatise*, rejected this logic as illegitimate, and affirmed the inalienability of liberty, often as both a political and civil status. In asserting liberty in this way, Richard Bourke (Chapter 5) argues, Enlightenment political authors generally evaded any neat distinction between liberal and republican traditions. They tended to accept Montesquieu's claim that rights could be secured by a variety of constitutional forms, with different degrees of popular participation.

Where enslaved people were concerned, by contrast, rights and liberty did not always go hand in hand, as Christopher Leslie Brown argues in Chapter 6. Spanish and French imperial law afforded certain rights to the enslaved, while obviously denying them liberty. Conversely, the Haitian government declared the liberty of its citizens (in 1804), but did not translate that liberty into individual rights. Still, by the late eighteenth century, there was a growing sense on both sides of the Atlantic that a legitimate government must *constitutionalize* rights. This effort to incorporate Enlightenment ideas about rights into constitutional theories was spearheaded by Italian lawyers and philosophers, such as Cesare Beccaria and Gaetano Filangieri, who sought to fashion a "science of legislation," as Vincenzo Ferrone details in Chapter 7.

American revolutionaries soon confronted the practical challenges of making rights judiciable, as analyzed by Jud Campbell (Chapter 8). While confusingly describing different types of rights as "natural," the Americans ultimately considered some rights as genuinely inalienable ("Congress shall make no law…"); others as derived from nature, but regulated by law (e.g. self-defense); and finally rights that only emerged with political society itself (e.g. trial by jury). Most of these rights would be proclaimed in an official declaration or bill of rights, a new "genre" (in David Armitage's terms) that became emblematic over the coming decades.[13] As Jeremy Popkin (Chapter 9) highlights, declarations publicly affirmed the rights of some, while quietly denying those of others. At the same time, the universalist language of this genre allowed for marginalized groups to lay claim to its promises, as well.

13 D. Armitage, *Declaration of Independence: A Global History* (Cambridge, MA, Harvard University Press, 2007).

Demands on behalf of women and enslaved people were often linked, as Karen Offen demonstrates in Chapter 10, but equally scorned. If the French, in 1794, granted equal rights to "all men, regardless of color," it was not in response to the philosophical weight of these arguments, but rather to the contingency of a slave rebellion in Saint-Domingue (soon to be renamed Haiti). Subsequent revolutionary upheavals revived rights claims for minorities, with France re-abolishing slavery in 1848, but legislative change eluded French women until 1944 (compared to 1920, in the USA). Still, it was these revolutionary declarations, and none more than the 1789 *Déclaration des droits de l'homme et du citoyen*, that gave rights their signature, modern expression. As Adam Lebovitz (Chapter 11) shows, the canonic status of the 1789 declaration was due not only to its text, but to the many visual representations of it in political culture. These representations rendered it literally iconic, while also shaping its meaning: The Declaration was portrayed as applicable to all peoples, throughout the world, but also as a lethal instrument that could destroy any who opposed it.

In contrast to the broadly European character of prerevolutionary rights discourse, in the wake of the French Revolution we find something of a divergence of national traditions. Both the centrality of property to rights theory and the philosophical grounding of rights in the value of freedom were taken up and developed by the most influential postrevolutionary philosophical rights tradition – the German tradition traced by Frederick Neuhouser (Chapter 14) through the work of Kant, Fichte, and Hegel. These thinkers thus took up Rousseau's insistence on the inalienability of liberty: his conviction that "to renounce one's freedom is to renounce one's quality as man, the rights of humanity, and even its duties."[14] They likewise insisted on the intersubjective nature of rights, arguing that freedom can only be realized in common with others and so must be mediated by a properly constituted state. Yet whereas property rights lay, conceptually, at the origin of this tradition and remained central to Kant's account of rights as protecting freedom from outside interference, in the hands of his successors the theory increasingly moved away from a defense of classical property rights. In developing more expansive conceptions of freedom as the development of individual personhood grounded in intersubjective recognition, Fichte and then Hegel laid the basis for Marx's critique of bourgeois rights.

In contrast, British thinkers across the political spectrum turned against natural rights less on philosophical grounds, Gregory Conti (Chapter 12)

14 Jean-Jacques Rousseau, *Du contrat social*, in *Œuvres complètes*, ed. Bernard Gagnebin et al. (Paris: Pléiade/Gallimard, 1964), 1.4, 3:356.

shows, than out of concern that the politics of rights threatened social stability. Bentham and Burke's earlier criticisms of rights as politically disastrous became talismanic, and Burke's philosophical acceptance of natural rights was largely forgotten by his self-designated conservative heirs. British liberals considered natural rights theories a simplistic abdication of the difficult moral and political work of balancing contending interests. Their French counterparts, meanwhile, continued to champion similar policies – freedom of speech and the right to vote – with the language of natural rights rooted in the national revolutionary tradition. *Les droits de l'homme* morphed into a "civil religion," Valentine Zuber argues in Chapter 13, with even authoritarian rulers (such as Napoleon III) professing their attachment to the "Principles of '89." At the end of the nineteenth century, the historian Albert Mathiez drew on emerging sociological concepts developed by Émile Durkheim and Marcel Mauss to reflect on the religious nature of this national attachment to rights.

Even in France, however, the strong ties that Enlightenment theorists and political actors had wrought between property and civil or political rights were unraveled in the nineteenth century. In the Napoleonic bargain, the state defended property and limited civil rights; in exchange for this narrow sphere of freedom, the people were to relinquish most political rights. David Todd (Chapter 16) explains how under the liberal regimes of France's July Monarchy (and Georgian England before it), economic rights were largely limited to wealthy men and could be short-lived, since governments frequently reinterpreted and infringed on these rights in the name of national prosperity. In their relations with non-European states, Western powers interpreted "free trade" to their advantage, imposing unequal treaties, especially in Asia. Colonized peoples generally saw their property rights vanish into thin air.

If liberals were imperfect defenders of rights, socialists turned overtly hostile, as Gareth Stedman Jones details in Chapter 15. Rights enjoyed a brief heyday with the Chartist movement but were notoriously absent in the work of early French socialists such as Henri Saint-Simon. With Pierre-Joseph Proudhon's 1840 *What Is Property?*, socialist authors took direct aim at rights, now seen as the defensive ramparts of bourgeois ideology. Karl Marx denounced rights as an obstacle to genuine human emancipation; accordingly, when he and Engels published the *Communist Manifesto* in 1848, they made no mention of rights.

While other revolutionaries, in 1848, were keener on defining and obtaining rights, Mike Rapport shows how rights played a surprisingly minor role in most European uprisings that year (Chapter 17). Where eighteenth-century

jurists and political theorists had sought to ground constitutions in universal human rights, the political actors of 1848 flipped the script, grounding rights in national constitutions. The reason for their demotion had to do with the nationalist context of 1848: collective emancipation and cultural preservation took priority over the "thinner" assertions of individual, constitutional rights.

Rather than a triumphant march toward increasing liberalism, the mid-nineteenth century thus witnessed a global *retreat* away from strong proclamations of universal rights. This retreat was particularly evident in settler colonies where, as Saliha Belmessous (Chapter 24) demonstrates, imperial powers that began by formally recognizing Indigenous land rights and other collective rights in treaties moved away from such nation-to-nation treaty commitments toward the treatment of Indigenous people as subjects with individualized and generally unequal rights. Individual rights provisions thus served as a means for undermining Indigenous autonomy, and rights for Indigenous subjects were justified in hierarchical terms, as forms of imperial protection.

In contrast to the universalist and formally egalitarian cast of so many philosophical treatments of rights, that is, the politics of rights in the nineteenth century were often avowedly inequitable and asymmetric. The diverse claimants of rights across national and imperial political spaces in the nineteenth century by no means necessarily committed themselves to equal or universal rights, and the politics of rights not only constrained but also bolstered the power and authority of states as well as those of dominant groups including slaveholders. Rights served as versatile mechanisms of governance: states used the management of differentiated rights regimes to entrench their authority inside their territories of formal control and to reach beyond them. The British, Spanish, and Russian empires, as Lauren Benton and Jane Burbank (Chapter 18) show, held out the promise of improved or degraded packages of rights in order to discipline subjects, while subjects in turn made use of imperial frameworks to seek better rights for themselves and to enhance their authority over others, particularly their rights to control others' labor.

Indeed, the denial of rights to subordinated groups – enslaved persons and free people of color, Indigenous communities, and women – was not incidental to the invocation of rights, often in universalist language, by some of their most vocal claimants. The rebellious male colonists of both the Spanish and British empires often spoke of their rights in exclusive terms. They claimed that their own rights stemmed from their particular colonial histories, as

Joshua Simon (Chapter 20) notes: they were a "sort of feudal property," as Simón Bolívar put it, or had been "purchased" by the blood and toil of the British colonists. Simon contests the argument of prior historians that rights claims by colonial leaders across the Americas evolved from particularist claims rooted in historic privilege to universalist claims rooted in divine or natural law when they found historical grounds too limited to support their ambitions. Rather, universalist articulations persisted alongside particular and limited rights claims throughout the independence movements of the eighteenth and nineteenth centuries: indeed, the tensions between these were inscribed into their constitutional documents.

When enslaved people, Indigenous communities, peasant insurgents, and women, excluded from the rights asserted by independence leaders, laid claim to rights on grounds of both universal morality and historical precedent, they were innovating new conceptions of rights from their experiences of oppression: not merely extending prior rights claims to their logical conclusion nor responding principally to theoretical lacunae in earlier formulations. Existing philosophical and legal formulations could be remade to new purposes, as Amy Dru Stanley shows in her account of an innovative abolitionist "oceanic idea of human rights" that drew on but radically repurposed the centuries-old commercial theory of the free sea (see Chapter 21). As Frederick Douglass argued in 1849, the slaves in an insurrection on board a vessel plying the American coastwise slave trade had been able to achieve their freedom on board the ship because the "bloody statutes of Slavery… cannot be written on the proud, towering billows of the Atlantic."[15]

While abolitionists militated for emancipation and the basic rights that derived from a free status, there was also a broader push for full civil and political rights for freed people and their descendants that proved more challenging. Though we were unfortunately unable to include a chapter on this topic, in the United States and the slave societies of the Caribbean, the rights of free people of color were unprotected even when they existed in law.[16] In the antebellum USA, Black Americans developed historical and legal arguments for their equal rights under the Constitution and US law that laid the groundwork for the Fourteenth Amendment. Rights were made, as

15 F. Douglass, "Great Anti-Colonization Meeting in New York," *North Star*, May 11, 1849.
16 T. Holt, *The Problem of Freedom: Race, Labor, and Politics in Jamaica and Britain, 1832–1938* (Baltimore, Johns Hopkins University Press, 1992); C. Hall, *Civilising Subjects: Colony and Metropole in the English Imagination, 1830–1867* (Chicago, University of Chicago Press, 2002); M. J. Smith, *Liberty, Fraternity, Exile: Haiti and Jamaica After Emancipation* (Chapel Hill, University of North Carolina Press, 2014).

Martha Jones has argued, not only by legislatures and judges but by African Americans exercising them: "carr[ying] themselves like rights-bearing citizens," particularly in local courthouses.[17] A key work for these efforts, Jones shows, was William Yates's 1838 treatise *Rights of Colored Men to Suffrage, Citizenship, and Trial by Jury*, which grounded the rights of free people of color in their claim to citizenship as recognized by US laws – sometimes even unwittingly, as in laws specifying white citizens, a specification that would be unnecessary, Yates noted, if citizenship was restricted to whites. Yates, a white antislavery activist, described the campaign for equal civil and political rights for free African Americans as a battle for "human rights" against racial prejudice.[18] After the 1850 Fugitive Slave Law threatened the legal standing of free Blacks throughout the USA, some abolitionists, while vowing to carry on the fight for rights in the USA, concluded that only emigration to Africa and political independence could secure their rights. As Martin Delany wrote, "even were it possible, with the present hate and jealousy that the whites have towards us in this country, for us to gain equality of rights with them; we never could have an equality of the exercise and enjoyment of those rights – because, the great odds of numbers are against us.[19] The increasing racialization of rights and responses to it are a crucial part of the nineteenth-century history of rights, as several chapters in the volume attest.

The aspiration to seek "the dignity of manhood, the rights of citizenship, and all the advantages of civilization and freedom" in separate republics such as Liberia foundered on the subordination of racialized states in the international order.[20] The early mobilizers of the Pan-Islamic, Pan-Asian,

17 M. S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge, Cambridge University Press, 2018), p. 13.

18 Prejudice against color… is the battle ground between the friends and foes of human rights in a contest for equal laws. Every legal disability – the exclusion of colored men from militia service, from naturalization, or the basis of representation; denying them the rights of citizenship or suffrage, or the benefit of the public schools; and rendering them incompetent to hold real estate, or to give testimony in court; wherever these exist, they are monuments of the force of prejudice.
W. Yates, *Rights of Colored Men to Suffrage, Citizenship, and Trial by Jury* (Philadelphia, Merrihew & Gunn, 1838), pp. 72, iv

19 M. Delany, *The Condition, Elevation, Emigration and Destiny of the Colored People of the United States, Politically Considered* (Philadelphia, 1852), p. 202; on individual and collective rights in Delany's thought, see T. Shelby, "Two Conceptions of Black Nationalism: Martin Delany on the Meaning of Black Political Solidarity," *Political Theory* 31/5 (2003), 664–92.

20 M. Delany, *Official Report of the Niger Valley Exploring Party* (London, Thomas Hamilton, 1861), p. 12.

and Pan-African movements countered the increasingly racialized forms of European imperialism with affirmations of racial and civilizational equality and demands for the recognition of their rights both individual and collective. The pan-nationalist movements were varied and often flexible in their institutional commitments, as Cemil Aydin shows in Chapter 23: their arguments for civilizational equality grounded claims for individual and communal rights within empires as well as for the recognition of the sovereign equality of non-European states and eventually equal rights in international organizations.

Meanwhile, such theoretically universal rights, particularly to self-ownership, fueled the extension of European power in the name of humanitarian values, although colonial officials were in practice slow to take action against practices of enslavement. An interplay between universal "rights of man" and particular rights of citizenship shaped relations between the European imperial states and the states and people of West Africa over the course of the nineteenth century. In both British and French colonial practice, Bronwen Everill argues (Chapter 22), a paternalist distinction emerged between "basic" universal rights available to all, limited in practice to freedom from slavery, and "civilized" citizenship rights, whose conferral was endlessly deferred on the grounds that colonial subjects had to be cultivated before being entrusted with them.

As European empires spread, they encountered other traditions of rights. Both the rights of "man" and of "citizen" had precedent in West African law and practice, as Everill notes, in such institutions as the landlord–stranger relationship, which structured the civil rights and obligations of outsiders and gave them limited forms of representation in many West African polities. Revolutionary Muslim regimes in nineteenth-century West Africa also founded new states based on universalist visions of Islamic law. These regimes, like European imperial states, exercised power beyond areas of their formal control in the name of moral and humanitarian obligations.

Islamic juridical traditions also supplied conceptual resources for criticism of the state. Mughal scholars and jurists, as Hasan Zahid Siddiqui argues in Chapter 19, developed the concept of "the rights of subjects over the kingdom" (ḥuqūq-i raʿayya bar salṭanat) from Islamic political traditions as a normative language to evaluate sultanic authority. Nineteenth-century political thinkers such as Rammohun Roy in India and Hamdan Khodja in Algeria drew on Hindu and Muslim conceptual repertoires of social, religious, and political entitlements, integrating them with Western discourse to argue in universalist and hybridized terms for the rights of the subjects of the