

Reading #1

Burns H. Weston, *Human Rights: Concept and Content*

I. BURNS H. WESTON, *Human Rights: Concept and Content*

It is a common observation that human beings everywhere demand the realization of diverse values or capabilities to ensure their individual and collective well-being. It also is a common observation that this demand is often painfully frustrated by social as well as natural forces, resulting in exploitation, oppression, persecution, and other forms of deprivation. Deeply rooted in these twin observations are the beginnings of what today are called "human rights" and the national and international legal processes that are associated with them.

HISTORICAL DEVELOPMENT

The expression "human rights" is relatively new, having come into everyday parlance only since World War II, the founding of the United Nations in 1945, and the adoption by the UN General Assembly of the Universal Declaration of Human Rights in 1948.¹ It replaced the phrase "natural rights," which fell into disfavour in part because the concept of natural law (to which it was intimately linked) had become a matter of great controversy; and it replaced as well the later phrase "the rights of Man," which was not universally understood to include the rights of women.

ORIGINS IN ANCIENT GREECE AND ROME

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

In part because Stoicism played a key role in

its formation and spread, Roman law similarly allowed for the existence of a natural law and with it—pursuant to the *jus gentium* ("law of nations")—certain universal rights that extended beyond the rights of citizenship. According to the Roman jurist Ulpian, for example, natural law was that which nature, not the state, assures to all human beings, Roman citizens or not.

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

For the idea of human rights qua natural rights to gain general recognition, therefore, certain basic societal changes were necessary, changes of the sort that took place gradually, beginning with the decline of European feudalism from about the thirteenth century and continuing through the Renaissance to the Peace of Westphalia (1648). During this period, resistance to religious intolerance and political and economic bondage; the evident failure of rulers to meet their obligations under natural law; and the unprecedented commitment to individual expression and worldly experience that was characteristic of the Renaissance all combined to shift the conception of natural law from *duties* to *rights*. The teachings of Aquinas and Hugo Grotius on the European continent, and the Magna Carta (1215), the Petition of Right of 1628, and the English Bill of Rights (1689) in England, were proof of this change. Each testified to the increasingly popular view that human beings are endowed with certain eternal and inalienable rights that never were renounced when humankind "contracted" to enter the social from the primitive state and never diminished by the claim of the "divine right of kings."

¹ Reprinted with changes from Burns H. Weston, "Human Rights," in *Encyclopædia Britannica*, 15th rev. ed. (2005), available from *Encyclopædia Britannica Online* at <http://www.britannica.com/eb/article?tid=119350>. Copyright © 2005 Encyclopædia Britannica, Inc. Reprinted by permission.

² Adopted Dec. 10, 1948, reprinted and referenced in Documentary Appendix A.

NATURAL LAW TRANSFORMED INTO NATURAL RIGHTS

The modern conception of natural law as meaning or implying natural rights was elaborated primarily by thinkers of the seventeenth and eighteenth centuries. The intellectual—and especially the scientific—achievements of the seventeenth century (including the materialism of Hobbes, the rationalism of Descartes and Leibniz, the pantheism of Spinoza, and the empiricism of Bacon and Locke) encouraged a belief in natural law and universal order; and during the eighteenth century, the so-called Age of Enlightenment, a growing confidence in human reason and in the perfectibility of human affairs led to the more comprehensive expression of this belief. Particularly important were the writings of John Locke, arguably the most important natural-law theorist of modern times, and the works of the eighteenth-century philosophes centred mainly in Paris, including Montesquieu, Voltaire, and Jean-Jacques Rousseau. Locke argued in detail, mainly in writings associated with the English Revolution of 1688 (the "Glorious Revolution"), that certain rights self-evidently pertain to individuals as human beings (because these rights existed in "the state of nature" before humankind entered civil society); that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property; that, upon entering civil society, humankind surrendered to the state—pursuant to a "social contract"—only the right to enforce these natural rights and not the rights themselves; and that the state's failure to secure these rights gives rise to a right to responsible, popular revolution. The philosophers, building on Locke and others and embracing many and varied currents of thought with a common supreme faith in reason, vigorously attacked religious and scientific dogmatism, intolerance, censorship, and social and economic restraints. They sought to discover and act upon universally valid principles governing nature, humanity, and society, including the inalienable "rights of Man," which they treated as a fundamental ethical and social gospel.

Not surprisingly, this liberal intellectual ferment exerted a profound influence in the Western world of the late eighteenth and early nineteenth centuries. Together with the Revolution of 1688 in England and the resulting Bill of Rights, it provided the rationale for the wave of revolutionary agitation that swept the West, most

notably in North America and France. Thomas Jefferson, who had studied Locke and Montesquieu, gave poetic eloquence to the plain prose of the seventeenth century in the Declaration of Independence, proclaimed by the 13 American colonies on July 4, 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." Similarly, the marquis de Lafayette, who won the close friendship of George Washington and who shared the hardships of the U.S. War of Independence, imitated the pronouncements of the English and American revolutions in the Declaration of the Rights of Man and of the Citizen of August 26, 1789, proclaiming that "men are born and remain free and equal in rights" and that "the aim of every political association is the preservation of the natural and imprescriptible rights of man."

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

"NONSENSE UPON STILTS": THE CRITICS OF NATURAL RIGHTS

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

In England, for example, conservative political thinkers such as Edmund Burke and David Hume united with liberals such as Jeremy Bentham to condemn the doctrine, the former out of fear that public affirmation of natural rights would lead to social upheaval, the latter out of concern lest declarations and proclamations of natural rights substitute for effective legislation. In his *Reflections on the Revolution in France* (1790),

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Burke—a believer in natural law who nonethe-less denied that the "rights of Man" could be derived from it—criticized the drafters of the Declaration of the Rights of Man and of the Citizen for proclaiming the "monstrous fiction" of human equality, which, he argued, serves but to inspire "false ideas and vain expectations in men destined to travel in the obscure walk of laborious life." Bentham, one of the founders of Utilitarianism, was no less scornful. "Rights," he wrote, "is the child of law; from real law come real rights; but from imaginary laws, from 'law of nature,' come imaginary rights. . . . Natural rights is simple nonsense; natural and imprescriptible rights (an American phrase) . . . [is] rhetorical nonsense, nonsense upon stilts." Agreeing with Bentham, Hume insisted that nat-ural law and natural rights are unreal meta-physical phenomena.

This assault upon natural law and natural rights intensified and broadened during the nineteenth and early twentieth centuries. John Stuart Mill, despite his vigorous defense of liberty, proclaimed that rights ultimately are founded on utility. The German jurist Friedrich Karl von Savigny, England's Sir Henry Maine, and other "historicalist" legal thinkers emphasized that rights are a function of cultural and environmen-tal variables unique to particular communities. The English jurist John Austin argued that the only law is "the command of the sovereign" (a phrase of Hobbes). And the logical positivists of the early twentieth century insisted that the only truth is that which can be established by verifi-fiable experience and that therefore ethical pro-nouncements are not cognitively significant. By World War I, there were scarcely any theorists who would defend the "rights of Man" along the lines of natural law. Indeed, under the influence of nineteenth-century German Idealism and par-allel expressions of rising European nationalism, there were some—the Marxists, for example—who, though not rejecting individual rights alto-gether, maintained that rights, from whatever source derived, belong to communities or whole peoples and nations preeminently.

THE PERSISTENCE OF THE NOTION

Although the heyday of natural rights proved short, the idea of rights nonetheless endured. The

abolition of slavery, the implementation of factory legislation, the rise of popular education and trade unionism, the universal suffrage move-ment—these and other examples of nineteenth-century reformist impulses afford ample evidence that the idea was not to be extinguished, even if its a priori derivation had become a matter of general skepticism. But it was not until the rise and fall of Nazi Germany that the idea of human rights truly came into its own. Many of the gruesome atrocities committed by the Nazi regime had been officially authorized by Nazi laws and decrees, and this fact convinced many that law and morality cannot be grounded in any purely Idealist or Utilitarian or other conse-quentialist doctrine. Certain actions, according to this view, are absolutely wrong, no matter what the circumstances; human beings are enti-tled to simple respect, at least.

Today, the vast majority of legal scholars and philosophers—particularly in the liberal West—agree that every human being has, at least in theory, some basic rights. Indeed, except for some essentially isolated late nineteenth-century and early twentieth-century demonstrations of in-ternational humanitarian concern to be noted below, the last half of the twentieth century may fairly be said to mark the birth of the inter-national as well as the universal recognition of human rights. In the charter establishing the United Nations, for example, all member states pledged themselves to take joint and separate action for the achievement of "universal respect for, and observance of, human rights and fun-damental freedoms for all without distinction as to race, sex, language, or religion." In the Uni-versal Declaration of Human Rights, representa-tives from many cultures endorsed the rights therein set forth "as a common standard of achievement for all peoples and all nations." And in 1976, the International Covenant on Eco-nomic, Social and Cultural Rights and the Inter-national Covenant on Civil and Political Rights, each approved by the UN General Assembly in 1966, entered into force and effect.²

DEFINING HUMAN RIGHTS

To say that there is widespread acceptance of the principle of human rights is not to say that there is complete agreement about the nature

² Text of these documents is reprinted and referenced in Documentary Appendix A.

and scope of such rights—which is to say, their definition. Among the basic questions that have yet to receive conclusive answers are the following: whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, culture, custom, social contract, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; and whether they are to be broad or limited in number and content.

THE NATURE OF HUMAN RIGHTS: COMMONLY ACCEPTED POSTULATES

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

First, regardless of their ultimate origin or justification, human rights are understood to represent both individual and group demands for political power, wealth, enlightenment, and other cherished values or capabilities, the most fundamental of which is respect and its constituent elements of reciprocal tolerance and mutual forbearance in the pursuit of all other such values or capabilities. Consequently, human rights imply both claims against persons and institutions impeding the realization of these values or capabilities, and standards for judging the legitimacy of laws and traditions. At bottom, human rights qualify state sovereignty and power, sometimes expanding the latter even while circumscribing the former (as in the case of certain economic and social rights, for example; see *Égalité* below).

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

Third, reflecting varying environmental circumstances, differing worldviews, and incapable interdependencies within and between different value or capability systems, human rights refer to a wide continuum of claims,

ranging from the most justiciable to the most aspirational. Human rights partake of both the legal and the moral orders, sometimes indistinguishably. They are expressive of both the “is” and the “ought” in human affairs.

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

Finally, if a right is determined to be a human right, it is understood to be quintessentially general or universal in character, in some sense equally possessed by all human beings everywhere, including in certain instances even the unborn. In stark contrast to the divine right of kings and other such conceptions of privilege, human rights extend in theory to every person on Earth, without discriminations irrelevant to merit or need, simply for being human.

In several critical respects, however, all these postulates raise more questions than they answer. Granted that human rights qualify state power, do they also qualify private power? If so, when and how? What does it mean to say that a right is fundamental, and according to what standards of importance or urgency is it so judged? What is the value of embracing nonjusticiable rights as part of the jurisprudence of human rights? Does it harbor more than rhetorical significance? If so, how? When and according to what criteria does the right of one person or group of people give way to the right of another? What happens when individual and group rights collide? How are universal human rights determined? Are they a function of culture or ideology, or are they determined according to some transnational consensus of merit or value? If the latter, is the consensus regional or global? How exactly would such a consensus be ascertained, and how would it be reconciled with the right of nations and peoples to self-determination? Is the existence of universal human rights incompatible with the notion of national sovereignty? Should supranational norms, institutions, and procedures have the power to nullify local, regional, and national laws

on capital punishment, corporal punishment of children, "honor killing," veil wearing, female genital cutting, male circumcision, the claimed right to bear arms, and other practices? How would such a situation comport with Western conceptions of democracy and representative government?

In other words, though accurate, the five foregoing postulates are fraught with questions about the content and legitimate scope of human rights and about the priorities, if any, that exist among them. Like the issue of the origin and justification of human rights, all five are controversial.

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

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

Particularly helpful in this regard is the notion of three "generations" of human rights advanced by the French jurist Karel Vasak. Inspired by the three themes of the French Revolution, they are: the first generation of civil and political rights (*liberté*); the second generation of economic, social, and cultural rights (*égalité*); and the third generation of solidarity rights (*fraternité*). Vasak's model is, of course, a simplified expression of an extremely complex historical record, and is not intended to suggest a linear process in which each generation gives birth to the next and then dies away. Nor is it to imply that one generation is more important than another. The three generations are understood to be cumulative, overlapping, and, it is important to note, interdependent and interpenetrating.

Liberté: Civil and Political Rights

The first generation of civil and political rights derives primarily from the seventeenth- and eighteenth-century reformist theories noted above (i.e., those associated with the English, American, and French revolutions). Infused with the political philosophy of liberal individualism and the related economic and social doctrine of

laissez-faire, the first generation conceives of human rights more in negative terms ("freedoms from") than positive ones ("rights to"); it favors the abstention over the intervention of government in the quest for human dignity. Belonging to this first generation, thus, are rights such as those set forth in Articles 2–21 of the Universal Declaration of Human Rights, including freedom from gender, racial, and equivalent forms of discrimination; the right to life, liberty, and security of the person; freedom from slavery or involuntary servitude; freedom from torture and from cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; the right to a fair and public trial; freedom from interference in privacy and correspondence; freedom of movement and residence; the right to asylum from persecution; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of peaceful assembly and association; and the right to participate in government, directly or through free elections. Also included are the right to own property and the right not to be deprived of it arbitrarily—rights that were fundamental to the interests fought for in the American and French revolutions and to the rise of capitalism.

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

Égalité: Economic, Social, and Cultural Rights

The second generation of economic, social, and cultural rights originated primarily in the socialist tradition, which was foreshadowed among

adherents of the Saint-Simonian movement of early nineteenth-century France and variously promoted by revolutionary struggles and welfare movements that have taken place since. In large part, it is a response to the abuses of capitalist development and its underlying and essentially uncritical conception of individual liberty, which tolerated, and even legitimized, the exploitation of working classes and colonial peoples. Historically, it is a counterpoint to the first generation of civil and political rights, conceiving of human rights more in positive terms ("rights to") than in negative ones ("freedoms from") and requiring more the intervention than the abstention of the state for the purpose of assuring the equitable production and distribution of the values or capabilities involved. Illustrative are some of the rights set forth in Articles 22-27 of the Universal Declaration of Human Rights, such as the right to social security; the right to work and to protection against unemployment; the right to rest and leisure, including periodic holidays with pay; the right to a standard of living adequate for the health and well-being of self and family; the right to education; and the right to the protection of one's scientific, literary, and artistic production.

But in the same way that all the rights embraced by the first generation of civil and political rights cannot properly be designated "negative rights," so all the rights embraced by the second generation of economic, social, and cultural rights cannot properly be labeled "positive rights." For example, the right to free choice of employment, the right to form and to join trade unions, and the right to participate freely in the cultural life of the community (Articles 23 and 27) do not inherently require affirmative state action to ensure their enjoyment. Nevertheless, most of the second-generation rights do necessitate state intervention because they subsume demands more for material than for intangible goods according to some criterion of distributive justice. Second-generation rights are, fundamentally, claims to social equality. However, partly because of the comparatively late arrival of socialist-communist and compatible "Third World" influence in international affairs, the internationalization of these rights has been relatively slow in coming, and with free-market capitalism in ascendancy under the banner of globalization at the turn of the twenty-first century, it is not likely that these rights will come of age any time soon. On the other hand, as the social inequities

created by unregulated national and transnational capitalism become more and more evident over time and are not accounted for by explanations based on gender or race, it is probable that the demand for second-generation rights will grow and mature, and in some instances even lead to violence. This tendency is apparent already in the evolving European Union and in wider efforts to regulate intergovernmental financial institutions and transnational corporations to protect the public interest.

Fraternité: Solidarity Rights

Finally, the third generation of solidarity rights, while drawing upon and reconceptualizing the demands associated with the first two generations of rights, is best understood as a product of both the rise and the decline of the nation-state in the last half of the twentieth century. Fore-shadowed in Article 28 of the Universal Declaration of Human Rights, which proclaims that "everyone is entitled to a social and international order in which the rights set forth in this declaration can be fully realized," this generation appears so far to embrace six claimed rights. Three of these rights reflect the emergence of Third World nationalism and its "revolution of rising expectations" (i.e., its demand for a global redistribution of power, wealth, and other important values or capabilities): the right to political, economic, social, and cultural self-determination; the right to economic and social development; and the right to participate in and benefit from "the common heritage of mankind" (shared Earth and space resources, scientific, technical, and other information and progress, and cultural traditions, sites, and monuments). The other three third-generation rights—the right to peace, the right to a healthy and sustainable environment, and the right to humanitarian disaster relief—suggest the impotence or inefficiency of the nation-state in certain critical respects.

All six of these rights tend to be posed as collective rights, requiring the concerted efforts of all social forces, to a substantial degree on a planetary scale. However, each of them also manifests an individual dimension. For example, while it may be said to be the collective right of all countries and peoples (especially developing countries and non-self-governing peoples) to secure a "new international economic order" that would eliminate obstacles to their economic and

social development, so also may it be said to be the individual right of every person to benefit from a developmental policy that is based on the satisfaction of material and nonmaterial human needs. It is important to note too that the majority of these solidarity rights are more aspirational than justiciable in character, and that their status as international human rights norms remains ambiguous.

Thus, at various stages of modern history, the content of human rights has been broadly defined not with any expectation that the rights associated with one generation would or should become outdated upon the ascendancy of another, but expansively or supplementally. The history of the content of human rights reflects evolving perceptions of which values or capabilities stand, at different times, most in need of responsible attention and, simultaneously, humankind's recurring demands for continuity and stability.

LEGITIMACY AND PRIORITY: LIBERTÉ VERSUS ÉGALITÉ

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

First-generation proponents, for example, are inclined to exclude second- and third-generation rights from their definition of human rights altogether or, at best, to regard them as "derivative." In part this is because of the complexities involved in putting these rights into operation. The suggestion that first-generation rights are more feasible because they stress the absence over the presence of government is somehow transformed into a prerequisite of a comprehensive definition of human rights, such that aspirational claims to entitlement are deemed not to be rights at all. The most compelling explanation, however, has more to do with ideology or politics. Persuaded that egalitarian claims against the rich, particularly where collectively espoused, are unworkable without a severe decline in liberty and equality, first-generation proponents, inspired by the natural law and laissez-faire traditions, are partial to the view that human rights

are inherently independent of organized society and are individualistic.

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

This liberty-equity and individualist-collectivist debate was especially evident during the period of the Cold War, reflecting the extreme tensions that then existed between Liberal and Marxist conceptions of sovereign public order. Although Western social democrats during this period, particularly in Scandinavia, occupied a position midway between the two sides, pursuing both liberty and equity—in many respects successfully—it remains true that the different conceptions of rights contain the potential for challenging the legitimacy and supremacy not only of one another, but, more importantly, of the sociopolitical systems with which they are most intimately associated.

THE RELEVANCE OF CUSTOM AND TRADITION

With the end of the Cold War, however, the debate took on a more North-South character and was supplemented by a cultural-relativist critique that eschews the universality of human rights doctrines, principles, and rules on the grounds that they were Western in origin and therefore of limited relevance in non-Western settings. The viewpoint underlying this assertion—that the scope of human rights in any given society is fundamentally determined by local, national, or regional customs and traditions—may seem problematic, especially when one considers that the idea of human rights and many of its precepts are found in all the great philosophical and religious traditions. Nevertheless, the historical development of human rights demonstrates that it cannot be wholly mistaken. Nor is it surprising that it should emerge soon after the end of the Cold War. First prominently

expressed at an Asian preparatory meeting to the second UN World Conference on Human Rights convened in Vienna in June 1993, it reflects the end of a bipolar system of alliances that had discouraged independent foreign policies and minimized cultural and political differences in favour of undivided Cold War loyalties. Against the backdrop of increasing human rights interventionism on the part of the UN and by regional organizations and deputized coalitions of states (as in Bosnia and Herzegovina, Somalia, Liberia, Rwanda, Haiti, and Serbia, including Kosovo, for example), the viewpoint serves as well as a functional equivalent of the doctrine of respect for national sovereignty and territorial integrity, which had been declining in influence not only in the human rights context but as well in the contexts of national security, economics, and the environment. As a consequence, there remains sharp disagreement about the legitimate scope of human rights and about the priorities that are claimed among them.

INHERENT RISKS IN THE DEBATE

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

First, one-sided characterizations of legitimacy and priority are very likely, at least over the long term, to undermine the political credibility of their proponents and the defensibility of the rights they regard as preeminently important. In an increasingly interdependent global community, any human rights orientation that does not support the widest possible shaping and sharing of values or capabilities among all human beings is likely to provoke widespread skepticism. The last half of the twentieth century is replete with examples.

Second, such characterizations do not accurately reflect reality. In the real world, virtually

all societies, whether individualistic or collectivist in essential character, consent to, and even promote, a mixture of all basic values or capabilities. President Franklin Delano Roosevelt's Four Freedoms (freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear) is an early case in point. A more recent demonstration is found in the Declaration and Programme of Action of the Vienna conference mentioned above, adopted by representatives of 171 states. It proclaims that, "[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

Finally, none of the international human rights instruments currently in force or proposed says anything about the legitimacy or priority of the rights it addresses, save possibly in the case of rights that by international covenant are stipulated to be "nonderogable" and therefore, arguably, more fundamental than others (e.g., freedom from arbitrary or unlawful deprivation of life, freedom from torture and from inhuman or degrading treatment and punishment, freedom from slavery, and freedom from imprisonment for debt). To be sure, some disagreements about legitimacy and priority can derive from differences of definition (e.g., what is "torture" or "inhuman treatment" to one may not be so to another, as in the case of punishment by caning or by death). Similarly, disagreements also can arise when treating the problem of implementation. For instance, some insist first on certain civil and political guarantees, whereas others defer initially to conditions of material well-being. Such disagreements, however, reflect differences in political agendas and have little if any conceptual utility. As confirmed by numerous resolutions of the UN General Assembly and reaffirmed in the Vienna Declaration and Programme of Action,³ there is a growing consensus that all human rights form an indivisible whole and that the protection of human rights is not and should not be a matter of purely national jurisdiction. The extent to which the international community actually protects the human rights it prescribes, on the other hand, is a different matter.⁴

3. Adopted June 25, 1993, referenced in Documentary Appendix B.

4. This discussion is continued in Reading 23 by Burns Weston in Chapter 5 of this volume.

QUESTIONS FOR REFLECTION AND DISCUSSION

1. Members of indigenous cultures in Africa and elsewhere believe that individual rights do not exist independently of a group structure; witness the Xhosa saying, "umuntu ngumuntu ngabantu" (a person is a person because of other people). Other, including Marxist, societies agree. Judeo-Christian and Islamic societies contend, on the other hand, that individual rights and duties are derived from divine sanction or nature. Given such radically different assumptions about the origins of rights, is it possible for the world's cultures to arrive at mutually comprehensible human rights accords? Indeed, might it not be argued that the individualistic ontology of the contemporary West has led not only to the development of individual human rights, but also to the abrogation of those rights by the West among peoples who do not share the same precepts?

2. Why is it important to inquire into the nature and scope of human rights? Do the following two statements by Burns Weston provide any guidance?

[I]f a right is determined to be a human right it is quintessentially general or universal in character, in some sense equally possessed by human beings everywhere, including in certain instances even the unborn.

[T]he legitimacy of different human rights and the priorities claimed among them are necessarily a function of context. Because different people located in different parts of the world both assert and honor different human rights demands according to many different procedures and practices, these issues ultimately depend on time, place, institutional setting, level of crisis, and other circumstance.

Can these two statements be reconciled? Does the latter statement imply that the universalist project reflected in the former is illegitimate?

3. If, as Weston contends, human rights "qualify state power" and, in addition to being "quintessentially universal," are "fundamental" in character, addressing needs rather than "mere wants," why is it considered permissible to place limits on them? Consider, for example, Article 29 of the Universal Declaration of Human Rights (UDHR) and Article 4 of the International Covenant on Civil and Political Rights (ICCPR), each reprinted in Documentary Appendix A. By the same token, under what circumstances, if any, is it permissible to sit by while human rights are violated?

4. It has been argued that the idea of universally applicable human rights is essentially a modernist idea, and that cultural relativism and contextuality critiques have undermined its theoretical foundations. If, as Andrei Sakharov once wrote, "The defense of human rights is a clear path toward the unification of people in our turbulent world," might one not rightly object that this "defense" is on the (offensive) march as, for example, Makau Mutua has done in *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002)? Might the "defense" of human rights in fact result in a new imperialism, albeit one imposed with the best of intentions? How might traditional modernist notions of universal human rights be reimagined to respond to this critique? See, in this connection, Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, N.Y.: Cornell University Press, 2002).

5. Are economic, social, and cultural rights really "rights"? Is it better to think of these second-generation "rights" as social "goals"? Why? Why not? See Reading 13 by Asbjørn Elde in Chapter 3 of this volume.

6. If economic, social, and cultural rights are rights, is the right to property—important in the liberal West and proclaimed in Article 17 of the Universal Declaration of Human Rights (UDHR)—among them? If so, why is it not recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR)? Is it because economic, social, and cultural rights really are not rights after all and that the right to property should be treated the same as life and liberty and thus be considered among first-generation civil and political rights? If so, why is the right to property also not recognized in the International Covenant on Civil and Political Rights (ICCPR)? Is it because civil and political rights are not really "rights" either and that they, too, are better thought of as social "goals"? If so, is the right to property a right?

7. Are so-called "communitarian" or "solidarity" (third-generation) rights really "rights"? Or is it better to think of them as social "goals"? Why? Why not? Consider Philip Alston, "A

Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" *Netherlands International Law Review* 29 (1992): 307-22, at 322:

In many respects the concept of third generation rights smack rather too strongly of a tactical endeavor to bring together, under the rubric of human rights, many of the most pressing concerns on the international agenda and to construct an artificial international consensus in favour of human rights by appealing to the "favorite" concerns of each of the main geopolitical blocs. . . . In sum, the concept of third generation solidarity rights would seem to contribute more obfuscation than clarification in an area which can ill afford to be made less accessible to the masses than it already is.

Consider also the conundrum posed in Question 6, above, and reflect upon how your answers to it compare with Professor Alston's observation.

8. It has been suggested that there exists a "fourth generation" of human rights consisting of women's rights, the rights of future generations, rights of access to information, and the right to communicate. Does this make sense? Is a "fourth generation" of human rights a valid category of rights? If so, how is it defined, what other rights might be included, and would it pose redundancy with certain first, second, or third generation rights? John Locke (1632-1704) once suggested in inevitably dated language that everyone has "property in his own person" and that "nobody has a right but to himself." Does it make sense to expand the notion of property rights to rights in one's person? Would such an expansion make property rights redundant with other rights? How might your answer to this question affect your answer to the issue of a "fourth generation" of rights? Is possible redundancy necessarily a liability?

9. In "The International Human Rights Movement: Part of the Problem?" *HHRJ* 15 (1999): 101-25, at 108, David Kennedy has argued that the human rights movement has achieved a level of hegemony that has effectively crowded out other, possibly more effective, modes of understanding, communicating, and acting. Kennedy also notes that human needs not framed in the vocabulary of the human rights movement often go unattended. Do you agree? If so, with which? And why? How might the human rights movement respond to Kennedy's critique? Consider Reading 2 by Martha Nussbaum, next in this chapter.

10. Is it possible and/or desirable to set a hierarchy of rights or categories of rights? Should economic, social, and cultural rights be secured before civil and political rights? Before solidarity rights? The other way around? Some other sequence? Why? Why not?

11. Former Indian Prime Minister Indira Gandhi once said that "it is not individuals who have rights but states." Do you agree? Disagree? What arguments can you make for this assertion? Is the claim that the state is a substitute for the traditional communal group—ergo the embodiment of the people—sufficient to justify the statement?

12. Where do human rights come from and for whom are they intended? In *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000), Costas Douzinas comments that "it is not so much that humans have rights but that rights make human" (372). This implies, Douzinas notes, that the granting and/or denial of rights results in a hierarchy of humanity, with those at the bottom accorded few rights and those at the top many or more. Does this reflect an understanding of what rights are that is meaningfully different from Weston's rationale for human rights, which, as stated in Reading 1, is essentially in agreement with that of Rhoda Howard (now Howard-Hassman) in *Human Rights and the Search for Community* (Boulder, Colo.: Westview Press, 1995): "Human rights are rights that one holds merely by virtue of being human" (1). Which rationale for the justification of human rights makes the most sense to you? Why? Or do you agree with Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002) that it is not enough to say that human beings possess human rights simply for being human because "It is not clear why one has any rights simply because one is a human being" (61)? If you agree with Freeman, what theoretical rationale for human rights do you propose? Given that human rights are presumed to be, in Weston's words, "quintessentially universal in character," bear in mind the importance (necessity?) of a rationale to which all peoples and cultures can subscribe. Is such a rationale or theory possible?

13. In *The End of Human Rights* Douzinas also comments that the twentieth century "has witnessed more violations of [human rights] principles than any of the previous and less 'enlightened' epochs" (2). He goes on to ask whether this gap between the theory and practice of human rights should lead us to question the principles of human rights. What do you think?