1 October 2019

Rights II: Human Rights Discourse

Origins

* World War II (1939 to 1945) and totalitarianism.
* Post-WWII liberal international order building.
	+ The United Nations Charter, October 24, 1945.
	+ The Universal Declaration of Human Rights (UDHR), December 10, 1948.
	+ The pre-WWII Western imperialist world order was overtly white supremacist.
	+ Prior to international human rights law, international law legitimated and colluded in many of the worst human rights atrocities in history, particularly the transatlantic slave trade and colonialism.
* Antecedents in natural rights theory.
* Normative ordering: human rights as standards of modern progress.

Evolution

* The UDHR has been translated into positive law through:
	+ Treaties
	+ Customary international law
	+ General principles
	+ Regional agreements
	+ Domestic law
* The UDHR has inspired over 80 international human rights treaties and declarations, numerous regional human rights conventions, domestic human rights bills, and constitutional securities, which together constitute a **comprehensive legally binding system** for the promotion and protection of human rights.
* The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force in 1976.
* The two Covenants further elaborate the rights already enshrined in the UDHR, making them effectively legally binding on States that have ratified the Covenants.
* The UDHR and the two Covenants constitute the International Bill of Human Rights.
* Over the past 70 years, international human rights treaties and instruments have become more focused and specialised regarding:
	+ The issues addressed;
	+ The social groups identified as requiring protection.
* These address concerns such as racial discrimination, torture, enforced disappearances, disabilities, and the rights of women, children, migrants, minorities, and indigenous peoples.
* Recent revisionist scholarship on the intellectual and political history of the genesis of human rights has emphasised the agency of postcolonial state-societies and subaltern actors in the origins and evolution of human rights discourse.
	+ Contesting the origin story of the 1948 Universal Declaration of Human Rights (UDHR) by accounting for the role of small powers and non-Western states as norm entrepreneurs in the framing of draft versions, proposed amendments, and the final document.
	+ Revising the prehistory of the UDHR, for example the anticolonial resistance to the conquest of the Americas in the 16th and 17th centuries and later waves of national independence won by colonies throughout the Americas, and the transcontinental struggles to abolish slavery and their climax in the Haitian revolution.
	+ Retelling the story of the subsequent evolution of the human rights paradigm during and after the period of formal decolonisation. In this narrative, the decolonisation struggles in Africa, Asia, the Caribbean and the Middle East in the 20th century are human rights struggles.
	+ Emphasising the intersection of the Cold War politics of decolonisation with Black civil rights and liberation struggles in the United States and the anti-Apartheid movement in South Africa.
	+ A related focus is on the late 20th century struggles against fascist and communist dictatorships and totalitarianisms in Latin America and the former Communist bloc.
	+ The *United Nations Declaration on the Rights of Indigenous Peoples*, has been shaped by the struggles of Indigenous peoples over land and water rights and contemporary social movements against the social and environmental destruction wrought by neoliberal globalisation and its state, corporate, and financial agents.
* Our focus next week is on the *United Nations Declaration on the Rights of Indigenous Peoples* and the ways in which third generation human rights discourse **decolonises the practice of human rights**.
* **Three generations of human rights** echo the motto of the French revolution:
	+ **Liberté** (freedoms, "civil and political" or "first generation" rights)
	+ **Egalité** (equality, "socio-economic" or "second generation" rights)
	+ **Fraternité** (solidarity, "collective-developmental" or "third generation" rights)
* <https://academic.oup.com/lril/article/3/1/61/2413099>
* In 1977, the UNESCO Courier published an essay by Karel Vasak, a Czech-born, French jurist and director of UNESCO’s Division of Human Rights and Peace. Entitled ‘A 30-year struggle’, Vasak’s essay characterised human rights in international law in terms of ‘three generations’.
	+ The first generation, he wrote, concerns civil and political rights, specifically those enshrined in the International Covenant on Civil and Political Rights (ICCPR), such as freedom of expression and the right to vote.
	+ The second generation, concerns economic, social and cultural rights, specifically those enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), such as rights to housing and to form a trade union.
	+ The third generation, which Vasak characterised as one that ‘the international community is now embarking on’, refers to ‘solidarity rights’, such as the right of self-determination, minority rights, Indigenous rights, the right to development, environmental protections, resource management, sustainable development, the rights of future generations.
		- Third generation rights are collective, not individual.
* **Three historical waves of struggles for human rights**
	+ The first wave, which accompanied the French revolution, gave rise to the generation of civil and political rights.
	+ With the second wave, after the Russian revolution of 1917, economic, social and cultural rights gained universal recognition.
	+ The third wave accompanied ‘the emancipation of colonised and dominated peoples’ in the middle of the 20th century.
	+ If we are to ascribe a chronology to these events, it is a much more complex one than what is offered by generational accounts of human rights.
* **Three analytical categories of human rights**
* Approached analytically, rather than chronologically, a human right belongs to a particular generation of rights because of distinctive properties that it possesses.
* Vasak distinguished the three generations of rights in terms of the obligations they generate and on whom their obligations fall – on the question of agency.
* Civil and political rights are ‘negative rights, in the sense that their respect requires that the state do nothing to interfere with individual liberties’.
* Social, economic and cultural rights require ‘positive action by the state to be implemented’.
* Unlike first- and second-generation rights, which impose obligations only on **states** as agents, third-generation rights, because they ‘reflect a certain conception of community life, … can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public and private institutions’. **Agency is complex and distributed**.
* The positive/negative distinction is spurious. Rights are ‘molecular’ (Hohfeld), combining liberties, claims, powers, and immunities. **Rights are functionally differentiated**.
* Vasak suggests that the three generations of human rights correspond, respectively, to the three ideals of the French revolution: liberty, equality and fraternity.
* Liberty corresponds to first generation rights because they function to protect fundamental freedoms such as freedom of expression and religion.
* Equality corresponds to second generation rights because they are function to ameliorate social and economic inequalities.
* Fraternity—or what Vasak also referred to as solidarity—underpins third generation rights in the sense that they function to promote the social solidarity necessary for individuals to develop their full human potential.
* <https://www.dailymaverick.co.za/opinionista/2019-04-29-three-generations-of-human-rights-balanced-application-will-protect-our-poor-and-vulnerable/>

Normative and Legal Force

* Although the UDHR was adopted as a mere declaration, without “binding” **legal force**, it is a **normative standard of evaluation of State conduct**.
	+ A “common standard of achievement for all peoples and all nations” (Preamble).
* Human rights are, for the most part, claim-rights that impose correlative duties on other agents. The primary addressee of human rights is the State.
* Human rights focus on a freedom, protection, status, or benefit for the subjects of human rights. The duties of States associated with human rights often require actions involving respect, protection, facilitation, and provision (Beitz 2009).
* Rights are usually obligatory: they impose strict duties on their addressees.
* Some human rights (“manifesto rights”) constitute aspirations or priorities for development, and assign responsibility for their progressive realisation.
* Many of the provisions of the UDHR have acquired the status of customary international law.
* The States that have ratified the ICCPR and ICESCR are legally “bound” by international human rights law, but there is no final enforcement mechanism or world police force to coerce compliance.
* International human rights law creates duties which States are legally bound to honour: to respect, protect, and fulfil human rights.
	+ **Respecting** human rights means that States must refrain from any actions that would violate or lead to a violation of human rights.
	+ **Protecting** human rights means States have a responsibility to protect individuals and groups against human rights abuses.
	+ **Fulfilling** human rights means that States must take progressively enable the full enjoyment of human rights: civil and political, economic, social, and cultural, and collective-developmental.
* States that ratify human rights treaties establish domestic legislation and policy measures compatible with their treaty obligations.
* The domestic legal system provides the principal legal protection of international human rights law.
* If domestic mechanisms and procedures fail to address human rights abuses, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that human rights are respected, protected, and fulfilled.
* The separation of the ICCPR and ICESR demonstrates that the initial proposal to transform the UDHR into a single binding instrument of international law was not feasible due to dissensus over the justiciability of socio-economic rights.
	+ Consequently, individuals could lodge complaints with the United Nations alleging violations by States of ICCPR, but not of ICESCR.
* Recent reforms at the UN have altered the structure of its human rights enforcement bodies.
* The new Human Rights Council (HRC) includes a system of special procedures, expert advice, and a complaint procedure. It is composed of 47 Member States elected by the UN General Assembly. It serves as a round-table for governments and civil society groups to raise concerns about human rights abuses in particular countries, as well as thematic areas of concern. The Council meets at least three times a year and also functions through a series of working groups and special procedures.
* The role of the Office of the High Commissioner for Human Rights (OHCHR) is to protect and promote human rights. It is the main office in the United Nations that deals with human rights and it works to ensure that human rights standards are applied in all of the UN's activities. It collaborates with governments to strengthen their human rights capabilities, encourages states to develop policies and institutions that are conducive to human rights, and provides advice and technical assistance to achieve these goals.
* **Universal Periodic Review** is a State-driven HRC process to monitor State compliance with human rights norms. Under this mechanism, the human rights situation of all UN Member States is reviewed every 5 years.
* <https://www.mfat.govt.nz/en/peace-rights-and-security/human-rights/universal-periodic-review-2019/>
* Some monitoring and enforcement mechanisms are linked to specialised agencies of the UN responsible for specific human rights instruments.
	+ The Committee on Economic, Social, and Cultural Rights (CESCR) is the body of independent experts that monitors States’ fulfillment of their obligations under the International Covenant on Economic, Social and Cultural Rights. The CESCR is an organ of the United Nations Economic and Social Council (ECOSOC).
	+ The Committee on the Elimination of Discrimination against Women monitors the progress of women’s rights by State parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
	+ The Committee on the Rights of the Child monitors the implementation of the Convention on the Rights of the Child (CRC) by State parties.
	+ The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties.
* Many countries create domestic human rights enforcement systems, which may include a national human rights commission legislatively empowered to investigate claims and special adjudicative bodies to hear cases.
	+ New Zealand Human Rights Commission
* Monitoring and enforcement mechanisms linked to national constitutions and legislation may offer more concrete and legally enforceable remedies. Generally, these avenues should usually be exhausted before appealing to international mechanisms.

Positivism About Human Rights

* Are human rights nonsense upon stilts?
* We boldly declare that human rights are inherent and universal, as if they have an independent existence from the discursive practice of human rights and the rules-based international order to which they are integral.
* Instead of theorising human rights law as a reflection of a independently existing moral reality, a theorist might understand them “politically” as the evolving, contested norms of a **historically contingent discursive practice**.
* Human rights exist because of international treaties that have turned them into international law, through the discursive practice of world ordering.
* On such an account, human rights perform critical functions at the local and global levels by promoting and protecting the most urgent interests of human beings and state-societies – for example, preserving the peace.

Resistance to Liberal Hegemony

* Human rights are integral to the Western imperialist discursive practice of liberal world ordering.
* A world of diverse religious and cultural beliefs and practices.
* A world of imperial, (neo)colonial, gendered, and racialised national, international, and transnational power relations.
* A world, also, of corrupt, aggressive, lawless, and tyrannical governments, oppression, and injustice – in the East and West, North and South.
* A minimalist, pluralist rules-based order.
* A negative focus on rectifying historical, structural, and relational injustices and ending corruption, aggression, lawlessness, tyranny, and oppression, rather than a positive focus on the universalisation of liberalism.
* When human rights are minimal standards of tolerable behaviour in world society, they preserve the “policy space” of state-societies to accommodate cultural and religious pluralism and self-determination.
* Failure to comply with minimal human rights standards that achieve a stable consensus in pluralistic world society would be seen as much more serious transgressions of international law.
* Not every question of global and social justice, peace and security, sustainable development, global governance, or political wisdom is best studied and debated using the discourse of human rights.
* “The UN was not created to take mankind to heaven, but to save humanity from hell.” – 2nd United Nations Secretary-General Dag Hammarskjöld.