

## **Sub-unit 1. Theories and characteristics of human rights**

### **Introduction**

Human rights are the rights a person has simply because he or she is a human being. Human rights are at the core of international law and international relations. They represent basic values common to all cultures, and must be respected by countries worldwide.<sup>1</sup>

This sub-unit discusses the concept of human rights, theories and characteristics of human rights.

### **1. Philosophical Foundations of Human Rights**

#### **1.1 Introduction**

Human rights are still the contested concept despite the fact that these rights have been internationalized through the development of the UN system of human rights. Questions are still posed about the correctness of the proposition that human rights are universal. Furthermore, human rights have pretensions to priority over other interests and norms. For example, do human rights trump trade objectives? A sound philosophical basis would provide a justification for such high moral ground and force and their universal legitimacy. In order for human rights to retain or enhance its standing as high moral values trumping all other edicts, a credible philosophical basis must be advanced. As Michael Freeman has rightly pointed out, ‘rights without reasons are vulnerable to denial and abuse.’

Contestation abounds what the content of human rights should be, that is, what the list of human rights should entail: whether socio-economic rights and third generation rights (including group rights) should be included. In particular, some scholars do not consider certain rights as full rights suitable to judicial enforcement.

There is also an on-going debate about who the duty-bearers for human rights are: whether states should continue to be the only bearer of human rights obligations or whether other actors such as Transnational National Companies and other business enterprises and individuals should be bound by certain human rights obligations – and what the nature of duties in relation to human rights entail: Are they limited to negative duties or should they entail positive obligations as well. If they entail positive obligations, how should they be enforced?

#### **What are human rights?**

The common simple definition of human rights is that they are rights which one possesses as a consequence of being human, (See Donnelly’s article). They can be distinguished from many other

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<sup>1</sup> Human Rights Concepts, Ideas and Fora, available at : <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/>

terms. Right may loosely mean what is right to do, a privilege (special entitlement), a power given to someone, or an immunity accorded to someone from legal process. Human rights create **legal entitlements** and **legal obligations** which can be enforced. But this is a very simplified definition. As Goodhart has argued in his response to Donnelly, not all philosophical accounts of human rights define human rights in this way.

They are held *equally* by every human being everywhere irrespective of their socio-economic status.

They are therefore **universal**.

They are **inalienable** because they cannot be lost, renounced or forfeited.

Human rights also take **priority** over other considerations or demands. They are paramount moral rights. All these three claims, ubiquitous as they may appear, are subject to perennial contestation.

## 1.2 Human Rights Theories

- Many theories
- Most important ones
- Key strong points
- Key weak points

Many theories have been propounded providing a conceptual justification for human rights, their basis and content. Some have had a significant contribution to the development of modern human rights while others haven't. This discussion will focus on the former, highlighting their contribution and weaknesses.

Students must be able to identify and discuss the philosophical traditions and schools that have made a significant contribution to the development of modern human rights; the actual contribution made and their points of weaknesses.

### 1.2.1 Natural rights theory

- Formulated in the 17<sup>th</sup> – 18<sup>th</sup> centuries
- Definition of rights
- Christian roots
- Secular touch
- Contribution
  - Forerunner to modern right
  - Civil and political rights
  - Basis and duties for state

This theory defined human rights as timeless and universal truths. They inhered in every human being by virtue of his/her reason or being human. Everyone was born with human rights, and therefore, they cannot be lost without one losing oneself.

The natural rights theory grew from the natural law theory, which was based on the elementary principles of justice. **Christian** philosophers held that natural law provided the source of *inalterable natural rights for individuals as part of the law of God*. Rights preceded birth and were god-given. Everyone is born with them.

Later on, as advances in science were being made, the religious flavour of the natural rights theory was replaced with a secular basis. In place of 'God' was inserted the 'dictate of right reason' as a basis for natural rights. By use of one's rationality or reason, it was possible to discover natural rights.

Later on in the 17<sup>th</sup> century, **John Locke** developed the so-called *social contract* theory as a basis of rights. To avoid the chaos that would erupt in the context where everyone had unlimited freedom, John Locke theorised that individuals has to submit to the body politic while retaining their civil rights of life, liberty and property. The exercise of political power by a government was in turn contingent upon the discharge of the obligation to respect these natural rights of individuals.

The main **contribution** of this theory was the adoption of early declarations – the French Declaration of the Rights of Man 1789) and the US Declaration of Independence 1776 – and the inclusion of human rights in constitutions of western countries. It also gave rise to the development of *civil and political rights and freedoms* eg, property, privacy, religion, equality etc. Crucially, this theory provided the basis for the legitimacy of state authority as well as the state as the main duty bearer of human rights. Thus, the implementation and protection of human rights is the state's primary obligation.

#### ■ The limits of the natural rights theory

- ☐ Determining rights
- ☐ Negative obligations
- ☐ Formal equality
- ☐ State centric

The weaknesses of the natural rights theory are firstly that it did not provide a clear *basis for determining the rights* that formed part of natural law. Bentham for instance criticized natural rights thus, '*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, -- nonsense upon stilts.'

At the time, civil and political rights to property, liberty and life were considered natural and inalienable. But this theory did not include and continues to provide the basis for not recognizing socio-economic rights.

The natural rights theory was conceptualized to impose limits on governmental interference in the exercise of individual rights. This led to the development of negative obligations of the state. To date, positive obligations are not well entrenched in comparative human rights jurisprudence.

Furthermore, this theory claimed that everyone was born *equal and free*, yet *not everyone was considered as equal*. *Slaves and women*, for example, were considered as second-rate people. The rights were for certain men and not for women. Slavery and the subjugation of women were deemed to be natural. At the same time, it failed to recognize that society has *systemic inequalities* which impede freedom and equality. Thus, presupposing equality and freedom and engendering negative obligations only, this theory supported *formal equality*, thereby ignoring systemic disadvantages.

The natural right theory also assumed that human rights are only relevant as a *shield against state authority*, giving rise to state obligations. Thus, human rights are still defined in relation to the state. And talk of the horizontal application of human rights is still mired in controversy.

- **The failure of natural rights**

- **The revival**

- **UN human rights standards**

Natural rights theory lost favour and gave way to the positivist theory in 19<sup>th</sup> and 20<sup>th</sup> century.

However, natural rights theory was revived by the events of the world war especially the atrocities committed by the Nazi regime.

A number of new theories have since been developed that recycle this theory. These include theories based on core rights, human dignity, or equality discussed by Shestack.

It still continues to imbue the international human rights regime. Eg the preamble to the UDHR refers to ‘inherent dignity and of the equal and inalienable rights of all members of the human family’.

### **1.2.2 Positivism**

- **Gained currency in 19<sup>th</sup>- 20<sup>th</sup> century**
- **Rejected a metaphysical basis of human rights**
- **Rights as those that the state recognises**
  - **HLA Hart**
- **Impact**

- ☐ Significant in the 19<sup>th</sup> and 20<sup>th</sup> centuries
- ☐ Importance of positivisation
- ☐ Flexibility
- ☐ Role of state

Positivism gained currency in the 19<sup>th</sup>-20<sup>th</sup> centuries as remarkable progress in science was being made. In this period, philosophy based on **concrete and empirical facts** established by the merging disciplines of natural sciences, and rendered the *metaphysical* basis of natural rights suspect.

Thus it defined rights as those that were *prescribed within the state's legal system or structure*. **Human rights emanate from positive laws as legally recognised within the domestic legal system supported by sanctions**. According to HLA Hart, 'Government among men exists not because men have rights prior to government which government is to preserve, but because without government and law men have no rights and can have none.' Thus, one cannot look beyond state law to discover human rights.

The positivist school impacted on the development of human rights considerably as it replaced the natural rights theory in the 19<sup>th</sup> and 20<sup>th</sup> centuries in placing significance on **positivisation**, it led to inclusion of rights in constitutions. Even now, much emphasis is placed on including rights in international treaties and constitutions and statutes. This helps to eliminate obscurities in the law, an idea that has crystallised under the notion of the rule of law.

Positivist, though it negates morality, is flexible because it places law reform within the control of human beings. It also reinforces the role of the state in the protection and enforcement of human rights. To date, the state machinery is indispensable to the protection and implementation of human rights.

- Weaknesses
  - ☐ Negates the moral basis of human rights
  - ☐ Oppressive laws
  - ☐ Undermines internationalisation of rights
- Current status
- Standard setting

Positivism negates the moral basis of right by insisting on state procedures as the basis for ascertaining rights. It can thus sanction immoral laws such as was the case in apartheid South Africa and under the Nazi regime of Germany.

It also undermines the international basis of rights protection since positivism views international law as improper law (rules of positive morality because it lacks enforcement mechanism or sanctions) and places much significance on domestic legal systems.

Its importance through remains especially as reflected in the continued emphasis on standard setting as a sure basis for entrenching rights.

### 1.2.3 Marxism

- Evolved contemporaneously with positivism
- Crystallised by the Industrial revolution
- Natural rights, state and oppression
- Rights not immutable
- Rights and historical context

The raw materials for the evolution of Marxism was provided by the Industrial revolution, which highlighted the poor living conditions of workers.

Marxism denies that human rights are immutable. Instead it maintains that rights are an artifice of the bourgeoisie.

Marxim rejected the notion that the state was a natural institution but rather that it was a reflection of and only came into being as a result of unequal distribution of commodities (which resulted in class divisions).

In a capitalist environment, the state was an institution of compulsion, oppression and exploitation by the bourgeoisie of the working class.

Rights, according to Marx, ‘can never be higher than the economic structure of society and its cultural conditions conditioned thereby.’ Where the few control the means of production, natural rights become the chief means of the ruling class for maintaining a capitalist order.

Marx argued that ‘None of the supposed rights of man goes beyond the egoistic man ... an individual withdrawn behind his private interests and whims and separate from the community’. He criticised individual rights as a basis for protecting individual property.

Rights can therefore not be defined independently from the economic context of a given society.

- Rights as those granted by state
- Socialism to communism
- Contribution
  - ❑ ESCRs or substantive equality
  - ❑ Status quo and human rights
  - ❑ Attention to duties

Marxism defines rights as those that the state grants. Rights are ‘contingent on the fulfilment of obligations to society and to the state’. Marxism envisioned a revolt by the working class to set up a dictatorship as a transition (*socialism*) to a classless society (*communism*). In the transition the law and the state would be retained but would wither away upon attaining communism. During the transition, the state would be an engine of social transformation of society and the only rights recognised would be those granted by the state.

Among the key contributions of this theory include the attention it gives to economic, social and cultural rights. Rights such as labour and employment rights were brought to the fore as a result of this theory. In highlighting the structural inequalities in society, this theory paved the way for the development of the concept of substantive equality.

Also this theory illuminated the danger of human rights serving the interests of the most powerful in society and for maintaining the status quo. It also calls attention to individual duties to the community and society, a much neglected theme in liberal understandings of human rights.

#### ■ Weaknesses

- ☐ Rights determined by the state
- ☐ Negated individual rights
- ☐ Resulted in authoritarian states
- ☐ Undermined international law

The problem with Marxism was that it vested the power to determine rights in the authoritarian state. By vesting too much power in the socialist state, authoritarian states sprung up.

It negated individual rights since it placed much emphasis on duties to the state and as a result most communist states suppressed civil and political rights.

Furthermore, it undermined the international system of rights as rights protection and implementation were regarded as falling in the states’ exclusive domestic jurisdiction.

### 1.2.4 Universality v cultural relativism

#### 1 Universalism

- ☐ Definition
- ☐ Basis
  - Wide ratification of international treaties
  - The nature of human beings
  - Universality of core values
  - Evolution of non-western societies
- ☐ Significance

In its strongest sense, universalism posits that all values, including human rights, are entirely universal irrespective of cultural or historical differences. It maintains that there is only one set of human rights applicable at all times and in all places. According to Shesstack, 'A universal moral philosophy affirms principles that protect universal, individual human rights of liberty, freedom, equality, and justice everywhere, giving them a nontransient, nonlegal foundation.'

Many grounds are offered on which universalism is based. It has been argued that human rights are universal because they have been universally accepted at least in word or as ideal standards. Secondly, human rights adhere to every individual by virtue of being human. Thirdly, some have argued since key characteristics of western societies have become globalised, the human rights ideology as developed in the west is relevant to these societies as well. Others argue that since all societies share certain common core values such as respect for human life, concern for truth, values of cooperation, common good, justice, and obligations between individuals, human rights are universal.

By establishing the universality of human rights, these rights gain *the status of supremacy* in that they can override any other considerations. Universalism is also a useful *foundational block for establishing a strong international system* for the promotion and protection of human rights. In the readings given, Michael Goodhart establishes the strong link between universalistic claims and the legitimacy of human rights, although Donnelly purports to dispute such link in his reply.

#### ❑ Demerits of universalist theory

- Cultural imperialism
- Rooted in natural rights – individual rights, not collective rights
- Acceptance as ratification – dubious basis
- Globalization and westernization has not eroded all values of non-western societies
- Concept of human being not universally intelligible
- Core values eg dignity, reason, equality are controversial terms, contingent and elusive

The theory of universalism has been criticised because it negates the importance of other cultures in the development of human rights. The international regime for human rights has been largely influenced by the Western world and therefore reflects the cultures of those societies. Universalism therefore suggests a kind of cultural imperialism.

## 2. Relativism

#### ❑ Definition

- Donnelly
- Shesstack
- Freeman

- ❑ **Significance**
  - **Underscores the significance of other cultures**
- **Critique of cultural relativism**
  - ❑ **(extreme form) negates the idea of human rights**
  - ❑ **Undermines international basis of rights**
  - ❑ **Important resource for repressive regimes**

Jack Donnelly defines radical relativism as a theory that sees culture (history and economics) as the source of all values. Shesstack defines relativism as reflecting the idea that human rights are not absolute, rather they are relative to the society in which one is raised and all cultures are morally equal and valid. According to Michael Freeman, cultural relativism underlies the idea that external agents should not interfere with the internal affairs of states on the ground of state sovereignty, that a culture should not be judged by external standards.

Cultural relativism therefore underscores the significance of culture in the articulation of human rights and accords respect to all cultures. Shesstack's article fails to recognise this significance as he equates cultural relativism with a defence to violations of human rights.

However, cultural relativism in its extreme form has the effect of denying the very idea of human rights because it denies that there are human rights that every human being has independent of society, history and culture. It also undermines the international basis of human rights as it confines the concern for human rights within the domestic sphere. Furthermore, it is a theory that repressive regimes or societies easily manipulate or use to defend departures from or violations of human rights.

### **Towards achieving universal legitimacy of human rights**

- **Middle ground**
  - ❑ **Human rights as culturally variable to some degree**
  - ❑ **Minimum core of rights universal**
  - ❑ **Relative *universalism***

Many scholars now agree that extreme forms of universalism and relativism are both untenable, leading the way for a middle ground which accepts that human rights are culturally variable to some extent although certain minimum core rights are universal. The core rights can be expanded through reinterpretation of both local and international norms.

Donnelly in his revised universalistic stance has argued for relative universality, meaning functional, international legal and overlapping consensus universality, which 'leaves considerable space for national, regional, cultural particularity and other forms of diversity and relativity'. Functional universality is based on the spread of modern markets and states, which has meant that

all societies face same threats and human rights are the most effective response to such threats. International legal universality is based on ratification of international norms. Consensual universality is based on the fact that people from across the globe now accept human rights voluntarily rather than by coercion. He however seems to suggest that the justificatory basis cannot be universal since he rejects ontological universality on various grounds including the problem of a single acceptable philosophical basis for human rights (although his main argument is based on a liberal Lockean conception of rights).

The move towards a concession about the dangers of absolute universalism is noteworthy, but Goodhart makes some incisive critical remarks on Donnelly's assertions and ideas. For example, his sole basis for human rights seems to be the liberal theory or the natural rights theory. He falls into traps of contradiction in the assertion of universality and relativism in ways that frustrate his attempt to maintain a universalistic stance. Thirdly, he assumes that the current system of human rights or the catalogue of rights based on liberalism is sacrosanct from which departures can be permitted under certain circumstances – he provides a four tiered basis for justified deviations. Of course, it is not clear how broad the realm of conception of human rights, which is absolutely universal is. To him, the particular rights and their implementation are open to relativism. It can therefore be seen that his conception is sharply limited and its purpose is to tolerate other cultural conceptions rather than to allow human rights to be reinforced or enriched by other cultural orientations of rights.

### **1.3 Human rights in non-Western societies**

- **No human rights in non-western societies**
  - ❑ **Howard and Donnelly**
  - ❑ **Human dignity & human rights**
- **Human rights in non-western societies**
  - ❑ **Eg Makau Mutua, Timothy Fernyhough, Bonny Ibhawoh**
  - ❑ **Imperialism**
  - ❑ **Conditions for human rights**

Some scholars maintain that human rights were known only in western societies and that non-western societies did not know the concept. Howard and Donnelly have argued that the latter only knew the notion of human dignity, which is different from human rights. They define human dignity as understandings of the inner moral worth of the human person and his or her proper political relations with society.' It confers privileges on socially unequal beings while human rights are entitlements that every human being ought to have regardless of status. Donnelly maintains that every society knows elements of justice and human dignity, but human rights are of more recent origin, having developed in the modern west in the 17<sup>th</sup> century.

Some scholars have strongly criticised these claims. Makau Mutua has argued for instance that the denial that non-western societies knew some notions of human rights in effect destroys any claim of universality as it places the concept of human rights firmly within a specific culture. Unless liberalism is considered universal, human rights cannot be universal. Timothy Fernyhough has argued that the view that human rights were alien to Africa is a new imperialism.

Donnelly asserts that human rights are inextricably linked with the emergency of the state and markets and suggests that without these, human rights cannot exist or could not have arisen. This claim is highly debatable and Goodhart points this out, arguing that human rights exist as a shield against dominion and oppression from the state or any other actor in a position of authority.

➤ **Notions of human rights in non-western societies & their relevance**

- **Communitarian**
- **Individual rights**
- **Welfare rights**
- **Right/duty dialectic**

Studies of ethnic groups in Africa and Asia reveal that these societies knew certain concepts of human rights. In Africa for example, the concept of human rights was communitarian as it provided protection based on ascribed status and membership to community, and sought the vindication of communal well-being. Individual rights were also recognized such as rights to life, land, marriage, personal freedom, fair trial, welfare and association to limited government. (See Mutua's article on the Akamba and Akan societies). The idea of human rights was closely tied up with duties. The rights/duties dialectic was inseparable, with some arguing that more emphasis was on duties rather than rights and others preferring the view that it was a balanced emphasis. Examples of duties to others, families, and the community included deference to age, solidarity with fellow human beings, and reciprocity in labour issues.

Similar notions of human rights have been noted among Asian societies (see Pollis). This is not to deny that these communities also had notions that are inconsistent with current human rights standards. How relevant are these traditional notions to the modern world and human rights?

## **2. Characteristics of human rights**

The following are the basic characteristics of human rights:

1. **Inherent** - Human Rights are inherent because they are not granted by any person or authority. Human rights do not have to be bought, earned or inherited; they belong to people simply because they are human. Human rights are inherent to each individual.

2. **Fundamental** - Human Rights are fundamental rights because without them, the life and dignity of man will be meaningless.

3. **Inalienable** - Human rights cannot be taken away; no one has the right to deprive another person of them for any reason. People still have human rights even when the laws of their countries do not recognize them, or when they violate them - for example, when slavery is practiced, slaves still have rights even though these rights are being violated. Human rights are inalienable. Human Rights are inalienable because:

a. They cannot be rightfully taken away from a free individual.

b. They cannot be given away or be forfeited.

4. **Imprescriptible** - Human Rights do not prescribe and cannot be lost even if man fails to use or assert them, even by a long passage of time.

5. **Indivisible** - To live in dignity, all human beings are entitled to freedom, security and decent standards of living concurrently. Human rights are indivisible. Human Rights are not capable of being divided. They cannot be denied even when other rights have already been enjoyed.

6. **Universal** - Human Rights are universal in application and they apply irrespective of one's origin, status, or condition or place where one lives. Human rights are enforceable without national border. Human rights are the same for all human beings regardless of race, sex, religion, political or other opinion, national or social origin. We are all born free, and equal in dignity and rights—human rights are universal.

7. **Interdependent** - Human Rights are interdependent because the fulfillment or exercise of one cannot be had without the realization of the other.

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