

Sub-unit 2: History and Classification of Human Rights

1. Origin and Evolution of Human Rights

Humanity's desire for respect, tolerance and equality goes a long way back in history, but the curious thing to note is that, although our societies have in many respects made great strides in the technological, political, social and economic fields, contemporary complaints remain very much the same as they were hundreds, even thousands of years ago.

1.1 Status of Human Rights before WWII

The concept of human rights can be found as far back in time as the age of the Greek philosophers Socrates, Plato and Aristotle. Their writings on the idea of natural law contain many of the same principles that are associated with human rights.

1.1.1 Greek history

The origins of human rights may be found both in Greek philosophy and the various world religions. In the Age of Enlightenment (18th century) the concept of human rights emerged as an explicit category. Man/woman came to be seen as an autonomous individual, endowed by nature with certain inalienable fundamental rights that could be invoked against a government and should be safeguarded by it. Human rights were henceforth seen as elementary preconditions for an existence worthy of human dignity. Before this period, several charters codifying rights and freedoms had been drawn up constituting important steps towards the idea of human rights.

1.1.2 The Code of Hammurabi (ca. 1780 BC)

It is considered one of the earliest codifications of law. It is based on the concept of an 'eye for an eye', but also seems to uphold certain human rights principles related to protection from arbitrary justice: 'If any one bring an accusation of any crime before the elders, and does not prove what he has charged, he shall, if it be a capital offence charged, be put to death.'¹

¹ Art 1 The Code of Hammurabi

1.1.3 The Achaemenid Persian Empire

During the 6th Century, the Achaemenid Persian Empire of ancient Iran established unprecedented principles of human rights. Cyrus the Great (576 or 590 BC - 530 BC) issued the Cyrus cylinder which declared that citizens of the empire would be allowed to practice their religious beliefs freely and also abolished slavery.

1.1.4 The Magna Carta to The English Bill of Human Rights

The Magna Carta (1215) is considered a milestone in the history of human rights and several great thinkers such as Grotius, Hobbes, Locke, Rousseau and Kant talk about the concept. The *Magna Charta Libertatum* of 1215, the Golden Bull of Hungary (1222), the Danish Erik Klipping's *Håndfaestning* of 1282, the *Joyeuse Entrée* of 1356 in Brabant (Brussels), the *Union of Utrecht* of 1579 (The Netherlands) and the English *Bill of Rights* of 1689.

These documents specified rights which could be claimed in the light of particular circumstances (e.g., threats to the freedom of religion), but they did not yet contain an all-embracing philosophical concept of individual liberty. Freedoms were often seen as rights conferred upon individuals or groups by virtue of their rank or status. In the centuries after the Middle Ages, the concept of liberty became gradually separated from status and came to be seen not as a privilege but as a right of all human beings. Spanish theologians and jurists played a prominent role in this context. Among the former, the work of Francisco de Vitoria (1486-1546) and Bartolomé de las Casas (1474-1566) should be highlighted. These two men laid the (doctrinal) foundation for the recognition of freedom and dignity of all humans by defending the personal rights of the indigenous peoples inhabiting the territories colonised by the Spanish Crown.

Some religious texts also are said to reflect the principles of human rights. The *Rig Veda* promotes conduct that is based on equality. Even certain Bible passages have similar content. For instance, in the Old Testament, when the midwives of Pharaoh disobey his order to kill all male babies, they do so on the basis of higher and more fundamental laws that they felt bound to follow.²

1.1.5 The American and French Declaration of Independence

The American and French declarations of independence in the 18th century were important in promoting human rights that were universal, individual and rational. In the 19th century, the

² L. Henkin, *The Rights of Man Today* (London: Stevens and Sons, 1979) at 4-5.

abolition of slavery and increased debate over freedom from government intervention also furthered these principles.³ With the dwindling of colonialism development in the third world received more focus and adult suffrage, liberty, equality and justice came to be emphasized.⁴ The Enlightenment was decisive in the development of human rights concepts. The ideas of Hugo Grotius (1583-1645), one of the fathers of modern international law, of Samuel von Pufendorf (1632-1694), and of John Locke (1632-1704) attracted much interest in Europe in the 18th century. Locke, for instance, developed a comprehensive concept of natural rights; his list of rights consisting of life, liberty and property. Jean-Jacques Rousseau (1712-1778) elaborated the concept under which the sovereign derived his powers and the citizens their rights from a social contract. The term human rights appeared for the first time in the French *Déclaration des Droits de l'Homme et du Citoyen* (1789).

The people of the British colonies in North America took the human rights theories to heart. The American Declaration of Independence of 4 July 1776 was based on the assumption that all human beings are equal. It also referred to certain inalienable rights, such as the right to life, liberty and the pursuit of happiness. These ideas were also reflected in the Bill of Rights which was promulgated by the state of Virginia in the same year. The provisions of the Declaration of Independence were adopted by other American states, but they also found their way into the Bill of Rights of the American Constitution. The French *Déclaration des Droits de l'Homme et du Citoyen* of 1789, as well as the French Constitution of 1793, reflected the emerging international theory of universal rights. Both the American and French Declarations were intended as systematic enumerations of these rights.

In the 19th century, there were frequent inter-state disputes relating to the protection of the rights of minorities in Europe. These conflicts led to several humanitarian interventions and calls for international protection arrangements. One of the first such arrangements was the Treaty of Berlin of 1878, which accorded special legal status to some religious groups. It also served as a model for the minorities system that was subsequently established within the League of Nations.

The need for international standards on human rights was first felt at the end of the 19th century, when the industrial countries began to introduce labour legislation. This legislation which raised

³ *Ibid* at 5-6.

⁴ *Ibid* at 14-19.

the cost of labour had the effect of worsening their competitive position in relation to countries that had no labour laws. Economic necessity forced the states to consult each other. It was as a result of this that the first conventions were formulated in which states committed themselves *vis-à-vis* other states in regard to their own citizens. The Bern Convention of 1906 prohibiting night-shift work by women can be seen as the first multilateral convention meant to safeguard social rights. Many more labour conventions were later to be drawn up by the International Labour Organisation (ILO), founded in 1919. Remarkable as it may seem, therefore, while the classic human rights had been acknowledged long before social rights, the latter were first embodied in international regulations.

1.2 Development of Human Rights after WWII

The atrocities of World War II put an end to the traditional view that states have full liberty to decide the treatment of their own citizens. The signing of the Charter of the United Nations (UN) on 26 June 1945 brought human rights within the sphere of international law. In particular, all UN members agreed to take measures to protect human rights. The Charter contains a number of articles specifically referring to human rights. Less than two years later, the UN Commission on Human Rights (UNCHR), established early in 1946, submitted a draft Universal Declaration of Human Rights (UDHR) to the UN General Assembly (UNGA). The Assembly adopted the Declaration in Paris on 10 December 1948. This day was later designated as Human Rights Day. During the 1950s and 1960s, more and more countries joined the UN. Upon joining they formally accepted the obligations contained in the UN Charter, and in doing so subscribed to the principles and ideals laid down in the UDHR. This commitment was made explicit in the Proclamation of Teheran (1968), which was adopted during the first World Conference on Human Rights, and repeated in the Vienna Declaration and Programme of Action, which was adopted during the second World Conference on Human Rights (1993).

Since the 1950s, the UDHR has been backed up by a large number of international conventions. The most significant of these conventions are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These two Covenants together with the UDHR form the International Bill of Human Rights. At the same time, many supervisory mechanisms have been created, including those

responsible for monitoring compliance with the two Covenants. Alongside the UDHR, ICCPR and ICESCR other specific treaties were adopted with their monitoring mechanisms: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), the Convention on the Rights of Persons with Disabilities (2006) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006),

Human rights have also been receiving more and more attention at the regional level. In the European, the Inter-American and the African context, standards and supervisory mechanisms have been developed that have already had a significant impact on human rights compliance in the respective continents, and promise to contribute to compliance in the future.

2. Classification of human rights

Human rights have been divided into three categories:

- i) First generation rights which include civil and political rights.
- ii) Second generation rights such as economic, social and cultural rights.
- iii) Third generation rights (collective rights) such as the right of self-determination and the right to participate in the benefits from mankind's common heritage.⁵

Human rights may be either positive or negative. An example of the former is the right to healthcare and an example of the latter is the right not to be tortured.⁶

The idea of basic rights originated from the need to protect the individual against the (arbitrary) use of state power. Attention was therefore initially focused on those rights which oblige governments to refrain from certain actions. Human rights in this category are generally referred to as 'fundamental freedoms'. As human rights are viewed as a precondition for leading a dignified human existence, they serve as a guide and touchstone for legislation.

⁵ P. L. Mehta and S. S. Jaswal, "Human Rights: Concept and Ideology", 30(1&2) *Indian Socio Legal Journal* (2004) at 83-85.

⁶ *Human Rights* (J. R. Pennock and J. W. Chapman, New York: New York University Press, 1981) at 19-21.

Classic (negative) and Social Rights . ‘Classic’ rights are often seen to require the non-intervention of the state (negative obligation), and ‘social rights’ as requiring active intervention on the part of the state (positive obligations). In other words, classic rights entail an obligation for the state to refrain from certain actions, while social rights oblige it to provide certain guarantees. Lawyers often describe classic rights in terms of a duty to achieve a given result (‘obligation of result’) and social rights in terms of a duty to provide the means (‘obligations of conduct’).

2.1 Civil rights

The term ‘civil rights’ is often used with reference to the rights set out in the first eighteen articles of the UDHR, almost all of which are also set out as binding treaty norms in the ICCPR. From this group, a further set of ‘physical integrity rights’ has been identified, which concern the right to life, liberty and security of the person, and which offer protection from physical violence against the person, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one’s privacy and right of ownership, restriction of one’s freedom of movement, and the freedom of thought, conscience and religion. The difference between ‘basic rights’ (see below) and ‘physical integrity rights’ lies in the fact that the former include economic and social rights, but do not include rights such as protection of privacy and ownership.

Although not strictly an integrity right, the right to equal treatment and protection in law certainly qualifies as a civil right. Moreover, this right plays an essential role in the realisation of economic, social and cultural rights.

Another group of civil rights is referred to under the collective term ‘due process rights’. These pertain, among other things, to the right to a public hearing by an independent and impartial tribunal, the ‘presumption of innocence’, the *ne bis in idem* principle (freedom from double jeopardy) and legal assistance (see, *e.g.*, Articles 9, 10, 14 and 15 ICCPR)

2.2 Political rights

In general, political rights are those set out in Articles 19 to 21 UDHR and also codified in the ICCPR. They include freedom of expression, freedom of association and assembly, the right to take part in the government of one’s country and the right to vote and stand for election at genuine periodic elections held by secret ballot (see Articles 18, 19, 21, 22 and 25 ICCPR).

2.3 Economic and social rights

The economic and social rights are listed in Articles 22 to 26 UDHR, and further developed and set out as binding treaty norms in the ICESCR. These rights provide the conditions necessary for prosperity and wellbeing. Economic rights refer, for example, to the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, a reasonable limitation of working hours, and trade union rights. Social rights are those rights necessary for an adequate standard of living, including rights to health, shelter, food, social care, and the right to education (see Articles 6 to 14 ICESCR).

2.4 Cultural rights

The UDHR lists cultural rights in Articles 27 and 28: the right to participate freely in the cultural life of the community, the right to share in scientific advancement and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author (see also Article 15 ICESCR and Article 27 ICCPR).

The alleged dichotomy between civil and political rights, and economic, social and cultural rights.

Traditionally it has been argued that there are fundamental differences between economic, social and cultural rights, and civil and political rights. These two categories of rights have been seen as two different concepts and their differences have been characterised as a dichotomy. According to this view, civil and political rights are considered to be expressed in very precise language, imposing merely negative obligations which do not require resources for their implementation, and which therefore can be applied immediately. On the other hand, economic, social and cultural rights are considered to be expressed in vague terms, imposing only positive obligations conditional on the existence of resources and therefore involving a progressive realisation.

As a consequence of these alleged differences, it has been argued that civil and political rights are justiciable whereas economic, social and cultural rights are not. In other words, this view holds that only violations of civil and political rights can be adjudicated by judicial or similar bodies, while economic, social and cultural rights are ‘by their nature’ non-justiciable.

Over the years, economic, social and cultural rights have been re-examined and their juridical validity and applicability have been increasingly stressed. During the last decade, we have witnessed the development of a large and growing body of caselaw of domestic courts concerning economic, social and cultural rights. This caselaw, at the national and international level, suggests

a potential role for creative and sensitive decisions of judicial and quasi-judicial bodies with respect to these rights.

Many international fora have elaborated on the indivisibility and interdependency of human rights. As stated in the 1993 Vienna Declaration and Programme of Action: ‘All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.’

The European Union (EU) and its member states have also made it clear on numerous occasions that they subscribe to the view that both categories of human rights are of equal importance, in the sense that an existence worthy of human dignity is only possible if both civil and political rights and economic, social and cultural rights are enjoyed. In their Declaration of 21 July 1986, they affirmed that ‘the promotion of economic, social and cultural rights as well as of civil and political rights is of paramount importance for the full realisation of human dignity and for the attainment of the legitimate aspirations of every individual.’

The so-called Limburg Principles on the Implementation of the ICESCR also indicate that a sharp distinction between civil and political rights on the one hand and economic, social and cultural rights on the other is not accurate. These principles were drawn up in 1986 by a group of independent experts, and followed in 1997 by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Together, these documents provide a clear explanation of the nature of the state party obligations under the ICESCR. The same can be said of the 1990 General Comment 3 of the UN Committee on Economic, Social and Cultural Rights on the nature of states parties’ obligations in relation to the ICESCR.

Fortunately, continuous declarations at the international level on the indivisibility and interdependency of all rights have finally been codified by way of the recently adopted Optional Protocol to the ICESCR. States parties to the Optional Protocol will recognise the competence of the Committee on Economic, Social and Cultural Rights to receive and consider individual and collective complaints alleging violations of economic, social and cultural rights set forth in the ICESCR. The Committee will also be empowered to request interim measures to avoid possible irreparable damage to the victims of the alleged violations and, where it receives reliable information indicating grave or systematic violations, it shall conduct an inquiry which may include a visit to the state party.

The adoption of the Optional Protocol on the 60th anniversary of the UDHR, on 10 December 2008, represents an historic advance for human rights. Firstly, economic, social and cultural rights - historically demoted to an inferior status with limited protection - are now finally on an equal footing with civil and political rights. Secondly, through an individual complaints procedure the meaning and scope of these rights will become more precise, facilitating efforts to respect and guarantee their enjoyment. Thirdly, the existence of a potential 'remedy' at the international level will provide an incentive to individuals and groups to formulate some of their economic and social claims in terms of rights. Finally, the possibility of an adverse 'finding' of the Committee on Economic, Social and Cultural Rights will give economic, social and cultural rights salience in terms of the political concerns of governments; which these rights largely lack at pres

2.5 Individual and collective rights

Although the fundamental purpose of human rights is the protection and development of the individual (individual rights), some of these rights are exercised by people in groups (collective rights). Freedom of association and assembly, freedom of religion and, more especially, the freedom to form or join a trade union, fall into this category. The collective element is even more evident when human rights are linked specifically to membership of a certain group, such as the right of members of ethnic and cultural minorities to preserve their own language and culture. One must make a distinction between two types of rights, which are usually called collective rights: individual rights enjoyed in association with others, and the rights of a collective.

The most notable example of a collective human right is the right to self-determination, which is regarded as being vested in peoples rather than in individuals (see Articles 1 ICCPR and ICESCR). The recognition of the right to self-determination as a human right is grounded in the fact that it is seen as a necessary precondition for the development of the individual. It is generally accepted that collective rights may not infringe on universally accepted individual rights, such as the right to life and freedom from torture.

2.6 First, second and third generation rights

The division of human rights into three generations was first proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. His division follows the principles of *Liberté, Égalité* and *Fraternité* of the French Revolution.

First generation rights are related to liberty and refer fundamentally to civil and political rights. The second generation rights are related to equality, including economic, social and cultural rights.

Third generation or 'solidarity rights' cover group and collective rights, which include, *inter alia*, the right to development, the right to peace and the right to a clean environment. The only third generation right which so far has been given an official human rights status - apart from the right to selfdetermination, which is of longer standing - is the right to development (see the Declaration on the Right to Development, adopted by the UNGA on 4 December 1986, and the 1993 Vienna Declaration and Programme of Action (Paragraph I, 10)). The Vienna Declaration confirms the right to development as a collective as well as an individual right, individuals being regarded as the primary subjects of development. Recently, the right to development has been given considerable attention in the activities of the High Commissioner for Human Rights. Adoption of a set of criteria for the periodic evaluation of global development partnerships from the perspective of the right to development by the Working Group on the Right to Development, in January, 2006, evidence the concrete steps being taken in this area. The EU and its member states also explicitly accept the right to development as part of the human rights concept.

While the classification of rights into 'generations' has the virtue of incorporating communal and collective rights, thereby overcoming the individualist moral theory in which human rights are grounded, it has been criticised for not being historically accurate and for establishing a sharp distinction between all human rights. Indeed, the concept of generations of rights is at odds with the Teheran Proclamation and the Vienna Declaration and Programme of Action, which establish that all rights are indivisible, interdependent and interrelated.

2.7 Types of state duties imposed by all human rights treaties: The tripartite typology

The early 1980s gave rise to a useful definition of the obligations imposed by human rights treaties, which blurred the sharp dichotomy between economic, social and cultural rights, and civil and political rights.

Specifically, in 1980, Henry Shue proposed that for every basic right (civil, political, conomic, social and cultural) there are three types of correlative obligations: 'to void depriving', 'to protect from deprivation' and 'to aid the deprived.' All human rights carry corresponding obligations that must be translated into concrete duties to guarantee these rights. For many years, traditional human rights discourse was dominated by the misperception that civil and political rights require only negative duties while economic, social and cultural rights require positive duties. In this view, the right to free speech is guaranteed when the state leaves people alone, whereas the state must take

positive action to guarantee the right to health by building health clinics and providing immunization.

Since Shue's proposal was published, the 'tripartite typology' has evolved and scholars have developed typologies containing more than three levels. While there is no consensus on the precise meaning of the different levels, the 'tripartite typology' presented by Shue is known today in more concise terms as the obligations '*to respect*', '*to protect*', and '*to fulfil*'.

Obligations to respect: In general, this level of obligation requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts.

Obligations to protect: This level of obligation requires the state to prevent violations of human rights by third parties. The obligation to protect is normally taken to be a central function of states, which have to prevent irreparable harm from being inflicted upon members of society. This requires states: a) to prevent violations of rights by any individual or non-state actor; b) to avoid and eliminate incentives to violate rights by third parties; and c) to provide access to legal remedies when violations have occurred in order to prevent further deprivations.

Obligations to fulfil: This level of obligation requires the state to take measures to ensure, for persons within its jurisdiction, opportunities to obtain satisfaction of the basic needs as recognised in human rights instruments, which cannot be secured by personal efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect to civil and political rights. It is clear that enforcing, for instance, the prohibition of torture (which requires, for example, police training and preventive measures), the right to a fair trial (which requires investments in courts and judges), the right of free and fair elections or the right to legal assistance, entails considerable cost.

- ❖ The duty to respect is the negative obligation. It requires responsible parties to refrain from acting in a way that deprives people of the guaranteed right. Regarding the right to health, for example, a government may not deprive certain communities of access to health care facilities.
- ❖ The duty to protect is the obligation concerning third parties. It requires responsible parties to ensure that third parties do not deprive people of the guaranteed right. For example, a government must pass and enforce laws prohibiting private companies from releasing hazardous chemicals that impair public health.

- ❖ The duty to fulfill is the positive obligation. It requires responsible parties to establish political, economic, and social systems that provide access to the guaranteed right for all members of society. For example, a government must provide essential health services such as accessible primary care and clean water.

The above analysis demonstrates that there is little difference in the nature of state obligations in regard to different human rights. The three levels of obligation encompass both civil and political rights and economic, social and cultural rights, blurring the perceived distinction between them.

“Human rights are rights accorded an individual simply for being human” . However, they disagreed strongly with statement that clearly elevated individual rights over group authority. One such statement went as follows: “In matters involving private individual relations such as marriage and private property disposal, the individual shall have the right to make decisions even at the objections of groups like elders, clan village, etc.” . On the bases of his view of African political history and the questionnaire results, Baah asserts that “Africans in general, and Akans in particular do not understand human rights” as it is conceptualized in the West with its elevation of the individual over the kin group or community (results of a survey using a questionnaire made to find out how people understood human rights).

“Human Dignity,” the quality that some claim is the justification for universal human rights. However, philosophers and human rights scholars do not agree on the nature of human dignity. For example, philosopher Herbert Spielgeberg defines human dignity as the intrinsic worth of a person for his/her own sake. While Rhoda Howard claims it as an extrinsic and relative quality, either granted at birth or earned in adulthood, depending on the society in question. John Locke claimed that the universal possession of human dignity justified the universal entitlement to human rights, while Jack Donnelly writes that human rights refers to a particular social practice whose purpose is to realize human dignity.

Because of these natural endowments, humans naturally want and value the freedom to think, to express their thoughts, to bond with others, to be free from torture, to have an adequate diet, shelter and clothing. We value and want to be free to learn and develop our mental abilities. These universal human wants and values have existed throughout human history. It is only recently that they have become, for some people, “human rights.” Consequently, Baah concludes that the claimed universality of human rights is problematic. He warns that unless this problem is

understood and addressed, “human rights will remain a fictitious abstraction based on Western liberal ideas and aspirations, relying on [a] capitalist ideological framework; imposed on mankind with no regard for cultural and religious differences or economic and political maturity; and expected to work in a real world of competition, avarice, and greed”.

References

1. P. L. Mehta and S. S. Jaswal, “Human Rights: Concept and Ideology”, 30(1&2) *Indian Socio Legal Journal* (2004) at 83-85.
2. *Human Rights* (J. R. Pennock and J. W. Chapman, New York: New York University Press, 1981) at 19-21.