

# Human Rights Law- An Account of Factors which Contributed to its Development

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## ABSTRACT

There is no denying the fact that human rights are a universal need. A great number of international declarations, resolutions and recommendations relating to human rights have been adopted under the auspices of the United Nations, which have established broadly recognized standards, in connection with human rights issues, despite the fact that they are not legally binding on the States. The ultimate touchstone of human rights success lies in concrete benefits that the mankind can reap from its practice.

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## Introduction

The study of history of human rights teaches us that wars, power abuse, greed, deprivation and want, at its worst, not only dehumanise societies but also undermine the intrinsic value systems, which preserve and lend impetus to the forces of collective well-being and individual evolution. So, all along the history of the rights, the twin challenges confronting the mankind were to first identify, recognise and define the fundamental ideas like liberty, equality, justice and fraternity, and then to catalogue and translate these ideas into inalienable international and national legal instruments, whereby these could become judicially enforceable laws.

The next obvious step was to ensure that these human rights standards should not remain simply 'law in books', a beautiful promise or grandiloquent documents, but should also become 'law in action'. For this, was needed the entire machinery of monitoring and implementing agencies which can oversee the codification and implementation of these laws. Thus, various conventions, laws and rules were evolved not only to convert these ideas into functional laws but also to develop an international vocabulary of human rights so that all information regarding any violation of human rights can be shared, catalogued and indexed.

## International Treaties

Treaties are the most important sources of international human rights law. Presently, a number of multilateral treaties relating to human rights are in force and are legally binding to those States, which are parties to them. The most important amongst them is the United Nations Charter itself, which is binding on all the States in the world and establishes at least general obligations to respect and promote human rights (Subramanian, 2007).

In addition to the Charter, a number of other multilateral human rights treaties have been concluded under the auspices of the United Nations and its specialized agencies, which create obligations on the contracting parties. Regional treaties on human rights such as European Convention on Human Rights, American Convention on Human Rights and African Charter on Human and people's Rights are

also legally binding on the contracting States and they therefore are the sources of International human rights law.

## International Customs

Certain international human rights have acquired the status of customary International Law by their widespread practice by States and they, therefore, are binding on all the States, without regard to whether they have expressly consented. The 1987 Restatement (Third) of the Foreign Relations Law of the United States takes the position that customary International Law protects at least certain basis human rights (Baldwin and Bottomley, 1978). Section 702 of the Restatement provides, "A State violates International Law if, as a matter of State Policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." Although the above list might not be exhaustive or other may disagree to the above list of human rights, as to have acquired the status of customary rule of international law, there seems to be widespread agreement that a number of rights are at present included, within customary international law and consequently, they are the source of international law. It is desirable that a study is conducted to prepare a list of those human rights which have acquired the status of international customary law (Singhi, 2011). It would be immense help to the International Court of Justice, States and to their courts as they would come to know about them.

## Other International Instruments

A great number of international declarations, resolutions and recommendations relating to human rights have been adopted under the auspices of the United Nations, which have established broadly recognized standards, in connection with human rights issues, despite the fact that they are not legally binding on the States. The most important of these is the Universal Declaration of Human Rights of 1948, which possesses a moral or political force that may be useful in persuading government officials to observe human rights

standards. Some of the rights referred therein have acquired the character of customary rule of International Law. Declarations adopted by the Tehran Conference (1968) and the Vienna Conference (1993) also serve as the source of the commitment by the international community.

### Judicial Decisions

Decisions of the various judicial bodies are relevant in the determination of the rules on human rights issues. Although action by the International Court of Justice in the area has been limited, there is no doubt that cases could fall within its competency. European Court of Human Rights, a regional court since the lawless case decided in 1960 has adjudicated many disputes successfully. The increasing case load prompted a lengthy debate which resulted into the creation of a new European Court of Human Rights on November 1, 1998. Although a few cases have been brought before the Inter-American Court of Human Rights, case law under the American convention is as yet in its infancy (Jaswal, 1990). Decisions of the municipal courts on human rights issues have contributed immensely to the development of International human rights law. In addition to the judicial decisions, opinions of the arbitral bodies whose function is to mediate on complaints of human rights violations under various treaties also assist in the determination of the rules relevant to international human rights.

The human rights, as we know, have been divided into two types of rights, negative and positive. The negative rights require the government not to tamper with the rights of an individual whereas the latter require the government to act to provide for a good. There is a cost attached to such actions when no other option is possible and the cost projection is substantially high. This kind of action is called using weaker means. Implementation costs are those costs incurred to implement rights. There are two ways of making rights cheaper either to eliminate some rights or to reduce several dimensions of a particular right. The Universal Declaration of Rights recognizes this aspect of affordability regarding rights when it mentioned that resources of each state must be kept in mind while implementing economic, social and cultural rights.

### A Critical Look

The ultimate touchstone of human rights success lies in concrete benefits that the mankind can reap from its practice. Here role of intellectual debates over various ideas and philosophies related to the rights is important to the extent it helps in stating the concept, clarifying it and enriching it before it finds expression in the form of practical laws. Human rights as a discipline have been witness to many such theoretical debates which raise issues about various aspects of human rights, their rational basis and their practical utility. So, this kind of critical look at the subject helps one absorbing the essence of the ideas and discussions in question without getting bogged down in pure cerebral discourses.

There are three important properties of human rights which have given birth to various debates. These properties are universality, inalienability or incontrovertibility and

subjectivity. Universalism has come under criticism from those who suggest that universality has tried to rely too much on meaningless abstract notion of natural law as well as from those who argue that the concept of universality, as being propounded, is ignorant of cultural differences. Similarly, the claim that rights are incontrovertible, forces us to find a hierarchy of human rights, to avoid any potential conflict, when one is confronted with the conflict between the two rights. My right as a tree cutter might come in conflict with somebody's right to a healthy environment. If the rights of both the parties can't be upheld, then importance of one right over the other has to be determined. The issue of incontrovertible human rights has also brought in question the argument of those who claim that rights always require reciprocal duties. If somebody is unable to perform his duty, does it mean his rights stand negated? Similarly, to claim that rights are subjective and grounded in individuals has brought to the fore the thorny issues of human rationality and agency and western bias towards individualism. By agency here means those who are active, thinking beings. This reliance upon human rationality and agency, more specifically the capacity to reason, has raised questions about human rights of those who are not able to think, for example children with imbeciles and those lying-in comas or what about animals? Similarly, when one studies the implementation of human rights at the international level, one finds that the decisions taken at the UNO, in the context of human rights, are more due to political muscle and influence, rather than any ethical principles. The failure on the part of various signatories to the Universal Declaration of Human Rights to arrive at a consensus over setting up of permanent international criminal court points towards prevailing differences among the member states. Here the issues related to sovereignty of nation-state take the center stage.

The issue of natural rights is important so far it forbids the states and governments to assume control over these rights. Ken Booth makes the break with essentialism by suggesting that 'we should have human rights not because we are human, but to make us human.' To make the claim that certain rights exist before the formation of human societies, that they are right and true in abstraction from people, that they are grounded in some higher spiritual or moral authority, is to invite criticism. In fact, the alleged universality of rights is less to do with their intent than with their implementation. This has led to charge of promotion of western bias of individualism in the name of human rights. The UN should take care that the universality of human rights is not turned into a weapon for western cultural hegemony, for 'attempting to replicate the United States in other part of the world' (Booth, 1999).

In the same way, Kant's abstract issues of ethical principles may not find so much favour with many practical human rights practitioners but nobody can take away the credit from Kant for introducing the elements of ethics in the human rights discourse. Unlike citizenship rights which are allowed by the state and thus granted from above, human rights, by contrast, come from below, from a universal set of principles. So, these rights attach equal worth to all human beings for all times in all places. Thus, in principle, rights are not subject to the whims of any political machinery. Baruch Spinoza once upheld the right of the strongest as absolute truth. There is a

school of thought known as realists in human rights area who believe that interstate system is controlled through balance of power. These thinkers, in matters of human rights or for that matter international laws, are skeptical at best and dismissive at best. Forsythe points out that according to realists, the primary concern for rationally acting states is the maintenance of security through the calculation of power relations – the task of upholding individual rights is best left to charitable organizations (Forsythe, 2012).

The move to set up a permanent international criminal court is one such case which highlights the power play at work. One of the problems being encountered in setting up this court is the model to be adopted. Geoffrey Robertson has divided the main arguments in three camps (Robertson, 1999).

The first comprises Canada and Germany who want the court to have strong prosecutorial powers and they want it to act independently of the Security Council. The second group led by United States, China and France will back a court only if it is controlled by the Security Council. Third comes the group comprising India, Asia and Middle Eastern countries, which oppose the establishment of the court. Highlighting these issues do not aim at downplaying the role of the UN in human rights arena. There is an urgent need to try all options available to us to improve our human rights records. There is no denying the fact that human rights are a universal need. We, as human beings, have the responsibility not only to prolong and better our existence individually and collectively but also carry the onus of protecting this planet which we share with all the other animate and inanimate objects as our common but only abode.

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