

Human Rights: The Deepening Footprint

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The human rights movement—young, fragile, universal, and consensual in its official discourse about norms but internally conflicted among its diverse political and cultural systems, animated by high ideals but too often hostage to states' material interests, long on norms but short on their enforcement, wavering if not feeble at critical moments of decision, passionate in its rhetoric but needful of a cool and probing understanding of its multiple environments and strategic choices—could hardly remain stable, let alone constant, while the tormented world that it addressed experienced cataclysmic events together with shifts in ideas, technology, and the distribution of power. My remarks below highlight some telling differences today in perceptions of the movement, in its structure, and in implementation strategies, as compared with the time the Harvard Law School Human Rights Program started up almost a quarter century ago.

Highpoints in the crises and oscillations that influenced the movement during this period are familiar enough. We think of the cycles of optimism and pessimism stemming from events like the collapse of the Soviet empire, the high birth rate of international human rights organizations, the movement of race and gender (with sexual orientation en route) toward effective inclusion within equality norms, the agony of Iraq, globalization's helpful and perverse effects, Rwanda's genocide and China's turnabouts, the creation of the ICTs and the ICC, the revivals of a fierce religious fundamentalism, and the threats posed by non-state terrorist groups and WMD's—as well as U.S. unilateralism and exceptionalism.

Issues once thought settled as a normative matter freshly engage us, as topics like state torture provoke a widening debate spurred by anxiety about national security. Concepts that figured only marginally in earlier human rights discourse—regime change to democracy as a human rights goal, cultural relativism nourishing resistance to universal norms—broadly inform policy formation and interstate debates. Economic and social rights, long as revered in ritual pronouncements as they were slighted in practice, have begun to permeate mainline fields like gender and development. Although the tensions between notions of state sovereignty and international regulation continue to inform policy debates about human rights in state and international organs, the very idea of sovereignty has experienced deep revision and even reinvention—though not quite everywhere!

Several characteristics of today's movement noted below represent genuine innovation, while others were long present but stand out more sharply now than earlier. In their totality, they dramatically distinguish interna-

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tional human rights from most other fields, both classical and newly developed, of international law.

(1) When the movement was launched in the 1940s, the founders naturally gave dominant attention to its international dimension. If states could work great evil internally and internationally, an obvious response pointed to their regulation by international norms and empowered institutions. The few but salient human rights provisions of the U.N. Charter started it all with a vision of international order ultimately secured “from above.” The Security Council would keep the world safe. There soon followed the Universal Declaration of Human Rights and the drafting of the two Covenants. Here lay the novelty, for the run of human rights violations generally occur within a state and affect only its population and internal order. International order within this “vertical” and hierarchical system required states to comply with international norms in governing their own citizens.

Gradually the “horizontal” dimension of the movement—the many new human rights provisions of state constitutions and statutes, the creation of monitoring and enforcement organs, the interaction among norms and institutions of different states—grew in prominence, to the point where today it has become commonplace for states to observe other states’ human rights innovations and sometimes follow their lead. This horizontal dimension has fostered systematic and recurrent interaction between states’ human rights systems as a whole and the international system. The non-governmental human rights movement bloomed, engaging in multiple ways both the international and state systems. This interweaving of international and state laws, processes and institutions, as well as of state and non-state actors, has become so pervasive as to make it a difficult, if not artificial, task today to trace the boundary between these formerly discrete categories, or between the horizontal and vertical dimensions of the movement at large.

(2) Serious, ongoing human rights violations—group discrimination in employment or elections, denial of popular education, manipulation of judges by their executive masters, censorship of the media, bans on association, torture, repression of religious beliefs—often reflect and influence a state’s political and socio-economic structures, distribution of power, and underlying culture. The violations are part and parcel of the state’s very identity and basic structure. This cardinal characteristic of systematic human rights violations—their instrumental efficacy in maintaining basic socio-economic structures and a particular organization of power—contrasts with serious violations of other types of treaties, such as regulation of taxation, trade, or the sea. Such other violations may indeed have important economic and further consequences, but only rarely would they reach to the core of the nation, to its moral and political identity and related distribution of power.

Arresting human rights violations can then cut as deeply into a state’s political structure as the violations themselves, if in a different direction. It

can be transformative. The consequences of the fall of apartheid or of the repressive Soviet system illustrate such possibilities, as do more modest moves toward free association, an independent judiciary, or an uncensored press as components of a longer-term effort to achieve a more open society, if not democracy. Few at its time realized the radical potential of the Universal Declaration. Surely to the United States, it must have seemed familiar and benign. No one today fails to realize that potential for the Declaration and the many treaties and institutions that it spawned, and not just for the developing world.

(3) Increasingly, international norms and institutions are reaching beyond the state to regulate large categories of non-state actors, from political associations and business corporations to ordinary individuals. They do so directly under international law, through treaty norms defining personal international crimes like crimes against humanity that cover state and non-state actors. They also do so indirectly, and far more broadly, by requiring states parties to protect their population against rights-violating conduct of non-state actors, often through treaties that specify what non-state activity—such as discriminatory corporate employment, or family violence—the state must proscribe and act against. Whatever its accuracy at the movement's foundation, the notion that the human rights movement regulates only state conduct is at best an historical observation. As it develops, human rights law continues to erode the long-standing notion of a public-private divide, in the sense of state and non-state actors, where only the former is subject to regulation under international law.

(4) Treaties and institutions (not to mention scholars and advocates) addressing such matters as gender, racism, or rights of children have become ever more attentive to the cultural foundations of rights advocacy and observance, as well as to the need to respond to not only selective but, more important, systematic denials of rights. This trend, to be sure, provokes opposition to criticism by states accused of human rights violations that rely on the supremacy of the local culture, and deny the universal reach of particular human rights norms. Claims of cultural relativism are advanced to legitimate conduct consistent with their different, local culture. (Indeed the question of who defines the “universal,” and from what perspective we decide what is universal and what is local, has become part of the debate.)

In the large, the movement has fortified its efforts to take into account “culture”—patterns of behavior or belief rooted in tradition, attitudes about the self and its relation to the community, religious canons legitimating or requiring particular conduct—as a vital factor for understanding the reasons or foundations for states' systemic human rights violations. Fields like gender, family, sexuality, and religion have become particularly engaged in cultural debate. “Culture” has become a two-way sword, both supporting selective resistance to asserted universal norms in the interests of cultural survival or deference to the local, and also offering the rights re-

former a path toward achieving broader observance of universal norms through strategies for change of conflicting beliefs or practices. One might, for example, concentrate on such deep characteristics of a society as its patriarchal tradition bearing on women's issues; the pull of hierarchical community norms involving race, caste, ethnicity, or religion; or the dialectic of notions of collective duty and individual right.

Through such concentration on foundational cultural notions and their amenability to change, human rights advocates have come to look beyond transient compliance stemming from carrot-and-stick strategies that may soon surrender to the prior practice. The effort becomes one of achieving longer-run change with lower risk of return. That effort underscores and is linked to the longer amount of time required to realize basic changes for the observance of many civil and political rights, despite the rhetoric of the two Covenants suggesting that only economic and social rights are subject to progressive achievement by states (as opposed to immediate compliance). Were China to ratify the International Covenant on Civil and Political Rights today, human rights advocates would welcome the move, despite the profound violations extending to the repression of speech and association, ultimately of the vote, that will not vanish overnight. Progressive achievement would indeed be the only realistic goal; such progress, if made at a justifiable pace, would be broadly praised. Stark and tragic examples like Iraq warn us of attempting radical transformation toward, say, broad equal protection and political participation, without prior strategic planning and while remaining ignorant of the state's culture, social organization, and history. Surely this heightened prominence of inquiry into cultural features of a conflict further blurs the distinctions of public vs. private, or state vs. non-state. How and where within these distinctions can we locate as expansive and protean a conception as culture?

(5) From the start, the movement aimed at more than requiring a state to "respect" individual rights—that is, not to torture, inhibit speech, and so on. States also had to "protect" their population from the abusive conduct of non-state actors. Moreover, particularly within the idiom of economic and social rights, they had to "provide" what those norms required. The heightened sensitivity over the decades to the role of cultural transformation in the realization of rights highlighted an additional state duty, broadly referred to as "promotion"—a duty that a growing number of treaties emphasize. Less determinate than the first three duties, promotion requires the state to become an explicit agent of cultural change. It must serve as an instrument for transforming attitudes and practices that at least inhibit, and perhaps block, required changes concerning gender, race, modes of government, poverty, or tolerance of minority religions.

By its terms and through the work products of its implementing committee, the Convention on the Elimination of All Forms of Discrimination Against Women well illustrates both the heightened sensitivity to cultural

obstacles and the greater pressure on states to “promote” cultural change in order to open paths toward greater equality. Among its prescriptions and the directions in which it points are, for example, appointing more women to high-status positions in government, changing educational texts to eliminate in words and pictures gender stereotyping about family and employment, and providing financial support to daycare centers to offer more time to women for work outside the family.

(6) My comments turn to universal human rights organizations and the progressive institutionalization of human rights norms and processes. The early decades of the East-West conflict gave rise to polarized IGOs; capitalism battled communism for world influence and for the support of the developing blocs of states. With the collapse of the U.S.S.R., new and more diffuse lines of division within and outside IGOs took prominence: North vs. South (developed vs. less developed states, rich vs. poor), post-colonial states vs. earlier colonizers, Arab or (more broadly) Muslim populations vs. the United States and its Western allies. A newly hegemonic state, China, made its power felt within and outside human rights institutions, avoiding as effectively as did other major powers any sustained or telling criticism from within the U.N., but nonetheless gradually coming to participate in human rights debates.

The processes of politicization and decision by bloc voting have become ongoing phenomena in the U.N. with respect to many human rights issues, as states’ different interests, ideologies, traditions, and histories displaced any pretense of evenhanded decision on the merits about violators. The inclusion of Israel among those few states specially monitored and criticized for violations has taken on the predictability of ritual, while countries committing graver abuses but shielded by regional or cultural groups of states have managed to escape serious inquiry, let alone criticism. In the process, human rights ideals have been devalued and mocked. Of course, such corruption has not equally affected all U.N. organs or other universal institutions concerned with human rights. Moreover, the regional systems, particularly in Europe, have made substantial progress.

(7) The stunning institutionalization of norms over several decades within state and international organs underscores how different are today’s circumstances. At the same time, the architecture of many IGOs and their organs has become the object of persistent criticism. But consensus over seriously different designs remains extraordinarily difficult to achieve. It is after all the international institution that can knock more threateningly on the door of state sovereignty than the international norm by itself. No debates during the drafting of human rights treaties were more closely argued than those over the control, structures, functions, and power of international institutions.

Some spirit of reform has taken hold, particularly as a consequence of the self-destructive politicization of the United Nations Commission on

Human Rights. Whether its successor, the structurally improved Human Rights Council, will achieve substantially more remains open, though its opening sessions hardly permit optimism. Efforts to reform the Security Council, ever more engaged in human rights issues (itself a significant evolution of its powers over the last two decades), confront the dramatically conflicting views of states over what to do about the veto, permanent and shifting membership, voting rules, and institutional powers. The U.N., created so as to reflect the then constellation of power among states, becomes in such respects the ongoing prisoner of the original design. But life goes on with its inevitable inventions; the Kosovo intervention represents one of several (disputed) maneuvers to escape the prison. One can expect more.

(8) Perhaps the most remarkable achievement—the stunning achievement of the movement since its inception, but particularly of the last decades—has been the deep institutionalization of a new discourse for much of the world. The movement proclaims its permanence with ever greater credibility. Surely it is apparent how profoundly it has changed not only the internal structures of many states, but also the landscape of international relations. Respected or mocked, complied with or flouted, human rights *is* talked about. It *is* an issue, persistent if often unwelcome. The Soviet Union felt compelled to join the conversation only to underscore for all to see (including, most importantly, the inhabitants of that empire) the gap between its commitments and its conduct. China appears to have discarded its earlier rejectionist strand of thought and has entered the debate, to be sure from its own perspective of history and interest.

There was a time in South Africa when some protested that in and of itself, debate about apartheid in the U.N. constituted unjustified intervention in violation of international law and of a long-standing conception of state sovereignty. Those days are long distant; such a claim today would be little short of ludicrous. That the earlier arguments now strike students as implausible, even bizarre, constitutes striking evidence of the movement's entrenchment. The prevalence of this new discourse and its widespread institutionalization in IGOs, NGOs, state governments, academia, and popular debates bode well for the movement, despite its abundant problems. As ideas become implanted, they inform and shape popular beliefs as well as popular visions of what may be possible. They form part of the education of the young about the world they are entering. Such ideas can animate, inspire, empower. They can generate criticism, protest, and change. The ideals that gave birth to the movement, and the discourse expressing them, continue as the movement's most effective weapons.