

THE ORIGINS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

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Presents the history of the 1948 adoption of the Universal Declaration of Human Rights, focusing on the prior status of human rights in international law and on the cultural/ideological aspects of the debates surrounding its adoption. This chapter shows both the Western origins of the core human rights concepts and the positive-law nature of the Universal Declaration. It also shows that the cultural issues were present from the very start of the modern human rights era.

Late in the evening of December 9th, 1948, Haitian Senator Emile Saint-Lot rose to present a draft resolution on human rights to the United Nations General Assembly. It was a proud day for this descendant of slaves. As Rapporteur for the U.N.'s Third Committee--in charge of social, humanitarian, and cultural concerns--he was bringing forward a document that had run a two-year gauntlet of commissions, councils, committees, and study-groups. Though not perfect, he said, the resolution that had emerged was a fitting counterweight to the recently ended World War. "A little over eight years ago," he proclaimed

the forces of evil had been let loose to compass the destruction of the spiritual and moral values which represented for the majority of mankind the sole reason for living.

At a moment when the greatest confusion reigned in that epic struggle, the clear and sincere voice of President Roosevelt had rallied the hopes of those who for centuries had been seeking the path of justice and liberty amid the tortuous ways of iniquity. When President Roosevelt proclaimed that all men should enjoy freedom of conscience and freedom of expression, that they should be free from want and free from fear, he overcame the last doubts of the waverers, for his

appeal was genuine and expressed clearly the aspirations of twentieth century man.¹

Roosevelt's speech on the Four Freedoms, he declared, had been the impetus driving the various U.N. bodies--the Economic and Social Council, the Human Rights Commission, the Third Committee, and others--to complete their work. How fitting it was that the President's widow, Eleanor, now sat as Chairman of Human Rights Commission. Her perseverance, her ability to rise above politics, her knack of finding the common ground between ideological opponents had brought forth a document that Saint-Lot described as "the greatest effort yet made by mankind to give society new legal and moral foundations." How appropriate for the Declaration to be ratified in Paris, "the capital of liberty"! And how honored was he, representing a country that had long ago fought its way out of slavery, to be the one chosen to present the Commission's draft for final approval.

It had already been a busy day for the Assembly. Delegates had just that afternoon approved a Convention on the Prevention and Punishment of the Crime of Genocide. Earlier in the fall they had hammered out agreements on The "Draft Universal Declaration of Human Rights" now before them² was the culmination of a series of documents that many thought would set the tone for the post-War era. Many yearned for the dawn of a freer, more peaceful, more optimistic, and more progressive age. If remarriage is the triumph of love over experience, these early years of the United Nations were the triumph of hope after a generation of catastrophes: two World Wars bracketing the Great Depression. The inter-war League of Nations had failed. The United Nations was dedicated to bringing about a world in which peace, hope, and freedom could succeed.

Yet the draft that Saint-Lot presented to the delegates was not quite what they had expected. Instead of a Covenant, with concrete applications, enforcement procedures, and so on, they had a mere statement of principles. "All human beings are born free and equal in dignity and rights. ... Everyone has the right to life, liberty, and the security of person. ... No one shall be held in slavery or servitude. ... No one shall be subjected to torture or to cruel, inhuman or degrading treatment ..." So read the draft, as it called out a litany of

rights and freedoms due to all persons, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

As the Eastern Bloc representatives noted throughout the debate, these principles were both vague and impractical.³ The Declaration was to be "a common standard of achievement for all peoples and all nations." It called on everyone to work for its implementation. Yet it was not self-implementing. It made few clear distinctions, established no courts, and laid down no clear penalties. It was a declaration of intent, not of law. In the words of the Australian representative, "the Declaration imposes no legal obligation and requires no measures for" enforcement.⁴

Even its intent was open to interpretation. Article Five⁵ prohibited "torture or ... cruel, inhuman, or degrading treatment or punishment." What constitutes "degrading treatment"? Do all society's consider the same things "inhuman"? Article 18 gave everyone "the right to freedom of thought, conscience, and religion." This seems to treat religions as belief systems--something true in the West but not for Hindus, Buddhists, Taoists, or Confucianists.⁶ This matter was never discussed. Did the right to work (Article 23) imply that governments must be employers of last resort? Were rights to "periodic holidays with pay" (Article 24) of equal importance with "freedom of opinion and expression" (Article 19) and if so, how were they to be reconciled with seemingly unlimited right to own (and use) property (Article 17)--which in some countries, at least, let the owners of industry set the rules of the workplace?

As several of the delegates remarked, the practical problems were immense, even involving such questions as whether "the right to freedom of movement and residence" (Article 13) could overturn local zoning laws. The draft answered none of these questions. It provided no means for adjudication, and prior committee work had explicitly rejected a proposed Soviet amendment committing each nation to guarantee the rights in domestic law.⁷ Though ringing with ideals, the draft was short on specifics--the very specifics that could turn ideals into social policy. Yet it was all that the delegates thought they could accomplish. And it was much more than had been done before.

The Universal Declaration of Human Rights was, indeed, the crowning point of the U.N.'s third session--and was among its last idealistic accomplishments before that organization was crippled by the emerging Cold War. The U.N. Charter implicitly called for such a declaration. It mentioned human rights in several places, but it nowhere defined them. A brief review of that Charter and of the history of international human rights legislation makes clear the Declaration's revolutionary scope. It also makes clear the problems with the human rights concept that the Declaration inherited.

Let us start with the U.N. Charter itself. That 1945 document declared among the organization's purposes

promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...[Article 1.3]

Article 55 held similar language:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote:

- a. ... [economic progress]
- b. ... [international problem solving and cooperation]
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The Charter also committed the organization and various of its bodies to make recommendations promoting such rights (Articles 13.1.b and 62). Article 68 set up commissions to carry out such work.

These passages did not define human rights, though they outlawed discrimination based on the four criteria mentioned. All recognized at the time that some sort of further definition was needed. Indeed, President Truman referred to a future agreement on rights in his closing speech to the 1945 San Francisco Conference where the U.N. Charter was shaped.

Yet the Charter almost lacked even these clauses. The 1944 Dunbarton Oaks agreement between Nationalist China, the United Kingdom, the United States, and the Soviet Union, which led to the post-War United Nations, had even vaguer references. John Humphrey, the Director of the U.N. Division of Human Rights during the organization's first two decades, reports that the Charter language was the work of intense lobbying by nongovernmental organizations at the 1945 San Francisco Conference.⁸ Though some diplomats favored stronger measures, few thought their adoption possible. Only a last-minute decision by Edward Stettinius, President Truman's Secretary of State, committed the U.S. to including rights language. He then persuaded the other Great Powers to accede.

Still the Charter held further ambiguities. Article 56 committed members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55", the key rights article. Because the Charter is a treaty between states--and has thus the force of law--this passage provided a firm legal ground for international human rights activism. Both member states and the organization are obligated to "promote ... universal respect for, and observance of" the human rights that the Charter failed to enumerate.

But the Charter also declared in the Article 2 that

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter ...

If a member state claims that its laws conform to the vague references to human rights contained in the charter, or if its violations of human rights affect only its own citizens, the U.N. cannot legally intervene to stop them. U.N. activism was thus from the beginning limited to wielding verbal carrots and sticks. To the degree that human rights are national rather than international matters, the organization can cajole and censure its members but it cannot act forcefully. Without further treaty law, the Charter's human rights passages faced becoming mere pieties.

The Origins of International Law

We cannot appreciate how radical were even these pieties without understanding something about the origins of Western international law. International law is part of the modern European state system, which emerged with the Treaty of Westphalia in the middle of the 17th century. Its key concept is 'sovereignty'--the notion that a state has absolute authority over its own behavior. International law limits that behavior. The question is: on what grounds are such limiting laws established?

The notion of 'state sovereignty' has roots in ancient Greece and Rome. Aristotle sorted states according to how they made laws: monarchies, aristocracies, and democracies. Each state was sovereign--independent of the others. No state could legislate for others. As Stanley Benn points out, however, for the Greeks "legislation was the local application of a divinely ordained order, rather than the authoritative creation of new laws."⁹ Greek states were bound to recognize a higher authority, though not the authority of other states except by conquest. Roman ideas were more autocratic: no one could question the ruler's laws, as he (the pronoun is apt) embodied the authority of the Roman people. Yet Benn notes that "the emperor was supreme because his function was to command what was right and for the public good." Justice ruled Will, not the other way around.

This tension between power and morality runs through the entire Western political tradition. Medieval thinkers gave considerable weight to the latter. Aquinas, for example, subjected kings not only to divine and natural law, but to the customs of their realms.¹⁰ Such customs most often divided sovereignty among various noble ranks, each with rights and duties against the others. Overlapping sovereignties were personalistic as much as they were legal. Rights and duties were passed by inheritance and gift, and were separable both from each other and from the territories to which they supposedly applied. As Benedict Anderson has pointed out, even while strong kings emerged in England and France in the early modern period, monarchical rulership was an

older imagining, where states were defined by centres, borders were porous and indistinct, and sovereignties faded imperceptibly into one another.¹¹

The situation of modern Andorra--which owes dual allegiance to the French state and to a Spanish bishop--was the rule rather than the exception.

Anderson rightly notes that medieval and early modern monarchs ruled over remarkably diverse populations, of which the final Habsburg's titles are an apt remembrance: "Emperor of Austria; King of Hungary, of Bohemia, of Dalmatia, Croatia, Slavonia, Galicia, Lodomeria, and Illyria ..." and so on through fifty or so honorifics.¹² After 1800, such multi-national empires were less and less possible; in the new republics sovereignty became tied to 'the people', who soon came to see themselves as 'nations'. The remaining kings and princes self-consciously remade themselves as nationalists--though the irony of an England that has not been ruled by an 'English' monarch since the 11th century should not pass without remark.¹³ In either case, modern

state sovereignty is fully, flatly, and evenly operative over each square centimetre of a legally defined territory.¹⁴

Anderson traces the consequences of this change for the growth of nationalism. For our purposes, it is enough to note that in the modern state system, each person is ruled by some state, either as subject or as citizen. Sovereignty rests with the state, not with any higher body. Though some states call their citizens 'sovereign', the state itself is deemed to be the proxy for such citizen-sovereignty; in effect the modern republican state carries the mantle woven by the European monarchs of three centuries ago.¹⁵

This state system emerged in Europe at least partly in response to the brutality of the Thirty Years War (1618-48). In opposition to feudalism with its conflicting sovereignties, it set one sovereign prince over each piece of territory, holding complete sway over that land and its inhabitants. It specifically rejected custom as a limit on that sovereign's power. As the 16th century French philosopher Jean Bodin articulated this notion, the sovereign rules absolutely and cannot be subject to any curb; he makes the laws for his subjects, not they for him. No custom, no tradition, no churchly

subservience, no dual allegiance; nothing stands in the way of the sovereign's will. According to Bodin, his only checks are the laws of God and nature, plus the fundamental laws of the state's constitution. Though these may seem to be superior 'laws', Bodin treated divine and natural law as moral, not legal, and so they were outside his system (as they were not for Aquinas). Constitutional law governed such things as succession and so merely determined who would be ruler, not how he ruled. For Bodin, it anchored the sovereign's claim to authority and was thus formal, not substantive. The result was sovereign absolutism: the view that underlies the modern state system. Real 'law' is whatever the sovereign wills.¹⁶

Thomas Hobbes (1588-1679) radicalized Bodin's views in response to the chaos of the English Civil War. Rather than relegating divine and natural law to morality, he abolished them altogether. Though clearly influenced by Puritan notions of God's omnipotence and of the covenantal community of believers,¹⁷ he redefined "natural law" and "natural right" to be properties of individuals. "Natural right" describes every individual's 'right' to self-protection, while "natural law" describes the moral conclusions any rational individual would 'naturally' draw from the war of all against all that the unguarded pursuit of "natural right" brings. Hobbes thought that the fear of death at others' hands 'naturally' leads individuals to subject themselves to an all-powerful sovereign. They give up their "natural right" to self-protection so that they can survive. "Natural law" thus amounts to the honoring of their own surrender of their rights to each other and to their ruler.

In essence, Hobbes located sovereignty in each individual but believed that the resulting chaos demands that these individuals surrender their sovereignty to a single lord. This ruler is absolute: limited by neither law, right, nor morality. 'Law' is what the ruler wills, individuals have surrendered their 'right', and 'morality' is, in Hobbes' eyes, merely a fancy term for whatever people desire. None of these stands over the sovereign, curbing his or her actions. He or she is also not limited by any constitution. Instead, the sovereign rules only so long as "the power lasteth, by which he is able to protect" his subjects.¹⁸ The ruler can thus do whatever he or she wants; so long as the commonwealth stays orderly, no outside law can stand judge.

Charles II, Hobbes's student and patron, clearly saw both the merits and defects of this scheme. It sustained absolutism but not necessarily monarchy: a legislature could exercise sovereignty as well. By freeing the sovereign from divine and natural law, Hobbes unleashed power but cost kingship the legitimacy that 'rulership by divine right' brings. Charles gave Hobbes a sinecure after the 1660 Restoration, but soon forbade him from publishing.

Bodin and Hobbes are worth this small detour because their thinking epitomizes an approach to sovereignty that has governed most states to the present day. For them, the ruler is paramount. Sovereignty is subject to no internal limits except self-declared ones, such as those in the U.S. Constitution.¹⁹ Sovereignty is subject to no external limits whatsoever. Though princes or legislatures can agree among themselves to restrict their actions, such bans are based solely on their free (and continued) consent. All law is thus domestic. 'International law' stems from the free agreement of independent sovereigns, not from any higher power. Article 2 of the U.N. Charter thus claims that the organization is based on the sovereign equality of all members. States are thus not bound to other states except by their own permission.

Treaties constitute such permission, and the main political difficulties faced by the early proponents of international human rights law stemmed from various governments' reluctance to give up 'national sovereignty' to anyone. The Truman Administration kept the U.N. Charter weaker than it would have liked because it worried that the Senate might not ratify a treaty that took away too much U.S. power. It nixed Soviet amendments to the human rights Declaration out of similar fears.²⁰ Other countries had matching qualms, though only the 'Great Powers' had the political muscle to shape international agreements to their liking. Monarchy or democracy, capitalist or socialist, states have proved remarkably reluctant to cede their powers.

Positive versus Natural Law

Given this state system, based in sovereignty, what supports human rights law? How can we justify human rights standards? And

which standards should we justify? These questions stood at the center of the 1948 U.N. debates, and the direction that those debates took accounts for the imprecision of the Declaration that emerged. There are, in general, two approaches to this issue. Positivists argue that human rights are created by international agreements, nothing more. No superior standard is either possible or necessary. Natural law theorists, on the other hand, argue that agreement is not enough. People can--and do--agree to the most unspeakable acts. Human rights are rights, even if no one agrees to them. Natural law theorists, however, differ about whether these rights are based in religion, reason, or human nature.

Though there are other approaches, most human rights theorists fall into one of these two camps. This is not the place for a long exposition, but a brief introduction to each now will clarify the issues involved and the conflict surrounding human rights today.

In the Hobbesian tradition, international law is 'positive law': law freely entered into and agreed upon by states sovereign over their own territories and peoples. It is based in nothing but self-interest, and needs no other basis to bind states together. For this approach--the dominant practical philosophy governing the affairs of nations--international law is based in politics, not in morality or philosophy. Though these latter factors may influence the goals toward which political dealing aims, international law does not depend on them. Politics is about power, and international law is thus also about power: in Ivo Duchacek's words, "who leads whom, with what intent, for what purpose, by what means, and with what restraints."²¹

Seen in this way, international law provides no room for 'human rights' per se, except as those rights are embodied in treaties.²² For legal positivists, 'human rights' are precisely those rights that states have granted. States are the players in this game, not individuals. A state's legitimacy arises not from any supranational standard, but from its ability to protect its citizens. Anything that weakens it is not just a threat to its sovereignty, but a threat to its being. Richard Falk points out that this "statist logic" is but one of several possible approaches to human rights; respecting human rights can even strengthen states in some circumstances. Yet all but one of his other "logics" are also positivist: i.e., they see rights as the result of an agreement between peoples, not as something

basic to which human law must conform. Falk notes that state-centered positivism is by far the dominant legal "logic" in the modern world.²³

Few human rights philosophers are legal positivists, as positivism provides no firm ground from which to criticize existing legal systems. Positivism can criticize states for their failure to enforce the international laws and treaties to which they have agreed, but it cannot criticize them for actions that conform to their own legal codes. How could it do so? Positivism sees agreements as the highest standard to which humans can be held. If states (or Great Powers, international organizations, transnational interest groups, or 'the people', to list Falk's other potential loci of human rights pressure) have not agreed that a particular action is wrong, then it is not wrong! Positivists see human rights as the result of an international consensus embodied in treaties between states. As David Forsythe, who wrote the first textbook on human rights politics, put it, "human rights is what the law says it is, however much philosophers may debate."²⁴ Though Forsythe only claims that this describes the actual workings of human rights law, true positivists take a similar stand on principle.

Natural law theorists oppose legal positivism, claiming that there must be better grounds than mere agreement on which to base notions of rights.²⁵ Various natural law doctrines posit key principles that they claim states 'must' recognize, on pain of losing their moral legitimacy. These principles stand above human law and provide standards by which to judge it. For example, Greek and Roman laws were supposed to conform to 'justice'--something beyond law that gave the law its legitimacy--though Plato showed in the Republic and the Gorgias just how difficult it can be to specify a 'just' act. Medieval Christian scholars found justice in the revealed laws of God and decried as unjust any laws that contravened them. Catholic moral philosophy has its origins here, as do most systems of religious ethics.²⁶

Yet the problem with basing human rights on religion is obvious: not everyone has the same religion, and not all of the 'gods' speak with one voice.²⁷ To posit one god as right and another as wrong can itself be justified in only two ways. Either one can compare various gods' edicts to some superior law, with the prize

going to the god who conforms most closely. Or one can claim that only one god is 'true', while all others are 'false'. But to do the first is to set the law above god, a thing few religionists wish to do. And if one tries to justify the second claim rationally, one is in effect comparing a god to a superior 'truth'--which is much the same as measuring a god by a superior 'law'. One can, of course, kill or convert one's opponents, thus eliminating their gods from the game; this is not generally considered a fair tactic, though.

As many Christian theologians have noted, the question "Is God just?" either forces God to submit to an external standard of justice or it is tautology: justice is defined as what God does. Jack Miles notes that when Job questioned the Hebrew God's justice, He responded with an imperious non-answer and then fell silent, to remain so through the rest of the Hebrew scriptures.²⁸ Would that all gods were so honest.

Early modern philosophers eschewed such religious appeals; the twentieth century decline of public religion banned them as well from mainstream political life, though they have continued in certain spheres.²⁹ Philosophers substituted appeals to 'reason' and to 'the laws of human nature' for 'the laws of God'. John Locke (1632-1704), for example, held that natural law began in God's will but could be discovered by human reason. He began his Second Treatise of Government with a depiction of a 'state of nature' in which men (sic) are bound to preserve peace, preserve humanity, and refrain from hurting one another. He claimed that people do not need any special help to know this law, but as all do not comply with it, reason leads them to institute a social contract for their mutual protection. Unlike Hobbes, Locke did not believe that this contract requires people to give up their natural rights. Indeed, he preserved their right to rebel against their rulers if the rulers "wage war" against them. Society begins, for him, with individuals naturally knowing the good; any government that violates that good has lost its legitimacy and deserves to be overthrown.³⁰

As many scholars have pointed out, and as we shall see in more detail in the following chapters, this is a very ethnocentric and time-bound image. C.B. Macpherson called it "the political theory of possessive individualism," a term as descriptive as it is gentle.³¹ For what rights does Locke suppose are universal? Self-preservation is

key, as is individual freedom, but soon after these comes the right to own property.³² For Locke, a main purpose of the state is to secure property and to regulate its use, distribution, and transference. Though the reasonableness of this 'right' may have been apparent to the merchant and proto-industrial classes of Locke's own day, one has trouble imagining tribal peoples being terribly concerned with it. Traditional Inuit, for example, specifically devalued those who clung to their own possessions. Reasonable Inuit shared everything they owned so that all could live.³³ This is not to say that the Inuit were right and Locke was wrong any more than it is to claim the reverse. Both versions are 'reasonable', given the differing social, cultural, and environmental circumstances in which they arose.

Basing rights on non-religious forms of natural law is no more sensible than basing them on religions, and for the same cause: one's concept of what is 'natural' is mediated by culture and belief. As these vary from society to society, one can only justify the primacy of one's own view without relying on the 'common-sense' philosophy built into one's own social order--a very hard thing to do.

Again, there are two possible arguments. Either reason itself varies from society to society, in which case different reasoning will lead different peoples to different moral conclusions.³⁴ Or if a 'universal reason' exists, that 'reason' would deduce a different list of rights for each people based on their different circumstances. In neither case is 'reason' a solid scaffold on which to hang a universal human rights code.

I shall later pursue this at some length and so shall not attempt to say more about it here. But I must note that natural law theories of rights suffer from the flaws inherent in all rule-based theories: that it is always hard to justify the rules on which they are built. Though the philosophers of an earlier time could simply assume that their own rules were best, that option is not open to our post-imperialist age.

Legal positivism avoids this problem by basing the rules on agreement, nothing more. Yet one wonders if this is enough. What does one do with a state that follows its own laws and treaties perfectly, yet commits genocide? Is clitoridectomy not a human rights violation simply because it has not been recognized as one by the international community? Were religious persecutions not wrong

before the evening of December 10th, 1948, when Article 18 was adopted by the U.N.? Pure positivism seems wanting.

A Middle Way?

Yet if both positivism and natural law theory have flaws--which my discussion of them has barely touched--there are ways of splitting the difference between them. Huge Grotius (Huig de Groot: 1583-1645) blended a modified natural law theory with a respect for politics to make a set of rules for international conduct that still informs modern statecraft.³⁵ Grotius noted that legal positivism allows states to be bound only by treaties to which they freely consent, yet it does not explain why those treaties should be binding when states' interests change. Pure *realpolitik* would encourage states to break treaties with impunity: to lie, cheat, and steal to protect their interests. Many states have behaved this way, but none advocate that all states do so; then no state could believe any other, and all promises would vanish in the air.

Like other natural law theorists, Grotius argued that prior to any political organization there exists a law, which he based on reason and on the social nature of human beings. States arise from a contract, as Hobbes and Locke said,³⁶ but like Locke he believed that rulers cannot freely overturn the laws of reason that necessitated that contract's creation. Human society and the human intellect depend on certain principles, among them consistency, order, and a respect for conclusions affirmed and promises made. By sticking to its treaty obligations--*pacta sunt servanda*--states both reaffirm these principles and subject themselves to their rule. In doing so they reinforce their own legitimacy. They could do otherwise, but breaking promises undercuts their own *raison d'être*, which is the protection of orderly social life. This they undertake at their own peril.

Of course, Grotius says much more than this, most of it in a natural law vein.³⁷ But by highlighting this thread in his work, one can see a middle way between positivist and natural law theories. In a sense, Grotius applies Hobbes' notion of a contract between equal persons to a contract between equal states and finds them declaring

their subservience to a sovereign principle instead of to a sovereign ruler. States must obey international law because to fail to do so would bring about anarchy. Reason tells states that they need international law in order to maintain the international system, even though that system's precise structure results from freely-made treaties between sovereign entities. International law is thus created by states, which in turn receive their legitimacy from it.

A step in the same direction is made by some modern legal positivists who investigate the presuppositions underlying legal norms. Hans Kelsen, for example, argued that legal systems are hierarchical in structure and gain their coherence by their conformity to a *grundnorm* or basic principle.³⁸ A *grundnorm* is not itself a law; rather it is a principle implied by a legal system, in whose light that legal system attains intellectual coherence. When scholars speak of a legal norm as a valid norm of the system, they mean that the norm conforms to the *grundnorm*. For Kelsen, 'natural law', 'justice', and so on are all unscientific nonsense, but the *grundnorm* of a legal system is a discoverable entity. International law plays this role in the modern world, by legitimating the sovereign states that act under its aegis. Yet Kelsen's "*grundnorm*" is much like Grotius's "sovereign principle": it both emerges out of international agreement and legitimates that agreement. Can it be the foundation of a human rights ethic?

I shall have to leave the discussion of these approaches to a later chapter, where I can pursue them in more depth. In brief, I shall argue that neither approach can ground a universal human rights ethic because both the basic principle of a code of justice (*grundnorm*) and the sovereign principle that makes adherence to codes of justice possible (*pacta sunt servanda*) operate at the level of ideas. That is, they are not independent enough of the cultural worldviews that place human rights ideas in conflict. At the same time, each approach provides a key that can admit us to a non-ideational foundation for a universal human rights code. We must cover considerable ground before this foundation emerges, however.

Both approaches, however, highlight the two-sidedness of international human rights law. As Forsythe puts the matter most clearly,

Human rights law ... establishes a set of rules for all states and all people. It reflects a moral demand for common, universal treatment of persons. It thus seeks to increase world unity and to counteract national separateness (but not necessarily all national distinctions). In this sense the international law of human rights is revolutionary because it contradicts the notion of national sovereignty--that is, that a state can do as it pleases in its own jurisdiction. On the other hand, for the state that adheres to international standards on human rights, its legitimacy is enhanced and its position made more secure. Thus at one and the same time internationally recognized human rights constitute a challenge to national sovereignty and a source of national security.³⁹

It is worth pointing out that one can still work for human rights without choosing between positivist and natural law approaches. Many scholars and activists recognize the importance of foundational human rights philosophies, but act as if legal positivism were true. They do not spend their time theorizing, but instead work to enforce the rights that now exist and to extend them further through treaty action. To quote Forsythe again,

Too much emphasis can be placed on theories of rights. That emphasis is bound to magnify abstract differences between liberals and conservatives, Marxists and non-Marxists, Westerners and non-Westerners, affluent and impoverished. One of my continuing objectives is to show that, despite various theoretical and philosophical differences which to be sure are very real in the world, a great deal of action can be--and has been--taken in support of human rights.⁴⁰

Similarly Abdullahi An-Na'im, a legal scholar and former Sudanese political prisoner, claims that only by encouraging cross-cultural and cross-philosophical conversations can one arrive at universally agreed-upon human rights standards. These standards will not reflect any one philosophy, but will reflect an emerging transnational consensus of the way social life ought to be ordered.⁴¹

This approach has historical merit: as John Humphrey notes, had all the members of the original Human Rights Commission insisted on imposing their own philosophical approaches, the Universal Declaration would never have been written.⁴² Natural law

theorists may wish that human rights law had more substantive philosophical foundations. True positivists would deny the validity of philosophical arguments rather than merely refraining from expressing them in the interests of consensus. One can sometimes make practical progress by pushing neither philosophy to its extreme. This has its cost, however, in the kinds of dilemmas traced in the first chapter. Fifty years after their first promulgation, the philosophical bases of universal human rights must still be revealed.

Early Human Rights Documents

Humphrey drafted the first U.N. documents on human rights; his practical attitude made possible much of what has been attained today. But he did not lack prior models. His draft had an intellectual genealogy, which, like most such genealogies, tells us as much about the limits of the U.N. human rights codes as it does about their accomplishments. That is to say, Humphrey, Saint-Lot, Roosevelt, and the other framers of the Universal Declaration had their own sense of history and of the historical movement of which they were a part. All people do. That their belief in cumulative Western historical progress toward a universal code of human rights is but one possible human rights history, and indeed is a retrospective construction, does not lessen their feat; it does, however, give us clues about the assumptions with which they labored.

Western human rights proponents often begin their tale with the Magna Carta (1215).⁴³ At least that far back, Western law has spoken of individual rights and liberties. In that charter, England's King John

granted to all freemen of our kingdom, for us and our heirs forever, all the liberties hereinunder written, to be had and held by them and their heirs of us and our heirs.

Then comes a list of more than sixty promises, of both lasting and temporary significance. Some were administrative: the king will only appoint bailiffs, constables, sheriffs and other officials who know and will obey the laws they are supposed to enforce.⁴⁴ Others protected a person from punishment "unless by the lawful judgment of his peers and by the law of the land." The king must prove

accused persons guilty of their crimes, pay for seized goods, allow freedom of travel, make sure that justice is not bought or sold--in short, must rule by law and not by fiat.

This is, of course, no modern document. It is less the cradle of freedom than a text reforming the late feudal system. The barons who forced John to sign it were as interested in good government as they were in liberty; they did not act from a deep belief in the rights of the common man.⁴⁵ Indeed, by its very language, the Magna Carta does not see rights inherent in people but grants them as a kingly gift. Still, the seventeenth-century opponents of Stuart absolutism thought it the foundation of English freedom, and overthrew two kings in its name.

The first of those revolutions beheaded Charles I (1649); the second produced the English Bill of Rights (1689), in which Parliament overthrew James II and offered the crown to William of Orange. That bill spoke not so much of individual rights as it did of the rights of Parliament: to pass laws, levy taxes, control the army, and so on. Free speech was reserved for parliamentary debates, not for the masses outside. But individuals were to be free to petition the King without fear, to be safe from cruel and unusual punishment, to have jury trials, and--if Protestants--to be able to keep and bear arms as allowable by law. This is not much by modern standards, but, as human rights advocates point out, it went against the absolutism of the age. And unlike the Magna Carta, this document presents itself as the product of the "full and free representative[s] of this nation...vindicating and asserting their ancient rights and liberties."⁴⁶

The history of the American Declaration of Independence (1776), the French Declaration of the Rights of Man and Citizen (1789), the United States Constitution (1789) and its Bill of Rights (1791) are too well known to need review, though they, too, are part of the standard genealogy. Sometimes lost in this list is the 1776 Virginia Declaration of Rights, the Bill of Rights' precursor.⁴⁷ Largely the work of George Mason, this document claimed for all the rights to

the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety.⁴⁸

Power comes from the people, officials are to serve the community rather than being served by it, and elections, religion, and the press should be free from government interference. The declaration affirms everyone's rights to a trial by peers, to just punishment, and to equal application of the law. In short, it lays the basis of modern democratic rule. Dag Hammarskjöld remarked that "what was new in the Virginia Declaration of Rights was the formal recognition of human rights as part of written constitutional law."⁴⁹

Each of these steps was a change in law and a change in legal philosophy. Together, say human rights historians, they represent a progressive shift toward the view that governments grow out of the people that they are supposed to serve. Though King John would never have signed--and his barons would never have asked for--a charter that embodied this thinking, King George's American subjects demanded it. The American Revolution was 'conservative' in so far as its partisans fought for 'the traditional rights of Englishmen' against what they saw as unjust tyranny. As E.P. Thompson has pointed out, a similar defense of 'traditional English rights' played a large role in creating the English working class during the same era.⁵⁰ Those rights were not traditional, strictly speaking, and they certainly did not arise out of the people's 'natural liberties'. But people thought that they did, which made all the difference. The growth of this popular natural rights philosophy is one of the hallmarks of the modern era.

The First Treaties

The first international human rights treaties--as opposed to philosophies and national constitutions--were not about human rights but about warfare. The 1864 Geneva Convention on the treatment of the war wounded granted them access to medical care and assured the safety of those who cared for them. No longer were states to target sick and wounded combatants. No longer were they to use medicine as a weapon. Though the treaty did not use this language, it implicitly recognized that individual soldiers had basic rights even in warfare; there was a limit beyond which the state could not go.⁵¹

There was, unfortunately, no enforcement mechanism, and the problem of protecting medical neutrality is with us to this day.⁵² States police themselves, with the soft oversight of the International Committee of the Red Cross. The role of this organization grew as the original treaty was revised in 1906, was supplemented in 1929 by a treaty on the treatment of prisoners of war, and was augmented by four 1949 treaties--which were themselves reaffirmed in 1977. Though these agreements are generally called "international humanitarian law", they act as a human rights law for armed combat.

A second nursery for human rights law was the fight against slavery--long a part of many world civilizations. Though Greek slaves were originally war prisoners, other Mediterranean civilizations usually recruited slaves among foreigners.⁵³ The early Roman term "servus"--the etymological source of serf--was replaced in late antiquity by "sclavus", parent to Slav: the general name for 'barbarians'. Moslem traders found slaves in both Russia and Africa, who could be owned as uncivilized infidels. Though Bloch notes that European slave-holding declined during the Middle Ages, a change he attributes to Christianity, Italians kept slaves throughout the Middle Ages, usually Russians, Greeks, and Bosnians before the fall of Constantinople closed the eastern routes and traders had to turn south for their wares. David Brion Davis notes that the three main periods of Western slavery correspond to the three main periods of Western expansion: the growth of Rome, of Islam, and of Iberian overseas imperialism. It was thus associated with 'progress' in the popular mind.⁵⁴

This is, of course, just the West. Africans practiced slavery, as did the Chinese, Burmese, Indians, Assamese, and nearly every other sedentary people.⁵⁵ In the Western case, at least, there was often some recognition that one did not enslave one's own kind, however this might be defined. The mid-15th century arguments about the enslavability of the 'newly discovered' peoples revolved around the question of their likeness to European Christians. Did they have souls, so they could be Christianized? And if so, could they still be enslaved? As is usual in politics, the parties compromised and Christian henceforth owned Christian. The economic logic of slavery in this period was too strong.⁵⁶

A cultural logic stood against this pressure, however--one that eventually triumphed. From the early 1700s, American and British Quakers opposed slavery as a crime against the human spirit. Combining a belief in human spiritual equality with an active moralism, they lobbied their governments to end the slave trade and to free slaves within their dominions. Their efforts resonated with other pietistic Protestants, enlisting their aid. Interestingly, it was Britain, rather than the United States, in which this movement first bore major fruit. Though her merchants had long dominated slaving, Britain outlawed it in 1807--at a considerable economic cost. Twenty-six years later, she abolished slavery in her dominions at a cost of some 20 million pounds compensation to slave owners.⁵⁷ This is not the place to decide whether slavery fell out of moral advancement or from its own economic inefficiency. Certainly abolitionists played the moral card by arguing that slaves possessed the same rights as their masters. In any case, all of the major Western nations followed Britain's lead, Brazil being the last to succumb in 1888.⁵⁸

Europe--particularly Britain--then tried to outlaw slavery in the rest of the world, without total success. Various treaties banned the practice, as did various governments--most recently the governments of Mauritania (1986) and Bahrain (1990). The conventions of 1919 and 1926, supplemented in the 1950s, imbedded the ban in international law.⁵⁹ But these victories came late.

The third main source of early human rights law was the League of Nations. Though by no means powerful, the League was the first international organization to try to protect individuals--even if not directly but through the medium of states. League action focused on three areas of concern: minority rights, labor rights, and the rights of persons in the former German colonies, now administered as League Mandates.

Humphrey himself argues that the League's work on minorities was its most important contribution to later U.N. efforts.⁶⁰ The various "minority treaties" that accompanied the Versailles Peace of 1919 were designed to protect the inhabitants of the former Russian, German, and Austro-Hungarian Empires who were now subjects of various national states. The Polish Minority Treaty, for example, outlined the rights of the former subjects of Russia and

Germany to become either citizens of Poland or of their former rulers. It also decreed that

Article 7: All Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language, or religion.

Differences of religion, creed, or confession shall not prejudice any Polish national ...

No restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind ...

Article 8: Polish nationals who belong to racial, religious, or linguistic minorities ... shall have an equal right to establish, manage, and control at their own expense charitable, religious, and social institutions, schools and other educational establishments ...⁶¹

The treaty went on to highlight the special rights of Jews and to allow any member state of the League of Nations Council to bring a complaint if the Polish Government violated any minority's rights. Significantly, Poland agreed to submit such disputes to the Court of International Justice--a major compromise of its national sovereignty. But only states could complain, not individuals. The other treaties had similar provisions.

Legally, these acts grew out of an established international law doctrine--one that gave each state the right to protect its citizens from other governments. If a citizen of Country X was mistreated by the rulers of Country Y, Country X was due compensation--not the mistreated individual. States would sometimes extend protection to a foreign minority with which they had some affiliation, as in the case of Louis XIV's Proclamation of French Protection of the Maronite Community in Lebanon (1649). The nineteenth century saw several such European efforts to help minorities under the Turks--efforts that were often imperialism in disguise. For it was not really the individual's interests that were protected, but the country's. International law was still a state-to-state matter.

The Polish and other minority treaties did not work well. They failed to impede tyrannous majorities and fell victim to Nazi

expansionism. Yet they represented an important principle. Not only were individual rights explicitly laid out, and members of minority groups seen as having rights to languages, religions, and cultural practices that separated them from the rest of their fellow citizens. But national majorities were enjoined to tolerate cultural minorities as groups, not just as disparate individuals. Though not totally overt, this notion of 'cultural' or 'group rights' would emerge in the 1970s as an important human rights issue--one that has not been resolved to date.

Labor rights treaties fared somewhat better. The International Labor Organization--also set up by the Versailles Treaty--spent much of the inter-war years working for internationally recognized labor standards: for hours, pay, pensions, safety, and so on. It produced two treaties, one on the unionization of farm workers and another placing restrictions on forced labor. Though really a negotiating rather than a legislative body, the ILO was popular enough with its constituent governments that it was absorbed into the U.N. after the second war. It produced six new treaties on labor standards while the U.N. Human Rights Commission was taking up formal human rights work. In subsequent years it produced many more.

Though less effective administratively, the League of Nations Territorial Mandates were the first field in which an international body claimed jurisdiction over the way governments treat individuals. Rather than having full sovereignty, the Mandate Authorities supposedly worked under the oversight of the Mandate Commission. Individuals could not appear before the Commission, yet it was supposed to represent their interests. In essence the League claimed sovereign power, which it delegated to the various colonial powers. But this in itself was new. For the first time, an international body claimed independent authority over persons--and held other sovereigns to account on their behalf. As Forsythe remarks, "this would not be the last time that a human rights provision was more important for long-term developments than short-term protection."⁶²

In all these fields, a discernible shift was taking place in international law. The doctrine of state sovereignty had originally given rulers sole voice in how they were to treat their subjects. That is, the rights of citizens were a matter of domestic, not international

concern. Though "the theoretical basis of human rights is the predominantly Western concept that individuals have a claim to autonomy and freedom in the face of governmental authority," this was manifestly not how states did business with one another. Oppenheim's 1912 classic summation of international law accurately proclaimed that "the Law of Nations is a law between States only and exclusively."⁶³

By the time that Lauterpacht revised Oppenheim's text some forty years later, however, much had changed. He was still able to write that "the Law of Nations is *primarily* a law between States," [italics added] but noted that states have granted rights to individuals to such an extent that "there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law." Though he denied that international law itself guaranteed individual rights as yet, he noted that the reference to rights in the U.N. Charter "has inaugurated a new and decisive departure with regard to this abiding problem of law and government." He looked forward to changes in positive law that would make this so.⁶⁴

A Note about Genealogical History

The history I have just recounted--tracing human rights from the Magna Carta to the ILO--is something more than it seems. It is a history, true enough, but it is also a genealogy: a record of the remembered forebears of the current human rights program. As Edmund Leach notes about the Hebrew Bible,⁶⁵ genealogies say a lot about the cultural lives of those who tell them. Such a 'history' is, of course, a reconstruction based on a particular image of the present: we see where we think we are and so look backwards to see who or what got us here. The human rights genealogy is, moreover, like all genealogical histories, not totally factual and not the only possible reconstruction of the past. Each of these points needs to be explained.

The first point is not difficult, but is key to the others. Just as nations are not natural, but are "imagined communities", to use Benedict Anderson's phrase, so too histories are not natural but are remembered. We recount the past from the standpoint of the present.

Our image of that present tells us what to look for: which ancestors to favor, which to shun, and so on. What we find there, of course, may revise our sense of the present, but more often the resulting story reinforces our image of ourselves. This is especially true with genealogies, whose prime purpose is to tell us (and others) who we are.

The genealogical history I have just told emphasizes progress; it portrays human rights emerging triumphant into the modern world. Though the precursors I have just cited all exist, there are more negative precursors that I could just as easily have included. Take the 1857 Dred Scott decision, in which the U.S. Supreme Court denied persons of African ancestry the protections of the Constitution. This was not 'progress'; it took away rights that seventy other Court cases had previously assumed slaves possessed. Similarly, Pitt's moves against the English working classes during the Napoleonic wars eroded their traditional rights. British courts routinely voided laws that supported workers against their employers, even if those laws had stood for centuries. The collapse of human rights in Nazi Germany--until then the one of the strongest defenders of the rule of law--is only a particularly egregious case of retrogression. A genealogy of human rights 'progress' is as much a wish as a reality.⁶⁶

Factually, some of that history's genealogical icons were not understood in their time as we understand them today. For example, Orlando Patterson describes the relative weakness of the 'rights' concept in the American colonies. He notes that 'liberty' was then a much more important notion, and that the Lockean ideal of natural rights bloomed only for Americans in the last quarter of the eighteenth century. 'Rights' justified rebellion, and they gave 'liberty' something to stand on when newly independent colonists could no longer appeal to their 'traditional liberties' under English common law.

So a strange thing happened in the history of rights. Immediately after the triumph of rights rhetoric in the enactment of the American Bill of Rights, the Bill and the whole tradition of rhetoric surrounding it quickly sank to insignificance. Indeed, several states had not even bothered to

ratify it, Massachusetts and Connecticut eventually getting around to doing so only in 1937!

Lead by Chief Justice Marshall, the Supreme Court ruled in 1833 that the Bill of Rights only applied to the federal government, not to the states. And the Slaughterhouse cases of 1873 reduced the 14th Amendment (granting citizenship rights to all races) to meaninglessness by claiming that states did not have to obey them--and so were free to brutalize anyone without legal limit. Surely this is not a record of consistent progress toward human rights for all!⁶⁷

Besides, there are alternate genealogies that could be written. As we shall see in the next chapter, there are Chinese and Islamic human rights histories that could have been tapped. Each of these traditions has its human rights precursors and opponents, and each had different kinds of battles between them. Even within the Western tradition, one can see the disparities between French and English approaches. The former's constitutionalism and the latter's base in common law are merely the surface manifestations of fundamentally unlike tales. French liberty challenged the Old Regime's social structure, though that Regime was not unambiguous darkness, as Robert Darnton has shown. English liberty defended an older structure, lost, and reemerged as trade unionism with a different concept of rights than the industrial classes it opposed. Both contributed to human rights, but they did so in different ways and in different modes.⁶⁸

My point is not that the modern human rights movement sprang into existence without history; just the opposite. The past made a great deal of difference to the kind of human rights embodied in the Universal Declaration. But the focus of that recounted history on the West and the picture of human rights progressively emerging out of previous darkness are just that: pictures, not reality. Where we see a progressive unfolding of democracy and of the rights of the individual, we could just as easily have seen a battle between evenly matched foes. Where we see the West leading us toward the freedom of the individual, we could see the East leading us toward an ordered and good society. Both images are 'correct', but each is constructed from the point of view of the present. The diplomats centered at the U.N. Human Rights Commission picked one view, which shaped the

Universal Declaration of Human Rights they created. It is to that shaping that we now turn.

Approving the Universal Declaration

Shortly after its founding, the U.N. Economic and Social Council established a Human Rights Commission, which first met in January, 1947.⁶⁹ Under the leadership of Eleanor Roosevelt, it was charged to report to the Council regarding:

- (a) an international bill of rights;
- (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;
- (c) the protection of minorities;
- (d) the prevention of discrimination on grounds of race, sex, language, or religion;
- (e) any other matter concerning human rights not covered by (a), (b), (c), and (d).⁷⁰

The Commission soon set up Sub-Commissions on Freedom of Information and of the Press, on the Prevention of Discrimination and Protection of Minorities, and on the Status of Women.⁷¹ It kept for itself the task of producing a general Bill of Rights. This was a wise move. While the sub-commissions were composed of specially-chosen experts and professionals, the HRC was made up of governments' representatives. They were in a much better position to do the hard negotiating that a human rights treaty required.

Yet no treaty came forth. Within six months of the first meeting it had become clear that the emerging ideological division between East and West would prevent any quick agreement on a formal human rights pact. With some reluctance, it was decided to split the task in two. The HRC would produce a general manifesto but would leave questions of enforcement to a detailed covenant, which it hoped to complete within a year or two. Though this tactic allowed the Commission to get a Universal Declaration through quickly, no one imagined that the Cold War would block the enforcing agreements for another 18 years.⁷²

The various draft human rights documents that appeared in the course of the HRC deliberations were clearly written in the positivist tradition. That is, they ignored the philosophical justification of human rights in favor of getting as many nations as possible to sign on. This decision, too, was politic. The main substantive divide was between the Western democracies, which wanted to affirm political freedoms, and the East Bloc, which focused on economic and social rights. Yet there were enough philosophical differences on just the western side to prevent any quick unity. The Vice-Chairman and Rapporteur of the first Human Rights Commission, for example, were respectively Dr. Peng-Chun Chang, a renowned Confucianist, and Dr. Charles Malik, a Lebanese Thomistic Christian. Their learned debates entertained many a delegate, but hardly settled the conceptual issues. HRC Chairman Roosevelt often had to bring their philosophical flights back to the business at hand.

With John Humphrey, the head of the Human Rights Division of the U.N. Secretariat, Roosevelt formed a small drafting committee to put forth a preliminary document. At first made up of themselves, Chang, and Malik, it soon added the representatives of Australia, Chile, France, the U.S.S.R., and the U.K. Based on Humphrey's model, France's Dr. René Cassin prepared a second and then a third draft;⁷³ these formed the basis of discussions at the HRC's December 1947 meeting in Geneva. Modified somewhat there, it was further revised through consultations with the member governments and passed with one abstention at the next HRC meeting in June, 1948.⁷⁴

The arguments that arose in these sessions show the depth of the differences between the various advocates of human rights, as well as the depth of division between the governments involved. The American State Department, for example, wanted "a carbon copy of the American Declaration of Independence and Bill of Rights." The Soviet Union wanted economic and social rights, with--the Americans feared--"the less said about freedom of speech, the right to a fair trial, etc., the better."⁷⁵ Roosevelt herself was open to both kinds of rights, but Chang saw the Western biases both contained. He twitted Humphrey about this, suggesting that whoever wrote the first draft Declaration should first spend a year in China studying

Confucianism. Otherwise, the Declaration would be Euro-American, not universal.⁷⁶

The philosophic fights did not always divide on political lines. Malik expressed the most extreme individualism, arguing that the human person is "prior to" and more important than the group and can thus alone be the judge of right and wrong. The British representative--a trade unionist--responded that "there is no such thing as complete personal freedom": individual, group, and state are interdependent and the rights and duties of one are meaningless without the others. Cassin supported this, but Ribnikar, the Yugoslavian representative, went further. He claimed that individualistic notions of rights only reflect the ideals of the middle classes; as those classes had become "obsolete", the international bill of rights should focus on economic issues, so as to "be in conformity with the aspirations of the popular masses of the world." They should thus delete the right to property, the rights to life and to personal liberty, and the prohibition against compulsory labor, among others. This was not acceptable to Roosevelt, who thought such rights adhered to individuals.

In the end, Humphrey did not read Confucius, but his draft contained both civil/political and economic/social rights, the "first-generation" and "second-generation" rights mentioned in the preceding chapter. Both were retained in the subsequent drafts and in the Universal Declaration. There, Articles 1 through 21 focus on civil and political liberties, with some additions to the traditional list--the right to equality in marriage being one. Articles 22 through 28 provide rights to social security, an adequate standard of living, education, cultural life, and to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"--all second-generation matters.

The conferees finessed the philosophic issues whenever possible. They changed an early draft's statement that all humans are "created" free and equal to "born" to avoid conflict with the East Bloc's official atheism; everyone could agree that all people are born, but not that a Creator made things so. They refrained from listing partisan principles from which human rights supposedly sprang. They beat back Malik's attempt to guarantee the right to life "from the moment of conception"--an issue as rancorous then as it is today.

They even dropped the few philosophic principles that Humphrey's first draft had included, such as the notion that individuals are citizens not only of their states but of the world. On the other hand, they bowed to the request of the Commission on Women to make the Declaration gender-neutral. The Universal Declaration thus refers not to "men" but to "every human" and "everyone."

Roosevelt consistently argued that the Declaration must be acceptable to all 58 U.N. members. This meant considerable politicking and frequent compromise for the sake of particular sensibilities. For example, American Under-Secretary of State Robert Lovett insisted that the Preamble call on members to "promote" human rights rather than "enforce" them. Soviets and Americans together voted to remove individuals' right to petition the U.N. directly. The Americans agreed to support the list of economic and social rights, but only if governments were to "promote" rather than "guarantee" them. (At this, the Soviet representative remarked that he understood the U.S. position, because capitalism could never guarantee full employment; perhaps the U.S. needed to try a different economic system!) Though the smaller countries wanted a firmer document, and Roosevelt herself would have been happy to see one, the great powers prevailed. Roosevelt satisfied herself with a commitment from her government to back a formal human rights treaty as soon as practicable.

Not all politicking was benign. By mid-1948, the Soviet government had apparently decided to obstruct progress toward a Declaration. Representative Alexei Pavlov announced that the HRC should throw out the Geneva draft and begin again from first principles--Soviet ones. When that motion failed, he proposed amending each and every article so that rights would be valid only "according to the laws of the state." The "right to leave any country, including his own" would then be limited by domestic law--effectively nullifying that right for Soviet citizens. Other rights would suffer as well. Roosevelt concluded that the Soviet Union had grown dubious of an accord that gave individuals rights against the state and gave the state duties toward its citizens. As that was the whole point of the Universal Declaration, she rallied the HRC to vote her way.

The HRC finished its work in June, 1948, and the U.N. General Assembly took up the draft Declaration at its September meeting in Paris. Its Third Committee⁷⁷ spent eighty-one sessions on the Declaration and considered one hundred and sixty-eight resolutions containing amendments. It examined each article in detail, rehashing many of the debates that had taken place in the HRC. In the end, the draft stayed much as it was, though the issues raised in the debate are instructive. Catholics in both Europe and Latin America tried to reinsert God and natural law as the foundations on which rights depend. Moslems objected to its support for freedom of marriage and religion, noting that the Qu'ran forbids Moslem women to marry outside their religion and forbids Believers to embrace other creeds. South Africa argued that the document went beyond truly universal rights to impose a particular social and political system; her representative especially opposed the articles supporting freedom of residence and the right of everyone to participate in government, which would undermine the *apartheid* regime.⁷⁸

Poland, Yugoslavia, and the Soviet Union argued that the Declaration interfered in the internal affairs of sovereign states--a violation of the U.N. Charter. Interestingly, they also complained that it did not protect the linguistic and cultural rights of national minorities, which many countries found to be just such interferences.⁷⁹ And they argued that its definition of the right to free speech would protect 'fascist speech' as well as 'democratic speech'; they favored a modifying the speech clause to guarantee the right of every person "freely to express and disseminate democratic views, and to combat fascism."⁸⁰

Most major changes were defeated. The Third Committee approved the draft Declaration on December 6th by a roll-call vote of 29 to none, with 7 abstentions.⁸¹ The same issues were brought up again in the General Assembly debate on December 9th and 10th, but again the vote was favorable. A Soviet motion to delay lost, a British motion to collapse two articles into one was approved, and the Declaration won by a vote of 48 to none, with 8 abstentions. The Communist Bloc, Saudi Arabia, and South Africa were the only holdouts.

Roosevelt remarked to a Paris audience that she had once thought she had reached the limits of human patience raising her children; now she knew that this was nothing to the patience that international diplomacy required.⁸²

Conflicting Concepts

At the time, the chief conflict seemed to be between advocates of first- and second-generation rights: i.e., between the Western-democratic and the Communist worlds. A second conflict was over the exact status of the Declaration: as legal document or as moral authority, though this did not stand in the way of approval.⁸³ Though still alive, these conflicts seem not so important today.

Below the surface, however, there were other contradictions. Chang failed in his attempt to have the delegates take Confucianism seriously, largely because few of them knew anything about Asian philosophy. He was (barely) able to keep references to "God" and "nature" out of the document by reminding them that not all people think in these Western terms. But the best he could hope for was a text that would not obviously offend East Asians, even though it did not express their views. A pragmatist, he thought the Declaration the best possible under the circumstances, though far from universal.⁸⁴

The Moslem critique was more direct, and Roosevelt worried that it would lead several countries to abandon the human rights effort. The Saudi Arabian delegate--ironically another Lebanese Christian--argued that the freedom to change one's religion was one that the Qu'ran did not grant to Moslems but only to other people. Saudi Arabia feared that declaring this right would unleash hordes of Western missionaries seeking to undercut the religious stability of the Middle East. Afghanistan, Iraq, Pakistan, and Syria all spoke for Saudi Arabia in the Third Committee, as did Egypt in the General Assembly. The Pakistani delegate spoke against them in the latter debate, however, attributing the concern to a textual misunderstanding. All but the Saudis voted for the Declaration.

Even the Communist challenge did not merely involve the relative merits of economic as opposed to political rights, but also a different notion of the relationship between the individual and the

state. Roosevelt was right to think that the Soviets opposed an accord that gave individuals prime authority, but she was probably not right to think that they did so just out of opportunism. As we shall see later, 'socialist morality' is not based in the individual. Though the East Bloc's arguments may have been disingenuous, they were not senseless. One can make a competent case for a socialist human rights philosophy, but the rights it supports are quite different from those that the Declaration enshrines.

Politically speaking, Roosevelt was wise to keep overt philosophy out of the Declaration, even if a covert philosophy remained. John Humphrey admitted in his memoirs that his "draft attempted to combine humanitarian liberalism with social democracy"--certainly not aphiosophical points of view.⁸⁵ But the document did avoid specifying any particular basis for the equality of rights, even though most of the delegates would have liked to have included one. It thus took an implicit positive-law approach: human rights are exactly what states agree them to be. Whether that agreement is enough to enforce human rights for all is still a question today.

If one measures the success of this positivist strategy by the extent to which states have ratified human rights treaties, the approach is not doing so well. Of the 20-odd worldwide human rights treaties in force as of this writing, most have been ratified by fewer than two-thirds of the world's states. Only three-quarters of the states have ratified the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights--the enforcement provisions that Roosevelt sought but which were so long delayed. About a third--not including the U.S.--have ratified the latter's Optional Protocol, which lets individuals petition the U.N. about rights violations. The U.S. has also not ratified the Covenant on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child, among others. And it has registered reservations about several of the treaties it has approved.⁸⁶ The Appendix lists the relevant treaties and the number of states that have agreed to them as of this writing. It seems that "positive law" is not as positive as it might like to be.

While past treaties sit unratified, new agreements, declarations, and so on, have come to the fore. World bodies have now proposed not just first- and second-generation but third-generation rights: to peace, to development, to a clean environment, and to humanitarian assistance, among others. Their very controversiality underscores the limits of legal positivism as a human rights framework. If "human rights is what the law says it is," to recall Forsythe's words, what undergirds that law? What happens when the law changes? What happens when states do not ratify agreements they sign? And what happens when states and peoples cease to agree with treaties they signed previously, or which were negotiated by previous regimes? To say that the positivist approach fails to give human rights conceptual stability is putting it mildly.

Already in 1948, the U.N. debate touched on several conceptual challenges to the list of rights contained in the Universal Declaration--even to any list that claims cross-cultural universality. The next two chapters will survey the challenges raised by Confucian, Moslem, Communist, Fascist, & indigenous "rights" philosophies. I contend that we must take these challenges seriously if we are to emerge with a human rights philosophy that is truly universal.

NOTES

¹ U.N. General Assembly Proceedings, Summary Version: 180th Plenary Meeting, p. 853.

² U.N. Document A/777: "Report of the Third Committee."

³ The debates took place in many committees, commissions, and councils, as well as in the General Assembly. The most readily available summaries can be found in the following U.N. documents:

HRC Report to the Economic and Social Council, 3rd year, 6th session, Supplement #1;

HRC Report to the Economic and Social Council, 3rd year, 7th session, Supplement #2;

3rd Committee deliberations: A/C.3/SR.88-116, A/C.3/SR.119-170, and A/C.3/SR.174-178.

General Assembly Proceedings, Summary Version: 180th-183rd Plenary Meeting.

Yearbook of the United Nations 1946-1947, pp. 523-531.

Yearbook of the United Nations 1948-1949, pp, 524-539.

See also Humphrey (1984: chapters 2-7); Lash (1972: chapter 3).

⁴ Human Rights Commission, Report to the Economic and Social Council, 3rd year, 6th session, Supplement #1, p 19.

⁵ Saint-Lot's draft and the final version of the Universal Declaration differed only in minor details. One of these, however, was the numbering scheme. Article Three of the draft was stricken and its content was absorbed into Article Two. In order to avoid confusion, I shall refer to articles by the final numbering in the Universal Declaration. This is much more available for reference.

⁶ See Smith (1991).

⁷ Article 8 provided for "an effective remedy by the competent national tribunals for acts violating the fundamental rights granted ... by the constitution or law." It did not, however, guarantee that the rights listed in the U.N. Declaration will be recognized by that "constitution or law." This was the intent of the Soviet proposal. The West's fear was two-fold. Either the Soviet Union would use its own versions of human rights law to void the international agreements; or the international law would supersede Western constitutionally guaranteed freedoms. Both East and West sought to minimize the impact of the Universal Declaration on their own state sovereignty.

⁸ See Humphrey (1984: 10-13).

⁹ Benn (1967: 501).

¹⁰ St. Thomas Aquinas: Treatise On Law

¹¹ Anderson (1983: 19).

¹² Jászi (1929: 34).

¹³ The Plantagenets were French, the Tudors were Welsh, the Stuarts Scots, and the House of Orange Dutch. The currently reigning House of Hannover/Windsor is German. Prince Philip is (at least dynastically) Greek.

¹⁴ Anderson (1983: 19).

¹⁵ See James (1986).

¹⁶ Bodin (1576); Benn (1967: 502).

¹⁷ I am indebted to Charles McCoy for this suggestion.

¹⁸ Hobbes (1651).

¹⁹ The fact that the United States Congress must pass a special law before the government can be sued underlines the nature of this sovereignty: it is as absolute as anything imagined by Louis XIV, because it is only limited by the sovereign's will.

²⁰ The Soviet delegation proposed an amendment to outlaw the poll tax--a common practice in the U.S. South to prevent African-Americans from voting. The U.S. delegation knew that the Senate, dominated by Southerners, would never support this. The fact that it took 40 years before the U.S. ratified the Genocide Convention--and then only with reservations that gutted its power--proves that the Administration's fears were realistic. See Kaufman (1990).

²¹ Duchacek (1973: 9).

²² There are several varieties of legal positivism, but any discussion of them would take us too far afield. For a positivist's manifesto see Hart (1953).

²³ Falk (1980). Falk's human rights "logics" are: "statist", "hegemonial", "naturalist", "supranational", "transnational", and "populist"; these terms allude to the level at which human rights politics are applied. All but the "naturalist" position make human rights depend on social agreement of some form. See Downing (1988) for a cogent critique of Falk's position.

²⁴ Forsythe (1989: 6).

²⁵ Natural law theorists are not the only ones to oppose strict positivism; see, for example, Dworkin (1977). They are, however, its most common foes.

²⁶ See Lebacqz (1986).

²⁷ This is true whether one has a restrictive or an expansive notion of 'gods'. For the latter, see McCoy (1980).

²⁸ Miles (1995).

²⁹ Some Western countries suffer from religious controversies more than do others; religious arguments are especially salient in the United States. Fights over such issues as abortion are essentially religious, and contemporary U.S. 'social conservatives' often frame their critique in religious terms. Even Dwight Eisenhower reportedly said that he thought every American ought to have a religion, though he is supposed to have added that he did not care which one it was.

³⁰ Locke (1664, 1690).

³¹ Macpherson (1964).

³² Indeed, Locke describes life and liberty as forms of property. The section of the Second Treatise entitled "Of Political or Civil Society" begins: "Man ... has by nature a power not only to preserve his property--that is, his life, liberty, and estate-- ..."

³³ Briggs (1970); Freuchen (1931).

³⁴ There is an extensive literature on the question of whether 'reason' is identical across cultural boundaries. For a taste see the articles collected in: Hollis and Lukes (1982); and Horton and Finnegan (1973).

³⁵ Grotius (1625).

³⁶ Grotius, however, thought that this contract was historical. Hobbes recognized that its necessity was logical, not historic.

³⁷ E.g., Grotius (1609).

³⁸ Kelsen (1928, 1943).

³⁹ Forsythe (1989: 6-7).

⁴⁰ Forsythe (1989: x).

⁴¹ An-Na'im (1992).

⁴² Humphrey (1984: chapters 5-7).

⁴³ The Human Rights Reader (Laqueur and Rubin, 1979) begins its historical survey with this document, following it with the English Bill of Rights (1689), the U.S. Declaration of Independence (1776) and Constitution (1789), the Federalist Paper #84 (1788), the U.S. Bill of Rights and other constitutional

amendments (1791 & following), and the French Declaration of the Rights of Man and Citizen (1789).

⁴⁴ This clause was removed in John's successor's version of the charter, issued in 1217.

⁴⁵ Besides securing the support of widows, the only clause specifically referring to women says that "no one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband."

⁴⁶ In Laqueur and Rubin (1979: 104-106).

⁴⁷ Other relevant documents include the English "Petition of Right" (1640), the declarations of the American Stamp Act Congress (1765), and the declarations of the First Continental Congress (1774).

⁴⁸ Quoted by Darnton (1995a: 48). Darnton also discusses the significance of including a right to "happiness" in this list.

⁴⁹ Hammarskjöld (1956).

⁵⁰ Thompson (1963).

⁵¹ Forsythe (1989: 7-8, 1993).

⁵² One of the cruelest state tactics in late-twentieth century guerrilla wars has been to deny medical care to whole populations in order to isolate and destroy a regime's enemies. By driving the rural population to refugee camps, for example, one drains the sea to catch the fish--to invert one of Mao Ze-dong's famous remarks. On the application of this tactic in El Salvador, see: Clements (1984); Lundgren and Lang (1989); and Spickard and Jameson (1995).

⁵³ For example, Leviticus (25: 44-46) granted the Hebrews ownership rights to the foreigners who lived among them. On medieval Europe, see Karras (1988: 5-39).

⁵⁴ Bloch (1975); Davis (1984: 33, 56, and *passim*). Davis's realization that people once associated slavery with 'progress' contradicts the 'progress' that human rights activists see in world history. There may well not have been unilinear movement in the direction of freedom for all. See Patterson (1995).

⁵⁵ This slavery took many forms, not all of them exactly comparable. If one defines slavery as involuntary servitude, one can cover not only chattel slavery but such things as debt-peonage and the Chinese market in prostitutes. See Leach (1967) and Siegal (1945).

⁵⁶ Davis (1984).

⁵⁷ Alexis De Tocqueville (1843: 138) wrote of this decision:

We have seen something absolutely without precedent in history--servitude abolished, not by the desperate effort of the slave, but by the enlightened will of the master; not gradually, slowly, through successive transformations which by means of serfdom led insensibly towards liberty; not by successive changes of mores modified by beliefs, but completely and instantly, more than a million men simultaneously passed from the extremity of servitude to complete independence, or better said, from death to life. ... If you pore over the histories of all

peoples, I doubt that you will find anything more extraordinary or more beautiful.

⁵⁸ Denmark abolished its small slave trade in 1792, with the law to take effect in its possessions ten years later. Britain's abolition was the first major one, though Eric Williams (1944);, among others, has argued that stopping it was not much of a sacrifice because the trade was losing money at the time. Many observers, from Benjamin Franklin, Adam Smith, and Friedrich Engels on, have argued that slavery was economically inefficient and used this inefficiency to explain its fall from favor. Davis (1984) makes a good *prima facie* case for the superior force of moral and cultural factors. Among other things, he traces a theological shift among American abolitionists from the slavery-justifying claim that servitude exposes the slave to Christian love to a belief that it is against God's law for one soul to rule another. He cites the letters of Theodore Dwight Weld to show that, for abolitionists,

external domination over the body was synonymous with spiritual annihilation. To combat such an evil was clearly virtue, whatever the insidious disguises of sin. (p 146)

On the other hand, Orlando Patterson (1995: 169) notes that the Jamaican slave revolts of the early 1830s may have done as much as morality to speed British emancipation. See also Engerman (1973); Patterson (1982,); Patterson (1991). Oshinsky (1996) notes that de facto slavery in the United States did not end with de jure emancipation.

⁵⁹ The relevant treaties are: the General Act of the Berlin Conference of 1885; the General Act of the Brussels Conference of 1890; the Convention of 1919, the International Slavery Convention of 1926, the Protocol of 1953, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

⁶⁰ Humphrey (1984: 11).

⁶¹ In Laqueur and Rubin (1979: 151-156).

⁶² Forsythe (1989: 9).

⁶³ Laqueur and Rubin (1979: 61); Oppenheim (1912: 164).

⁶⁴ Lauterpacht (1955: 167, 168, 169). Lauterpacht was among those who gave Humphrey draft bills of rights, from which the latter crafted the Commission's first working documents (Humphrey 1984: 31).

⁶⁵ Leach (1969).

⁶⁶ *CITE LLOYD & LUNDBERG*; Thompson (1963); Kershaw (1995).

⁶⁷ Patterson (1995: 163-164). Patterson also notes that Hobbes and Locke, both of whom are claimed as key intellectual generators of the rights tradition, were not as popular in their time as they are today. He reports that Locke was much less influential in England than in America, and that Hobbes was shunned nearly everywhere. (See Patterson 1995: 156ff.)

⁶⁸ Darnton (1995b, 1984); Thompson (1963).

⁶⁹ The Commission was, in fact, called for by the U.N. Charter and is the only commission specifically named in that document. ECOSOC established a nuclear version of the HRC (which met in April, 1946) and simultaneously set up the Division for Human Rights in the U.N. Secretariat. The first formal HRC meeting did not take place until early 1947. See the Yearbook of the United Nations 1948-49, pp. 524ff.

⁷⁰ Yearbook of the United Nations 1946-47, p. 523.

⁷¹ Only the second of these survived as a formal sub-commission. The Economic and Social Council abolished the first in 1951. The third soon severed its links with the HRC and became a Commission in its own right. (Humphrey 1984: 19-22)

⁷² The blame was, of course, on both sides, as Humphrey's memoir and Roosevelt's biography show (Humphrey 1984; Lash 1972). The Soviet bloc resisted all attempts to open up its political system, and the American Senate would not ratify any treaty that might be effective against racial segregation. The growth of McCarthyism and the anti-U.N. agitation of the radical right kept the U.S. from pushing for a treaty for quite some time.

The following account of the HRC debates is taken largely from Lash (1972), Humphrey (1984), Korey (1974), and the relevant U.N. records.

⁷³ Cassin won the Nobel Peace Prize in 1968 for his human rights work. Roosevelt was nominated several times (including jointly with Cassin), but died before she could be chosen.

⁷⁴ The Soviet representative abstained, calling the document "weak and unacceptable" (Lash 1972: 67).

⁷⁵ Lash (1972: 53), quoting James P. Hendrick, Roosevelt's assistant at the HRC.

⁷⁶ Lash(1972: 54); Humphrey (1984: 29).

⁷⁷ Formally the Committee on Social, Cultural and Humanitarian Questions.

⁷⁸ It was in this debate that the right to petition national governments and the U.N. was deleted. The Economic and Social Council debated the right of petition again the next year, but tabled it for lack of agreement. It finally reappeared in the Optional Protocol to the International Covenant on Civil and Political Rights (1966), but as a grant from the signatory states, not as a 'right'. As of 1995, only 87 states were full parties to it.

⁷⁹ Humphrey's memoirs make it clear that he thought this lack of minority protection the Declaration's chief failing.

⁸⁰ Yearbook of the United Nations, 1948-49, p. 534.

⁸¹ Six were from the East Bloc: Byelorussia, Czechoslovakia, Poland, Ukraine, USSR, and Yugoslavia. Canada abstained from the Third Committee vote out of fear that the Declaration would upset her federalist constitution. Her representative voted "yes" when the Declaration came before the General Assembly.

⁸² Lash (1972: 68); Korey (1974).

⁸³ Though the Declaration was not itself a treaty, and thus not legally binding on signatory states, some delegates argued that it interpreted the human rights clauses of the U.N. Charter, which was a treaty; this made the Declaration binding by extension. By spelling out just what the Charter meant by "human rights and fundamental freedoms", they reasoned, the Declaration committed member states to uphold human rights as part of their Charter duties.

This view did not prevail, largely because the U.N. lacks effective powers of enforcement and cannot do much against Charter violators. The Declaration's moral authority, however, has steadily grown. It has effectively become part of international customary law, even if not positive law itself.

⁸⁴ His speech during the final debate is a masterpiece of subtlety. See the General Assembly Proceedings, Summary Version: 182nd Plenary Meeting, pages 895-6.

⁸⁵ Humphrey (1984: 40).

⁸⁶ The U.S. has signed several of these treaties, but not yet ratified them. U.S. treaty confirmation requires concurrence of the Senate, often obtainable only by registering reservations that void the effect of the treaties in question. Other countries can then register their criticisms of these reservations; the interchanges make fascinating reading.

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