

The Generations of Human Rights

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INTRODUCTION

In the tradition of legal positivism, the social facts are those facts that are authoritatively given by society itself, because they are recognized as such by a law creating authority within a society, flowing from its own conception of the facts. Once they are accepted through a norm-creating process, they become binding on the community. Whether a particular claim is a legal norm in law can be determined by whether it has been accepted as such by the different subjects of society through such a process. Generally in law literature, to be a legal norm means a claim to something of value on other people, and to have a structure even internal or international. Raymond Aron Squarely made this point, stating:

“An institution which is based on contribution of all parties to it, to broad co-operation and mutual understanding considering its principles.”⁽¹⁾

Recognizing the legal norms would necessitate identifying the institution and the relationship between its subjects. Any attempt to satisfy the use of legal

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norms must be preceded by specifying the nature of the valuable elements that are considered as norms. Nevertheless, in order for a norm to be recognized as a legal norm, the sustainability of realizing it in the society still has to be established.

The advent of norm creating raises basic questions about the connection between norms arising in social fields. What is their hierarchical relationship? How does the content of one inform that of the other, if at all? Is the legal order a “system”, an aggregate of disparate elements haphazardly brought together, or a systemically organized and coherent structure? What organizing techniques, if any, exist to assure hierarchy?

Legal order, is the product of an essentially legislative process. It illustrates how, when faced with the need for innovative law-making, the law has found ways of responding, through the use of guidelines, soft-law codes, hard-law codes and the principles.

There is no doubt that International law is dynamic and that even the most firmly established human rights have been introduced into and developed in International law step by step on the basis of social circumstances and cultural changes. This process of formulating are the perception and identification of relevant needs, the translation of some of these needs into specific legal norms/ and the elaboration of means by which to promote realization of these norms. Now the legal institutions and legal mechanisms must come to recognize these legal norms in quite general language, the more determinative specification of the norms and the identification of procedures for implementing them.

The human rights tradition assumes that the fundamental moral rights universally possessed by all human beings are not eternal and changeless. However, the creation and maintenance of human rights in International law is a temporal process moving from general declaration through the

formulation of specific legal norms to the elaboration of procedures and mechanisms of implementation. The something like the history of the development of human rights in International law is true. One can understand the nature and importance of new human rights only by relating them to the historical context in which they emerge.

This requires to study the efforts on introducing and effectively implementing human right in International human rights law. The author believes that this must be done.

In this Article, I have presented a brief but systematic theory of what has called “the human rights generations”, speaking of successive generations. I have reflected upon the emergence of the new human rights in International law over last decades, and reported the current legal status of these generations. I have done all my effort to give and briefly defend a critical assessment of the conception of human rights generations. Throughout this article we examine research reports and briefing papers, many International treaties and various documents and standards, dealing with human rights issues and also reviewing of legal materials.

1- GENERATIONS IN HUMAN RIGHT THOUGHT

The evidence and analysis presented in this commentary demonstrate that the Human Rights Generations Thought serve to emphasize that, human rights are in a constant process of developing as the world changes and as non-state groups gain influence.

The Nordic Editors generatically attempt to destroy the generation theory, but they nevertheless find it necessary to relate to it. Over time, the inflexible view of rights has given way to a broader understanding of the rights-duty relationship to the fulfillment of those rights. On the face of it, from the time that United Nations started its work, the promotion for observance of human

rights and fundamental freedoms were fully realized, and all states pledge themselves to take joint action in co-operation with people.⁽²⁾

Moreover, the universality of human rights involves the insurance of individual human dignity through states. This idea was perceived in the different International Covenants and conventions which the states and International organizations themselves dictated obligations for ensuring and protecting human rights there into.

These International documents clearly recognize the states as a first violators of human rights and they indicate that the primary responsibility for protecting human rights will also belong to states. With respect to ensure this obligation of states operating as a protector and violator in the same way, the system has been internationalized.

The reasoning employed here demonstrates that the continual introduction of new categories of human rights keeps up, and by lapse of time it will appear new human rights with different features and weights. There is no doubt that International law is dynamic and that the most firmly established human rights which have been introduced to regulate the relation between the duty-holder and the right-holder have been legitimated by that of the principles which themselves had different credibility in each period of time. In fact, most of the principles and provisions of human rights law, have been legitimated by the principles which contrary to the opinions of most of the advocates of human rights, are not absolute.⁽³⁾

The historical account of the human rights transition through establishment of positive law demonstrates that human rights are not absolute and immutable, because by their very nature are limited by the rights of others. And Human Rights is not immutable, because what is necessary for the realization of its concept can vary with the passage of time.

Therefore generating and dividing human rights would be in different ways too.

Through the process of social developments the shortcoming of the Lockian view in relation to private property was gradually recognized, because according to his viewpoint, human rights were by definition rights to freedom. This is why the right to property was not emphasized in the Covenants on Civil and Political Rights and also Economic, Social and Cultural Rights. We see these changes and evolution in ideas also in the prohibition of Death Penalty.

Human rights thought is therefore about the constant process of developing and changing and the cause and reason of this in our new world would be the world's transformation, the direct and indirect participation of non-state actors and also the appearance of new subjects of International law.

In this manner, to formulate these evolutions in a well set shape proper to social facts, the systematization of human rights would be inevitable. After all making a balance between Human Rights and these social facts and not prevailing the individual interests of states against their plural interests, like securing the International peace and security, ensuring the human dignity and protection of human rights, protection of environment, will result the promotion and development of Human Rights Law. That is to say resorting to the very idea of generations is important. By using the generational categories in rights thought, we will facilitate the monitoring of these aims. Although extravagance in differentiate between the generations of human rights would lead to human right violations.

2- HUMAN RIGHTS GENERATIONS

The UNESCO Courier of November 1997 carried an article in which KAREL VASAK,⁽⁴⁾ called for the recognition of an appealing formula of Human Rights Generations. For this purpose, he emphasizes the detailed historical interpretations of human rights in three phases:

A- THE FIRST GENERATION

The first generation of civil and political rights derives primarily from the 17th century reformist theories in French Revolution, inspired by the first theme of the French Revolution: *Liberte*.⁽⁵⁾

Eventhough, this principle was realized in The American Declaration of Independence of 1776,⁽⁶⁾ and also in The British Bill of Rights of 1689.⁽⁷⁾ Generally in the human rights literature, all kind of human freedoms, means civil and political rights and they were recognized in this way. In more detailed historical interpretations the development of human rights thought was at first started by recognising all kind of civil and political rights.

JOHAN GALTUNG describes the first generation of human rights as belonging to the bourgeoisie and in his color scheme describes it as a blue color.⁽⁸⁾ Galtung, with his color scheme, thus connects the civil and political rights with special people, which is hardly completely correct!

The Human Rights Commission was created in 1946 for pursuing the United Nations Charter⁽⁹⁾ (Introduction, Articles 1/3-13/2-55/3-56-62/2-68-76) and worked on drafting the International Bill of Rights. Completed draft referred to the United Nations General Assembly and was passed on 10th December 1948. Belonging to this first generation, thus are rights such as those set forth in articles 2-21 of the Universal Declaration of Human Rights.⁽¹⁰⁾

Following the ratification of Universal Declaration of Human Rights, the covenant on civil and political rights was approved⁽¹¹⁾ and the conventional

mechanism was addressed for monitoring the protection of all kind of civil and political rights. This covenant was ratified by United Nations General Assembly on 1966 and after that the first optional protocol on 1976 and the second optional protocol on 1989 was ratified.

The covenant on civil and political rights has a preamble with 53 articles which observes the rights recognized in it: right to life, right to freedom from torture, right not to be held in slavery, right to liberty and security of person, right to freedom of expression and to adopt a religion, right to marriage, right to freedom of association and so on.

This covenant was entered into force after ratification of the thirty-fifth state on 1976.

The first optional protocol to the covenant on civil and political rights⁽¹²⁾ has an Introduction with 14 articles, and has made the opportunity for the nationals of the state parties to the protocol to claim any violation of any rights set forth in the covenant by their state to the Human Rights Committee.

The second optional protocol⁽¹³⁾ is aiming at the abolition of the death penalty, and has 11 articles.

It has become common to consider that the qualification of the rights described in this generation like the right to freedom of association, right to fair trial, right to have a counsel, ... / and also the apparent meaning of them in the way the covenant on civil and political rights puts it right: freedom of ... / protected from ... / have a dispossessive implication not affirmative. Although exaggeration in this expression causes trouble. In fact the state has a positive obligation to ensure the right to fair trial or the right to have a free and fair elections.

In broad terms, the opposition against absolute monarchy created a new relationship between state and subject. In this new relationship a basis was

created for the individualistic understanding of society that found expression in the American Declaration of Independence and in the French Revolution and then in the Universal Declaration of Human Rights. Although Nordic editors believe that Human Rights thought have a central place in the western philosophy.

B- THE SECOND GENERATION

The rights specified in this generation are those who have been codified at the same time with the norms of first generation, but the theoretical recognition of them was after the political and civil rights were recognized. It was at that time when the legal status of these norms was accepted and was determined by International Human Rights Law. They were authoritatively given by society and the different circumstances which they face in each period of time.

The Economic, Social and Cultural rights are corresponded respectively to the second ideal proclaimed in the French Revolution of 1789: Equality or egalite and also one of the principles of the American Declaration of Independence of 1776: freedom from want. The factors leading to emergence of this category of rights were the emergence of a numerically dominant group of developing countries, a result of the wave of decolonization. Third world countries were calling for reparations and it was because the Mexican and in particular, the Russian Revolutions that these rights gradually achieved universal recognition, these were so-called EQUALITY RIGHTS. Johan Galtung, with his color scheme, describes the whole range of economic, social and cultural rights as belonging to the working class (red), and connects the second generation with this special class.⁽¹⁴⁾

The Articles 22 to 27 in the Universal Declaration of Human Rights cover the legal status of these rights and all kinds of them have been ratified

by United Nation's General Assembly through the International Covenant on Economic, Social and Cultural rights on 1966.⁽¹⁵⁾ This Covenant with a preamble and 31 Articles contains recognition of particular rights like: right to work, right to social security, right to education, right to health, This covenant entered in to force on 1976.

Contrary to the first generation rights, the economic, social and cultural rights require active measures by states and may therefore appear that they incur only positive obligations of entitlements from the state. But this statement is not absolute, because for example the states in protecting the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, have no absolute positive obligation.

To speak of successive generations of human rights, of course, we introduce to mark the development of human rights through time and after the adoption of the Universal Declaration of Human Rights, one single covenant was to be negotiated to include all those rights identified in the Universal Declaration, but the post-war solidarity gave way to the cold war and the countries were divided in their support of the different rights. Some of the countries supported by Russians promoted equality rights the so-called Economic, Social and Cultural Rights and several countries in the U.S.A position had recognized only the Civil and Political Rights. In spite of the integrity of these rights, instead of one unified covenant, those rights were codified in 1966 in two separate International covenants. But throughout as early as 1968,⁽¹⁶⁾ the proclamation of Tehran, and in 1993,⁽¹⁷⁾ the second UN World Conference on Human Rights in Vienna emphasized the interdependence of these two sets of rights. However, it was first articulated by the first UN World Conference on Human Rights in 1968 and also in 1969,⁽¹⁸⁾ the Declaration on Social Progress and Development that human rights are indivisible.

On this view, the individualistic thought of the society changes to a minimum of solidarity. This is how solidarity, thus conceived, entered into theory of solidarity and fraternity rights.

C- THE THIRD GENERATION

On 1977, Karel Vasak called for currently experiencing a third revolution: the emancipation of colonized and dominated peoples, linked to total interdependence, which a third generation of human rights inevitably presents itself: this imposed brotherhood of man demands solidarity rights.

Johan Galtung describes the third generation as belonging to the social movements and connects it with the grassroots movements in green color.⁽¹⁹⁾

In fact the creation of new human rights like: right to peace, right to a healthy environment, right to communication, right of indigenous peoples, ... requires the recognition of solidarity rights and thus these rights only began to emerge in International law late in the twentieth century.

Whatever may be true of human rights considered as often thought to be eternal and changeless, the creation and emergency of the third-generation human rights in international law, shows us the evolution of human rights concepts during time. Maintaining peace after the two world wars, protecting the environment, and encouraging a sustained and equitable development of all economies / even developed or developing, requires action. To ensure these efforts, we need the concerted efforts of all the actors on the social scene: the individual, the state, the public and private groups, and the entire International community. This consensus and commitment of all humanity would constitute solidarity. The Universal Declaration of Human Rights of 1948, clearly recognizes these rights in Article 28.⁽²⁰⁾

This notion of solidarity is the sense of a sharing of purpose and an agreeing on modes of action among various elements of society on the national and international level (civil society) and joining in responsibilities

for their achievement. In fact solidarity rights are radical rethinking of the concept of nation-state relationship and its inadequacy in ensuring human rights in twentieth century.

In this generation, all kinds of rights in the first and second generation which have not been ensured, will be achieved in a process of new relationship between the actors of civil society. According to this, there has been a different definition of third-generation human rights. The content of these rights can be analyzed on two basis: Equity, which is equality of all human beings in rights and justice which aims at the constant improvement of the well-being of all individuals.⁽²¹⁾ In fact in this generation, the duty holders are different too. Where as the first and second generation rights impose obligations and responsibility primarily upon states, third generation rights can be real only if they impose obligations upon a much wider range of actors, and of course the participatory factor minimizes this responsibility of states. In this generation the collective rights are more appreciated than the individual and personal rights which are recognized in the first and second generation. In the case of collective right, the right-holder may be a collective, but the beneficiary of the exercise of the right has to be the individual. An obvious example would be the membership of individual in a religious minority which he must profess and practice a collective right. However the right itself is basically personal.⁽²²⁾

3- THE PRIORITY AND LEGITIMACY OF HUMAN RIGHTS GENERATIONS

I would like to repeat the quotation which I placed at the beginning of this article: The human right, its concept and indicators are in a constant process of developing as the society changes and new actors gain influence. It is now customary to discuss human rights in terms of generations. Each generation

of rights has its distinctive characteristics, each more developed and sophisticated than its predecessor. Norberto Bobbio points out a fourth generation of rights that are related to the disturbing results of biological research and to the question of genetic identity, in his book: *The Age of Rights*.⁽²³⁾ For example we can refer to the right of cloning, right to sex change, right to abortion, right to transplantation, right to brain death and right to assisted reproductive.

It is appropriate to think about the different tendencies of the generational theory:

The first generation alleges the fundamental human rights and protects the liberty of the individual. The rights indicated in the second and third generation are born after the first one. Human rights are the individual rights and have been recognized and distinguished separately from the group.

The advocates of the second generation believe that ensuring the first generation rights will be achievement of fundamental rights of individual and this will happen only in a good and perfect society. Then safeguarding economic, social and cultural rights is the first step to ensure civil and political rights.

In fact, these statements have to be seen in light. Taking the first generation rights not seriously, will be misleading as well as harmful and it would deny the creation and maintenance of economic, social and cultural rights.

In the time of cold war we faced the opposition between individualism and society, in one hand and the interface between freedom and equality. At the end of this competing, several ideas and tendencies like liberalism and Marxism emerged. The Nordic countries energetically attempt to destroy the generation theory and thus they were in the middle side.

The process of legitimizing human rights is no doubt the emergence of the category of rights during period of time and this has been confirmed by the world in the Vienna Declaration and Programme of Action on 1993.

What is the legitimate scope of human rights and the priorities claimed among them? In fact, where is the basis of expressing human rights in this kind of extremely complex historical record?

The legitimacy and credibility of a right, is exactly the same as its legal status. Nevertheless, in order for a claim to be recognized as a right, the feasibility of realizing the right still has to be established. A claim that cannot be realized in a given institutional set up, can possibly be a societal goal or even related to any practical social agreement, and this is how a right can be legislated. Human rights set universal standards of achievement and norms of behavior of human beings and there could be lots of different kinds of them.

Now one can understand the nature and importance of new human rights only by relating them to the historical context in which they emerge, and it is no accident that a new human rights still emerge over the time, and this is why the legal order recognizes a need like cloning.

There are some advocates, who, however, do not adhere to the notion of generations, because they believe that the history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages. Efforts to do so would in any case make it necessary to distinguish also between civil and political rights, since the political rights were accepted as human rights much later than some of the civil rights, in some countries even later than economic and social rights. It may therefore appear that in each different country this evolution has been various. Some of the advocates believe that in some ways the model of human rights was unable to bring about what it was intended to

bring about, viz., the full realization of right to private property. In other words, these different approaches show that every insistence on the priority in emerging new kinds of rights is only because of the methods and approaches that advocates use to observe them. For example, in the European system, the right to education and cultural rights are considered in conjunction with civil and political rights rather than with economic and social rights, shown by the fact that the right to education is included in Protocol No.1 to the Convention for the Protection of Human Rights and Fundamental Freedoms,⁽²⁴⁾ the European Social Charter.⁽²⁵⁾

This is not to deny that much of the differences of emphasis revolves around the perceived role of the state. Hence, the differences imply the sort typical of the generations. It is a well-known fact that civil rights incur only passive obligations of abstention from state and freedom from state interference, whereas economic, social and cultural rights require active measures by the state and there is the claim on the state for protection and assistance.

There has been considerable debate as to whether the economic, social and cultural rights regarded as a human right. Regrettably, adherents of opposing schools of thought resort more to catchwords and political sloganism than to serious analysis of economic, social and cultural rights as individual, enforceable rights. There is a view, that if certain rights are not legally enforceable, they are not individually justiciable too.⁽²⁶⁾

More over, fulfilling human rights is needed now more than ever before. Economic, Social and Cultural rights include a major concern with the protection of vulnerable groups, such as the poor, the handicapped and indigenous peoples.

4- CRITICAL ASSESSMENT

The integration of economic, social and cultural rights with civil and political rights was envisaged at the beginning of the Post Cold War era. The International community has moved to examine the question of implementation of the third generation rights and participation of all kind of International law subjects in realization of them. Thus the requirement for improving the realization of human rights is not only looking at it in terms of growth of income, but also to capture the notion of quality of growth in terms of social and human development on the basis of active and meaningful participation by all concerned and the fair distribution of benefits.⁽²⁷⁾

This takes us to another feature of the third generation human rights to assignment of duties. States have the primary responsibility for the creation of conditions favourable to the realization of the first and second generation human rights. But the solidarity rights can be realized only by the concerted efforts of all the actors on the social scene. Who are these wide range actors? Could we believe that the current International human rights law can play role in holding International community accountable for abusing human rights?

To date, at an International level, much of discussion has focused on the scope of companies or International community responsibilities in this area, but it was not as the recognition we need in hard law. Indeed, realization of a right goes far beyond improving its legal status. Instead of perfectly linking rights to exact duties of identified agents, we have the broader understanding of the right-duty relationship in terms of imperfect obligations.⁽²⁸⁾ The rights become norms of behavior or action of the agents, such as other individuals, the state, companies or the international community, who can contribute to the fulfillment of right, even it cannot be realized in a given institutional set up. Nevertheless, in order for a claim to be recognized as a right, the

feasibility of realizing the right still has to be established and specified. Eventhough these are not justiciable, as immediate individual remedies through the courts normally provided when the states fall short of their responsibilities, but we still consider them legal obligations, because the states are required to take steps in the direction of sound progressive realization of the right.

The International community should promote an effective international cooperation for the realization of rights. This obligation must be recognized as such through a norm-creating process and become binding on the community. An integrated approach to international human rights as an indivisible whole is necessary. Creation and emergence of new human rights does not mean neglecting the human rights of the first and second generations. The debate about the nature and content of human rights reflects, after all, a struggle for power and for favoured conceptions of the “good governance”.

Whenever we face evolving perceptions which values or capabilities stand, at different times, in social scene, does it mean we need a new right to recognize as a legal and binding one?

Yes, like all normative traditions, the human right traditions is a product of its time. In the years that have gone by, civil and political rights have often been neglected in theory and practice, and to somewhat remedy the situation, the emergence of economic, social and cultural rights was considered necessary. When a state cannot meet its obligation to the goal of ensuring equality for all to have an active role in fulfilling their economic and social rights, there will be a need to create a new right like right to development. It is unlikely, that states will any time soon, tighter controls over the production, export, import and transfer of weapons of mass destruction. They use all the resources to violate respectation for the dignity

of every human being. This is the perception of a problem and identification and translation of the need for peace into specific legal norm like Right to Peace. There is no more possibility for states to promote and provide individual commitment to pursue a certain policy to achieve best results in protecting environment alone. This is why it is required to recognize the legal status of right to healthy environment.

Throughout the evolutionary history of human rights, axiomatic to other aspects, is respectation for human dignity. We will discuss this issue in another convenience. ❖

NOTES:

1. Mehdi Zakerian, *Human Rights in New Millennium*, Tehran, Iran: Faculty of Law and Political Science, Tehran University Publications, 2002, p: 110. Raymond Aron has pointed out this statement in his book: *The War and the Peace*. He regards the fact that International relations are based upon sociological and legal approaches of french schools and this is why he defines a system to be the framework of a society. See also:

Phillippe Moreau Defarges, *Relations internationales*, Paris: Editions du Seuil, 1997, p. 57.

2. Charter of the United Nations, Articles 55 © and 56.

3. P. H. Koojmans, “*Human Rights-universal panacea? Some reflections on the so-called human rights of the third generation.*” In Marinus Nighoff publishers/Dadrecht, Third Generation Human Rights, NIRL 1995, p. 315.

4. Karel Vasak, *A 30-year struggle: the Sustained effort to give force of Law to the universal declaration of Human rights*, UNESCO courier (November 1997) p. 29.

5. The French Declaration on the Rights of Man and Citizen (1789)

6. The American Declaration of Independence (1776)

7. The British Bill of Rights (1689)

8. Johan Galtung, “*Human rights: Western, Universal or both*”, in: *Human Rights Quarterly*, Vol. 22, 2000, John hopkins University Press Sano Hans-Otto, (Development, and Hamun Rights: The Necessary, but partial Integration of Human Rights and Development), p. 737.

9. Charter of the United Nations, 1945, Introduction, Articles 1/3-13/2-55/3-56-62/2-68-76)

10. The Universal Declaration of Human Rights, G.A.Res. 217 (111), U.N.Doc A/810 AT 71 (1948)

11. International Covenant on Civil and Political Rights, G.A,Res. 2200 A (XXI). 21U.N.GAOR Supp. (No.16) at 52, U.N.Doc A/6316 (1966).

12. Optional protocol to the International Covenant on Civil and Political Rights, U.N.Doc. A/6316 (1966).
13. Second Optional Protocol to the International Covenant on Civil and Political Rights, U.N.Doc. A/44/49 (1989).
14. Johan Galtung, *op.cit.*
15. International Covenant on Economic, Social and Cultural Rights, U.N.Doc. A/6316 (1966).
16. Proclamation of Tehran, proclaimed by the International Conference on Human Rights at Tehran on 13 May 1968, U.N.Doc. A/conf. 32/41.
17. Vienna Declaration and programme of Action, U.N.Doc. A/CONF. 157/24 (part I) at 20 (1993).
18. Declaration on Social progress and Development, adopted 11 Dec. 1969, G.A.Res. 2542.
19. Johan Galtung, *op.cit.*
20. The Universal Declaration of Human Rights, *op.cit.*
21. Arjun Sengupta, "On the Theory and Practice of the Right to Development". In: John Hopkins University Press, *Human Rights Quarterly*, Vol. 24, 2002, p: 846-847.
22. Jack, Donnelly, "Human Rights, Individual Rights, Collective Rights" in J. Berting et al. (eds.), *Human Rights in a Pluralist World* (1990) p. 48.
23. Norberto Bobbio, "The Age of Rights". In: *Human Rights Quarterly*, Vol. 22, 2000, John Hopkins University Press, Sano Hans-Otto, (Development and Human Rights: The Necessary, but Partial Integration Of Human Rights and Development), p. 736.
24. European Convention on Human Rights, ECHR, 1953. This convention has been amended many times.
25. European Social Charter, 1961, original version. This charter has been revised.
26. M. Scheinin, (*Economic and Social Rights as Legal Rights*), economic, social and cultural rights, a text book, edited by Asbjorn Eide, Catarina krause, Allan Rosas, 2001, kluwer Law International.
27. The Declaration on the Right to Development, adopted at 4 Dec. 1986, G.A.Res. 41/128.
28. Amartya Sen, "Development as freedom", in *Human Rights Quarterly*, Vol. 24, 2002, John Hopkins University Press, Arjun Sengupta, (On the Theory and practice of the Rights to Development), p. 843.