HUMAN AND FUNDAMENTAL RIGHTS: WHAT ARE THEY ABOUT?

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Their History

The history of the idea of human rights in Western thought is relatively recent. In England one could point to the philosophy of Locke, the Glorious Revolution of 1688 and the Bill of Rights and even the trial of Charles I in 1649 as showing, in a vague manner, the failure of a king in his duties towards his subjects. In the United States the idea has definitely its origins in the American Declaration of Independence in 1776 which read: "We hold these truths to be self-evident, that all men are created equal: that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness." Some years later the French Declaration of the Rights of Man and Citizens in 1789 was more specific. It read:

The representatives of the people of France formed into a National Assembly, considering that ignorance, neglect, or, contempt of human rights are the sole cause of public misfortunes, and corruptions of Government, have resolved to set forth in a solemn declaration, these natural, imprescriptible, and inalienable rights:... The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistance of every man, has no other limit than those which are necessary to secure to every other man the free exercise of the same rights; and these are determinable only by the law." The inclusion of property alongside liberty, security and resistance of oppression as rights, is, however, open to criticism. The importance attached to the freedom of expression is also evident from the same Declaration: "No man ought to be molested on account of his opinions... The unrestrained communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he is responsible for the abuse of his liberty, in cases determined by the law.

In a way one could witness from Hobbes to Locke and Rousseau the emergence of what Kamenka points out, the Gemeinschaft, i.e., the modern European society, where the right-and-duty-bearing individ-
ual stands in external contractual association with other right-and-duty-bearing individuals. This is akin to Maine’s famous dictum on the history of Western societies in terms of a change from ‘status to contract’. Such a society is different from Gemeinschaft which saw man as part of a social organism, a structured community based on a common religious tradition, a hierarchy of power, a network of mutual obligations that made and shaped men rather than served them. Thus in Roman law there was a concept of duty or duties — but no concept of rights, even though Roman private law and Christianity were based on the individual as a private object of the legal and social system. Bentham, however, said in his essay Anarchical Fallacies that contracts flowed from government and not vice versa; hence the French Declaration was ‘a perpetual vein of nonsense, flowing from a perpetual abuse of words’. He was thus opposed to any talk of human rights. Of course, scientifically one cannot establish human rights, but so is the case with many legal concepts; the whole idea of law or even legislation as a science is based on the notion of certainty which the legal rules possess only in part. As Professor Hart has pointed out, a core of certainty and a penumbra of doubt can never be dispensed with, when one is engaged in making general rules out of particular situations. There is an open texture or vagueness in legal rules. Bentham thus exaggerated the contrast between law and moral or human rights.

The liberal ethic at its heart has always been utilitarian, for a liberal society maximises at the cost of both justice and freedom. But natural or human rights are not, as has sometimes been said, rights of market men, the creatures of market society. Nevertheless, liberalism requires reformation rather than a radical reconstruction. This explains why, historically, the process of identification of rights — human, fundamental and relative — has been ad hoc and piecemeal in response to particular political pressures at the time instead of being systematic on the basis of a well-worked out plan in turn based on a coherent and rational philosophy. Such philosophy should have correctly identified the scale of values which would have determined the proper hierarchy of rights sought to be identified here earlier.

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