

5. Doctrine

The rights listed in the declaration and the core treaties consist of protections of an array of human interests, and their requirements bear on many aspects of a society's political, legal, economic, and social structure. There are various ways to sort these protections. One classification

of the rights in the declaration, due to René Cassin, distinguishes four categories: 42

1. Rights to liberty and personal security such as life, liberty, and security of the person; prohibition of slavery, torture, cruel or degrading punishment; right to recognition as a legal person; equality before the law; no arbitrary arrest; presumption of innocence;
2. Rights in civil society protection of privacy in family, home, correspondence; freedom of movement and residence within the state; right of emigration; equal rights of men and women to marry, within marriage, and to divorce; right to consent to marriage;
3. Rights in the polity-freedom of thought, conscience, and religion; freedom of assembly and association; rights "to take part in the government of the country" and to "periodic and genuine elections... by universal and equal suffrage"; and
4. Economic, social, and cultural rights adequate standard of living including adequate food, clothing, housing, and medical care; free, compulsory elementary education; free choice of employment; just and favorable remuneration; equal pay for equal work; right to join trade unions; reasonable limitation of working hours; social security.

In addition to these rights found in the declaration, both covenants, in common articles, incorporate what is effectively a fifth category of rights:

5. Rights of "peoples" (conceived as collective entities) most importantly, self-determination and communal control over "natural wealth and resources." 43

The covenants are sometimes regarded as expressions of the rights of the declaration put into a form appropriate for an international agreement, but in fact they expand in both scope and detail the doctrine formulated in the declaration. Thus, for example, whereas the declaration speaks of a right to "medical care" which is "adequate for health and well-being," the

corresponding passage in the Covenant on Economic, Social, and Cultural Rights postulates a right to "the highest attainable standard of physical and mental health." 44 The declaration guarantees everyone the right "to take part in the government of his country" but beyond what might be inferred from this takes no explicit position about colonial rule; both covenants specifically recognize a right of self-determination. The declaration holds that "higher education shall be equally available to all on the basis of merit;" the Covenant on Economic, Social, and Cultural Rights calls for "the progressive introduction of free [higher] education." The only



significant reduction in scope concerns the right to own property: vaguely acknowledged in the declaration (art. 17), it is missing altogether from both covenants. 45

The four "core" conventions yield a further enlargement of the scope of international human rights doctrine. So, for example, the Convention on the Elimination of All Forms of Racial Discrimination commits the parties not only to eliminate racial discrimination in law and the practices of public institutions but also to use state power to prohibit and punish the public expression of "ideas based on racial superiority or hatred" (art. 4(a)). More strikingly, the Convention on the Elimination of All Forms of Discrimination against Women commits the parties "to modify the social and cultural patterns of conduct of men and women" so as to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes." (art. 5). Both conventions call on parties to eliminate discrimination "without delay:" unlike portions of the Covenants, neither bears interpretation as establishing long-term policy goals or "manifesto rights" that do not require immediate action. The Convention on the Rights of the Child is the most detailed of the sector-specific conventions. It establishes the principle that "a primary consideration" in public policies affecting children should be "the best interests of the child" (art.

3(1)) and enumerates a series of rights that go well beyond the specific provisions of the declaration and

covenants, including the child's right to preserve his or her identity, the right of indigenous children to practice their own culture, and the right of the child "to freedom of expression" including "freedom to seek, receive and impart information and ideas of all kinds" (arts. 8, 13, 30). Parties are required to adopt minimum age and hours provisions for child employment to protect against exploitation and work likely to interfere with their education (art. 32). The convention also commits parties to adopt some policies that cannot readily be seen as protecting individual rights at all—for example, to "encourage the production and dissemination of children's books" and to take measures to educate parents about "child health and nutrition, the advantages of breast feeding, hygiene and environmental sanitation" (arts. 17(c), 24(2)(e)).⁴⁶

I comment here on several general features of human rights doctrine. The first and most important is its broad normative reach. Human rights are sometimes conceived as minimal requirements—"minimum conditions for any kind of life at all" or protections against the most "unambiguous" kinds of "abuse of power."⁴⁷ Perhaps there is a sense in which these phrases describe earlier declarations of rights, but neither applies in any straightforward way to the human rights of the postwar enactments, which differ strikingly from their predecessors in the range of their provisions. International human rights seek not only to protect against threats to personal security and liberty and to guarantee some recourse against the arbitrary use of state power, but also to protect against various social and economic dangers and to guarantee some degree of participation in political and cultural life.

A second and related feature is the heterogeneity of these requirements. Different rights are open to different strategies of implementation: some describe structural features of acceptable

institutions whereas others are standards for policy and action that can be satisfied in many different types of institutions. Among the latter, some prescribe relatively specific policies whereas others state more general political goals. This means that for some rights, and under some circumstances, human

rights may not serve as grounds on which any individual agent who is deprived of the substance of the right is entitled to press claims for the satisfaction of the right against any other identifiable agent.

Third, owing to their range and heterogeneity, not all of the human rights of contemporary doctrine can plausibly be regarded as preemptory. Under the economic and social conditions prevailing in some societies it may not be possible to satisfy all of these rights immediately, and even if it is possible to satisfy a right, it may be so only at the cost of not satisfying another or of sacrificing some other important aim of public policy. 48 In this respect human rights seem to depart from a familiar (if perhaps a naive) paradigm of fundamental rights.

A fourth significant feature is the relativity of human rights to social circumstances of a certain general kind. Human rights are sometimes described as timeless-as protections that might reasonably be demanded in all times and places. But this description is difficult to reconcile with the content of international doctrine.

Many of the threats protected against (e.g. unfair pay, lack of educational opportunity and access to medical care, loss of nationality) arise distinctively in modern or modernizing societies; they are not generic in the way that assault, say, was conceived as a threat in traditional "state of nature" theories. Moreover, some human rights are only comprehensible against a background can be brought to exist-for example, the rule of law, elections for public office, a public capacity for taxation and welfare provision, at least a rudimentary administrative state. Modern human rights doctrine cannot plausibly be regarded as seeking to articulate protections of timeless significance; it speaks to what might be described broadly as the conditions of modern life.⁴⁹

assumption that certain types of institutions either do or

Finally, human rights doctrine is not static. The 1948 declaration is seminal but neither it nor the covenants set limits to the range and content of human rights. The conventions on racial discrimination, discrimination

against women, and the rights of the child, in particular, bring about a substantial enlargement of human rights protections. They do not simply present more specific formulations of the provisions of the declaration and covenants. To recall some illustrations, the convention on racial discrimination requires governments to prohibit and punish the public expression of "ideas based on racial superiority or hatred."⁵⁰ The women's convention requires governments "to modify the social and cultural patterns of conduct of men and women" so as to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority

or the superiority of either of the sexes. "51 The children's convention holds that "a primary consideration" in public policies affecting children should be "the best interests of the child. "52 These provisions show both the substantive expansion of human rights doctrine and the extension of its reach from a society's constitution and basic laws to its public policies and customs. The evolutionary enlargement of human rights doctrine is sometimes disparaged as subversive of the effectiveness of human rights. Whether and in what sense this might be true are complicated questions. What should be observed here is that another view is possible. The evolution of human rights doctrine might be regarded as integral to the larger normative practice, a feature that could be important in forming an adequate grasp of its point.

