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CONFERENCE ON HUMAN RIGHTS, PUBLIC FINANCE, AND THE DEVELOPMENT PROCESS

THE HIERARCHY OF HUMAN RIGHTS

Tom Farer*

Development and participation are relevant to at least two major issues in human rights discourse. The first issue is whether a hierarchy of human rights exists, and if so, what is this hierarchy. The second issue is whether political and civil rights are universal; this is a matter of particular magnitude if one deems these rights to be privileged.

First, I want to focus on the question of hierarchy. A number of approaches to establishing a hierarchy have been proposed. Perhaps the most common, certainly among the leading U.S. human rights organizations, is to identify non-derogable human rights, that is those which cannot be suspended under any circumstances: primarily the right to life, physical security, due process, and non-discrimination on the basis of race and other ascriptive categories.

Enthusiasts of this approach have proposed a number of reasons for locating these rights at the peak of the hierarchy. One reason is the shared intuition that they must be of central importance, because we regard violation of them as particularly evil. Another reason stems from the universal recognition which these rights enjoy. In a system where no central institutions of enforcement exist—no courts of general jurisdiction, police forces or armies—we rely on attitudes concerning the legitimacy or illegitimacy of public institutions and of officials, in order to generate the effective enforcement of rights. Since the threat of delegitimation affects the behavior of officials, the defenses of human rights could be undermined if they lost their aura of universalism. To maintain this aura, some argue, the entire community should emphasize the rights most generally accepted as universal. An emphasis on

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non-derogable rights maintains the consensus. Conversely, campaigns on behalf of contested rights, like those of participation and development or economic and social rights, undermine the consensus. This is the functional justification for treating non-derogable rights as the apex of the human rights hierarchy.

A third argument for treating non-derogable rights as privileged is functional and deductive: they should be seen as primary because all other rights are dependant on them. A political order in which the rights to life, physical security, and due process are frequently violated generates an intense and pervasive fear which annuls the will to exercise other rights. Despite these arguments, some claim that subsistence rights, sometimes described in terms of basic needs, should be seen as the apex rights. The claim usually is expressed in fairly homely terms. For instance, if people are unable to eat or if they die as a consequence of dysentery and other diseases of the poor, then all the other rights are irrelevant.

The next approach to apex rights is that most frequently identified with Henry Shue.¹ He argues that both subsistence and physical security are basic rights.² Under these basic rights, he places all the particular liberties upon which security and subsistence depend, including participation.³ Thus, participation enters the human rights equation.

Shue states that one must speak not only of subsistence but of a sense of security in the enjoyment of subsistence.⁴ In order to obtain this security, you need social protection.⁵ Social protection implies a variety of other rights, including participation in directing the institutions and policies which vitally affect security of subsistence.⁶ He adds that by virtue of being entitled to invoke the right to subsistence, a person is correspondingly entitled to influence the operation of institutions and the implementation of policies relevant to its realization.⁷ The influence, he insists, must be genuine. Thus he presents the question of how to measure genuineness of participation.

Still another approach to identifying the apex rights was the one championed by the Reagan Administration, which emphasized fair elections. The Reagan Administration argued, presumably in good

1. *See generally*, HENRY SHUE, BASIC RIGHTS (1980).

2. *Id.* at 22-23.

3. *Id.* at 71-78.

4. *Id.* at 26.

5. *Id.*

6. *Id.* at 74-78.

7. *Id.*

faith, that as long as people participate in fair elections, then all other rights fall into place, albeit not always as quickly as one would like.

Those of you who read the editorial pages of the *Washington Post* may have noticed a column by Stephen Rosenfeld.⁸ He compared the approaches of Human Rights Watch and Freedom House to the changed environment of human rights.⁹ The article noted that Freedom House recognized and extolled the transformation in the world, particularly in Eastern Europe where democratic elections have occurred,¹⁰ while Human Rights Watch emphasized human rights violations that continued to occur in countries after they held elections.¹¹ Rosenfeld mildly disparaged, unfairly I think, what he took to be the latter's continuing sour-notedness about the worldwide condition of the human race.

The *Washington Post* also published recently a striking column by Richard Cohen (with whom I usually feel a very considerable rapport) on the Algerian democratic elections.¹² He did not deny that the elections were democratic, but he suggested that even those concerned with human rights could recognize occasions where democratic elections produced undesirable results.¹³ He did not quite tell us what to do under those circumstances but the implication was all too clear.¹⁴

Most human rights organizations, particularly non-governmental organizations, have steered clear of development issues and touch only peripherally on participation. Amnesty International, as most of you know, looks only at torture plus imprisonment for the exercise of rights such as freedom of speech and association. Human Rights Watch concentrates on first generation rights,¹⁵ and generally refuses to acknowledge second,¹⁶ much less third generation rights,¹⁷ due to the view that only first generation rights enjoy a broad consensus. The strength of

8. Stephen Rosenfeld, *Democracy First, Then Human Rights*, WASH. POST, Jan. 3, 1992, at A23.

9. *Id.*

10. *Id.*

11. *Id.*

12. Richard Cohen, *Phony Democracies*, WASH. POST, Jan. 2 1992, at A19.

13. *Id.*

14. *Id.* Cohen suggests that a government dominated by Islamic fundamentalists would adversely affect such minorities as Western-oriented citizens and women and generally threaten the pluralist values required for democracy to endure. Hence there was a very respectable case for *not* insisting on deference to majority choice. *Id.*

15. See JOSEPH WRONKA, *HUMAN RIGHTS AND SOCIAL POLICY IN THE 21ST CENTURY* 25 (1992) (defining civil and political rights as first generation rights).

16. See *id.* at 27 (explaining that second generation rights are social and cultural rights).

17. See *id.* (stating that solidarity rights (e.g., minority rights, the right to development) comprise the third generation of rights).

that consensus must be maintained in order to manipulate the capacity for delegitimation through exposure of human rights violations.

At least two other reasons for an exclusive focus on political and civil rights exist. The first reason is the difficulty in monitoring violations of other kinds of rights, such as the right to participate or the right to development. Even if there was consensus, at some very high level of abstraction, that these were indeed rights, in practice the consensus would break down very quickly into debate about progress. This has been a very important aspect of the reluctance to talk about economic rights.

Second, in the area of first generation rights, you have an infinite opportunity to express them. To be sure, if everyone insists on a right to speak on the same street corner at the same time, equal enjoyment would mean no enjoyment. But with a certain amount of management, roughly equal opportunity is achievable. When, however, it comes to the division of the gross national product, whether it is inter-generationally or within a single generation, only a finite amount of the valued thing is available. No consensus criteria exist for deciding how to make the requisite allocations. Different societies at different times, even different groups within a society, will disagree about the appropriate criteria.

Allow me to conclude by disagreeing slightly with many of my colleagues by suggesting that we should try to operationalize the right to participate at the macro-level. The ability to participate through the traditional or classical modality of elected representatives is diminished by two phenomena of our time. First, of course, is privatization. As privatization continues, the state has fewer tools and less opportunity to make decisions on matters that vitally affect the quality of life of the electorate. But even if privatization does not occur, as long as the aspiration to increase the gross national product survives, then the consequent participation of the country in the global economy reduces the ability of national policy makers to influence outcomes.

If we focus on participation on the micro or project level, I believe the key issue is the nature of the right to participation. Is it a right to be informed or to have one's views heard? Is it a right to veto projects when the local deprivation is great and the general benefits are uncertain or modest? Is it a right not to suffer a disproportionate burden in contributing to a possibly very great increase in the economic welfare of the society? Or, is it simply a right to compete for the benefits which result from growth? This question brings us back to the macro-level. Here one might look to demands for more education and training, anti-trust laws, harsh taxation of inherited wealth, and so on.

I would say finally that perhaps the deepest element of conflict between rights to development and rights to participation, both of which are group rights, and the classic first-generation concerns of human rights groups, relates to the fundamental question of what human rights are about. Some people think of human rights ultimately as a means to permit individuals to invent and re-invent themselves or to maintain their peculiar personal identity (to be, in G.K. Chesterton's words, "their own petty little selves"). Others think of these rights as a means for groups to prosper and to maintain their identity or to change their identity. Harsh conflicts arise between individual rights and other kinds of rights. In the process of seeking to maintain their identity, groups often must practice or wish to practice forced inclusion and exclusion, and often such group practices are incompatible with the whole notion of human rights as a basis for individual creation and recreation.