CHAPTER TWO

AN OVERVIEW OF THE CHARACTERISTICS AND CONTROVERSIES OF HUMAN RIGHTS

Introduction

In an examination of the nexus between the environment and human rights, Chapter 1 discussed the ethical and philosophical underpinnings of the concept of the environment. This chapter concentrates on the major controversies and issues in the conceptualisation and implementation of contemporary international human rights in order to determine the appropriateness and constraints of the human rights-based approach to environmental issues. The chapter is comprised of five sections. Section A examines the main theories that underlie the concept of human rights. Section B focuses on the issue of rights-holders and the expansion of human rights law beyond human beings. Section C considers the internationalisation and universalism of human rights. Section D presents the taxonomy of human rights and its corollary issues. Section E investigates the implementation mechanisms for human rights and the impediments to their enforcement at national and international levels.

A. Theories of Human Rights: Philosophical and Legal Foundations

While it is beyond the purpose of this chapter to examine thoroughly the philosophical underpinnings of the human rights concept, it is important to look at some of the main theoretical controversies that surround it in order to highlight the conceptual issues that accompany the transformation of a specific claim into a human right. Since its inception, the doctrine of human rights has oscillated between two theories of law: natural law and positive law. This oscillation reflects the unsettled debate in international human rights law over the source of human rights, that is, whether they emanate from the inherent dignity of the human person or from the will of the State.¹ Among the legal theorists and philosophers of the Enlightenment era who debated the legal aspect of human rights, Bentham represents the most extreme view against natural law. His stance was that positive law is the only accepted form of law and that

rights emanating from natural law are ‘metaphysical’ or even ‘nonsense upon stilts’.2

Alternative concepts such as utilitarianism and socialism advanced to fill the gap created by the decline of natural rights at the end of the 18th century. The utilitarian principle, based on the quest for ultimate happiness, moved away from the ‘metaphysical abstraction’ of natural rights to be a channel for social reform.3 Instead of liberal political philosophy, French social theorists such as Saint Simon proposed economic science as a remedy for what natural rights failed to achieve for the poor.4 Similarly, Karl Marx expressed disdain for the ‘rights of the man’, describing them as bourgeois rights that overlooked the importance to human emancipation of socio-economic factors like labour, production and wealth.5 Thus, the drift away from the emphasis on the natural rights of the individual that occurred in the 19th century opened the door to the development of socio-economic rights. Although individual rights did not vanish, they were viewed through utilitarian and socialist lenses as a channel of the public good instead of as part of the traditional concept of natural rights.6

Several contemporary human rights scholars have also reconsidered the validity of the philosophical underpinnings of the human rights concept. Gearty argued that the philosophical bases of human rights are fading and that there is a crucial need to look for an appropriate foundation to solidify the concept in the future.7 If the term ‘human rights’ is neglected on the theoretical level, many might fill it with notions at odds with the essence of human rights.8 To fill the gap, the term ‘compassion’ is suggested as a proper justification for human rights to replace both the religious and rational underpinnings of the past. Compassion, described by Davies as a ‘virtuous disposition’,9 is a powerful channel through which human rights can be used to “frame and mobilise responses to suffering and to atrocities.”10

On the other hand, some scholars have refuted the overemphasis on the notions of legality and justiciability to justify a new human right. Alston noted that notions of ‘implementation’ and ‘supervision’, rather than those of justiciability or enforceability are those that mainly govern international

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4 Ibid., 29.
5 Ibid.
6 Ibid., 30.
8 Ibid.
9 Quoted in Gearty, 43.
10 Ibid., 43.