Chapter 3

Human Rights and the Rule of Law

I. Introduction

The key feature of the second (legalisation) stage of internationalisation is its representation of human rights ideals as law. The effect of this so-called legalisation of human rights ideals far exceeds the mere restatement of human rights ideals in international treaties and other sources of law. It is, in fact, a deliberate and purposeful strategy to undertake a value change, as opposed to a mere forum shift of the first (facilitative) stage. This shift in an emphasis of values aims to transform human rights ideals into practical and tangible outcomes.

Quite apart from generating tangible outcomes, this latter stage in the internationalisation of human rights is also an exercise in efficiency and refinement with an interesting twist of objectives, including the representation of human rights as ends in themselves rather than as an appendage to the politics among states. The efficiency and refinement also encompassed the need to mainstream the individual as an actor of international law, integrating and consolidating the various dimensions,¹ stages and levels² of human rights policy and activity into a holistic regime.

The management of this value shift has hinged on the adoption of an entirely new persona for international human rights in the form of a legal character based on a framework of carefully defined standards supported by an increasingly efficient institutional structure for the attainment of its objectives. This second wave of internationalisation focused on the legalisation of human rights ideals that validate the emergence of human rights as a distinct sub-system. This distinguishing reinvention of human rights as a legal standard led Louis Henkin to describe the post-United Nations regime

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¹ Such as the political, the philosophical, the religious and the legal dimensions.
² Such as the national and the international levels.
as ‘the age of human rights’. His description is not to suggest that rights have been unknown before this time, but rather to emphasise and to re-enforce the unique and distinguishing character of the norms and strategies that followed from the broad ambitions of the Charter.

II. Transformation and Transubstantiation

There are important theoretical and practical lessons associated with the branding of human rights as a part of the law. In the first place, legalisation implies the transformation of the persona of international human rights from a matter of political convenience to one of objective legal standard – from a facilitator of parochial national interests to an end in itself. In this respect, the new human rights order relies less on power (political or military) and more on pre-defined logical standards to determine its scope and outcomes. This ‘new’ persona of international human rights follows the direct application of the key attributes of the concept of rule of law – including its supremacy and deification; its objectivity and neutrality; as well as its pervasiveness, universal acceptance and the equal applicability to all – to human rights ideals and processes. Of these attributes of the law, it is the effect of its so-called supremacy that is the most transformative. The ‘supremacy’ concept suggests the remodelling of human rights from a subjective and often parochial moral and political idea to an objective and neutral regime with an autonomous and independent identity from its authors and users.

This process of transubstantiation of moral ideals into law is not unusual in the development of the law from a pre-legal to a legal stage. Here, individual moral preferences crystallise through debate, negotiation and even protest into a public morality that then forms the basis of the law. The attachment of the ‘law’ label to a particular moral idea ordinarily does not alter the core

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4 Indeed, he identifies a long period of antecedent events such as the French Revolution, the American Declaration of Independence, the Atlantic Charter and the strategies of the inter-war (League of Nations) period. See, Louis Henkin, *The Age of Rights, op. cit.*, p. 13 et seq.
5 This is the most common definition drawn from the work of the English legal theorist, A.V. Dicey in his *Introduction to the Study of the Law of the Constitution* (Liberty Reprint 1982).
7 There is vast evidence of crystallised community moral standards in international human rights law, especially in treaty texts. The Charter of United Nations for example: “reaffirms faith [of the Peoples of the United Nations] in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small” and seeks “to promote social progress and better standards