HUMAN RIGHTS EVOLUTION: REFLECTIONS ON 75 YEARS OF CANADA'S HUMAN RIGHTS HISTORY

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In 1946, John Peters Humphrey (1905–1995) was an international public servant at the fledgling United Nations when he served on a committee tasked with drafting the Universal Declaration of Human Rights. The process would take two years, and the Declaration was proclaimed in 1948.

When we met many years later, Humphrey was a professor at McGill's law faculty and president of a Montreal-based NGO, the Canadian Human Rights Foundation (now Equitas: International Centre for Human Rights Education). I recall a conversation we had in the early 1990s about how he viewed the Declaration and what was in store for the future.

"What you need to understand," he said, "is that we

wrote the Universal Declaration of Human Rights as the foundation of a global human rights order. All you need to do now is implement it!"

Two things strike me as noteworthy when considering this extraordinary statement as we reflect on the legacy of the Declaration in 2023. The first is that Humphrey saw the Declaration as revolutionary. The second and related point is that it represented the summit of our human rights achievements. The rest would be about mere execution.

The idea of a human rights revolution is not new: it has been expressed by others, including prominent Canadians like Irwin Cotler and Michael Ignatieff. Indeed, the 1948 Declaration did play a Promethean role. It has served as an inspiration for other international human rights systems. At the state level, it spurred the emergence of rights-based constitutions, and national laws, codes, and institutions that have echoed its aspirations to a greater or lesser degree.

But the Declaration was not the high-water mark in the history of human rights ideas. The twists and turns of geopolitical events both before and after 1948 have meant that there have been many different challenges than simply implementing its blueprint and carrying out the human rights *revolution*. Rather, we have been struggling towards a more inclusive and progressive rights *evolution*.

THE UDHR: PART OF AN ITERATIVE, HISTORICAL PROCESS

The Declaration signalled a moment in time but was also part of a much longer narrative arc. It was the conclusion of a carefully curated codification that distilled centuries of legal thought. Humphrey is part of that story: Clinton Curle's important book *Humanité: John Humphrey's Alternative* (2007) traces the evolution of Humphrey's thinking about law and human rights, as well as his role in the development of the first draft of the Declaration, in the context of the political thought of Henri Bergson, the influential French philosopher.

Humphrey was not, of course, working alone. The UN held dozens of meetings of committees and working groups — almost 300 — in which many legal scholars, experts and UN officials worked to hammer out the 30 articles of the Declaration through the collective and iterative processes that led to its proclamation.

The Declaration includes civil and political rights that protect individuals against state power. It also safeguards equality rights and requires that states progressively realize economic, social and cultural rights. All of these rights were contained in a single document.

RIGHTS-SPLITTING AND RIGHTS HIERARCHIES

Two decades later, the integrated rights framework that underpinned the Declaration was split into two, largely as a result of post-Cold War tensions. The West valued civil and political rights as precursors to an open, democratic society, while the Communist bloc saw economic and social values as priorities. In 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted as separate multilateral treaties. (Together, the Declaration along with

the two Covenants are known collectively as the 'International Bill of Rights'.)

These developments have had problematic consequences, including the bifurcation of rights categories and the creation of hierarchies among rights. For the West, the "great freedoms" (freedoms of expression, religion, conscience and peaceful assembly, for example) were seen in practice as being at the apex of human rights norms.

We know now that the idea that civil and political rights are at the apex of a rights hierarchy is inconsistent with established law. At the UN World Conference on Human Rights in 1993, the world's nations came together to reject hierarchies of rights through the Vienna Declaration and Programme of Action, which states that:

> All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

Statements from the Supreme Court of Canada have also made it clear that there is no hierarchy of rights.[1] The rhetorical rut of Cold War thinking nonetheless has cast a long shadow, dividing civil and political rights from economic and social rights. Equality rights are often seen as secondary or subordinate rights, antithetical to liberty. Economic, social and cultural rights are still seen in some circles as largely aspirational. The result in countries like Canada has been a sustained reluctance to recognize social and economic rights as "real rights".

Ken Norman, a Saskatchewan-based human rights lawyer and emeritus professor of law, is one of Canada's leading experts on Canada's human rights history. On considering this rights-splitting and its historical context, he observed:

> Look what happened to Franklin Roosevelt's second bill of rights [on economic and social rights]. The Cold War killed it dead. People who think that economic and social rights are bolshie sorts of socialism are out there, but that generation is slowly but surely leaving.[2]

The challenge then, has been to return to the unifying vision of the Declaration, while recognizing that it was just the beginning of making human rights truly universal.

NOT SO UNIVERSAL?

There are now nine core human rights instruments and about 100 "universal" human rights instruments[3] in the UN system that have attempted to achieve universal rights. Regional systems contain their own, different, human rights instruments. In Canada, as in many other countries, there has been a push to develop new rights frameworks that are more capable of including human beings and

1 See, e.g., *Dagenais v. Canadian Broadcasting Corp* [1994] 3 SCR 835 at 839 and 877; *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 SCR 238, at para 2.

2 Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Montreal-Kingston: McGill-Queens University Press, 2014).

3 Excluding the procedural and substantive optional protocols.

peoples who had been denied the promise of human rights, despite its claim to universal protection.

Predictably, perhaps, the proliferation of human rights instruments triggered something of a backlash. Civil liberties advocates like Alan Borovoy in Canada and Aryeh Neier in the United States argued not only for the supremacy of civil and political rights but also that the expansion of rights would devalue civil and political rights. Authors like Eric Posner argue, moreover, that ongoing and widespread global human rights violations demonstrate that human rights are not up to the job.

Combating these critiques and their attempts to restrain the evolution of human rights is not merely an issue of implementation. The iterative development of human rights has been an existential project, focused on expanding and extending protections. That is because the promises of universalism have not been met for all human beings. The changing recognition of human needs, capabilities and conditions has required new rights and reframed existing ones.

In so doing, the rights evolution has altered the contours and content of human rights. Women have battled for decades under the banner of "women's rights are human rights". The rights of people with disabilities were not even discussed as "human rights" until the 1980s. even in many human rights discourses. Indigenous people were denied the franchise, legal rights, and a host of other rights for decades in Canada. These are not historical phenomena of the distant past; it was only in 2008 that Indigenous people living on reserve were allowed to file human rights claims under the *Canadian Human Rights Act*.

These are but a few of the many examples. The human rights challenges that we have faced at home and around the world are about so much more than just implementing the Declaration's blueprint.

CONCLUSION

It is true that enormous work is needed to implement human rights, a point that Alex Neve's essay in this collection drives home with depressing accuracy. But there are many other challenges too. The political divisions discussed in this article that created rights "categories" have operated to weaken rights and marginalize human beings, although many of the more recent human rights instruments have started reversing the trend and now integrate civil and political rights with economic, social, and cultural rights, emphasizing the interdependence of human rights. That is why the struggle to create strong and novel legal protections for people's freedoms and basic needs has been so important: it has led to important new human rights instruments like the Universal Declaration on the Rights of Indigenous Peoples and the Convention on the Rights of Persons with Disabilities, among others.

The rights evolution has taken place in direct response to the need for meaningful solutions that respect the dignity of human life and promote democratic societies. Human rights law is, as a result, vulnerable to distortion and even attack because it is inherently, inevitably, and often explicitly political because it challenges established authority. The history of how rights emerged and the processes by which human rights law has responded to changing societies points to an iterative development of human rights that has been more "evolution" than "revolution".

Thirty years ago, John Humphrey believed that the Universal Declaration of Human Rights was so important that it meant all the real work was already done. It was supposed to be downhill from there. That was not the case for reasons that were impossible to foresee at the time, but with the benefit of hindsight, we know that the Declaration was but one point of light along the longer arc of justice.