Human Dignity

THE INTERNATIONALIZATION OF HUMAN RIGHTS

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Essays based on an Aspen Institute Workshop sponsored by the

Program on Justice, Society and the Individual
Director, Robert B. McKay

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Director, Harlan Cleveland

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PREFACE

The Aspen Institute Program on Justice, Society and the Individual and the Progam in International Affairs held a Workshop during the summer of 1977 on "The Internationalization of Human Rights." Earlier Institute work and concern regarding human rights had proved useful, and the Institute intends to remain active in this area. Human rights of various sorts are central to the Institute's growing involvement in "Governance"; that is, the relation between individual freedom and creativity on the one hand and social justice, fairness and efficiency on the other.

The timing for the 1977 Workshop was auspicious. The Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Accord) was soon to be reviewed by the signatory nations, and President Jimmy Carter had startled the world with his insistence that the United States would henceforth take seriously its commitment to the advancement of human rights without conventional regard for national boundaries.

The Workshop participants (listed in the Summary Report) came from various disciplines and diverse parts of the world. They were activists and academics, from the private sector as well as the public. Their wisdom, experience and good spirits contributed to a lively and useful discourse.

The basic papers in this volume by Harlan Cleveland and Abraham Sirkin were part of the Workshop's preparatory material. Those by Elaine Pagels, Charles Wyzanski and Thomas Buergenthal were developed in the course of the meeting. Thomas Wilson's paper was written following the conclusion of the session.

This volume has been prepared to coincide with the 30th anniversary year of the signing of the Universal Declaration of

Human Rights. It is a tangible token of the Aspen Institute's continuing interest in developing standards and mechanisms for the internationalization of human rights.

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INTRODUCTION:

The Chain Reaction of Human Rights

Harlan Cleveland

More than a year ago, President Carter moved to make international human rights a central theme of United States foreign policy. At the outset, the human rights campaign was all heart and no strategy—the philosophy far from clear, the targets scattered, the methodology unplanned and the worldwide ripple effect (the President said later) a surprise. But the wobbly launching of the Carter initiative should not obscure its truly historic quality. For the world's most powerful government to commit itself to championing the rights of individuals subject to the jurisdiction of other sovereign governments is a major event in the story of international relations.

The idea of human rights is itself newer than many of its advocates seem to realize. A speaker at a national conference on human rights opened with what he thought was a truism: "Human rights are as old as people are." But they are not, of course. They have to be listed as "new business." The old business was rights *conferred or arrogated*—granted by God if that could be arranged, but if necessary seized by force and maintained by force accompanied by claims of superiority on account of rank, race, early arrival or self-anointed citizenship.

We may be living, even if we are not yet noticing and articulating, through one of those profound shifts in human values that comes along once a millennium. As Professor Elaine Pagels says, the kernel of human rights was always there—in the idea that Adam was created in the image of God, and in the practice of a few: the civil disobedience that brought Daniel to the lion's den, the claim of the early Christians that Rome governed by transgressing the dictates of the Divine, the resentment of oppression that drove the

Puritans to America—all precedents for Martin Luther King who violated American laws as contrary to the laws of God.

Only with the Enlightenment came widespread acceptance of the idea that every human being has rights that are to be recognized, even protected, by society but are not conferred by authority. Today, three crowded centuries and many revolutions later, the content of these rights is still debated and no one's minimum list is anywhere fully realized. Yet we sense that this late-starting, primarily Western idea is on its way to universality. The idea of human rights—the notion that societies should be managed "as if people mattered"—is so fundamental, so "natural," so obvious once revealed, that it just may be the first revolution to achieve a global reach, the first world-class superstar in the history of political philosophy.

What has brought human rights to center stage in a world still dominated by nation states and the concept of national sovereignty? Thomas Wilson in his paper identifies four serendipitous happenings that have occurred in the 30 years since the signing of the Universal Declaration of Human Rights.

One was the eventual success of the civil rights movement in the United States, which freed the world's most influential nation to press human rights claims in the global arena without having to be quite so self-conscious about its performance at home.

Secondly, in the United Nations, newly sovereign governments could not resist the temptation to break down the barriers of sovereignty in order to get at the other fellow's internal abuses, especially racial abuses. The hypocrisy of much of this transnational criticism, the tendency of nations to ignore the beams in their own eyes, the frequent demonstration that courage is directly proportional to distance from the problem make it easy to caricature this trend and obscure the basic change in international law that is already well advanced. As detailed by Professor Thomas Buergenthal, since the end of World War II, the international community has made substantial progress in the codification of human rights law.

The third happening was the signing in 1975 of the Final Act of the Conference on Security and Cooperation in Europe. This

East-West agreement, known popularly as the Helsinki Accord, gave a new dimension to the law of nations; 35 sovereign states made solemn promises to each other as to how they would treat their own citizens. A meeting of the signatories to review compliance with the Accord was held in Belgrade in 1977-78. Although that meeting failed to produce a statement on the present condition of human rights within the signatory countries, the important mechanism of monitoring survived, and a second review meeting will be held in 1980 in Madrid.

The great wave was thus already well in motion when the fourth happening came along. As soon as he took the oath of office, Jimmy Carter sought to make international human rights central to United States foreign policy. It was, of course, one thing to announce a commitment to human rights but quite another to fashion a strategy to effectuate and institutionalize that commitment. The questions that must be dealt with as the human rights component is spliced into United States foreign policy are discussed by Abraham Sirkin in his paper.

The Carter human rights initiative survived: The speed and duration of a great wave does not depend on the skill of the surfer who catches it. Partly it has survived because President Carter bracketed negative rights, those asserted against governments, with positive rights, defined as a society's obligation to help provide a better life.

At the traditional core of international human rights are those dealing with the security of the person. The heart of this collection of rights is freedom from the excesses of the State—in Secretary of State Cyrus Vance's words, freedom "from governmental violation of the integrity of the person." Such violations include torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest or imprisonment; denial of a fair public trial, and invasion of the home.

The Carter Administration has fused these "freedoms from" (that is, rights the State can guarantee by simply laying off its citizens) with a couple of "freedoms to" that can only be assured by the State's affirmative action. These are an entitlement to the fulfillment of basic human needs (now usually defined as socially determined but culturally and geographically different minimums of

food, shelter, clothing, education and employment), and the right not to be discriminated against by reason of being different—a different race, a different belief, a different sex.

Judge Charles Wyzanski says that, as a matter of history, "negative and positive liberties have never been, and never could be, totally reconciled." But he also suggests that they may be added together, as they are in the international bill of rights which is the Universal Declaration. Adding them together is also the way to create and sustain a human rights movement universal enough in its appeal and its application to qualify as a global political philosophy. The chain reaction of human rights and human needs is explosive, and that explosive power is now somewhere near the center of world politics.

CONTENTS

THE ROOTS AND ORIGINS OF HUMAN RIGHTS

Elaine Pagels

Advocates of human rights policy claim not only that there are human rights but also that these rights have universal applicability. What—if anything—justifies this claim? This question is motivated, at least in part, by the suggestion that advocates of human rights are attempting to impose Western values on other peoples. Abraham Sirkin in his paper acknowledges that a human rights policy, especially one initiated by the United States, "is bound to carry with it overtones of moral arrogance."[1]

Some advocates make extravagant claims for the policy. The book prepared for World Law Day, *International Legal Protections for Human Rights*, opens with these words: "The idea of the inalienable rights of the human being was often articulated by poets, philosophers, and politicians in antiquity." This grandiose—and vague—statement is followed by a single specific example, which reads:

> When Antigone, in Sophocles' play, written 422 B.C., says to King Creon, "all your strength is weakness itself against the immortal, unrecorded laws of God," she invokes the higher law, the natural rights of man.[2]

It seems to me that she also speaks for the rights of women—but let that pass.

Antigone speaks of the divine "laws of God," not "natural law;" furthermore, the divine laws she invokes concern blood loyalty among family members, not "human rights" in some general and universal sense. As a historian, I would say that the example proves little—if anything—for the idea of human rights. More accurate is

Condorcet's observation that "the notion of human rights was absent from the legal conceptions of the Romans and Greeks; this seems to hold equally of the Jewish, Chinese, and all other ancient civilizations that have since come to light. The domination of this ideal has been the exception rather than the rule, even in the recent history of the West."[3]

Another recent book, *Great Expressions of Human Rights*, edited by R. M. MacIver, contains many elements from different cultures. Those written before the 17th century, however, have nothing to do with human rights understood in contemporary terms—that is, the idea that the individual has rights, claims upon society, or against society; that these rights, which society must recognize, on which it is obliged to act, are intrinsic to human beings.

Much more common, and far more universal, in historical and geographical terms, is the opposite idea: that society confers upon its members whatever rights, privileges or exemptions they enjoy. According to this concept, ultimate value derives from the social order. In traditional societies, Eastern and Western, the socio-political order is understood to reflect the universal, inviolable divine order. Leaders of such societies, therefore, rule by divine right: they can make claims on any members of the society, but no ordinary individual has any claim on them. Correlated with this is the conviction that social hierarchy, and whatever rights it conveys (or withholds), also are rooted in the divine, universal order.

Some have suggested that the idea of human rights can be traced to the ancient code of Hammurabi, which ensures, for example, certain legal protections against mutilation and torture. But they fail to acknowledge that these exemptions applied only to aristocrats: lower class people and slaves had no such exemptions. The structure of the Hammurabi code indicates that these "rights," such as they were, derived entirely from society (they would say, from the gods) and not from any intrinsic quality of the individual.

In Rome, as well as in the ancient Near East, the emperor ruled as the son of the gods; against his will there was no recourse (except, of course, assassination!). Only Roman citizens, a small percentage of the population, had specific rights, and these were

minimal indeed: a citizen could not be tortured or condemned without a trial; if condemned to death, the citizen had the privilege of being beheaded, rather than tortured to death in the public arena, as non-citizens were. Again, this legal system was based on the premise that rights were conferred—or withheld—by the state.

This concept is not just ancient history; it was also the dominant form of political theory in Christian Europe since the fourth century. Rulers of the Holy Roman Empire and the Catholic and Protestant kings of Europe claimed to rule by divine right; one's political position, whether as serf or aristocrat, was understood to be arranged according to the will of God. Slavery and the negligible legal position of women often were sanctioned in the same way, as was persecution of Jews and Muslims. The same pattern prevailed in Greece until recent times, and in Russia until 1917.

It is essential to note that this pattern of deriving rights from the society has prevailed in non-Western countries as well. Among the tribes of Australia, Africa, North and South America, tribal hierarchy and tribal custom are understood to be sanctioned by the divine order or by nature. They allow no recourse for the individual—or individual "rights"—outside the tribal structure.

A similar pattern has prevailed for centuries in Hindu societies of India, Cambodia, Nepal, and in Pakistan: the social and political order reflect the divine order which the ruler embodies. The caste system, endorsed as the reflection of that order, fixed the ranks of society into the three upper classes, defined by their privileges, the fourth class, consisting of people who maintained minimal rights, and, below these, the "untouchables," who remained outside of society, and outside any system of rights. Buddhist society, which for centuries prevailed in China, Japan, Korea, Mongolia, Burma and Ceylon, similarly, revered the ruler as the embodiment of divine order. The laws of Buddhist society, which in its Indian form included the caste system, were religious laws which allowed no recourse for what we call "the individual."

To this list we might add Marxist societies, which invert the religious pattern and claim that the social order reflects inviolable natural laws, analogous to the laws of biology and physics. Here again, value resides in the social order. It makes no sense, in this

context, to speak of individual rights prior to participation in society. Instead, only as one contributes to the community can one expect to derive benefits from it.

Where, then, do we get the idea on which contemporary human rights theory rests: that ultimate value resides in the individual, independent from and even prior to participation in any social or political collective? The earliest suggestion of this idea occurs in the Hebrew account which describes Adam, whose name means "humanity," as being created in the "image of God." Written in the seventh century B.C. (and probably told centuries earlier), this account implies the essential equality of all human beings, and supports the idea of rights that all enjoy by virtue of their common humanity.

Nevertheless, the perspective of the ancient Israelites was very different from that of contemporary human rights theory. The modern theory traces the origin of those rights to natural law, which is claimed to surpass conventional law. According to Professor Louis Henkin, "Judaism never accepted natural law: only one law was recognized and that was divine law."[4]

The concept of human rights does not occur in ancient or rabbinic Judaism. As Henkin observes:

> The Hebrew language did not have an authentic word for rights. The word for a right today (z'khut) originally connoted purity, virtue, innocence: it was used for benefit received, or even deserved . . . but it did not carry the sense that one had these benefits 'as of right' . . . Judaism knows not rights but duties, and at bottom, all duties are to God.[5]

Yet the law developed among the people of Israel, based on the principles of equality and justice, could function to ensure what we would call human rights, such as the right of field workers to eat while harvesting (Deuteronomy 23:25-26); limitations on slavery (Exodus 21:2; Leviticus 25:10, 39 ff.); protection of female slaves from arbitrary assault or abuse (Exodus 21:7-11); equitable distribution of land (Numbers 33:54; Leviticus 25:14-18, 25-34), and universal education (Deuteronomy 6:7; 11:19). The primary bene-

fits of this society, however, were extended only to those who were free, male members of the community; they did not extend to non-Hebrews, or to women.

In contrast to the pattern mentioned above, where the ruler embodies the gods and the law, the Hebrew people developed a tradition of resistance to absolute claims made by any ruler, native or foreign. According to tradition, the nation originated in opposition to tyranny and enslavement, and in response to the agony of oppressed people (Exodus 3:7-10). The early Israelite tribes rejected any form of divine kingship in favor of tribal councils;[6] all alike were subject to the same laws. When, under the pressure of war, a king finally was chosen, opposition persisted (I Samuel 8:1-22; IV Judges 8:22-23; 9:1-15). The first king of Israel, Saul, found that certain of his commands were deliberately rejected by his servants, who judged his orders to be contrary to the divine law (I Samuel 22:17). His successor, David, also was held accountable for violating the law, which was binding on him as on every other member of the tribe (II Samuel 11-12).

When, in later times, the Israelite people were subjected to centuries of foreign imperialism, they survived by resisting arbitrary laws of foreign governments in the name of a higher order. It is not an accident that *Time* magazine, depicting President Carter meeting the leaders of other nations, has characterized him as Daniel in the lion's den, defying King Nebuchadnezzar!

The early Christians inherited this tradition; the most courageous among them, like the Jews, refused to obey civil laws which, in their view, transgressed divine law.[7] Often at the cost of harassment, torture and execution, they rejected any claim that Roman rule was divinely sanctioned. Throughout the centuries, others have followed their example: it was that tradition to which the English Puritans appealed as they fled from Europe and claimed the American colonies as the "promised land" of the deliverance. Only 20 years ago in the same spirit Martin Luther King condemned and deliberately violated American laws that endorsed segregation; these, he insisted, were contrary to the laws of God.

The third "religion of the book," Islam, likewise inherited the ideas of human equality and divine justice. The Koran enjoins