Jack Mahoney

The Challenge of Human Rights

Origin, Development, and Significance

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The Challenge of Human Rights

Dedicated to the memory of my brother, Bernard

Acknowledgments

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Introduction

The emergence of human rights into human ethical consciousness and their development and now worldwide recognition constitute a moral phenomenon of astonishing scale and unparalleled significance, well meriting the remark of Henkin (1990: p. xvii) that "Ours is the age of rights. Human rights is the idea of our time." Fifty years after the historic promulgation of the Universal Declaration of Human Rights in 1948, the UN Secretary-General, Kofi Annan (1998: 18) noted that "it is the universality of human rights that gives them their strength. It endows them with the power to cross any border, climb any wall, defy any force." On the same occasion, the former President of Ireland and newly appointed UN High Commissioner for Human Rights, Mary Robinson (1998: 253), declared that "we must learn that human rights, in their essence, are empowering."

Timely, universal, and empowering. These three characteristics of human rights identified above have inspired and shaped this study which is aimed at examining, and commending, their challenge today. We begin in chapter 1 by tracing the roots of natural rights and the growth of the theory from the ancient and medieval worlds through the revolutionary ages of Britain, America, and France to the eve of the Second World War. This is followed in chapter 2 by examining the development of the modern human rights movement which emerged as a consequence of that war, and by chronicling its international expansion to the present time. Attention is then given, in chapter 3, to clarifying how the many complexities of human rights can be understood, and to responding to the criticisms which are raised against them. In chapter 4 we then expound and assess the varied arguments which are invoked to establish the existence and the validity of human rights, and suggest which of these might be most popularly acceptable today. Finally, we devote the fifth chapter to the topic of how human rights

relate to the most significant and pervading feature of modern life, globalization in its many manifestations. We examine their role in a world which is in some respects increasingly interconnected and yet in other respects increasingly divided; and we indicate how some human rights have acquired a globalized application, especially those which appeal to economic justice, to environmental justice, and to HIV/AIDS justice.

We suggest finally that respect for human rights must logically culminate in some form of cosmopolitanism, or a more consciously united world, manifesting what the French in their Revolution termed *fraternité*, and what today we might prefer to term *human solidarity*. The UN Secretary-General, Boutros-Ghali (*The UN and Human Rights* 1995: p. 442), observed that humankind constitutes "a single human community." Our conclusion is a richer one, to propose that what human rights reveal is that humanity forms a single moral family, all of whose members are united in human solidarity and thus owe to each other a mutual moral respect based on their shared dignity as awe-inspiring human beings.

The canvas covered by human rights is thus a very large one indeed, and our attempt to capture at least the broad picture has inevitably meant that some details of the subject have not received the justice they would otherwise deserve. We have singled out three human rights as especially significant in illustrating the way in which rights are acquiring a global dimension today. A great deal more can be said of each of them, and about other particular rights, including the rights of particular groups in every society and rights arising within different areas of human life and activity. Our hope, however, is that the picture presented here will be recognized as a faithful, if general, one of the subject as a whole, and that it will stimulate and encourage further reading and research in the area.

The extensive reach and moral leverage of human rights appear indisputable, as the record of history shows. Yet that record also sadly acknowledges that there have been, and remain, massive defaults in recognizing and respecting these moral claims. As McGrew noted (1998: 194–5), "The twentieth century has witnessed an unprecedented global diffusion of the idea of rights . . . But whereas the idea of rights has spread, this has not necessarily been accompanied by greater universal observance of rights." Henkin (1990: 28–9), however, offers some wry encouragement: "No doubt the commitment of many countries to human rights is less than authentic and whole-hearted. Yet . . . even hypocrisy may sometimes deserve one cheer for it confirms the value of the idea, and limits the scope and blatancy of violations."

Coupled, then, with a conviction of the significance of human rights for the gradual advancement of human society worldwide must come the continual awareness of the need for vigilance to work for their recognition and implementation in every corner of that society. At the close of the study we observe that the uncovering and emerging consciousness and recognition of human rights has immeasurably enriched the human race's ethical resources. Our hope is that this work will have contributed to accepting the challenge of those human rights, which is to identify, confront, and where possible to eliminate what the Scots poet Robert Burns (1995) described feelingly as "man's inhumanity to man." Accordingly, the aim of all concerned to meet the challenge of human rights must be, as expressed by one UN Secretary-General (*The UN and Human Rights* 1995: p. 533), to "continue to mobilize [our] efforts, so that human rights may one day emerge at last as the common language of humanity."

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Contents

Chapter ①

Human Rights in History

Human rights as we understand them today are largely the product of seventeenth- to eighteenth-century Western thought, and as such find no substantial place in ethical or political reflection in Europe before the twelfth century. However, the earliest stage of Western ethical reflection contains two deeply significant features which contributed to the eventual emergence of human rights: the centering of human morality on the idea of justice; and the recourse to human nature as a source of moral knowledge. The aim of this opening chapter is to identify the source of the idea of human rights in Western thought and to trace its historical development as far as the middle of the twentieth century.

The Ancient Classical World

The ancient world of Greece and Rome did not have a theory of human or natural rights. In a wide-ranging and discursive history of human rights Gary B. Herbert seemed clear that the notion of subjective rights dates only from the late Middle Ages (Herbert 2002: 49, 69–71), yet in his history of Homeric society he regularly refers to subjective rights (pp. 1–18). He further claimed that Aristotle held that "a natural commensurability exists between natural abilities and natural rights; those who have greater abilities have correspondingly greater rights" (p. 29); and he alleged that Aquinas was to follow Aristotle in thus viewing "natural rights" (p. 62); all without providing any textual citations. Likewise Hayden writes of Aristotle as envisaging citizens having subjective rights to property and to political participation, commenting that he "defined rights only in a restricted legal sense"; but he offers no sources for his statement (Hayden 2005: 39). An attempt was made by Miller actually to prove that "Aristotle recognizes 'subjective' rights in

the sense of rights belonging to individual subjects which can be claimed by them against other individuals" (Miller 1995: 113 n. 68). However, his textual argument is tenuous and not persuasive in itself; nor does he explain why Aristotle's contemporaries and successors did not pick up or develop the theme if it did indeed form part of his political or moral philosophy. Nor does Stoic thought contain the idea of human rights, in spite of several popular presumptions to the contrary, including that of Cranston (1973: 10), who refers to the concept of natural rights as elaborated by the Stoics of the Hellenistic period.

However, although we cannot find any language or theory of human rights in ancient Greek thought, nevertheless the basis of human rights, the concept of justice, is strongly present there. Thus, Aristotle recognized a clear distinction between two types of justice, one which is legal or conventional (*nomikon*) and which can change according to circumstances in society, and the other which is natural (*phusikon*) and more fundamental, "which everywhere has the same force and does not exist by people's thinking this or that" (Grant 1885: bk. V, ch. 7, sect. 1; vol. 2, p. 126). In addition, Aristotle's reference to "natural justice" invokes another major idea, the idea of nature (*phusis*), which was to provide a highly significant resource for ethical standards by acting as the basis of a moral law of human nature, or a "natural law," and eventually of "natural" rights as the historical precursor of human rights. As Weinreb observes, "from the first, the idea of a normative order immanent in nature was a fundamental element of classical Greek speculation" (Weinreb 1987: 150).

Moreover, some awareness in Greek culture of a court of moral appeal superior to all civil law or convention is to be found in the much quoted passage in the *Antigone* of Sophocles, in which the daughter of Oedipus justified her action of burying her slain brother against the ruling of the victorious ruler Creon by appealing to "the unwritten and unshakeable usages (*nomima*) of the gods" (Sophocles 1998: ll. 454–5). Yet, although this may be seen as dramatic evidence of a Greek belief in a transcendent ethical structure of reality in the light of which human constructs could be judged, it is not evidence, as some have claimed, of Antigone "claiming a right" (Warnock 1998: 62), nor of "rights bestowed by the higher law" (Cranston 1973: 10). Antigone's phrase itself, as Elaine Pagels (1979: 1) pointed out, proves "little – if anything – for the idea of human rights."

The idea of a *nomos*, or "law," of nature, however, establishing different ways of behaving as in harmony with, or at odds with, the divine *Logos*, or Reason, which was believed to permeate nature was central in Stoic ethical thought (Copleston 1944: 396–400). As Weinreb noted

(1987: 36), "Stoicism . . . transformed classical Greek speculation into a theory unmistakably identifiable as natural law." The same applied in ancient Roman writing, as we find in the *Meditations* of the Stoic philosopher-emperor Marcus Aurelius, who recalls with gratitude "to have pictured to myself clearly and repeatedly what life in obedience to Nature really is . . . though I still come somewhat short of this by my own fault and by not observing the reminders and almost the instructions of the gods" (Marcus Aurelius 1961: 1. 17).

In the legal and philosophical tradition of ancient Rome, it was this concept of a normative human nature which was to provide Roman ethical theory with a systematic basis for exploring universal moral obligations and duties as expressed in the concept of "natural law," or *ius naturale*. As explained by Buckland (1966: 53) in his study of Roman law, the notion of natural law "originated in Greek philosophy; it was a system of moral rules implanted in man, not necessarily in other living things, by nature – an intuitionist morality."

Marcus Tullius Cicero (106–43 BCE), well described as "the plain man's interpreter of ancient thought" (Grant 1971: 35), explains this law of human nature with his usual lucidity and elegance; and "his writings contain the first clear statements of natural law as a distinct philosophical doctrine" (Weinreb 1987: 39). As Cicero (1960: II. 22. 65; pp. 228–30) observes, "the origin of law appears to be drawn from nature . . . There seems to be . . . a law of nature which comes to us not from opinion but from a kind of inborn power." Elsewhere he expands on this:

> There is a true law which is right reason congruent with nature, widespread within everyone, constant and everlasting, which calls to duty by its bidding and deters from wrongdoing by its forbidding . . . We cannot be released from this law either by the Senate or by the People, nor need we look to anyone else to explain or interpret it to us. Nor will there be one law in Rome and another in Athens, one law now and another later on, but one law, eternal and unchangeable, will encompass all peoples at the same time. And there will be one common teacher and ruler of all, god, who is the origin, arbitrator and maker of this law. Whoever does not obey will be running away from himself and denying the nature of mankind. (Cicero 1928: bk. III, ch. 22, sect. 33; p. 210)

The World of the Bible

As the classical tradition of ancient Greece and Rome, so also the other major contributor to Western ethical thought, the religious traditions of

Judaism and Christianity, have no theory of natural or human rights. The Hebrew Bible and the Christian New Testament have a profound interest in how God's human creatures behave, of course, but the morality is distinctly theonomous, or as legislated by God, as is indicated by the title the *Torah*, or Law, given to the Hebrew Bible, and by the title of a new "covenant" with God which is given to the Christian writings. One writer on the subject (Sugden 1996: 4) has claimed that "human rights are clearly set down in the law of Moses," but the statement is simply false, for neither the Hebrew Bible nor the Christian New Testament makes any reference to the subject of human rights. There is a great deal about justice, of course, in the Judeo-Christian tradition, mainly about God's justice in dealing with the Jewish people, but also by extension about their justice towards their God and towards each other. And it is possible on the basis of biblical teaching, particularly in its concern for the economic and social lot of the poor, to construct an argument to produce a theory of human rights. But such a logical train of thought is not to be found in the Bible itself. The point is well made by Jones (1994: 37) when he follows others in describing the Ten Commandments as "rightless rules," that is, rules which prescribe duties laid down by God from which human beings will clearly benefit, such as "Thou shalt not kill" or "Thou shalt not steal." Such conduct is not, however, Jones maintains, conceived as owed to those other human beings. The moral demands contained in the Ten Commandments are grounded in the will of God and not in a set of titles which God has given to his human creatures. As Tierney (1997: 1) expressed it succinctly, "Moses gave commandments to the children of Israel, not a code of rights." Indeed, as Habgood has noted (1993: 97), there is a "strong sense of unease among Christians about the concept of rights." The Judeo-Christian situation is, then, well described in his conclusion that "it may be possible to *deduce* some rights from biblical teaching; but it is a mistake to say that the Bible is about human rights, because that implies commitment to a concept and a way of thinking which did not then exist" (p. 96).

By contrast, however, in Christian thinking influenced by Hellenistic thought the idea of human nature as a resource from which to derive ethical obligations became accepted largely as a result of the teaching and authority of the early writer, Paul, and the distinction which he drew between the written moral law, or *Torah*, which was believed to have been revealed by God to the Jewish people through Moses, and the way in which other nations who had not received this Mosaic law nevertheless knew in their conscience by "nature" (*phusei*) how they ought to behave. In this way, Paul explained (Rom. 2: 14–15), such

non-Jews were a "law unto themselves," not in the modern relativist sense of deciding for themselves what was right and wrong behavior, but in the sense of their possessing an interior conscience, or a "natural" personal consciousness, of how God wished them to behave. This Pauline doctrine would readily become the "natural law" of the medieval Schoolmen.

The Medieval World

It was only gradually that the idea of personal rights, or the application of *ius* (justice) in a subjective sense of something possessed by the individual, took shape in the course of the Middle Ages. To start with, the idea of the universal moral law emerging from human nature which was developed from classical and Christian sources became a central component of medieval ethical thought; and a systematic expression of this source of moral knowledge and duties based on the natural constitution of the human creature was developed and articulated in the thirteenth century by its greatest thinker, Thomas Aquinas (*c.*1225–74; see Mahoney 1987: 77–80). Yet Aquinas accords no place in his system to the idea of rights entitling a person to make moral claims on others; and indeed it was only gradually during the medieval period that the subjective understanding of *ius*, as a right, became accepted and widespread. Finnis (1980: 206–7) infers a "watershed" in the history of the understanding of the term *ius*, pointing out that in the thirteenth century Aquinas's explicit analysis of the word contains no reference to a subjective right, whereas Suarez's seventeenth-century analysis presents subjective right as the first meaning given to the term.

Until recently the historical approach to the origin of subjective human rights has been dominated by the French historian, Michel Villey (1962), who argued for and popularized the view that the origin and systematic development of the idea of subjective human rights is to be ascribed to the radically minded English Franciscan theologian William of Ockham (*c.*1280–1349). The conclusions of Villey were followed by Tuck (1993: 11–30) and others in the field, so much so that Ockham has become widely viewed as the originator of personal rights. There is an obvious attraction in viewing the idea of subjective moral demands as a natural outcropping of the fourteenth-century worldview which stressed the unique significance of individuals as contrasted with universals, and which considered freedom the outstanding characteristic of human beings, a worldview of which Ockham was a leading and controversial exponent. However, in his detailed study of *The Idea of*

Natural Rights, Brian Tierney (1997: 3; see also pp. 27–42) dismantled this standard view promoted by Villey. Tierney recognized that Ockham was certainly "an important figure in the development of natural rights theories" (p. 8), and he acknowledged that, after Ockham, the language of rights "increasingly inhabited the realms of philosophy and theology" (p. 202). He argued, however, "that his characteristic teachings were not derived from his nominalist and voluntarist philosophy, but rather from a rationalist ethic applied to a body of juristic doctrine available to him in the canon law collections that he knew well and frequently cited" (p. 8).

To be historically accurate, and however attractive Villey's thesis is, Tierney maintains, we must recognize that as early as "the canonistic jurisprudence of the late twelfth century . . . we can find an important shift of language, a new understanding of the old term *ius naturale* [natural justice] as meaning a kind of subjective power or ability inhering in individuals" (Tierney 1997: 8). When subsequently, within the developed Franciscan tradition in the fourteenth century, Ockham came to write on subjective rights he was not, then, inaugurating what Villet claimed was a "semantic revolution" (p. 42); "he was carrying on an established tradition of juristic discourse in new and interesting ways." In point of fact, Tierney sums up, "a rich language already existed in which rights theories could be articulated. The doctrine of individual rights . . . was a characteristic product of the great age of creative jurisprudence that, in the twelfth and thirteenth centuries, established the foundations of the Western legal tradition" (p. 42; see pp. 54–69, and, on Tuck, pp. 218–20, 257).

Tierney's argument that the idea and language of subjective rights definitely precedes the age of Ockham is historically confirmed by events to which Tierney, Villet, and Tuck do not refer, which took place in Spain and in England as early as the century before Ockham. *Las Siete Partidas* was a thirteenth-century codification of civil law and custom compiled for his kingdom of Castile by Frederick the Wise. It was significant not only in its own day but also "was the fountainhead for the slave-code later to be applied to the New World" (Klein 1969: 141) in its examination of the rights of masters over their slaves, where its reference to subjective rights is clear in its treatment of a master's right (*derecho*) to the person and property of his slaves (Burns 2001: vol. 4, pt. 4, sect. 22 title; p. 981).

The same century saw occurring in England what is widely considered one of the major landmarks in the historical development of human rights, the signing of Magna Carta, or the Great Charter of liberties wrested by the barons of England from their king in the meadow of