Part I

Early Themes That Reappear in New Forms

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Plato, Augustine, Aquinas, and Others, Asking What Is Morally Right: Essays on Natural Law, Ideal Law, and Human Law

Introduction

In the history of the West debates about equality and liberty, about property and contract, about the individual and society, go back as far as the writings of Plato and Aristotle. It goes without saying that ideas about law were involved in those debates. Much of this literature concerns matters special to the period in which they were written. Nevertheless, what strikes the modern reader is the extent to which some of the ideas in the fourth century B.C. in ancient Greece have echoes in present philosophical thought.

Much of what Plato (427–327 B.C.) wrote was in dialogic form, ostensibly recording the views of his mentor, Socrates, as he posed questions to him. He sought answers about what is ideal, what is true and what is good. In *The Republic* he imagined a utopian commonwealth in which a philosopher-king of superior intellect would devote himself to discovering the ideal law, and then would impose it. The function of that law was to produce virtuous men. Plato was entirely aware of the profound distinction between the ideal and the actual world. However he thought that through reasoning he could discover the ideal, that major improvements could be made in society.

This theme continues in Aristotle (384–322 B.C.) who said, ''Our purpose is to consider what form of political community is best of all for those who are most able to realize their ideal of life.'' And he asked ''Should a well ordered state have all things, as far as may be, in common, or some only and not others?'' (Aristotle, *Politics* 1943:80).

> Political Justice means justice as between free and . . . equal persons, living a common life for the purpose of satisfying their needs . . . we do not permit a man to rule, but the law, because a man rules in his own interest, and becomes a tyrant; but the function of a ruler is to be the guardian of

> justice, and if of justice, then of equality . . . Political justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not . . . Similarly the rules of justice ordained not by nature but by man are not the same in all places, since forms of government are not the same, though in all places there is only one form of government that is natural, namely, the best form. (Nichomachean *Ethics*, quoted in Morris 1971:21, 22).

Hundreds of years later, this dichotomy between the ideal law and actual practice came to have a Christian meaning. The ideal law was the Law of God. Saint Augustine (A.D. 354–430) contrasted the ''city of God'' with the ''city of men.'' ''The city of God is that mystical society of all those who, both now and in the hereafter, have accepted orthodox Christianity . . . On earth these societies are mixed, and it is only as a symbol that the church stands for the city of God'' (Becker and Barnes 1961:243).

Saint Thomas Aquinas (A.D. 1225–1274) wrestled with the same thematic duality, but constructed more sophisticated categories in addressing it. ''His social theories can best be approached through his doctrine of four-fold law: (1) *eternal law*, God's own will and purpose for the universe; (2) *natural law*, the progressive expression of this eternal law in reason; (3) *human law*, the application of natural law to human needs and the basis of the human social order, deriving its authority through conformity with natural law; and, (4) *divine law*, supplementing human reason and human law in regard to man's eternal destiny, salvation, as revealed in the sacred Scriptures'' (Becker and Barnes, 1961:246). Harold J. Berman commented, ''Law was seen as a way of fulfilling the mission of Western Christendom to begin to achieve the kingdom of God on earth'' (Berman 1983:521).

By the time of Thomas Hobbes (1588–1679), the focus had shifted. Here the Law of Nature is, ''a Precept, or generall Rule, found out by Reason'' (Hobbes, *Leviathan* 1996:91). The condition of Man, ''is a condition of Warre of every one against every one'' and the Fundamental Law of Nature is to seek peace. The second Law is, ''that a man be willing, when others are so too . . . to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe'' (Hobbes, *Leviathan* 1996: 92).

John Locke (1632–1704) also reasoned from the state of Nature in which men have perfect freedom to pursue their own interests, to the condition of Political Society where they have conceded that liberty to a collectivity. ''Where-ever therefore any number of Men are so united into one Society, as to quit every one his Executive Power of the Law of Nature, and to resign it to the publick, there and there only is a *Political, or Civil Society*'' (Locke 1996: 325).

Rousseau's (1712–1778) version of the same problem was to emphasize the consequence for individuals of the social contract, ''by the social compact we have given the body politic existence and life: we have now by legislation to give it movement and will.'' He goes on to say, ''All justice comes from God . . . but if we knew how to receive so high an inspiration, we should need neither government nor laws. Doubtless there is a universal justice emanating from reason alone; but this justice, to be admitted among us, must be mutual. Humanly speaking, in default of natural sanctions, the laws of justice are ineffective among men . . . Conventions and laws are therefore needed to join rights and

duties and refer justice to its object . . . In the state of society all rights are fixed by law . . . Laws are, properly speaking, only the conditions of civil association'' (quoted in Morris 1971:223, 224).

A compendium of selected quotations from some legal philosophers is no substitute for reading their works, but it gives us a glimpse of the background of current human rights arguments. The men quoted here are only a few of the many who have contributed to the development of Western thought on law and society. For an anthropologist, one of the more puzzling aspects of their reasoning is that Political Society is derived from a pre-existing, rather mythical, State of Nature. But this conjectural point of departure is not just a historical oddity. An analogous, abstract, theoretical proposition also can be found in John Rawls' ''original position'' (1971:12). Rawls allies himself to this tradition of reasoning and declares that, ''In justice as in fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice'' (p. 12).

By contrast, anthropologists do not traffic in hypothetical original conditions. They do their fieldwork in existing living societies, observe local practices, and listen to explanations. The work of anthropology could not be further from this ''original position'' reasoning. Yet it is important to be aware of the resurgence of elements of this philosophical train of thought. Echoes can be heard in contemporary discussions of general legal principles, particularly those of universal application, as in discourse about human rights.

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Classic Themes in New Forms

The International Bill of Rights

Louis Henkin

Human rights is the idea of our time. It asserts that every human being, in every society, is entitled to have basic autonomy and freedoms respected and basic needs satisfied. These claims by every individual against his society are designated "rights," presumably in some moral order, perhaps under "natural law." The society has corresponding duties to give effect to these rights through domestic laws and institutions.

Today, the human rights idea is universal, accepted by virtually all states and societies regardless of historical, cultural, ideological, economic, or other differences. It is international, the subject of international diplomacy, law, and institutions. It is philosophically respectable, even to opposed philosophical persuasions.

From Louis Henkin (ed.) *The International Bill of Rights* (New York: Columbia University Press, 1981), p. 1.

Culture and Rights

Jane K. Cowan, Marie Benedicte Dembour, and Richard Wilson

RIGHTS AND CULTURE AS EMERGENT GLOBAL DISCOURSES

In the past few decades there has been a dramatic increase in negotiations between social groups of various kinds and political institutions, whether at the local, national or supra-national level, phrased in a language of 'rights'. Processes of globalization have led to rights discourses being adopted widely throughout the world, far from their original sites in the French and American revolutions. Just as importantly, they have framed new domains of political struggle, such as reproductive rights, animal rights and ecological rights. Constituting one historically specific way of conceptualizing the relations of entitlement and obligation, the model of rights is today hegemonic, and imbued with an emancipatory aura. Yet this model has had complex and contradictory implications for individuals and groups whose claims must be articulated within its terms.

However, despite the global spread of rights-based political values, the specificities of any particular struggle cannot be grasped empirically through a methodological focus on the local community alone. For in the process of seeking access to social goods (ranging from land, work and education to

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freedom of belief and recognition of a distinctive group identity) through a language of rights, claimants are increasingly becoming involved in legal and political processes that transcend nation-state boundaries. Our desire to explore the tensions between local and global formulations of rights leads us to consider in more detail the interplay between the languages and institutions at a multiple of levels, from the local through to the transnational.

A striking feature within the contemporary efflorescence of rights discourse is the increasing deployment of a rhetoric of 'culture'. We are particularly concerned with the implications of introducing 'culture' into rights talk. Although 'rights' and 'culture' have emerged as key-words of the late twentieth century, their relationship to each other, both historically and in the present, has been conceived in quite variable ways. Nancy Fraser (1997: 2) has identified the 'shift in the grammar of political claims-making' from claims of social equality to claims of group difference to be a defining feature of 'a post-socialist condition'. Yet this condition clearly draws on forms of activism and critique developed within civil society in the past four decades, particularly in North America and Europe.

CONCLUSION: TOWARDS BETTER THEORY AND PRACTICE

The cases in which rights and culture are mutually implicated have proliferated, emerging in the context of diverse local and national regimes and stymying the international community's efforts to deal with them coherently at the level of principle. It is therefore unlikely that any single model of the relationship between culture and rights, or between minority and majority rights, is going to be adequate for all cases, either normatively or analytically. Clearly, all of us, but especially those involved in advocating or adjudicating rights such as theorists, NGOs and legal and political institutions, need to become more sceptical about claims to culture, and to examine more closely the power relations and divisions they sometimes mask. At the same time, we need to be more cognizant of the role played by the law in essentializing categories and fixing identities, as a concomitant of its task of developing general principles to include, ideally, all possible cases. But the search for a single theory that would provide definitive guidance in all cases is quixotic, not only because of the existence of irreducible difference and contingency across contexts and situations, but also because it misconstrues what actually happens when universal principles are applied in the real world.

Finally, case studies such as those presented and analyzed here by anthropologists and sociologists enable a stronger grounding of the conversation between theory and practice. This is unquestionably a concern for theorists and activists alike. Claims around culture and rights show no sign of abating. To numberless activists and their communities, they provide a powerful, universally recognized language into which to translate – and validate – local struggles. There is a pressing need to develop approaches to such claims which are principled and theoretically informed, yet also sensitive to the contingencies and ambiguities that the world never ceases to offer up.