From Whence Come Rights?

By Dr. Kathy McReynolds

Introduction

The Universal Declaration of Human Rights of 1948 was a groundbreaking document which was developed and disseminated in the wake of the unspeakable human tragedies of World War II. The Preamble opens with the following statement, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[1] Article One affirms that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

The Declaration is still considered a relevant work for many important reasons, not the least of which is the enormous influence it has had on other documents such as the Convention on the Rights of Persons with Disabilities. The Convention mentions the Declaration in its Preamble and its impact is seen in Article One in the following words, "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[2]

December 3 was declared the International Day of Persons with Disabilities and the theme in 2007 was "Decent Work for Persons with Disabilities." The International Labor Organization issued a report which stressed the need to include people with disabilities in employment, rural development and poverty to meet the Millennium Development Goals. The Report also noted the significant growth in anti-discrimination legislation in many countries and also points to the willingness of many nations to recognize and uphold the International Convention on the Rights of Persons with Disabilities. In fact, the UN High Commissioner for Human Rights, Louise Arbour, vowed her commitment to increase the employment of persons with disabilities in her office.

Since we live in a time when the personhood and worth of many human beings are consistently called into question, few would deny the need for nations to come together and agree to protect human rights, especially the rights of those with disabilities. But, both of these documents and the International Day of Persons with Disabilities, which upholds the validity of these documents, leave unanswered a vital question: *Where do human rights come from?* The unquestioned assumption seems to be that rights come from individual governments. If this is what the writers of these documents tacitly assume, there is great cause for concern over whether these rights will continue to be protected.

After all, the same governments which advocate on behalf of protection for all can just as well reject it at a future date. If human rights are the product of mere convention or positive law, then, if recent history is any indication, there is every reason to believe that they may be jeopardized someday. What is needed to ensure the rights of all is the universal recognition of *natural* rights. Natural rights transcend

individual governments and are derived from the Creator Himself. *If there is no natural right, then what is right is established by legislators*. What this means is that there is ultimately no moral basis for government decisions.

What is at stake if we do not recognize natural rights? Consider, for example, the fact that the personhood of some human beings is consistently being called into question by ethicists who are supposed to support the protection of basic rights. If a human being can be declared a non-person based on diminished abilities, what rights can he or she possibly have? The prevailing view which seems to be reflected not only in these documents, but also in many circles in society, is that human rights are established by the courts and the legislators. *In other words, there is no such thing as natural rights, but only human rights*. And, human rights are the product of human thought alone. Not many ponder the significance of this paradigm shift; but one thing is for sure, it is not just a matter of semantics. Natural rights and human rights cannot be used interchangeably.

Those who know anything about the terms know at least this much and they are also aware that these terms carry with them a different understanding of the *source* of rights. Natural rights are derived from natural law which in turn recognizes that human beings can know something about the transcendent. Human rights, on the other hand, presuppose that human beings are unable to grasp the eternal. This is the prevailing view and one that believers must challenge. We must be educated on the differences between natural rights and human rights because the implications of the latter are enormous. The following discussion is an attempt to do just that. From a Christian viewpoint, there is good reason to believe that God is the source of all rights and we can *know* this to be true.

Natural Law and Natural Right Until the Nineteenth Century

The function of natural law is to connect the principles of reality to the principles of action—to connect knowledge with morality—so that human beings might act in accordance with ultimate reality. In other words, natural law presupposes the reality of moral knowledge. Natural law points to the coherence of reality, to an absolute, unchanging basis for ethics, and to a vital link between the "is and the ought."[3] Natural law is prima facie knowable to all human beings and binding on all human beings. By definition, nature is accessible to all human beings; however, as C.S. Lewis points out, the natural is derived from and has its ultimate source in the supernatural. The moral law necessitates a Moral Law Giver. Natural law is unique for three reasons: 1) its longevity; 2) its continuity; 3) its sustainability.[4] Few doctrines have been discussed or debated in the history of Western thought more than natural law. This long history indicates not only its enormous influence, but also its ability to transcend time and culture and remain relevant.

Aristotle (384–322 BC), for example, taught that natural law was universally valid for all people in every generation and that it was not the same as positive law. It did not depend, in other words, on what people thought about it. It was understood by everyone by nature. But many argue that Aristotle's definition of natural law included support for the "unnatural" suppression of women and slaves. The Stoics took a more egalitarian position and believed that natural law could be grasped by the logos (reason) which was latent in the human mind. The Romans had a view of natural law, but they rarely appealed to it on a practical level. The Apostle Paul, on the other hand, took the notion seriously and spoke about a law "written on the hearts" of all Gentiles (Romans 2:14–15).

Augustine (354–430) believed that Adam and Eve lived freely under natural law, but their fall led to subsequent bondage under the law of sin; hence that initial gift of freedom was lost. Positive law then became necessary in order to restrain sin. In the Summa Theologica, Thomas Aquinas (1225–1274) developed one of the most comprehensive and influential views of natural law and its relationship to eternal law. Under the general idea of law, Aquinas distinguished 1) eternal law, which embraces all God's creatures, rational and irrational; 2) natural law, being that part of the eternal law that relates to rational creatures

as such; 3) human law, which properly consists of natural law particularized and adapted to the varying circumstances of actual communities; 4) divine law specially revealed to man.

With regard to natural law, Aquinas taught that God had firmly implanted in the human mind knowledge of its immutable general principles; and not only knowledge, but a disposition as well. He uses the term *syndersis* to describe this dual purpose of natural law. All natural acts of virtue are implicitly included within the scope of this law of nature; however, in the application of its principles to the particular circumstances, a person's judgment is liable to err; the light of nature being obscured by sin. Other Medieval theologians such as Scotus (1266–1308) and Ockham (1285–1347) emphasized divine will rather than human reason as a source of natural law. This view held sway through the Counter-Reformation period (16th–17th century); but Pope Leo XIII (1810–1903) used as the ground of his social teachings the Thomistic view which carried through to his successors. While the Catholic Church renewed her commitment to natural law and natural right, thoughtful men outside of the church were challenging the way in which "nature" should be viewed altogether. They were calling for no less than a revolution in the state of nature—one that would free all men from abusive authorities. For instance, Grotius (1583–1645) argued that nations must recognize the validity of natural law; but he also asserted that natural law was legitimate "even if we were to suppose . . . that God does not exist or is not concerned with human affairs."[5] For Grotius, natural law is the dictate of right reason apart from any knowledge of God, indicating that an act, from its agreement or disagreement with man's rational and social nature, is morally disgraceful or morally necessary.

According to Grotius and other writers of the age, natural law is a part of divine law that follows necessarily from the essential nature of man, who is distinguished from animals by his peculiar appetite for tranquil association with his fellows, and his tendency to act on general principles. There had to be established a conception of a state of nature, social in a sense, but not yet political, in which individuals or single families live side by side. This conception Grotius took, and gave it additional force by using the principles of this natural law—so far as they seemed applicable for the determination of international rights and duties.

Thomas Hobbes (1588–1679) further revolutionized the definition of natural law by beginning not with the biblical state of innocence, but rather with the unruly state of nature. Hobbes' understanding of nature involved four points: 1) the *hypothetical* state of nature in which men are brutish and unsocial; 2) the right of nature in which men have the liberty to protect and preserve themselves; 3) the law of nature in which men ought not to jeopardize their own wellbeing; 4) the social contract in which men consent to give up the right to protect themselves and willingly submit that right to rulers and authorities who will allow men to live as painlessly as possible. For Hobbes, good and evil are purely subjective: good brings pleasure, evil brings pain. So rulers should ensure that individuals be allowed to pursue their pleasures as long as they do not harm another. Hobbes' main concern was not truth, but conflict resolution. Thus, Grotius and Hobbes redefined natural law along Enlightenment themes and ushered in the beginning of an era of conventionalism.

John Locke (1632–1704) agreed with Hobbes' psychological and ethical egoism, but dismissed his dim view of the state of nature. Locke argued that men in the state of nature were free and equal and already obeying natural law. While Locke's state of nature was more idyllic than Hobbes, his justification for his position was similar to Hobbes' in that he grounded his view in human reason rather than divine revelation. Rousseau's (1712–78) view on natural law represents one of the first major shifts in the understanding of its role and function. Rousseau imagined a savage, virtuous and passionate longing to return to the state of nature, but not by any promptings from rational faculties. Prior to any use of reason, the savage is moved by self-preservation and compassion for others. Reason, which was crucial for Hobbes' and Locke's understanding of natural law and the social contract, was virtually ignored in Rousseau's framework. These conflicting views of the state of nature in the 17th and 18th centuries set the stage for a crisis in the 19th century.

Kant and the Crisis of Natural Law

It would be difficult to overstate the impact Kant (1724–1804) has had on natural law. He completely undermined the belief that nature could be a legitimate source for morality. After creating an epistemological split between nature and morality, he spent the latter part of his career trying to rectify the enormous problems his views created, but without much success. The horrors of the Holocaust and World War II provoked a renewed interest in natural law; there was initially a widespread realization that human rights could be threatened if viewed as a product of convention. But natural law never fully recovered from Kant's relentless attacks on it. Skepticism about grounding morality in nature has persisted to the point that most contemporary philosophers and theologians speak not about *natural* rights, but *human* rights. Few rarely think about the implications of this shift. However, ideas have consequences, and Kant realized that something had to be done to recover the validity of the relationship between nature and morality. His motivation may have been simply to save his reputation as a philosopher. The concern here is much more practical—to save lives.

In his classic essay on Kant and the crisis of natural law, Leonard Krieger describes exactly what Kant did to natural law:

> Kant's notorious so-called dualism was a classic statement invalidating, among other things, the traditional function of the natural law. This is hardly surprising, since his inspirations were Hume for his theory of knowledge and Rousseau for his ethics—the Hume who had denied the descriptive validity of law in nature and the Rousseau who had rejected the prescriptive validity of any intellectually known law for human action. Kant combined these insights into a radical and systematic dialectic opposing knowledge to action and nature to morality, and undermining thereby the very foundations of the natural law as it had been previously conceived. These foundations, common to the classical and modern schools of natural law . . . had included, as their essential feature, a general level of reality, conceivable by reason from the total nature of all things or, alternatively, of all men, which was the absolute sanction for general ethical and legal precepts.[6]

Kant completely separated the truths of nature from the truths of morality, claiming the former as knowledge and the latter as unknowable. The former is derived from the faculty of understanding and the latter from the faculty of reason. Kant thus proposed his famous distinction between things as they appear to be and things in themselves. The objects of knowledge are things as they appear to be—things we can sense (phenomena). The objects which are unknowable are things in themselves—things which are not open to sense: God, moral truths, self.

The realm of nature made up of phenomena or appearances are related to human beings through knowledge and are characterized by the principle of necessity while the realm of morality made up of noumena are related to human beings through action and are characterized by the principle of freedom.[7] Laws of nature belong to the realm of nature and are produced by human understanding which operates upon natural objects through the category of causality. These laws endow nature with necessity and make it "knowable" in a way that morality does not. Kant explains these distinctions in *Critique of Pure Reason* and the *Metaphysics of Morals*:

> Consequently, all events are empirically determined in an order of nature. Only in virtue of this law can appearances constitute a nature and become objects of experience. This law is a law of the understanding from which no departure can be permitted, and from which no appearance may be exempted . . . The understanding can know in nature only what is, what has been, or what will be. We cannot say that anything in nature ought to be other than what in all these time-relations it actually is. When we have the course of nature alone in view, ought has no meaning whatsoever.[8]

It is important to keep in mind that Kant held that not only does the world act upon the mind through the senses, but the mind in virtue of various concepts inherent in it is also active. The mind structures sense data and then makes a judgment about what is perceived. In light of this structure, Kant proposed his famous distinction between things as they appear to be and things in themselves. He argued that things actually do exist outside of the mind, but no one can experience them as they are in themselves. Hence, Kant says that the moral realm does indeed have laws, but they are distinct from the laws of nature. In his own words, he says the following:

> Everyone must admit that a law, if it is to hold morally, as a ground of obligation . . . must not be sought in the nature of man or in the circumstances in which he is placed, but sought a priori in the concepts of pure reason, and that every other precept which is in certain respects universal, so far as it leans in the least on empirical grounds . . . may be called a practical rule but never a moral law . . . Applied to man, all moral philosophy borrows nothing from knowledge of him, but gives him, as a rational being, a priori laws.[9]

The gist of what Kant is saying is that human beings can only know through the faculty of understanding the outside appearances of things and their relation to other things. The only inner reality we can know is that which we produce ourselves through our own actions. "The laws which govern our knowledge of externals are natural laws, the laws that govern our creation of internals are moral laws."[10] To be fair to Kant, what he was attempting to do in creating this distinction between phenomena and noumena is to rescue human freedom and autonomy from secularized science. Yet he realized that this distinction could not be logically sustained—that it was in fact an "unnatural" distinction. The human mind *naturally* desires and searches for unity. So he sought to unify nature and morality once again by attempting to show that morality actually supersedes nature by providing a ground for it—that morality was the "final cause" of nature. It is a relationship between the process of creating reality and the reality that has been created. Kant then had to show how the moral law could affect the natural world. In order to do this, he modified nature by adding a "supersensuous" dimension. He explains how this works in the following passage:

> The moral law gives to the sensible world, as sensuous nature, . . . the form of an intelligible world, i.e., the form of supersensuous nature, without interfering with the mechanism of the former. Nature, in the widest sense of the word, is the existence of things under laws. The sensuous nature of rational beings in general is their existence under empirically conditioned laws; therefore, it is, from the point of view of reason, heteronomy. The supersensuous nature of the same beings, on the other hand, is their existence according to laws which are independent of all empirical conditions and which therefore belong to the autonomy of pure reason. And since the laws, according to which the existence of things depends on cognition, are practical, supersensuous nature is nothing else than nature under the autonomy of pure practical reason. The law of this autonomy is the moral law, and it, therefore, is the fundamental law of supersensuous nature and of a pure world of the understanding, whose counterpart must exist in the world of sense without interfering with the laws of the latter.[11]

It may seem from this passage that Kant was restoring the notion of natural law in the traditional sense. But this is not the case. Supersensuous nature is only a possibility in Kant's view. Possibilities have no reality in existence, but they can become a reality from a moral viewpoint. The moral law which is apprehended by human reason creates existence; therefore, possibilities are real guidelines of what can come into existence, but yet do not exist. Kant demonstrated how this can take place by "creating" his *categorical imperative*: "Act only according to that maxim by which you can at the same time will that it should become a universal law . . . Act as though the maxim of your action were by your will to become a

universal law of nature."[12] In a sense, the categorical imperative replaces natural law in the modern era. What has changed dramatically is that rather than the *source* for moral rights, natural law becomes the means to the end of moral rights. What remains the same is that, like natural law, the categorical imperative is viewed by Kant as universal and necessary.

While on the surface the categorical imperative might appear to be a sufficient replacement for natural law, Kant encountered a major conceptual problem: the problem of evil. History is littered with human conflict, cruelty and suffering. It reveals the constant battle between the individual and the community, between reason and instinct, between morality and nature as it were. The consistent theme running through history is conflict resolution by which nature is tamed by morality in the process of historical time. Nature, then, became for Kant a mere *idea*, a product of human history. Krieger observes what happened to natural rights in this framework:

> History was not, as Kant literally portrayed it, a product of nature, but the *idea* of nature was rather a product of history. Thus the natural rights of humanity which he upheld were rooted not in any stable realities or values of human nature but in its historical destiny—that is, the progress in general enlightenment, its progress toward improvement. Correspondingly, the worst of all offenses against natural rights were offenses against posterity.[13]

Kant's notion of history replaces nature and thus subordinates natural law and natural rights to the political realm. This leads us back to where we began: *there is no such thing as natural rights, only human rights*. Kant's legacy is *historicism*, the idea that all human thought is bound by history and that history—that is, political enlightenment—will progress to morality. The theory depends wholly upon man's rational freedom and his ability to create moral laws. This was Kant's way to assure that man would not become just another natural object subject to the scrutiny of secularized science. Thus, for Kant, God became a postulate (a possibility) of practical reason, or else there could be no way to ground morality. But Kant's successors took historicism to its "logical" conclusion and undermined completely any knowledge outside of time.

Natural Right After Kant

Kant held that the knowledge of the eternal was at least possible; but by early twentieth century, this idea was rejected. In his thought-provoking Walgreen lectures, Leo Strauss traces the history of natural right and pinpoints the rejection of the eternal with the emergence of the historical school. According to Strauss, the historical school emerged as a reaction to the French Revolution and to the natural right doctrines that paved its way. The founders of the historical school surmised that universal principles are by their very nature revolutionary. Universal principles force individuals to judge a political regime in light of a transcendental rational order; what is invariably found is that the regime falls far short of the timeless norm.

Recognition of universal principles causes men to resist oppressive social orders; it forces them to see themselves as pilgrims—as belonging to another world. By denying the existence of universals, the conservatives of the historical school strengthened the resolve of the revolutionists. The problem was that the revolutionists had a specific notion of the natural in mind, one that was directed against both the conventional and the transcendent. Their experiences in France lead the revolutionists to assume that the natural was *individual* and that *uniformity* was unnatural.

In other words, the individual was to be liberated in order to pursue his or her own version of happiness. This ultimately meant that one universal and uniform goal was to be instituted for all people: *the natural right of each individual was something that universally belonged to every individual as an individual*. The revolutionists had already said that uniformity was unnatural; but it was also impossible to individualize rights to encompass the diversity of all individuals. So a compromise of sorts was reached. The only

kinds of rights compatible with social life, and yet not uniform were *historical* rights; that is, the rights of individual groups: *rights of African Americans, rights of Jews, rights of women, rights of gays and lesbians, rights of the disabled*.

Localized rights were a middle ground between radical individualism and unnatural uniformity.[14] But did the revolutionists discover something that is true or did they merely create a way of peace? It is clearly the latter; for the historical school did not "discover" this local approach to justice. One cannot discover what is in plain sight. The charm of the inwardness of local groups overwhelmed the revolutionists to the point of declaring its superiority to the universal.

The historical school assumed the existence of folk minds; it assumed that ethnic groups were natural communities; it assumed the existence of laws that governed historical evolution. It also assumed that the empirical was the only valid source of knowledge. Strauss makes the following stunning observation:

> Historicism now appeared as a particular form of positivism, that is of the school which held that theology and metaphysics had been superseded once and for all by positive science or which identified genuine knowledge of reality with the knowledge supplied by the empirical sciences . . . Thus history was thought to supply the only empirical, and hence the only solid, knowledge of what is truly human, of man as man: of his greatness and misery. Since all human pursuits start from and return to man, the empirical study of humanity could seem to be justified in claiming a higher dignity than all other studies of reality. History—history divorced from all dubious or metaphysical assumptions—became the highest authority.[15]

The very situation Kant sought to avoid with his renowned distinction between noumena and phenomena—the subjugation of man to secularized science—came to pass anyway. History was subsumed under science, and consequently, so was all of humanity. The empirical study of humanity supposedly confirms the validity of the local over the universal, the validity of human or group rights over natural, transcendent rights. The historicist asserts that his position is supported by an abundance of historical evidence.

To the contrary, however, what history actually shows is that men do indeed abandon certain views in favor of others; but it does not show us whether or not those views deserved to be abandoned. The only legitimate way to measure the validity of any view is to hold it up to an objective standard. We must be able to step out of our own time, and indeed transcend time in order to make that kind of judgment. Kant knew this, and so did most of the great thinkers of the past. Truth be told, the historicist also knows this. The history of ideas is a history of dismal attempts by man to pervert and distort the truth to suit his own ends; however, the Truth itself always manages to prevail.

The Truth About Historicism and the Origin of Human Rights

Historicism holds that all human thoughts are historical and destined to perish; this includes all thoughts and beliefs concerning human rights. Human rights are established by governments situated in specific times and places. It is good to encourage all legislators to embrace the notion of human rights; but there is ultimately no higher authority to which they are bound to obey in this regard. Even if there was such an authority, we could not know it anyway. This is the logical conclusion of historicism. But is historicism true? If it is put to the test, it shows itself to be self-defeating. If all human thought is historical, and historicism itself is a product of human thought, then it is only temporary and cannot be true. As Strauss points out, "historicism thrives on the fact that it inconsistently exempts itself from its own verdict about all human thought. The historicist thesis is self-contradictory or absurd. We cannot see the historical character of all thought—that is, of all thought with the exception of the historicist insight and its implications—without transcending history, without grasping something trans-historical."[16]

Is there any evidence that human thought can transcend time? In other words, is there moral knowledge from which are derived natural law and natural right and can we know it? C.S. Lewis adamantly insists that such knowledge is real and available to us, though obliquely because of sin. Drawing on the wisdom of the whole counsel of Scripture, Lewis formulated his moral argument for the existence of God, the Moral Law Giver. It can be summarized as follows: 1) People make comments that presuppose some moral law: it's good to keep promises; it's wrong to be cruel to the innocent; 2) This notion of right and wrong seems to be universal, though practices may vary from culture to culture.

Several objections have been raised against these ideas. First, many have argued that the moral law is simply a herd instinct. It is merely human instinct to help a drowning person because we also would want to be helped. Lewis agrees that we have various instincts, but none of them tell us whether we should follow them. Therefore, the moral law must be different from instinct. Second, some have insisted that the moral law is nothing more than mere convention taught by parents and society. But Lewis points out that the moral law must be more than mere convention and this is evidenced by the fact that there is great similarity in moral codes from one culture to another. This is why it makes sense to talk about some moral codes being better than others.

Lewis is also quick to affirm that the moral law is not the same as the laws of nature. The laws of nature merely describe the regularities of nature. The moral law does more than this. It tells us how to behave. It commands us to do right, and causes guilt when we do wrong. Thus, Lewis moves from the universal moral law to the Divine Law Giver as the eternal source of ethics and human rights.

In light of these truths, and in order to ensure the rights of all, especially those with disabilities, a universal declaration of rights ought to boldly and with confidence proclaim the transcendent and eternal nature of these rights. They are a gift from the moral Law Giver. Such a declaration would openly reject the fact/value dichotomy forced upon us first by Kant and later by historicism. The only way to truly ensure the rights of all is to embrace the truth about the origin of rights.

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Notes

1. Universal Declaration of Human Rights, http://www.un.org/Overview/rights.html.
2. www.un.org/disabilities/convention/conventionfull.shtml.
3. See Leonard Krieger, "Kant and the Crisis of Natural Law," *Journal of the History of Ideas*, Vol. 26, No. 2. (April–June, 1965), pp. 191–210.
4. Ibid.
5. http://www.britannica.com/eb/article-9055045. Some ideas in this historical section were gleaned from this article entitled, "Natural Law."
6. Leonard Krieger, "Kant and the Crisis of Natural Law," *Journal of the History of Ideas*, Vol. 26, No. 2. (April–June, 1965), 195.
7. Ibid., 196.
8. Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith: London, 1933), 140, 172, 661–662.
9. Immanuel Kant, *Foundations of the Metaphysics of Morals, Critique of Pure Reason and Other Writings in Moral Philosophy* (Lewis White Beck: Chicago, 1949), 52.
10. Krieger, 197.
11. Kant, *Critique of Pure Reason*, 153–154.
12. Ibid., 80.
13. Krieger, 204.
14. I am indebted to Leo Strauss for these insights on the emergence of the historical school. See Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1950), 9–15.
15. Ibid., 16–17.
16. Ibid., 25.

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