PART ONE

The First Expansionary Era

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The Prehistory of Rights

Rights are universal, many people say. Everybody possesses certain fundamental rights simply by virtue of being human. But there are also many people who say that rights are a modern, Western invention. Rights are something made up, "constructed," by a certain historical culture – call it the modern, bourgeois West – that seeks, for its own purposes, to export its notions and even to impose them upon other cultures regardless of their traditional ways. And some people seem to want to say both that rights are something that modern Western culture made up and that rights belong to everybody simply by virtue of being human – ignoring the apparent inconsistency.

One way of trying to reconcile these conflicting opinions about the nature of rights is to trace the history of rights discourse, and see whether rights or something equivalent to rights are recognized in all human cultures at all times. If they are, then that would settle the question: rights, whatever else they are, are not simply a modern Western invention. If, on the other hand, rights are not universally recognized across cultures, then the discovery may make us uneasy, for we will then have to face the following dilemma: Should we say that the particular moral cultures that do not, or did not, recognize rights are to that extent morally defective cultures, or should we say instead that the fact that a given culture rejects or ignores the idea of rights does not entitle us to draw any conclusions about its moral worth? (I ignore for now a third possibility, of viewing talk of rights as a decadent and defective mode of moral discourse – what could be called the *narcissism worry*.)

The dilemma has practical implications. If we are persuaded that rights are not recognized in all cultures, the question then arises: What posture should we adopt toward the cultures that do not recognize them? If the culture in question is a historical one – ancient Greece, say – the issue is whether we are to admire the ancient Greeks and even to emulate their culture, or whether to regard them as morally primitive, even blamable. If the culture in question is, on the other hand, a contemporary one – say, China or Iran – the issue is whether or not to regard that culture as

a candidate for reform, censure, and sanctions by means of diplomatic, economic, or even military pressure. For it would be remarkable if a culture that did not recognize the existence of rights should nonetheless be able to treat its members decently. Or is it possible that a culture might treat its members decently without, by that very fact, exhibiting a recognition of rights held by its members?

Finding that a culture recognizes the existence of rights will not, of itself, satisfy all of our possible concerns about that culture's treatment of its members, for it is still possible that the kind of rights it recognizes, and its distribution of rights, may be defective. For example, one culture might tolerate religious nonobservance but not open dissent, or another culture might allow certain rights to all but a despised minority of outcastes. But we can appreciate that moral reform has a much surer opportunity within a culture that recognizes that some of its members, at least, have some rights, than it has within a culture to which the very idea of rights is alien.

Are rights a modern invention? Alasdair MacIntyre makes this observation about "natural" or *human* rights:

> It would of course be a little odd that there should be such rights attaching to human beings simply *qua* human beings in light of the fact … that there is no expression in any ancient or medieval language correctly translated by our expression "a right" until near the close of the middle ages: the concept lacks any means of expression in Hebrew, Greek, Latin, or Arabic, classical or medieval, before about 1400, let alone in Old English, or in Japanese even as late as the mid-nineteenth century. (67)

MacIntyre's account would explain why historians of ideas disagree about which mediaeval thinker, writing in Latin, should be credited with having introduced our modern concept of rights: some say William of Ockham, some say Duns Scotus, others say Jean Gerson. The mediaeval thinkers had to express themselves in a classical language, Latin, in order to convey an idea for which language had no expression. So it is only to be expected that there should be disagreement, since none of the candidates clearly announced: "I am introducing a concept without precedent in this language."

Other writers have made similar observations about the concept of rights. Benjamin Constant, writing in the aftermath of the French Revolution, thought rights, as we "moderns" think of them, were unknown to classical antiquity. Sir Henry Sumner Maine, the preeminent Victorian-era legal historian, wrote that the foundation of Roman law was not individual rights but, rather, relationships defined by social status. And the twentieth-century classical scholar Kenneth Dover has written:

> The Greek [of classical antiquity] did not regard himself as having more rights at any given time than the laws of the city into which he was born gave him at that time; these rights could be reduced, for the community was sovereign, and

> no rights were inalienable. The idea that parents have a *right* to educate … their children … or that the individual has a *right* to take drugs … or a *right* to take up the time of doctors and nurses in consequence of not wearing a safety-belt, would have seemed to a Greek too laughable to be discussed. (157–58)

But here we should pause and consider carefully what to make of these claims. Assuming for the moment that we have before us a correct account of the linguistic resources and commonsense beliefs of, say, classical Greece, what conclusions would this warrant with respect to the nature and existence of rights?

The presence or absence of a word or concise phrase or locution in another language, with which to translate a word we use, is hardly conclusive as to the *availability* of an idea to speakers of another language. The Greeks had no word for *quarks*, but the idea of what a quark is could surely have been conveyed to them as a kind of constituent of certain subatomic particles – after all, we have borrowed the Greek terms *atomos*, *electron*, *proton*, and so on in order to describe these very things. So, if the argument is that the concept of rights cannot be attributed to a linguistic culture lacking a precisely equivalent term, the argument is not a very good one.

But perhaps the argument is more subtle. MacIntyre admits that his linguistic observations do not show that there are no human rights: "It only follows that no one could have known that there were" (67). What might this tell us? It might tell us something very important if the existence of rights is somehow dependent upon their being known. Certainly some kinds of entity are dependent upon being known. *Headaches*, for example, have no existence whatever apart from being felt and known as such. We could imagine an isolated tribe of people who had the good fortune of never suffering headaches. Naturally, their language would lack an expression for headache. Would we then conclude that the concept of headache was simply inapplicable within this culture? We might hesitate before drawing this conclusion, because there are two possible ways of introducing the concept to this tribe.

One way would be by analogy. If the tribe knew what *aches* were – maybe from the occurrence of stomachaches among them – and it knew what heads were, we could explain headache as a stomachache of the head. Another way would be simply to introduce the concept by banging tribespeople "upside" their heads, thereby acquainting them with the thing itself. Similarly, the concept of rights could be introduced either by analogy or by the institution of rights among the members of a culture unfamiliar with them. But both methods require some further examination.

Introducing the concept of rights by analogy would first require our getting clear about what rights are and what they are analogous to. And here comes a worry: If rights are not closely analogous to anything else, any analogy will fail; but if rights are too closely analogous to something else, then rights would seem to reduce to that something else. If, to suggest one example, rights are like *privately enforceable legal*

duties not to harm, and another culture is familiar with *privately enforceable legal duties not to harm*, but not with rights, the worry might arise as to whether we would be better off abandoning our talk of rights except insofar as it was a shorthand for *privately enforceable legal duties not to harm*. Rather than introduce our concept to another culture, perhaps we should eliminate it from ours. Call this worry the *reductive worry*.

The other way of introducing the concept – by instituting it within the other culture – creates a separate but equally serious worry. Just as it would be objectionable to teach someone what a headache was by hitting him on the head, it may seem objectionable to teach another culture what human rights are by forcing it to respect them. This kind of imposition may seem especially objectionable in the case of rights, which exemplify a moral concept. It may seem to be hypocritical to try to force a moral concept upon another culture. Call this the *imperialism worry*.

Having looked ahead at the dilemma we will face should it turn out that rights are not found among the conceptual resources of all people at all times, we should pursue a bit further the question, Are rights universal? That is, can we interpret every culture as having a grasp of at least the rudiments of the idea of rights? Or are we forced to embrace some kind of relativism about rights, a relativism that goes deeper than the unexciting truism that what rights a person has depends in some measure on what her circumstances are? It will help us to focus this question if we look at two particular points of dispute, the first having to do with mediaeval Europe, the second with India.

Mediaeval Europe and the Possibility of Poverty

The first of these disputes involved the Franciscan monastic order. St. Francis lived a life of poverty, and his example galvanized the order that bears his name. Worldliness (that is, attachment to this world and a coordinate neglect of the world to come after death) was a vice for the Franciscans, and poverty a sign that one was free of it. But how is perfect poverty possible? Surely even St. Francis had to eat, and in so doing did he not exercise dominion over what he ate? This fact posed a disturbing problem for the Franciscans, for it seemed that even St. Francis had to have been a proprietor, even if only on a small scale, and that "apostolic" poverty (the austere practice the Franciscans attributed to the apostles) was not a pure state isolated from worldly concerns at all. The solution for the Franciscans was put forth by Duns Scotus, a member of the order. Scotus emphasized the distinction between *dominium* or dominion (what we can simply call property rights), on the one hand, and use or mere possession of a thing ("imperium"), on the other. Although in order to live it is necessary to use things, it is not necessary to own them or to exclude others from using them. Property is not natural, and the world belongs in common

to humanity, at least before civil society arises and draws most of us into the network of artificial relationships that constitute property holding. Apostolic poverty is possible, after all, and the Franciscan view was for a time the official view of the Roman Catholic Church.

The Franciscan view was in an important sense consistent with the theory of the ancient Roman jurists, who were of the opinion that property was not something that occurred in nature, but only came into existence with human institutions that define and enforce it. The Romans (Cicero aside) did not typically conceive of rights as preexisting or possibly opposing and limiting the enacted or "positive" law (and they notoriously did not harbor our worries about imperialism). Christians, on the other hand, took very seriously the idea that God administers a moral kingdom that stands apart from and above any merely temporal institution or convention, and that the "natural" design God made for the world is what ought to be consulted for guiding our lives.

But apostolic poverty was not a doctrine that appealed to all within the Church. It had the inconvenient implication that we all ought to follow St. Francis's example, and live in a condition of humble communism. Thomas Aquinas, a member of the rival Dominican order, had already seen the matter as at least ambiguous: Although material things are subject, in a sense, only to God's moral powers, they are, in another sense, subject to at least de facto human power whenever they are used or consumed. The dispute was finally settled in the year 1329, when Pope John XXII issued a papal bull flatly declaring that human dominion over material things is, though in miniature, precisely like God's dominion over the universe. The Church's official position, reversing a half-century of Franciscan-inspired precedent, became this: Property is natural and inescapable, apostolic poverty is impossible and, moreover, primitive communism is impossible – God has made us as individual shareholders, however small, *ab origine* – that is, from the very first. Even in the Garden of Eden, Adam was already exercising moral as well as physical power over the fruits he gathered – at least over those that were not forbidden to him.

Although that battle was now over, a number of conceptual issues crystalized in the Franciscan William of Ockham's rebuttal to John XXII (if not earlier – who is to be credited with these refinements, and when, is a matter of controversy into which we need not enter). One crucially important distinction was by this time generally appreciated – that between what has been called *objective right* and *subjective right*. The objective sense of "right" is that which is expressed by the formula "It is right that p" – where p stands for a proposition describing an actual or possible fact, as in "It is right that promises are kept," or "It is right that there be a Palestinian state," or "It is right that Palmer inherit Blackacre." The job done by any expression of the form "It is right that p" could equally well be done by the expressions "It ought to be the case that p" or "It is just that p" or perhaps "It is fitting that p." The formula "It is

right that *p*" expresses what logicians would call a *sentential operator*: it operates on a sentence expressing proposition *p* to yield another sentence, and in this case the truth of the resulting sentence, "It is right that *p*" happens not to be a function of the truth *of p*. In other words, depending upon what proposition *p* we pick, *p* may be false while "It is right that *p*" is true, and vice versa. For example, it is false that children are never abused, but it is nonetheless true (if awkward) to say that it is right that children are never abused.

Subjective right is different in that it expresses a relationship between *a person* and something else. The canonical form is "X has a right to a thing or to do something" – where X stands for an individual person, or perhaps a group of individuals. The crucial difference is that the concept of objective right is a global moral evaluation of a state of affairs, while the concept of subjective right is a moral *relationship* between a person (typically) and a thing or action or state of affairs. One question that rights theory must decide is whether moral reality is fully describable in terms of objective right: that is, by filling out the formula "It is right that the world be as follows . . .," followed by a description. The Decalogue can be understood as an example of a moral code stated solely in terms of objective right – these are the Ten Commandments: "Thou shalt not do this and thou shalt do that, and so on," or (translating), "It is right that this be done and it is right that that not be done, and so on."

Subjective right adds something that objective right might very well do without: subjective right refers to individuals and defines moral facts that essentially involve them. Suppose I take St. Francis's sandals without his permission. "Thou shalt not steal" – I have violated objective right, I have transgressed God's commandment. But where does St. Francis come into the picture? We want to add, "St. Francis has a right to his sandals." It isn't enough to say "It is right that St. Francis has his sandals back," because that way of putting it leaves St. Francis on the sidelines, so to speak. There is more to the situation, somehow, than the fact that St. Francis needs sandals and I have an extra pair that I wrongfully got from him. We want to say that *St. Francis has a right* to those sandals, and saying it that way puts the focus on him in a way that merely stating that my wrongful action caused him to be in need does not. If we worked at it, we might be able to avoid using the language of subjective right, but it would be cumbersome to do so, and probably pointless as well. We don't have to come to a decision about the precise logical relationship between objective and subjective right to appreciate the fact that subjective right puts a right-holder in the foreground, in a way that objective right does not.

The terms for subjective right and objective right are unfortunate, in a way, because they misleadingly suggest that there is something more real about objective right, and that subjective right is somehow in the eye of the beholder. This is not what is meant at all. The "subject" in subjective right is the right-holder, not the right-*be*holder. And the "object" in objective right is not any particular object – natural,

material, or otherwise – but is, if anything, the global object of moral assessment or prescription.

Let us assume that the language of rights as we know and understand it has not taken hold until the subjective right/objective right distinction is operating. What implications follow? If the concept of subjective right has to have emerged in a culture before we can say that the concept of a right has emerged, what does that tell us about, say, contemporary and traditional cultures in Asia?

Third-Century India and Tolerance

The former Prime Minister of Singapore, Lee Kuan Yew, has argued that the imposition of the concept of human rights upon Asian nations is insensitive to the cultural values of the East, and so represents a kind of cultural imperialism. Singapore is typically thought of in the West as a prosperous but authoritarian, even repressive, regime, where the chewing of gum is a crime and petty vandalism is punishable by flogging. Ought Singapore to align itself with Western thinking about human rights, or ought the West learn to respect the more authoritarian traditions of the East? The Nobel Prize–winning economist Amartya Sen has taken issue with Lee's premise that the traditions of the East are monolithically indifferent or hostile to human rights. The imperialism worry, in other words, is misplaced if rights already have gotten a foothold in Eastern traditions.

But have they? Sen adduces evidence that liberty and toleration – if not for all, then at least for some – have been valued by powerful leaders in India's past. The third-century B.C. emperor Ashoka, for example, decreed that "a man must not do reverence to his own sect or disparage that of another man without reason. Depreciation should be for specific reason only, because the sects of other people all deserve reverence…." (Sen 1999). Ashoka intended edicts such as this to guide citizens in their daily lives, as well as public ministers in their official acts. A convert to Buddhism, Ashoka dispatched missionaries beyond India, thus projecting an influence throughout Asia.

Much as we may approve of Ashoka's promotion of tolerance and diversity, is it a sufficient basis for attributing to him a concept of rights? More pointedly, is Ashoka's attitude one that necessarily reflects an appreciation of subjective right – that is, of the rights *of persons* to worship as they see fit? Or might Ashoka equally well be understood as declaring as a matter of objective right that tolerance is to be extended by each to all – announcing, as it were, yet another "Thou shalt … ?"

If it is granted that the concept of rights that interests us is a subjective conception, what would that do to address the relativism worry? Some will say that there is far more built into a distinctively modern conception of rights than what the idea of a subjective right captures. Rights are "trumps" over political majorities, or over

considerations of aggregate social welfare, others have argued. Nothing in the subjective notion, standing alone, guarantees that rights are taken seriously enough to match our modern notion of them, some would argue, along with MacIntyre. Others have pointed to aspects of the Roman Code of Justinian, or of Aristotle's *Politics*, that go beyond a bare-bones notion of subjective right, and they have gone on to argue on this basis that ancient Greece and Rome employed a vigorous conception of rights that is essentially continuous with the one that we use today.

Deciding these kinds of controversies is beyond the scope of this book. We will take it as granted that the concept of rights is a subjective one, but we have now to consider carefully what else is distinctive of the concept. To do this, it is necessary to trace some further intellectual history. The language of rights has attained the importance it has because it answers somehow to the needs that people have felt to express themselves in certain ways rather than others. These felt needs can be better understood if we have at least a loose grasp of the historical circumstances and practical problems that were before the minds of those who made the earliest and (often) the most eloquent use of the language of rights. The concept of rights is a *practical* one, and we must not lose sight of this central fact about rights: By their very nature they have a bearing upon how we are to conduct ourselves and order our affairs.

Two Expansionary Periods of Rights Rhetoric

If we were to draw a time line running from left to right, representing the prevalence of rights rhetoric across history, we should show two periods of time during which "rights talk" was so prevalent that its very prevalence became a matter of comment and criticism. For convenience, I will refer to these as "expansionary periods," without meaning to imply thereby that any sort of deflationary reaction was or is justified. I simply want to call attention to the peculiarity that rights rhetoric, as a historical fact, has had its ups and downs and, looked at in schematic profile, resembles a Bactrian camel – it has two humps.

The first hump appeared in the late eighteenth century, approximately between the American Declaration of Independence in 1776 and the end of the French Reign of Terror in 1794. The 1790s produced several important skeptical examinations of the concept of rights, which we will look at in some detail after a brief look at some of the philosophical writings that preceded, and fed, the first "hump" – that is, the first expansionary period. To say that that expansionary period ended is not to say that the clock was turned back or that rights ceased to be important: it is only to suggest that as a result of an accumulation of skeptical doubts and practical worries, rights rhetoric became more guarded and ceremonial than exploratory and provocative.

We are living today somewhere in the midst of the second hump, or second expansionary period of rights rhetoric. The second period began with the Universal