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Human Rights, Non-Human Rights, and Multinational Corporation in the Global Age: H Rights Paper 2022 No.3

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Abstract

In the age of globalization few elements of the legal atmosphere are viewed with such universal public favor as is the guarantee of Human Rights. The advent of such guarantees is almost uniformly viewed as a mark of human progress, as conferring a positive benefit, as providing necessary relief from want or redress for wrongs of oppression. However, there are multiple ways to view the substance and employment of the Human Right as a source of legal remedy and as instrument of legal oversight. In a general way the idea of Human Rights follows on a long history of rights variously conceived, a history that extends back to the medieval or even the ancient period of the Western tradition. But the instrument employed today is, in fact, a modern innovation of very recent origin. In nascent form it first began to emerge in the interwar period within the British system when it was changing from an imperial to a commonwealth structure of legal oversight. Very soon it was also employed as the legal basis for British entry into the European War of 1939 against Germany. It re-emerged on a worldwide scale after the Allied Victory in World War II, especially at the Nuremberg Trials. it then became integral to a post-war program to construct a stable system of world order--as it was enshrined in the United Nations Declaration of Human Rights. Examining the historical context in which Human Rights were first conceived helps in understanding their original composition. Viewing them in relation to the multinational corporation makes it possible to understand their global importance in a twenty-first century *Rule of Law*.

Keywords: Human Rights, Corporation, State, Transcendence

Introduction

A Historical Context

Probably no aspect of the project to construct a global regimen of governance is more universally celebrated than is the legal instrument of *human rights*. Those rights, enshrined in a founding declaration of the *United Nations* are looked upon by the global public as an unqualified good, a mark of human progress. However, despite the favorable view held by jurist and public alike, when examined closely there is, in fact,

no settled consensus among legal scholars or political theorists concerning precisely what a *human right* is, its content, and purpose, or how it is to be defined. (Domingo 2010)

The general topic of rights, civil, property, and procedural, for example, are, of course, a main staple of both Western legal traditions, Anglophone and Civilian. Historians often trace the concept of legal rights back to ancient sources, including Plato, or to medieval writers such as Thomas Aquinas. In the modern era early figures such as Hobbes and Locke are thought to be important, as were various *Enlightenment* thinkers, including Montesquieu.

Perhaps the most widely held view in the eighteenth century was that rights either naturally inhered in all persons or they had been bestowed upon all persons by a beneficent god. However, the formulation of a concept of specifically *human rights* in current usage is of a much more recent provenance. In fact, an understanding of legal events at the time it originated provide a clue to why the *human right* came to exist as a distinct legal instrument. Such an understanding might also give some insight into what it means today. (Dworkin 2013)(Moyn 2018)

Of the many ways to understand *human rights* perhaps one of the most useful is to study them in the context of legal development from which they derived. That is, especially to view them as emerging from the interstices existing between the two primary structures for the ordering of persons and things in modern Western legal culture. First was the law-based, territorially defined, nation-state, traditionally said to have originated at Westphalia in 1648. Generally, based on explicit principles of sovereign independence. These included exclusive authority for domestic affairs, the right to conduct diplomatic relations, and to wage war. Whether taking the form of a kingdom, republic, or commonwealth, each state was recognized to have such clearly outlined authority. This explicitly defined frame of governance became so successful that in hundreds of separate iterations it would eventually come to cover nearly the entire habitable territory of the earth. (Lesaffer 2009)

However, the English were ambivalent toward the Continental innovation of the state, and following the *Glorious Revolution* in 1688, approached the problem of rule quite differently. Their new form of governance combined the outward forms of a medieval *Norman Kingship* with the closely centralized inward powers typical of modern *absolutism*. Avowedly inexplicit in nature, it was famously based on an unwritten constitution comprised of members, hereditary and professed. This organic edifice included three ruling classes of the *Royal, Noble,* and *Gentle*, who convened in a *Parliament* that was deemed to be *omnicompetent* in all questions legal and religious.

Until that time, Britain had only been on the periphery of European affairs. But with the overthrow of King Charles II and the installation of William of Orange, the Dutch *Stadtholder,* as King William III, the kingdom would soon be transformed. Amsterdam had been the center of worldwide commerce, but when William arrived with his

entourage of mariners, bankers and lawyers, London soon became the center of world finance and trade, as Britain soon became the pre-eminent naval power of the world. (Babington 1995)(Habermas 2008)

Empire and Incorporation

Historically, Continental scholars had been an active source of legal innovation, including the nation-state. But in the nineteenth century they produced another major advance, the *Napoleonic Code* of 1804. Moreover, because their law was based in principles of logic and reason, European law could easily be adapted to purposes of overseas imperial administration. Since it also claimed to an affirmative view of human nature it could plausibly be adapted as an overlay to the native custom of distant colonies. At the same time its rationality met the needs of modern commerce.

However, the British case was quite different. The Common law, now *writ large* around the world, was still a collegial law based on the principle of consensus among its members. Its antique methods and medieval assumptions were unsuitable, not only for imperial rule. Beyond that, they lacked the principled predictability of the Civilian method, and were useless to engage the complexities of modern commercial enterprise. By the early nineteenth century the Common Law was a source of recurring legal crises in the British Empire. Nonetheless, being unconstrained by fixed principle, or rigid logic, it had the advantage of malleable adaptability. It was also receptive to borrowing from its European counterpart. (Benton 2016)

The deficiencies o English law would be greatly remedied by the Benthamite legal scholar John Austin, who spent the sabbatical year of 1827 in Germany, the center of legal scholarship in the nineteenth century. He returned to England with the doctrine of *Positivism*, along with the concept of *Abstractionism*, or *Formalism.* These would provide a great advance on medieval English practice. *Positivism* solved many philosophical problems in the application of Common law as it adopted the premise that law was the command of the sovereign, and the sovereign could be any person or group of persons able to impose its will with continuity and stability. In this Hobbesian view the workings of law were distinct from any conventional standard of fairness, or any alternative measure of right and wrong--giving rise to the idea that English law was somehow value-free in its operation. The Hegelian *Abstractionism*, on the other hand, opened an entire realm of judicial imagination, greatly expanding the scope of legal possibility. (Rumble 1985)

Then, following on Austin would be another innovation, a British counterpart to the Continental nation-state. It was the creation of Robert Lowe, an imperial pro-consul who came to be known as father of the multinational corporation. In fact, for purposes of governance at a distance his new structure had many advantages over the state. First, insulated from public view, it was free from the tumult of public politics. Along with that, not responsible for matters of public welfare and public order, it could be focused on the single purpose of enriching its shareholders. (Maloney 2005)

In certain conditions, it could operate virtually as a government to conduct diplomatic negotiation and even to wage war. But most of all it was transcendent in its composition, unimpeded by topographic barriers, geographic distance, or national boundaries. For purposes of raising capital, assembling labor, and appropriating natural resources, the multi-national corporation became the primary legal mechanism of British expansion. It also fit well into the imperial atmosphere described by A.V. Dicey as an elevated and magisterial *Rule of Law*. (Cosgrove 1980)

Viewed from the perspective of rights, the corporation was a *persona ficta*, having existence in the law as a legal personality, very much like its human counterpart. Even though it was not a human person in the biological sense, it had many of the citizen, procedural, and property rights that were held by natural humans. It could sue or be sued in a court of law. It could enter into contracts, own property, and take title to land.

But by the influence of both Austin and Lowe, this fictive being also had the potential reach of a worldwide *Leviathan*. It could be transcendent, extra-territorial, and supra-national. It was also non-moral in its actions as it was completely the insensate creature of those who owned and managed its affairs. In fact, as a legal entity it amounted to an overpowering presence. This creation combined with the premise, *Rule of Law*, based in the principle of *omnicompetence,* and backed by naval power, became a featured structure of the *Pax Britannica*. (Bell 2007)

An International World

The first decade of the twentieth century marked the onset of a major transformation in Continental jurisprudence and legal philosophy. Most notable was the official promulgation, in 1900, of a new German legal system, the *Burgerliches Gesetzbuch* , or, BGB. Long anticipated, it was the product of a century of study and deliberation. One important aspect of the BGB was that its clarity of reason and humane principles made it adaptable to a wide range of governing structures, state, kingdom, monarchy, empire, or commonwealth—as well as the potential basis for an international legal order. The obvious advantages it offered caused many of its provisions to be adopted, or received, by a variety of nations, not only in Europe, but also in South America, Africa, and Asia.

Correlate with the announcement of the BGB were the *Hague Peace Conferences* of 1899 and 1907. They brought to a successful conclusion the groundwork laid down by German American legal scholar, Francis Lieber, and were hosted by Czar Nicholas II. The hope was to provide a basis of peaceful relations among the European states. A first step in that aspiration was achieved when the conferences established the *Permanent Court of Arbitration* and the *Permanent Court of International Justice*.

But these new products of Continental jurisprudence further divided the legal world into a competition between the two Western traditions, Civilian and Anglophone. In a rapidly changing twentieth century this rivalry was of profound importance. But

discussions of legal advance were temporarily lost in the destructive conflict of what was then called *The Great War*, and later called *The First World War*. As it occurred, that war would have enormous legal consequences. (Lesaffer 2009)(Schiff 2008)

The Great War also brought a reaction against militarism generally, as well as the idea of imperial rule. At the same time, there was a serious drive to strengthen the right of self-determination for all peoples, including former colonial populations, in a world system based on sovereign statehood. This emerging attempt to construct a more equitable international legal order was based on the *League of Nations*, founded in 1920, and given form through the mechanisms of the new German-Swiss law.

As imperial forms of rule were falling into disfavor, Europeans were focused on developing a legal fabric in which to embed the nation-state. The purpose was to replace the catastrophes of war with diplomatic mediation and judicial arbitration. But the British looked beyond the Continent in a supranational way that was more concerned with *The Economic Consequences of the Peace.* (Keynes 2015)(Schake 2017)

Within the British realm this period marked the end of the *Pax Britannica*, and a re-conception of British holdings as no longer dependent on the Royal Navy. Instead, the British pursued the *Rule of Law* outlined by Lord Dicey. Governance of the realm would come to be primarily a judicial matter rather than a military one. In this approach the various territories would become self-governing polities within a commonwealth order centered in the mother country. In the new panorama of power, the multi-national corporation would provide a primary tissue of connection—but it lacked general authority over individual persons. (Benton 2016)(Joerges 2005)

Commonwealth and Consensus

During the period between the world wars a serious friction occurred between the overlay of economic architecture and an established system of international law. The British *economistic* approach was vulnerable to critique because its legal assumptions included no necessary ideas of fairness or moral standards of right and wrong--especially in disparities of property and wealth. What the English lacked was a credible claim that their law produced a judicial good other than merely—in the Dicey approach—the imposition of its own imposed rule. Moreover, English law, as a basis of order, had fallen into disfavor; its influence being questioned by those who advocated an international system embodied in the League of Nations.

Yet, the situation was complicated much further than a mere dispute between pragmatic opportunism and principled predictability. By the mid nineteen-thirties both prevailing schools of thought were being challenged by the rise of a newly militaristic Germany. It was threatening both the *League of Nations* system and the British imperial realm. Moreover, it made this challenge, not merely on the basis of either military power or an expedient legal casuistry. The German position was

advanced instead by the convincing arguments of its widely admired legal theorist Carl Schmitt. (Byers 2003)(Schmitt 2007)

Viewed strictly from a geostrategic perspective, Britain faced a challenge, once again, to both its naval supremacy and its imperial network. But in accord with its new juridic premise, Britain engaged these questions, not in the vocabulary of militarism, but as a question of law. However, the response was not addressed according to the principles of international law, but in the form of a new legal. The instrument had recently been crafted to remedy a deficiency in the Commonwealth regimen of states and corporations. (Darwin 2016)

This new legal device had been formulated in the Sankey Committee of Parliament beginning in 1937, and first made public in the *Sankey Declaration* of 1940. That same year H.G. Wells was commissioned by the committee to publish a fuller account in a book entitled *The Rights of Man.* These were the first announcements of the idea of *human rights.* Originally, it was posed as justification for British legal authority to reach within the territorial confines of any member of the Commonwealth. But it was now being set forth as a justification to extend that authority to whatever region of the earth it saw necessary. If required, the new legal doctrine could supply a plausible legal justification for the British entry into war against Germany. Viewed as a *Positivist* premise, this had no necessary meaning in terms of any conventional standard of right or wrong. Instead, it was concerned with a *Positivist* ability to impose its legal order. (Wells 2015)(Coquillette 1999)

The properties of this new right were especially adapted to the world of the twentieth century. First, the *human right* was unique in that it penetrated the shield of sovereignty that defined each nation-state. In other words it gave a legal basis for intervention into the internal affairs of another state—a direct contradiction of the Westphalian premise. Justification for such a move would be based on a consensus of agreement among a number of allied nations. Along with that the *human right* was only concerned with the affairs of natural persons, not incorporated, artificial persons. (Allport 2020)

In fact, it was indifferent to the multi-national corporation, having nothing to do with such an entity. Although it could fatally penetrate the shield of sovereignty, the essential characteristic of statehood, it would leave undisturbed the transcending regimen of the *persona ficta*, the corporation. As it turned out, Britain had declared war on Germany late in 1939, and was soon armed with a legal basis to convince world opinion that it was entitled to do so. (Parish 2012) (Borgwardt 2005)

THE GLOBAL AGE: Legal historians often mark the inception of a global law with events of the Nuremberg Trials that followed World War II. After the *Allied Victory* there was debate concerning the fate of political and military leaders who had brought the *Axis Powers* into war. The possibility of summary execution was rejected as having the appearance of mere retribution. Instead, it was agreed that the fate of

those leaders should be decided according to a public process of adjudication. (Taylor 1992)

But much more importantly from both a juridic and geopolitical perspective, it amounted to the establishing by precedent a new form of worldwide law. The innovation was portrayed as an advance over the fundamental assumption existing since Westphalia, that in matters of war, as in all other situations, authority over their individual citizens rested with the government of each independent state. But the new claim of non-moral *Positivist* authority meant that acts and events, even though not fitting into conventional strictures of law could—from a moral perspective--require intervention. (Moyn 2018)

Until that time the procedures of international law extended between, but did not enter within, national borders. The innovation at Nuremberg was to penetrate the sovereignty of a nation, by a supervening claim of authority based on consensus among nations. The effect, in historical terms was to posit a worldwide transcendence whereby an action could directly reach any single individuated person on earth. Viewed from the perspective of its future significance, it also established a global atmosphere that could both envelop and supersede an international system of law. Most of all, it did so on the *Positivist* assumption that authority ultimately rests with any claimant or claimants that had the capacity to enforce their judicial will. (Raful 2006)(Malloy 2008)

The formal inception, as a permanent fixture of what would become a new global order, can be understood within the simultaneous founding of the *United Nations Organization* and the *International Monetary Fund* in 1945. Together they comprised a two layered regimen to reshape the world: an international forum for open deliberation based on the nation-state. Along with that was a body of consultation that privily directed the immanent affairs of finance and trade. Both institutions wielded persuasive power to influence legal policies in their respective spheres. This simultaneous founding filled a legal vacuum left by the war, as the great trinity of global doctrine was unfolded: The *Rule of Law* over all persons and things, the guarantee of democratic government in every nation, along with the uniform accountability for the *human rights* of every legally individuated natural human person in the world. (Cutler 2003)

These concepts not only established the legal premise for a post-war hegemonic system, they would also later become primary stated values for a regimen of global law in the twenty-first century. But there was no equivalent mechanism reaching across borders in relation to artificially created legal personalities—multinational corporations--or those who owned and managed them. The effect of this omission was to make that legal construct integral to the architecture of global governance and absolved from any potential violation of *human rights*. (Ruggie 2013)(Slobodian 2018)

Perhaps most of all the advent of the *Human Right*, as a legal instrument, was symptomatic of a time when the age of imperial militarism was merging into an era of international legalism. Or perhaps, when seen in conjunction with the multinational corporation, it represented two constituents for an entirely new structure of hegemony. That legal atmosphere of unobstructed reach would be understood primarily in terms of mathematical, theoretical, and political economics.

Yet, no matter the context, both the instrument of *Human Right* and the structure of the multinational corporation reflected elements of *omnicompetence, extra-territoriality*, and *collegiality* peculiar to the Common Law tradition. Along with that, the unique claim of legitimacy based on consensus among parties also reflected the pattern of a medieval guild law. For whatever lofty purpose the *Human Right*, or its derivatives, are now employed, for purposes of understanding, it is useful to examine the very practical and pragmatic reasons for which such instruments originally came into being, to examine the legal context in which they were born. (Moyn 2018)(Kennedy 2016)

References

[1] Allport, Alan 2020: *Britain at Bay: The Epic story of the Second World War 1938-1941*, Knopf
[2] Babington, Anthony 1995: *The Rule of Law in Britain*, Barry Rose
[3] Bell, Duncan 2007: *The Idea of Greater Britain: Empire and the future of global order*, Princeton University
[4] Benton, Lauren 2016: *Rage for Order: The British Empire and the origins of international law*, Harvard
[5] Borgwardt, Elizabeth 2005: *A New Deal for the World: America's vision for human rights*, Harvard
[6] Byers, Michael 2003: *United States Hegemony and the Foundations of International Law*, Cambridge University
[7] Coquillette, Daniel 1999: *The Anglo-American Legal Heritage*, Carolina Academic Press
[8] Cosgrove, Richard 1980: *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, University North Carolina
[9] Cutler, Claire 2003: *Private Power and Global Authority: Transnational merchant law in the global political economy*, Cambridge University
[10] Darwin, John 2016: *The Empire Project: The rise and fall of the British world system*, Cambridge University
[11] Domingo, Rafael 2010: *The New Global Law*, Cambridge University
[12] Dworkin, Ronald 2013: *Taking Rights Seriously*, Bloomsbury Academic
[13] Habermas, Jurgen 2008: *The Divided West*, Polity Press
[14] Hafetz, Jonathan 2018: *Punishing Atrocities Through a Fair Trial: International criminal law from Nuremberg to the age of global terrorism*, Cambridge University

[15] Joerges, Christian 2005: *Economy as Polity: Political constitution of contemporary capitalism*, UCL Press
[16] Kennedy, David 2016: *A World of Struggle: How power, law, and expertise shape the global political economy,* Princeton University
[17] Keynes, John Maynard 2015: *The Economic Consequences of the Peace*, Createspace
[18] Lesaffer, Randall 2009: *European Legal History*, Cambridge University
[19] Malloy, Sean 2008: *Atomic Tragedy: Henry L Stimson and the decision to use the bomb against Japan*, Cornell University
[20] Maloney, John 2005: *The Political Economy of Robert Lowe*, Palgrave MacMillan
[21] Moyn, Samuel 2018: *Human Rights in an Unequal World*, Harvard University
[22] Parish, Matthew 2012: *Mirages of International Justice: Transnational legal order*, Edward Elgar
[23] Raful, Lawrence 2006: *The Nuremburg Trials: International criminal law since 1945*, K.G. Saur Verlag
[24] Ruggie, John 2013: *Just Business: Multinnational corporations and human rights*, W.W. Norton
[25] Rumble, Wilfrid 1985: *The Thought of John Austin: Jurisprudence, colonial reform, and the British Constitution*, Athlone Press
[26] Schake, Kori 2017: *Safe Passage: The transition from British to American hegemony*, Harvard University
[27] Schiff, Benjamin 2008: *Building the International Criminal Court*, Cambridge University
[28] Schmitt, Carl 2007: *The Concept of the Political*, University of Chicago
[29] Slobodian, Quinn 2018: *Globalists: The end of empire and the birth of neoliberalism*, Harvard University
[30] Taylor, Telford 1992: *The Anatomy of the Nuremberg Trials*, Little, Brown, and Company
[31] Wells, H.G. 2015: *The Rights of Man*, Penguin Books