

Is “Rights as Response” an Adequate Account of the Origin of Rights? A Reply to Jack Donnelly

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Jack Donnelly’s presentation of rights as response to the formation of the modern state is a familiar thesis. This essay expounds the thesis to justify it and present the ways in which rights can be seen as a reaction of the state and the market. It also notes that the value of this argument is that it gives a justification for the universality of human

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rights by basing this on the universality of the modern state and its shortcomings. However, the paper challenges this version of the origin of rights as inadequate. It argues that rights have a peculiar status between values and laws that can only be accounted for by understanding the positive factors that led to their growth in the European Middle Ages.

Key words: rights, values, state, market, universality

I. Introduction

Jack Donnelly is a famous professor of human rights and a forceful expounder of the universality of rights. One disagrees with him at one’s peril but that is what I propose to do in this paper. It is a disagreement, though, which he would heartily endorse in the sense that on the question of the origin of the human rights we have agreed to differ. In this paper I will first outline what I take to be Donnelly’s account of the origin of rights based in particular on a speech he gave in Tainan on 3 October 2008.¹ I will then go on to justify his position showing not only that it is correct in many ways but that it is also valuable and necessary. After thus stating his case in the best possible light I will then stop to ask if it is adequate and suggest that there is room for a fuller account of the origin of rights. In this later part my basic contention is that the matter at stake is the Middle Ages. In the run-up to an election, Bill Clinton is said to have remarked, “It is the economy”, meaning that the key point was one’s attitude to the economy. I will be arguing that “it is the Middle Ages” which is the key to understanding the growth of human rights.

1. Jack Donnelly was the keynote speaker in a one-day conference held at National Cheng-Kung University on 3 October 2008. The Chang Fo-chüan Human Rights Centre at Soochow University was one of the co-sponsors of the Conference and I acknowledge the help of the Centre in enabling me to attend. The Conference was entitled “International Conference on Human Rights Protection and Practice in Taiwan”.

II. Rights as Response to the State and Market

(1) Donnelly's Argument

Donnelly accounts for the emergence of human rights discourse in response to “states and markets” (Donnelly, 2003: 58).² I call this account “rights as response”, that is a response against the predatory and invasive nature of states and markets.³ Many authors have noted that rights are a response to state power, Donnelly's inclusion of markets is perhaps a response to globalisation that is extended back in time to the rise of socialism and the fight for economic rights and workers' rights in particular.

The basic trend of this argument is familiar. Political sociologists such as Giddens among others have drawn attention to the rise of the national state and its centralised power.⁴ Rights are necessary to

2. In his book (Donnelly, 2003: 58), Donnelly uses the expression “the rise of modern markets and modern states.”

3. A reviewer has castigated me for describing Donnelly's argument as only one of rights as response. This was certainly the focus of his talk in Tainan, but of course no scholar can be expected to include all that he wants to say in one speech, so I am prepared to accept that Donnelly does have a more substantive concern for human dignity, but even so I still think that there are fundamental differences between my view and Donnelly's and that both of us would acknowledge this. This paper is in fact largely concerned with how rights emerge and why and it is here that we disagree.

4. Giddens (1985) focuses on the increasing centralisation of the state, which is combined with control of military power. For another version of the same kind of argument I refer also to a

protect the individual against this Leviathan, to use Hobbes’ expression. Donnelly notes that “international human rights proved to be the best means to protect the human individual against the state and the market.” He describes the state as “bureaucratic” and the markets as “capitalist” and sees rights as a “response” to these twin forces. His description of seventeenth century Europe leaves one in no doubt as to why rights were necessary. It is a place marked by “racism, sexism, religious intolerance, aristocratic and class rule and imperialism”. Kings were claiming to rule by “divine right” with no thought of human rights. Among the woes of the time he also correctly notes slavery.

Faced with “poverty and oppression”, people fight for rights and when they are able to choose always choose human rights. Indeed, all peoples all over the world habitually choose the same menu of rights, even if they may disagree on (minor) details.⁵ Given the universality of oppression so too there will be universality of demand for respect for rights. He acknowledges that if a people freely choose to reject

paper by Lawrence M. Friedman of Stanford University, who uses the term ‘modern’ rather than state or ‘state and market’: “The basic menu of human rights is ... *modern*. They are a consequence of modernization... By ‘modern’ here I simply refer to the type of society we are all familiar with: wealthy, highly industrial and urban, with rich access to technology” (Friedman, 2006: 197).

5. The universality of rights is thus a happy coincidence, since “a list of rights reflects a contingent response to historically specific conditions” (Donnelly, 2003: 61). He uses article 11 of the ICCPR to illustrate the point. It was derived from the existence of debtors’ prisons. But in most cases it would seem that lists of rights are universal. Moreover, they are not menus from which one can choose, but one set. The items in the set are contingent.

human rights that would be acceptable but it is clear that he believes no people would freely make such a choice, though its leaders may make such claims. Human rights protect the interests of the weak, the poor and the oppressed. Thus the argument for the universality of rights rests on a claim that there is a broadly similar universality of oppression to which rights provide the necessary response.

Thus far I have simply stated Donnelly's position. In what follows I would like to reinforce it with material drawn from sources other than this one speech, which for reasons of time could necessarily not cover all the ground. The emergence of rights is portrayed as a response to both the state and the market. Let us first examine the 'state' and try to understand why it should give rise to rights as a response against it.

(2) The State

Many authors take the date of the Treaty of Westphalia, 1648, as the date for the concrete emergence of the modern state.⁶ I would venture to say that we go back earlier in history and indeed see the various layers of the state as something that only emerged gradually. We may describe the stages as follows: (1) centralised bureaucracy; (2)

6. See, for instance Holsti (1991: 32-35, 39-42). Donnelly also discuss the role of state sovereignty with respect to both national and international human rights in a paper entitled "State Sovereignty and International Intervention: The Case of Human Rights." (Donnelly, 1995: 115-46). He is well aware that the 1648 date is simply a convention and not to be taken as absolute.

last resort of legal appeal; (3) focus of patriotic sentiment; (4) territorial unity based on centralised communications network; (5) bureaucratic register reinforced by electronic storage of information. These five stages can be illustrated as distinct in European history but this does not mean that they are so for all states, where in many cases the various stages will coalesce and adhere together.

The first stage is marked by the emergence of England in the Middle Ages as one of the first unified states. The Norman Conquest of 1066 brought to England a centralised and reasonably efficient bureaucracy that sought to study the holdings of everyone in the land so as to produce a reasonable and fair system of taxation. The first step in this direction was Domesday Book, William the Conqueror’s first study of England as a whole completed in 1086. His successors continued in this line. Henry II (r. 1154-89) in particular can be credited with building up a detailed written record of his realm.⁷ If human rights are seen as a response to this kind of bureaucratic centralisation, then Magna Carta is surely a good example of rights as response, since its principal purpose in 1215 was to limit royal usurpation of traditional feudal norms, in particular to limit the payment of taxes and inheritance dues to what had been the norm in the past.⁸ Along with this bureaucratic centralisation there was also the

7. Robert Bartlett (2000: 199-201) uses the subtitle “The Record Revolution” to talk about Henry II’s efforts in this regard.

8. Magna Carta is a good example of rights as response. The barons, city leaders and church dignitaries who drew it up were largely concerned with restraining the power of the king so that it remained within the limits set by tradition. They were not interested in establishing new

growth of territorial unity and integrity. While the Plantagent kings of England were as much French as English, we find an increasing tendency for them to become English monarchs along with the loss of most of their French land holdings; for the Kings of Paris to become kings of France including Burgundy, Navarre and Brittany; for the kings of Castille and Aragon to become kings of a Spain that included Cordoba. The date of the Spanish expulsion of the last Moorish king, 1492, indicates that this period of territorial unity and integrity was spread out over several centuries.

The second stage in the establishment of the power of the state is that of the state as the last resort of legal appeal. This is traditionally dated to Westpahlia in 1648 or to the Peace of Augsburg (1555) with the slogan: *cuius regio, eius religio*: the king being absolute within his own domains could chose the religion of his kingdom. In fact the first step on this path took place in 1533 with Henry VIII's decision to break with Rome and establish the King in Privy Council as the highest legal authority.⁹ Subjects were no longer permitted to appeal to Rome and hence to the Canon Law which had acted as a kind of international law. The contrast between King John and King Henry VIII is striking. The former openly repudiated Papal authority but

rights, nor did they argue from first principles as in the case of the American Declaration of Independence.

9. Henry VIII's Act in Restraint of Appeals (1533) forbade anyone to appeal to any court outside England. It cut England off from continental Europe and by clever political propaganda justified this move as simply in continuity with tradition. In fact it was a complete break with tradition. See Jones (2003: 40).

finally capitulated to the extent of acknowledging the Pope as his overlord and thus using his status as Papal tenant to have Magna Carta declared null and void. Henry VIII had, by contrast, been a loyal member of the Church and was awarded the title “Defender of the Faith” but he had his own way in his divorce by repudiating the legal authority of the Pope.

Westphalia simply spread Henry’s model to Europe in general, giving each potentate authority within his own territory, leading to the division of Europe along confessional lines with limited tolerance for religious minorities.¹⁰ It was at this time that we begin to see the classic discussions of human rights with Hobbes and Locke and the English Bill of Rights followed by the American Declaration of Independence, the Constitution of the United States and in particular the amendments to it known as the Bill of Rights. Here we may describe rights as a response by parliaments and middle-class landowners to the arbitrary rule of individual monarchs and nobles. The response takes the form of enunciating principles that are seen as overriding positive laws: equality, liberty, life. The principles are no longer formulated in the form of international law, as in the Middle Ages, but take the form of indisputable philosophical or even theological premises that are said to override the law and regulate its

10. Holsti (1991: 39) refers to the Peace of Westphalia as legitimizing “the ideas of sovereignty and dynastic autonomy from hierarchical control. It created a framework that would sustain the political fragmentation of Europe.” Holsti concentrates on the implications for international relations. In the domestic sphere it tended to justify absolute rule for the ruler of each state.

application.¹¹

The third stage is that of patriotic sentiment, which is closely connected to an innovation of the French Revolution: conscription. Eighteenth century wars were largely fought by ill-paid armies which included mercenaries, ready to fight for pay for whichever side they thought might win. Loyalty was weak and wars had little impact on much of the country apart from the battlefields. Death from disease was more probable than from gunshot wounds. The French Revolution changed that by advocating conscription for all young men. This had two immediate consequences. Firstly, armies swelled in size and permitted Napoleon to terrorise the whole of Europe from Portugal to Moscow. Secondly, conscription required records of population and of dates of birth, no longer simply in the parish church but on a state scale. Patriotism thus encouraged other aids to military might. In France the roads were centred on Paris and attained an efficiency that had only been known previously under the Roman Empire. Moreover, like the Roman Empire, which may be said to be an empire of civil engineering and law, Napoleon established one central legal system: the Napoleonic Code, which ensured greater uniformity and efficiency. Patriotism also led to the invention of National Anthems, National Flags, National Holidays, unified currency and army and a national

11. The need to appeal to such principles was made particularly clear in the American case. The independence movement could not appeal to tradition as the barons of Magna Carta had done because they were creating a new country. Hence both Paine and Jefferson, the main thinkers behind the rights discourse, had to appeal to the status of 'man' as created by God in the beginning.

language.¹² This type of patriotic nationalism spread throughout the century in part due to revolutions in 1830 (establishment of Belgium) and 1848 leading to the unification of Italy and of Germany later in the century.¹³

When Donnelly refers to the state as the catalyst for a human rights response, he must surely refer to this new patriotic nationalised state. Yet it should be noted that the emergence of this kind of state went hand-in-hand with efforts to promote human rights, either along the lines of the French and American declarations of first principles, or by piecemeal parliamentary work leading to an expansion of the suffrage, to include non-landowners and women for instance, and to abolish slavery and the slave trade. These measures were implemented by states and this gives rise to a curious anomaly: the state not only provoked rights as response it also became the main protector of rights. Indeed, Donnelly himself noted that in today’s world sovereign states are still the best guarantors of rights, even if

12. Contrast the uniformity bred by the new revolutionary states with the diversity preserved in more traditional states that did not experience revolution. The United Kingdom, for instance, has a flag that is composed of three mixed together. It is not a separate creation in its own right. Although the pound sterling is the common currency for England and Wales, Scotland has three banks that issue notes and the Channel Islands have their own currency. English and Scottish legal systems are significantly different. These huge regional differences are unthinkable in the monotone Republics based on the French model.

13. On this point, Hobsbawm has an interesting note on the gradual equation of the terms ‘nation’, ‘state’ and ‘people’. He notes that the French Revolution encouraged a common sense of citizenship over and against the privileges of the aristocracy. Whilst the Revolution did not define being French in terms of speaking the French language, nonetheless linguistic conformity was a marked characteristic after the Revolution (Hobsbawm, 1992: 18-21).

they may appeal to higher authorities such as the United Nations.

While patriotism tried to create states as centres of national feeling, the industrial revolution led to the growth of the state as the centre of an industrial-military complex. Urbanisation and the growth of factories led to increasing regimentation of life. Anthony Giddens has shown how the growth of the state, with its clearly defined borders, centralised authority and increasing bureaucracy was a powerful military tool. It was the combination of industrially produced guns, speedy railways and patriotic volunteers that led to the slaughter of the First World War battlefields. The state controlled the country to a degree that had never before been possible. Moreover, war was no longer something fought a long way away. For a start battlefields could be reached by railway, aeroplane and motor-car such that Winston Churchill, for instance, could take a few days off from his office in Whitehall to visit the army on the front-lines in Belgium or France and be back in his office the next day or so.¹⁴ But not only that, the growth of industry meant that workers in every town could contribute directly to the war effort. Indeed, Canada, the United States and South American countries were contributing to the First World War even without or before any troops were sent. A whole country was at war and by the time of the Second World War it became even more the case that the whole country could be a potential military target.

14. On 29 January 1915 Churchill left London and spoke to Sir John French at the British General Headquarters in France. In March of the same year he took two days' holiday and again went to the Headquarters. See Churchill (2007: 132, 167) respectively. These are only two examples of many.

The distinction between the battlefield and home was broken down as aircraft and flying missiles carried the attack forward with impunity. In all this we see the rise of the state.

If again we take human rights as response, then the response to the military-industrial state must be seen firstly in the promotion of worker’s rights at the national level in various Factory Acts and at the international level with the work of the International Labour Organisation (founded in 1919) and then with the development of the Welfare State after the Second World War, which attempted to give protection to citizens for their basic living.¹⁵

The fifth stage of state expansion can be seen in the growth of bureaucracy that was required by the Welfare State and the provisions of parliamentary democracy as well as the increase in travel that has marked the post-War years. People required driving licences, passports, health cards, registration for voting as well as bank cards, credit cards, birth certificates, wedding certificates and death certificates. A person existed if they were registered. Without registration one was stateless, forgotten and left in limbo. The advances in computer technology have made it possible to register people in new, more complete ways, but also to infringe on their privacy in new ways. Thus registration breeds invasion of privacy on the one hand and the emergence of the

15. Of course, the classic early exposition of the Welfare State is found in Part Two of Thomas Paine’s *Rights of Man*, first published in 1792 and hence only as urbanisation was just beginning: “Civil government does not consist in executions; but in making that provision for the instruction of youth, and the support of age, as to exclude, as much as possible, profligacy from the one, and despair from the other.” (Paine, 1984: 218).

unregistered on the other. In a country such as China the number of unregistered, known as the floating population, is over 50 million, but the worst kind of lack of registration are the many refugees who are left at the interstices of the nation-states.¹⁶

At this stage we see once again the paradoxical nature of the state, which both protects and invades human rights. It was to protect the individual and promote the welfare state that states developed the bureaucratic register of their citizens, but it is this in turn which creates new possibilities for the abuse of rights. Recent discussion over terrorism illustrates this. States can pass anti-terrorist legislation to protect the lives of citizens but this legislation creates new forms of abuse of rights: restrictions on privacy and invasion of privacy, detention of suspects, even suspension of the operation of banks!¹⁷ If rights are response, then what response can be made to these new kinds of abuse, beyond calling for respect for former norms of privacy and *habeas corpus*, remains to be seen.

(3) The Market

In addition to states, Donnelly refers to markets as catalysts of rights as responses. This coupling of states and markets is something

16. Undocumented refugees or persons who live in one country but without any legal registration there are the new poor of the present world order.

17. During the credit crunch in October 2008, the British government used anti-terrorist legislation to control an Icelandic bank. The aim was to protect the investments of British citizens, including considerable investments by local councils. The use of this kind of legislation was obviously greatly resented by the Icelandic government.

new in human rights discourse, but not unexpected. I suspect that it has received an impetus from the current spread of globalisation, where states seem powerless beside markets that overwhelm them. However, we may also trace the development of the market through history and identify various stages of its development. So long as the market exists at the level of barter and exchange in kind it is more likely to be dominated by fluctuations in the weather and hence in production of crops than by its own mechanisms. Hence we must consider the market as a substantive factor in invading rights only when its internal mechanism becomes the dominant issue in its fluctuations. In short, this means that we can only really consider the market as a substantial factor after the emergence of financial institutions and the costing of labour in terms of cash. This only really begins in eighteenth century Europe, where incidents such as the South Sea Bubble (1720) show that a crash in the market can lead to poverty. Hence the three stages in the development of the market that we may identify here are (1) the assessment of labour in terms of cash; (2) the effect of trade on the overall economy of a country and (3) the phenomenon of globalisation.

The first stage is characterised by the rise of capitalism and its displacement of other forms of economic enterprise. Max Weber has given one account of how this happened in Europe, focusing on the role of the spirit of Protestant and Puritan ethics in encouraging a capitalist mentality. It leads to the build-up of industries, to capital, banking, investment and shares. In short it leads to a rationalisation of

resources, what Weber terms instrumental rationality. But Weber also notes that this leads also to irrational conduct in respect of values. To put it bluntly, if making money is the end then how money is made is no longer a priority and who suffers in the course of money-making is not important.¹⁸

The rights that emerge in response to capitalism are the socialist values of protection of workers' rights. Yet, paradoxically these 'rights' were not initially expressed in the language of rights. The most famous exponent of such 'rights', Karl Marx, held that the language of rights was itself part of the problem and hence he rejected it. It is only subsequently that the demands of workers were formulated in terms of rights. Indeed, at the international level this happened not with the founding of the International Labour Organisation in 1919, but with the Declaration of Philadelphia of 1944.¹⁹ Here the response preceded the 'rights' if one may so put it.

The second stage is the growth of international trade. The most

18. Professor Chen Lai (陳來) of Beijing University has made a strong case for the maintenance of value rationality in the Chinese context. He rejects the idea that modernity can be defined wholly in terms of instrumental rationality. While it may be true that instrumental rationality—political and economic efficiency—may be the distinctive feature of modernity, it cannot be the only feature. All societies need to maintain their tradition of value rationality into the modern era. See Chen Lai (陳來 · 2006: 45-46).

19. The Declaration of Philadelphia (10 May 1944) recasts the purpose of the ILO in human rights terms, eg. Article 2a reads, "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." Previous to this ILO Conventions regulated the conditions and terms of work but did not speak in terms of 'rights' (International Labour Organisation, 2010).

glaring example of international trade that was an affront to rights is the slave trade, but in some ways this trade was a unique case that does not fit the pattern. In looking at trade as a major factor in determining the market it is perhaps more useful to look at imperial and colonial trade, of which the slave trade may be considered a partial example. Colonial trade skewed the development of regions and countries by leading to specialisation that could only be justified in the context of the market itself. As Adam Smith noted, the specialisation by one country on the production of a given item is a rational and beneficial move. But it introduces a new kind of dependency. The plantations of sugar (using slave labour), cotton, tea and other products reduced vast swathes of countryside to the production of one crop or one industry. Simultaneously these massive plantations encouraged the importation of huge numbers of workers. Between 1834 and 1937 some 30 million Indians moved to British colonies such as Fiji, Singapore, Guyana, Uganda, Kenya and South Africa.²⁰ The lack of integration of these people has led to discrimination against them or resentment in several of these countries. The blame is not to be laid on the Indians but on the system which led to the imbalances. Colonies became dependent on the mother country and consequently had an unbalanced internal economy that only seemed balanced within the context of the whole colonial trade. It was this that gave rise to inequalities between rich, industrial

20. While migration has been a constant feature of human history since our origins, the capacity of shipping made it possible to bring about entirely unnatural patterns of migration. For a history of this, see Cholewinski (1997).

nations and poor, under-developed producers of raw materials. Hence international trade on the colonial model can be seen as the catalyst for the assertion of self-determination as a right in response to the abuses of the market.

Finally, we come to globalisation.²¹ In some ways this is a continuation of the imbalances associated with colonial trade and many of the poor countries who suffer from globalisation are previous colonies that were disadvantaged in the first stage of international trade. In this sense globalisation is simply more of the same, albeit on a greater scale and often with even less guarantees than were found in the paternalism of the colonial era. Yet, globalisation is also seen as something significantly different in that it is decentralised. A colonial empire had a centre and some sort of central control with varying degrees of political participation in that centre. But globalisation has removed the centre. Multi-national corporations have shifting loyalties and more power than many states. They are not bound to states and have little political oversight thus making any meaningful political participation not only impossible in practice, as may have been the case under imperialism, but even in theory. A firm can shift its

21. Globalisation is a notoriously slippery word. In the context of human rights, perhaps one of the most authoritative definitions must be that in the Report of the Secretary-General of the United Nations (2000) entitled "Globalization and its impact on the full enjoyment of all human rights" dated 31 August 2000 (UN: A/55/342). "While there have been previous eras that have experienced globalization, the present era has certain distinctive features, including, although not limited to, advances in new technology, in particular information and communications technology, cheaper and quicker transport, trade liberalization, the increase in financial flows and the growth in the size and power of corporations." (para. 5 in part).

factories from Lesotho to China or Vietnam and the only way to control it is by ‘name and shame’ campaigns. Thus globalisation has led the market to achieve a mastery over human life that seems to have escaped from any effective political control. It is this which has given rise to the various protest movements that frequently dog the meetings of the World Trade Organisation for instance.

Hence the market has been responsible for inciting human rights responses in different ways. At the first stage we noted that workers’ ‘rights’ were not even framed in the language of rights until long after they had been politically acceptable. At the second stage, international and colonial trade, the right to self-determination by the colonies and hence to the formation of new states was the main issue. Globalisation, the third stage, has led to protest movements but is seen as a threat to rights in that it reduces the capacity of the state as the legitimate upholder of the rights of its citizens. It may be that globalisation will provoke the rise of new rights, such as ecological rights, but this remains to be seen. Thus the relationship of markets to rights is even more complicated than that of states to rights. In this context, is the word ‘response’ an adequate description of the nature of rights?

III. Rights as Response to other Factors

In all these ways, then, the power of states and of markets has given rise to factors which may provoke human rights as a response. Yet, before we conclude this historical review, we must ask if states

and markets are necessary and sufficient conditions for the emergence of rights.

We have already noted that certain responses to markets were not initially expressed in the language of rights. It would seem then that not every response to states and markets is a ‘human rights’ response. Or should we say that even if at the time it were not seen as a ‘human rights’ response, nonetheless with hindsight we know it should be included as such? In other words, we might still want to describe all responses to states and markets as human rights responses.

A second issue is whether rights can emerge in any other way than as responses to states and markets.²² Before discussing this possibility I want to draw attention to the pairing of states and markets that Donnelly makes. Suppose with many other writers he had simply said ‘states’ or ‘nation-states’ then could we not then co-opt the first two items listed under markets above as attributes of states. The growth of capitalism happened within nation-states and in many cases industry was simply part of the military-industrial complex that built major nation-states. Likewise colonial trade was dependent on certain nation-states: Great Britain, France, Leopold II King of the Belgians.²³

22. In fact Chapter 4 of his 2003 book is entitled “Markets, States and ‘the West’” and he argues that human rights are linked to modernity. He explains the reference to the West as follows: “Westerners had no special cultural proclivity that led them to human rights. Rather, the West had the (good or bad) fortune to suffer the indignities of modern markets and states before other regions.” (Donnelly, 2003: 57-70, 78). In other words he still returns to the pair: states and markets.

23. Leopold II (1835-1909), King of the Belgians, was King of the Congo Free State between 1885 and 1908. He ran it as a slave colony, see Hochschild (1998).

Indeed it is perhaps only with globalisation that the factors of oppression, if I may use that term, exceed the limits of the state and hence require the addition of ‘markets’ to ‘states’. This may sound like a quibble, but let me illustrate the problem with a concrete example.

The recognition of the rights of indigenous peoples as having a right to their own customs, land, religion and dominion was formulated at the Spanish court of the Holy Roman Emperor Charles V. This right was asserted in direct opposition to Spanish colonial policy and behaviour. We might then say that it is a right asserted against the state, the Spanish state. Vitoria states it clearly using the term ‘dominion’ that was the normal medieval expression for those things under the control of a person, whether the things in question be material objects or personal decisions such as accepting a religion:

The upshot of all the preceding is, then, that the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners(Scott, 2000: Appendix A xiii).

It is also a right asserted against the emerging colonial market in gold. But at the time the right was not asserted in these terms. Las Casas and other Dominicans who argued in favour of the Amerindians did not deny that the Spanish state had a right to allow travel to the Indies, nor did they deny trade. Rather what both Las Casas and Vitoria argued was that the Spaniards had no right to make war. Indeed, Las Casas argued that all wars initiated by the Ameridians were just

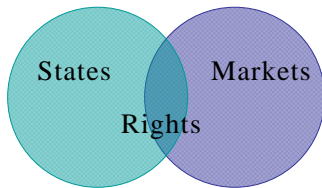
and all wars initiated by the Spanish were unjust.²⁴ If anything then the rights of the indigenous people were asserted in response to war, murder, treachery, cruelty and pillage. Could we not then see the assertion of rights as a response to war? If we are going to expand the factors that provoke a rights response from states to markets, could we not also add war, or is war simply to be subsumed under ‘states’, in which case why should ‘markets’ have a privileged place as equal to states in the factors that provoke rights?

In asking this question, I am simply noting that general explanations in terms of ‘states’ or ‘markets’ or even ‘war’ run the risk of oversimplifying the factors that explain the rise of rights. In other words, supposing that rights are response, a plausible case can be made for rights as a response to the nation-state and also to markets, but perhaps also to war and other factors. Hence not only states and markets generate rights as a response. Nor would it seem to be the case that all responses to states, and markets and war are to be viewed as rights. While Donnelly’s initial presentation may be set out as “rights are responses to states and markets”, I would add that not all rights are responses to these two factors, nor are all responses rights.

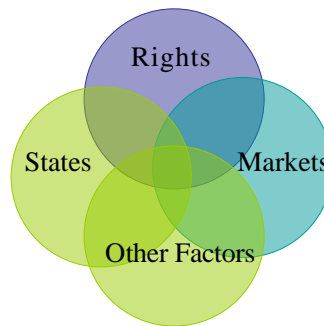
We may illustrate this using pie charts, the left-hand chart being an illustration of Donnelly’s thesis and the right-hand one being my modified version:

24. “I know... that the wars waged by the Indians against the Christians have been justifiable wars and that all the wars waged by the Christians against the Indians have been unjust wars, more diabolical than any wars ever waged anywhere in the world.” (Las Casas, 1992: 41). In many cases, though, indigenous people could give no response to oppression as they were all killed.

Here Rights are generated within the circles of the State or the Market or both.



Here Rights may be generated by the State, the market or other factors (such as war), or even not be a response to any of these factors.



Source: author.

IV. Universality Grounded on Consensus

(1) Donnelly’s Purpose: Uniformity of Rights

So far my argument has simply modified Donnelly’s in ways that may not seem particularly significant. After all his main point is not to present a detailed history of rights in which we could see exactly how each right had been generated by a particular state of oppression that can be ultimately referred back to a general cause such as the state, the

market, war or something else. Donnelly develops his argument not as a history of rights but for a much more important reason. He wants to argue that rights are universal, that claims to particularity in rights while they may be acceptable in minor details are not valid for the central core of rights. His argument that rights are responses deals with this question of universality by taking the simple step of noting the universal inhumanity of humankind. In other words the universality of oppression breeds the universality of rights.

This argument is not only plausible it also has another advantage: it obviates the need to look into the particularity of cultures and value systems. There is no need for rights to be buttressed by cultural peculiarities that are by definition limited in scope. This sweeps the ground away from the particularist's enterprise. We do not need to work from Chinese culture, for instance, to establish what Chinese rights are and then try to juggle these with universal rights. We simply start from the ubiquity of oppression by state and market and arrive automatically at the same set of rights for all nations. Particularism is defeated by having the carpet pulled out from under its feet. The argument also has a further advantage: it obviates the need for any metaphysics of rights. Rights are simply responses to oppression; they do not have an inherent life of their own. Here we are in pure nominalism: there is in fact no such thing as 'rights' in the abstract. There are only specific rights in response to specific acts of oppression. By avoiding metaphysics we avoid potential grounds for disagreement and hence increase universal solidarity.

At this point we must note that Donnelly’s argument is not only useful and persuasive, it is also the approach taken by the United Nations. As Jacques Maritain famously noted, “Do not ask why we have these rights, because we all disagree on the ‘why’, but we all agree on the rights.” The Universal Declaration of Human Rights has deliberately avoided the inclusion of any philosophy, religion or other form of metaphysical underpinning of rights. As to why we should recognise the set of rights it contains, we can only say that it is due to consensus, a consensus that can grow to include new rights as new sources of oppression are identified. He refers to this as an “overlapping consensus” and a “social decision to act as though such ‘thing’ existed.” (Donnelly, 2003: 51, 21).²⁵ Rights have no ‘foundations’ outside this consensus.

Let me say to begin with that I agree with Donnelly’s position, especially when it comes to formulating rights in legal documents. I also agree with him on the question of universality, but at the same time I find doctrinaire nominalism as much a philosophical *parti pris*

25. A critic has drawn my attention to another article by Donnelly which also refers to rights as a “special kind of social practice” as if this is at variance with a nominalist position (Donnelly, 2007: 284-5). But surely, a nominalist could claim that the way we use words is a social practice and that no matter how universal the practice is it does not suddenly create a metaphysical entity that corresponds to the word used. The same critic also notes that Donnelly stresses consensus, again no problem for a nominalist, and that he calls his theory a constructivist one, inspired by Wittgenstein. But Wittgenstein would surely support the idea that there are no metaphysical entities behind words and thus could be classed as a nominalist himself. As I note nominalism is not necessarily a bad thing, indeed it is the basic human rights philosophy of the United Nations.

as certain forms of religious or metaphysical absolutism. Let me first present several questions which doctrinaire nominalism of this type has problems accounting for.

(2) Problems of Nominalism

In a discussion of Confucianism, de Bary and Tu (1997: 24) ask if it is possible to have a human rights regime in the absence of any value system.²⁶ Suppose a culture has rights enshrined in law but no values of any kind, would we describe such rights as human rights? There is a great danger when rights are reduced to legal or constitutional privileges because the law and the constitution need to be guided by moral values if they are not to be degraded into mere positive norms. Nazi Germany was a country that had great respect for the law. The law decreed that Jews were non-citizens. The law decreed that they could be killed. Positive legal norms run the danger of degenerating in this way unless they are upheld by moral norms. Donnelly (2003: 11, 18-note 19) himself wishes to claim that rights are not simply legal prescriptions but he also wants to distinguish them from the “values or aspirations” underlying them and he argues that any attempt to find moral foundations for rights will fail because “foundations operate only within discursive communities.”²⁷

26. “Could any kind of human rights program be effective in the absence of both a civil, political infrastructure and a moral culture supportive of them?” (de Bary and Tu, 1997: 24). It is clear that the authors believe the answer to their question to be ‘no’.

27. “A human right should not be confused with the values or aspirations underlying it.”

A second question we may pose arises from what are the core of rights that everyone accepts. Donnelly listed examples such as the right to life, to be free from torture. He also noted differences that are permissible, when they do not affect the core. He gave the following example: Europe rejects the death penalty whilst parts of the United States, as well as the Federal government, accept it. The death penalty is thus not part of the core of the right to life. Why? On what grounds can this judgement be made? Is it simply an empirical observation that can be overthrown in the future? What are we to make of ardent supporters of the right to life who oppose abortion in all circumstances but uphold the death penalty? Is there some contradiction here? In a previous paper I argued that in this case there is in fact an underlying theological argument according to which innocent life has the right to life, thus including unborn babies, but guilty life does not, hence permitting the death penalty. The guilty have set themselves outside the pale of rights.²⁸ I believe that this amounts to an assertion of privilege and not rights. In Burke’s England privilege is granted to the descendents of ‘nobles’ but in the American case the privilege is a moral privilege. In neither case are we dealing with rights.

Moreover, if rights are merely responses to the state and the

28. Elsewhere I have discussed this case and concluded that it is based on a peculiar theology according to which the guilty are condemned and the innocent saved. If indeed a theological argument is at work on the periphery of rights, might it not also be the case that theology is involved in the definition of the core too? Here I will not pursue this issue except to say that the motivation impelling us to assert certain rights (rights of the unborn) and deny others (rights of the guilty) is not value-neutral and hence rights themselves do not exist in a value-vacuum. See Ryden (2004: 103-131).

market are they not somewhat over the top? If Jefferson merely wanted to stop English oppression he could have called for the independence of the United States without any need to appeal to God and to inalienable rights. If the French wanted a better ruler than Louis XVI they need not have proclaimed ringing declarations about liberty and equality.²⁹ In fact even the Universal Declaration is surely too grandiose to be merely a response. If we want responses then perhaps the Covenant against Genocide which dates from the same time is a better example. It is a simple rejection of what Hitler did to the Jews during the Second World War but couched in universal language so as to apply to all forms of genocide. It makes no statements about life or culture or the other rights it upholds. The Universal Declaration, however, sees itself as a “common standard of achievement”. It defines its rights in very abstract terms. It cries out for a covenant to realise its claims in law. Moreover, the very fact that it still carries weight even after virtually all of its terms have been turned into legal documents in the ICCPR and ICESCR shows that there is something more to rights

29. Consider Paine’s comment: “In the declaratory exordium which prefaces the Declaration of Rights, we see the solemn and majestic spectacle of a Nation opening its commission, under the auspices of its Creator, to establish a Government; a scene so new, and so transcendently unequalled by anything in the European world, that the name of a Revolution is diminutive of its character, and it rises into a Regeneration of man.” (Paine, 1984: 114). Perhaps Paine exaggerates a little but he has his finger on something here. There is more to the Declaration than simply a list of legal norms. Actually Donnelly believes that the liberty, equality and security of the late eighteenth century are “abstract values” and not rights (Donnelly, 2003: 11).

than simply response.³⁰

Hence, while I can sympathise with Donnelly’s desire to avoid metaphysical and cultural disputes by adopting a nominalist position and while I am prepared to accept that in practice this may be the best way to ensure that different people can work together to promote rights, I do not hold that it is an adequate description of what rights are. There must be some positive content to rights that is not enclosed in a negative terminology that portrays rights as mere responses to situations. Even if, as one reviewer notes, Donnelly does identify “inherent dignity and worth” as the positive content of rights, he does not say where this comes from (Donnelly, 2003: 44-5).³¹ If there he is prepared to accept that rights do have a positive content that is not supplied purely as a negative reaction to oppression, then it is incumbent on him to tell us where this comes from. It is to explore this part of the argument that I start a new section of the paper.

30. There is not perfect correspondence between the Declaration and the Covenants. Article 17 on property has not been legislated either in the two Covenants of 1966 or in any subsequent ones. But the Declaration has not been forgotten simply because its provisions have become law, nor is it remembered for article 17. This shows that the Universal Declaration carries a moral weight that has value over and above the legal norms it enunciates.

31. “individuals have inherent dignity and worth for which the state must demonstrate an active and equal concern. And everyone is entitled to this equal concern and respect.”

V. Values, Rights and the Law

(1) Values as a Source of Rights

In a discussion of modernisation in China, Professor Chen Lai (陳來, 2006: 45) notes that during the twentieth century there was a tendency to identify modernisation with westernisation defined as science and democracy. But, Chen argues, the modern West is not simply science and democracy. He accepts Weber's argument that modern capitalism was inspired by the Protestant ethic, but he notes that in looking at Europe it is not enough just to look at Protestantism. There is a need to look at Catholicism too and at the basic common matrix of Christian values that exist even today in the modern West. Modernisation may be the fruit of capitalism; it may even be science and democracy; but modernisation is not the be all and end all of a society. Similarly too a modernised China will not simply be a replantation of capitalism, science and democracy in Chinese soil, such that these elements stifle out any specific Chinese character. Chen Lai argues that the values of Chinese Confucianism are necessary in order to provide a value rationality to compensate for the possible excesses of purely instrumental rationality. Economic efficiency can make money but it cannot guarantee a fully human life because the human being is something more than a financial statistic. Hence any society must consider its core values no matter what instrumental rationality it

accepts.

In looking at values there may be a tendency to think that each culture has its own values and that hence there is no universality. But just as Donnelly’s argument for universality is based on the ubiquity of human wickedness, so too we can say that all values if they are truly values are human values. There may be different ways in which they are lived but respect for persons, for family and society are common to all human beings. There have been moves to try and identify these core values in all religions (Küng, 1998).³² The result has been rather disappointing in that the core runs the risk of being so vague as to be meaningless, but at least the enterprise shows that it is not impossible to think of how to articulate the essential values of being human in society for everyone.³³

A second important point is that values belong to human beings and are not static, fixed entities. Values must grow and develop. This is clearly the case when we look at attitudes to slavery in the West or in attitudes to gender, which have been shifting only in more recent times. Values can expand and need to do so to become more human.

32. Küng’s version has two presuppositions and four directives. The former are (1) human dignity, and (2) the Golden Rule of reciprocity; the latter are (1) non-violence, (2) solidarity, (3) truthfulness, and (4) equal rights between men and women.

33. In the *Ladany Lectures 2007*, Professor John Coleman SJ argued that the common core of a global ethics should be a “minimal, basic set of rules” but that there was also a need to enter into the differences present in various cultures and look for a kind of “overlapping consensus” or “family resemblances” across the various ethics of the world (Coleman, 2007). In fact Coleman’s language is very similar to that of Donnelly, but whereas Donnelly places the consensus at the level of rights, Coleman places it at the level of morals.

Hence a diachronic view of the values of a given culture at a given point in time cannot pass itself off as the permanent and only set of values to which that culture can aspire.³⁴

Hence I argue that human rights are the respect for human beings expressed in legal form and the use of the law to express that respect for human beings.³⁵ There is a healthy tension between the values of respect and the legal norms, between the use of the law and the formulation of better laws that conform more adequately to the norms they attempt to incarnate. In the language of Cicero the tension is between the universal unchanging natural law and the positive laws that try to express that natural law but which never perfectly succeed in doing so. In fact, Donnelly himself describes human rights as seeking “to fuse moral vision and political practice.” (Donnelly, 2003: 15). He would tend to place them more in “political theory” than “moral theory” (Donnelly, 2003: 41) but he also terms them “social practices” which “realize” abstract values (Donnelly, 2003: 11). Hence he too acknowledges that they stand between values and the law.³⁶

Let me turn at this point to a famous text in the *Mencius*, where

34. Here Donnelly is correct when he says, “cultures are complex, variable, multivocal and above all contested. Rather than static things, ‘cultures’ are fluid complexes of intersubjective meanings and practices.” (Donnelly, 2003: 86).

35. There can be human dignity that is unrelated to the law, but the idea of ‘right’ (Latin ‘ius’) is certainly related to the law (in Latin also ‘ius’). Human rights are the expression of human dignity in the law.

36. I am not concerned here with discussing which values or which laws are required for human rights to arise—that would require a whole book—but only with saying that both of these elements are essential if we are to have human rights.

Mencius describes how four key virtues arise from shoots within the human heart (*Mencius: Gongsun Chou A*). He is arguing that virtue is natural and that human nature is fundamentally good. Of course he is perfectly aware that there are bad people but he argues that virtue is natural to the human being and hence a person who is properly educated will grow to be virtuous. If on the other hand a person were naturally vicious then it is very hard to understand how virtue could ever appear. Again if a person were indifferent to either, tending now towards one and now towards the other, then strictly speaking vice and virtue would be equally unnatural. Mencius argues that a human person naturally tends towards the good. One might add that this was also the common opinion of Greek philosophy.

In other words a person will naturally tend to respect rights and do so because this is virtuous. Hence when faced with oppression by state and market, the person will want to look for positive values on which to base her response. This is why rights are not simply a matter of response alone. They carry the extra baggage of values that we have noted in all the principal declarations of rights. Moreover, this basis in values is seen as justifying the specific demands that are then made.³⁷ It may be that the circumstances of oppression are required to bring forth the formulation in terms of rights but that formulation typically

37. Paine (1984: 113) makes the point quite plainly when speaking of the French Declaration of Rights: “The 7th, 8th, 9th, 10th and 11th articles are declaratory of *principles* upon which laws shall be constructed, conformable to *rights* already declared.” Paine sees the Declaration as containing rights (articles 1-3), which are elucidated (articles 4-6) and then set out in principles (7-11), on the basis of which laws can be made.

supposes human values that have roots which go back further and deeper than the responses elicited.

In the face of this account, one may object that if rights are values and values have existed in human culture for millennia then what is new about rights? Here Donnelly is correct. The creation of the political structures with their legal and bureaucratic format brought about a form of human organisation that required that moral values be integrated with the legal system. But this integration was not inevitable and here again I must take issue with him.

(2) The Peculiarity of the Latin West

The fact that in so many European languages, starting with Latin, the word for ‘law’ is the same as that for ‘right’ is not a simple coincidence.³⁸ The use of the law to assert rights and the formulation of human requirements in legal terms is a peculiar creation of medieval Europe. Without this medieval basis, the language of human rights would simply not have been available to Europeans in 1648. Let us then reflect more about what kind of a thing a right is.

Above I have noted that for rights to live in a society there is a need for a basic matrix of human values. Are rights simply values? In a sense they are values. Respect for others, respect for life are basic human values. Liberty and equality are also values of a kind, but ones

38. This observation applies to Latin, French, Spanish, German, Slovak and other languages based on Latin usage.

that call for legal expression. Hence rights are a kind of amphibious entity at home both in the realm of philosophy and in the law. They are a curious kind of beast and yet in the modern world they have become the best defence of individuals and peoples.

In a previous paper I suggest using the Kantian-type term 'affective *a priori*' to refer to rights (Ryden, 2008: 55-84). The aim of this term is to indicate the amphibious nature of rights. Human rights are values that can be articulated based on an understanding of human nature in society but they are not produced by deduction from human nature alone, rather they emerge within history according to need and that as they emerge we acknowledge that they adhere to values.³⁹ Kant referred to the synthetic *a priori* by saying that objective experience requires a synthesis of perceptions, in other words the unity of the experience is something given by the mind *a priori* but the mind works by synthesising the manifold into a unity.⁴⁰ Mikel Dufrenne (1967: 548) distinguishes three ways in which subject and object are related: firstly on the level of presence, "what Merleau-Ponty calls the corporeal *a prioris*"; secondly on the level of knowledge which is that at which Kant operates; and thirdly on the level of 'sentiment', which is that of aesthetic appreciation. Dufrenne refers to the last of these three as 'affective *a priori*' including such things as sublime, grotesque, pretty, tragic, beautiful.

39. A critic of this paper has rightly pointed out that here I am not entirely following Kant with regard to the *a priori*. This is correct.

40. For a summary of Kant's position see Copleston (1960: 262).

I am arguing that human rights work in a similar way as synthetic *a priori*s of the value of the human being. I have compared them to artworks which embody beauty but where the beauty can only be acknowledged subsequent to the creation of the artwork. We do not first have beauty and then paint a picture or write a poem. The painting and the poem, though, are more than arrangements of colour and words: they express beauty. Rights emerge in the course of history as different scenarios present themselves but they are not simply responses to oppression; they have something which can be seen as expressing enduring value.

Our enquiry must ask why these amphibians could play this role and how it came about that they did so. Let us note that they require both a philosophy of human values and a legal system for their existence. This kind of environment is fairly widespread today, but it was not so in the past. Take a society like China that has a well-articulated philosophy of human values dating back for several millennia. China had values. But China lacked a modern legal system. Chinese criminal law was developed but civil law almost non-existent. The criminal law enforced strict punishments for crime, but disputes within the family were dealt with by arbitration without appeal to the law. Hence China presents the picture of a Confucian value system that was seconded by a legalist criminal law but in which the two did not, on the theoretical level, engage each other. In a famous debate in the Han Dynasty the Confucian scholars argue for education in virtue as the remedy for crime whilst the government, legalist, representatives

argue for strict law.⁴¹ This dichotomy of values and law was to last throughout the imperial era.

Islamic society developed law, jurisprudence and adopted Greek philosophy as well as the basic Abrahamic values found also in Judaism and Christianity. Here then was a society in which values and the law could be brought together but it did not generate rights. This does not mean that it is incompatible with rights, any more than Chinese society is incompatible with rights, but it did not generate rights. Perhaps because it lacked the separation of religion and politics that led to the development of a civil law different from religious law. Under the Ottoman Empire, and to this day in Israel, certain civil issues such as marriage and divorce came under the competence of religious courts rather than under the civil courts. In religious courts the tendency would be to provide a conservative ruling based on tradition and hence not conducive to the emergence of rights.

Eastern Orthodoxy is closer in terms of the components of civilisation to Western European society. Of course, the Byzantine Empire was to fall to Turkish power and Russia only developed late in the European world, but despite these historical accidents, Orthodoxy also did not breed rights. I would suggest that one reason for this was that Orthodoxy as a whole lacked the unity of the Latin West. Within individual states, though, religious and state power were coalesced into one and thus more closely resembled the Chinese model of imperial rule.

41. I am referring here to the *Disputes on Salt and Iron* 《鹽鐵論》 (桓寬，1971: 57-59).

What is peculiar to the Latin West is a degree of cultural uniformity combined with political variety. The effect of this was that Christianity had to exist in a vast plurality of political jurisdictions, including independent cities, empires, kingdoms, dukedoms and republics. And within this political jigsaw, the chief universities and colleges were common so that the literate class had a common standard of education and a common language. Moreover, Christianity encouraged the separate development of religious institutions and state institutions. Thus in the Latin West there were ecclesiastical courts for internal ecclesiastical matters; there were also secular courts based on Christian values. Three issues can illustrate why the Church needed also to have a separate secular legal system, which upheld rights.⁴²

The first is the issue of marriage. The Church regarded this as a sacrament given by Christ and to be upheld for life. Hence it needed legal protection. But a marriage was considered valid if two people sincerely promised to love each other, even if there were no witnesses. Marriages were also blest in the church porch. The Church was concerned about the freedom of the parties and this required protection by both ecclesiastical and civil courts. The ability to contract such a marriage is referred to as a power, an ability and even a 'ius', which can only be translated here as 'right' rather than 'law'.

The second issue was that of freedom to choose bishops. Here freedom was freedom from state interference and royal appointments.

42. For an account of these three issues in Chinese, please see 雷敦蘇 (2008: 19-24). For detailed discussion in English, I refer to the books by Brett (1997) and Tierney (1997).

Magna Carta opens by King John proclaiming that he will respect the freedom of the Church. This kind of freedom required the Church to deal with all the different forms of government it faced and hence demanded that this one value be upheld in a variety of legal jurisdictions.

The third issue that is important is that of what a person required to live on. Already in the fourth century there is discussion over the rights of the poor as opposed to the rich but in the Middle Ages there is a very particular example of this. The Franciscans wanted to live in perfect poverty and travel all over the world, including Karakorum and Egypt. They therefore renounced all that they had. A strict interpretation of this renunciation called also for the renunciation of any claim or right to anything. This interpretation allowed use but not the right to use. By this means they hoped to live the value of poverty. But the Church, led by the Pope, rejected this reading, holding that use of a thing implied a right to use a thing. He noted that it was absurd to eat an apple but say that the right to eat the apple belonged to the Pope. Without going into all the details of this issue what we notice is that it sought to define the use of basic necessities as right that could be claimed in court and, given that a human being could not commit suicide, it amounted to a right to the basics for human life. Thus even the pursuit of the spiritual ideal of poverty had to be interpreted in legal terms as well.

Thus in these three cases of marriage, the election of bishops and Franciscan poverty the Church was not content with simply upholding

a religious value confined to the religious sphere.⁴³ It wanted these values to be effective in civil law as well as in church law. It is true that the medieval period did not employ the term 'human' rights. It is also true that the medieval world had practices we would now consider as utterly unsuited to human rights. But nonetheless it was in the Latin West that values were upheld in the law courts as 'rights'. The Latin Church had to contend with such a variety of political jurisdictions thus there was a need for an amphibious beast that could move from religious values into civil law and this is what rights are.

To return to the history of rights: the iniquities produced by humankind, by states and markets could have led, and did lead, to revolutions, wars, declarations of independence and the like. Rights were not the only possible response. Yet in Europe and America the idea of rights was adopted because it was available. It helped recreate a new uniformity of cultural discourse to replace the old uniformity of

43. Given that it is hard to distinguish religion and society in medieval Europe the fact that these rights were articulated in canon law does not mean that they are simply illustrative of religious rights. The right to freedom, noted in the context of choice of Bishops, is a standard civil and political right; the right to marry is recognised both in civil/political and social/economic/cultural rights; whilst the right to an adequate standard of living is clearly in the realm of social and economic rights. Some people would argue that medieval rights are unrelated to 18th century rights and that European rights are unrelated to Chinese rights. I cannot go into all of this discussion here but, to use a metaphor, I take it that the word 'rights' functions like the word 'rabbit' not like the word 'herbivore'. Black rabbits, white rabbits, big rabbits and small rabbits are all animals of the same species. Modern pet rabbits may differ somewhat from their medieval forbears but they are not radically different. Rights are like that. Kangeroos, deer, horses and cows are all herbivores but they are not closely related, nor did they all evolve in the same place. Medieval Rights, UN human rights, civic rights etc. are not like herbivores.

Christendom. It did this by appealing to new principles but it acted in a very similar way to the medieval pattern. These rights had to be implemented through a variety of political jurisdictions. Hence it seems to me that if rights are merely a response to states and markets it must just be considered a happy accident that they are largely uniform across the world. If rights arise, however, from a unified cultural base founded on basic human values there is more coherence to their global uniformity.

VI. Conclusion

Thus, while I concur with Donnelly and others in observing that rights are a product of modernity, I do not believe that they are simply a *response* to modernity. They could only arise, in some ways, because of pre-modernity: a pre-modernity in which universal values had to exist in a variety of legal jurisdictions and hence had to learn how to combine value and law in one. It is the contrast between cultural uniformity and political diversity in the Latin West that provided this environment and hence enabled the thinkers and writers of the modern age to have recourse to rights when they were faced with a situation in which there was no effective alternative universal cultural structure and where the growing power of the modern state was a threat to the individual person. The language of rights recreated a universal discourse, increasingly shorn of its religious context, that could defend the human person in the face of the growth of centralised, urbanised

and now technologically-advanced states.

Rights arise from the value system of a culture. They have a positive source. It is true that this positive source may only be rendered thematic in legal form in the face of abuses, and, in that sense, rights are a response, but they are a response that has a basis in positive values and not simply a negative response against. Indeed while the language of response may be adequate for outlining the historical way in which rights have come into the public domain, it cannot be an adequate explanation for what rights are.

It should be noted, if this is not already clear, that this paper points out why human rights arose in the European Latin West. It has claimed that there was a root planted in medieval times which could flourish when states and markets, and other factors, attacked the human person. In this sense my paper is a counterpart to Weber's argument that capitalism arose in Protestant Europe, not in China, or Needham's argument that modern science arose in Western Europe. However, to explain how something arises is quite different from discussing whether or not that thing (human rights, capitalism, science) is universalisable or can be transplanted into another culture.

My argument is not without implications for the human rights debate. I do believe that the answer to particularist cultural responses to rights must involve work in grounding rights within the value-systems of each culture. As we have noted cultures and values grow and hence we need to look at ways in which the rights that grew in the West can be grafted onto other cultures. I also believe that

nominalism gives a very weak account of rights and that it is perfectly legitimate to develop more satisfactory, deep, explanations of rights in terms of the values of cultures.

Maybe I can close with a simple image. Donnelly's account of rights as responses may be portrayed in terms of mushrooms. One morning we suddenly see the damp ground covered in mushrooms. They have no roots but there they are. So too in the damp oppression of modernity rights appear, rootless. My account sees rights as branches of a tree. They have roots in a particular soil. The branches flourish when the ground is damp and cuttings may be grafted onto trees in other cultures. If the cuttings are simply stuck in the new soil they will die. They only survive if they can be grafted onto existing trees, so too rights need to be grafted onto the value systems of other cultures.

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「將權利視為回應」 是否足以說明人權之起源？ 對傑克·唐納利之觀點的回應

雷敦穌*

傑克·唐納利認為人權是為了回應現代國家所產生的。本文先說明此論點，按照唐納利所強調的國家與市場兩個產生人權的來源加分析，並承認杜那利論說的基本目標在於確定人權的普遍性格。國家與其缺點的普遍化使人權自然產生回應。不過，本文認為杜那利的論述無法說明人權的本質。作為價值與法律之間的特殊產物，人權的產生只能在歐洲中世紀的環境中才得到圓滿的解釋。

關鍵詞：權利、價值、國家、市場、普遍性

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