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Justice and Rights

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Justice and Rights

Nicholas Wolterstorff

The aim of this article is to give the reader a synoptic view of justice in the thought of the Christian church and, more briefly, in its practice, over the centuries and today.

Scripture is foundational in the thought and life of the church, so the article begins by taking note of the prominent and distinctive role that justice plays in Christian scripture, and explores why some writers hold that justice has been superseded in the New Testament. The biblical writers employed the concept of justice without defining it. The most influential definition in the Western tradition occurs in the *Digest* of the Byzantine emperor Justinian: *justice is rendering to each what is their right or due*. After probing the implications of the Justinian definition, the article explores a dispute that arose, in the latter decades of the twentieth century, concerning what one might call the *deep structure* of rights: are rights all derived as correlatives of obligations imposed on us, or are some *inherent* in the rights-bearer on account of some worth or excellence that the bearer possesses?

Though few writers explicitly reject the Justinian definition of justice, a number of writers in recent years, Christians prominent among them, have argued that rights-talk has become so debased that it should be discarded in favour of talk about obligations, love, and so forth. The article explores reasons for holding that talk of rights remains important. It concludes by highlighting the role of justice in the worship of the church, and by pointing to the mixed record of the church with respect to the practice of justice.

Keywords: Social justice, Justinian, Derived vs. inherent rights, Obligations, Human rights, Dikaïosunê, Natural law

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1 Justice in Christian scripture

1.1 Justice in the Hebrew Bible/Old Testament

1.1.1 Terminology for justice in the Hebrew Bible/Old Testament

The role of justice in the thought and practice of the Christian community has been decisively shaped over the centuries by the way in which justice figures in the authoritative texts of the community, namely, the books comprising the Christian Bible. That, then, is where we must begin. Our analysis will necessarily be brief, only enough to give a sense of the distinctive features of justice in the writings that have founded and guided the Christian community.

The word in the Hebrew Bible/Old Testament that is commonly translated into English as 'justice' is *mishpat*. Scholars agree that in its original usage the term referred to the judgment issued in a dispute or in a case of wrongdoing – and, by extension, to the situation effected by such a judgment, viz., justice. The corresponding verb was *shapat*. In his *Social Justice in the Hebrew Bible* (1996), the Hebrew Bible scholar Bruce Malchow writes,

Mishpat [...] is the decision or action that results when someone *shapat*. Thus it can mean judgment when a person judges or justice when someone brings a situation to an appropriate resolution. (1996: 16)

He continues,

The implication of *mishpat* is that rights are due to every individual in the community, so that when a person *shapat*, those rights are to be upheld [...] It was the function of the judge to restore rights to those from whom they have been removed. (1996: 16–17)

There are many examples, in the Old Testament/Hebrew Bible, of this use of the term. Here is one from the so-called *Deuteronomic Code*, delivered by Moses to Israel:

You shall appoint judges and officials throughout your tribes, in all your towns that the Lord your God is giving you, and they shall render just decisions for the people. You must not distort justice, you must not show partiality; and you must not accept bribes, for a bribe blinds the eyes of the wise and subverts the cause of those who are in the right. Justice, and only justice, you shall pursue. (Deuteronomy 16:18–20)

Though *mishpat* referred originally either to a judgment or to the situation effected by a right judgment, there are many passages in the Hebrew Bible/Old Testament where it is no longer used with that original meaning but refers, instead, to justice in the ordinary interactions of people with each other. Here is one example:

It is well with those who do generously and lend,
who conduct their affairs with justice. (Ps 112:5)

A term that is closely associated with *mishpat* in the Hebrew Bible/Old Testament is *tsedeqa*, commonly translated into English as ‘righteousness’. The two terms are rather often paired: *mishpat* and *tsedeqa*, justice and righteousness. About the meaning of *tsedeqa*, Malchow writes, ‘[t]he etymology of *tsedeqa* helps little in illuminating its meaning. The cognate Arabic root signifies straightness, hardness, or firmness’ (the English expression ‘going straight’, said of someone released from incarceration, captures those connotations). Malchow continues:

But none of these ideas can explain the variety of uses of [*tsedeqa*] in the Hebrew Bible. A study of the uses of [the term] reveals that it refers to a relationship between two parties and implies behaviour which fulfils the claims arising from such an involvement. *Tsedeqa* is, thus, the fulfilment of the demands of a relationship [...] When people fulfil the conditions imposed on them by relationships, they are righteous. Every relationship has special obligations [...] In those relationships all had their own right [...] It was the function of the judge to restore rights to those from whom they had been removed. (1996: 16–17)

Though, as noted above, *tsedeqa* in the Hebrew Bible/Old Testament is commonly translated into English as ‘righteousness’, that is sometimes not a felicitous translation. The term ‘righteousness’, in present-day English, refers to a character-trait. But rather often the context in which *tsedeqa* occurs in the Hebrew Bible/Old Testament makes clear that the reference is not to a character-trait but to a way of acting: specifically, acting rightly, doing the right thing, ‘going straight’. An example of the point is Psalm 106:3. In the NRSV it reads:

Happy are those who observe justice,
who do righteousness at all times. (Ps 106:3)

The locution ‘do righteousness’ makes no sense. A character-trait is not something one does. One doesn’t do courage. The Psalmist’s thought is clearly this:

Happy are those who observe justice,
who act rightly at all times.

1.1.2 Distinctive features of references to justice in the Hebrew Bible/Old Testament

Let us move on beyond these terminological points to identify some of the distinctive ways in which justice figures in Christian scripture, ways that have shaped the Christian tradition. The feature that calls for mention first of all is that at the centre of what the biblical writers

say about justice is their declaration that God loves justice and that God enjoins human beings to imitate God in doing and seeking justice. 'I the Lord love justice', writes the prophet Isaiah (61:8). And in a well-known passage the prophet Micah writes,

The Lord has told you, O mortal, what is good,
and what does the Lord require of you
but to do justice, and to love kindness,
and to walk humbly with your God. (6:8)

Plato's *Republic* is an extended dialogue on justice; Aristotle's *Nicomachean Ethics* includes a substantial discourse on justice. In neither of these is there any mention of divinity; the accounts offered are purely secular. God is up-front-centre in what the biblical writers say about justice.

A second distinctive feature of what the biblical writers say about justice is that it is almost always social (systemic) justice that they have in mind – that is, justice and injustice in the laws and social practices of Israel (this is reflected in the title of Bruce Malchow's book, *Social Justice in the Hebrew Bible*). When condemning injustice, they seldom name names of individual wrongdoers. The prophet Micah writes,

The official and the judge ask for a bribe,
and the powerful dictate what they desire;
thus they pervert justice. (7:3)

No mention of names.

A third distinctive feature of what the biblical writers say about justice is that their concern for social justice in Israel typically takes the form of emphasizing the condition of the widows, the orphans, the aliens, and the impoverished – call them, *the quartet of the vulnerable*. So striking is this that one is compelled to ask: Why? What does it mean?

An initial point to make is that, as Malchow details in his opening chapter, many of the Near Eastern law codes of the time likewise show a concern for the condition of the vulnerable; it's likely that Israel was influenced on this point by the surrounding cultures. But the writers of the Hebrew Bible/Old Testament were not simply sponges soaking up the cultures of the surrounding nations; their writings are shot through with vigorous polemics against various practices of the surrounding nations. So something more has to be said than just that Israel was likely influenced on this point by the practices of the surrounding nations.

South American liberation theologians, writing in the sixties and seventies of the last century, suggested that the emphasis by the biblical writers on the quartet of the

vulnerable has theological significance; it is, they said, an indication of what they called ‘God’s preferential option for the poor’.

It’s clear from Scripture that God loves all those who bear God’s image, rich and poor alike. Why might it nonetheless be the case that God has a preferential option for the poor – or, more precisely, for the vulnerable?

Nowhere in Plato’s long dialogue about justice in the *Republic* does he make reference to the vulnerable in Athens. The reason he does not is that he is articulating principles of justice for an ideal society. The biblical writers hold out the hope of a messianic age; that is the form the ideal society took for them. But when they speak about justice, their eye is seldom on justice in the messianic age but almost always on justice and injustice in this present fallen, far-from-ideal, age. They represent God as working to redeem humankind, and the cosmos in general, from this fallenness, and as calling us to share in this cause.

Those who seek the undoing of social injustice must set priorities. No doubt the wealthy and the powerful in Israel were sometimes victims of injustice, as they are in our society – victims of *episodes* of injustice. The injustice experienced by the widows, the orphans, the aliens, and the impoverished in Israel was not *episodes* of injustice but *the daily condition* of injustice. It’s because the biblical God is a redeeming God that there is, in God, a preferential option for the vulnerable, an option that we are to imitate.

A fourth distinctive feature of how justice figures in the Hebrew Bible/Old Testament is that, over and over, the writers connect justice with what they call, in Hebrew, *shalom* (for example, Isa 12:16–17). *Shalom*, often rendered as ‘peace’ in English translations, consists of flourishing in all dimensions of one’s existence in one’s relation to God, to one’s fellow human beings, to the natural world, to human artifacts, to oneself. The thought of the writers was that, insofar as one is a victim of injustice, one is not fully flourishing even if one is, for some reason, content with one’s condition. Though true and full *shalom* goes beyond what justice requires, justice is a condition of *shalom*. Justice is, as it were, *shalom*’s ground floor.

1.2 Justice in the New Testament

1.2.1 Jesus identified as inaugurating God’s reign of justice

In the Gospel of Luke we read that, shortly after Jesus began speaking in public, he attended the synagogue in Nazareth on a Sabbath and was invited to read scripture and comment on what he had read. He was handed the scroll of the prophet Isaiah, unrolled it, and, on Luke’s narration, read the following:

The Spirit of the Lord is upon me,
because he has anointed me to bring good news to the poor.
He has sent me to proclaim release to the captives

and recovery of sight to the blind,
to let the oppressed go free,
to proclaim the year of the Lord's favour. (4:18–19)

Luke reports that Jesus then rolled up the scroll, gave it back to the attendant, and sat down. 'The eyes of all were fixed on him', writes Luke, expecting him to offer some comment on what he had read. Jesus then said, '[t]oday this scripture has been fulfilled in your hearing'.

What Luke reports Jesus as reading was an adaptation of the opening verses of Isaiah 61, a passage that is a close parallel of a passage a few chapters earlier in which the prophet spoke explicitly of God's call for justice

Is not this the fast that I choose:
to loose the bonds of injustice,
to undo the thongs of the yoke,
to let the oppressed go free
and to break every yoke? (58:6–7)

The import of Jesus' declaration, '[t]oday this scripture has been fulfilled in your hearing', is unmistakable: Jesus identified himself as the one anointed by God to proclaim the coming of justice in 'the year of the Lord's favour' (the Year of Jubilee).

In Matthew's gospel, Jesus has already been teaching and healing for some time when the writer intrudes himself into the story he has been telling to offer his interpretation of Jesus' identity – the same interpretation as that which Jesus himself offered in the synagogue. Jesus is 'to fulfil what had been spoken through the prophet Isaiah', namely,

I will put my Spirit upon him,
and he will proclaim justice (*krisis*) to the Gentiles [...]
He will not break a bruised reed
or quench a smouldering wick
until he brings justice (*krisis*) to victory. (12:17-20)

1.2.2 The claim that love supersedes justice in the New Testament

In spite of these identifications of Jesus as the one appointed by God to bring about God's reign of justice, a number of twentieth-century theologians and ethicists have argued that justice has been superseded by love in the New Testament. Jesus, it is noted, issued a love-command; he did not issue a justice-command. The classic statement of this position is *Agape and Eros* by the Swedish Lutheran bishop Anders Nygren, published in its original language in the 1930s (Nygren 1953; For a critical discussion of Nygren's typology, see Streiker 1964).

The argument of Nygren and others for this position hinges on their interpretation of the Greek term *agapê*, used by the three synoptic gospels in their report of the episode in which Jesus issued the two love-commands – love God with all one’s being and one’s neighbour as oneself (Matt 22:34–40; Mark 12:28–34; Luke 10:25–27). Nygren interpreted agapic love as gratuitous giving of oneself to the good of the other, paying no attention to what justice might require. He was admirably explicit as to why he adopted this interpretation of agape. The paradigm of agapic love, he argued, is God’s forgiveness of the sinner. God’s forgiveness is sheer grace; sinners cannot claim that justice requires that God forgive them (a Thomistic understanding of *agape* and *eros* is articulated in Mattison 2012).

In assessing this interpretation of agapic love, a point to note is that Jesus, in remarking that ‘on these two commandments hang all the law and the prophets’ (Matt 22:40), was not just presenting these two commandments as the ‘essence’ of the law and the prophets but was quoting from the Torah: Deuteronomy 6:5 for the first command, Leviticus 19:18 for the second. The contexts in which the two love-commands occur in the synoptic gospels give no clue, one way or another, as to whether Nygren’s interpretation of the meaning of *agapê* was correct. The thought occurs to one that perhaps the context in which the Hebrew term for ‘love’ occurs in the passages Jesus was quoting does give us a clue. And so it does.

In Leviticus, the command to love one’s neighbour as oneself concludes a long list of injunctions to Israel as to how it is to live. The command occurs there not as one-among-other commands but as summing up the preceding injunctions: ‘In short, love your neighbour as yourself’.

For our purposes here, what’s important to note is that, among the long list of injunctions summed up by the command to love one’s neighbour as oneself, are injunctions to act justly: ‘You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great; with justice you shall judge your neighbour’ (19:15).

The conclusion to be drawn is that acting justly is not incompatible with acting out of agapic love but is, rather, an example of such love. Love and justice are to be understood in such a way that love incorporates justice. Love often goes beyond what justice requires; forgiveness is, indeed, an example of such love-beyond-justice. But love always does *at least* what justice requires (an excellent discussion of the significance of the neighbour-love command in the context of the Hebrew Bible generally, not just in its immediate context in Leviticus, is Lenn Goodman 2008).

1.2.3 Common English translations conceal the prominence of justice in the New Testament

Before we leave the topic of justice in Christian scripture we must briefly address an issue of translation. The word 'justice' occurs often in English translations of the Hebrew Bible/Old Testament but seldom in English translations of the New Testament; ordinary readers can be forgiven for thinking that justice has been superseded. In the Septuagint, the third century BCE translation of the Hebrew Bible into Greek, the Hebrew *mishpat* was translated as *krisis* and *tsedeqa* as *dikaionunê*. *Krisis* occurs a few times in the Greek of the New Testament and is always translated as 'justice'. *Dikaionunê* and its grammatical cognates occur over three hundred times. The noun *dikaionunê* is almost always translated as 'righteousness', the adjective *dikaion* as 'righteous'.

When *dikaionunê* occurs in classical Greek texts it is almost always translated into English as 'justice', and *dikaion* as 'just'. So, when a person who has been working with classical Greek texts and their English translations comes to English translations of the Greek New Testament, they are in for a surprise. Here *dikaionunê* is translated not as 'justice' but as 'righteousness'. In present-day idiomatic English, 'righteousness' is not a synonym of 'justice'. 'Righteousness' denotes a certain trait of personal character. In everyday speech we don't often, nowadays, describe a person as *righteous*; when we do, what we suggest is that the person is scrupulously concerned with their personal rectitude. Justice, by contrast, is an inter-personal normative state of affairs, specifically, the state of affairs that obtains when people treat each other justly. And a just person is one who habitually treats their fellows justly.

If *tsedeqa* in the Hebrew Bible/Old Testament is commonly translated into English as 'righteousness', and if one knows that the Septuagint translation of the Hebrew Bible translated *tsedeqa* as *dikaionunê*, then one will, of course, feel a strong pull, when translating the Greek New Testament into English, to translate *dikaionunê* as 'righteousness'. But if, on the other hand, one comes to the New Testament from reading and translating classical Greek texts, one will wonder.

A number of considerations enter into any such issue of translation, prominent among them being context. And to this writer, it appears that, in a number of cases, context requires that *dikaionunê* in the New Testament be translated as 'justice' (or as 'doing the right thing') rather than as 'righteousness'. Here are just three examples.

In the Beatitudes as reported in Matthew 6 we read, in the NRSV translation, '[b]lessed are those who are persecuted for the sake of righteousness [*dikaionunê*], for theirs is the kingdom of heaven'. This is an implausible translation. Righteous people are typically either admired or ignored; they are seldom persecuted. It is those who work for social justice who get under people's skin and find themselves persecuted. Jesus is blessing those who are persecuted for the sake of justice (the *Jerusalem Bible* translates the passage as, '[h]appy are those who are persecuted in the cause of right').

Another of the Beatitudes as we find them in Matthew reads, again in the NRSV translation, '[b]lessed are those who hunger and thirst for righteousness [*dikaiosunê*], for they will be filled'. This translation is strange. One doesn't hunger and thirst for a character-trait, be it righteousness, perseverance, or whatever. It makes sense to say that one is *striving* to be righteous, but not that one is *hungering and thirsting* for righteousness. That makes it sound as if righteousness is out of one's control. But it's not. Act uprightly; then you'll be righteous. By contrast, whether justice is present in society is largely out of one's control; social justice depends on what others are doing, not just on what one is oneself doing. That's why one hungers and thirsts for justice. Jesus is blessing those who hunger and thirst for justice in society (the *Jerusalem Bible* translates the passage as, '[h]appy are those who hunger and thirst for what is right').

In Romans 1:17, Paul states the main theme of the letter that follows. In the NRSV translation, the passage reads: the gospel 'is the power of God for salvation to everyone who has faith, to the Jew first and also to the Greek. For in it the righteousness [*dikaiosunê*] of God is revealed through faith for faith, as it is written, "[t]he one who is righteous [*dikaios*] will live by faith". The main theme of the letter that follows is that God offers justification impartially to Jews and Greeks alike. 'God shows no partiality' (Rom 2:11). To distribute a benefit impartially is to act justly. The main theme of Romans is not God's righteousness but God's justice.

The New Testament scholar N. T. Wright, in his recently published translation of the New Testament, renders the passage as follows:

The good news [is] God's power, bringing salvation for everyone who believes – to the Jew first, and also, equally to the Greek. This is because God's covenant justice is unveiled in it from faithfulness to faithfulness. As it says in the Bible, 'the just shall live by faith'. (Wright 2011)

The *Jerusalem Bible* translates, '[t]his is what reveals the justice of God to us' (a fine extended discussion of justice in the New Testament is Timothy Keller 2013).

2 Ulpian's definition of 'justice' in terms of what one has a right to

The biblical writers do not give an account of justice; they do not explain what justice is. Assuming that their readers know what justice is, and injustice, they speak of God's love of justice and of God's injunction to us to do and seek justice, and they condemn the injustice that they find all around them. The Old Testament scholar, Walter Brueggemann, in his *Theology of the Old Testament*, says that the dominant overarching character of 'Israel's

speech about God is that of testimony' (Brueggemann 1997: 119). The writers are 'giving their testimony', as we say, not developing theory.

Shortly after Justinian became ruler of the Byzantine Empire in 527 CE, he ordered the preparation of three compilations of Roman law: the *Code*, which collected the legal pronouncements of the Roman emperors, the *Institutes*, a beginning student's textbook, and the *Digest*, by far the largest and most influential of the three texts, which culled and organized everything of value from earlier Roman law. The influence of the *Digest* on the subsequent legal tradition of Christendom was enormous; it became its foundational legal text.

The *Digest* opened with what became a well-known definition of 'justice' that came from the third-century Roman jurist, Ulpian. Justice (*iustitia*), said Ulpian, 'is a steady and enduring will to render to each their *ius* (*suum ius cuique tribuere*)'. The use in Ulpian's time of the Latin term *ius* does not map precisely onto the use of any term in present-day English (see Finnis 1980: 209). Translators use a range of terms to capture Ulpian's thought. To be just is to render to each person what is their due, their right, what is theirs by right, what they have a right to, what is owed them, what they have a rightful claim to, what they are entitled to. It's the virtue of justice – *being just* – that Ulpian was defining. Justice is present in society insofar as its members exercise this virtue.

There are two fundamentally different sorts of justice, a point made already by Aristotle. One is justice in our ordinary engagements with each other: parents and children treating each other justly, banks and clients treating each other justly, etc. Writers have given this sort of justice a variety of different names; let's call it *first-order* justice. The other sort of justice is the sort that is relevant when there has been a violation of first-order justice; call it *second-order* justice. Down through the ages, second-order justice has taken a wide variety of different forms, and continues to do so today: amputations, beheadings, stonings, putting to death by other means, incarcerations, beatings, exile, censure, reprimands, and so on.

It is likely that, when Ulpian proposed his definition of 'justice', he was either not distinguishing these two sorts of justice or intending that his definition apply to both. Parents and children rendering to each other their *ius* is *iustitia*; society rendering to wrongdoers their *ius* is also *iustitia*. Be that as it may, quite different things have to be said about these two sorts of justice when we go beyond offering a formula that applies to both to analysing what constitutes each of them. Of the two sorts, first-order justice is basic in that, if there were no such thing as first-order justice (and injustice), there would be no such thing as second-order justice (and injustice). For that reason, let us focus our attention on first-order justice in what follows – though a good deal of what will be said about first-order justice pertains to second-order justice as well.

There are few writers, if any, who explicitly contest Ulpian's explanation of justice in terms of rendering to one's fellows what they have a right to. Some of those who write about justice pay no attention to the connection between justice and rights. And, as we shall see later, some hold that thought and talk about rights is so seriously abused in the modern world that we should forego such thought and talk. But, to the best of this writer's knowledge, no one explicitly contests Ulpian's thought, that justice – in contrast, say, to benevolence – consists in rendering to people what is theirs by right, what they have a right to, what they have a rightful claim to, what would wrong them if they were denied it.

Unlike Ulpian, Aristotle, in his discussion of justice in the *Nicomachean Ethics*, does not say what justice is; he does not say what constitutes justice. What he does, instead, is offer a general characterization of those situations in which justice is present: justice is present, he says, when benefits and/or burdens are distributed equitably. That general characterization is compatible with Ulpian's account of what justice is. One might hold that, in general, what persons have a right to is that they be treated equitably in the distribution of benefits and burdens.

Aquinas was, of course, profoundly influenced in his thought by Aristotle. Given that fact, and given the fact that Aristotle nowhere says or suggests that justice consists in being rendered what is due one, what one has a right to, one wonders whether, perhaps, the Ulpian account of justice is missing in Aquinas. It is not. Aquinas does say that 'justice denotes a kind of equality' (*S. Th.* II-II 57, 1; see also II-II 58, 2 and 59, 2; Dominican translation). But clearly he does not regard that as an explanation of what justice is. For when he asks in *S. Th.* II-II, 58, 1, 'what is justice', how 'justice is fittingly defined', his answer is that justice is 'rendering to each his right [...] A man is said to be just because he respects the rights [*iura*] of others'. Aquinas goes on to say that justice can also be defined as rendering to each 'what is his' or what 'is due to him' (*S. Th.* II-II, 58, 11).

The contemporary neo-Thomist legal theorist John Finnis echoes Aquinas – and Ulpian:

[The] concept of justice is that of *duty*, of what is owed (*debitum*) or due to another, and correspondingly, of what that other person has a right to (*viz.* roughly, to what is his 'own' or at least his 'due' by right) [...] [J]ustice concerns not every [...] dealing between one person and another, but only those relations and dealings which are necessary or appropriate for the avoiding of a wrong (Finnis 1980: 162).

It is worth remarking, parenthetically, that in the passages quoted earlier from Bruce Malchow, in which he explained the meaning of the terms *mishpat* and *tsedeqa* in Hebrew scripture, he employed the term 'rights' five times.

3 The twentieth century dispute concerning the deep structure of rights

3.1 Rights as derived vs. rights as inherent

Though few, if any, writers contest the definition of 'justice' that opens Justinian's *Digest*, a disagreement arose among Christian thinkers in the latter decades of the twentieth century concerning what might be called the *deep structure* of rights. A number of participants in the discussion have placed the basic point of disagreement in the context of what they claim to be a fundamental change from the pre-modern way of thinking of the deep structure of rights to the characteristically modern way. The following passage from Oliver O'Donovan's *The Desire of the Nations* can serve as an entry to the discussion:

The language of subjective rights (i.e., rights which adhere to a particular subject) has, of course, a perfectly appropriate and necessary place within a discourse founded on law. One's 'right' is the claim on which the law entitles one to demand performance [...] What is distinctive about the modern concept of rights, however, is that rights are taken to be original, not derived [...] The right is a primitive endowment or power with which the subject first engages in society, not an enhancement which accrues to the subject from an ordered and politically formed society. (O'Donovan 1996: 262)

What is it about some laws that generates a right in certain persons? It is this: laws of the sort in question impose on certain agents an obligation to perform (or refrain from performing) certain actions. And if X has an obligation to Y to perform (or refrain from performing) act \emptyset , then Y has a right vis-à-vis X to X's performing (or refraining from performing) act \emptyset . Y's right is derived from the obligation imposed by the law on X.

O'Donovan has ordinary laws in mind in this passage; and the first two sentences give the impression that he is claiming that, in the pre-modern way of thinking about rights, rights were limited to those implied by such laws. But the contrast, *derived* versus *original*, suggests that that is not his thought, as does the remainder of the passage in which the sentences quoted occur. Whatever it is that imposes on some agent an obligation to some person or social entity to perform (or to refrain from performing) a certain action, there will be a right derived from that obligation. Commands impose obligations. Promises impose obligations. Contracts impose obligations. Social practices of certain sorts impose obligations. And, of course, God's commands impose obligations. Whatever it is that imposes an obligation of the sort in question, there is a right derived from that obligation. What O'Donovan is implicitly claiming is that, insofar as pre-modern thinkers thought and spoke of rights, they thought of them as derived in this way. O'Donovan makes clear that he shares this way of understanding the deep structure of rights.

And what, then, is the different, purportedly modern, understanding of that deep structure? O'Donovan describes it as rights understood as *original*. A somewhat more felicitous word would be 'inherent'. Of course, everyone agrees that a good many of our rights are derived from obligations. The purportedly modern idea is that not all are so derived; some are

inherent. Some we have by virtue of *something about us*, rather than being *derived* from an obligation *imposed upon* someone.

What might that 'something about us' be? By far the most common view is that we possess some of our rights on account of some worth we have, some excellence, some goodness, some praiseworthiness. Certain of our rights are what due respect for our worth requires. You have a right to be treated a certain way just in case, were you not treated that way, you would not be treated in a way that befits your worth, your dignity, your praiseworthiness. The philosopher Jean Hampton puts the idea well: A person wrongs another, treats them as they have a right not to be treated, 'if and only if (while acting as a responsible agent) she treats him in a way that is objectively [...] demeaning, that is, disrespectful of [that person's] worth' (Hampton and Murphy 1988: 52; passage italicized in original). Due respect for your worth as a human being requires that you not be tortured. Due respect for your worth as the one who won the race requires that you be honoured in whatever way is appropriate for winning. Et cetera. This is the understanding of inherent rights expressed in all the UN rights documents; they all ground rights in dignity.

Here is not the place to consider in detail whether the story told by O'Donovan and others, concerning a fundamental change in how the deep structure of rights has been understood, is correct. Suffice it to note that, since the publication of O'Donovan's book, there have been two seminal studies by legal historians concerning the history of the employment by Western Christian lawyers and theologians of the idea of natural rights: Brian Tierney's *The Idea of Natural Rights: Natural Law and Church Law 1150–1625* (1997), and John Witte's *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (2007). Natural rights – or what Witte calls 'human rights' – are rights that human beings have whether or not they have been conferred on them by some human act or practice. Rights that we have on account of some action on God's part are, by this account, natural rights. Determining whether the story told by O'Donovan and others is correct would require looking closely at the writers to whom Tierney and Witte call attention, to determine what they regarded as the deep structure of natural rights: did they regard all such rights as derived from God's commands, or did they regard some of them as inherent.

Whatever be the history, to this writer it appears that rights cannot all be derived from obligations imposed by laws, social practices, commands, promises, and the like. Suppose I address to you a speech act in the grammatical form of a command to perform some act. My speech act generates in you an obligation to perform that act only if I have a prior right to issue that command to you. Absent that prior right, my speech act is nothing other than an attempt to exercise power over you. That prior right on my part might, in principle, have been generated in me by some command issued to me by someone else. But any

such chain has to end with someone's inherent right to issue a command to someone (this argument is developed extensively in Wolterstorff 2008: chapter 12).

3.2 Inherent rights presupposed in scripture

Scripture speaks extensively of God's commands, and thereby implies a multiplicity of derived rights. But the point just made about prior rights implies that presupposed in Scripture is the existence of inherent rights on God's part. God has a right to issue commands to us, a right prior to those commands rather than derived from them, hence an inherent right. It is by virtue of God's excellence as our creator and redeemer that God has the right to issue commands to us.

The biblical writers not only present God as having excellence that require due respect on our part, but presents human beings as having such excellence as well. The psalmist of Psalm 8 can scarcely contain himself when he thinks of human worth. God has placed human beings just a bit lower in the cosmic scale of worth than divine beings (or angels) and 'crowned them with glory and honor'. God has 'given them dominion over the works of [God's] hands'. The psalmist is, of course, echoing the first chapter of Genesis, where God resolves to create human beings in God's image.

Later in Genesis, in a sentence within the blessing that God pronounces upon Noah and his children, we read,

Whoever sheds the blood of a human being,
by a human being shall that person's blood be shed;
For in [God's] own image
God made humankind. (9:6)

The proscription against murder is grounded here not in God's command but in the worth or dignity of human beings as bearers of God's image. By virtue of having the dignity of bearing God's image, all human beings possess an inherent right not to be murdered – and much else besides, of course.

4 Human rights

This observation, that by virtue of having the dignity of bearing God's image, all human beings have certain inherent rights, leads naturally to some remarks about *human* rights. So prominent in the contemporary discourse about rights is the idea of *human* rights that it tends to obscure the fact that human rights are a species of the rights that human beings have, not the whole. So what is that species of rights that are human rights?

Reading through the list of what the various UN documents on human rights cite as examples is an exercise in bewilderment. Among the rights the 1948 Declaration mentions

is the right to an annual paid vacation. What could possibly be meant by citing this as a human right when many, perhaps most, societies have no such thing as vacations? It's impossible to extract a coherent concept of human rights from the examples given. But if we ignore the lists, with all their quirkiness, and pick up on some clues as to how the authors of the documents were implicitly thinking, a more or less coherent concept of human rights emerges.

One clue is how the documents were intended to function. They were intended to function as a critique of extant laws and practices of nations around the globe. What that implies is that human rights are rights that *ought to be recognized* by the laws and practices of societies whether or not they are in fact recognized. The fact that the documents declare that human rights are grounded in dignity points in the same direction.

Another clue is the word 'human'. Now and then the term 'human rights' is used by writers to single out the rights human beings have in contrast, say, to the rights animals have. That is not the idea here. A student's right to an A in the course she has taken is a right that a human being has, but it is obviously not an example of what the authors of the UN documents were implicitly thinking of as a human right.

Might the implicit thought of the authors have been that a human right is a right such that the only status one needs to possess the right is that of being a human being – not any type of human being, just a human being? That seems not to have been their thought. The authors of the UN documents were focused entirely on the rights of those human beings who can function *as persons in society*, not on the rights of all human beings whatsoever, whether or not they can so function. They were implicitly thinking of human rights as the rights of such persons.

But suppose one holds that even those human beings who cannot function as persons in society – human beings sunk deep into dementia, human beings in a coma – have certain rights. Surely such rights should be included under the rubric *human rights*.

What this implies is that the concept of human rights cannot be explained as the rights one has *qua human being who can function as a person in society*, because that excludes the rights of those human beings who cannot so function. But neither can the concept be explained as the rights one has just *qua human being*, because then none of the rights cited in the UN documents would be human rights; all of them are the rights of those human beings who can function as persons in society. Human rights are the disjunction of these. Human rights, so this writer suggests, are best thought of as those one has either *qua human being* or *qua human being who can function as a person in society*.

The idea that even those human beings who cannot function as persons in society nonetheless have rights was introduced above as a supposition. What we saw in the

preceding section is that all human beings, just by virtue of having the dignity of being created in the image of God, have certain inherent rights, whether or not they are capable of functioning as persons in society. Deep in the Christian tradition, and in the traditions of the other ‘religions of the book’ – Judaism and Islam – is the conviction that all human beings have inherent rights by virtue of each having the dignity of being a creature created in the image of God and being loved by God (O’Donovan 2015; Puffer 2017). Whether secular ways of thinking have the resources for grounding the rights of those human beings who cannot function as persons in society is an open question (this question is explored at length in Wolterstorff 2011: 177–200).

5 Rights and obligations

5.1 The principle of correlatives between obligations and rights

The principle formulated above concerning the relation of obligations to rights was this: If X has an obligation to Y to perform (or refrain from performing) act \emptyset , then Y has a right vis á vis X to X’s performing (or refraining from performing) act \emptyset . The converse is also true: if Y has a right vis á vis X to X’s performing (or refraining from performing) act \emptyset , then X has an obligation to Y to perform (or refrain from performing) act \emptyset . Call the two principles together, *the principle of correlatives between obligations and rights*. Or for short, *the principle of correlatives*.

The principle of correlatives naturally raises in one’s mind this question: if obligations and rights are correlative in this way, could rights-talk be eliminated without loss from our moral vocabulary in favour of talk about obligations and duties? In many quarters nowadays, including Christian quarters, there is resistance to thought and talk about rights. The reasons for this resistance are varied (see Wolterstorff 2013: 37–41; and Ver Beek and Wolterstorff 2019: 103–109). But among the most common reasons is the claim that rights-talk is made to order for expressing one of the most malignant diseases of modern society, namely, the mentality of possessive individualism. It’s made to order, so it is said, for an ‘entitlement society’ such as ours in which individuals place themselves at the centre of the moral universe, focusing on their own entitlements to the ignoring of their obligations towards others and to the neglect of those virtues that are indispensable for the flourishing of our lives together. Rights-talk, so it is claimed, both encourages and is encouraged by the possessive individualism of the capitalist economy and the liberal polity. The theologian Joan Lockwood O’Donovan puts the point crisply: ‘the modern liberal concept of right belongs to the socially atomistic and disintegrative philosophy of possessive individualism’ (O’Donovan 1998b: 51; for a critical account of O’Donovan and Wolterstorff, see Carlson 2016).

So once again the question: given the principle of correlatives, if rights-talk is commonly abused in this way, why not eliminate it in favour of talk about obligations and duties?

5.2 The language of rights is for bringing to speech the patient dimension of the moral order

A preliminary point to be made in response to this question is that talk about duties is as subject to abuse as is talk about rights. Just as the possessive individualist employs the language of rights to focus on his own right to be treated in certain ways by others to the neglect of the rights of others to be treated in certain ways by him, so too the authoritarian individual employs the language of duty to focus on the duties of others to treat him in certain ways to the neglect of his duties to treat others in certain ways.

The important point to be made, however, is that certain things of great importance would be lost if we eliminated rights-talk from our moral vocabulary. The moral order has two dimensions, distinct but intimately connected, the agent-dimension and the patient-dimension, the dimension of what we do and the dimension of how we are done unto. The principle of correlatives specifies an intrinsic connection between these two dimensions; it does not imply that there is just one dimension with two distinct ways of speaking of that one dimension. Consider an analogy: there is an intrinsic connection between the equality of sides in a triangle and the equality of internal angles; but *equality of sides* is not the same property as *equality of angles*.

The language of obligation, duty, responsibility, and the like, is for bringing to speech the agent-dimension of the moral order; the language of rights, of what is due one, of being wronged, is for bringing to speech the patient-dimension of the moral order. That these are indeed distinct dimensions of the moral order is especially clear from the terms we use to describe a violation or breakdown in these dimensions: someone who does not do what they ought to do is *guilty*; someone who is not treated as they have a right to be treated is *wronged*. Being guilty is obviously not the same thing as being wronged.

In some situations, it is important to bring to speech the agent-dimension of the moral order by speaking of responsibilities; in other situations, it's important to bring to speech the patient-dimension by speaking of rights. Consider the abused wife. With the language of obligation and duty she can bring to speech the agent-dimension of the situation, the moral significance of what her husband is doing. He is failing in his obligations to her, his duties, his responsibilities; he is guilty. But she cannot bring to speech the patient-dimension of the situation, the moral significance of how she is being done unto. For that, she needs the language of rights: she is being wronged, her rights are being violated, she is not being rendered what is due her.

It is no accident that all the great social justice movements of the twentieth century, struggling against one or another form of systemic injustice, employed the language of rights: women's rights, children's rights, labour rights, civil rights, on and on. It was their

use of such language that enabled members of those movements to bring to speech the moral condition of those who were being systemically wronged.

In September 1985 a remarkable pamphlet called *The Kairos Document* was issued by over 150 theologians and church leaders in South Africa who were participants in the struggle against apartheid. In what they say about 'Church Theology', in a section of the pamphlet titled 'Justice', the authors point to the difference between the two dimensions of the moral order to which we have been calling attention. They state that those in power prefer to attend only to the agent-dimension, and they explain why it is important to bring the patient-dimension into the discussion. The pamphlet was issued before the abolition of apartheid in South Africa:

It would be quite wrong to give the impression that 'Church Theology' in South Africa is not particularly concerned about the need for justice. There have been some very strong and very sincere demands for justice. But the question we need to ask here, the very serious theological question is: What kind of justice? An examination of Church statements and pronouncements gives the distinct impression that the justice that is envisaged is the *justice of reform*, that is to say, a justice that is determined by the oppressor, by the white minority and that is offered to the people as a kind of concession [...] The general idea appears to be that one must simply appeal to the conscience and goodwill of those who are responsible for injustice in our land. The problem we are dealing with here in South Africa is not merely a problem of personal guilt [...] We cannot just sit back and wait for the oppressor to see the light so that the oppressed can put out their hands and beg for the crumbs of some small reforms. That in itself would be oppressive and degrading.

There is something else of great importance that would be lost if we eliminated rights-talk from our moral vocabulary. A feature of rights that we have thus far not taken note of is what is sometimes called their *trumping* force, sometimes, their *peremptory* force. The idea is this: if you have a right to my treating you a certain way, then, no matter how many good things I might bring about by not treating you that way, I am morally required to treat you that way (a full discussion of this point would require distinguishing between *prima facie* rights and *ultima facie* rights; the principle stated holds for the latter, not the former).

The best way to see that rights do indeed have this trumping force is to recall the connection, noted above, between rights and obligations. If you have a right to my treating you a certain way, then I have an obligation to treat you that way. But if I have an obligation to treat you that way, then I am morally required to treat you that way, *period*, no matter how many good things I might otherwise bring about. Nothing trumps obligation.

The twentieth century was rife with authoritarian regimes pursuing policies that they claimed to be for the greater good over the long haul: Hitler, Stalin, Pol Pot, the Afrikaners. If we do not have available to us the language of rights to call attention to the fact that, no matter how much good such policies might bring about, they are nonetheless morally unacceptable because they are trampling on the rights of people, we have no way of

putting the brakes on such (self-perceived) benevolence. The point is relevant at the micro-level as well. All too often, benevolence is extended in such a way as to humiliate the recipients. We need the recognition and language of rights for putting a brake on paternalistic benevolence.

6 Rights in the life of the Christian faith community

6.1 Justice in the social action of the Christian community

Let us bring this article to a conclusion by considering the role of justice in the life of the Christian community, beginning with its role in the daily life of the community and moving on to its role in the worship of the community.

The Christian community has a very mixed record when it comes to listening to the biblical call to act justly and to promote justice in society. One discerns in many quarters a preference for dispensing charity over joining in the struggle for social justice – a preference for alleviating suffering over seeking to undo the cause of the suffering, should that cause be oppression or neglect rather than natural disaster. This preference for charity will, of course, characterize those who understand justice as superseded in the New Testament by love. But there are also reasons rooted in human nature for preferring the dispensing of charity over participating in the struggle for social justice.

The struggle for social justice almost always evokes hostility. Working for social justice requires that one identify those who are engaging in the oppression or neglect, requires that one call them out for it, and requires that one insist that they desist. But they benefit from what they are doing, so they resist the call to desist. And they resent having the finger of moral judgment pointed at them. By contrast, charity seldom evokes hostility. Who could be opposed to supporting the local food pantry? Who could be opposed to supporting an orphanage in Honduras?

The mixed record of the Christian community with respect to justice goes beyond a preference in many quarters for dispensing charity over seeking justice. Over the centuries, members of the Christian community have perpetrated – and supported the perpetration – of appalling and egregious acts of injustice. Sometimes they defended what they were doing by appealing to a (distorted) reading of Scripture; that was the case for defenders of South African apartheid, as it was for defenders of chattel slavery in the U.S. South in the eighteenth and nineteenth centuries. Often they made no attempt to offer a biblical defence.

Fortunately, this is not the whole story. Christians who have heard the biblical call for justice have been active in all the great social justice movements of the past couple of centuries – active, for example, in the nineteenth century abolitionist movements in

England and the U.S., active in the twentieth century civil rights movement in the U.S., active in the anti-apartheid movement in South Africa.

What also deserves mention here is the story told by Richard Tuck, in *Natural Rights Theories: Their Origin and Development* (1979), about the development of natural rights theories by Spanish Catholic theologians in the early modern period, and the role played by an appeal to natural rights in the critique, by Spanish theologians and clerics, of the Spanish conquest of South America. What likewise deserves mention is the role played in the formation of liberal democracies by the profusion of discussions of human rights in the writings of the early Calvinists, as detailed by John Witte. Whatever else we may regard as definitive of liberal democracies, liberal democracies are rights-limited polities. The actions of the state are limited by the natural rights of the citizens – limited, above all, by their natural right to freedom of religion, but limited also by their natural right to freedom of speech, to freedom of assembly, etc.

6.2 Justice in the worship of the Christian faith community

In ‘The Holy Eucharist: Rite One’ of the Episcopal Church, ‘The Great Thanksgiving’ begins with the words, spoken by the celebrant,

It is very meet, right, and our bounden duty, that we should at all times, and in all places, give thanks unto Thee, O Lord, holy Father, almighty everlasting God.

When the celebrant says these words, the first-person plural ‘we’ refers not just to the members of that particular assembly, and not just to Christians more broadly, but to human persons in general. ‘It is very meet, right, and our bounden duty as *human persons* that we should at all times [...]’ The declaration that it is our duty as human persons to give thanks to God goes back into the ancient church, occurring often in the Eucharistic prayers collected by Lucien Deiss in *The Springtime of the Liturgy* and in those collected by R. C. D. Jasper and G. J. Cuming in *Prayers of the Eucharist: Early and Reformed*.

It is, of course, good and desirable that human beings give thanks to God. But that is not what these liturgies are declaring. They are declaring that it is our *duty* to thank God. Now recall the principle of correlatives. If it is our duty to give thanks to God, then God has a right to our giving God thanks. In giving thanks to God, we render justice to God.

To the best of this writer’s knowledge, liturgies have traditionally used the language of ‘bounden duty’ only at the beginning of The Great Thanksgiving. But if asked, those who used these liturgies would surely have said that it is also our bounden duty to praise God, to intercede with God, to confess our sins to God, to listen for God’s speech – in short to acknowledge liturgically who God is and what God has done. And that implies, given the principle of correlatives, that those who perform the prescribed acts of worship are

rendering justice to God throughout the liturgical enactment, not just in the Eucharist. Liturgical enactments are corporate acts of rendering justice to God.

There is another way in which justice can be present in a liturgical enactment – and a way in which injustice can be present instead. In his first letter to the church in Corinth, the apostle Paul says he has heard that when they assemble, the well-to-do eat and drink their fill while the poor are left hungry. One infers that the assemblies in Corinth included some sort of potluck and that the well-to-do arrived and began eating and drinking before the slaves and servants got off work. Paul uses striking language in criticizing the behaviour of the well-to-do. No doubt he regarded them as failing in love for their fellow believers; but that is not what he says. He says, ‘you humiliate those who have nothing’ (1 Cor 11:22).

The writer of the New Testament letter of James uses similar language to condemn the favouritism displayed by the seating practices in the assemblies of those whom he was addressing: rich people were given seats of honour while the poor were made either to stand or to sit on the floor. God, says the writer, has ‘chosen the poor in the world to be rich in faith and to be heirs of the kingdom that he has promised [...] But you have dishonoured the poor’ (James 2:3–6). No doubt the writer regarded those who organized or tolerated such seating arrangements as failing in love for the poor. But what he says is not that but rather, ‘you have dishonoured the poor’.

Suppose it’s true that treating someone justly consists of treating them as they have a right to be treated. And suppose it is true, as this article has argued, that to treat someone as they have a right to be treated is to treat them as befits their worth. Then Paul and James are both pointing to injustice in the assemblies. Humiliating or dishonouring someone is a patent case of not treating them as befits their worth, and hence not treating them justly. By virtue of how the participants in liturgical enactments treat each other, justice and/or injustice are present in those enactments. The assemblies are to be paradigms of justice.

Justice can also be present in liturgical enactments in the form of prayers for justice and for the undoing of injustice. And it will be present in many of the readings from the Psalms and the prophets, and in readings from the New Testament in translations that do not conceal the references to justice – and in preaching that is faithful to those readings. But rather than elaborating these points, let us close by noting that at the very heart of the Christian liturgy is the remembering of a case of gross injustice – the crucifixion of Jesus – and the worship of him who was the victim. It is ironic that the one who came to inaugurate God’s reign of justice should fall victim to a case of gross injustice.

Death by crucifixion was not only a slow and excruciatingly painful method of execution. It was also shameful. In the Roman empire of the time it was reserved for those whom the officials regarded as despicable: rebellious slaves were commonly executed by crucifixion. ‘You are scum’ was the message. In Judaism the message of crucifixion was different, not

'You are scum' but 'You are cursed'. 'Cursed is everyone who hangs on a cross', wrote Paul, quoting Deuteronomy (Gal 3:13; Deut 21:23).

The episode of Jesus falling victim to the appalling injustice of crucifixion is, of course, part of a larger narrative. Christians confess that this same Jesus who died by crucifixion was raised from the dead. Had he not been raised, he would not have been worshipped. Stories about his baffling sayings, his mysterious doings, his painful and humiliating death, might have been handed on; but it was his resurrection that led to his being worshipped. Absent that, there would have been no Christian church and no Christian liturgy.

When one has a clear picture in mind of Jesus' manner of death, and then reads mainline present-day Christian liturgies, one is struck by how veiled is the presentation of Jesus' death in most of them. In the Great Thanksgiving of the Episcopal liturgy the celebrant says, 'We now offer unto Thee [God the Father] the memorial thy Son hath commanded us to make, having in remembrance his blessed passion and precious death, his mighty resurrection and glorious ascension'. Not only is there no mention of the injustice and shame of the crucifixion, nor of Christ's suffering; the terms 'blessed passion' and 'precious death' tend to put all thought of injustice, shame, and suffering out of mind.

In his fascinating book, *The Cross and the Lynching Tree*, the African-American theologian James Cone writes, 'Black Christians sang more songs and preached more sermons about the cross than any other aspect of Jesus' ministry' (Cone 2011: 25). In their songs and sermons, the cross was not prettified.

Though wonderful and beautiful, Jesus' cross was also painful and tragic. Songs and sermons about the 'blood' were stark reminders of the agony of Jesus' crucifixion – the symbol of the physical and mental suffering he endured as 'dey whupped him up de hill' and 'crowned him wid a thorny crown.' Blacks told the story of Jesus' Passion as if they were at Golgotha suffering with him. 'Were you there when dey crucified my Lord?' 'They nailed him to de cross'; 'dey pierced him in de side'; and 'de blood came twinklin' down'. (Cone 2011: 73–74)

Though the injustice of Jesus' crucifixion is obviously in the background here, it's his suffering that is foregrounded. In one of the eucharistic prayers to be found in *The Apostolic Constitutions* (late fourth century), both the injustice of what was done and Christ's suffering are vividly expressed:

Having brought his entire work to completion, he was betrayed by the man who was corroded by wickedness and delivered into the hands of the impious by the treachery of priests and high priests unworthy of the name, and of a corrupted people. He suffered painfully at their hands, endured every kind of ignominy in accordance with your plan, and was handed over to Pilate, the governor. He the Judge was judged.

He the Savior was condemned. (Deiss 1979: 233)

Attributions

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