



The Natural Law and Natural Rights Tradition: A Foundation for Religious Freedom

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At the end of May 2019, the U.S. Department of State announced the establishment of a Commission on Unalienable Rights. Almost immediately, reactions to the announcement were critical. The Commission was said to constitute a threat to human rights in general and LGBTI and women's rights in particular.

Depending on the exact approach adopted by the Commission, this could, to a greater or lesser extent, indeed be the case. On the whole, however, the establishment of the Commission must be regarded as a positive development. The history of modern human rights, such as the right to religious freedom, goes back approximately 250 years to the idea of constitutional government securing natural rights. In so far as this notion has faded over time, with a view to the future of rights like religious freedom it might be worthwhile bringing it back into focus.

The establishment of a Commission on Unalienable Rights is in line with the argument made in a 2018 book by practitioner Aaron Rhodes, *The Debasement of Human Rights. How Politics Sabotage the Ideal of Freedom*. In the book, Rhodes notes how the international human rights system rests on a flawed foundation. The Universal Declaration of Human Rights (1948) already added social and economic rights to the category of natural rights as found in, for example, the U.S. Bill of Rights. Since then, specialized treaties have introduced further types of rights.

As a result, these other categories of rights have been upgraded to the status of human rights. Although at first sight this seems to be a welcome development, there is also a downside to it since in the process, the traditional natural rights have become 'debased,' i.e. been degraded. If nearly everything is a human right, no right stands out. Debasement is undoubtedly also a term which applies to the right to freedom of religion or belief. Thus, the British All Party Parliamentary Group (APPG) on International Religious Freedom has called Article 18 of the Universal Declaration of Human Rights an 'orphaned right'. Even though there are clear indications that religious freedom has increasingly come under pressure around the globe in recent years, the right to freedom of religion or belief remains very much on the margins within the international human rights system as a whole.

This debasement of the right to freedom of religion or belief is all the more to be regretted since the right is also of vital importance to the functioning of a liberal and democratic order. Such an order is dependent on an ethos among the population that it cannot itself (re)produce. This democratic ethos will need to be developed by citizens through their participation in various

institutions and civil society organizations, among other things. In order for these institutions and organizations to flourish, natural rights such as freedom of religion, freedom of expression, and freedom of association and assembly are prerequisites.

By limiting such freedoms, without realizing it, liberal democracies are cutting off the very branches on which they rest. At a minimum, restrictions on these natural rights will result in a transformation of the nature of liberal democracy. From a system in which citizens are free to pursue the good life they have chosen for themselves, it runs the risk of changing into a system which imposes one particular conception of the good life on society as a whole.

It is against this background that some authors are arguing for a return to the roots of human rights. Rhodes, for example, calls to remembrance that the American Republic was founded in order to guarantee religious freedom and other natural rights. Paradoxically, because of the expanding number of human rights, fundamental rights are currently sometimes perceived as contributing to a gradual erosion of democracy.

Of course, opponents of this view will argue that going back to the origins of human rights puts a whole range of newly-acquired rights at risk. Rhodes and others will argue, to the contrary, that the return to a limited set of natural rights is an attempt to rescue the very notion of human rights. They are not so much against the newer categories of rights claims as such, but believe these ought to be secured through the political process rather than by imposition on society with the help of courts.

It is not quite as self-evident as it may seem that a return to the roots of human rights poses a risk to, for example, LGBTI rights. Much depends on whether natural rights are seen in isolation or within a natural law context. In the former case, it is possible to argue that both LGBTI rights and religious freedom deserve to be protected. A libertarian think tank such as the Cato Institute has in effect taken this position, and also defended same-sex marriage.

The same think tank has made clear that the right to abortion is a different matter. Even so, a natural rights approach cannot be equated with a conservative morality. Social and economic rights, like environmental rights, will be rejected, however, as they can logically only have arisen after the birth of the nation-state. In this sense, a natural rights approach will still lead to a considerable reduction of the categories and numbers of rights.

Sometimes one has to be careful what one wishes for, however. Those who are critical of natural law because it could bring a theological perspective to the table, might be surprised to learn that the same theological perspective can also be applied to support social and economic rights. Thus, the International Theological Commission of the Roman Catholic Church has taken a more comprehensive approach to human rights than those who prefer to look at natural rights in isolation.

In the case of the right to freedom of religion or belief, arguing for a natural law foundation, it seems, is not so much a matter of trying to convince others of an approach that initially they may not feel sympathetic towards. A recent book that tries to achieve precisely this is J. Daryl Charles' *Natural Law and Religious Freedom. The Role of Moral First Things in Grounding and Protecting the First Freedom* (2018). Still, it may not 'convert' as many readers as the author had hoped for.

Perhaps a stronger argument is that this is how the Founders regarded this right. To the extent that *The Federalist Papers* are the first modern constitutional treatise, the Founders have stood at the basis of current liberal and democratic orders. The implication is not that no alternative foundation for such an order can be found. Generally speaking, though, it is not a good idea to throw out something that is old before a replacement has been found.

To the extent that this is what has happened in the case of human rights in general and the right to freedom of religion or belief in particular, turning around half-way is to be preferred to continue running towards a dead-end. If this is the idea behind the Department of State's Commission on Unalienable Rights, the Commission is not necessarily an unwelcome initiative.