

Comments on Human Rights

A conception of human rights is meant to play a certain role in global political argument (in what Rawls calls the “public reason of the society of peoples”): principles of human rights are meant to provide *shared standards* for evaluating and criticizing the *practices of a political society* in its treatment of its *individual members*.

Three points—signaled by the three italicized phrases (*shared standards*, *practices of a political society*, *individual members*)—are important in this characterization of human rights. First, the focus on individuals. The role of a conception of human rights is to present a set of important standards that all political societies are to be held accountable, by their members and by outsiders, in their treatment of individual members. A statement of human rights presents, as is commonly said, a set of limits on internal sovereignty, or—perhaps better—presents conditions on which a state’s internal sovereignty is acknowledged. The idea that there are such limits on internal sovereignty is often said to be a fundamental departure from the Westphalian conception of sovereignty that prevailed from the mid-17th century until the end of World War II. Krasner expresses some skepticism on this point: though the norms of Westphalian sovereignty deny external accountability, those norms, he argues, have persistently been violated by externally-guaranteed protections of rights; that’s why sovereignty is *organized hypocrisy*. The change since World War II,

Krasner claims, is better understood as a shift from abridgements in the name of minority group rights (always part of the Westphalian system) to abridgements in the name of individual human rights, rather than a shift in the basic understanding of sovereignty. Krasner is right to emphasize that protections of minority rights were abridgements of conventional understandings of internal sovereignty. But I suspect that the more recent developments have changed the norms of sovereignty themselves, and not simply shifted the content of the predictable abridgements of the conventional norms.

Second, the conception of human rights is supposed, in some sense, to be *shared*: human rights standards are standards that can be endorsed by people who hold different religious and philosophical views. The standards represent a partial statement of the content of a global public reason: a public reason that is global in reach, inasmuch as it applies to all political societies, and global in its agent, inasmuch as it is presented as the common reason of all peoples, who share responsibility for interpreting its principles, and monitoring and enforcing them. Beitz suggests this point in his account of human rights as matters of common concern, and Ignatieff in his comments on how a conception of human rights should not be thought of as providing trumps that resolve disagreement, but as a “common framework, a common set of reference points that can assist parties in conflict to deliberate together” (20).

This conception of shared framework was present from the outset in the evolution of the doctrine of human rights, as Glendon’s book on the Universal Declaration shows. Jacques Maritain—perhaps the central figure in mid-20th

efforts to reconcile Catholic social thought with democracy and human rights, and who participated in discussions leading to the Universal Declaration—formulated the idea as follows: “Yes, we agree about the rights, but on condition that no one asks us why.” The point of developing a conception of human rights, capable of being shared by adherents to different traditions, he said was to create agreement “not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but on the affirmation of a single body of beliefs for guidance on action.”¹

Now it is common worry that there is a tension created by these first two elements of a conception of human rights. The problem is that the focus on individual rights, which is characteristic of a conception of human rights, is in tension with the concern that the conception be capable of being shared by people who belong to different “speculative” traditions. Thus Ignatieff says that “rights language cannot be parsed or translated into a nonindividualistic, communitarian framework. It presumes moral individualism and is nonsensical outside that assumption” (67). This is a very strong assertion, in that it makes a claim about “rights language” quite generally irrespective of the content of the rights and of the specific idea of human rights. I want to say something about this

¹ Cited in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). On the background of Maritain’s views of human rights in broader efforts to rethink the fundamentals of Catholic social thought—especially the relative significance attached to notions of the human person and the common good—see John T. McGreevy, *Catholicism and American Freedom: A History* (New York: Norton, 2003), chap. 7.

tension: between a focus on individuals as the bearers of rights and on the importance of shared point of view.

Before getting there, I want to mention the third point about human rights as global standards *applied to organized political societies*. Thus, if we think of natural rights as the rights that persons would have even in a non-institutional state of nature then human rights and natural rights are fundamentally different ideas. It might turn out to be true that human rights and natural rights are coextensive: that all that people can reasonably demand of an organized political society in its treatment of individuals is that the individuals have the protections that they would be entitled to even in a state of nature with no institutions. But it is not at all obvious that there are any such natural rights; if there are not, why anything follows about human rights; and if there are, why individual assurances in organized political societies should be confined to them.

To see why consider the case of Bentham, who famously said that natural rights are nonsense and that natural and imprescriptible rights are nonsense on stilts. The point I want to make here is that these observations are entirely consistent with a Benthamite-utilitarian theory of human rights. And once we see that they are consistent, we will be less inclined to think that there is a tension between the first two elements of a conception of human rights—the fact that it is shared and the fact that it is focused on individual rights.

Bentham had two reasons for disliking the idea of natural rights. First, he thought that the idea of natural rights (esp. imprescriptible natural rights) went along with the anti-legal-positivist thought that compatibility with natural rights is a

condition of legal validity (a legally valid regulation cannot deny natural rights), and the thought that we have no obligation to obey regulations that are not legally valid. So the idea of natural rights is destructive of political authority and stability: thus Bentham's association of natural rights with anarchism. Moreover, Bentham thought—as a matter of analytical jurisprudence—that having a right requires a setting of organized political institutions. That 's because having a right requires that others have obligations, that obligations require laws, and that laws require a political authority who is habitually obeyed. So in the absence of a political authority there are no laws and therefore no rights. That's why assertions about natural rights are nonsensical, and not simply false.

But consistent with these points, a Benthamite utilitarian can also endorse a doctrine of human rights. Thus, the Benthamite says that human rights are the rights that all people *ought to have*, in any organized political society (either quite generally or at a certain historical period). The rights that people *ought to have* are the rights whose protection—via law (as Bentham and Habermas insist) and perhaps other systems of pressure and sanction (as Beitz suggests)—promotes the aggregate social welfare, understood by Bentham as the net balance of pleasure over pain. These are the rights whose protection is relatively inexpensive, and/or whose protection promises large benefits, and/or whose violation imposes large harms, and/or whose violation brings only small gains. So for example, there might be a human right to bodily integrity, violated by slavery, because the harms imposed on slaves by a system of slavery are greater than the benefits conferred on owners and third parties by that system. Or a human

right to free expression, because the pleasures conferred and pains avoided by open discussion (no famines, for example) are greater in general than the pleasures that result from uniformity of opinion.

I do not mean here to be defending these particular claims, but only to be saying that a commitment to basic human rights is entirely consistent with denying that there are any natural rights. Moreover, it is entirely consistent with endorsing an outlook that is not based on the idea—associated with a natural rights theory—of individual human beings as having a special moral status or dignity owing to our capacities as rational agents with a power to choose the directions of our lives. The doctrine of human rights is much less theoretically committed than that, and in that respect fundamentally different from a doctrine of natural rights.

And because the idea of human rights is much less theoretically committed, it is easier to see how it might be shared among adherents of different traditions and thus form part of a global public reason, and troubling that Ignatieff thinks that “rights language...presumes moral individualism and is nonsensical outside that assumption.” Bentham’s utilitarianism is a form of moral individualism only in a very attenuated sense, because of the emphasis on aggregate happiness: the moral importance of individuals seems derivative in his view. Or consider views that emphasize at the most fundamental level the fulfillment of duties, either based on social roles or on divine laws. In both cases, a conception of human rights may be available, founded on the idea that the possession of certain rights is a precondition for the fulfillment of the relevant

duties: here, the rights are justified not by reference to their consequences for human welfare, as in utilitarianism, or by reference to the idea of a special moral status associated with capacity to choose, but are understood as enabling the proper fulfillment of those duties. Of course, more needs to be said on this point, about the nature of the duties, in order to explain why the fulfillment of duties might arguably require rights and not simply sanctions for failing to fulfill them. The point here is only to note that this idea of *rights* that enable the fulfillment of duties is available as a way to bring a conception of individual rights within a non-individualistic outlook, and thus to dampen the tension between the idea of human rights as a shared point of view and the idea of human rights as assigning rights to individuals.