



Should International Human Rights Law and Practice Shape the Philosophy of Human Rights?

Presenter: Professor Charles Beitz
Discussant: Professor Liam Murphy

Workshop Report

January 28, 2004

Acknowledgements

The Institute for International Law and Justice, the Center for Human Rights and Global Justice, and the Jean Monnet Center extend their special thanks to Professor Charles Beitz, Professor of Politics at Princeton and Visiting Fellow at the Institute for International Law and Justice, for presenting his paper at the workshop. We would also like to thank Professor Liam Murphy for agreeing to act as commentator, Professor Benedict Kingsbury for introducing the discussion, and Shelley Bogen and Tish Armstrong for organizing the event. This workshop report was written by Romanita Iordache and Dan Hardy, and was edited by Meg Satterthwaite.

Should International Human Rights Law and Practice Shape the Philosophy of Human Rights?

Paper Summary

In his workshop paper, Professor Charles Beitz sets out to demonstrate why the question posed in his title should be answered affirmatively by philosophers. Beginning with the Rawlsian approach set out in *The Law of Peoples*,¹ Professor Beitz explores the prospects for a political theory of human rights. Dissatisfied with what he calls the “orthodox” view, he asserts that the philosophy of human rights should not be constrained by the skepticism inherent in a theory based on “natural rights,” but instead ought to be influenced by the actual practice of international human rights promotion and protection.

Professor Beitz identifies two aspects of the role of human rights in international political discourse. First, he finds that human rights violations “may serve to justify interference in the internal affairs of states or other local communities,” and second, that they “may argue for various external agents, such as international organizations and other states, to commit the resources required for effective interference.”³ In this view, justification for interference with the autonomy of states becomes the primary purpose for establishing certain values as human rights.

With this understanding of the role of human rights, Professor Beitz then endeavors to argue for a conception of human rights that expressly takes this purpose into account. Associating himself with the view set out in *The Law of Peoples*, Professor Beitz calls this proposed conception of human rights a “practical” one. He contrasts this with the “orthodox” view, which asserts that human rights exist “in the moral order,” independently of their “expression in international doctrine.”⁴

The orthodox view, according to Professor Beitz, regards human rights as existing at “a deep, perhaps even a fundamental, level of our moral beliefs and to be discoverable by reason or rational intuition.”⁵ In the orthodox view, then, a human right is very similar to a natural right as described by the political theory of Locke or Kant, and has several corresponding characteristics. First, human rights are viewed as pre-institutional, deriving their authority not from a political structure but from nature or reason. Next,

¹ JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

³ Charles Beitz, *Should International Human Rights Law and Practice Shape the Philosophy of Human Rights?* workshop paper, page 3.

⁴ *Id.* at 5.

⁵ *Id.* at 6.

they belong to people as a result of their humanity, abstract from any social situation. Finally, they are timeless.

Professor Beitz's main conclusion regarding the orthodox view is that it leads to "unjustifiably skeptical conclusions."⁶ In his view, the premises behind the different characteristics identified above are suspect, the results are dogmatic, and they merely serve to argue against the acceptance of many rights that have been identified and accepted as human rights in international practice. For example, the limitation of rights to only those identified as pre-institutional does not recognize that the rights commonly accepted as "natural" were identified in a historical and political context in which tyranny and oppression were the primary threats to individual freedom. To confine the list of contemporary human rights to those described by classical natural rights theorists ignores the affects that political and social factors had in the formation of classical theory. Similarly, the concepts of "timelessness" and of rights belonging to persons "as such" ignore the importance of people's relationships in a global community to the formation of a list of what should count as human rights.

Professor Beitz openly states that his object is not to refute the orthodox view by engaging in this critique, but instead to accomplish "two more modest results." First, the inferences drawn from the orthodox view about the content of international human rights doctrine must be recognized as "normative conclusions requiring a defense" – indeed, "it is a sleight-of-hand to present them as analytic."⁷ Second, Professor Beitz hopes to raise doubt as to the relevance of the orthodox exercise, stating that it is "just dogmatic to hold that any adequate understanding of [international human rights] practice should *begin* by identifying the objects of theoretical interest with objects that originated in a particular philosophical tradition and were constructed for quite different purposes."⁸

Professor Beitz argues that the practical conception adopted by Rawls suggests "a more constructive understanding of human rights."¹⁰ Rawls views human rights as "a special class of urgent rights" whose violation "is equally condemned by both reasonable liberal peoples and decent hierarchical peoples" and whose political function is to "restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."¹¹

The justification of human rights is treated as distinct from their content in Rawls' approach. Rawls limits human rights to their contextual dimension: "human rights are a proper subset of the rights possessed by the members of a liberal constitutional democratic regime, or of the rights of the members of a decent hierarchical society."¹² Under this view, the content of human rights doctrine should be determined by its

⁶ *Id.* at 7.

⁷ *Id.* at 11.

⁸ *Id.* (emphasis in original).

¹⁰ *Id.*

¹¹ *Id.* at 11-12 (quoting and citing RAWLS, *THE LAW OF PEOPLES*, at 79).

¹² *Id.* at 13-14 (quoting and citing RAWLS, *THE LAW OF PEOPLES*, at 81).

purpose, which is to serve as a “public basis of action for both liberal and decent societies committed to preserving a world in which such societies can prosper.”¹³

Based on Rawls’ approach to human rights, Professor Beitz argues that the role that human rights play in international discourse should constrain the content of the concept of human rights itself. This requirement – that certain forms of practice must constrain content – is then applied. This application leads Professor Beitz to posit three main ways in which his proposed requirement will limit the content of a plausible human rights doctrine, instead of merely adopting current international human rights practices as the norm. First, “human rights should constitute principles of action that persons in any culture would have reason to accept.”¹⁴ Next, human rights doctrine should be taken “as a reasonable basis for cooperation in international schemes to enforce its requirements.”¹⁵ Finally, the means of interference in a given society to safeguard human rights should fall under ethical constraints that apply to any political action, including the “economy of force and respect for innocent life.”¹⁶

In concluding his paper, Professor Beitz explores the application of his approach to the right to an adequate standard of living as spelled out in the Universal Declaration of Human Rights. In doing so, he concludes that, if his cursory analyses under a Rawlsian approach are to be accepted, the right to an adequate standard of living would be “an element of the Law of Peoples”¹⁷ – and therefore a human right under his practical conception. This is so because the right to an adequate standard of living “states a condition that anyone could reasonably expect social institutions to satisfy, and whose satisfaction in all societies represents a reasonable long-term goal of the international community.”¹⁸

Discussion

Professor Liam Murphy, Professor of Law and Philosophy, NYU School of Law, designated commentator

Professor Murphy began his comments by drawing a further distinction among the different versions of rights orthodoxy identified by Professor Beitz. Specifically, he identified the view – represented primarily by Maurice Cranston – that limits the concept of human rights to the classically “natural” rights to life, liberty, and property, as the “ultra-orthodox” view of rights. In this context, if a person has a right, it must be the case that everybody else can fully satisfy the claim. The most often cited examples are the right not to be killed or the right to hold property. The motivation of the ultra-orthodox

¹³ *Id.* at 13.

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 24.

¹⁸ *Id.* at 24-25.

view is a concern about the relative importance of different moral concerns. However, this approach is in decline, and the practice and discourse of rights has departed from it.

The orthodox view is generally seen as more permissive than its ultra-orthodox sibling. Under this view, rights are held by people in virtue of their humanity and we can affirm our natural rights because we are human, not because of institutional arrangements or social practices surrounding claims. Professor Murphy recognizes that the target of Professor Beitz's paper is not to provide a full analysis of the orthodox view. Instead, Professor Beitz turns to Rawls' identification of human rights as "a special class of urgent rights whose violation is equally condemned by both reasonable liberal peoples and decent hierarchical peoples." He then takes this idea one step further, arguing that what can be considered a human right is determined by the functional role played by claims of human rights within existing practice.

Professor Murphy concluded his commentary by raising the possibility that reliance on the functional role of human rights could lead to skepticism. Wasn't one of the functions of claims of rights that that they serve as a basis for criticism of governments, even in situations where there is nothing outsiders can do about the situation?

Professor Beitz, responding to Professor Murphy's comments, underlined the exploratory character of the paper as an approach to the philosophy of human rights that would genuinely take practice into consideration. The negative motivation of the paper stems from the desire to give moral credit to human rights practice as it is carried out around the world. It also represents an answer to the failure of theorists in their attempt to define the conceptual basis of human rights.

Professor Beitz also emphasized his desire to locate a model through which one could identify the most important moral claims, and the difficulty of conceptualizing entitlements removed from any specific time and set of conditions. Human rights operate as standards for policies whose aims are to improve the situation of groups. This setting is different from the classic model as exemplified by the individual freedoms in the First Amendment of the U.S. Constitution. Such a view could distort our understanding of human rights by ruling out certain values as human rights (political rights) and the issue is whether one can do anything at the international level if those rights are violated.

Ms. Andrea Armstrong, Research Associate, International Center for Transitional Justice, asked about the applicability of Professor Beitz's approach to reparations and to certain human rights violations which may reasonably be viewed as incapable of reparation or restoration.

Professor Beitz acknowledged the limited solution found in political theory when faced with real life dilemmas. He emphasized that even if there are cases where there is no way to restore the person's previous condition, this does not mean that the rights infringed are not rights or that they have not been violated. If nothing follows from a valid claim of rights, it is hard to say that there is a perfect or even imperfect duty correlative to the right. However, identifying what forms of intervention would be most likely to prevent

these violations to happen in the future is equally important. This is because what makes human rights different is that they serve as a guide to policy. Thus, even if they do not include a duty for a specific person, they still influence the process.

As a follow up question, Ms. Armstrong inquired about a possible hierarchy of human rights. Professor Beitz suggested that the UN language of indivisibility (spelled out during the World Conference on Human Rights and which rejects a hierarchy of rights), is expressing a political doctrine rather than a moral claim.

Professor Philip Alston, the Faculty Director of the Center for Human Rights and Global Justice, observed that, even from a practitioner's perspective, there are few issues as important as this one. It is widely acknowledged that, by the standard of most traditional philosophical approaches, the body of human rights incorporated in international instruments such as the Universal Declaration is philosophically incoherent. But while supporting the quest for an answer, he wondered if it can ever be possible to resolve the incoherence. In this context, if one starts with the now very extensive international practice and seeks to work back from that towards a coherent theory, there is a risk not only of not having a comprehensive theory but also of smuggling into the theory of rights the often dubious interpretations of the different rights which are all too often put forward by various governments. In response, Professor Beitz recognized Professor Alston's point that political theories cannot aspire to give a coherent account of the whole practice of human rights, as the limitations of all human social practices would apply. Professor Beitz's hopes for the paper are more modest, as he wishes only to bring into focus the relevance of practice in identifying the philosophical underpinnings of a human rights regime.

Professor Mattias Kumm, Professor of Law, NYU School of Law, addressed the criticism of the orthodox position and emphasized the issue of a normative reconstruction of human rights similar to the Dworkinian approach to hard cases. Professor Kumm proposed, as an alternative, to develop a conception of political justice and inquire about various mechanisms of enforcement, differentiating between constitutional and institutional constraints. From that position, it would be possible to move to the international level while acknowledging the dignity and significance of self-government and institutional imperfections of international justice. Responding, Professor Beitz stated that the language of human rights is the language in which certain world communities speak about global justice. A complete theory of global justice with applications in human rights practice and theory would require an understanding of the function of human rights.

Professor Catherine Kessedjian, Professor of Law, University of Paris II and NYU Hauser Global Law School Professor, made comments on the various theories on natural rights and raised the issue of the interference of private actors: specifically, transnational corporations and international NGOs. Professor Beitz responded by suggesting that when proposing a functional role for human rights, this understanding should not apply only to public actors but should equally apply to non-state actors.