Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights

Introduction: Locating Culture, Identity, and Human Rights Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights

Tracy E. Higgins

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship

Part of the Civil Rights and Discrimination Commons, Human Rights Law Commons, Law and Society Commons, Sexuality and the Law Commons, and the Women Commons

Recommended Citation


Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/232

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
REGARDING RIGHTS:
AN ESSAY HONORING
THE FIFTIETH ANNIVERSARY OF
THE UNIVERSAL DECLARATION
OF HUMAN RIGHTS

by Tracy E. Higgins*

I. INTRODUCTION

The half-century since the drafting of the Universal Declaration of Human Rights¹ has been famously heralded as the “Age of Rights” and the concept of human rights described as “the only political-moral idea that has gained universal acceptance.”² During the same period, however, both terms defining the subject—human and rights—have become increasingly contested. Informed by the emergence of identity-based political movements, critics have attacked the category human has as bearing the baggage of Western Enlightenment assumptions about personhood and community, inherently racist, sexist, and classist.³ Theorists across the political spectrum have criticized the concept of rights as indeterminate, destructive of political

---

* Associate Professor, Fordham Law School; J.D., Harvard (1990); A.B., Princeton (1986). I would like to thank David Nachman, Chair of the International Human Rights Committee of the Association of the Bar of the City of New York and the members of that committee who organized the conference of which this paper was a part. I would also like to thank Ruti Teitel for organizing the panel on the theory of human rights and my colleague, Martin Flaherty, for his helpful comments and his support of human rights work at Fordham Law School. I am grateful to the participants in the Cornell Law School Faculty Workshop where I presented a draft of this article and received many thoughtful comments and suggestions.

2. See Louis Henkin, The Age of Rights ix (1990) (declaring that “[o]urs is the age of rights.”).
community and even threatening to moral values.4 In light of these developments, it seems appropriate not so much to celebrate the survival of the Universal Declaration and its progeny but to consider the significance of that survival for the meaning of human rights in an increasingly fragmented world. This article speaks to this theme by considering the Universal Declaration and the human rights framework it established in light of various rights-based and identity-based critiques.

I confess that, as a feminist, I am sympathetic to many of the critiques that have emerged from identity politics.5 Moreover, I am skeptical of the ability of a framework of liberal rights to safeguard many of the important human needs underlying international human rights instruments.6 At the same time, as a human rights lawyer, I am committed to the principles embodied in the Universal Declaration and to the existence of a standard which permits cross-cultural human rights activism and legal remedy. Thus, in this Article, I attempt to explore some of the challenges presented by both the politics of difference and the various critiques of rights to the Universal Declaration and suggest ways that those challenges might be met without undermining the power of that document as a yardstick of human integrity. In Part II, I first summarize briefly several characteristics and critiques of rights discourse. I then consider the relevance of these critiques to the discourse of international human rights and argue that human rights discourse is less vulnerable to certain of these critiques than is rights discourse generally. Part III elaborates a second important challenge to the concept of human rights, the emergence of identity politics. Part IV integrates these two themes by suggesting ways in which a shared discourse of rights may bridge cultural differences and build political community and, at the same time, systematic attention to cultural contingency may address some of the weaknesses of that discourse.


II. INTERNATIONAL HUMAN RIGHTS AND THE LIMITATIONS OF RIGHTS DISCOURSE

A. Critiques of Rights

In the five decades since the drafting of the Universal Declaration, the language of rights has become an increasingly central feature of political discourse.\(^7\) The most common political response to hunger, homelessness, illiteracy, or poverty has been to seek (or grant) legal rights to food, shelter, education, or public support.\(^8\) As a result, important human concerns have been increasingly translated into legal rights rather than articulated politically as needs or interests.\(^9\)

The turn to rights represents not simply a political expression of an obligation on the part of society to meet basic human needs but also the pragmatic belief that defining those needs as legal rights makes it more likely that they will be met.\(^10\) This faith in rights stems, at least in part, from the power of rights in liberal theory to function as *trumps*, to borrow Ronald Dworkin’s famous characterization.\(^11\) Dworkin explains that “[i]ndividuals have rights when, for some reason, a collective goal is not a sufficient justification for denying what they wish, as individuals, to have or to do.”\(^12\) In theory, then, the recognition of a right stops political debate, removing the claim from the political process. At the point at which the right is recognized, the political question is apparently resolved, and the need is met.

Of course, rights do not really function in this way. The translation of needs into rights, even if judicially enforceable, simply defers and individualizes the struggles to satisfy those needs. Thus, even as the trumping power of rights has helped to fuel the widespread expansion of rights discourse, disenchantment with that discourse has long since set in. Critics on the political left have argued that, although rights function as


\(^{9}\) The best example of this trend may be the new South Africa. For an interesting analysis of the South African experiment with “human rights statehood,” see Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 Harv. Hum. Rts. J. 63 (1997).

\(^{10}\) See Henkin, supra note 7, at 265.


\(^{12}\) Id.
trumps in the political process, this function often leaves human needs not merely uncontested but unrealized. These critics insist that our liberal rights regime has largely failed to deliver on its apparent promise to meet the basic human needs characterized as rights. The particular explanations for this failure vary. Critical Legal scholars have focused on the indeterminacy of rights. For example, Mark Tushnet has argued that "[o]nce one identifies what counts as a right in a specific setting, it invariably turns out that the right is unstable," thereby undercutting the power of the claim of right to protect the individual. This indeterminacy is rooted in part in the balancing of interests implicit in the decision whether to recognize a right in a given context, a problem that is particularly acute when rights are in conflict and must be balanced against each other. Nothing in our rights framework constrains this determination, leaving the recognition or denial of rights to politics while simultaneously masking this political aspect.

13. This literature is voluminous and extends at least as far back as Marx's argument that the Enlightenment's conception of rights abstracts from, and therefore ignores, concrete human suffering in favor of ideal equality and freedom. See Karl Marx, On the Jewish Question, in Karl Marx, Early Writings 233 (Rodney Livingstone & Gregor Benton trans., 1975).


15. Tushnet, supra note 4.

16. See id. at 1371–72.

17. See id. at 1373.

18. Wendy Brown explains the problem as follows:

The question of the liberatory or egalitarian force of rights is always historically and culturally circumscribed; rights have no inherent political semiotic, no innate capacity either to advance or impede radical democratic ideals. Yet rights necessarily operate in and as an ahistorical, acultural, acontextual idiom: they claim distance from specific political contexts and historical vicissitudes, and they necessarily participate in a discourse of enduring universality rather than provisionality or partiality.

Feminists have also offered critiques of rights, often focusing on the emphasis of liberal rights on state power. According to the feminist critique, by constraining the scope of state but not private power, liberal rights not only ignore an important threat to women’s well-being, but may undermine the ability of the state to remedy gender inequality in the private sphere. Feminists have also criticized the assumption of autonomy underlying liberal rights, noting that recognition of these rights presupposes the capacity of the individual to exercise them meaningfully, an assumption that may be less valid for some groups than for others. By ignoring this preexisting equality, liberal rights regimes have not only failed to end gender-based oppression but have, in some cases, preserved the prerogatives of male power.

Critical Race scholars have been somewhat more reluctant to relinquish the discourse of rights altogether. For example, Patricia Williams has noted that “[r]ights imply a respect that places one in the referential range of self and others, that elevate one’s status from human body to social being.” Nevertheless, these scholars have effectively exposed the ways in which liberal rights tend to preserve racial privilege, notwithstanding guarantees of equality. In the United States, this conservative power of rights is perhaps most evident in the Supreme Court’s voting rights and affirmative action jurisprudence in which the Court has used the Constitution’s guarantee of equal protection to strike down measures designed to ameliorate racial inequality.

According to many of these radical critics, the problem with rights discourse is not limited to its failure to meet human needs through the

19. See, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 42 (1988) (arguing that “[i]f differentiation into classifications, in itself, is discrimination . . . the use of law to change group-based social inequalities becomes problematic, even contradictory”).

20. I have argued elsewhere that “[t]he critical problem with overstating the agency of the individual is not that human nature is misdescribed but that the political consequences of that misdescription are visited unequally on different groups.” Higgins, supra note 6, at 1696.

21. See Carol Smart, Feminism and the Power of Law 144–46 (1989) (discussing ways in which rights designed to protect the individual from the state may be used by individuals against other, less powerful, individuals).


23. See Freeman, supra note 14, at 331.

creation of legal claims. The problem also lies with the way rights discourse frustrates the effort to meet those needs through the political process. An emphasis on rights elevates the legal over the political, thereby undercutting political solidarity around an issue by translating the denial of political claims into individualized harm. Defining needs as rights may also create a dependence upon courts and lawyers that is particularly problematic where access to such resources is quite limited.

Other critics of rights, more often politically moderate or conservative, have focused not so much on the failure of rights discourse to meet the human needs it describes, but its effect on the political process even when rights claims succeed. For example, Mary Ann Glendon criticizes rights discourse as obscuring questions of responsibility and duty. She argues that rights discourse "disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social

25. See Gabel, supra note 14 at 1588-90 (describing the role of rights in rising political movements and the threat that a rights victory can subdue the transformative potential of such movements).

26. See id. at 1591 (discussing the strategy of state containment of social movements through the selective recognition of rights claims); see also Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 Univ. Colo. L. Rev. 975, 996-98 (1993) (discussing ways in which ineffective judicial victories can weaken a social movement by lessening grassroots pressure for change and mobilizing opposition).

27. See Gerald N. Rosenberg, Hollow Hope: Can Courts Bring About Social Change? (1991). This problem is well-illustrated by the post-apartheid constitutional regime in South Africa. Influenced by Western liberal constitutionalism, the South African constitution translates many of the most important needs of its people into rights language. It has been heralded as one of the most progressive constitutions in the world. Nevertheless the ability of citizens to assert rights-based claims is limited by a lack of resources. In 1995, for approximately twenty-six million South Africans, there were approximately nine thousand practicing lawyers. Note, Legal Representation For Indigent Criminal Defendants in South Africa: Possibilities Under The 1994 Constitution, 5 Duke J. Comp. & Int'l L. 425, 448 (Spring 1995). Given the lack of resources both to litigate and to remedy deprivations of such rights, this rights language may ultimately contribute to political instability rather than freedom. See Sharon Meadows, Implementing The Right to Counsel in Post-apartheid South Africa, 29 Geo. Wash. J. Int'l L. & Econ. 453 (1995) (examining the problems associated with providing legal services to the poor in South Africa); Charles J. Ogletree, Jr., From Mandela to Mthwana: Providing Counsel to The Unrepresented Accused in South Africa, 75 B.U.L. Rev. 1 (1995) (discussing lack of access to counsel in the criminal context).

dimensions of personhood." From a somewhat different perspective, Michael Sandel emphasizes the problematic neutrality of a liberal rights regime and argues that liberalism, characterized by a framework of rights and negative liberties, has impoverished public debate about important political questions. Each contemplates an alternative public discourse that is enriched by collective deliberation over important moral issues and common values rather than assertions of rights claims by atomistic, self-regarding individuals.

B. International Human Rights and Rights Critiques

Rights discourse can and has been defended vigorously against these critiques. If, however, one assumes their validity as to rights discourse generally, how does the particular discourse of international human rights fare in the face of such critiques? In this section, I argue that in many respects our international human rights framework, informed as it is by Western liberalism, is quite vulnerable to many of the radical critiques presented by critical legal scholars, feminists, and critical race theorists. On the level of discourse, or "rights talk," however, it is less vulnerable to the communitarian critiques of scholars such as Glendon and Sandel.

As the current framework of international human rights derives much of its content from Western liberalism, it suffers from many of the weaknesses highlighted by the radical critics of rights. Indeed, those weaknesses may be more evident in international human rights guarantees. For example, the balancing of interests that contributes to the indeterminacy of rights on the national level is even more problematic on the international level where states are permitted expressly to derogate from their obligations


30. See Sandel, supra note 4, at 322 (criticizing procedural liberalism and warning that "[a] politics that brackets morality and religion too completely soon generates its own disenchantment.").

based on domestic political considerations. Moreover, the problem of balancing conflicting rights seems to emerge more frequently on the international level where economic and cultural rights, though themselves virtually unenforceable, are invoked as a counterpoint to claims of civil and political rights.

The international human rights framework is also quite vulnerable to feminist criticism that its rights guarantees overemphasize state action and ignore private power. For example, feminists have criticized the traditional focus in international law on political and civil rights, particularly negative rights against the state, as reflecting the view that the greatest threat to the life and liberty of the individual is the state. According to many, that view does not adequately reflect the realities of women's lives. For women, the private exercise of male power more often threatens their lives and liberty. This exercise of power includes all forms of private discrimination whether it takes place in the workplace, in religious institutions, or in the family. It also includes all forms of gender-based violence including sexual harassment and domestic violence. These private forms of power are often reinforced by the state, though they are not easily characterized as abuses of state power in the traditional sense. According to this critique, by emphasizing limits on state power, the traditional human


34. This is not to suggest that women are not also the victims of traditional human rights violations. Women are imprisoned, tortured, raped, killed, and silenced by state authorities just as men are. Feminist human rights advocates simply argue that abuses are more often perpetrated against women by their own spouses, lovers, and families.


36. See Bunch, supra note 33, at 13–14.
rights framework understates the need for state intervention to limit abuses of private power even while reinforcing traditional sources of such power.\(^\text{37}\)

Notwithstanding these limitations of the human rights regime, it is also in some respects less vulnerable to certain rights critiques than is rights discourse generally. Important aspects of the radical rights critique and much of the communitarian critique emphasize rights discourse or “rights talk” rather than the more specific legal operation of rights.\(^\text{38}\) Indeed, radical critics and communitarians offer surprisingly similar arguments concerning the negative effects of rights talk on political discourse.\(^\text{39}\) With respect to these arguments, human rights discourse is better able to withstand criticism than is rights talk more generally.

Popularly understood, human rights are those rights possessed by all persons equally by virtue of their status as human beings. This very general definition of human rights leaves much open to debate,\(^\text{40}\) not least of which is the philosophical basis for human rights. Philosophers and political theorists have offered justifications for the existence of human rights ranging from positivism\(^\text{41}\) to utilitarianism\(^\text{42}\) to social contract theory\(^\text{43}\) to natural

\[\text{37. Id.}\]

\[\text{38. See, Glendon, supra note 4, at 15 (characterizing her critique as aimed at the rhetoric of rights rather than at specific rights or the idea of rights in general).}\]

\[\text{39. Compare Gabel, supra note 14, at 1588–90 (describing the disabling impact of rights on political movements), with Glendon, supra note 4, at 109–10 (describing the disabling impact of rights discourse on public deliberation), and Sandel, supra note 4, at 321–24 (attributing similar consequences to a commitment to procedural liberalism).}\]

\[\text{40. Philosophers have attempted to ground human rights on the requirement of human agency, on human dignity, or the preconditions for human flourishing, among others, each of which may yield a different catalogue of rights. Political and legal theorists debate whether human rights depend on the existence of the state, whether they impose corresponding duties, and, if so, upon whom are those duties imposed.}\]


\[\text{42. See Richard Brandt, The Theory of the Good and the Right (1979) (offering utilitarian analysis of human rights); Richard M. Hare, Justice and Equality, in Justice and Economic Distribution 116, 130 (John Arthur & William H. Shaw eds., 1978) (defining the critical question as “[w]hat principles of justice, what attitudes towards the distribution of goods, what ascriptions of rights, are such that their acceptance is in the general interest?”).}\]

law. In popular discourse, however, human rights are frequently regarded as independent of social contract or positive law. Human rights are rights we all enjoy, whether or not they find recognition in positive law or provide for individual remedy.

This pre-political or politically transcendent quality of human rights represents an important distinction between human rights discourse and rights discourse generally. Whereas rights exercised within a narrower juridical context operate as internal constraints on state power, enforced through legal claims of the governed, human rights discourse operates as an external constraint on state power, brought to bear as much by domestic and international political pressure as by formal procedural enforcement of positive law. Articulated on this level, human rights discourse is often abstract and aspirational rather than concrete and justiciable. Although these qualities represent limitations in a legal context, perhaps even exacerbating the problem of indeterminacy, they permit human rights discourse to operate

---

44. See Hedley Bull, The Universality of Human Rights, 8 Millennium: J. Int’l Stud. 155, 159 (1979) ("The validity of our beliefs about human rights does not depend on the amount of consensus that exists in favor of them . . . .").

45. The Universal Declaration clearly embraces this idea. The Declaration states:

The General Assembly [p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measure, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Universal Declaration, supra note 1, preamble.

46. Joy Gordon suggests that

[it]he Enlightenment conception of rights does not fit cleanly within the framework of either natural law or positive law. It holds that, in contradistinction to positive legal entitlements, there exist legal rights inherent in the individual, prior to and outside of the state and society. . . . [I]n contrast to natural law, [this] conception of rights very much anticipates enforcement in concrete ways [including] revolutions and political institutions.

politically as a standard against which state practice can be measured and around which popular mobilization can occur.

This distinction evident in the discourse of human rights is mirrored in the system of positive law in which those human rights are embodied. Although international legal instruments often speak of rights as direct and unconditional entitlements of human beings, they do not generally create obligations that run directly between the individual and the state.\(^47\) Rather, international human rights instruments create obligations among states regarding their treatment of their own citizens.\(^48\) Professor Louis Henkin has described individuals as the "third-party beneficiaries" of these contracts among states.\(^49\) Individual rights under international human rights law therefore depend upon the political will of states to insist that these obligations are met. Thus, in both human rights discourse and positive law, there is a disjunction between state obligation and individual rights claims.

These features of international human rights discourse have significant implications for both the radical and communitarian critiques of rights talk. For example, Glendon's argument that rights encourage the individual to indulge his own interests against the common good responds primarily to the power of rights to trump collective goals.\(^50\) The success of human rights claims in the face of state practices that violate international norms, however, will very often depend upon domestic and international political support. In this sense, the claim of right does not trump collective goals but rather serves as a catalyst for collective expression of shared values. Moreover, despite arguments such as Tushnet's that individual rights undermine political mobilization, the quest for human rights has served repeatedly as a rallying point for liberatory movements around the world and as a basis for transnational organization.\(^51\) Finally, the gap between human rights discourse and positive law, coupled with the abstract and aspirational nature of that discourse may contribute to political change in a way that forestalls the conservative force of rights criticized by feminists and critical race theorists.

\(^47\) For a concise discussion of this point, see Henkin, *supra* note 7, at 268.
\(^48\) *Id.* at 268–69.
\(^49\) *Id.* at 270.
\(^50\) See Glendon, *supra* note 4, at 109–12.
\(^51\) See, e.g., Thomas M. Franck, *Community Based on Autonomy*, 36 Colum. J. Transnat'l L. 41, 52 (1997) (arguing that "retreat of the all-controlling state and . . . [the] emergence of the morally autonomous individual, far from undermining community and civic virtue, creates the necessary conditions for real community and genuine civic virtues").
III. HUMAN RIGHTS AND THE POLITICS OF DIFFERENCE

If the period since the drafting of the Universal Declaration can be called the "Age of Rights," the latter part of that period might also be called the "Age of Difference," as it has been characterized by the emergence of a wide range of identity-based political movements. Among these, the most familiar to Americans, perhaps, are movements such as feminism and gay rights, defined according to shared characteristics politicized by societal discrimination. Elsewhere, ethnic nationalism has re-emerged with groups claiming linguistic and/or genealogical kinship and revitalizing historical conflicts. Throughout the world indigenous groups have mobilized politically to assert rights to land, culture, and sovereignty. Finally, fundamentalist religious movements here and abroad increasingly insist on the right to pursue traditional practices and structures of government at odds with international norms. Each of these movements makes a claim of political solidarity and community based on shared history, culture, belief system, or other characteristics that are particular, not general—or at least less than universal.

The emergence of identity politics in its various forms presents at least two important theoretical challenges to the accepted framework of international human rights, both of which concern the role and nature of the

52. According to Cornel West:

Distinctive features of the new cultural politics of difference are to trash the monolithic and homogeneous in the name of diversity, multiplicity and heterogeneity; to reject the abstract, general and universal in light of the concrete, specific and particular; and to historicize, contextualize and pluralize by highlighting the contingent, provisional, variable, tentative, shifting and changing.

Cornel West, Keeping Faith, Philosophy and Race in America 3 (1993).


55. The Islamic fundamentalism movement, Taliban, in Afghanistan is an apt example in this context. This movement, now controlling most of the country, has imposed harsh restrictions on women and girls. See, e.g., Associated Press, 100 Girls Schools in Afghan Capital Are Ordered Shut, N.Y. Times, June 17, 1998, at A8.
individual in human rights theory. First, the emphasis on identity-based differences not only prioritizes difference over commonality but also—and perhaps more importantly—reflects a particular assumption about identity formation. In liberal theory, difference is a product of the choices of autonomous, self-determining subjects expressing their particular visions of the good.\textsuperscript{56} The exercise of individual choice produces differences in cultural practices, artistic and political expression, and religion, among others.\textsuperscript{57} A strong commitment to pluralism, in turn, protects those choices. Human rights instruments reflect these liberal assumptions about individual choice and difference in their protection of freedom of speech, association, and religion.\textsuperscript{58}

In contrast, feminist, anti-racist, and postcolonial theorists tend to view difference as a product of power, location, culture, and history.\textsuperscript{59} Differences are regulatory, socially-constructed, and constitutive of identity, not manifestations of the free choices of liberal subjects. This notion that differences are constitutive of identity rather than a self-determined expression of identity undermines the liberal assumption that a common humanity existing prior to difference will yield consensus regarding political first principles. Moreover, it suggests that our traditional framework of negative liberties, premised on protecting individual choice and disregarding the constraints identity imposes on the subject, afford a somewhat limited form of freedom.\textsuperscript{60}

The second important theoretical challenge presented by identity politics concerns the relationship between the individual and the community. Conceptually, human rights discourse invites us to see ourselves as essentially human, as human beings first. It asserts a collective identity that encompasses the human species as a whole while at the same time treating

\textsuperscript{56}. John Rawls, Political Liberalism 36 (1993) (arguing that "[u]nder the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines will come about and persist if such diversity does not already obtain").


\textsuperscript{58}. \textit{See, e.g.}, Universal Declaration, \textit{supra} note 1, art. 18.

\textsuperscript{59}. Judith Butler, \textit{Gender Trouble: Feminism and Subversion of Identity} 2 (1990) (arguing that "the feminist subject turns out to be produced by the very political system that is supposed to facilitate its emancipation"); West, \textit{supra} note 52, at 267–70 (articulating a genealogical materialist account of race).

\textsuperscript{60}. For an elaboration of this argument in the context of constitutional theory, see Higgins, \textit{supra} note 6, at 1694–99.
the individual as the relevant political unit. In contrast, the politics of difference, in its various forms, emphasizes the differences among groups or cultures while stressing the commonality among individuals within those groups. At best, this group-based identity fits uncomfortably within the liberal human rights framework both because it deems relevant differences from which rights discourse abstracts and because it ignores intra-group differences that rights discourse privileges. Arguments that emphasize the inadequacy of the international human rights framework to protect equally the interests of individuals divided by race, gender, ethnicity, and religion rely on the difference rationale. In contrast, arguments that rely upon identity-based claims to religious or cultural practices rely on collective values that downplay or deny individual autonomy and, in effect, individual difference.

The assumptions about identity and community that drive identity politics pose a fundamental question: Can any one set of civil, political, and social rights (much less the prevailing one) accommodate the multiplicity of legitimate claims that stems from politicized group identities? If the answer is no, as some have suggested, human rights discourse loses much of its vitality as a medium for political exchange and mobilization. By shifting the focus of the multicultural debate from an emphasis on "human" to an emphasis on "rights," the next section suggests a way to maintain some of that vitality while taking seriously the challenges of identity politics.


This debate informed the drafting of the Universal Declaration itself. For example, Arab states challenged the right to change religion, a standard contrary to the tenets of Islam. Howard Tolley, The U.N. Commission on Human Rights 1, 22 (1987). The Soviets were opposed to the preponderance of Western civil liberties. Id. at 21. Western nations were persuaded to include economic, social, and cultural rights in the document only after having been assured that it would not be legally binding. Id. at 21–22.
Viewed through the lens of identity politics, the category human is refracted into a vast array of overlapping sub-categories, each of which poses a separate challenge to the notion of a common humanity. When this multicultural array is viewed through the lens of human rights discourse, however, a different, more manageable set of categories emerges. Organized according to the minority's stance toward the majority-defined rights regime, the complaints raised by cultural, ethnic, or other minorities that drive the politics of difference generally fall into three categories. First, such groups may complain that they are inappropriately defined as different, narrow, or exceptional while the culture and characteristics of the majority are accepted as neutral, universal, or at least representative of the general interest. Second, minorities may complain that their distinctiveness is inappropriately ignored or disrespected by the majority, that they are denied the opportunity to assert their distinct status in the political and economic realms or to organize their communities around that distinct status. Third, minorities may not merely insist on the right to dissent and to self-determination but propound an alternative universalist vision that challenges the foundational commitments of the majority.

The first type of challenge, a claim of unjust marginalization, might be understood as a response to the failure of the existing human rights regime to realize its own commitments. For example, Article 2 of the Universal Declaration guarantees the rights and freedom set forth "without distinction of any kind, such as race, colour, sex, language, religion," etc. This equality guarantee, however, has not proven to be very robust. It has been most effective, at least rhetorically, as a form of negative liberty, guaranteeing freedom from state-sponsored discrimination. It has been much
more problematic with respect to the realization of positive rights such as education, employment, and an adequate standard of living. Not only have states failed to realize these rights generally, the failure has often mapped the very categories listed in the equality guarantee. As a result, the very guarantee of nondiscrimination in the protection of rights gives rise to identity-based political affiliations by appearing to promise but failing to deliver equality. Precisely because members of ethnic or racial minorities are denied the substantive equality promised by human rights instruments, such groups mobilize along the lines of division. This mobilization, in turn, undercuts the premise of commonality underlying the equal protection guarantee.

Much feminist human rights activism on the international level is an example of this form of identity politics. The international feminist movement did not emerge out of any pre-existing or essential connection among women as women. Rather, it is a direct response to the failure of the traditional human rights framework to safeguard women's fundamental integrity. To the extent that international alliances exist, women's shared experiences of oppression have helped to create them across nations and cultures with radically divergent beliefs.

In this context, feminists have exposed problems in the existing human rights framework that contribute to the systematic subordination of women and have argued that gender difference must be taken into account in reformulating human rights norms—not as an exception to those norms but as a constituent part of them. Though expressed in reformist terms, such arguments are potentially quite radical in their impact on our human rights regime. One need only recall the recent resistance to the inclusion of gender

---

66. See, e.g., The World's Women: 1995 Trends and Statistics 90 (United Nations 1995) (documenting a lower literacy rate for women than for men in almost every region of the world); id. at 108-9 (documenting women's disproportionate share of unpaid work in Bangladesh, India, and Nepal and worldwide under-representation in the paid labor market).

67. For a discussion of the connection between liberal citizenship and identity politics, see Brown, supra note 18, at 96–134.

68. Id.

69. See Higgins, supra note 5, at 89–90 (describing the widespread divisions and conflicts among state representatives and women's rights activists at the U.N. World Conference on Women in Beijing).

70. See id. (noting the emergence of coalitions, particularly in connection with the issue of violence against women).
REGARDING RIGHTS

as a basis for political asylum under U.S. law to see why. Opponents argued that adjusting our notion of international human rights abuses to include not just what states do to their own citizens but also states' systematic failure to protect some of its citizens from the abuse of others would "dilute the power of core human rights protections." Supporters insisted that the move would create much-needed enforceable obligations on the part of states to provide affirmative protections.

Despite their potentially radical impact, these arguments are internal to our human rights framework in that they accept the aspirations of the existing scheme at a general level but argue that those aspirations have been improperly defined in some cases and inadequately met in others. For example, most Western feminist theorists working on international human rights accept the assumption that individuals are rights-bearers and that those rights should be universally respected. To the extent that feminists reject assumptions regarding universal personhood, that rejection is usually based upon the claim that personhood has been defined largely in male terms. The response to this critique, therefore, involves an expansion of our notion of personhood to embrace more fully the experiences of women, particularly with respect to the impact of private power and violence. In other words, these feminist critics are engaged in an effort to recast basic rights to address more fully the needs of women.


72. This assumption is often simply taken for granted, not stated explicitly. Evidence of the importance of the individual as rights-bearer can be found in feminist skepticism toward group rights rooted in culture. See, e.g., Ann Elizabeth Mayer, Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience, in Women's Rights/Human Rights: International Feminist Perspectives, supra note 33, at 176–88. For a discussion of the problems created by feminism's simultaneous commitment to a critique of rights and liberal individualism and to the expansion of women's rights globally, see Higgins, supra note 5.

73. Charlotte Bunch, Women's Rights as Human Rights: Toward a Re-Vision of Human Rights, 12 Hum. Rts. Q. 486, 492 (1990) (advocating an expansion of state obligations "to respond to the brutal and systematic violation of women globally); Hilary Charlesworth, et al., supra note 33, at 621 (acknowledging cultural difference but advocating an "international feminist perspective" that would inform international law).

74. See, e.g., Catharine A. MacKinnon, Crimes of War, Crimes of Peace, in On Human Rights: The Oxford Amnesty Lectures, 83–109 (Stephen Shute & Susan Hurley eds., 1993). MacKinnon notes that "[h]uman rights principles are based on experience, but not that of women," and then goes on to suggest ways to remedy this deficit. Id. at 84.
Though in some sense radical, such internal challenges should not be seen as threats to the human rights framework but rather opportunities to see it in a new light. Consider the Universal Declaration, a document which lays out a traditional human rights agenda inspired by Western liberalism and therefore presumably vulnerable to the feminist critique I have described. Article 1 obliges all human beings, not merely states, to act toward one another in a spirit of brotherhood. Article 3 declares that everyone has the right to life, liberty, and security of person. Again, the language includes no mention of the state. In light of the feminist critique, this guarantee can plausibly be read both as a constraint on state-sponsored deprivations of these rights and an obligation of the state to prevent deprivations by non-state actors. Similarly, Article 23, guaranteeing rights in the workplace, must logically refer to obligations on private employers. In short, the plain language of the Universal Declaration goes well beyond the actions of states to confer duties on non-state organizations and upon individuals. Read in this way, it addresses many of the substantive concerns raised by feminists regarding the abuse of private power.

The second category of challenges presented by the politics of difference includes multiculturalist arguments for the preservation of cultural values through separation or exclusion. Such claims are really arguments for the majority to respect, or at least tolerate, the practices, customs, religious beliefs, or social organization of the minority by declining to enforce the norms of the majority. In the face of such challenges, one must ask the difficult question as to what extent a human rights regime committed at least

75. Universal Declaration, supra note 1, art. 1.
76. Id. art. 3.
77. For a discussion of the creation of private duties under international human rights law, see Jordan J. Paust, The Other Side of Right: Private Duties Under Human Rights Law, 5 Harv. Hum. Rts. J. 51, 53 (1992) (noting that “[m]ost of the articles in the Declaration speak generally of the particular rights and freedoms of each person or of everyone without any mention of which person or entity might owe a corresponding duty”).
78. See id. at 53–54.
79. Universal Declaration, supra note 1, art. 23.
80. See Lung-Chu Chen, An Introduction to Contemporary International Law 215 (1989) (noting that “most [human rights standards] are documented in terms of the right of persons and not in terms of participation in or protection from the state. They are, in the words of the International Court of Justice, obligatio erga omnes (owing by and to all humankind)
in part to toleration and pluralism must accept the intolerant sub-community. 82

A common response to this type of conflict is to interrogate the legitimacy of the claims of a cultural or religious groups by asking who is asserting them and who might be resisting. Rather than responding to the claim directly, defenders of universalism may instead question who is entitled to speak on behalf of the dissenting sub-community and whether the cultural defense is being asserted in good faith. 83 This response, though sometimes valid, often misses the point. Certainly culture and religion are sometimes invoked cynically to mask oppression. 84 But, if one assumes the strongest case for cultural claims—that they are asserted in good faith and represent consensus among those affected by the practice—this second category of culture-based challenges presents a more difficult problem for the international human rights community than does the first. Unlike minority groups seeking transformation through inclusion, those raising this second type of challenge do not seem to embrace the basic commitments of the majority. Rather, they merely want out, exemption, exclusion, a remedy that appears to be inconsistent with the commitment to the universality of basic rights.

The United States Supreme Court faced (and ultimately avoided) this issue in Santa Clara Pueblo v. Martinez, 85 a case involving the power of a Native American tribe to determine the requirements for tribal membership. Under the tribe’s rules, the children of a male member of the tribe and a female who was not a member of the tribe could obtain tribal

82. For a discussion of the obligations of a liberal regime to tolerate a community that may reject liberal values, see Chandran Kukathas, Cultural Toleration, in Ethnicity and Group Rights, supra note 81, at 120–21.

83. See, e.g., Mayer, supra note 72, at 176 (citing examples of the use of cultural or religious defenses by Islamic regimes accused of suppressing feminist dissent).

84. Arati Rao, The Politics of Gender and Culture in International Human Rights Discourse, in Women’s Rights/Human Rights: International Feminist Perspectives, supra note 33, at 167, 169 (“No social group has suffered greater violation of its human rights in the name of culture than women. Regardless of the particular forms it takes in different societies, the concept of culture in the modern state circumscribes women’s lives in deeply symbolic as well as immediately real ways.”).

As a specific example, Rao cites Kenyatta’s invocation of culture as a defense to the practice of female genital surgery among Kikuyu. Rao urges the questioning of the “politics of such a claim, particularly when it is made by a male national leader on behalf of the social group most directly affected by the practice: women.” Id.

membership. In contrast, if the mother but not the father was a member of the tribe, the children were excluded from membership. A woman seeking membership for her children challenged this gender-based inequality under a federal statute, the Indian Civil Rights Act, which made individual civil rights protections under federal law applicable to members of Native American tribes. The question facing the Supreme Court seemed to present a conflict between the prerogatives of the tribe to define its membership and the rights of individuals within the group to the civil liberties guaranteed by the laws of the outsider/majority. The Court declined to address the question directly, finding no individual right to sue under the statute. The effect of the decision, however, was to uphold the prerogative of the tribe on the issue of tribal membership.

On the international level, a similar conflict arises when groups invoke religious or cultural justifications for the practice of polygamy or female genital surgery or the maintenance of strict rules of purdah. Again, one can analyze these situations as a direct conflict between local practices and international norms, placing female genital surgery, polygamy, or purdah in a category with ethnic cleansing or torture. Nevertheless, the reason that human rights advocates and even feminists have difficulty responding to such challenges is that the defenders of such cultural practices tend to invoke justifications human rights advocates are obliged to respect, including autonomy, cultural integrity, and religious freedom.

Again, consider the Universal Declaration. Articles 18 and 19 guarantee freedom of conscience and religion, and the freedom, either alone or in the company of others and in public or private, to manifest one's religion or belief in teaching, practice, worship, and observance. To what extent can the right of religious observance or political self-determination legitimately be invoked to deny other rights such as the right to be free from

86. Id. at 52–53.
87. Id.
88. Id. at 53.
89. For a discussion of the Santa Clara Pueblo case in the context of feminist theory, see MacKinnon, supra note 19, at 63–69 (1988) (calling into question the cultural claim asserted by the tribal community), and Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 593–94 (1990) (criticizing MacKinnon's assumption that the Pueblo women's gender identity is more important than their tribal identity).
90. The Court held both that the tribe itself was protected by sovereign immunity and that no private right of action existed. 436 U.S. at 59, 64–65.
91. For an example of an argument that takes seriously such contentions in a cross-cultural critique, see Gunning, supra note 61.
92. Universal Declaration, supra note 1, arts. 18, 19.
gender discrimination? On one hand, one might view the dissenting member of the community as the relevant rights-bearer whose claim must be recognized against the power of the community. Yet it is such a view that is most vulnerable to the critique that rights discourse promotes selfish individualism and disregard of collective interests.\textsuperscript{93} Focusing on the individual alone obscures the significance of the intermediate unit between the citizen and the state. On the other hand, one might as easily view the minority community as the rights-bearer against the power of the majority that insists on an egalitarian norm.\textsuperscript{94} Unless the human rights framework can accommodate such group-based claims of right, at least some very important interests will fall outside of its protection.\textsuperscript{95}

The conflict among the claims of the majority, minority subcommunities, and individual members of those communities is a problem that admits no easy resolution. Nevertheless, although it often arises from the assertion of group identity, it is not a problem that can be attributed to cultural difference per se. Rather, it goes to the tensions that are built into our foundational human rights documents, particularly with respect to the status of group rights.\textsuperscript{96} In other words, the problem resides not in the conflict over the category \textit{human} but the contestation over the meaning and content of \textit{rights}.

This distinction is more than semantic in that the invocation of the language of rights by groups engaged in practices the human rights community finds objectionable brings such groups into a common discourse. For example, in the Santa Clara Pueblo case, both the tribe and the plaintiff mother were arguing from within the same rights-based paradigm. Resolution of their conflicting rights claims, to sovereignty and to gender equality, did not entail rejection of that paradigm but rather invited a working out of competing arguments articulated in a common language. By making rights-based arguments, the defenders of cultural practices submit themselves, at least rhetorically, to the dominant community and its legal

\begin{footnotesize}
\begin{enumerate}
\item[93.] See supra notes 28-30 and accompanying text (discussing communitarian critique).
\item[94.] For an example of an argument strongly supporting this view with respect to the intolerant sub community, see Kukathas, supra note 82.
\item[95.] Many strong defenders of liberalism have begun to take seriously collective interests and have attempted to accommodate those interests within a liberal framework. See, e.g., Will Kymlicka, Multicultural Citizenship (1995) (articulating a liberal theory of minority rights).
\item[96.] See id. at 34–48 (discussing the difficulties and possibilities of recognizing group rights within a liberal framework).
\end{enumerate}
\end{footnotesize}
structures. The rhetoric signals a desire not so much to be left alone but to be embraced, respected by the rights-regarding community.

Finally, the third category of challenges presented by the politics of difference can be defined by the absence of shared assumptions and the rejection of the human rights discourse altogether. In this category, the community of human rights dissenters responds to criticism by insisting on the irrelevance of such standards. Such an argument does not depend upon the assertion of cultural difference—cultural difference is properly a defense within the rights framework. Rather, the dissenting community may offer an alternative vision that simply does not speak to the agenda of the majority. Moreover, as Jeremy Waldron points out, this vision may be a competing universal claim, not one of many acceptable views within a pluralist international community. \(^97\)

For example, in response to the U.N. Population Conference in Cairo in 1994 and again to the U.N. World Conference on Women in Beijing in 1995, the Catholic Church and representatives of several Muslim countries denounced the agenda of both as promoting immorality by advocating family planning and emphasizing sexual autonomy. \(^98\) Though at times articulated in the language of cultural difference, these objections in fact represented competing universalist claims. Neither the Vatican nor Muslim leaders were claiming merely a right to dissent. Rather, they offered an alternative vision of universal norms regarding sexuality, reproduction, the family, and ultimately the status of women in society.

Objections that fall within this third category resist accommodation within a liberal-pluralist regime based on a combination of individual and group rights. Unlike the rights-based claims of dissenting groups, such conflicting universalist claims do not depend upon an implicit acceptance of the traditional human rights framework. By challenging the moral foundations of that framework, this third category demarcates the limits of the rights discourse and represents the most serious challenge to the principles of the Universal Declaration.

\(^{97}\) See Jeremy Waldron, supra note 64.


\(^{99}\) See Barbara Crossette, The Second Sex in the Third World, N.Y. Times, Sept. 10, 1995, at A25 (describing Western conservative groups, including the Vatican, as invoking the charge of cultural imperialism).
V. CONCLUSION

Viewing cultural difference or identity politics as a threat to human rights standards reflects the notion that a shared idea of what it means to be human is essential to the acceptance of those standards. I have argued, however, that our human rights regime is able to endure in the face of divergent ideas of human flourishing so long as a common discourse of rights is available at a general level. Indeed, the very effort to accommodate such competing conceptions within rights discourse may address some of the acknowledged limitations of that discourse. Although certain groups will continue to stand outside the existing framework and challenge its terms, it is acceptance of the language of rights, not recognition of cultural difference that is the relevant marker.