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HUMAN RIGHTS AND THE LIMITS OF LAW

*Amartya Sen**

I.

In a sentence that sounds oddly conservative—even reactionary—Mary Wollstonecraft wrote in 1790: “on what principle Mr. Burke could defend American independence, I cannot conceive.” This was in the first of Wollstonecraft’s two books on what we would now call “human rights,” the one entitled *A Vindication of the Rights of Men*, in *A Letter to the Right Honourable Edmund Burke*. What could she be talking about?

Mary Wollstonecraft was talking, in fact, of the inadequacy of any defense of the liberty of non-slave population in the British colony in North America without addressing, at the same time, the rights of human beings who happened to be enslaved. Wollstonecraft went on to say:

[T]he whole tenor of [Burke’s] plausible arguments settles slavery on an everlasting foundation. Allowing his servile reverence for antiquity, and prudent attention to self-interest, to have the force which he insists on, the slave trade ought never to be abolished; and, because our ignorant forefathers, not understanding the native dignity of man, sanctioned a traffic that outrages every suggestion of reason and religion, we are to submit to the inhuman custom, and terms an atrocious insult to humanity the love of our country, and a proper submission to the laws by which our property is secured.¹

Edmund Burke was very much against the French revolution, but entirely in favor of the American war of independence; Mary Wollstonecraft was in favor of both. The point she is making here, as she does elsewhere as well, is that it is hard to justify the defense of freedom of human beings that separate out some people, whose liberties matter, from others not to be included in that select category. Two

* Lamont University Professor, and Professor of Economics and Philosophy, Harvard University. Some of the methodological issues considered here have also been discussed in Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315 (2004).

¹ MARY WOLLSTONECRAFT, *A Letter to the Right Honourable Edmund Burke*, reprinted in *A VINDICATION OF THE RIGHTS OF MAN; WITH, A VINDICATION OF THE RIGHTS OF WOMAN, AND HINTS 5, 13* (Sylvana Tomaselli ed., 1995) [hereinafter *VINDICATION*].

years later, in 1792, Mary Wollstonecraft would publish the second of her two treatises on human rights with the title *A Vindication of the Rights of Woman*.² One of the themes running through the volume is that we cannot defend being in favor of the rights of men, in particular, without taking a similar interest in the rights of women.

Even though Wollstonecraft's arguments did not engage issues of jurisprudence, she made powerful use of the fact that there is something immediately appealing about the presumption that every person anywhere in the world, irrespective of citizenship and residence and the laws of the land in operation, has some basic claims to the attention of others, simply by virtue of being a human being. However, to give the idea its due, we have to examine what is entailed by the recognition that some particular claim should count as a human right. How should we think about the basis of human rights? What is the nature of the discipline if there is any to be found underlying the political discussion?

We must also ask: how do human rights relate to law? It is not surprising that there is a strong temptation to link human rights to law, in a way that Wollstonecraft abstained from doing. There are at least three reasons for wanting to see the linkage. First, even though idea of human rights is of comparatively recent origin, the concept of legal rights is old, well established, and widely used, and there is some obvious reason to understand new claims in the light of old understandings. Second, the language of human rights is clearly influenced by legal terminology. Indeed, the term "right" itself has strong legal antecedence. And not surprisingly, many people object to the use of a variant of a legal concept in a strictly non-legal way. There is a suspicion that some conceptual confusion is involved in the idea of human rights—a suspicion to which Jeremy Bentham (as I shall presently discuss) gave eloquent expression. And third, those who fight for human rights work often enough to promote fresh legislation in that direction, so that the connection between human rights and legal rights are of immediate interest to these advocates of new laws.

The cogency of these concerns would be hard to deny. And yet, I would like to argue, the entirely legal routes to understanding human rights are not only misleading, they may also be foundationally mistaken. The different legal routes that have been suggested—I shall discuss three distinct ones—all suffer from being either misdirected or seriously incomplete.

² MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* (1792), reprinted in *VINDICATION*, *supra* note 1, at 65.

II.

Before proceeding further, I must make a clarificatory point. The rhetoric of human rights is sometimes applied to actual legislation inspired by the idea of human rights. There is clearly no great difficulty in seeing the obvious juridical status of these already legalized entitlements. No matter what they are called (“human rights laws” or whatever), they stand shoulder to shoulder with other established legislations. There is nothing particularly complicated about this bit of understanding. The question rather is whether that is all there is to human rights: do they become real only when placed in legislation?

That can hardly be the whole story. For one thing, prior diagnosis of the importance of some rights clearly plays an important part in motivating legislation. Indeed, a great many acts of legislation and legal conventions (such as the European Convention for the Protection of Human Rights and Fundamental Freedoms) have certainly been inspired by a belief in some pre-existing claims of all human beings. There are important issues about the status and standing of human rights before any legislation aimed to give force to those rights actually occurs.

Furthermore, we must also examine whether legislation is the only—or even the pre-eminent—route through which accepted human rights can be made effective. Is the practical relevance of human rights entirely parasitic on legislation that has actually occurred? This would be hard to accept. Consider, for example, a country in which there are no laws—written or unwritten—that protect freedom of speech and prohibit arbitrary imprisonment. Can the political authorities there arrest people for being critical of the government, without this being seen as a serious violation of the human rights of the dissidents? Would the continued incarceration of an accused but untried prisoner be exempt from condemnation as a violation of human rights, whenever the prisoner is not covered by some ratified injunction, such as the Geneva accord (an issue that has received some attention in the debates about the acceptability of Guantanamo detention arrangements)? Or, to take a different type of case, would the failure of public authorities to make arrangements for the schooling of young girls and boys not count at all as a breach of human rights, if there were no rights to education already embodied in the laws of the land?

These are pertinent questions, and there are good grounds for being skeptical of such a legally parasitic view of human rights. However, on the other side, the idea that human beings may have some rights even without any specific legislation is seen by many as foundationally dubious and lacking in cogency. A chronic question is: where do these rights come from? Many philosophers and legal theorists see the

rhetoric of human rights as just loose talk—perhaps kind and noble forms of locution—but loose talk nevertheless. Is the force of legislation, or at least some judicial reinterpretation of existing laws, needed to make any sense at all of human rights?

The relationship between law and human rights does require a closer examination. I shall distinguish between three different types of legal connections, in particular that human rights are (1) post-legal, or (2) proto-legal, or (3) ideal-legal. I would argue that while each of these connections can be contingently important, they fail—individually and jointly—to do justice to the nature and use of human rights. We need to see human rights, I would argue, over a much bigger arena, of which legal motivation, actual legislation, and judicial enforcement form only one part.

More particularly, I would argue that human rights are best seen as articulations of social ethics, comparable to—but very different from—utilitarian ethics. Their functional usefulness lies in their role in practical reason. Like other ethical tenets, human rights can, of course, be disputed, but the claim of the generality of human rights is that they will survive open and informed scrutiny. Any universality that these claims have is dependent on the opportunity for unobstructed discussion. As John Rawls has argued, the objectivity of social or political ethics can be seen in terms of its ability to be sustained by “a public framework of thought” that provides “an account of agreement in judgment among reasonable agents.”³

I shall have to say more about the nature of the social ethics that is involved, but I begin with a critique of the entirely law-dependent views of human rights—that is, of seeing human rights either as consequences of the relevant legislation, or as precursors of such legislation, or as ideal grounds for appropriate legislation.

III.

These questions, I must note, are not new. Debates on this subject have occurred for more than two hundred years. The American Declaration of Independence took it to be “self-evident” that everyone is “endowed by their Creator with certain inalienable rights,” and thirteen years later, in 1789, the French declaration of “the rights of man” asserted that “men are born and remain free and equal in rights.” But it did not take Jeremy Bentham long, in his *Anarchical Fallacies* written during 1791-92 (aimed against the French “rights of man”), to propose the total dismissal of all such claims. Bentham insisted that “natural

³ JOHN RAWLS, *POLITICAL LIBERALISM* 110-12 (1993).

rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”⁴ That dichotomy remains very alive today, and despite persistent use of the idea of human rights in worldly affairs, there are many who see the idea of human rights as no more than “bawling upon paper”—to use another of Bentham’s barbed portrayal of natural right claims, such as the French “rights of man.”

However, seen as ethical—rather than legal—claims, social demands linked to the so-called “rights of man” are no more nonsensical than Bentham’s own utilitarian pronouncements. Indeed, the analogy between articulations of human rights and utilitarian propositions has considerable perspicacity, even though the great founder of modern utilitarianism managed to miss that connection altogether in his classic hatchet job on natural rights in general and on the “rights of man” in particular. Bentham took the appropriate comparison to be that specifically between the legal significance, respectively, of (1) declarations of human rights, and (2) actually legislated rights. Not surprisingly, he found the former to be lacking in legal status which the latter, actually legislated rights would obviously have. Bentham’s dismissal of human rights came, thus, with amazing swiftness.

Right, the substantive right, is the child of law; from real laws come real rights; but from imaginary laws, from “laws of nature,” [can come only] “imaginary rights.”⁵

It is easy to see that Bentham’s rejection of the idea of natural “rights of man” depends substantially on the rhetoric of privileged use of the term of “rights,” seeing it in its specifically legal interpretation. However, insofar as human rights are taken to be significant ethical claims, the pointer to the fact that they do not necessarily have legal or institutional force—at least not yet—is obvious enough, but altogether irrelevant. The right comparison is, surely, between (1) a utility-based ethics (championed by Bentham himself), which sees fundamental ethical importance in utilities but none in human rights, and (2) an ethics that makes room for the significance of human rights (as the advocates of “rights of man” did), linked with the basic importance of human freedoms.

Just as utilitarian ethical reasoning takes the form of insisting that the utilities of the relevant persons must be taken into account in deciding on what should be done, the human rights approach demands that the importance of the freedoms that are incorporated in the form of human rights must be given ethical recognition. The relevant

⁴ JEREMY BENTHAM, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution*, in 2 THE WORKS OF JEREMY BENTHAM 501 (photo. reprint 2005) (J. Bowring ed., 1843).

⁵ *Id.* at 523.

comparison lies principally in this contrast—not in differentiating the legal force of legislated rights from the absence of any legal standing generated by an ethical recognition of human rights. Indeed, even as Bentham was busy writing down his dismissal of “rights of man” in 1791-92, the reach and range of ethical interpretations of rights were being powerfully explored in such writings as Thomas Paine’s *Rights of Man*, and more innovatively, in the two books of Mary Wollstonecraft already mentioned (though neither seemed to arouse Bentham’s curiosity).⁶

If human rights are not just post-legal, what about the possibility that they are proto-legal? In fact, an ethical understanding of human rights goes not only against seeing them as legal demands (and against taking them to be, as in Bentham’s view, legal pretensions), it also differs from a law-centered approach to human rights which sees them as if they are basically grounds for law—almost “laws in waiting.” Ethical and legal rights do, of course, have motivational connections. In a rightly celebrated essay *Are There Any Natural Rights?*, Herbert Hart has argued that people “speak of their moral rights mainly when advocating their incorporation in a legal system.”⁷ He added that the concept of a right “belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s and so to determine what actions may appropriately be made the subject of coercive legal rules.”⁸ Whereas Bentham saw rights as a “child of law,” Hart’s view takes the form, in effect, of seeing some natural rights as *parents* of law—they motivate and inspire specific legislations.

There can, in fact, be little doubt that the idea of moral rights can serve—and has often served in practice—as the basis of new legislation. It has frequently been utilized in this way, and this is indeed an important use of human rights. That, for example, is precisely the way the diagnosis of inalienable rights was invoked in the American Declaration of Independence and reflected in the subsequent U.S. legislation (including the Amendments), a route that has been well-trodden in the legislative history of many countries in the world. Providing inspiration for legislation is certainly one way in which the ethical force of human rights have been constructively deployed.

However, to acknowledge that such a connection exists is not the same thing as taking the relevance of human rights to lie exclusively in

⁶ See THOMAS PAINE, *Rights of Man, Part One* (1791), reprinted in RIGHTS OF MAN 39 (1985); THOMAS PAINE, *Rights of Man, Part Two* (1792), reprinted in RIGHTS OF MAN, *supra*, at 39; WOLLSTONECRAFT, *supra* note 1.

⁷ H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 177 (1955), reprinted in THEORIES OF RIGHTS 77, 79 (Jeremy Waldron ed., 1984).

⁸ *Id.* at 79 (footnote omitted).

determining what should in Hart's language "appropriately be made the subject of coercive legal rules." It is important to see that the idea of human rights can be—and is—actually used in several other ways as well. Indeed, if human rights are seen as powerful moral claims—indeed as "moral rights" to use Hart's phrase—then surely we have reason for some catholicity in considering different avenues for promoting these claims. The ways and means of advancing the ethics of human rights need not, thus, be confined only to making new laws. For example, monitoring and other activist support provided by such organizations as Human Rights Watch, Amnesty International, the ACLU, OXFAM, or Medicines Sans Frontiers, can themselves help to advance the effective reach of acknowledged human rights. In many contexts, legislation may not, in fact, be at all involved.

IV.

The point is not so much whether the legislative route can make the social ethics of human rights more effective. It certainly can do this in many cases. The point, rather, is that there are other routes as well, which too help to make the ethics of human rights more influential and effective.

First, under what can be called the "recognition route" (to be distinguished from the "legislative route"), there is acknowledgement, but not necessarily any legalization or institutional enforcement of a class of claims that are seen as fundamental human rights. The Universal Declaration of Human Rights, sponsored by the United Nations in 1948, which was perhaps the most important move that advanced global activities on human rights in the last century, falls squarely into this category (even though the framers of the Declaration had also hoped that it would lead to specific bills of rights in different countries). Subsequently, there has been a sequence of other international declarations, often through the United Nations, giving recognition—rather than a legal and coercive status—to various general demands, for example the "Declaration on the Right to Development," signed in 1986. This approach is motivated by the idea that the ethical force of human rights is made more powerful in practice through giving it a high-profile social recognition and an acknowledged status, even when no enforcement is instituted.

Another line of implementation goes beyond recognition to active agitation. There can be organized advocacy urging compliance with certain basic claims of all human beings that are seen as human rights, and there can also be monitoring of violations of these rights and attempts to generate effective social pressure. The global NGOs have

increasingly been involved in advancing human rights, through public discussion and support on the one hand, and publicizing and criticizing violations on the other.

It is also worth noting that even when the agents involved in activist promotion of human rights do not have any special legal status, they can still make a difference to political, social, and administrative practice through the use of existing laws, combined with seeking public disclosures and critical debates. For example, unlike the Indian and South African Human Rights Commissions, which are recognized in the respective national laws, the Pakistan Human Rights Commission is basically just an NGO, and yet under the visionary and courageous leadership of Asma Jahangir, I.A. Rehman, and others, it has been remarkably effective in identifying and resisting violations of human rights, and in defending vulnerable persons including religious minorities and ill-treated women.⁹

V.

I have argued so far against seeing human rights as consequences of appropriate legislation, or as motivation for making such legislation. But what about the third law-related view—which has sometimes been aired—that human rights are best seen as ideals for legislation? This raises an interesting question about the appropriate reach of the legislative route. Can it be claimed that if a certain human right is seen as important, then it must be ideal to legislate it into a precisely specified legal right?

It is not clear that this is, in fact, so. For some rights, the ideal route may well not be legislation but something else, such as recognition or agitation, or even public discussion and education, with the hope to change the behavior of those who contribute to the violation of human rights. For example, recognizing and defending a wife's moral right to be consulted in family decisions, even in a traditionally sexist society, may well be extremely important.¹⁰ And yet it seems entirely plausible that coercive legislation, with the imprisoning or fining of husbands for ignoring the views of their wives may be much too blunt a way of ensuring that husbands consult their wives in family decisions. Because of the importance of communication, advocacy,

⁹ For a good discussion of some of these supportive activities, see HUMAN RIGHTS COMMISSION OF PAKISTAN (HRCP), *THE STATE OF HUMAN RIGHTS IN 2001* (2002).

¹⁰ The public importance and social reach of women's participation in family decisions is discussed in the chapter on women's agency and social change in AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 189-203 (2000).

exposure, and informed public discussion, human rights can have influence without necessarily depending on coercive legal rules.

Similarly, the moral or political entitlement, which can easily be seen as a human right, of a somewhat slow speaker not to be snubbed in an open public meeting by a rudely articulate verbal sprinter may well be important for the self-respect of the leisurely speaker, but also for public good. Nevertheless, it is not likely to be a plausible subject for punitive legislation. The protection of that human right would have to be sought elsewhere. The effectiveness of the claims of human rights does not rest on seeing them invariably as putative proposals for legislation.

It is perhaps important also to emphasize that there are several ways of safeguarding and promoting human rights other than legislation, and that these different routes have considerable complementarity. For example, for effective enforcement of already legislated human rights laws, public monitoring and pressure can make considerable difference. The ethics of human rights can go with a variety of interrelated instruments and a versatility of ways and means. This is one of the reasons why it is important to give the general ethical status of human rights its due, rather than locking up the concept of human rights prematurely within the narrow box of an entirely legal approach.

VI.

Let me now move from presenting critiques of the purely legal understanding of human rights (as post-legal, proto-legal, or ideal-legal concepts) to some constructive claims. A pronouncement of human rights is an assertion of the importance of the corresponding freedoms—the freedoms that are identified and privileged in the formulation of the rights in question. For example, the individual right not to be tortured springs from the importance of freedom from torture for all. This goes with the affirmation of the need for others to consider what they can reasonably do to secure the freedom from torture for all. For a would-be torturer, the demand is obviously quite straightforward—to wit, to refrain and desist. The demand here takes the form of what Immanuel Kant called a “perfect obligation.”¹¹ However, for others too—that is, those other than the would-be torturers—there are responsibilities, even though they are less specific and come in the general form of “imperfect obligations” (to invoke another Kantian concept). Imperfect obligations

¹¹ See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Mary Gregor ed. & trans., 1997) (1788).

are general duties of anyone in a position to help to consider what he or she can reasonably do in the matter involved. The perfectly specified demand not to torture anyone is supplemented by the more general—and less exactly specified—requirements to consider the ways and means through which torture can be prevented and then to decide what, if anything, one should, thus, reasonably do in any particular case.

The recognition of human rights is not an insistence that everyone everywhere rise to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgement that if one is in a plausible position to do something effective to prevent the violation of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns may overwhelm the reason for the action in question, but that reason cannot be simply brushed away as being “none of one’s business.” Imperfect obligations must not be confused with no obligations at all.

It may be useful to illustrate the distinction between different kinds of obligations with a concrete example. Consider a real-life case which occurred in Queens in New York in 1964 when a woman, Kitty Genovese, was fatally assaulted in full view of others watching the event from their apartments who did nothing to help her. It is plausible to argue that three terrible things happened here, which are distinct but interrelated:

- (1) that Genovese’s freedom—and right—not to be assaulted was violated (clearly the primary nastiness in this case was that Kitty Genovese was murdered);
- (2) that the murderer violated the immunity that anyone should have against assault and killing (a violation of a “perfect obligation”); and
- (3) that the others who did nothing whatsoever to help the victim also transgressed their general—and “imperfect”—obligation to help, which they could reasonably be expected to provide.

These distinct failings bring out a complex pattern of rights-duties correspondence in a structured ethics.

As it happens in the laws of some countries, there is even a legal demand, which can hardly have extreme precision, for providing reasonable help to third parties. For example, in France there is provision for “criminal liability of omissions” in the failure to provide reasonable help to others suffering from particular types of transgressions. Not surprisingly, ambiguities in the application of such laws have proved to be quite large and have been the subject of considerable legal discussion in recent years.¹² The ambiguity of duties

¹² See generally Andrew Ashworth & Eva Steiner, *Criminal Omissions and Public Duties: The French Experience*, 10 LEGAL STUD. 153 (1990); Glanville Williams, *Criminal Omissions*:

of this type—whether in ethics or in law—would be difficult to avoid if third-party obligations of others in general were given some room, and this cannot be avoided for an adequate theory of human rights.

Even though recognitions of human rights (with their associated claims and obligations) are ethical affirmations, they need not, by themselves, deliver a complete blueprint for evaluative assessment. An agreement on human rights does involve a firm commitment—to wit, to give reasonable consideration to the duties that follow from that ethical endorsement. But even with agreement on these affirmations, there can still be serious debates, particularly in the case of imperfect obligations, on (1) the ways in which the attention that is owed to human rights should be best paid, (2) how the different types of human rights should be weighed against each other and their respective demands integrated together, and (3) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on. A theory of human rights can leave room for further discussions, disputations, and arguments. The approach of open public reasoning, which is central to the understanding of human rights (as proposed here), can definitively settle some disputes about coverage and content (including the identification of some clearly defensible rights and others that would be hard to sustain), but may have to leave other possibilities unsettled, at least tentatively. The admissibility of a domain of continued dispute is no embarrassment to a theory of human rights.

In practical applications of human rights, such debates are, of course, quite common and entirely customary, particularly among human rights activists. What is being argued here is that the possibility of such debates—without losing the basic recognition of the importance of human rights—is not only a feature of what can be called “human rights practice,” but that it is actually part of the general discipline of human rights (rather than being an embarrassment to that discipline). Variability of this kind is typically present in all general theories of substantive ethics. Indeed, a similar diversity can be found within utility-centered ethics (a subject that has been extensively explored in contemporary social choice theory), even though this feature of that large ethical discipline often receives little—or no—recognition at all (it certainly received little discussion from Jeremy Bentham himself).

VII.

I turn now to a critique of a non-legal (or more accurately, not fully legal) understanding of human rights that is applied particularly to the inclusion of some economic and social rights within the permissible domain of human rights. For example, since it may not be possible for some poor countries to eliminate hunger altogether, it is argued that the freedom not to be hungry cannot possibly be seen as a human right.

Maurice Cranston has put the argument sharply:

The traditional political and civil rights are not difficult to institute. For the most part, they require governments, and other people generally, to leave a man alone The problems posed by claims to economic and social rights, however, are of another order altogether. How can governments of those parts of Asia, Africa, and South America, where industrialization has hardly begun, be reasonably called upon to provide social security and holidays with pay for millions of people who inhabit those places and multiply so swiftly?¹³

In assessing this line of rejection, we have to ask: why should complete feasibility be a condition of cogency of human rights when the objective is to work towards expanding both their feasibility and their actual realization? The understanding that some rights are not fully realized, and may not even be fully realizable under present circumstances, does not, in itself, entail anything like the conclusion that these are, therefore, not rights at all. Rather, this ethical understanding suggests, as Mary Wollstonecraft discussed with much clarity, the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized.

It is also worth noting in this context that the question of feasibility is not confined to economic and social rights only; it is a much more widespread problem. Even regarding liberties and autonomies, to guarantee that a person is "left alone" (as Cranston sees it) has never been particularly easy. That elementary fact cannot but be rather clearly recognized now, at least since September 11 of 2001, or July 7 of 2005. If the current feasibility of guaranteeing complete and comprehensive fulfillment were made into a necessary condition for the cogency of any right, then not only economic and social rights, but also liberties, autonomies, and even political rights may fall far short of cogency.

¹³ Maurice Cranston, *Are There Any Human Rights?*, DAEDALUS, Fall 1983, at 1, 13.

VIII.

Finally, before I end this lecture, it may be useful to address briefly a worry that many people may have that a non-legal (or not entirely legal) theory of human rights would lack definitiveness. I have argued that survival in open public discussion—a criterion that is central to the approach of human rights I am trying to present—may make some claims to human rights easier to defend than others. That seems to me to be the nature of the territory we are in. As Aristotle remarked in the *Nicomachean Ethics*, we have to “look for precision in each class of things just so far as the nature of the subject admits.”¹⁴

The connection between public reasoning and the formulation and use of human rights is extremely important to understand. Any general plausibility that these ethical claims—or their denials—have is, under this theory, dependent on their survival and flourishing when they encounter unobstructed discussion and scrutiny, along with adequately wide informational availability. The force of any particular claim to be seen as a human right would be seriously undermined if it were possible to show that such a claim is unlikely to survive open public scrutiny. But contrary to a commonly offered reason for skepticism and rejection, the case for human rights cannot be discarded simply by pointing to the fact (when it is the case) that in politically and socially repressive regimes that do not allow open public discussion, many of these human rights are not taken seriously at all.

Even as far as use is concerned, the fact that monitoring of violations of human rights and the procedure of “naming and shaming” can be so effective (at least, in putting the violators on the defensive) is some indication of the reach of public reasoning when information becomes available and ethical arguments are allowed rather than suppressed.

The role of public reasoning in the understanding and recognition of human rights links, in fact, closely with Adam Smith’s approach to jurisprudence. Rather than trying to cater only to the dominant views of ruling groups, Smith saw the need to bring in perspectives from, as Smith put it, some distance. One of Smith’s illustrations of parochial values that needed confrontation by views from elsewhere was the tendency of all political commentators in ancient Greece, including sophisticated Athenians, to regard infanticide as perfectly acceptable

¹⁴ The admissibility of inescapable ambiguities within a framework of rational assessment is discussed in Amartya Sen, *Internal Consistency of Choice*, 61 *ECONOMETRICA* 495 (1993), reprinted in AMARTYA SEN, *RATIONALITY AND FREEDOM* 121 (2002); Amartya Sen, *Maximization and the Act of Choice*, 65 *ECONOMETRICA* 745 (1997), reprinted in *RATIONALITY AND FREEDOM*, *supra*, at 158. See also AMARTYA SEN, *INEQUALITY REEXAMINED* 46-49, 131-35 (1992).

social behavior. Even Plato and Aristotle did not depart from expressing approval, Smith noted, of this extraordinary practice which “uninterrupted custom had by this time . . . thoroughly authorized” in ancient Greece.¹⁵

While a European or an American audience today may find it easy to believe that distant perspectives may be usefully invoked in the case of “backward” societies such as Sudan or Afghanistan, in which, for example, honor killings occur and adulterous women might be stoned to death, there may be no corresponding recognition of the need to do this for more advanced countries in North America or Europe. However, well-established practices in a rich and advanced country, which receive widespread support within the country, might be subjected to serious criticism—and rejection—in many other countries, where public dialogues may bring in other considerations that are ignored in the first country. Such divergences can be seen even between Europe and America. For example, plentiful use of capital punishment, accompanied or not by public jubilation, may receive persuasive criticism outside of the borders of that country, or state. To assess the diverse points of view, “the eyes of the rest of mankind” (to use Adam Smith’s phrase) may have to be invoked to understand whether “a punishment appears equitable.”¹⁶

The usefulness—or lack thereof—of distant perspectives has clear relevance in some current debates in the United States. For example, the issue came up when the U.S. Supreme Court had to consider recently the appropriateness of using capital punishment for crimes committed in juvenile years. The majority judgment of the Court, which went against the prevailing American practice of allowing such execution, actually did cite some arguments and perspectives on this subject from other countries. In his minority report, Justice Scalia saw this as an act of deferring to “like-minded foreigners.”¹⁷ But that, in fact, was not the way the foreign experiences and assessments were brought into this particular majority judgment of the Court. Rather, it was based on the understanding that in the deliberations to arrive at judgments of rights and wrongs in America—and to decide on appropriate punishments—note may be sensibly taken of the discernment that non-local perspectives provide. The cogency of invoking impartial spectators from Smith’s “certain distance” has a direct bearing on interpreting the kind of considerations that can be internalized in a broad understanding of the role of public reasoning in the contemporary world.

¹⁵ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 210 (D.D. Raphael & A.L. Macfie eds., 1976) (1759).

¹⁶ ADAM SMITH, *LECTURES ON JURISPRUDENCE* 104 (R.L. Meek et al. eds., 1978) (1763).

¹⁷ *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

This issue is particularly important in assessing the pessimism toward universal acceptance of human rights on grounds of cultural differences. Not only is the depth of the differences on the subject of freedoms and rights between different societies often much exaggerated (as I have discussed elsewhere), but also there is a strong need to see debates and discussions within a country, when it is permitted, in the light of global interactions across the world. What are taken to be “foreign” criticisms often correspond to internal criticisms from non-mainstream groups, influenced by global as well as local ideas. If, say, Iranian dissidents are imprisoned by an authoritarian regime precisely because of their heterodoxy, any suggestion that they should be seen as “ambassadors of Western values” rather than as “Iranian dissidents” would only add insult to injury.

The fact that authoritarian orders are typically quite afraid of uncensored news media and of uncurbed public discussion, which makes them resort often enough to suppression (including censorship, intimidation, incarceration, and even execution), provides some indirect evidence that the influence of public reasoning can indeed be quite large. That influence also makes more effective the interactive ways and means including social recognition, informational monitoring, and public agitation that human rights activists tend to use.

If we have reason to go beyond existing laws to give human rights their due, we also have good reason to focus particularly on the importance of public reasoning. Indeed, public discussion is centrally important both for the recognition of human rights, and for their realization and advancement. That understanding is also an invitation to look beyond the rigid box of currently legislated rights. There is a huge world of legitimate human rights beyond the limits of law.

