

Submission from Professor Gerald L. Neuman to the Commission on Unalienable Rights

The following text is respectfully submitted to address some of the issues that the Commission on Unalienable Rights is reportedly considering, in the hope of being helpful to reaching appropriate conclusions on these subjects.

Given that this is an unsolicited contribution, I should begin by introducing myself. I am the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School. I am also one of the two Directors of the Law School's Human Rights Program. From 2011 to 2014, I served as a member of the Human Rights Committee. (For those Commission members who are unfamiliar with the Human Rights Committee, it is the "treaty body" created by the International Covenant on Civil and Political Rights (ICCPR) for the purpose of engaging in oversight of the compliance of states parties to the treaty with their obligations. Members are nominated by their governments, and elected by the states parties to the treaty, but serve independently in their individual capacities.) Of course, as an academic I submit this text on my own behalf, and do not speak for my law school or my human rights program, and I do not speak for the Human Rights Committee.

The Charter of the Commission on Unalienable Rights includes the objective of proposing "reforms of human rights discourse where it has departed from our nation's founding principles of natural law and natural rights." This mission statement has prompted concern among some observers that the Commission is being asked to redirect U.S. human rights policy in ways that would be self-defeating and would create serious damage to international cooperation for the protection of human rights.

This submission will address the claim that there are too many human rights; the protection of diverse sexuality; the equal priority of economic/social rights and civil/political rights; the usefulness of "natural law" at the international level; and the question of privileging freedom of religious conduct over other human rights.

[1] How many human rights should there be? The Commission appears to have heard arguments that there are too many human rights in the international system and that there should be only a few human rights. Such arguments reflect a fundamental misunderstanding of how a system for protecting human rights through legal institutions and government action operates, both at the national level and at the international level.

Both the Universal Declaration of Human Rights (UDHR) and the treaties that have followed from it contain a variety of provisions of different kinds. Some provisions are negative guarantees, protecting the ability to engage in primary activities that are viewed as essential for human life or human flourishing, without undue interference. Some provisions specify organizational structures through which individuals are entitled to interact with government,

either defensively or proactively. These rules, regarding courts, jails, and other agencies, may not directly express timeless principles of individual or political morality, but represent contingent structural solutions that help give effect to primary norms. Some provisions involve rights to government services, including direct fulfillment of human needs, and secondary rights to government intervention to prevent, redress or punish infringements by public or private actors.

The UDHR was drafted at a relatively high level of generality, and it was understood throughout the drafting that a more precisely phrased and specific treaty would be needed to give legal effect to human rights in practice. The early stages of the drafting of the Covenant on Human Rights, later split into two Covenants, went on in parallel with the drafting of the UDHR. The UDHR already contains some rights with procedural or institutional features. For example, article 10 provides, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The principle of “fair trial,” without more, would be too abstract to provide meaningful limits on the conduct of governments. The ICCPR repeats some of the details that article 10 already supplies, and adds further features, especially for criminal trials.

The U.S. Bill of Rights is similarly a combination of generally stated rights and specifically worded provisions, many of which are procedural. The First Amendment is famously general in its reference to “the freedom of speech, or of the press”; the Fourth Amendment gives more detail regarding the legal institution of warrants. When James Madison introduced his proposals for a Bill of Rights in the US Congress in 1789, he described the right to jury trial as a needed protection for natural rights rather than as a natural right itself: “Trial by jury cannot be considered as a natural right, but rather a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”¹ The inclusion of rights provisions that are needed to make other rights effective should not be a reason for criticism, of either the Bill of Rights or the ICCPR.

Other human rights treaties similarly serve to implement principles that have been generally stated. The Convention against Torture was not adopted to prohibit torture, but rather on the understanding that torture was already prohibited by international law. It contains a series of preventive, repressive and remedial obligations to increase the effectiveness of the prohibition against torture. Other human rights treaties involve measures for the practical realization of the right to equality on various bases. The Convention on the Elimination of All Forms of Racial Discrimination spells out obligations with regard to racial discrimination, while clarifying that it includes race, colour, descent, and national or ethnic origin.

¹ 1 Annals of Cong. 437 (1789) (remarks of Rep. Madison).

[2] The Universal Declaration of Human Rights is fundamentally committed to human equality. The first sentence of Article 1 provides that “All human beings are born free and equal in dignity and rights.” Article 2 provides that everyone is entitled to all the human rights being declared, without discrimination (“distinction”) on the basis of any status; nor should distinction be made on the basis of the status of one’s home territory – that is, those who lived in colonies were equally entitled to the same human rights as those who were citizens of colonial powers. Article 7 goes on to list explicit rights to equality before the law, equal protection of the law, and protection against discrimination and incitement to discrimination. Much of the content of human rights treaties is directed at prohibiting and rectifying discrimination against minorities and other subordinated status groups.

Racial discrimination and discrimination against women were early targets of international human rights law, but over time other groups against whom discrimination had long been tolerated have been recognized. That includes indigenous peoples, and persons with disabilities, who have now received a specifically designed convention. It also includes sexual minorities, whose very existence in all societies some governments continue to disingenuously deny, rather than acknowledge as a valid form of human diversity. The Human Rights Committee recognized discrimination on grounds of sexual orientation as a prohibited form of sex discrimination under the ICCPR more than twenty-five years ago, in *Toonen v Australia* (1994). Efforts to prevent discrimination and violence on grounds of sexual orientation and gender identity are part of the central mandate of the Universal Declaration and the two Covenants.

[3] Neither the UDHR nor the division of the originally planned Covenant into two Covenants with separate implementation mechanisms justifies giving one category of rights temporal or normative priority over the other. Civil and political rights on the one hand and economic, social and cultural rights on the other hand are not separable. The COVID-19 pandemic that is requiring the Commission to abandon its March 2020 public meeting illustrates this point. The right to life is inseparable from the right to health and the right to food and the right to work.

The modern perception of this interconnectedness has much older roots, and in fact was well expressed by Judge William Blackstone, whose Commentaries on the Laws of England had such strong influence on the U.S. founders. In Book I, Chapter I, Blackstone addressed “the absolute rights of individuals,” meaning those that “would belong to persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it.”² In a state of nature, these rights would be threatened by other individuals, and the principal aim of society is to protect individuals in the enjoyment of those rights – that is, against private threats and not only against threats by government itself. In Blackstone’s view, the absolute rights may be summarized in “three principal or primary articles: the right of personal security, the right of

² William Blackstone, Commentaries on the Laws of England (1765), vol. 1, at *119.

personal liberty, and the right of private property.”³ The first of these “consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.” Under this heading, he explained that the English legal system

not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places [*i.e.*, in chapter 9].⁴

Thus, Blackstone recognized not only the duty of government to protect individuals against private threats to their well-being, but the right of the most needy to government assistance in preservation of life. The particular arrangements that English law made at that period for the support of the poor are hardly models that we would praise today, but that is true of many features of eighteenth-century English law, including its selective approach to freedom of religion.

[4] By quoting the references by Blackstone and Madison to the state of nature and the social compact, I do not mean to endorse the Secretary of State’s proposal that natural law thinking should be given prominence in U.S. human rights policy, either in domestic matters or in foreign policy. Neither religiously sectarian notions of natural law nor antiquarian revivals of natural law can provide guidance for the protection of human rights in a diverse world.

John Locke’s own treatment of the social contract in his *Second Treatise on Government* demonstrates his understanding that disagreements over the content of natural law are inevitable, and that positive legal institutions are required to establish the actual rules of conduct for a society.⁵ The international human rights treaties were designed to bridge widely varying philosophical commitments, not to impose a single historical or contemporary philosophical approach on the world.

The global human rights instruments aim at the protection of the human rights of all persons all societies. They speak to Christians and also to Muslims and Jews, Buddhists and Hindus, as well as to adherents of indigenous belief systems of many kinds, and to non-believers. They speak to societies with majorities of various kinds. This diversity of addressees makes extremely visible the need for generalizable arguments that do not ground their details in a single religious tradition. The international human rights system cannot favor one religion as such over another. This proposition is not merely a normative claim, but an empirical one. It reflects the basic fact that all religions in the world, including Christianity, are minority religions at the

³ *Id.* at *125.

⁴ *Id.* at *127.

⁵ See John Locke, “An Essay concerning the true, original, extent, and end of civil government,” in *Two Treatises of Government* (Peter Laslett ed. Rev. ed. 1960), chapter IX.

global level. Christians must claim their international human rights in countries with non-Christian majorities on the same basis as non-Christians claim their international human rights in countries with Christian majorities.

For these among other reasons, the United States cannot pursue a human rights policy that is visibly guided by a sectarian or secular conception of natural law.

[5] Finally, concern has been expressed that the Committee may give extraordinary priority to a notion of religious freedom that includes a right to engage in religiously motivated conduct that overrides the rights of others. It would be strange indeed to adopt such a doctrine and attribute it to an interpretation of United States ideas of unalienable rights. For most of U.S. history, the strength of protection of free exercise rights under the First Amendment has been determined by the belief/action distinction famously articulated in *Reynolds v. United States*, 98 U.S. 145 (1879) (“Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices.”). Individuals have an absolute right to believe what they believe, but their conduct is subject to regulation for the public good. Only in the 1960s did the Supreme Court develop the doctrine of *Sherbert v. Verner*, 374 U.S. 398 (1963), strictly scrutinizing the denial of religious exemptions from generally applicable regulations of conduct, and that doctrine survived less than thirty years. It was overruled in 1990 in *Employment Division v. Smith*, 494 U.S. 872 (1990), with a majority opinion by Justice Scalia. Statutory policies modeled on that short-lived constitutional interpretation have been enacted by the federal government and by some states, but the Supreme Court emphasized in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that such policies cannot be characterized as enforcing the right to free exercise.

The ICCPR does protect religiously motivated conduct as well as religious belief as a global human right. Article 18 of that Covenant absolutely protects freedom to have or adopt a religion or belief of one’s choice (including non-religious belief), and forbids coercion that would impair that freedom. But the freedom to manifest one’s religion or belief in worship, observance, practice and teaching is subject to limitation under Article 18(3) in terms similar to the permissible limitations on other rights such as freedom of expression, assembly, and association. Neither U.S. tradition nor international human rights treaties elevate freedom of religiously motivated conduct over other human rights.

I hope that the foregoing observations are useful to the Commission’s deliberations.

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