Utilitarianism and Human Rights - Contrary or Complimentary?

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It has been argued that utilitarianism is incompatible with the rule-based nature of human rights. However, within the restrictive contexts wherein such rights are exercised and adjudicated, this is not necessarily the case. Drawing on examples from the European Court of Human Rights, I argue in this paper that within the framework of certain judiciaries, utilitarianism can be a desirable tool that leads to the broadening and deepening of human rights protections.

Before we can begin to discuss the implications of utilitarianism for human rights law, we first must establish what is meant by this term. Put simply, utilitarianism is a normative theory for judging human actions, which argues that the ideal means of determining the appropriate course of action is to weigh the potential outcomes of each possibility and choose that which allows for the 'greatest benefit for the greatest number'. Put more simply, one chooses the one which provides the greatest 'utility'. Within utilitarianism, there are two different views on what the basis of analysis ought to be. Proponents of act-utilitarianism posit that a particular action should be evaluated on the basis of its own individual consequences, while proponents of rule-utilitarianism argue that the consequences of an action should be judged on the basis of what would happen if everyone performed similar actions (Mill, 1998; Sen & Williams, 1992; Smart, 1973).

Utilitarianism has been criticised as incompatible with the rule-based notion of human rights on multiple grounds. For one, it is argued, by treating individuals as a means to an end, utilitarianism fails to protect the fundamental integrity of the individual against incursions upon his or her freedom and dignity in the name of the group. For this reason, so the claim, utilitarianism is actually far more compatible with political considerations, rather than ethical ones, and that in order to protect us from its flaws, abso-

lute rights are needed to act as "trumps" (Dworkin, 1984, p. 153).

Likewise, the absolute nature of some rights is inconsistent with the goal of maximising utility. For, if one right is relatively easy to guarantee for a large number of people and it conflicts with another right that is much harder to protect, which should be given priority? According to the utilitarian goal of providing the greatest benefit to the greatest number, those rights that have the biggest impact ought to be prioritised when a clash occurs. This is problematic not only because it discounts the intrinsic value of some rights – especially those considered to be 'fundamental' – but because it leads to a situation where rights are established, protected and enforced according to the path of least resistance. As a result, there is no guarantee that the logic of utilitarianism will lead to conclusions that correspond with the moral and social rules underlying a rights framework, or any other set of ethical principles for that matter. Individual morality and community welfare are not the same thing, and thus it seems inevitable that there would be situations where utilitarianism would reject the ethically superior position. As David Lyons has pointed out: "Unless we assume that arguments based on moral rights converge perfectly with those based on welfare, it would seem that a utilitarian like Bentham would be obliged to reject moral rights" (Lyons, 1984, pp. 114-115).

Despite these criticisms, it is not the case that utilitarianism is *necessarily* incompatible with human rights. Rather, when certain limitations are imposed, such as those that may be found in the institutional framework of a court, a utilitarian approach can actually afford important benefits for the development of human rights protections. In the following section I outline three reasons for this: the moral grounding of a court, the limitations of a judicial framework, and the nature of judicial reasoning.

Firstly, in the practice of human rights law, the moral grounding of the court is already established. For, unlike that of the philosopher, the role of the court is not to determine a basis for ethics, but rather to interpret law into which a certain ethical code is already imbedded. A court mandated with defining and defending human rights takes for granted that the moral thrust underlying them is legitimate. This is particularly the case when such rights are given the legal status of fundamental laws, such as in a Bill of Rights. One good example of this can be seen in the European Court of Human Rights. Starting from the standpoint that "[t]he [European] Convention is intended to guarantee not rights that are theoretical or illusory

but rights that are practical and effective" (Van Dijk et al., 1998, p. 74), the Court accepts as its starting point that all of those human rights outlined in the Convention are not only legitimate, but that they are equal and at times absolute in value (Fenwick, 2007, p. 284). In this context, the rights in question are already assumed to be 'trumps' to begin with.

Second, unlike an individual, courts are subject to certain pre-determined parameters that guide the way laws are interpreted. These regulators – such as the way individual laws are written, jurisprudence, the court's mandate and the scope of its jurisdiction – all act as checks upon the free exercise of utilitarian logic. For example, many human rights statutes contain specific instructions on how a law can and should be interpreted in different situations, including when it can be overridden. This kind of limitation is particularly relevant to the utilitarian goal of achieving the 'greatest good.' Even 'fundamental' human rights are sometimes put into law with clauses identifying specific situations where they can be derogated in order to serve particular public goods.

In this way, the legal protection of an individual's human rights is not necessarily in contradiction with the utilitarian principle of promoting general welfare. Indeed, while the idea of human rights is to provide fundamental protections for the individual, it also aims to serve the greater welfare of the community, and these two purposes are meant to be weighed and balanced. This point can be seen in some of our oldest international human rights documents, such as the Universal Declaration, which places limitations on some rights and in Article 20 specifies the wellbeing of the whole community as a fundamental aim of human rights protection (Ghandhi, 2006, p. 23).

Within the parameters of such limits, courts mandated with interpreting and upholding human rights often rely upon utilitarian considerations when weighing rights claims. When determining whether a right has been violated, or alternatively whether it ought to be enforced in a particular case, courts always weigh a variety of interests, both individual and communal, and take into account a number of possible consequences in light of the broader goals and purposes of the law, and strike a balance between all of these. Within the practice of the European Court of Human Rights, this utilitarian approach is known as the proportionality principle. Defined as "the search for a fair balance between the demands of the community and the requirements of the individual's fundamental rights'" (Van Dijk et al.,

1998, p. 81), this principle comes to play in a variety of ways, in determining an appropriate margin of appreciation, in judging the appropriateness of certain restrictions, and in determining whether or not a positive obligation exists under a specific Convention provision (Danchin & Forman, 2002, p. 193; Van Dijk et al., 1998, pp. 83-95). In each of these cases, the Court seeks to judge whether a "fair balance has been reached between the general and individual interests at stake" and does this on the basis of outcomes (Fenwick, 2007, p. 284; Van Dijk et al., 1998, p. 81).[1]

Third, the nature of judicial reasoning acts as a further limit to the exercise of utilitarianism. Even though courts are generally understood to be outside of politics, their rulings have the effect of public policy, in that they determine how existing rules ought to be understood and applied. Because of this general effect, courts are far more prone to rule-utilitarianism which, I argue, is more consistent with the broad application of human rights protections. For example, this can be illustrated by the conflict between individual liberty and community security. According to the perspective of act-utilitarianism, the pre-emptive killing of a terrorist suspect in order to prevent an imminent terrorist attack might be justified, because even though it violates that individual's human rights, it protects that right to life of all those people that would have been victims of an attack. However, from a rule-utilitarian perspective such an action would not necessarily be justified. For, if the police were to start going around killing everyone suspected of being a terrorist, the very basis upon which law and order (and therefore security) is based would be violated, making us all subject to the arbitrary deprivation of life. There can be no doubt that innocent people would be killed, and in the end the result would be the potential loss of everyone's liberty and security. In this way, rule-utilitarianism encourages courts to establish a high threshold for when the violation of a particular right is justified.

I have argued that utilitarianism is not necessarily incompatible with human rights and that within a judicial framework certain limitations are imposed that resolve many of the issues that are otherwise problematic. However beyond these points, there are real benefits to a utilitarian approach. As a consequentialist philosophy, utilitarianism can help keep a court's reason-

1 It has been noted that in cases where an "absolute right or freedom" is at stake proportionality principle may be left aside (Van Dijk et al., 1998, p. 82). However, I would argue that even in this case a utilitarian logic is at work. For in this situation the court does so on the basis that it finds these values to be so important in their impacts that they overwhelm all other claims.

ing within an appropriate perspective because it requires judges to consider the broader implications of their rulings and then weigh these both against one another and the purpose of the law at hand. If a rule created in the name of one right were to create consequences that would ultimately impede to a significant degree our well-being (or alternatively the overall enjoyment of our human rights), then it would not be justifiable in utilitarian terms.

Lastly, if we accept that human rights represent the international consensus on what 'the greatest welfare' actually is (Law, 2005, pp. 357-358), a utilitarian approach to protecting these rights would be highly desirable. For, if we modify our maximum to 'provide the greatest protection of human rights possible for the greatest number of people' – then it is a logical extension of this that the court would seek to deepen and expand its interpretation of the law over time to apply to as many people and situations as possible. For in order for some rights to be protected, others must be protected as well. In this way, rather than limiting or trading off between different rights, a utilitarian approach encourages the overall growth in the appreciation of human rights protections. This kind of progressive tendency is highly compatible with the evolving nature of human rights in general. For, contrary to a duty-bound approach that locks policymakers into a limited array of responses, 'utilitarianism assigns people responsibility for producing certain results while leaving the individuals concerned broad discretion in how to achieve those results' (Goodin, 1995, p. 26).

As a philosophical grounding, utilitarianism poses a number of challenges to human rights. However, within the limiting context of a judicial institution, those extreme scenarios where utilitarian logic would run counter to human rights principles are avoided, and instead utilitarianism can be an extremely useful tool. In this context, utilitarianism promotes the weighing of different interests and rights claims in a way that keeps the 'bigger picture' and thus the larger goals of human rights – human welfare – in the forefront. Thus in conclusion, while a utilitarian interpretation and practice of human rights should have some limits (it is arguable, for example that it should not lead to the narrowing of human rights) such a philosophical approach is desirable when it allows for broadening interpretations and applications of human rights law.

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