Human Rights and National Minorities in the United States

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Three human rights myths serve to limit the debate over human rights in the United States and bias our perspective in dealing with the human rights claims of citizens from other countries. The first myth is that human rights belong solely to individuals and protect them largely from negative actions by the state. The second myth declares that civil and political rights are primary while economic, cultural, and social rights are secondary. The third myth asserts that the only rights that count are legal in nature and that moral or personal claims are invalid or irrelevant. Even a brief historical analysis reveals that all three myths are just that—myths. The group rights of corporations are protected under the Fourteenth Amendment to the Constitution, economic rights have been upheld over political claims as witness the Supreme Court's *Dred Scott* decision, and legal debates over rights have often obscured the political, personal, and identity questions that many rights arguments revolve around. Only a conception of human rights that views them as the gradual empowerment of people or groups or the deconcentration of power removes them from the realm of an elite debate among experts and allows for cross-cultural comparison and action.

The last 25 years have given rise to an explosion of human rights demands. These demands, in turn, have produced many new laws, organizations, and a library of scholarly works on human rights. In fact, one author refers to a new "human rights industry" that has sprung up. Belatedly, human rights education has emerged in the school curriculum far beyond its usual place as a "current event" or as an "Enlightenment idea." However, in moving to a more central place, human rights has created as much confusion as clarity. Who

Explorations in Ethnic Studies **Vol. 16, No. 1 (January 1993): 75-83.**

are all of these special interests and how do we adjudicate between their competing demands? What is the relationship between rights and freedoms? Is there a clear-cut answer to the "hate speech" debate? Have demands such as affirmative action some how gotten away from the more "basic" rights embedded in our Constitution?

In a truly multicultural country and world, we must begin to clear away some of the confusion surrounding human rights in the United States and create a foundation on which we might build a more coherent and equitable conception of human rights. To do this, we must challenge the traditional conception of human rights embraced by the United States government and many scholars and activists in this country. This traditional view of human rights rests on at least three myths. First, it sees rights only as individual claims against state power. There are no rights between the state and groups even though the United States may be the most group-oriented society in the world. Second, partly as a result of history and partly as a result of superpower politics, human rights in the US has come to mean political and civil rights rather than economic and cultural rights. The rise of "third world" claims and the deconstruction of the Soviet Union have made this narrow view of rights increasingly untenable. Third, rights in the US tend to be seen as legal rather than moral or political. That is, if one does not have recourse to legal action then one is seen as not having a right in reality. This legal framework extends to the international arena where all rights are seen as flowing from the United Nations Universal Declaration of Human Rights, however, there is no acknowledged framework for prioritizing these delineated rights.

The traditional way we view these rights in the United States ignores the fact that this country has never been culturally or religiously homogeneous and that its diversity has increased dramatically over the last century. The United States was first a multicultural nation through conquest and then enslavement followed by immigration. Given this history, I believe that the phrase "human rights" is best defined as the newly articulated demands for empowering people who (because of poverty or discrimination) have suffered deprivation or oppression. In a power theory of human rights, demands (or claims) are made by persons, individually or in association with others, to get or keep the power to satisfy felt or perceived needs. Frederick Douglass was asserting such a theory over 100 years ago when he said: "Let me give you a word of the philosophy of reform. The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been born of earnest struggle. . . .Power concedes nothing without a demand. It never did and it never will."[1] Power (or control) is simply the ability to help cause effects. It is much more than might, or physical force.

Love, religion, philosophy and law may all be sources of power. Their use combines with other causal factors to produce unintended consequences and by-products. Their legitimacy depends on the depth and breadth of acceptance either through passive consent or active support.[2]

The first myth, that rights obtain only to the relationship between the individual and the state, helps delegitimize group-based claims. This traditional individualistic view of rights is ironic given that the development of the UN Declaration of Human Rights was grounded in response to the oppression of a group (Jews) by another group (Aryans). Without going into the enormous economic and cultural differences within the US or between the US and any other country, we must recognize that all humans are first and foremost individuals-in-groups. From birth onward, they are social animals. The "self" is linked first with the mother and then with other "others." It is influenced not only by heredity and the physical environment but also by a cultural environment. Individual dignity and worth are defined largely by multiple social roles and affiliation, that is, by belonging to one or more communities of shared interests—a family, household, gang, neighborhood, association, formal organization, religion, ethnic or national group or even by identifying with a uniform, flag, athletic team or media celebrity. The "rat race" in corporate bureaucracies, as pointed out decades ago in *The Organization Man*, takes place in a collectivist cage.[3] The long-term impact of Soviet totalitarianism was the impairment of "a citizen's ability to act constructively and cooperatively with fellow citizens." As a Soviet official explained it to Richard Schifter: "I spoke freely to my wife and she spoke freely to me. We did not share our thoughts with any one else."[4]

An examination of the diplomatic history between Native American peoples and the US government would certainly seem to support the argument that the rights of individuals reign supreme. How else do we explain the nearly 500 broken treaties with American Indian tribes? What motivates government policy to break-up tribes? How can the sovereignty of tribal nations be ignored in legal and moral terms? What role does race play in the group-centered demands of Native Americans and African Americans? Are cultural or biological definitions of race more persuasive in making rights claims? Indeed, claims such as affirmative action and reparations make no sense unless we recognize that government policy did recognize groups rewarding some and punishing others. Perhaps the best example of the legal recognition of groups is the corporation Moreover, the recognition of the corporation as a "legal person" bestowed upon them economic benefits that were often given priority over the political and civil claims of individuals.

The legislative history of the post-Civil War Fourteenth Amendment to the Constitution reveals that two members of the committee that drafted the amendment, Representatives John Bingham and Roscoe Conkling, a prominent Republican and successful railroad lawyer, explained that they added the word "person" (in addition to "citizen") not to help former slaves but to help protect "joint stock companies" from the oppression of state or local regulation, expropriation, and "invidious and discriminating" taxes. Under a flood of judicial decisions, the "fictive personality" of state-chartered corporations became one of the fundaments under the towering structure of corporate law.[5] Every corporation was thus entitled to all the rights, including due process, at all levels of government, that the constitution granted to mortals. Despite occasional dissents, these rights have long been upheld.

With this due process protection against state government regulation and with massive government aid to corporate collectivities through land grants, protective tariffs and other subsidies, Northern industry expanded rapidly and the US began to emerge as a potential Great Power. All this took place under the ideological umbrella of a weak central government. For decades the Supreme Court declared unconstitutional many laws that limited the rights of large corporations or, as Arthur Schlesinger puts it, to "counter the aggressions of local majorities on the rights of minorities and individuals."[6] More recently, the US has insisted that the right to private property be a part of international human rights instruments.

The second human rights myth in the United States is that political and civil rights should be given priority over economic and cultural rights. This myth prevails even though the right to private property (which runs counter to the conceptions of land ownership held by the original inhabitants of this country) is certainly an economic right. A recent example of the priority attached to this position comes from the introduction to the State Department's Country Reports on Human Rights Practices for 1990 by Richard Schifter:

> In applying these internationally recognized standards, we seek to be objective. But the reports unashamedly reflect the U.S. view that government is legitimate only when grounded on the consent of the governed, and that government thus grounded should not be used to deny life, liberty, and the pursuit of happiness. . . . We have found that the concept of economic, social, and cultural rights is often confused, sometimes willfully, by repressive governments claiming that, in order to promote these "rights," they may deny their citizens the rights to integrity of the person as well as political and civil

> rights. If these basic rights are not secured, experience has shown, the goals of economic development are not reached either. . . . From this premise, that basic human rights may not be abridged or denied, it follows that our human rights policy is concerned with the limitations on the powers of government that are required to protect the integrity and dignity of the individual.[7]

It is certainly true that US human rights policy has been concerned with limiting the powers of government. However, it is a myth that this policy placed individual political and civil rights first. Perhaps the greatest challenge to this myth occurred in 1857 in the *Dred Scott* decision of the US Supreme Court. Dred Scott, a slave, had been taken by his master to live in Illinois, a free state, and later in the Louisiana territory north of 36° 30' in which slavery had been prohibited by the Missouri Compromise of 1820. After his return to Missouri, Scott sued in Federal Court to obtain his freedom on the ground that he had resided in "free territory" and was thus entitled to his freedom (citing English common law). In its decision, the Supreme Court stated that historically blacks "had no rights which the white man was bound to respect" and therefore blacks had been denied citizenship.[8] Thus, *Dred Scott* lacked "legal standing" before the courts. However, the Supreme Court went beyond denying Scott citizenship rights to assert that congress had no authority to deprive a citizen "from holding and owning property of this kind [slaves] in the territory mentioned in the Compromise or in any place in the United States."[9] In *Dred Scott* the civil and political rights of blacks in even free states was submerged beneath the economic rights of slave masters to own human property.

The debate over the *Dred Scott* decision illustrates the final myth about human rights-that they are natural or "God-given." Aside from the theological questions this view raises, it also tends to obscure the political context of rights. A top-down view of rights that sees them only as a struggle between the individual and the state artificially separates the public sphere from the private. Every right involves a political and social struggle and these struggles by individuals and groups to control their lives are more than simple protection from the power of a monarch or a centralized government. It is the power of women and children to gain some control over their lives in the family as well as the right of a union to organize. While court decisions or UN Conventions may help legitimate certain rights claims, governments cannot guarantee rights. Only the actual struggle over responsibilities and remedies will determine which among competing claims are met. In this struggle, moral and political norms provide the framework in which legal decisions are made and legislation is passed.

Only by understanding the political context of the human struggle can one explain the failure of the United States to ratify the basic human rights instruments. Throughout the 1950s and 1960s a common theme of the opposition involved the fear that international pressure would force the granting of political and civil rights to national minorities in this country. Thus, the president of the American Bar Association, Frank Holman, could state the following: "I pointed out that if, in driving me from the airport, [someone] had unfortunately run over a Negro child running out into the street in front of him, what would have been a local offense under a charge of gross negligence or involuntary manslaughter would, under the Genocide Convention, because of the racial differential, not be a local crime but an international crime and that [he] could be transported someplace overseas for trial."[10] The long-term success of the forces opposed to ratification of the UN conventions and covenants in the US is at least in part measured by their success in framing the debate over human rights treaties in legal rather than moral terms.

This formalistic approach to rights is complemented by our assumption that rights are public rather than private. Such a distinction is evident when we label violence that occurs in the home "domestic" and thus attach less severe or no penalties to those who perpetrate such acts. The modern women's movement has done much to break down the barriers between the personal and the political. Yet many of these activists are often drawn into abstract debates on rights rather than the substance of specific demands for empowerment. In the case of the Equal Rights Amendment (ERA), for example, the anti-ERA forces mobilized their constituents far more effectively than did their opponents around the politicizing of personal issues. The ERA's abstract nature and indeterminate language lacked the impulse of an urgent issue and left the door open for distorted claims about possible future interpretations by the Supreme Court.[11] However, that is not to say that the campaign for ratification was without positive education effects for women and men.

The tendency for the human rights struggles to get caught up in abstract, legalistic arguments hides the moral bases of law which are essential to building mass movements. Martin Luther King's great appeal was as a moral leader and not as a legal scholar or legislator. His appeal to higher "natural law" as reflected in the "Letter from Birmingham Jail" represents the most eloquent statement of the spirit of the civil rights movement.[12]

Yet this appeal to higher law can work both ways as evidenced by the wide-spread disrespect for law and order in the South following the *Brown* decision in 1954. At the same time, there exists in American legal culture a quite different tendency: a desire to regulate

human behavior tyrannically by means of formal laws. Over fifty years ago, Gunnar Myrdal cited this tendency as a remnant of early American Puritanism which was sometimes fanatical and dogmatic and always had a strong inclination to mind other people's business. Thus, according to Myrdal, "[t]o demand and legislate all sorts of laws against this or that is just as much a part of American freedom as to disobey the laws when they are enacted." "America," he says, "has become a country where exceedingly much is permitted in practice but at the same time exceedingly much is forbidden in law."[13]

Myrdal's discussion of these conflicting tendencies in American law helps explain why Americans have come to place so much emphasis on "the letter of the law" as opposed to its spirit.[14] How else can we explain why the federal government is forced to carry out important social legislation like the 1964 Civil Rights Act under the fiction that it is regulating "interstate commerce," or that federal prosecuting agencies punish dangerous gangsters for income tax evasion rather than for the felonies they have committed.

Myrdal contends that Americans now have a judicial order that runs counter to their basic idealistic inclinations. The American creed as Myrdal delineated it in *An American Dilemma* included liberty, equality, individualism, democracy and rule of law under a constitution. More recently, Samuel Huntington has argued that this American Creed forms the basis for our national identity which is political rather than cultural. In a country as heterogeneous as the United States it is not surprising that our identity would flow from political ideals rather than cultural reality.

This peculiar political identity, however, has a number of consequences. American identity, for example, is defined in normative terms, French identity in existential terms. French political behavior, in this sense, is whatever the French *in fact do* in politics; American political behavior, on the other hand, is what American political ideals say Americans *ought to do* in politics. This external standard by which to judge the legitimacy of American political practice and institutions provides a basis to challenge the status quo.[15]

Of course, the problem with the American Creed as a standard of evaluation is that it contains conflicting values. It is not a systematic ideology in the European sense. There is no theory for ordering these values or resolving conflict among them. Hence, we are back to our original questions. Whose rights do we uphold—those who wish to engage in free speech or those who wish to be protected from hate and intimidation? In fact, as our three myths demonstrate, power is the instrument used to resolve conflict.

The political character of our national identity helps explain much of our bias in approaching international human rights. We

tend to distrust authority, promote individual liberty and political rights over economic equality and group rights. Yet, as we have seen, our idealism has often masked a practice that promotes the rights, including economic rights, of some groups over others. Our tendency to engage in extended legal debates over "the letter of the law" also hides the moral basis of our actions and removes them from the realm of popular discourse.

Many rights are "universal" ideals in the sense of being widely accepted by elites in the world community, although violated in practice and unknown to most people in the world. By focusing on human rights as the gradual empowerment of people or the deconcentration of power, we move away from the conception of rights that views them as a public contract between the individual and the state rather than the private relationships within families or between groups. In the words of Nobel Laureate Ralph Bunche during World War II: "As members of a disadvantaged minority in this society, we must recognize clearly that we are forced to fight on two fronts. We must struggle to win our share of the blessings of life in a democratic society and we must join with the rest of the nation in a whole-hearted fight to preserve the democratic framework and ideals of this society. It is only when the latter fight is won that the former can ever again have real meaning."[16]

NOTES

[1]Frederick Douglass as quoted in *A People's Charter*, ed. James Macgregor Burns and Stewart Burns (New York: Knopf, 1991), preface.

[2]Bertram Gross, *Tragedy and Triumph* (unpublished pre-text, 1991), 18.

[3]William F. Whyte, Jr. *The Organization Man* (New York: Simon and Schuster, 1956).

[4]Gross, 18.

[5]Gross, 110.

[6]Arthur Schlesinger, Jr., *The Cycles of American History* (New York: Houghton Mifflin, 1986), 242.

[7]Richard Schifter, *Introduction: Country Reports on Human Rights Practices for 1990* (Washington, DC: US Government Printing Office, 1991).

[8]Lucius J. Barker and Jesse J. McCorry, Jr. *Black Americans and the Political System* (Cambridge, MA: Winthrop, 1976).

[9]Barker and McCorry, Jr., 12.

[10]Natalie Hevener Kaufmann, *Human Rights Treaties and the Senate* (Chapel Hill, NC: University of North Carolina Press, 1990), 18.

[11]Burns and Burns, 132.

[12]Martin Luther King, Jr., *Why We Can't Wait* (New York: Signet, 1963).

[13]Gunnar Myrdal, *An American Dilemma* (New York: McGraw-Hill, 1964), 17.

[14]See Adda B. Bozeman, *The Future of Law in a Multicultural World* (Princeton, NJ: Princeton University Press, 1971) for an examination of the differences between traditional African systems of justice and the American legal order.

[15]Samuel P. Huntington, *American Politics: The Promise or Disharmony* (Cambridge, MA: Harvard University Press, 1981), 30-32.

[16]Ralph J. Bunche, "The Negro's Stake in the World Crisis," unpublished speech delivered in Montgomery, Alabama, December 6, 1940, in Ralph Bunche Papers Collection, UCLA.