Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs

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I

I do not believe in natural law. As a result, I find neither comfort nor security in the proposition that the human rights principles we are now developing or reinforcing are something "natural" and hence inevitable because they are inherent in our nature or in the very nature of law. Nor do I believe that the human rights program in this century has very deep roots in human history or, for that matter, very deep roots in contemporary politics. It is a recent development, arising from a unique conjunction of factors including the deterioration of the prevailing political and social order in Europe in the fourteenth and fifteenth centuries, the rise of industrialization, the increasing complexity of class structure in Western Europe, and some religious innovations that fortuitously played into these other trends. One should be wary of assuming that human rights is the unfolding of something inherent and will inexorably continue whether or not political leaders and those who act as temporary custodians of this program make grievous errors. The stakes are high and the game could be lost.

The distinctive prescriptions and institutional arrangements for invocation and application of the human rights program were developed after World War II. Initially, they were attempts to establish a set of standards to test and restrain the exercise of power of those governing against those governed. Prior to that time, the general assumption had been that, short of certain excesses, what a government did to its own people was, for the most part, its own business. In 1942, for example, a member of the British House of Commons characterized Adolph Hitler's treatment of Jews of Allied nationality as a matter of international concern but characterized the treatment of Jews of Axis nationality as no one else's business; it was a domestic matter.[1] Since 1945, that conception has, for the most part, changed. The basic proposition of the contemporary international law of human rights is that a government may no longer do anything simply because it is effective and promises to achieve its purpose or enhance its

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1. *See* Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 183-84 (1946) (quoting 385 PARL. DEB., H.C. (5th ser.) 2083 (1942)).

power vis-à-vis its own population as long as it is doing it only to its citizens and in its own territory. In order to qualify for the name of government, a government now has to meet certain standards, all of which involve restraints on the use of power: no torture, no brutalization; no seizure of property; no state terror; no discrimination on the basis of race, religion, or sex; no prevention of people leaving a particular country, and so on.

The inception of the human rights program was a unique moment in history, for the very elites that participated in this lawmaking process were limiting some of their own future options by establishing a set of criteria under which they could henceforth be criticized by enlightened world opinion in terms of common legal symbols. At the legislative or prescriptive level, the post-World War II experiment was largely successful. A number of basic principles were firmly established. Civilized human beings in earlier times might have looked at barbaric practices beyond their own boundaries with feelings ranging from regret to horror; there was also the conviction that those acts were beyond legal sanction. It is now normal to look at such practices as violations of human rights and to insist upon official or unofficial punitive and remedial action.

Because the lawmaking function of the human rights program has been successful, attempts have been made periodically to transfer the positive and now-accepted symbols from the core of prohibited acts to a wider set of undesirable practices. Not all of these attempts have been aimed at improving human rights. In 1978, I was present in Manila when Ferdinand Marcos spoke to the International Law Association (ILA). He was, he assured us, completely in favor of a very, very broad conception of human rights. But the question of violation of human rights, he explained, was always a matter of domestic concern and could not be reviewed by the international community. Marcos' theory would have undone much that had been accomplished since the end of World War II. It was resoundingly rejected by the ILA.

About the same time, a number of other governments sought to introduce a regional notion into human rights. Again the argument was disarmingly simple: There is, of course, a general universal standard, but one also ought to take account of regional and specialized cultural practices. Now we can be sure that those who were trying to establish a regional standard were not doing it because they wanted something *higher* than the Universal Declaration of Human Rights. What they were trying to do was to carve out a geographical exemption. It too has been largely rejected.

Another effort was made to limit the operation of the norms that had been established by insisting that countries involved in efforts at rapid development of social and economic processes should be entitled to suspend or, on a longer term basis, "defer" certain human rights. This, too, won a certain amount of political and intellectual support, which is puzzling; the alleged causal relationship between torture and economic development is, to say the least, obscure. If this *démarche* had succeeded, it effectively would have eviscerated the international human rights program, for 120 of the 160 states now in the United Nations can validly say they are involved in development. That number includes few human rights paradises.

It has been suggested in the last two years that the "right to peace" should be viewed as a basic human right. It has been suggested as well that the right to a clean environment should be installed as a basic human right. If one takes the notion of man as the measure, then indeed, everything has a human rights dimension—as a philosophical matter. But if we are talking about a specialized program with limited resources, aimed at addressing a particular pathology that has been characteristic of governments since the beginning of recorded history, I submit that we undermine that program by trying to extend it into areas beyond enforcement capacities, thereby bleeding away both the anger at atrocities, the motive force we bring to the program, and the very scarce resources we have for its implementation. The international program for human rights will proceed best if it remains fairly narrowly gauged, and if other social pathologies are treated in different programs and not forced into this one.

For the same reason, it is not particularly useful to expend limited resources for international human rights programs on American domestic matters. In human rights discussions, it is exhilarating to strike our breasts and say that we too are violators and should therefore be subject to the same program. We should, of course, sign and ratify the treaties. But whether we do or not, we are, in fact, in substantial compliance with them, which is much more important and certainly better than the converse. In the United States, domestic processes for remedying social iniquities are more accessible and effective than their shadowy international counterparts. We squander our scarce international resources if we extend our conception of international protection of human rights to matters that are appropriately and effectively taken care of by our domestic institutions concerned with civil liberties.

II

Two separate functions of the international human rights program are frequently merged. One decision function is concerned with the establishment of a general set of legal norms that are deemed to be of universal application: "legislation," in domestic systems in which we have an organized entity called the Legislature, or "prescription," its functional equivalent in unorganized systems. The other is the decision function of application or implementation which takes these established general norms and applies them to particular factual situations in which violations are alleged—identifying and making an appropriate characterization of the facts in question, finding that there has been a violation and meting out appropriate punishment, or, if necessary, appropriate compensation.

Human rights prescription, or lawmaking, has been rapid and extraordinarily successful since the end of World War II. All sorts of behavior that formerly would not have been considered as within the possible ambit of law is now deemed, with scarcely a second thought, to be a violation of international law. The accomplishment is all the more remarkable considering that the entities that played a major role in creating this law were henceforth restricting their own freedom of action and holding themselves up to a level of criticism that previously did not exist. But the *application* of these general norms has proved a much more stubborn obstacle. The same

governments that have been otiose in high-sounding statements about the international law of human rights have been much more reserved in making themselves available for something equivalent to compulsory adjudication or even investigation, when they themselves might be violators.

The major problem for enlightened citizenry, in our country and abroad, who care about and have the luxury of being able to do something about human rights violations elsewhere, is the question of application. We know what the human rights prescriptions are; we frequently know when they are being violated; and we know something should be done. We look desperately around for a competent court, for a public prosecutor or a district attorney, and we find none. In these circumstances, we turn to our own government and ask it to do something. When it resists—as it does, to some extent, in every case in which we importune it—we then begin to criticize the government or governments, in general, as being inherently against human rights. And gradually our attention shifts from the actual human rights malefactor to the "unindicted co-conspirator," our government, which has not responded to our entreaties and hence must be a collaborator in evil.

Sometimes we identify the culprits as our courts. Many international lawyers experience a rapid escalation of blood pressure and tempers when our courts refuse to take cases we think raise clear human rights issues. Given our own commitment, it is hard to step back and ask whether these courts have other functions and responsibilities whose discharge may militate against active engagement in campaigns close to our own hearts. It is to this matter and the moral and ethical problems it poses to citizen activists that I would like to turn.

III

The absence of agencies and institutional arrangements for the enforcement of law is the central problem in contemporary international protection of human rights and in international law in general. We have libraries full of international law, but it is very difficult to implement or enforce it. It is easy enough to make matter-of-fact judgments about violations of international law, but we can rarely proceed beyond that. The problem is *structural* and almost insoluble at the international level, for at that level, governments must establish enforcement institutions which will operate against them and they are unwilling to do so.

One response of international lawyers to this structural problem was to develop a notion of *dédoublement fonctionnel* or "functional doubling," a term coined by the great French professor, Georges Scelle.[2] The idea had a charming simplicity. We do not have an international court of general or compulsory jurisdiction, but we do have domestic courts of general and

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2. *See generally* Scelle, *Le Phénomène Juridique du Dédoublement Fonctionnel*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION (FESTSCHRIFT FÜR HANS WEHBERG) 324 (W. Schätzel & H. Schlochauer ed. 1956).

compulsory jurisdiction. Why not view domestic courts as functional international courts?[3] We do not have an international legislature with a general or compulsory jurisdiction, but we do have domestic legislatures with general and compulsory jurisdiction. Why not use those domestic legislatures as functional international lawmakers?[4] A generation of scholars discovered that it was possible, case by case, to gerry-rig different sorts of domestic enforcement mechanisms in order to secure some implementation of international law issues. Human rights lawyers have been doing the same thing. Rather than continuing to look vainly for an international agency for the international protection of human rights, attention has shifted to domestic legislatures and courts.

Functional doubling suggests certain possibilities for enforcement but they are not infinite. Functional doubling depends on the elasticity of institutions. But there is a limit to "institutional elasticity," *i.e.*, the extent to which institutions created and still used for other purposes can be "stretched" in order to get them to perform human rights functions, especially when those functions are accomplished *at the expense* of their manifest functions. Institutions simply cannot do everything we think they are capable of, if this requires them to move too far from their manifest mandate.

Consider an example: A factory is an institutional arrangement designed to increase production, reduce cost, and enhance both the wealth of the community and the different factors of production engaged in it. A factory is an almost quintessential profit-maximizer. Once you have established a factory, you may be able to stretch it to perform a number of nonwealth-producing functions. For example, it may be possible to get it to discharge a variety of health functions, particularly if you can persuade those who are in charge of it or are its beneficiaries that enhancing the health of the workers is likely to contribute to the factory's overall utility. It may be possible to persuade the managers to set up a crèche so that mothers with young children can continue to work. But there is a limit to elasticity. There is a point at which stretching the factory to include sports, vacations, and so on—all legitimate welfare functions—will begin to undermine the factory's wealth-production function, which continues to be its *raison d'être* and the condition *sine qua non* of its existence. Then the factory, in competition with others, goes bankrupt, or before that, the factory's managers reject this functional doubling and revert to a narrower range of activities. If you are still committed to having those welfare activities performed, you must develop separate specialized institutions—government agencies and so on—to perform them.

Consider another example. Because an embassy is "extraterritorial," embassies abroad could be extraordinarily valuable for human rights purposes. The United States Embassy in Moscow is, metaphorically, not Soviet, but American territory. Anyone who can reach the sanctuary of the Embassy is outside Soviet jurisdiction. If you look at the various despotisms about the globe, you may ask why we do not use our embassies in those

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3. *See id.* at 339-40.
4. *See id.*

countries as underground railroads. When people find themselves in peril from a wicked regime, why not let them into our embassies and then slip them out or negotiate them out? The practice is known as "diplomatic asylum." From time to time, governments use it. There are, however, costs involved with the use of diplomatic asylum. When a government has major foreign policy concerns with another government, it may discover that when it uses its embassy for this nonembassy function, it gets high marks for human rights but minimizes its effectiveness with the host government. Here again, there are limits to institutional elasticity.

We encounter the same limited elasticity when we seek to recruit our own government as an enforcer or applier of international human rights for clear cases of violation. The government official has a role that carries a variety of obligations with different priorities. One of them may be to enhance, insofar as possible, the human rights of citizens of other states. But another obligation—possibly more exigent—may be to enhance relationships with the governments of other states on whom we may be dependent for some important service. One does not have to look far for examples. If one is locked into a global war system, as we unfortunately are, it may be necessary to maintain bases abroad as a way of countering the military reach or capabilities of an adversary. Important bases may have to be maintained in the territories of egregious human rights violators.

The government official, who is animated by human rights concerns and revolted by the human rights violations of another government, will often find that the obligations of a governmental role do not permit taking the same position that might have been taken were the incumbent still in the private sphere. Unless we are willing to say that there are no security problems abroad—that all talk of national security is the figment of a paranoid's imagination, that one does not need military bases for there are no countries that conspire to cultivate schemes that might involve or undermine our position or that of our allies—we must try to understand and sympathize with the human-rights-sensitive government official who encounters a clear human rights violation but determines that other official obligations prevent stretching or elasticizing to deal with the infraction.

The source of the conflict between human rights activists, operating on the civic side, and the human-rights-sensitive government official, operating on the governmental side, is not one of personal moral defect of particular government officials. It is inherently structural. To be sure, some administrations have more coherent, articulated human rights programs. Rhetoric is important and not without consequence, for it may act, at least in anticipatory fashion, as some sort of warning to despots. But if one totals what was actually done at the end of a four- or eight-year period, the differences between successive United States governments in this matter are essentially superficial.

The point of this analysis is not that we should stop pressuring our government when we think there are severe human rights violations abroad. On the contrary. Political pressure is our role and responsibility and our only base of power. There are cases and circumstances in which there is no valid reason for a democratic government to refuse to respond actively and publicly to human rights violations. But there are other cases in which

we ought to be sensitive to the complexity of governmental objectives, and to appreciate that the amount of favorable response and action we can secure by popular pressure will be limited. When this happens, there is no reason to wax furious at our government and to indict it as a collaborator in the violation of human rights. Rather, we ought to look for alternative methods of enforcement.

IV

But are there alternatives? And, equally important, are they within our reach?

Sunshine can be a sterilizing agent. Things that have been permitted to grow in the darkness should be exposed to the light. In a modern state system, electronics link us all together. Nationally and internationally we exist in a state of electronic simultaneity. Those who control the content of the electronic channels characterize the events that are transmitted through them: they choose which events to transmit and how often to transmit them. They determine what editorial comments or what evaluations to make of those events they transmit. I submit that the media in our system and in systems in related industrial democracies can be recruited much more effectively for human rights enforcement than they have been until now. They are part of a competitive market and, as such, must respond to consumer demands. Those in the media are insufficiently aware of the human rights movement and, in particular, of the prescriptions or legislation that have been established. Insufficient pressure is brought on editors and reporters to cover violations of international law because the violations do not seem to be sufficiently glamorous or important. Rather than creating a human rights institute in which we bring in lawyers for three or six months of intensive training, we ought to bring in journalists, particularly television journalists. They ought to learn what the Universal Declaration and the Covenants are. They ought to understand that their reporting of certain events and their characterization of those as violations will surely reinforce the norms in question and might act as a deterrent, particularly when the governments concerned are dependent on or interdependent with us.

Beyond this, it is important to develop a refined conception of the range of strategies by which we can direct the reservoir of latent indignation of public opinion about particular human rights malefactions. It is useful to think in terms of *ideological* pressure or pressure using mass communications; *diplomatic* pressure or pressure focused directly on those who are in elite positions: Senators, Congressmen, the President, the Secretary General, and their counterparts abroad; and the *economic* instrument, such as boycotts. Nor should one exclude the *military* instrument. I think coercion is an inherent part of law and a ubiquitous feature of social process. I protest all unlawful uses of violence, but see nothing wrong with using coercion as the last alternative to support and enhance public order. In a world in which coercion is routinely used, it is quite naive to assume that one can achieve political goals by forswearing a priori this instrument of policy.

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If we move from the sterile sequence of first importuning our own government, becoming angry when we are rejected and then blaming the government, to a more active posture of importuning the government and when the government cannot respond either for the structural reasons considered earlier or because of its iniquity or obduracy, to developing our own strategies, we will discover that we have moved into a different ethical region. When one protests and asks the government to do something, one transfers to a government official the awesomely difficult problem of determining what is the right thing to do in the particular case. The official must act not simply to terminate a particular outrage, but to enhance—in terms of international human rights—the entire system for which he is responsible such that it is no worse off *after* his action than it was before. When *we* act rather than simply demand that someone else act, we too must take the same broad and consequential perspective. No human rights activist any more than any sensible government official can take pride in a human rights intervention in any of the modes of influence I have reviewed, which leaves the situation after the intervention net *worse off* in terms of human rights than it was before.

What do we really want when we encounter a cancerous social situation in which there is a serious rights violation? It is not enough to terminate or stop one particular practice. We want to make sure that the situation after intervention—after pulling one strand out of a complex social fabric—is better in terms of all the human values we cherish. Hence we must ask ourselves in a systematic fashion what is likely to be the result of intervention in terms of the shaping and sharing of power, in terms of the production and distribution of wealth, in terms of the freedom of cultivation of enlightenment and skill, in terms of the freedom of cultivation of religion, in terms of the freedom to pursue sexual and agapeic love, in terms of the health of the community, in terms of individual and group respect, and so on. There are circumstances that are so comprehensively evil that only a complete revolution may make sense. In other situations, sober appraisal may suggest that pressure for organic and incremental rather than radical change may be more appropriate. A single strategy must be evaluated prospectively, not in terms of its consequences for one clause of one article of the Universal Declaration of Human Rights, but in terms of its consequences for all of them.

In thinking in terms of aggregate rather than specific consequences, we ought to be mindful of a warning Martin Buber sounded to his own students about the dangers of imagining that they could mechanically apply a single rule, or a single nostrum, to a situation and make it right. Buber said:

> [T]here are all sorts of similarities in different situations; one can construct types of situations, one can always find to what section the particular situation belongs, and draw what is appropriate from the hoard of established maxims and habits, apply the appropriate maxim, bring into operation the appropriate habit. But what is untypical in the particular situation remains unnoticed and unanswered . . . . In spite of all similarities every living

> situation has, like a new-born child, a new face, that has never been before and will never come again . . . . It demands nothing of what is past. It demands presence, responsibility; it demands you.[5]

5. M. BUBER, BETWEEN MAN AND MAN 113-14 (R.G. Smith trans. 1968).