

Commentary

Human Rights as a Contest of Meanings

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Not since the civil rights era have human rights been so much a part of public debate within the United States, about the United States, and among American institutions, the media, and the public. The events of September 11 changed many things, among them attitudes about and conduct in human rights. Much of the change has been disturbing, if not shocking. However, it has also revealed important inconsistencies and divisions within the human rights rhetoric that many took for granted.

Before September 11, certain practices—among them the protection of due process and the prohibition of torture—were, if not always exercised, at least held up as ideals. Most Americans would have described themselves as in favor of human rights, and would have described the United States as an exemplar in human rights promotion and protection.

In important ways, this was an accurate reflection of the status quo. The United States is the only country that annually requires its foreign service to publish a comprehensive report on human rights practices across the globe. Though its practical policies are criticized, the United States has made human rights a central part of its foreign policy rhetoric and, at times, action. The time of massacres (of Native Americans), lynching (of black Americans), and broad discrimination (of women, gays, minorities, and immigrants) is past. Issues remain, yet they do not compare in size or scope to the human rights disasters in places like Rwanda, Bosnia, Colombia, or Indonesia.

Among all countries, the one that receives the most refugees annually still is the United States. Individuals who have suffered human rights abuse sue in U.S. courts for damages—and sometimes win. The U.S. Justice Department even has a special unit dedicated to catching foreign human rights abusers in the U.S.

That is, until September 11. Suddenly, torture became a topic that talk radio shows debated. This wasn't, as it might have been a year earlier, a discussion of the ills reported in a far-off land, but an impassioned argument over the utility of torturing suspected terrorists. The question was not whether torture was acceptable, but under what circumstances (a repeat of 9/11, the "ticking bomb" scenario) torture should be used.

Once the Abu Ghraib scandal became public knowledge, it became sickeningly clear that this was not a theoretical debate. In August 2002, the Justice Department's

Office of Legal Counsel, at the request of the CIA and then the White House, wrote a memo arguing that it “may be justified” to torture Al Qaeda suspects. The memo also speculates that international law, which categorically prohibits torture, “may be unconstitutional.”

Another Bush Administration document, discovered by the *Wall Street Journal*, was written in March 2003 by a Pentagon working group. It stated that the American president has the power to evade international law and torture foreign prisoners, and that interrogators who carry out the president's commands can, in addition, be held immune from prosecution.

For the first time in my memory, the U.S. also “disappeared” individuals—first Chicagoan José Padilla, accused of planning a “dirty bomb” attack, and then an Iraqi whom Defense Secretary Donald Rumsfeld ordered removed from prisoner lists at Baghdad's Camp Cropper. The creation of “ghost detainees was necessary,” the Central Intelligence Agency had warned, to prevent the International Committee of the Red Cross from monitoring their treatment and conditions.

Such events and shifts demand not only awareness, but inquiry, and the publication of papers like these is a necessary and vital step in understanding what is happening both within the United States and abroad, particularly in the countries that have appeared as the generators of the terrorist attacks that prompted this shift. Shapiro's piece begins with a perspective that immediately reminds us that the abuse of human rights is not foreign to the United States, but is in fact an indelible part of our history, with the country's early dependence on slavery.

Shapiro's analysis of the address by Harvard political theorist Judith Shklar is telling. Shklar posited that, since American democracy overcame ills like slavery, they could be reduced to the category of “political phenomena,” suggesting a lamentable, though extraneous matter, and were not a fundamental part of the American structure of politics of the time. That led Shklar “to safely treat Jefferson as ‘a revered founder of a nation dedicated to the universal principles of human rights and individual liberties,’ and ignore the Jefferson whom many have seen as an example of that ‘white mythology’ which conceals an oppressive racial imperialism in a language of universal philanthropy.”

Certainly, that is a position that could be seriously questioned, and not just in light of recent revelations about Jefferson's relationship with a slave woman, Sally Hemmings. This relationship was not merely of lubricious interest, but now served as a marker of how mixed relations really were between whites and their black slaves, and how permeated both are with each other's genes, perspectives, and histories. To dismiss Jefferson's attitude toward and practice of slavery as addenda to the important matters he parsed is to miss an elemental building block of the nation.

These are not, as Shapiro notes, mere “phenomena” but act as “loci of enunciation, as situated voices contributing to American political theory.”

Read in light of the current news, Shapiro's analysis also reminds me of a recent piece by Michael Ignatieff, also a Harvard scholar and a noted author who writes frequently for the American and European press about human rights matters. In a kind of “mea culpa” for his position in support of the Iraq war called “Second, sober

thoughts,” he revisits his support for the invasion on the grounds that Saddam Hussein was a brutal and ruthless dictator who killed tens of thousands. Invasion, he said he concluded, was the “least bad of the available options.”¹

Though his view of the “essential issue” had not shifted, Ignatieff does allow that “intentions do shape consequences.” It is not enough to look at the grand schemes and propositions at play; one must also take into account the nitty-gritty, which in Jefferson’s case meant attitudes and behaviors that were as much a part of the fabric of American existence as his intellectual contributions. Just as Shapiro encourages the casting of a wider net in the historical enterprise, in terms of current events, one must also pursue the views of those Iraqi prisoners forced to pose in sexual tableaux or the “ghost detainee” whose name, as yet, is not publicly known.

As seared now into the consciousness of Americans as the September 11 attacks, these visions of abuse are as novelistic and as overwrought at times as Thomas Pynchon’s larger-than-life characters. But the novelistic form is ideal for exploring the interstices that Shklar leaves so invitingly on view. Jefferson’s mapping of the new territory into manageable grids is, after all, repeated in the Coalition Provisional Authority’s “good works” among the restless Iraqis, with job recruitment sites now doubling so conveniently as car bomb targets. Americans try to put a mold on their conquests, and the natives are predictably unpredictable. Or at least that is how they seem, if all that the theorists are looking for are, in Shklar’s words, what is grand about intentions and not what is real about power relationships and inconvenient histories.

This line of thought leads directly into Ebrahim Moosa’s timely meditation on the dilemma of Islamic human rights schemes. As human rights thinkers like Ignatieff have said, the future of the “rights project”—which includes Western-style democracy, economic stability, regional alliances, and respect for human rights—hinges on the Islamic world and, without question, the U.S. response to the state of “too much freedom” that threatens to turn Iraq into chaos and a failed state wound in American diplomatic and financial purse strings.

Moosa paints a complex, disturbing, but ultimately guardedly hopeful picture. There may be a way to build a “rights project” within Islam, but it will not necessarily depend on the same foundation as the western system. Secular human rights and Islamic rights are “conceptually different things.” However, contemporary Muslim thought may be able to produce a rights system “that may be based on different ethical and moral premises but not dissimilar to secular human rights declarations in their outcomes. The success of a modern Islamic human rights theory depends on the extent to which modern Islamic thought would be open to a revisionist or reconstructionist approach in philosophy and ethical orientation.”

What is striking about Moosa’s piece to me is that, without overplaying the idea, I found his analysis of the problematic aspects of Muslim law—aspects that lead to human rights abuses—to be strangely resonant with Latin American law at least until the 1990s. The caveat is, of course, that Latin American countries adopted a Napoleonic system modeled on Europe, precisely the system that gave rise to the current human rights legal concepts.

Yet the authoritarian and oligarchic nature of colonial and post-colonial societies meant that this law became the tool of the powerful and the rich and was used, in large part, to keep the poor and indigenous populations enslaved and cowed. For human rights, this meant a system of violations that have only recently begun to cede. When dictators like Chile's Pinochet took power, for instance, they did so by appealing to a "higher" law, the defense of the nation against a godless communism, then quickly turned to the law to support and protect their regimes. At the same time, they also abused and ignored the law—in Chile, by "disappearing" thousands, and in places like Guatemala, Colombia, and Peru by "legally" mobilizing peasants and civilians in civil defense patrols that they themselves massacred and tortured.

Yet their "legal" and semi-legal practices have ceded over time, in a rather remarkable way. I am not making the case that a similar process is at work in Islamic countries but rather finding odd similarities in Moosa's argument, which for me hold unexpected seeds of hope.

After all, who would have guessed that Argentine legislators and the courts would roll back or curtail laws that granted impunity to the generals and soldiers who carried out notorious human rights abuses in the 1970s and 1980s. In 2001, Federal Judge Gabriel Cavallo declared unconstitutional the "Full Stop" and "Due Obedience" laws, introduced in 1986 and 1987 to quell a military revolt against prosecutions for human rights crimes committed during the "dirty war." The Argentina truth commission estimates that the military government, in power from 1976 to 1983, systematically tortured, murdered, and disappeared almost 9,000 Argentine citizens.

The "Full Stop" Law prevented the consideration of cases filed with the courts after a deadline of sixty days. The "Due Obedience Law" granted automatic immunity to all members of the military except those in positions of command.

Judge Cavallo's ruling is worth examining. The judge based it on Article 118 of Argentina's constitution, which regulates how the country's courts adjudicate crimes against humanity. Cavallo argued that the prosecutions of such crimes cannot be left to the discretion of individual governments. They transcend national jurisdictions. Judge Cavallo held that crimes against humanity can neither be amnestied nor made legal, and are not excused simply because they were committed as a result of orders from a superior. In his conclusion, Judge Cavallo ruled that the amnesty laws violated Argentina's obligations under the American Convention as well as the American Declaration on the Rights and Duties of Man and the International Covenant on Civil and Political Rights.

On appeal, the ruling was upheld. Two years later, Argentina's congress voted by a large majority to annul the "Due Obedience" and "Full Stop" laws. Judge Cavallo's ruling is now awaiting the final decision of Argentina's supreme court.

But Argentina has gone further. On March 19, 2004, another federal judge overturned two of the seven pardons issued by former President Carlos Menem between 1989 and 1990. One of the pardons shielded from prosecution six members of Argentina's infamous First Army Corps, among them its former commander, General Carlos Suárez Mason. Immediately, authorities detained Jorge Olivera Rovere, the one living

officer who was not already in custody. Although the decision to overturn these pardons pertained only to the case involving crimes committed by the First Army Corps, Argentine prosecutors say that they will be using it to invalidate other pardons.

Finally, turning to the piece contributed by Franz J. Hinkelammert, I feel both informed and frustrated. I don't quarrel with his analysis of Locke or the dark side of the rights project. Certainly, there are many more examples that could be given of the nefarious purposes to which the human rights rhetoric is put, and I could, if pressed, add several more to the bin of excellent examples.

But as an activist, I must take issue with his overarching language, and the effect of his paper to dismiss the rights project as a ruse for destruction. This is simply not so. Indeed, the first examples he uses to sustain his argument are demonstrably false. Kosovo was not "destroyed in the name of assuring the force of these rights"—and neither was Serbia. NATO did assume responsibility for the deaths of civilians (Milosevic did not, and is currently facing a life sentence in The Hague). While I know nothing of the author, the piece reads like a defense of Milosevic himself, victimized by those who would hold him accountable for the atrocities he ordered.

What I do take away from this final piece, however, is that human rights are, more than ever, a battleground of meaning and interpretation. The Bush Administration claims that it invaded Iraq in part because of the Hussein regime's appalling human rights record; yet it ushers in the most devastating era for human rights protection at home and abroad, involving Americans in new acts of violence and abuse. The Palestinians argue their rights and send representatives across the globe to plead the case of a people; yet in Gaza and the West Bank, children have become the suicide bombers of choice. In Colombia, where I have done much of my work, a war still rages that was supposed to create a more just society; yet as I type these words, news of a massacre of 34 people flashes across my screen, their throats cut by the guerrillas who claimed to represent their best interests.

Perhaps this will be the decade of human rights—not of their protection, but of their debate and their contention. One needs to be a convinced optimist to continue to believe that with the next decade, respect for human rights will become the rule we once assumed to already be the case.

NOTE

1. Michael Ignatieff, "Second, Sober Thoughts," *Toronto Star*, December 26, 2003 [online] <http://www.occupationwatch.org/article.php?id=3833>.