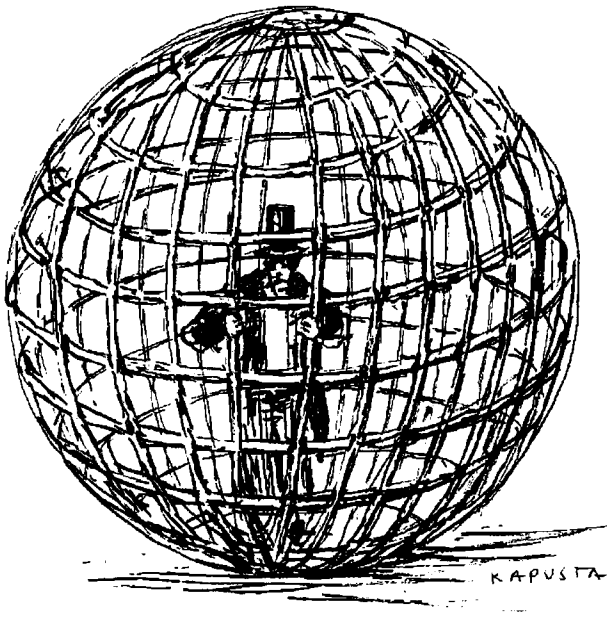
Human Rights and Self-Government

by Marshall DeRosa



In the United States, the federal system of government is undergoing profound changes that compel students of American politics to rethink traditional ideas about national identity. Questions such as: "What does it mean to be a citizen of the United States?" and "What are the duties and privileges of U.S. citizenship?" and "In what manner and to what extent is the locus of sovereignty to be found within the jurisdiction of these United States?" For economic, political, and constitutional developments that advanced national supremacy since the Philadelphia Convention in 1787 and the same influences that are now relegating national sovereignty to the same dustbin of history into which state sovereignty has been tossed, just as state sovereignty was engulfed by nationalism, so national sovereignty is being engulfed by a globalistic network of policymaking and implementation.

A case in point is human rights, or more specifically, a universal human rights agenda that scoffs at traditional American principles such as popular control over public policy and the constitutional federalism that was designed to safeguard popular control. The adjudicative incarnation of this type of case law has already taken embryonic form in the jurisprudence of national and state court opinions. If unchallenged, this incarnation in the next century will be walking upright with the vigor of youth, uncontainable by the cradle-like checks and balances of America's remnant constitutional federalism.

The universal human rights agenda is not limited to the sorts of rights protected in the United States and state constitutions. Rather they have within their scope policies that necessitate extensive social engineering on a global scale, including redistributive policies. Several U.N. documents provide American jurists with the requisite raw materials to incorporate internationally generated human rights into national and state case law, as a review of the United Nations Charter, the United Nations Declaration of Universal Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights makes clear.

The preamble to the U.N. charter appears to be innocuous—"We the people of the United Nations determined . . . "—but it can be used to consolidate sovereignty into an extended global community of individuals, in contradistinction to a collection of sovereign communities represented by their respective national governments. Chief Justice John Marshall, in the case that established national supremacy over the states, deduced from the "We the People" of the U.S. Constitution that the national "government proceeds directly from the people" and is "ordained and established in the name of the people" (see *McCulloch* v. *Maryland*, 1819). This vision of government "proceeding directly from the people" is requisite to the U.N. implementation of universal human rights. In conjunction with Article 55 of its charter, the U.N. has its own general welfare mandate, which states that it "shall promote (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and economic cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Thus, the groundwork for transnationally based rights has been established.

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The preamble to the 1948 U.N. Universal Declaration of Human Rights is more specific. It is applicable to "all members of the human family . . . the aspiration of the common people" and "the peoples of the United Nations." The significance of a United Nations that is the representative assembly not of nations but of the "human family" is that it can reign supreme over national standards that deviate from acceptable universal norms. From a juridical perspective, the supremacy of universal human rights standards over nation-based rights could be rationalized on the grounds that nation-states have been integrated through these U.N. documents into the "human family." This theoretical integration was advanced in 1976 through the United Nations' "international bill of human rights," comprising the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Optional Protocol. These agreements supplement the "moral force" of the 1948 declaration with "legal obligations" as components of the customary law of nations and, regarding the ICCPR and optional protocol, through senate ratification in 1992.

ICESCR delineates fundamental rights that member states must respect, including: the right of all peoples to self-determination (Article 1); the "equal right of men and women to the enjoyment of all economic, social, and cultural rights (Article 2); the right to work and the right to freely choose or accept the work one does (Article 6); the right to favorable working conditions, fair wages, leisure, and paid holidays (Article 7); the right of everyone to form a trade union, the right of trade unions to form national federations, the right of national federations to form or join international trade-union organizations, the right to strike (Article 8), the right of everyone to social security and social insurance (Article 9); the right of everyone to an adequate standard of living and the fundamental right to be free from hunger (Article 11); the right of everyone to the "enjoyment of the highest attainable standard of physical and mental health" (Article 12); and "the right of everyone to education" (Article 13).

ICCPR more directly subsumes national and state identities into that of the "human family." This document proclaims that "the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." For the United States, sovereignty is shifted away from the popular control of citizens within the respective states and to the United Nations. When universally recognized rights have been violated, the nation-states are responsible for providing an effective remedy, but the fact that a remedy is an inherent right of the claimant, domestic law notwithstanding, is a significant development. Moreover, the claimant need not be a citizen of the nation-state against which the claim is filed. Article 2 of ICCPR stipulates that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Coupling Article 2 with Article 25, the legal distinction between citizen and noncitizen is minimal, because with the exception of being able to participate in the political process, all the privileges of the former are extended to the latter. And the door to citizenship must be open to the noncitizen, "without unreasonable restrictions." Article 25 stipulates that every citizen shall have the right and the opportunity, "without any of the distinctions mentioned in Article 2 and without unreasonable restrictions,"

> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access on general terms of equality, to public service in his country.

To remove any ambiguity that citizens of a country may enjoy rights and privileges denied to noncitizens within that country but nevertheless "citizens of the 'human family,'" Article 26 of the ICCPR stipulates:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Consider whether a U.S. District court judge would have any difficulty finding Article 2, section 1, of the U.S. Constitution—which stipulates that no person except a natural born person can be President—repugnant to Articles 2 and 25 of the ICCPR.

Following similar rules of procedure—excepting the closed meetings—nation-states that accede to the Optional Protocol to the ICCPR are open to claims by "individuals subject to its jurisdiction who claim to be victims of human rights violations" (Article 1). In the absence of the Optional Protocol, an individual was dependent on another nation to file a claim on his behalf. For example, a resident of the United States seeking protection against the government for human rights violations would have to obtain the assistance of a second country to file a complaint against the United States. But under the Optional Protocol the individual may directly file his claim before the Human Rights Committee (see Part IV of the Optional Protocol). This is a major departure from traditional international law, which governs relations between nations, not individuals. But that traditional rule was premised upon the relevance of sovereign nation-states, a relevance that is giving way to the global human family, with the United Nations serving as its agent.

Several points need to be emphasized. First, the guarantees against discrimination include public and private, the governmental and nongovernmental. Second, the word "persons," to which these fundamental rights are extended, means members of the human family, and not necessarily or exclusively the residents of particular countries. And third, the American federal system of state-reserved powers are negated by ICESCR, ICCPR, and the latter's Optional Protocol, theoretically and technically, as is evidenced by Articles 28, 50, and 10, respectively, which stipulate that "The provisions of the present

Covenant shall extend to all parts of federal States without any limitations or exceptions."

It was the clear intent of the drafters of the ICCPR and the Optional Protocol to ensure injunctive relief against human rights violations through domestic courts first and foremost, leaving open the option of international remedies if domestic legal systems were to fail. In 1985, this intent was formalized by the U.N. General Assembly, when it adopted the Basic Principles on the Independence of the Judiciary, thereby stipulating that

> Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights . . . Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation, Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality, Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles, Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens . . .

Although for the time being they may be coincidentally compatible, it is not only possible, but highly probable, that as the "gap between the vision underlying those principles and the actual situation" closes, the remaining remnants of popular control over American law will be gradually displaced by U.N.-sanctioned rights. The displacement will be subtle, but effective, and it will have a significant impact on the capacity, and indeed the right, to be self-governing. Secretary-General of the U.N. Boutros Boutros-Ghali sees the heightened role of nationally based judiciaries as not only as essential, but an inevitable part of the "historical synthesis resulting from a long historical process." For "to move from identifying inequality to rebelling against injustice is only possible in the context of a universal affirmation of the idea of human rights. Ultimately, it is this idea which allows us to move from ethical to legal considerations, and to impose value judgments and juridical constraints on human activity."

It may at first appear farfetched to link the idealistic language of the United Nations to American public policy, but the jurisprudential groundwork has already been set. The first significant precedent legitimizing supranational supremacy was a 1920 test case, *Missouri* v. *Holland*. At issue was the constitutionality of the 1916 treaty between the United States and Great Britain and of the Migratory Bird Treaty Act of 1918, which executed the terms of the treaty. The state of Missouri maintained that the treaty and the statute were repugnant to rights reserved to the states by the 10th Amendment. The primary legal issue was: Can a treaty validate an otherwise unconstitutional congressional statute? For the Supreme Court, Justice Holmes provided an emphatic yes. He maintained that in those instances when the national interests are at stake, and in those matters that require national action, the power to secure those interests and execute the necessary action must reside somewhere. Because the states are incompetent to secure national interests individually, the power must be conferred upon the national government, and not necessarily by the Constitution, but by the Supreme Court. He wrote:

> The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment. We must consider what this country has become in deciding what that amendment has reserved.

These few lines represent a paradigm shift in American jurisprudence that shakes the foundation of American federalism. The tenets of that jurisprudence are that statutory and fundamental laws are organic in nature, not static; that the meaning of statutory and fundamental laws may change as circumstances change, a type of legal environmental determinism; that the 10th Amendment is subject to a juridical sliding scale, whereby the reserved powers of the states are circumstantially contracted and those of the national government are expanded; and that the U.S. Supreme Court is empowered to keep the organism, i.e., the U.S. Constitution, healthy in its ever-changing environment. According to Justice Holmes, the demarcation between reserved and unreserved state powers is arbitrary, or, in other words, political. Thus, the sovereignty of the states over their purely internal affairs is not contingent upon the rule of law as expounded in the United States and state constitutions, but upon the rule of political expediency, especially when "a national interest of very nearly the first magnitude is involved," as presumably was the case in protecting the migration of Canadian wild birds.

The logic of *Missouri* v. *Holland* was expanded in U.S. v. *Curtiss-Wright* (1936), when the court outlined differences between the powers of the national government in respect to internal and external affairs. According to the Court, the differences are "fundamental" and the constitutional limitations are applicable only in respect to internal affairs. At issue was the constitutionality of the congressional delegation of law-making powers to the President. If the delegation falls within the category of internal affairs, it would be constitutionally invalid, repugnant to the constitutional separation of powers. However, if it falls within the category of external affairs, the delegation of law-making powers is not open to constitutional challenge. Grounding the court's opinion not in the "provisions of the Constitution, but in the law of nations," Justice Sutherland maintained that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." The powers of external sovereignty passed from the Crown, that is King George III, to the government of the United States, and then on to the President of the United States. Drawing on a twisted interpretation of the last paragraph of the Declaration of Independence, Sutherland concluded that the states never were free or independent. To make the United States completely sovereign, Justice Sutherland read into this last paragraph of the Declaration principles that are clearly inconsistent with the language and history of the document.

But this was precisely the point: the United States was not designed to be completely sovereign; nor was it designed to confer King George-like powers on the President of the United States. Nevertheless, *Missouri* v. *Holland* and U.S. v. *Curtiss-Wright* constitutionally sanction the overthrow of the state-based federal system of government. One year after *Curtiss-*

Wright, the Court went the next logical step and freed the President from dependency on the Senate. In *U.S.* v. *Belmont* (1937), the Court elevated executive agreements to the same constitutional Article VI status as treaties.

There are three avenues of influence over which U.N.-based rights may be incorporated into American constitutional law. First, the provisions may be deemed to be self-executing. A self-executing treaty is one in which the terms of the treaty are binding upon national and state courts without requiring ancillary congressional legislative action. Second, if the provisions are not self-executing, the U.S. Congress may statutorily implement legislation that provides for their implementation. Whether self-executing or statutorily implemented, both types of implementation fall under the supremacy clause of Article VI of the U.S. Constitution. And third, the stipulated rights may incrementally become part of the American juridical mindset, thereby finding their way into the American legal culture. But regardless of the means of incorporation, the end result is the same: the incorporation of these United Nations-sanctioned universal human rights would have a profound impact on the legal culture of the United States, whereby, in the words of one advocate, international law would be converted into world law.

One should not be deceived into believing that internationally generated human rights will augment the "unalienable Rights . . . of Life, Liberty, and the Pursuit of Happiness" by limiting state and national policies. This transnational jurisprudence will be the antithesis of such Jeffersonian ideals and will determine who gets what, when, and how in the emerging New World Order. From the language and rhetorical context of these documents, it is quite clear that what passes for a universal human right will inevitably be measured by the standards of global equality and redistribution, which is tantamount to conceding the fruits of the Cold War stalemate to egalitarian ideologues. Secretary-General of the U.N., Boutros Boutros-Ghali, acknowledged that the universal human rights agenda is a "fundamental dialectical conflict between the universal [the global human family] and the particular [the traditional nation-state]." From the perspective of the United Nations, "human rights, by definition, are the ultimate norm of politics [and] in their very expression, reflect a power relationship." The universal human rights movement is part of a "historical synthesis" through which a "single human community" will democratically procure the rights to a healthy environment, peace, food, security, ownership of the common heritage of mankind, and development. "The human person is the central subject of development," and this "imposes on States . . . at the national level, the duty to ensure access to basic resources, education, health services, food, housing, employment and the fair distribution of income."

Although American commitments to universal human rights treaties appear to be harmless, these commitments pose a significant threat to the American sovereignty and the constitutional rule of law, premised upon popular control. The displacement of popular control with transnational elitism will be subtle, but effective. More specifically, it is clear that the New World Order is at odds with the American constitutional scheme of republican government, which entails the fundamental right to be self-governing for ourselves and our posterity. The universal human rights agenda is nothing short of sacrificing freedom for the utopian speculations about which James Madison warned.

Reviving the Bricker Amendments of the 1950's will not suffice. Neither Congress, the Chief Executive, nor the states are reliable checks against the global leviathan. As the examples of 1776 and 1861 make clear, if liberty is to be preserved, the leviathan must be destroyed and the locus of sovereignty restored to its constitutional moorings. In the words of M.E. Bradford, we have reached the point of a reactionary imperative.

Epitaph for an Unfashionable Poet

by Katherine McAlpine

Future biographers take note: his life
won't make any best-seller lists. One wife
was all he had and never, to our knowledge,
liked to sneak out with leather boys or college
girls. He kept his private life quite private,
was generous with friends, did not arrive at
poetry readings plastered and unkempt.
He never made a suicide attempt
or suffered bouts of existential pain.
His rhymes were funny, sly, and fiercely sane—
which brought small recognition, no awards,
lush grants or honorary mortarboards.
Yet he continued, cheerful, undeterred,
to skewer sacred cows and scare the herd.
So let's hear no regrets on his behalf;
in heaven, he's still having the last laugh.