

Affirmative Action in a Global Context:
Diversity and the Intersection of Civil and Human Rights

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Dr. Martin Luther King, Jr. said, "I think it is necessary to realize that we have moved from the era of civil rights to the era of human rights." Almost 40 years after his death, civil rights groups have begun to move in that direction.

I will first outline what I mean by human rights; then discuss how the concept of affirmative action plays out in a human rights context. Next, I will talk about American civil rights in the context of human rights. Following that, I will outline these issues in the context of globalization and the limitations of focusing only on diversity and the implications of globalization on work force issues. Finally, I will offer some thoughts on the role of the private sector given these forces.

I know if you are in this room, it is because you care about these issues. I know many of the companies with whom you work also care, but are driven by the bottom line. Hopefully, you will find this framing of the issue helpful to you in your work. It is very much on the cutting edge.

What are Human Rights?

In legal terms, human rights are international ethical standards set by the United Nations and other international bodies. In philosophical terms it is what we believe to be inalienable rights that are fundamentally inherent to what all human beings have a right to expect without regard to who they are or where they were born.

I think of them in terms of our Declaration of Independence, that all men are created equal with the inalienable right to "life, liberty and the pursuit of happiness."

Human rights are usually divided into three main general categories:

-civil and political rights;

-economic, social and cultural rights; and

-‘third generation’ rights such as the right to peace, the right to development and environmental rights.

The civil and political rights such as those stated in our Declaration of Independence are generally those that set limits on the power of government over individuals. Those are seen to be at the core of human rights.

The concept of economic, social and cultural rights are more controversial have been more strongly resisted by governments as they are rights that require the state to act to provide financial assistance or other services. Health care, education and housing fall into this category as do the rights of minority communities to respect for their culture and language.

Third generation rights have been even more controversial as they are global in nature, requiring multilateral cooperation among nations.

How does the Human Rights framework address affirmative action?

As Supreme Court Justice Ruth Bader Ginsburg notes in her paper on *Affirmative Action as an International Human Rights Dialogue*, the words "affirmative action" do not appear in the 1948 Universal Declaration of Human Rights.

She argues that the principles in that Declaration support the concept of a measure that provides for remedial justice and economic equity.

She points out that Article 26 of the Declaration states that public education "shall be directed" to "promoting understanding, tolerance and friendship among all nations, racial or religious groups" supports the rationale of affirmative action in admissions to promote diversity in the classroom.

The Human Rights framework, like U.S. Constitutional law, traditionally conceives of human rights as legal rights of individuals.

As a result, there is tension between the rights of the individual and the collective rights of groups.

International law does recognize group rights such as the right to self determination, the right to be protected against genocide and the right to one’s language.

There is a philosophical debate as to whether minority rights are individual or collective or both. However, international law explicitly recognizes the need to protect the rights of minorities as human rights.

As in U.S. law, international law has sought to balance the recognition of individual rights and formal equality with the aim of group protection and actual substantive equality.

Is it special minority rights and privileges (or in the context of the U.S. debate on affirmative action, special preferences) or a recognition that equal treatment does not lead to equal enjoyment of basic rights when there has been a history of discrimination?

International law seeks to strike a balance by generally avoiding quotas, but does not completely ban their use as does U.S. law.

International cases and commentary endorses time limited measures that are appropriately tailored.

Treaties and declarations that expressly call for the use of "special measures" which is a term used to mean affirmative action.

The International Covenant on Civil and Political Rights, which the United States has signed, has been interpreted to require that to eliminate conditions which cause or help to perpetuate discrimination, a country must take specific action to correct those conditions and that it may involve granting preferential treatment.

The ILO Discrimination Convention of 1958 also states that special measures or assistance will not constitute discrimination and the Convention on the Elimination of all Forms of Discrimination Against Women also approves of temporary special measures aimed at accelerating de facto equality between men and women.

On October 8, 2001, the Committee on the Elimination of Racial Discrimination, which is the body set up to monitor compliance with the Convention on the Elimination of All Forms of Racial Discrimination, talked specifically about affirmative action in its review of the report submitted by the United States, which is a signatory.

The Committee noted its concern with the position of the United States that the CERD only permits but does not require countries to adopt affirmative action measures to ensure the adequate development and protection of minority groups.

The Committee argued that the CERD obligates countries to enact special measures, particularly in the case of persistent disparities.

The Committee also expressly applauded the establishment of the Minority Business Development Agency within the Department of Commerce and the efforts to increase the number of African Americans and Latinos employed in fields previously predominately occupied by Whites, as well as the employment of minorities within police forces.

These programs are increasingly under challenge by conservative groups in the United States and face an Administration at best unsupportive and at worse actually hostile.

American courts have held that such programs can look at only already available minority and women owned businesses and not what might exist but for existing discrimination which vastly limits the scope of many governmental efforts.

The Committee went on to call in the United States to review its laws and to consider implementing criminal sanctions for the largest possible sphere of private conduct which is discriminatory on racial or ethnic grounds.

The Committee also called on the United States to protect against unjustifiable disparate impact – a concept which the Bush Administration has actively sought to undermine.

Finally, U.S. courts have not recognized a constitutional right to an education and have not mandated affirmative action and instead made voluntary affirmative action admissions programs permissible only under limited circumstances.

As a result, academic and other institutions have largely been limited to basing their argument for affirmative action in terms of the academic benefit of diversity rather than on the need to address institutional vestiges of discrimination.

Clearly, international human rights law provides a strong basis for affirmative action rooted not just in notions of desired diversity but to remedy institutionalized discrimination.

It is important that efforts go beyond success at creating superficial diversity and address the underlying problems creating the inequality.

The international framework of support for affirmative action that is time limited and tailored is consistent with, although perhaps more flexible and generous than the American framework.

Certainly, companies with a global reach should also be considering international human rights law as they look at their human resource obligations outside, as well as within, the United States.

One of the results of globalization of business and foreign ownership of corporations with significant business in the U.S. and a lack of understanding of the particular U.S. context of discrimination and, because of that, a weak commitment to addressing the problem.

What has been the history of the United States and human rights?

The United States has long championed human rights abroad, particularly when it comes to communist countries. Indeed Eleanor Roosevelt helped to draft the Universal Declaration of Human Rights in 1948 for the United Nations.

However, the U.S. government's definition of human rights has also been a very limited one. It has taken the position that economic and social human rights don't qualify as human rights. They are viewed as moral aspirations, but not inherent rights and the Constitution with the Bill of Rights has been viewed as the last word on this subject.

Historically, America's resistance to the application of human rights principles and stronger international human rights enforcement mechanisms is somewhat rooted in the historic effort by some members of Congress and some states fighting to preserve segregation.

As discussed by Gay McDougall in a recent American Prospect article "Shame in Our Own House," one of the U.S. Delegates, a senator from Texas, Tom Connally, opposed even language about UN support for education because it might be read as endorsing education "irrespective of race."

When the NAACP and other African American leaders in the 1940s sought to petition the United Nations over segregation and lynching, they were branded by politicians and media as disloyal and unAmerican.

Courts have also taken a narrow view, rooting the concept of "civil rights" in our Constitution and Bill of Rights. In America, the concept has come to mean the right not to be discriminated against and the right to be treated fairly. Because of our history as a nation, to many people, civil rights are primarily viewed as pertaining to African Americans.

The United States government has largely resisted acknowledging human rights abuses at home preferring to focus on the sins of other countries. Human rights has often been a tool to other diplomatic and military goals rather than an end in itself.

Over the last several decades, the push in the United States has been to broaden the concept of civil rights to include women's rights, labor rights, gay rights, disability rights, immigrant rights, senior citizens and health care. Over the last decade, there has been a growing movement to reframe many of these rights in human rights terms.

While the United States has signed several key human rights treaties and conventions, it has failed to ratify several human rights related treaties,

such as the 25 year old Convention to Eliminate All Forms of Discrimination Against Women

and the International Covenant on Economic, Social and Political Rights.

It is one of only two countries not to have ratified the International Convention on the Rights of the Child – the other is Somalia.

Even where the United States has signed treaties, it has done so with limiting reservations and has been late and incomplete in its reporting.

Its reports are criticized when lack of compliance is based on states rights, a favorite tool of those opposed to strong civil rights laws.

Standards are sought that would not require the United States to act or that would not interfere with the United States other diplomatic interests.

At the U.N. Conference on Women in 1995, as part of a delegation of women of color, I naively sought the U.S. delegation's support in pushing countries to agree to stronger language to protect immigrant women and their children. The delegation informed me that it was the U.S. who was blocking the stronger language because Congress was looking at harsh legislation and the U.S. was afraid the proposed law would violate the stronger language.

The vast majority of Americans have had little knowledge of international norms.

The mainstream media has paid little attention to these international conferences and declarations which are usually covered by international and foreign policy reporters rather than reporters focused on domestic issues.

Because U.S. based human rights groups traditionally focused on abuses in other countries, there isn't a well developed press corp who regularly follows, and therefore has any expertise, on human rights as it applies to the United States.

Americans have grown up with the notion that human rights are about international standards that apply everywhere but in the United States.

Here we are accustomed to separating out rights and talking about civil rights, labor rights, women's rights, environmental rights and disability rights, for example, when all of them can be linked through a basic notion of human dignity and human rights.

Indeed, public opinion research indicates that while Americans believe in basic rates, we bristle at the notion of other countries judging us.

We are steeped in the belief that American legal standards were far superior to any other when indeed that may no longer be the case.

At an American Bar Association conference in Toronto several years ago, one of the Canadian Supreme Court Justices on a panel talked about how judges in Canada, Europe and other countries around were increasingly looking at international law for guidance and how the United States risked becoming an international outlaw in its stubborn refusal to consider international norms. This has begun to change.

Over the past few years an effort has begun to educate the American public and encourage civil rights attorneys and organizations to explore international human rights strategies and better hold the U.S. accountable in these international arenas where nongovernmental organizations can play such an important role. This effort has begun to bear fruit and an increasing number of activists from across the spectrum are organizing around human rights framing.

What is Changing?

There is increasing energy in the United States among social justice activists around applying the concept of human rights in America.

There is increased awareness of the human rights arena in part because of the U.N. Conference on Women in Beijing in 1995 and the U.N. World Conference Against Racism, Xenophobia and other forms of oppression in 2001 in Durban.

These events generated organizing and outreach to groups and community leaders that had not been familiar with the human rights framework.

Local grassroots organizers have begun employing this framework with some success. The international conferences garnered some media attention who generally don't cover U.S. civil rights issues in the context of human rights.

The new technology that has helped to drive economic globalization is also fostering a larger global human rights communication and movement.

For example, groups organizing against sweat shop labor understand that it is a global phenomenon with clothing companies setting up operations all over the world.

To be successful in helping to improve wages and working conditions in the U.S., there needs to be success in addressing these issues on a global level.

U.S. groups are able to communicate fairly inexpensively and timely through the internet with their counterparts in sweatshops outside the U.S. borders and educate U.S. consumers about the clothes they are buying.

As the terrible series of terrorist attacks on 9/11 so vividly showed us, America is increasingly affected by political, social and economic circumstances of other countries around the globe.

Addressing racism, xenophobia and bigotry is becoming seen as important to our national security to the extent that it creates instability and fosters terrorism.

The American Ambassador to the Organization for Security and Cooperation in Europe, Stephen Minikes, noted at the OSCE Conference on tolerance and the Fight Against Racism, Xenophobia and Discrimination in Brussels this year that racism and xenophobia was not just a human rights issue but is central to the political and economic stability in increasingly diverse nations. Indeed, even in Sweden, one in five people is foreign born.

In addition to the underlying moral consideration of ensuring respect for human dignity and well being of minorities who might otherwise be trampled on by an intolerant population, the consideration of minority rights considerations is gaining prominence as integral to the maintenance of internal and international stability.

Lack of economic security is also destabilizing. In calling for a second bill of rights, President Franklin Roosevelt linked national security and prosperity with economic security. He said that needy men are not free men and that people who are hungry and jobless are the stuff out of which dictatorships are made.

Certainly, our own history is replete with examples of inner city riots growing out of frustration over economic insecurity, inequality and injustice.

The acceleration of economic and political globalization and significant international migration is also challenging our concept of traditional borders.

With more than one in 10 Americans now foreign born, many of these newer Americans are more familiar with the human rights framework than with the civil rights framework of the United States and also more likely to be aware of the opinion of people outside of the United States.

Research shows that younger Americans are also more likely to think of issues in more global terms and be more comfortable with a human rights framing, perhaps because they did not live through the branding of such as being somehow unAmerican. Or perhaps because the internet and advances in television technology have brought them much more global information in real time.

Last year, Supreme Court Justice Stephen Breyer talked about a consensus that is growing in strength about the importance of protecting basic human rights and the interest in enlisting judges to make the protection "effective in practice."

In a speech to the American Society of International Law, he said that "We face an increasing number of domestic legal questions that directly implicate foreign or international law" and that the change "reflects the globalization of human rights."

There is also interest in the language of human rights since the radical right has managed to take the language of civil rights and redefine the meaning.

The area of affirmative action is clearly a case in point. The language of the initiatives, extensively tested, reads like a traditional civil rights law and has successfully misled at least some voters. The definition of affirmative action as quotas and preferences has been difficult to defeat.

The framing of civil rights language depends primarily on your status and interpretation of Constitutional law – which is increasingly narrow. Whereas the framing of human rights goes to the core of basic humanity. There is a strong interest among people concerned about social justice to work across the silos we often find ourselves in.

For example, in the United States the rights of a migrant turn on the minute detail of their immigration status, rather than on a basic notion of what kind of treatment any human being should expect. A conversation about whether an undocumented immigrant should get emergency care is very different if the focus is on whether we believe, as humanitarians, that every human being should get emergency care rather than on what kind of papers gives you what kind of rights.

A human rights framework can move us from talking about tolerance to respect. We can focus on who we want to be as a community as a basis for change – and move away from the argument that only the historical perpetrators have a responsibility and only the direct victims have a remedy.

A conversation about admissions based on a theory that everyone has a right to a quality education is very different than one based on the extent to which grades and test scores indicate one person's worthiness over another and the extent to which their status in life should factor in.

Supreme Court decisions have built a framework that hampers the ability of Americans to devise programs that can effectively address institutionalized discrimination and the continuing impact of past discrimination.

The Supreme Court has held that education is not a constitutional right. It is, however, a human right. The Supreme Court has limited the degree to which affirmative action can be used to remedy the results of historic discrimination in education and forced us into a framework of diversity.

The Human Rights framework, while also trying to balance individual rights against discrimination, has been much more willing to accept the need for temporary and tailored measures to address an unlevel playing field.

International human rights standards require governments in looking at possibly discriminatory practices to look at effect as well as intent.

In some ways, the use of a diversity framework rather than on remedying discrimination is a way to avoid talking about fault or intent – to look at effect.

If you have to admit to bad intent before you can act, few institutions will be willing to do so. If you don't see how inclusion helps to achieve the bottom line, the commitment isn't there.

This is important because diversity as a goal in education, while a worthy value, alone will not address the historic legacy of housing, education and employment discrimination.

Some African American academics have raised a concern that many of the African Americans who are being admitted to the most elite schools are often immigrants or the children of immigrants which means that African Americans who can trace their ancestry through the days of slavery and Jim Crow are still not being given the opportunities they need to succeed and break free of that legacy.

Finally, the long held practice of American courts ignoring all international law has begun to slowly shift.

The last time a U.S. Supreme Court decision mentioned the Universal Declaration of Human Rights was 29 years ago in a dissenting opinion by Justice Thurgood Marshall.

Last year, Justices Ginsburg and Breyer concurring opinion in the Michigan Law School's use of affirmative action cited the International Convention on the Elimination of all Forms of Racial Discrimination.

In the year before, Justice Steven's majority opinion ruling that the execution of mentally retarded people violates the Eighth Amendment against cruel or unusual punishment noted that the world community overwhelmingly disapproved of imposing the death penalty in these situations.

What are the implications for corporations?

Some corporations may view the need to understand human rights arguments as stemming from potential challenges to which they might need to respond. Certainly, oil companies and clothing manufacturers have found themselves caught in the cross hairs.

I believe that this direction presents an opportunity for companies to rethink their enlightened self interests.

There is a strong argument that it is in the longer term best interest of companies seeking expanding markets and long term profitability in and outside of America to invest in creating strong democracies and stable open economies.

Except for companies who profit from military engagement, conflict and concern about national security diverts resources here and in other countries away from building roads, schools, public utilities and other infrastructure, as well as from training workers and keeping them healthy and productive.

Moreover, global conflict makes it more difficult to manage a workforce drawn from around the world.

Corporations need growing markets and growing markets are most likely to exist when countries have stable political environments. Moreover, corporations need healthy and educated workforces.

Armed conflict within countries is often based on religious or ethnic discrimination. Destructive riots occur when there is a feeling of deep inequity and hopelessness. Inequality and repression foster terrorism under the guise of freedom fighters.

There are studies that show that educating women and protecting their rights has a positive impact on poverty. Yet it undermined the ability of United States to hold itself out as an example to the rest of the world when it has not ratified CEDAW.

Since much conflict stems from prejudice and inequality, addressing racism, bigotry, xenophobia and other forms of discrimination is fundamental to creating prosperous communities. As a result, companies should consider more seriously a strategy of working to support policies that will eliminate racial, gender and other inequities in education as well as in other facets of our society.

Ensuring that all countries provide education to all their residents is also one of the keys to providing a more prosperous global community as education affects not only the level of job skills, but helps encourage entrepreneurship, reduces birthrates and improves income levels.

Improved and broader education and therefore economic opportunity reduces competition between communities that might foster racial, religious or ethnic conflict and helps to build more inclusive communities.

The generals and corporations who filed key briefs in support of affirmative action in Michigan understand this. Other corporations need to be willing to add their voice to the battle and if they aren't willing to do so, to support groups who are using all the different strategies, including human rights, to secure success.

Corporations will need to become better educated themselves on the language and framework of human rights and develop their own strategies as the movement continues to build.

A national coalition of groups framing their work on social justice in human rights formed this year.

NAPALC is working with human rights and other groups in a coalition focused on the intersection of civil rights, human rights and civil liberties as it applies to immigrants in a post 9/11 world.

To the extent that your company believes, as many experts do, that immigrant workers are going to continue to be needed to offset the aging of America and the fall off in the birthrate, then your company absolutely needs to be paying attention to what messages our country is sending about the extent to which it is no longer willing to respect the civil and human rights of noncitizens who are working and contributing to this country.

I believe that corporate America should also consider participating in helping to create a stronger human rights framework.

Corporations will face, as clothing companies have, more organized internationally networked campaigns holding them and their employees and consumers more accountable for their employment and business practices here and abroad. Corporations should try to think outside the box and rather than a knee jerk defense, see if there are creative partnerships that can serve shared interests.

Finally, what if we all worked together to make quality education a human right? Imagine making it possible for all children to have the skills and the knowledge and the opportunities to fully contribute to society?

One clothing company facing calls to better ensure against the exploitation and use of sweat shops has been thinking about investing in human rights groups here and abroad to help affected workers gain better enforcement of laws that exist in the countries with which they work but are not enforced or passage of stronger laws with better enforcement in those countries.

Enforcing human rights in this case might help level the playing field between those corporations who seek profits based on exploitation and those who seek to compete fairly and ethically.

In conclusion, these are uncertain times and globalization is changing our worlds in more ways than we can imagine even now. Those of us who care about finally achieving Dr. Martin Luther King's dream now need to be thinking about how that is done in a global context.

Thank you. I look forward to your comments.

This paper has been drawn from the following sources:

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