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I

Paradoxes and Possibilities: Domestic Human Rights Policy in Context

Kathryn Libal and Shareen Hertel

MOVING BEYOND EXCEPTIONALISM

The United States of America was founded on the principle of equality through law, even if this ideal has not always been realized. Indeed, the struggle to realize equality and full participation in society and governance is a perennial theme in U.S. history. At various junctures, realizing this ideal has been challenging, especially in the face of war, economic crises, or social unrest. Nowhere is this more evident than today, when growing opposition (both at the grassroots level and among political elites) to “big government” and “judicial activism” threatens to significantly limit the capacity of the state to address discrimination and social inequality. This opposition has sharpened in the wake of economic recession, heightened national security concerns, and rising nativism.

Human rights could provide a useful tool for addressing these challenges. Human rights are grounded in the notion of human dignity, and they obligate the state to assure the protection and provision of a full range of political, civil, economic, social, and cultural rights. Why, then, are human rights not central to discussions of public policy and legal reform in the United States? After all, the United States played an instrumental role both in founding the modern human rights regime in the immediate aftermath of World War II and in championing human rights as a foreign policy priority at various junctures over the ensuing six decades.

Yet many politicians, civil servants, members of the judiciary, academics, and pundits have long insisted that international human rights norms do not apply (or apply in only a limited manner) to the crafting, implementation, or evaluation of U.S. domestic laws and public policy. American citizens have tended instead to frame their grievances over

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personal abuse both in terms of constitutional rights and civil rights. Indeed, the Constitution (not human rights) is a focal point of national identity in the United States. The practical effect has been to extend “American exceptionalism” on human rights to the domestic realm. As Catherine Powell notes: “[H]uman rights has come to be seen as a purely international concern, even though it is fundamentally the responsibility of each nation to guarantee basic rights for its own people, as a matter of domestic policy” (Powell 2008, 1).

Americans thus resist scrutinizing domestic concerns – such as the effects of institutionalized racism and discrimination on other grounds (e.g., gender identity or disability) or the deepening of class-based inequality – in human rights terms. At both the institutional and popular level, human rights discourse in the United States has been anchored in the notion of freedom from abuse (negative rights) rather than entitlements to particular forms of social welfare or state-sponsored economic development to fulfill rights (positive rights). This dichotomy stems in part from the U.S. constitutional framework, which emphasizes civil and political rights and is less explicit on economic and social rights.¹

The intellectual and political gulf between positive and negative dimensions of rights has thus become central to the United States’ human rights identity over the past half-century. Although the interdependence and indivisibility of human rights was central to their initial conceptualization in international law, such lofty principles quickly became eclipsed by global politics during the Cold War. The reverberations were clear at the domestic level, in the United States’ insistence that only civil and political rights are “real” rights. The U.S. Supreme Court, moreover, has never ruled that poor people constitute a protected group (“suspect class”), and thus there remains no fundamental right to subsistence in U.S. law (Kaufman 2005, 3; Davis 1995).

The institutional landscape mirrors this divide. Relevant federal, state, and local human rights agencies focus principally on questions of

¹ The U.S. Constitution sought to reverse the legacy of racial inequality in citizenship rights and political participation through the addition of the Fourteenth and Fifteenth Amendments. The Fourteenth Amendment, in particular, was grounded in the right to equal *protection from harm* rather than substantive guarantees of the *right to state provision of entitlements* – as evident in the landmark *Brown v. Board of Education* decision of the Supreme Court, which asserted the right to nondiscrimination rather than a substantive right to education (Patterson 2001; Steel 2001; Balkin 2001). Substantive guarantees of education and other economic and social rights have thus remained largely outside the purview of formal U.S. constitutional interpretation or reforms (Sunstein 2004).

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procedural discrimination in the areas of civil and political rights. These institutions are largely separate in mandate and function from parallel agencies tasked with promoting domestic human welfare. Their work intersects only when individual discrimination is at stake, not when shortfalls in human well-being violate basic notions of rights fulfillment. As Stein and Lord observe in this book, “over-reliance on a minority-rights frame, involving rigid adherence to the formal equality mode” means that “equality measures that move beyond the elimination of simple prejudice are considered outside the province of law makers” (204).

As several chapters in this book underscore, the enduring legacy of racism has also contributed to the uneven realization of human rights in the United States. Since the 1970s, the bottom decile of wage-earners has seen wages increase less than 1 percent, whereas wages of those in the top decile have grown 27 percent (Opportunity Agenda 2010, 6). The patterns of these losses and gains follow racial lines. Asian Americans and whites earn the most; Latinos and Native Americans earn the least (American Human Development Report [AHDR] 2010, 2). Home ownership has modestly increased among higher income groups over the past three decades, whereas persistent discrimination in mortgage lending and home sales has resulted in declining rates of ownership among minorities (Glasberg, Beeman, and Casey forthcoming; Opportunity Agenda 2010, 6).

Health disparities are also pronounced. Whereas Asian Americans live the longest of any group in the United States, African-American life expectancy today is on par with that of the average American three decades ago (AHDR 2010, 1–2). African-American women are nearly four times more likely to die of pregnancy-related complications than white women, a level of disparity that has not improved in more than twenty years (Amnesty International 2010). In all but four states, Latinos either equal or surpass the national average in life span (AHDR 2010, 1–2), yet they lag significantly in educational attainment nationally, with only six in ten completing high school (Lewis and Burd-Sharps 2010, 8).

Moreover, the disproportionate incarceration of minorities in the United States has a multitude of human rights implications. As the Sentencing Project Reports (2010):

More than 60% of the people in prison are now racial and ethnic minorities. For Black males in their twenties, 1 in every 8 is in prison or jail on any given day. . . . Increasingly, laws and policies are being enacted to restrict persons with a felony conviction (particularly convictions for drug

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offenses) from employment, receipt of welfare benefits, access to public housing, and eligibility for student loans for higher education. Such collateral penalties place substantial barriers to an individual's social and economic advancement.

The UN Committee on the Elimination of Racial Discrimination underscored the interconnectedness of civil, political, economic, and social rights for ethnic and racial minorities in the United States in its most recent review (CERD 2008) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). The United States ratified this landmark treaty on ending racial discrimination in 1994. In its 2008 Concluding Observations, the committee linked the disproportionate representation of "ethnic and national minorities in the prison population" to racial discrimination in the guarantee of equal treatment before the law, *and* to broader structural discrimination (2008, 5–6, ¶20).

Yet despite the collective dimension of these inequalities, American "rights talk," to use Mary Ann Glendon's phrase (1991), remains individualistic in nature with a strong emphasis on rights rather than responsibilities. Whereas human rights law posits rights as connected to corresponding duties (Whelan 2006; Baehr 2000), in practice duties have been eclipsed by rights in U.S. discourse. This "American rights dialect," Glendon argues, promotes a culture of rights in which "the winner takes all and the loser has to get out of town" (1991, 9, cited in Maltese 1993, 7). The American commitment to property rights above nearly all other rights, coupled with the virtual silence on collective duties, is a paradox of human rights discourse in America. So, too, is the consistent emphasis on individual over collective rights.

American notions of responsibility for fulfilling rights are also highly individual, with a tendency to blame the victim (especially in the case of the poor) for her or his situation rather than to consider the state's role in respecting, protecting, or fulfilling rights (Neubeck 2006) – including the state's duty to protect those within its borders from violations by nonstate actors, such as corporations (Bauer, Chapter 9 of this book). Indeed, the notion that poor people's rights are violated through systemic economic disadvantage or that the state has a responsibility to alter economic structures that perpetuate inequality has not been central to U.S. human rights for decades (Albisa, Chapter 4 of this book). In part, this stems from a myth of the individual's ability to secure one's own well-being and that of one's family solely through hard work and perseverance (Rank

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2005). The failure to recognize structural disadvantage is also a result of the fealty that Americans hold toward property rights and market-based capitalism. Yet as constitutional scholar Noah Feldman (2010) observes:

... new and pressing constitutional issues and problems loom on the horizon – and they cannot be easily solved or resolved using the now-familiar frameworks of liberty and equality. These problems cluster around the current economic situation, which has revealed the extraordinary power of capital markets and business corporations in shaping the structure and actions of our government. . . . They require us to determine the limits of government power and the extent to which the state can impinge on collective and individual freedoms . . . Progressive constitutional thinkers . . . are out of practice in addressing such structural economic questions.

Supreme Court justices, moreover, have been reluctant to invoke foreign law – let alone international human rights law – in their jurisprudence (Ginsburg 2009), although lower courts are beginning to shift in this direction (Davis 2000). As Catherine Albisa shows in chapter four of this book, whereas questions of economic rights have often been adjudicated in the courts, they have not been recognized explicitly as human rights.

At the grassroots level, domestic social-justice advocates typically have not employed the language of international human rights in their critiques of U.S. public policy (Lewis 2008; Thomas 2008). Despite early twentieth-century efforts by American nongovernmental organizations (NGOs) to frame inequality in human rights terms (Anderson 2003), advocates in the United States have employed a nondiscrimination frame that resonates with U.S. case law and corresponding statutory protections of citizenship guarantees, as well as public discourse on human rights. Yet those working on behalf of noncitizens or other structurally marginalized groups within the United States have begun to engage more vigorously with international human rights institutions and processes. They have done so because of inadequate protections for these groups under existing U.S. law (Soohoo, Albisa, and Davis 2008) and because of strident anti-immigrant rhetoric at the popular level (Neubeck, Chapter 12 of this book).

Several trends are clear in the work of major U.S.-based human rights groups (including Human Rights Watch, Human Rights First, and Amnesty International-USA, among others). First, these groups are increasingly partnering with traditional civil rights organizations – such

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as the American Civil Liberties Union (ACLU) or the Center for Constitutional Rights – to address human rights violations in the United States and abroad. Second, conventional human rights groups have begun to move beyond a narrow civil rights frame to incorporate economic and social rights into their programming (Khan 2009). Third, all of these groups (human rights and civil rights groups alike) have begun to dedicate significant resources to monitoring and reporting on violations of noncitizens' rights.² They have focused on violations of civil rights in the context of detention and deportation as well as violations of health, housing, and labor rights involving structurally marginalized and immigrant populations (Human Rights Watch 2010a; Human Rights Watch 2010b; Amnesty International-USA 2009). Fourth, leaders in domestic human rights advocacy – particularly on economic and social rights – are drawn from a dynamic new universe of lawyers and grassroots activists, many of whom are linked through the U.S. Human Rights Network.

Indeed, the tide appears to be turning slowly but surely – with a widening set of actors exploring the application of international human rights law and discourse within the United States. Thus, the “domestication” of human rights is beginning to occur on multiple fronts. This is evident from the number of U.S.-based NGOs participating in the first universal periodic review of U.S. domestic human rights performance, conducted by the UN Human Rights Council (United Nations Human Rights Council 2010).

This book brings to light emerging evidence that U.S.-based scholars, activists, lawyers, and policy makers are shifting toward a fuller engagement with international human rights norms and their application to U.S. domestic policy dilemmas. This signals a growing recognition of economic and social rights and their implications for addressing historic patterns of discrimination and inequality within the United States. The book also underscores how civil rights concerns are increasingly framed as part of a broader human rights language and practice. Before proceeding to explore this contemporary shift, a brief discussion of historical milestones in U.S. human rights practice is in order.

² For example, in the wake of recent changes to state immigration law in Arizona (i.e., Law SB 1070), domestic human rights advocates have echoed international condemnation of a “disturbing pattern of legislative activity hostile to ethnic minorities and immigrants” (UN Office of the High Commissioner for Human Rights 2010). The Arizona law, they argue, increases the risk of racial profiling by law enforcement officials. This, in turn, violates the United States' commitments under ICERD. Labor rights advocates have also strategically engaged both regional and international human rights mechanisms to defend the rights of noncitizen workers (Asbed 2008; Compa 1999).

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HISTORICAL ACCOUNT OF THE RISE OF HUMAN RIGHTS
PRACTICES IN THE UNITED STATES

As historian Ken Cmiel has noted, “Few political agendas have seen such a rapid and dramatic growth as that of ‘human rights’” (2004, 117). Whereas this has been most evident in the post-Cold War era in the United States, since at least the 1930s, human rights has been invoked as a framework or justification for action in a variety of campaigns challenging state-sanctioned oppression. The term “human rights” was rarely invoked prior to the 1940s in the United States, though antecedents to grassroots human rights activism could be seen in antislavery, labor rights, children’s rights, and women’s rights movements (Ishay 2004; Lauren 2003). Henry Gerber, for example, founded the short-lived Society for Human Rights in 1924 in Chicago to press for the rights of sexual minorities (Katz 1992).

The role of Eleanor Roosevelt as the first chair of the Human Rights Commission and key contributor in drafting the Universal Declaration of Human Rights is relatively well known (Glendon 2002). Less recognized has been the engagement of African-American organizations in human rights advocacy aimed at addressing the legacy of official segregation and discrimination against African Americans and other minority racial groups. In the decade after the creation of the United Nations, African-American leaders, galvanized by the National Association for the Advancement of Colored People (NAACP), mobilized to “make human rights *the* standard for equality” (Anderson 2003, 2). These early efforts bridged what would become ossified divides between civil and political rights and social and economic rights during the Cold War era. For example, in the 1940s–1950s, leading civil rights organizations such as ACLU and NAACP combined labor rights issues with challenges to segregation and discrimination in the workplace on the basis of ethnicity or race (Goluboff 2007).

Yet, as Carol Anderson (2003) has masterfully shown, U.S. treatment of human rights as a matter of foreign rather than domestic policy reflected a compromise with segregationist and anticommunist political leaders of the 1940s–1960s (see also Abramovitz, Chapter 3 in this book). As a number of scholars have argued, politics have profoundly shaped the U.S. government’s participation – and nonparticipation – in international human rights processes (Anderson 2003; Hattery, Embrick, and Smith 2008).

Indeed, as the Cold War struggles between the United States and the Soviet Union deepened, the United States played a less fundamental role

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in drafting the major post-UDHR covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The United States increasingly refused to recognize economic and social rights as “rights.” The privileging of civil and political rights as core human rights was also reflected in the advocacy of the most prominent human rights organizations that emerged in Europe and the United States in the 1970s (Cmiel 2004; Moyn 2010). Until the 1990s, Amnesty International and Human Rights Watch, for example, rarely tackled economic and social rights in local and transnational campaigns (Lewis 2008). The majority of civil rights activists of the 1960s did not engage these rights either – with a few exceptions such as Martin Luther King, Jr., who turned to human rights discourses late in his life (Jackson 2006).

In 1966, Lyndon B. Johnson signed the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), although the treaty was not ratified until the tenure of the Clinton Administration. President Gerald Ford initiated the practice of selectively tying foreign aid to human rights performance, and in the 1970s he began to push for greater human rights participation internationally. President Jimmy Carter signed key treaties, including the ICCPR, ICESCR, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). But such efforts were framed as extensions of foreign policy intended to solidify U.S. involvement in the enforcement of human rights norms abroad (Cmiel 2004). Despite the Carter Administration’s rather patchy and unsystematic support for U.S. participation in key human rights treaties, the United States ratified only a few of the key human rights treaties throughout the ensuing decades: the Convention Against Torture (in 1994); the ICCPR (in 1992); ICERD (in 1994); the Optional Protocol to the Convention on the Rights of the Child (CRC) on the Sale of Children, Child Prostitution, and Child Pornography (in 2002); and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (in 2002).³

As a number of contributors to this book argue, the election of Barack Obama as president and his subsequent appointment of key human rights leaders (such as Harold Hongju Koh and Michael Posner) to important positions within the administration signal an opportunity for fuller

³ The United States also ratified the Protocol Relating to the Status of Refugees in 1968 and the Convention on the Prevention and Punishment of the Crime of Genocide in 1988.

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participation and engagement in international human rights processes (Stein and Lord, Chapter 10 and Todres, Chapter 7 of this book). Koh, as legal advisor to the State Department, has underscored that obligations for human rights reporting must be addressed at both the state and federal levels. He has issued memoranda to state governors, for example, calling attention to the human rights treaties the United States has ratified (Koh 2010).⁴ Access to these documents on a consolidated, officially hosted webpage (United States Department of State 2009) also responds to UN human rights criticisms about limited knowledge of human rights obligations and weak implementation at local, state, and federal levels throughout the United States (Committee on the Elimination of Racial Discrimination 2008, 3). Thus, the State Department's website includes links to the major human rights treaties to which the United States has acceded, including U.S. government reports and UN human rights committee recommendations concerning the ICCPR, CAT, ICERD, and the optional protocols of the CRC (<http://www.state.gov/g/drl/hr/treaties/index.htm>).

In addition, State Department lawyers are currently considering which other human rights treaties could be advanced to the Senate for ratification during President Obama's tenure. Advocates involved in ratification efforts cite internal debates over which treaty is likely to gain the Senate's support, signaling that the newest convention – the International Convention on the Rights of Persons With Disabilities – is a likely forerunner (Stein and Lord, Chapter 10 in this book). Other official documents underscore support for the Convention on the Elimination of All Forms of Discrimination Against Women (United States Department of State 2009). The Convention on the Rights of the Child is also under consideration, but advocates recognize that organized grassroots opposition to CEDAW and the CRC may present insurmountable barriers to ratification (Todres, Chapter 7 in this book). The International Covenant on Economic, Social, and Cultural Rights remains a distant prospect.

POWER AND LIMITS OF LEGALISM: INSTITUTIONAL ANALYSIS

Although the United States has a long and storied tradition of judicial activism on civil rights, there are both procedural obstacles and theoretical challenges that constrain a human rights approach to U.S. legal practice,

⁴ See Koh's (2007) analysis of the relevance of applying international human rights principles in both domestic and foreign policy.

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public policy design, and grassroots advocacy. Procedurally, international law is nonself-executing in the United States (Henkin 1995). It does not automatically enter into force upon the country's ratification of any given treaty, but instead requires an assessment of conformance with domestic law and policy first. This often means endless partisan wrangling within Congress over whether international norms are compatible with U.S. norms – even when the distinctions are exaggerated for political purposes.

There are numerous debates about the compatibility of U.S. and international human rights law. For example, the notion of a human right as a claim by someone, on someone, for something essential to human dignity establishes an individually based claim structure, which maps onto existing U.S. law well (Gewirth 1998). However, international human rights law also invokes the collective dimensions of rights in multiple ways – for example, through the formulation of “group rights,” such as indigenous rights to land and cultural expression. These are afforded to the group as a whole, are nondivisible, and are one of the most contested and least well-established categories of rights in international law (Reidel 2010). As discussed by Bethany Berger (Chapter 11 in this book), the human rights of indigenous peoples in the United States repeatedly have fallen victim to a failure to implement group rights effectively.

Collective individual rights, in turn, are also controversial. These rights are individually enjoyed by specific people based on their membership in a group with a collective history of shared oppression. Remedies such as “temporary special measures” (e.g., legislative quotas for women) are required under CEDAW to redress historical patterns of economic, political, and social marginalization (Krook 2010).

Although the United States is not a party to CEDAW, temporary special measures are paralleled in U.S. law by the principle of “affirmative action.” This remedy itself is increasingly under siege in the United States – challenged by citizens who regard it as a special privilege that affronts deeply held notions of a meritocracy (Dudas 2005; Amsterdam and Bruner 2002). Indeed, a corresponding series of lower court cases has been decided favorably on behalf of white plaintiffs who claim that race-based university selection criteria discriminate against them in violation of the Fourteenth Amendment's equal protection clause. Even when the Supreme Court has ruled that such criteria are justified in the interest of creating a diverse learning environment, such as in *Regents of the University of California v. Bakke* (1978) or *Grutter v. Bollinger* (2003), popular ballot initiatives have eliminated the remedy (e.g., California's Proposition 209; Michigan's Proposition 2; Washington's Initiative 200).