

### Testimony of Catherine Albisa before the Massachusetts Joint Judiciary Committee Hearing on the Human Rights for All Bill (HB 706)

June 7, 2005

Good afternoon. My name is Catherine Albisa and I would like to thank the members of this Committee for allowing me to testify here today. I am a human rights attorney with over 15 years of experience in both constitutional and human rights law as applied in the United States, and currently the Executive Director of the National Economic and Social Rights Initiative – an organization dedicated to the implementation of economic and social rights in the United States.

It is an honor to testify hear today as part of this effort which reflects the ongoing leadership taken by this State on the question of ensuring fundamental human rights. Your Chief Justice, the Honorable Margaret H. Marshall has stated with reference to the Massachusetts courts:

Participating in the global conversation about human liberty will keep our courts a vital part of the local community we serve and of the world community into which we and our constituents are now so tightly woven.

This applies with equal force to the crucial – indeed central – role of the legislature in protecting human rights. The work on HB 706 recognizes that the citizens of the State of Massachusetts must be guaranteed basic economic and social rights standards in order to protect the liberty and dignity that every democracy owes to its citizens. HB 706 also reflects an understanding that the solutions to the current state of failure to protect economic and social rights lie in the development of a cohesive systemic approach, and not in piecemeal efforts that ultimately rely on tradeoffs among and between economic and social human rights. It cannot be a question of investing in education at the cost of protecting health, or investing in security at the cost of education – but rather solutions must emerge from a solid commitment to guarantee all fundamental rights.

It is appropriate that this effort begin with study and dialogue. Human rights provide a strong starting point for developing new policy models, but human rights only offer a set of standards and criteria to judge and assess those models. The concrete and particular solutions must come from communities themselves in this type of thoughtful and constructive dialogue which respects the right to participation of civil society in the development of human rights policy. Nonetheless, recognizing that there is a universally accepted framework of basic human rights standards by which to guide the development of policy is a critical piece of moving towards greater liberty, dignity, peace, and stability.

My comments will be directed towards economic and social rights – an arena primarily under State control and responsibility. I will address three issues:

- The role of a State within a federal system in ensuring universally recognized economic and social rights; and
- Core economic and social rights and where they are protected;
- The basic government obligations under economic and social rights standards;

#### *Role of the State*

Due to the nature of our federal system, the reach of international human rights standards must extend beyond the federal government and become part of state government as well. In particular, economic and social human rights standards are relevant and important to State governance because the nature of our federal system places

both the authority and responsibility for enforcement of these rights squarely on the individual States. Not only does our national Constitution limit itself to civil and political rights, but it also limits Congress from addressing many areas affecting economic and social human rights. Moreover, even where Congress has authority under the Constitution's Spending Clause and can regulate programs around food, housing, welfare, etc. The current trend is to provide more flexibility and authority to the States regarding how to implement those programs.

Moreover, human rights obligations bind every official and every level of government, and the federal government has consistently recognized that obligations extend to state and local actors. Indeed the U.S. State Department website clarifies that human rights obligations will be "implemented at the appropriate government level – federal state or local." Specifically, through the treaty ratification process and other representations on the international stage, the federal government has committed the individual States to meeting U.S. human rights obligations. For example, as early as 1951 the U.S. ratified the Charter of the Organization of American States with the following reservation:

That the Senate give its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.

This approach became a pattern and each time the Senate has given its advice and consent to ratify a major human rights treaties, it has done so with the following understanding:

That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

Additionally, when the U.S. issued its first report in 1994 to the United Nations Human Rights Committee regarding its compliance with the International Covenant on Civil and Political rights, the federal government stated that, it was:

a government of limited authority and responsibility.... [and that] state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power... Some areas covered by the Covenant fall into this category.

The report then explained that the United States had, through its ratification process, put other governments on notice that the:

United States will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.

Thus the judicial and political trend towards strengthening and amplifying "state rights" has been integrated into national level human rights policy. Unless there is State participation in the implementation of human rights standards, the United States will fall short of meeting its human rights obligations to its own people. Given that states primarily regulate the economic and social fields, the State role is of particular importance with regard to economic and social rights.

### ***Core Economic and Social Rights***

Human rights are based on principles of dignity, equality, and freedom. All are severely compromised when human beings are not afforded the conditions to develop themselves or meet their basic needs. The United States played a central role in drafting the founding human rights document – the Universal Declaration of Human Rights. The

Declaration recognizes several distinct social and economic human rights:

- The right to health ensuring the right to the highest attainable standard of physical and mental health including access to all medical services, nutrition, sanitation, safe workplace conditions, and clean water and air.
- The right to food guaranteeing freedom from hunger and access to safe and nutritious food.
- The right to housing ensuring access to a safe, secure, habitable, and affordable home with freedom from forced eviction.
- The right to work guaranteeing the opportunity to have fulfilling and dignified work under safe and healthy conditions and with fair wages affording a decent living for oneself and ones family.
- The right to education ensuring an education that enables all persons to participate effectively in a free society and is directed to the full development of the human personality.
- The right to social security guaranteeing that everyone regardless of age or ability to work is guaranteed the means necessary to procure basic needs and services.

There is a spirited international debate on whether the Universal Declaration is a binding document or whether the standards are aspirational. The highest level decision on this question in the U.S. came from the California Supreme Court. In *Fujii v. State*, 38 Cal. 2d 718 (1952), that Court found that the UDHR was merely aspirational. Even if the Courts of today were to address the issue and find the standards in the UDHR to be aspirational, however, this does not mean they are without content or meaning, but I will return to that point later.

Subsequent to the Universal Declaration, the members of the United Nations drafted the two principal human rights treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR reaffirms and encompasses the six rights I previously mentioned and provides greater detail on each of them. The United States has signed and ratified the ICCPR, and has signed, but not yet ratified the ICESCR. When a country has signed but not yet ratified a treaty, it is obligated under international law to refrain from violating the “object and purpose of that treaty.” Additionally, the U.S. has signed but not ratified the Convention on the Rights of the Child (only the U.S. and Somalia have failed to ratify this Convention) which includes extensive economic and social rights protections.

The United States is also a member of the Organization of American States (OAS), a regional body similar to the United Nations in its purpose and structure. Members of the OAS are obligated to ensure the rights contained in the American Declaration on the Rights and Duties of Man, which also includes the six rights mentioned above. Both the Inter-American Court and the Inter-American Commission on Human Rights have found that the American Declaration is not an aspirational document, but rather one that creates binding obligations for the member nations. Nonetheless, the U.S. government rejects the position. Additionally, the OAS system has also produced a series of treaties, all of which have reaffirmed and incorporated these rights. The United States has not yet ratified these, but has signed the principal treaty – the American Convention on Human Rights.

Where does this leave us? On a global level, the U.S. played a key historical role in creating and developing economic and social human rights standards. On a national level, the federal government has been slow to guarantee these rights to the American people. Although, the American Declaration is applicable to the U.S. under regional law, the federal government rejects that position and has yet to actually ratify an international economic and social rights treaty.

The most important point, however, is that in this context the distinction between aspirational and binding norms is irrelevant. People in the U.S. have every right to expect their leaders to aspire in a real way, not a rhetorical way, to globally accepted human rights standards that protect their freedom and dignity. This country was founded on these principles, and this Bill is a serious step towards meeting those aspirations.

### ***Government Obligations***

I would like to now turn to the question of how the human rights framework views government obligations towards implementing economic and social rights. Each economic and social right has several components, such as access (healthcare, education, housing), acceptability and/or appropriateness, quality, etc. I will not address the various components of each of the rights as they are too numerous, but rather focus on general government obligations to the

entire category of these rights.

The basic government obligations are to *respect* and *ensure* human rights. Governments must respect human rights – this means a government cannot interfere with an individual exercising a human right. Governments must also ensure human rights, which can be broken down into three aspects – the duty to protect, fulfill and promote. The duty to protect involves enacting measures directed at private actors – such as corporations or private institutions including universities and hospitals – to ensure that these actors do not and cannot take actions that undermine the exercise of human rights. An example would be labor laws – they are directed at private actors to ensure the right to work under reasonable conditions. Governments also have a duty to fulfill, which means create the conditions that would permit individuals to realize their human rights. Schemes that would guarantee affordable insurance, access to credit for lower-income people in order to allow the purchases of homes, adequate childcare for working mothers, living wage proposals – all of these fall under the rubric of fulfilling human rights.

It is important to note that the human rights system does not require any particular mode of protecting these rights. Each Nation – and in this case State – has the flexibility to adopt any effective method so long as the outcome is protective of and guarantees human rights. For example, with regard to the right to health, while Canada has private doctors with public insurance, the United Kingdom has public doctors and a fully publicly run health care system. Both of these approaches are acceptable so long as health care is assured to all of the population. Finally, governments must also engage in effective public education around these rights, i.e. the duty to promote.

With regard to the duty to fulfill rights (and to some extent protect against private actor infringement as well) governments are expected to *progressively implement* these human rights obligations. In the case of economic and social human rights, a government is not expected to immediately fulfill the full range of rights. However, there must be an effective plan in place to move towards fulfilling those rights within a reasonable and realistic period of time, and that plan must take into account those in greatest need.

A necessary corollary is the principle of *non-retrogression*. This means that anytime a government takes action that results in regression or rights, simply put going backwards and eroding guarantees, it is a clear violation. Other key principles include *monitoring*, a *prohibition on arbitrariness* and *non-discrimination*. Nation-states are required to monitor how well they are doing in ensuring social and economic human rights. This obligation is so central that it cannot be waived even on the grounds of inadequate resources. Nation-states are prohibited from taking action that is arbitrary or discriminatory. The prohibition on discrimination is not only applicable to intentional discrimination, but it also applies to any action or failure to act leading to a discriminatory effect.

Another important point is that in the case of economic and social human rights, the appropriate standards are affected and informed by the resources available. State government has a different level of resources available than the federal government. However, because State government has primary responsibility for economic and social rights it must move towards fulfillment of these rights within the maximum available resources, while also communicating resource needs and issues to the federal level from a human rights perspective.

## ***Conclusion***

In the United States, recognition of and protection for economic and social rights is uneven and far from comprehensive. If we acknowledge that quality education, access to health care, adequate food and housing, decent work conditions and wages, and social and economic security are basic human rights, the current state of development of these rights in the United States system is patently unacceptable. For example, for reasons wholly unrelated to national resources: 1) over 45 million people lack basic health care insurance, while the insurance and pharmaceutical industries are amongst the most profitable business sectors; 2) three million people in the United States suffer hunger and 36 million face food insecurity despite the abundance and low cost of food; 3) families without housing lose custody of children who are then placed in a foster care system that requires more resources per child than it would to provide housing for the family. These are but a few examples reflecting what is, from a human rights perspective, an irrational and inequitable use of existing resources. These examples also speak to the desperate need for a cogent, fair and rational framework under which policy and legal decisions affecting such fundamental aspects of human existence and development can be made. Human rights offers the conceptual and moral clarity to develop such a framework for the residents of Massachusetts.