

*Towards a Human Rights Vision for People's Lawyers in the United States:
Taking up the Call to Strengthen Economic and Social Rights*
Presentation to the National Lawyers Guild "Law for the People" Convention
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The National Lawyers' Guild (NLG) has long been committed to progressive politics and people's movements. Given this longstanding commitment, the NLG should take up the important task of strengthening the efforts to secure economic and social rights, as recognized in international human rights instruments, within the United States. For lawyers to genuinely support people's movements, they must make economic and social rights as central to their agenda as civil and political rights, if only because this set of rights is of paramount importance to communities that face the greatest levels of marginalization and social exclusion in the country.

The United States government has put up fierce resistance, in particular in the last few decades, to recognizing economic and social rights. Within our borders, this has resulted in some of the worst socio-economic indicators among wealthy countries, including the highest rate of child poverty, a severe crisis in people having access to health care, a growing housing crisis and an unconscionable level of functional illiteracy. Internationally, it has inhibited the development of economic and social rights institutions and enforcement mechanisms and contributed to devastating structural adjustment and trade policies.

While the United States came close to embracing economic and social rights during the New Deal, and initially provided leadership and inspiration for the embrace of these rights on the international stage, only education has ever been afforded legal protection as a right across the country, and only on the state level. Even New Deal legislation failed to create a universal and equitable rights landscape whereby all people in the United States would be assured a decent standard of living through guaranteed decent work or social security income support, as well as quality healthcare, education, food and housing. Moreover, New Deal legislation had built in racial exclusions that automatically precluded it from being in alignment with human rights demands. For example, as noted by the Center for Social Inclusion:

The National Housing Act of 1934 ... created the agency that subsidized and insured private mortgages. Federally subsidized mortgage loans often required new owners to refuse to sell to Black people through racially restrictive covenants in deeds. By the 1950s, about half of all home mortgages were federally insured through the Federal Housing Administration (FHA) and the Veterans Administration (VA), but only in segregated neighborhoods. The FHA's underwriting manual required a determination about the presence of "incompatible racial or social groups..." People of color were literally classified as nuisances, to be avoided along with "stables" and "pig pens."¹

¹ "The Race to Rebuild: The Color of Opportunity and the Future of New Orleans" at <http://www.centerforsocialinclusion.org/PDF/racetorebuild.pdf>

Once the backlash to the Civil Rights Movement's inroads against legally sanctioned racism (as well as to the successes of the women's and anti-war movement) really manifested itself, government support for economic and social rights plummeted. In fact, under the Reagan Administration the U.S. government undertook a concerted and intentional strategy to undermine the legitimacy of these rights both internationally and domestically, and to dismantle any legislation that might afford protection for them.

Economic and social rights are rights of survival, but they are also much more. These rights hold governments accountable for creating policies and practices that best allow for all people in society to reach their full potential, that recognize the inherent dignity of everyone, and ensure that all people – irrespective of identity, income, gender, etc. – participate in social decision making and social structures. Economic and social rights, in short, promote a vision of full social inclusion for every member of society.

As lawyers, however, what can we do? It is important to start by recognizing what international human rights law is not at this moment in time. Our courts do not recognize these rights and our national government has assiduously avoided committing itself to treaties in a way that would allow lawyers and activists to hold it accountable to meeting people's basic needs. The United States has not ratified the International Covenant on Economic, Social and Cultural Rights and is one of only two countries that have failed to ratify the Convention on the Rights of the Child (which contains very strong economic and social rights protections). While the United States has ratified the Convention on the Elimination on All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights there are both limitations to addressing these rights only through the discrimination framework, and more problematically, the United States has attached a series of reservations, declarations and understandings that make it exceedingly difficult to rely on these treaties in the courts. One particularly damaging "understanding" is the understanding that these treaties are not self-executing (thus do not provide a cause of action) and the Supreme Court in *Medellin v. Texas*² construed this understanding so broadly that it seems to have taken the position that treaties cannot be used even as a tool to interpret existing laws. While there are lawyers and scholars working on a theory to undermine the *Medellin* decision, the reality is that human rights, and economic and social rights in particular, are not likely to be the basis for a successful cause of action anytime soon. Similarly, customary international law fails to provide much of an alternative, given how narrowly such law has been interpreted in Alien Tort Claim Act cases and in the Restatement on Foreign Law.

Thus, economic and social rights are far from a blunt instrument that knocks down any opposition when representing marginalized communities. But they are a potentially powerful, if subtle, tool that can strengthen your position in court and other legal venues. Comparative law approaches, for example, allow us to raise economic and social rights jurisprudence. Because

² 552 U.S. _____, 128 S.Ct. 1346 (2008).

many other countries incorporate international economic and social rights standards into their domestic jurisprudence, comparative law approaches allow a lawyer to use human rights standards as a tool for interpreting more open ended questions of U.S. law, and as an example of precedent and models that might be directly applicable in a case – in particular a case at the state level where federal precedent, with its failure to include positive state obligations, may be particularly inapplicable. Often, it is even the case that the history of a state’s constitution reveals a strong connection to international human rights standards. For example, the Montana Constitution adopted language about human dignity that was taken directly from Puerto Rico’s Constitution, that in turn had “borrowed” the language from the Universal Declaration of Human Rights. Comparative law can be particularly powerful in situations where the United States is an outlier on a legal or policy issue, which is increasingly often the case.

We need to make economic and social rights part of the legal debate, both in and outside our courts, in order to be part of the international dialogue on these issues. This international dialogue is painfully different from our own country’s unfortunately narrow legal vision. International human rights dialogue assumes that rights must be universal and transcend national governments, that governments have positive obligations with regards to their people and beyond, that remedies must be afforded for discriminatory impacts, not just legally provable intent, and that economic and social rights are not only legitimate, they are a central component to any credible system of human rights protection.

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