Human Rights and the United States Experience

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Human Rights Week
July 21, 2003

Thank you very much, and good afternoon. I will be speaking, I regret to say, in English today. I have promised COL Downie on a number of occasions that on my next visit I would attempt to deliver my remarks in Spanish. But I'm afraid that cowardice has prevailed. I hope that it will nevertheless be possible for you to follow what I have to say.

MAJ Raimondo has asked me to address the question of human rights and the United States experience. I have to start with a linguistic issue of a different kind. The term "human rights" is not typically used in our United States domestic law. We speak of "civil rights," or of "individual rights." Yet, essentially, the history of U.S. constitutional interpretation is the development of a legal system focusing on human rights. I want to do a very brief survey of that body of domestic law with you today, and then to discuss equally briefly the development of what has come to be called international human rights law. Let us then see if we can find the ways in which they have affected one another.

My thesis is that the United States has been a very positive influence on the development of international human rights law, but that the reverse is not true. International human rights law has had very little to do with the evolution of the laws of this country. This has certain implications for the future progress of international law, which I will sketch out at the end of my talk.

The United States Constitution is of course the starting point for any discussion of the people's legal and civil rights in this country. It is correctly seen as one of the world's most important, effective documents for the promotion and protection of individual rights. And it strives to accomplish that objective in a number of ways. First, in outlining the structure of the United States government, our Constitution provides for a separation of powers, according to which each of the three branches (the executive, the legislature, and the courts) is accountable to the others for what it does. No branch of government is entitled to act unilaterally, completely outside of the control of the other two.

The key to the separation of powers is the role of the Supreme Court. The Court, comprising unelected judges who serve for life, and whose constitutional commitment is to the law only and not to politics, may and does override the will of the people as expressed through their elected representatives. It may declare that acts adopted by the Congress and signed by the President are inconsistent with the Constitution, and are therefore invalid. The power to act without regard to the will of the people is an enormously important power that the judiciary holds. While the other branches of government do leave their imprint on the Court – the President appoints its members, who must be confirmed by the Senate, and the Congress is responsible for appropriating funds for its operations – the direct accessibility of the courts to citizens backs up the commitment that Americans' governors will abide by their Constitution.

The Constitution itself, when it was adopted in 1787, did not speak at all of individual rights. A Bill of Rights was appended as the first ten amendments to the Constitution two years after the document itself was first opened for ratification by the States. The Bill of Rights provides for the most fundamental of the individual rights that today have come to be called "human rights": freedom of speech and of religion, of the press and of assembly. Yet perhaps even more important than the listed freedoms is the provision of the Bill of Rights to the effect that the powers not delegated to the United States by the Constitution are to be understood as reserved to the States or to the people themselves. The drafters of the Constitution understood that they were not **creating** rights that they were **giving** to the people; rather they were **recognizing** that people **have** rights, and that the government they were creating would be limited in its authority to act in ways that restrict those rights.

That was very radical doctrine in the 1780s, and I submit to you that in some parts of the world it is no less radical today. Yet this historical context matters, because at the very time in which the Constitutional fathers were busily guaranteeing the popular election of leaders and protecting the freedom of the press and of religion of some citizens, those who happened to be female did not even have the right to vote. Nor, in many States did people who did not own property. And, even more shockingly, in over half of the colonies constituting the original United States chattel slavery was practiced. Certain human beings were owned as property by other human beings. Today, that notion perhaps more than any other is seen as absolutely irreconcilable with any functioning concept of human rights. The changes that have taken place against the constant backdrop of the Constitution are testament to the flexibility and fluidity, the responsiveness to changes in the times, that is a great contribution of the United States to the rule of law in the world.

U.S. constitutional interpretation, and the body of international human rights law developed along parallel tracks in the second half of the twentieth century. Constitutional change comes, as it should come, very slowly. It was only in 1954 that the United States Supreme Court held unconstitutional the maintenance by States of separate school systems for students classified on the grounds of their race. On the international human rights track, as you all know, the very concept that international law protects the rights of individuals against abuses by their own governments goes back no further than 1948 and 1949, with the adoption by the United Nations General Assembly of the Universal Declaration and the enactment of the Geneva Conventions. So along both strands, the substantive steps toward the recognition of the basic individual rights of all human beings are relatively recent history.

The United States Constitution has had an important influence on the emergence of human rights law in the world in a number of ways and for a number of reasons. Whatever else is true, the very concept that rights protected by the Constitution are capable of interpretation in different ways according to the tenor of the times has been an important impetus and exemplar for the development of international human rights law. But there is a dark side to that proposition. It is that the system of constitutional law is ultimately about the interpretation and construction of a single instrument. It is thus of necessity self-contained: it resists outside influence in general, and in particular influence from foreign or international sources.

Let me give you three illustrations of how U.S. constitutional law has matured in its protection and recognition of individual rights: the separation of church and state, discrimination based on race, and the right of privacy. In each case, the outer limits of constitutional doctrine are still being

explored, and the vibrancy of our Constitution is seen in the very real and current differences of opinion about what is permitted according to law.

All Americans are raised to believe that the separation of church and state is a fundamental principle of constitutional law. However, the Constitution itself does not contain a single word about the separation of church and state. What it says is that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." There is no mention of "separation" as such. Yet the Court, over years, has developed that concept, in the context of consideration whether laws and policies adopted by the federal government and by the States have constituted either an establishment of, or an excessive entanglement of government in, religion. The Court-developed principles have led to a number of very important changes to our society, as well as to some serious controversies, some of which are still unresolved.

Public schools, for example, in the United States, may not mandate worship. They may not require that students pray, and they may not even set aside time in the public school curriculum for the recitation of prayers. Public funds may not be used for the support of sectarian religious objectives even in universities. However, there is currently a very live debate in the United States about whether the right of students to an effective education may in some circumstances mean that those students have the right to be educated in private schools that may have church or other religious affiliation. A current political issue concerns whether school vouchers paid for with public funds – that is, coupons given to parents to redeem for an education – may be used in private schools that are connected with churches. It is a subject of great and immediate controversy.

There is also, at present, a case working its way up to the Supreme Court, in which a court of appeals, one level below the highest court in the land, has held that two words of the pledge of allegiance to our flag are unconstitutional. According to those words, ours is a Republic established "under God." The U.S. Court of Appeals for the Ninth Circuit, in California, has held that the use of those words in the pledge of allegiance is inconsistent with the First Amendment, as an establishment of religion.

Now, one is of course free to support or to disagree with that conclusion. My point is simply that this is an issue of constitutional law perceived by many Americans as going directly to the question of their individual rights, and yet which is not easily settled. There are few absolutely clear rules. In the United States, there is public support for religious institutions in many forms. Laboratories in Catholic universities receive government grants, and buy their supplies with public funds. Right here in this room, I daresay that there is at least one person wearing the uniform of the United States Army and on it a Christian religious symbol. The presence of chaplains in our armed forces is entirely consistent with our Constitution. There is a line to be drawn, and the courts continue to occupy themselves, even after more than 200 years, with locating it with precision.

The second issue to which I want to turn is discrimination based on race. In 1789, and indeed in 1864, certain black Americans were held as chattel slaves – as property to be owned – within the territory of this country. The Supreme Court has consistently upheld the right to own property freely, and with relatively little government restriction. Individuals have the right to engage in contracts with one another, so long as the object of those contracts is not contrary to law.

How, then, can we reconcile with those propositions the idea that it is illegal to discriminate against certain Americans on the basis of their race in public accommodation, for example, or in

employment? In 1964, Congress enacted a statute forbidding racial discrimination, among other things, in hotels and restaurants, in the workplace, in employment, in education, and in certain other areas of our public and private lives. How can that possibly be constitutional?

Congress found the basis for this legislation in the following words of the Constitution: "the Congress shall have power to regulate commerce with foreign nations and among the several States." What does the authority to regulate interstate commerce have to do with discrimination? The Supreme Court held that when Congress forbade discrimination in employment and in accommodation and in education, what it was actually doing was regulating the traffic of people, goods, capital, and services across State lines. In the leading case to determine the constitutionality of the Civil Rights Act of 1964, the Supreme Court held that a motel, not far from here in Atlanta, Georgia, was bound by this law because its guests were people who might have been in interstate commerce. They might have been driving from Georgia to Florida, or from Florida to Maine, when they stopped at the motel. The congressional authority to regulate interstate commerce, therefore, included the power to legislate that all Americans, regardless of race, should be permitted to be guests in that "public" establishment.

It is completely clear that, in inserting those words into the Constitution in 1787, the drafters had no idea that some day their assignment of authority to the Congress to regulate commercial activity would be used to achieve the social objective of ending discrimination based on race in public accommodations. Yet the flexibility of the Constitution is seen precisely here: a case in which that kind of general language is capable of producing those socially beneficial results.

Since 1964, there have been 40 years of legislation aimed at reducing or eliminating discrimination based on race, color, religion, sex, national origin, disability, or age, in various aspects of our national life. All of these powers that Congress has the authority to exercise have been grounded in a provision of the Constitution addressed to the regulation of commerce. The actual intentions of the founders are of no moment. What matters is the flexibility of our inheritance from them: the language of the Constitution as a living document.

The third illustration of my point is the right of privacy. Again, there is nothing in the Constitution that speaks to the right of Americans to be left alone by the government, even if it can be said that such a right lies close to the very core of all constitutional rights. This is, after all, the right to tell government authorities that they have no business interfering in what goes on in my private life, in my bedroom, or in my head. And while there is nothing explicit in the Constitution about this, a majority of the Justices of the Supreme Court have found an implicit right to privacy in numerous places in the Constitution. Yet there remain fundamental differences about this, and the Court itself is divided on whether there is such a right, and if so, what its limits are.

This area too is a matter of great and current controversy for Americans. The entire debate on abortion is centered on the question of the right to privacy. For some, the abortion debate is no more nuanced than the debate on whether murder should be illegal. They say that abortion should be condemned as a matter of course. But for others, the constitutional right to abortion is based in the unspoken constitutional right to privacy.

Just last month, the U.S. Supreme Court held that the States have no business regulating certain sexual practices engaged in by adults, consensually, in the privacy of their own homes. Again, some Americans, including some on the Supreme Court, maintain that since no right of privacy is to be

found in the Constitution, there is no obligation on the States or on the federal government to refrain from regulating any area of people's conduct as to which their elected representatives, in legislative assemblies, find of legitimate public concern. How this will end is an open question, which may depend on which President appoints the next members of the High Court.

In all of these examples that I have given, from the most established law, the law against discrimination, to the most fluid, the law concerning privacy, the interpreters of the United States Constitution have very rarely, if ever, paid any attention to parallel developments in international human rights law. Yet they have overseen enormous changes in their views of what rights inhere in individuals subject to United States law.

The good news in all of this is that, in the United States, constitutional rights are clearly and indisputably legal rights. This means that individuals are entitled to them as a matter of law, and they are enforceable in court if necessary. Yet those constitutional rights emerge from a self-contained legal regime. They are based on the text of the Constitution, with the textual gaps filled in by the courts, assigned this role in our divided system of government.

This very description of the process indicates the limitations of this flexibility. Constitutional interpretation is textual in nature, and is therefore immune from outside, and in particular international, influence. It is a commonplace for Supreme Court Justices to write that they have no concern with what international covenants or custom might have to say about a matter, because they are charged with interpreting not those instruments but rather the Constitution of the United States.

The political branches of our government have on many occasions gone even further out of their way to shield themselves from any international winds of change. In particular, the executive and the legislature have routinely indicated that the origin of rights for Americans is not to be found outside of our shores. When the United States became a party to the International Covenant on Civil and Political Rights, for example, it signed with a reservation, according to which any rights that are recognized in the treaty, but that are not already enshrined in our system of law, may not be enforced in the courts of the United States.

The point is that, to the extent that treaty rights are less than or equal to what our Constitution guarantees, we don't need them. And to the extent that they provide more than our Constitution does, we don't want them.

The United States has consistently taken such a position, even with respect to documents of nearly universal acceptability setting out the most basic rights. These include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the United Nations Convention Against Torture. Even in acceding to those instruments, the United States has provided, by reservation or otherwise, that it does not consider itself bound to recognize legal rights of persons within its jurisdiction that might accrue under those treaties.

Further, the United States consistently resists the pressure of outside institutions to declare certain of its legal policies to be inconsistent with the international law of human rights. The most obvious case concerns the issue of capital punishment. Even if capital punishment can be defended as consistent with the international law of human rights – a tenuous argument at best – the application of such punishment to juveniles certainly cannot be. And yet the United States (along with no more than three or four other countries, all conservative Muslim ones) reserves the right to execute people

who were under the age of 18 at the time of the crimes of which they were convicted. We do this not only in resistance to customary international law, but the United States is one of only two nations in the world not to have become party to the United Nations Convention on the Rights of the Child, which expressly forbids capital punishment of people under 18.

Current issues raised by the treatment of prisoners at Guantanamo constitute, of course, another illustration of the point that I am making. It appears as if, thus far at least, most of the provisions of the Geneva Conventions that might be applicable to those men are in fact being applied. They are not being interrogated outside the Geneva Convention rules, for example, so far as we know. Yet the United States steadfastly insists that its conduct owes nothing to the Geneva Conventions, but is driven exclusively by our own national policy. And of course the position of this government – and not just the current administration – on the International Criminal Court puts the United States at odds with most of its allies around the world. Not only do we oppose participation in the Court, but our government is willing to exercise very strong and coercive pressure on countries that are our friends to grant immunity to Americans from the prospective jurisdiction of the new Court.

Some of the people in this room come from nations that have acceded to the U.S. insistence on so-called Article 98 waivers, and others are from countries that have refused. Those that are not giving into the U.S. demand may find that their military aid, including the tuition payments for some of you to study here at the Western Hemisphere Institute, may no longer be forthcoming. Such is the level of antagonism on the part of the United States to the notion that the origin of law, the origin of rights, may come from beyond these shores.

This is not to say, and I do not want to be heard as saying, that the United States consistently violates international law. Whether that is true is a different subject, for another day. What I am saying simply is that the U.S. will not concede that the source of individual rights may be located in international law. The conformity or lack of conformity of this nation's policies to international standards is based not in an obligation to abide by international rules or treaties, but in our own self-driven commitment to fairness.

What are the lessons to be learned from this? I would suggest to you, in summing up, that the establishment of individual rights as legal rights has been a very positive, powerful, and progressive contribution that the United States has made to the international community, by virtue of our own constitutional history. All countries can, in the development of their own conception of individual rights, benefit from studying and learning about the American example. It is helpful to know that, in this country, the courts are the ultimate arbiters of the rights of individuals, and that the doors of the courts are as a matter of constitutional principle at least open to everyone without favor. All are to be treated equally before the law.

That is a positive contribution by the United States to the development of a set of universal legal rights. But on the other hand, the tradition in this country that constitutional interpretation is self-contained means that it is to be shielded from developments that take place outside. It means that if the world gets out ahead of the U.S. in the development of international human rights, we will simply not follow. Ultimately, this conclusion can undermine the confidence that the United States asks the world to have in the emergence of an international legal regime that is binding on everyone.

I suggest that the conclusion is this. As you embark on your studies here at WHINSEC, I urge our friends from Latin America to do two things. First, respect the experience of your United States

friends, colleagues, and teachers, who will be discussing and sharing with you a constitutional tradition of which we are justifiably extremely proud: a tradition of recognition, honoring, and protection of the rights of individuals under the law. But at the same time, I urge you not to accept the proposition that the fact that the United States takes a particular position on the meaning or interpretation of international law or relations means that it is right.

You should be asking your colleagues and your teachers from the United States to defend the positions that they are taking, and you should hold them to the same standards to which they will hold you. The standard for the defense and justification of legal arguments is the law. Do not let anyone persuade you that international law is only for other countries, and not for the United States. The international law to which you will now be exposed intensively here at the Institute is the law that governs, and that must govern, the behavior of all nations in the 21st century.

Thank you for your attention, and I look forward to hearing your questions.