TESTIMONY BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW ON IMPLEMENTATION OF HUMAN RIGHTS TREATIES

Submitted by

Program on Human Rights and the Global Economy
Northeastern University School of Law

We welcome the opportunity to submit testimony on the critical issue of the United States' implementation of ratified treaties, and commend the Subcommittee for engaging in this important oversight.

This testimony is submitted by the Program on Human Rights and the Global Economy (PHRGE) of the Northeastern University School of Law. Founded in 2005, PHRGE is a law-school based human rights program that engages in the study, promotion, and implementation of rights-based approaches to economic development and social transformation in the U.S. and worldwide.

Our testimony focuses on U.S. implementation of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR).[1] We first set out the interplay between national and subnational obligations under these treaties, then examine a specific issue, the right to counsel in civil litigation, through the prism of these ratified human rights treaties.

[1] Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, entered into force Jan. 4, 1969; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. DAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 2.

Human Rights Treaty Implementation Under Our Federal System

Treaty ratification clearly obligates the federal government to take progressive steps to implement provisions of the ratified treaty. However, our federal system also necessitates interplay between federal and subnational implementation. Put simply, when the U.S. assents to a treaty or other international agreement, implementation must occur on the state and local levels as well as the federal level. Our federal system is categorical: local governments have primary regulatory responsibility for, among other things, social welfare and health, family law matters and criminal law, while the federal government primarily regulates, among other things, immigration and international relations. Since international human rights agreements often address health and welfare, federal implementation alone is doomed to fall short of international standards. Thus, the categorical nature of U.S. federalism necessitates implementation of human rights standards at every level of government.

The federal government has acknowledged these layers of implementation and, through the treaty ratification process and other public representations, has recognized the obligations of subnational states and local governments to meet U.S. human rights commitments. For example, when the U.S. Senate gave its advice and consent to the ratification of the ICCPR, it did so with the following understanding:

> 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 states or local governments may take appropriate measures for the fulfillment of the Covenant.[2]

[2] U.S. reservations, declarations, and understandings, ICCPR, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

Similar understandings have been attached to other human rights treaties ratified by the U.S., including CERD.[3] Thus, the federal system necessitates – and the U.S. government has itself acknowledged – shared responsibility for human rights implementation by federal, state and local authorities.

At the same time, under international law, the federal government continues to have an obligation to promote (and achieve) treaty implementation and compliance at every level. While this might be viewed as creating tension within a federal system that accords some autonomy to subnational governments, in fact, this principle serves as the impetus and motivator for action and leadership. In areas where subnational states exercise considerable discretion, strong federal leadership may be critical to ensuring implementation of human rights obligations.

Human Rights and the Right to Counsel in Civil Cases

The issue of the right to counsel in civil cases – known as the "Civil Gideon" right -- illustrates the ways in which federal and subnational governments can coordinate to meet treaty obligations and implement human rights norms.

In recent decades, many states have passed statutes providing for a right to counsel in a bounded categories of cases.[4] For example, almost all states provide some form of representation to children in child abuse and neglect cases.[5] In contrast, the right to counsel in housing eviction matters, if it exists at all in a particular jurisdiction, simply

[3] *See* U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

[4] *See, e.g.*, Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. 245 (July-Aug. 2006).

[5] *Id*. at 246.

accords judicial discretion to appoint counsel to the tenant.[6] Unlike criminal cases governed by the Eighth Amendment to the Constitution, the Supreme Court has ruled that there is no generalized constitutional right to counsel in civil matters under federal law.[7] The absence of this right, and the patchwork approach to civil counsel that has arisen from the lack of federal leadership in the area, raises important human rights concerns.

Both the ICCPR and CERD speak to the issue of fairness in judicial proceedings, an issue that is directly implicated when, for example, an unrepresented litigant seeking to avoid eviction faces a represented party in court. For example, ICCPR has been interpreted by its treaty-monitoring body, the U.N. Human Rights Committee, to encompass procedural fairness in civil adjudication, including the right to counsel in civil matters.[8] The Human Rights Committee has frequently suggested that legal assistance may be required to ensure fairness in civil cases in legal systems based on both common law and civil law traditions.[9]

Similarly, the lack of a more comprehensive civil counsel right in the U.S. implicates CERD. Since racial minorities in the U.S. are disproportionately poor, they

---

[6] *Id*. at 247.

[7] *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981).

[8] Article 14 of the ICCPR generally addresses fairness before domestic tribunals in both civil and criminal matters, and has been applied to issues of civil counsel. *See, e.g.*, Human Rights Committee, General Comment 13, art. 14 (21st sess. 1984) para. 8, Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 14 (1994) (noting that Art. 14 of the ICCPR applies to civil as well as criminal proceedings); Annual Report of the Committee to the General Assembly: 9th Report, Spain, para. 419, U.N. Doc. A/40/40 (1985) (Human Rights Committee requesting information on availability of legal aid in civil cases); List of Issues: Trinidad and Tobago. 16/08/2000, 70th Sess., U.N.Doc. CCPR/C/SR. 1879 (2000). *See generally* Northeastern Law School Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (Dec. 2006), *available a t* http://www.slaw.neu.edu/clinics/RightToCounsel.pdf.

[9] *Id.* at 11.

are also disproportionately harmed by the lack of government-funded civil counsel. Empirical studies confirm this racially disparate impact.[10]

This civil justice issue is within the scope of CERD Articles 5 and 6, which address fair procedure and adjudication through the lens of equality and non-discrimination. Both articles include civil matters and explicitly require that nations take positive steps to ensure effective access to the apparatus of the civil justice system. Indeed, in 2008, the CERD Committee specifically applied these provisions to the U.S. context, recommending that in order to further compliance with its obligations under CERD, the U.S. should allocate "sufficient resources to ensure legal representation to indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs – such as housing, health care and child custody – are at stake."[11]

This standard of procedural fairness may be high, but it is clearly an achievable goal. In fact, the European Convention on Human Rights and Fundamental Freedoms has been construed to require provision of civil counsel to the indigent; this ruling governs all forty-nine nations that are members of the Council of Europe.[12] Even before this standard was enshrined by the European Court of Human Rights, many European nations already had longstanding practices of providing civil counsel. For example, by at least 1495, England required courts to appoint lawyers for indigent civil plaintiffs.[13]

---

[10] *See* Access to Justice, in ICERD Shadow Report (2008), available at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/14_Access_to_Civil_Justice.pdf. *See also* Martha F. Davis, *In the Interests of Justice : Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L.REV. 147 (2009).

[11] Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, UN Doc. CERD/C/USA/CO/6 (May 8, 2008), *at* http://www2.ohchr.org/english/bodies/cerd/cerds72.htm.

[12] *Airey v. Ireland*, 2 Eur. Ct. HR Rep. 305 (1979).

[13] An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 1494,11 Hen. 7, c. 12 (Eng.).

Other European countries also have programs extending back centuries. Norway's program can be traced to the 1600's; Austria's since 1781; and, France, Germany, Italy, Portugal, and Spain since the 1800's.[14]

The Need for Federal Leadership in Implementing Civil Gideon Rights in the U.S.

On one hand, as the CERD Committee articulated in its 2008 review of U.S. practices, the federal government bears responsibility for failing to exercise leadership to address the lack of systematic access to civil counsel, particularly in cases involving basic human rights. On the other hand, our federal system cautions against federal mandates on state governments when, as here, the U.S. Constitution has been construed to stop short of such a requirement.

Some states have taken recent action to comply with the ICCPR and CERD, particularly in the wake of the CERD Committee's explicit admonition to the U.S. in 2008. Most prominently, in October 2009, the state of California approved initiation of pilot projects to appoint counsel for indigent litigants in cases involving basic human needs.[15] Across the country, local bar associations are working to develop similar programs in their states.

However, the federal government has not taken the same progressive steps to comply with the treaty obligations articulated by the CERD Committee and addressed in CERD and the ICCPR. As set out below, there are a number of ways for the national U.S. government to address the government's human rights obligations under the ICCPR

---

[14] Earl Johnson, Jr., et. al., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975) [Justice Earl Johnson, Jr., Associate Justice of the California Court of Appeals]; Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, 24 FORDHAM INT'L L.J. S83 (2000).

[15] *See CA Pilot Project is Now Law*, in NEWSLETTER: NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, *available at* http://www.civilrighttocounsel.org/news/recent_developments/32.

and CERD, providing leadership without unduly interfering with the delicate domestic federal-state balance. We recommend that each of these measures be pursued vigorously, in partnership with state and local governments where appropriate, in order to ensure the human right to fundamental fairness guaranteed under the ICCPR and CERD.

First, the immigration area is within the exclusive purview of the federal government. This area provides an opportunity for the U.S. to exercise leadership in providing fair procedures consistent with its human rights obligations. In particular, removal (deportation) proceedings are an appropriate area for provision of government-appointed counsel. According to Amnesty International, 84 percent of detained immigrants are unrepresented.[16] For these non-citizens and their families, the stakes involved in removal proceedings are extremely high. Further, studies reveal that the availability of legal counsel has a significant impact on case outcomes – with legal representation yielding a fivefold increase in the likelihood of a successful claim for asylum.[17] The ideal of "equality of arms" can only be satisfied by a system that equalizes access to lawyers, since the current approach often pits government lawyers against unrepresented and "unarmed" litigants. Further, as set out in the many writings on this issue, there are many benefits to the government of providing appointed counsel in such proceedings, ranging from better outcomes to greater faith in the system of immigration adjudication.[18] Provision of appointed counsel in removal proceedings would be an important step toward human rights implementation.

---

[16] Amnesty International, *Jailed Without Justice: Immigration Detention in the U.S.A.* (2008), *available at* http://www.amnestyusa.org/immigration-detention/immigrant-detention-report/page.do?id=1641033.

[17] Donald Kerwin, *Revisiting the Need for Apppointed Counsel*, Migration Policy Institute, April 2005; Amnesty International, *supra* n. 15.

[18] Kerwin, *supra*, n. 17.

Second, the federal government should provide leadership in implementing our human rights obligations through funding and implementing a broader system for providing a right to counsel in civil cases, particularly in matters of fundamental human needs as recommended by the American Bar Association in 2006.[19] Specific implementation measures might include providing additional funding for federal legal services to provide more comprehensive civil legal representation to indigents as well greater coordination and training for pro bono representation;

Third, in furtherance of its obligations under CERD and to provide leadership in a federal context, the national government should engage in further data collection, assessment and public reporting on the discriminatory impact of the current system of providing civil counsel, including collection of data documenting the intersection of race and gender in these impacts.

In conclusion, as the Civil Gideon example illustrates, federalism concerns should not and need not undermine federal government leadership in implementation of human rights obligations. Both states and the federal government have a role to play in implementation. When the federal government relies exclusively on states for implementation of human rights standards, without providing leadership in the areas in which the federal government exercises jurisdiction, it shirks its international obligations. Indeed, by engaging both federal and state actors in human rights implementation – as in

[19] ABA Resolution, Aug. 7, 2006, *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf

the example of Civil Gideon -- our nation's record of treaty compliance and human rights leadership will only be enhanced.

Respectfully submitted,

Professor Martha F. Davis
Professor Lucy Williams
Professor Margaret Woo
Associate Professor Daniel Danielsen

Contact: Martha F. Davis
Associate Dean and Professor of Law
Co-Director, Program on Human Rights and the Global Economy
Northeastern University School of Law
400 Huntington Avenue
Boston, MA 02115
(617) 373-8921
m.davis@neu.edu