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The Age of Rights

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THE AGE OF RIGHTS By *Louis Henkin*. New York: Columbia University Press. 1990. Pp. xi, 220. \$29.95.

The United States was a leader in developing and promoting an international consensus that national governments should protect and guarantee the human rights of their citizens.¹ In 1941, as the nation geared up for World War II, President Roosevelt declared as a national objective “a world founded upon four essential human freedoms”: freedom of speech, freedom of religion, freedom from want, and freedom from fear.² A more general understanding of human rights became a seriously accepted justification for America’s full-scale participation in the war.³ The Universal Declaration of Human Rights, adopted by the United Nations in 1948, borrowed heavily from the U.S. Declaration of Independence and Bill of Rights.⁴ In *The Age of Rights*, Professor Louis Henkin⁵ explains how the United States, by failing to join the primary international human rights agreements and by failing to accept the existence of economic and social

1. “For Americans — our common usurpation for the inhabitants of the United States — the idea of rights is an old friend, and we tend to think of it — with some arrogating exaggeration — as our contribution to mankind.” P. x; see also Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS 405 (Louis Henkin & Albert J. Rosenthal eds., 1990).

2. President’s Address to Congress of Jan. 6, 1941, 87 CONG. REC. 44, 46-47 (1941). Roosevelt told Congress:

The first is freedom of speech and expression everywhere in the world.

The second is freedom of every person to worship God in his own way everywhere in the world.

The third is freedom from want

The fourth is freedom from fear

Id.

3. “During the War, the Allied powers had proclaimed that assuring respect for human rights was their war aim.” P. 1. The role of the United States as a defender of human rights during World War II is still recognized today:

Twice in this century, the world has been threatened by catastrophe. Twice this catastrophe was born in Europe, and twice you Americans along with others were called upon to save Europe, the whole world and yourselves. . . .

. . . .

. . . [The U.S.] became the most powerful nation on earth, and it understood the responsibility that flowed from this.

Vaclav Havel, *Excerpts From Czech Chief’s Address to Congress*, N.Y. TIMES, Feb. 22, 1990, at A14 (translation).

4. See Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1-4 (Adamantia Pollis & Peter Schwab eds., 1979).

5. University Professor Emeritus and Special Service Professor, Columbia University, and Chairman, Directorate, the Center for the Study of Human Rights. In addition to his academic career, Professor Henkin has served in the U.S. Department of State and for the United Nations. He is the author of several books, including: FOREIGN AFFAIRS AND THE CONSTITUTION (1972); HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1972); and THE RIGHTS OF MAN TODAY (1981).

rights as a matter of domestic policy, now trails much of the world in recognizing a full range of human rights.

In this collection of essays and speeches published or presented over the past decade, Henkin provides a thorough and readable explanation of how international rights developed and how they reflect our constitutional notions of individual rights. *The Age of Rights* does not present innovative arguments; rather, it provides a forum for Professor Henkin, a leading authority in the field of international human rights, to expound on the rights debate. As a collection of essays, however, the book suffers from certain structural problems. Throughout the book Henkin repeats arguments made in the earliest included essays — a necessary device for the individual pieces, but distracting to one reading the entire work. More seriously, the essays were published before the revolutions in Eastern Europe and the collapse of the U.S.S.R. Although these occurrences may not challenge Henkin's conception of rights, they necessarily leave his analysis dated.

In the first section, "International Human Rights," Henkin provides a philosophical and moral underpinning for his definition of international human rights, places the relatively new concept in its historical context, and expands on several of the more difficult issues. While relatively uncontroversial, the essays in the first section are valuable as clear and authoritative analyses of the present status of human rights in the international legal system.

International human rights are relatively new, legally and philosophically. Henkin cites as their origin a psychological, moral, and political consensus, born out of the World War II experience, that the treatment of fellow human beings is a concern of "everyone, everywhere."⁶ Human rights became part of the international legal structure through two postwar processes: incorporation into the constitutions of virtually all nations and codification into a series of international legal instruments, such as the Nuremburg Charter, the U.N. Charter, and the Universal Convention on Human Rights. This evolution of the concept of international human rights as a product of the consent of nations to international treaties results in some significant differences between our views of domestic constitutional rights and of international rights. As Henkin writes, "for American constitutionalism, the individual had natural rights before the Constitution, before government was established" (p. 144). By contrast, international human rights, dependent upon the consent of national governments, cannot be said to "precede" government. Furthermore, international human rights are enumerated in several international in-

6. P. 16. Examples of concern for the human rights of individuals other than national citizens do predate World War II. For instance, the international abolitionist movement was active as early as the beginning of the eighteenth century, presumably out of concern for the human rights of Africans taken as slaves. P. 15.

struments; there has yet to develop a need for judicial interpretation to give them substance.

In addition to offering a philosophical basis for international human rights, Henkin provides a detailed historical account of the evolving attitude of the U.S. government toward international human rights (Essay 5, pp. 65-80). In particular, he grants a behind-the-scenes description of the conflicts within the State Department and between the Congress and the Executive Branch. He also briefly discusses several other international human rights issues, including: the lack of institutional remedies for international human rights violations (Essay 2, pp. 31-41); the rights of aliens and immigrants (Essay 3, pp. 43-50 & Essay 8, pp. 127-40); and the problems of nonintervention and domestic jurisdiction (Essay 4, pp. 51-64).

In the second group of essays, "Rights in the United States," Henkin isolates two deep problems with our constitutional jurisprudence reflected in federal judicial decisionmaking, in congressional action, and even in law school teaching about the Constitution.⁷ First, Henkin argues that since the inception of judicial review courts have paid too much attention to the text of the Constitution, ignoring the underlying theory of rights that informed its creation.⁸ Second, this overly textual approach functions poorly because the Constitution was not written to perform its modern role as "the constitution of a powerful national government largely subordinating state governments and itself governing the people" (p. 91). The Constitution is therefore a "congenitally flawed" document. It fails to provide adequate textual support for certain individual rights, leaving judges to find such protections in the imperfect Due Process Clause.⁹

To compensate, Henkin attempts to revive the original Jeffersonian notion of "a constitution as social compact, retained rights, government for agreed-upon purposes" (p. 91). He explains that, as a social agreement, the Constitution must be renewed, or readopted, by each generation. As a result, modern ideas about the federal government — such as its role in satisfying economic needs — should now be incorporated in our collective vision of constitutional rights.

7. "Doubtless as the result of judicial neglect, law schools teach constitutional law as though the Constitution has no theory, and some students of the law may be surprised to learn — and some may deny — that it has one." P. 83.

8. "We were condemned to be textualists, 'interpretivists'; other parts of our hagiography — notably the Declaration of Independence — were excluded from the jurisprudential canon; ancestral theory might sneak in, but only occasionally, and in the guise of construction of the constitutional text." P. 91.

9. Henkin has argued this point elsewhere:

Except for the right to vote we have not added explicitly to the rights protected by the Constitution, but individual claims, imaginative counsel, and judicial exegesis have transformed rights probably beyond what the framers of the Bill of Rights, and even the framers of the Fourteenth Amendment, would have recognized.

LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 96 (1990).

In the third and final group of essays, "Rights: Here and There," Henkin contrasts U.S. constitutional rights with international human rights. Although Americans tend to view human rights as intellectual and political products that we export to other nations,¹⁰ there are clear differences in the substance of U.S. and international rights.¹¹ These differences, according to Henkin, can be traced to their different conceptual origins.

International human rights are not *a priori*, and depend upon the consent of national governments; if governments refuse to recognize them, they cease to exist. As a result, Henkin sees a task of international lawyers and politicians interested in human rights to promote the idea of national governmental responsibility for protecting human rights. He writes, "[t]he purpose of international political and legal preoccupation with human rights, and of recognizing their quality as rights of some order, is to help obtain for them the quality of legal rights in domestic societies and to enhance the likelihood that they will be enjoyed in fact" (p. 32).

This emphasis on promoting the recognition of human rights belies a basic inconsistency in Henkin's scheme. On the one hand, he attributes to international human rights the same "weight" as domestic rights. At the same time, he is aware that the existence of international human rights depends on governmental acceptance. Henkin never seems to resolve this inconsistency, resorting instead to a functional approach, terming a potential entitlement a "right" only when it is helpful to his argument.¹² While this may be a necessary approach to what is essentially a developing body of legal thought,¹³ it weakens

10. See *supra* note 1.

11. The distinctions Henkin considers most important, and describes most completely, are the fortunate lack of provisions in the Constitution for the suspension of its protections in time of emergency, and the unfortunate absences of a statement of equality and of protections against violations of the individual rights by other private individuals. See generally Essay 9, pp. 143-56.

12. For instance, in discussing economic rights Henkin writes:

Adequate food and other necessities, however, are surely fundamental, and essential to human dignity. The argument against treating them as rights was that they depended on available resources and large national policies and could not be enforced by the means available for enforcing civil-political rights. Treating them as rights, therefore, would only dilute international efforts to obtain respect for civil and political rights.

P. 33 n.*.

13. Some argue that fretting over this question is unnecessary because sufficient common ground exists among different political cultures regarding the basic core of human rights. See DAVID P. FORSYTHE, *HUMAN RIGHTS AND WORLD POLITICS* 182, 187-88 (2d ed. 1989). Henkin seems willing to accept the philosophical ambiguity:

[I]nternational discourse seems to see human rights in one or more of the following ways:

- a. as "goods," desiderata, that are not rights but that might be translated into legal rights in domestic or international law;
- b. as moral rights in an accepted moral order (or under some natural law), the individual having "claims" to freedoms and basic needs, seen perhaps as claims upon the moral order, or the universe, or God;
- c. as moral (or natural law) claims by every individual upon his society; or
- d. as legal claims upon his society under its constitutional system and law.

P. 32.

the argument for full recognition of international human rights in two ways.

First, Henkin's theory is susceptible to the frequent criticism that international human rights are essentially a Western concept, and therefore not applicable or acceptable to non-Western cultures that do not share a "rights tradition."¹⁴ Henkin addresses this criticism in the Epilogue, when discussing the problem of conflicting religious, political, and moral systems. He concludes that all societies share some common ground: "[T]here is now a working consensus that every man and woman, between birth and death, counts, and has a claim to an irreducible core of integrity and dignity. In that consensus, in the world we have and are shaping, the idea of human rights is the essential idea" (p. 193). Although inspiring, this position dodges the argument that a "working consensus" is a description of agreement, rather than a reason for agreement, and therefore lacks persuasive value.

Second, the disjunction between the theoretical underpinnings of domestic and international human rights weakens the book's most significant and controversial position, Henkin's persistent and persuasive advocacy for the acceptance of economic and social rights in U.S. foreign policy and as U.S. constitutional rights. Henkin explains that economic rights are not a new concept in U.S. political debate. As early as 1944, President Roosevelt spoke of an economic Bill of Rights in his State of the Union message: "In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all."¹⁵ Nevertheless, they have been rejected in both domestic constitutional law jurisprudence¹⁶ and U.S.

14. See Pollis & Schwab, *supra* note 4, at 14-15.

Efforts to impose the [Universal Declaration of Human Rights] as it currently stands not only reflect a moral chauvinism and ethnocentric bias but are also bound to fail. . . .

. . . .

. . . If the notion of human rights is to be a viable universal concept it will be necessary to analyze the differing cultural and ideological conceptions of human rights and the impact of one on the other.

15. Roosevelt continued:

Among these are:

The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

. . . .

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

President's Message to Congress of Jan. 11, 1944, 90 CONG. REC. 55, 57 (1944).

16. See Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; Martha H. Good, *Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights*, 6 HUM. RTS. Q. 335 (1984).

foreign policy.¹⁷

The latter rejection is most clearly demonstrated by Congress' refusal to ratify the International Covenant on Economic, Cultural and Social Rights. As the only major Western nation not to accept this international agreement,¹⁸ the United States is hard pressed to assert its continued role as human rights standard bearer. According to Henkin, the sources of the resistance to acceptance of the Covenant¹⁹ include a devotion to representative democracy over satisfaction of human needs; strains of isolationism; and a belief that rights in the United States are satisfied more completely than in other nations, excusing the U.S. from its international obligations (p. 77). Opposition to the Covenant, according to Henkin, is an outdated position.

Let there be no doubt. The United States is now a welfare state. Commitment to some minimum levels of individual welfare may not be of constitutional rank but it is deeply, ineradicably imbedded in our national life. . . . To the world, moreover, whatever the United States does in fact, it does not proclaim a national commitment in principle to meeting basic human needs. Americans are frequently reminded that our eighteenth-century philosophy, our kind of democracy, our national hagiography, show the United States committed to protecting property, but not to alleviating hunger, even of our own people. [p. 153]

As with other arguments in the book, Henkin is persuasive and impassioned in his defense of economic, social, and cultural rights. Unfortunately, his argument for their domestic recognition reveals more about his perceptions of what should be our collective moral sensibilities than it does about traditional notions of "rights." It may therefore fail to persuade those who instinctively believe that economic rights just don't exist.

Professor Henkin has long been an advocate for recognition and application of the concept of human rights. *The Age of Rights*, while offering little in the way of new arguments, and sometimes lacking in

17. "It is true that the state must establish a legal framework which encourages fairness and prohibits fraud; but, having done so, the state must then get out of the way and permit individuals to live their own lives as they see fit." Ambassador Patricia M. Byrne, Statement to the Third Committee of the U.N. General Assembly (Nov. 9, 1988), *quoted in Philip Alston, U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INTL. L. 365, 374 (1990).

18. As of January 1, 1990, 93 nations had become parties to the International Covenant on Economic, Social and Cultural Rights, yet the United States remains a holdout. RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 180.25-180.26 (2d ed. 1990).

19. Initially, some critics charged that joining the Covenant would unconstitutionally violate states' rights, interfere with congressional power, and affect matters of strictly domestic concern. Henkin dismisses these objections, writing that "[e]ach of these legal objections was long ago refuted." P. 76.

analysis of competing views, is a comprehensive and accessible presentation of the views of a leading scholar in the field.

— *Stephen D. Sencer*