Chapter 11
Poverty and the Right to Development in the United States of America

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Abstract In May 2020, some time after completion of this chapter, America seems to be coming apart at the seams. Fear of SARS-CoV-2 and the countermeasures introduced across the country have left much of the economy in tatters and produced well over 40 million newly unemployed. Many existences, difficult even before this global crisis, have become untenable. Pictures of long lines in front of food banks made international headlines. America, one of the richest societies in the world, is in deep trouble. With economic pain comes civil unrest. Demonstrations, often violent, are paralysing cities across the nation. Triggered by the death of George Floyd in a police incident on the streets of Minneapolis, citizens are expressing deep frustration with not only unequal treatment by law enforcement but also the deteriorating socio-economic situation of many communities. The income gap in America is one of the most pronounced among OECD nations; areas like Los Angeles are experiencing unprecedented numbers of homeless people; staggering differences in the quality of health care are having a measurable impact on the life expectancy of citizens; and spending cuts for public education are coming under judicial scrutiny and putting courts at loggerheads with the executive and legislative branches of government in states like Kansas or Kentucky. This contribution describes the constitutional parameters that shape these dramatic developments and define economic existence in the United States of America. It highlights the very limited protection provided for the essential core of human life (food, water, housing and health care), education or other socio-economic entitlements under both the federal and state constitutions, and contrasts these findings with the elaborate system of statutory social welfare programs that many Americans believe should determine the country’s identity but are today under siege in light of budgetary constraints and an increasingly partisan political landscape. The challenges of allocating dwindling public resources to
competing needs, problems created by the internal migration of citizens seeking a better future in other parts of the country, tensions caused by significant economic differences between the component parts of a federal system, and America’s strained relationship with the international community and global approaches to poverty and development are related themes that feature in this analysis. America, so the conclusion, lacks constitutional consensus about what society must provide in terms of individual socio-economic security. Leaving this decision to the ebb and flow of political majorities is likely to further increase wealth disparity, put considerable pressure on the country’s democratic institutions, waste valuable human potential and risk alienating citizens that have lost trust in the ability of the system to provide sufficient opportunity for personal development.

Introduction

The dream of making it from rags to riches is still very much alive in America—as it is, viewed from afar, in the minds of many outside observers. Reality is different. Life in the lower socio-economic strata of contemporary American society is increasingly tough, with fewer success stories to keep alive what must remain a mirage for most.1 Increasing pressures to introduce or increase minimum wages across the country—despite comparatively low unemployment rates—and bleak data concerning the cost of education, the quality of housing, the level of health care and even life expectancy reflect the dwindling chances, slim in the first place, of leapfrogging upwards individually or, from one generation to the next, as a family. Social mobility is low and income inequality on the rise.2 The political system is adapting to this development. The field of Democratic hopefuls looking toward the 2020 race for the White House has created a sharply divided political landscape—even by American standards—not just on immigration and the environment but also on a host of broad socio-economic issues including (again) health insurance, education and childcare support.3 The legal system may be slower to respond. This contribution seeks to summarize the contemporary narrative on poverty and the right to development inside America; sets out what constitutional footholds there are at the federal and state levels to invoke socio-economic entitlements; and analyses critically the limited influence international instruments or doctrines have on this part of

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1See e.g., the New York Times of 19 November 2018 (The American Dream is Alive. In China.).
2See Organization for Economic Cooperation and Development (OECD), United States, at https://data.oecd.org/united-states.htm (last accessed 28 February 2019).
3See, e.g., reports in the New York Times of 26 August 2018 (The New Socialists), 24 January 2019 (Young Voters Keep Moving to the Left on Social Issues, Republicans Included), 9 February 2019 (For Democrats Aiming Taxes at the Superrich, ‘the Moment Belongs to the Bold’), 17 February 2019 (How Much Will Americans Sacrifice For Good Health Care?), 19 February 2019 (Elizabeth Warren proposes Universal Child Care) and 22 February 2019 (Democrats for Family Values).
American law. The final section offers some thoughts about the significance of comparative constitutional experience in the field.

**Domestic Law and International Standards**

The United States is reluctant to join regional or international legal regimes outside the areas of trade and defence. The keys to understanding this position are manifold. Economic or strategic considerations that require the country to engage with the world outside rarely have an equivalent in the realm of human rights. Data protection, an area closely intertwined with commercial interests, is perhaps the only exception.\(^4\) The importance of national sovereignty and a general—and often openly articulated—sense of superiority and exceptionalism among many influential American actors provide additional insight. President Donald Trump’s ‘America First’ (a slogan actually going back to a movement opposing the country’s involvement in World War II) is only the most recent expression of a wide spread sentiment, found across the entire political spectrum, that America has little to learn from other nations or international initiatives and—more importantly—will not subject its own national interests, representatives, companies, citizens or, more generally, its legal system to (apparently lesser) external standards. It is therefore hardly a surprise that international expectations regarding socio-economic entitlements have just as little—and likely even less—impact on domestic law as foreign expectations in other policy areas. National law and policy approaches, so the predominant view, are best able to protect the interests, socio-economic or otherwise, of American citizens.

A closer look at particular international and regional instruments confirms this broad assessment. The United States, as explained in the introductory chapter of this volume, is reluctant to ratify international or regional instruments relating to human rights protection generally or the fight against poverty and the right to development in particular. The country signed the American Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights in 1977 as well as the International Convention on the Rights of the Child in 1995 but did not ratify any of these instruments. The United States is also critical towards the recognition of a right to development. It has, however, developed a national approach (the Millennium Challenge Account, MCA), which is administered by the Millennium Challenge Corporation (MCC), an independent federal agency created by Congress in 2004, and endorses the United Nations Sustainable Development Goals (SDGs) of 2015.\(^5\)

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\(^4\)See the cooperation with Switzerland and the European Union with respect to personal data (Privacy Shield).

\(^5\)See the statement on U.S. policy towards the SDGs on the website of USAID at [https://www.usaid.gov/GlobalGoals](https://www.usaid.gov/GlobalGoals) (last accessed on 28 February 2019).
Adequate Living Conditions

The U.S. Constitution of 1789 does not recognize a general right to an adequate standard of living. Obligations to care for the poor—if not the right to an adequate standard of living—are, however, found in some constitutions at the state level. The New York State Constitution declares that ‘the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions (…) as the legislature may (…) determine.’ This amounts to a guiding principle of (state) policy and may be the reason for the steady stream of socio-economic initiatives generated by legislators across the State. Issues covered most recently include paid vacation for private sector workers and minimum wage requirements in New York City. The Constitution of Alabama requires counties ‘to make adequate provisions for the maintenance of the poor.’

Specific and Justiciable Socio-Economic Entitlements

The U.S. Constitution does not recognize justiciable socio-economic entitlements. The drafters of the document were primarily concerned with the abuse of government power and left the enjoyment of rights to work, health, education, housing, food or water to be determined by statute. The same is true for guiding principles of state policy, found in systems like India, or the articulation of positive government obligations. The only tangential exception in this context is the—negative—protection of property. A measure of—albeit indirect—protection is offered by equality considerations.

This bleak assessment should be qualified by three observations. First, there has always been political concern about socio-economic rights. President Theodore Roosevelt famously articulated their importance, alongside civil and political rights, in his State of the Union Address of 1941:

> The basic things expected by our people of their political and economic systems are simple. They are: equality of opportunity for youth and for others; jobs for those who can work; security for those who need it; the ending of special privilege for the few; the preservation of civil liberties for all; the enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living. These are the simple, the basic things that must never be lost sight of in the turmoil and unbelievable complexity of our modern world. The inner and abiding strength of our economic and political systems is dependent upon the degree to which they fulfill these expectations.

Roosevelt’s legislative agenda was driven, inter alia, by the need to create jobs and improve working conditions; the desire to secure a pay that provides for

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6New York State Constitution (1938), Article XVII.
7Constitution of Alabama (1901), Section 88.
8F. D. Roosevelt, The Four Freedoms—speech delivered on 6 January 1941.
adequate food, clothing and recreation; the wish to ensure decent homes for families; the concern about 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; and the right to a good education. Presidents Lyndon B. Johnson and Richard Nixon took Roosevelt’s legacy forward by putting in place significant social programs. The success of these political efforts is mixed. More than seven decades since Roosevelt, and despite much progress in a number of these areas, large parts of his progressive agenda remain unfulfilled. Contemporary conflicts over health care, the enforcement of minimum wage requirements or living conditions in inner city areas show, however, that the country remains deeply engaged in the debate over socio-economic entitlements. The financial resources dedicated to health care, housing or education (both by government at various levels of the system and philanthropy) are substantial. There is, without doubt, a ‘constituent commitment’ to socio-economic policy in the sense that American society will expect a certain level of action by governments at all levels of the system with respect to meeting the core needs of its citizens regardless of specific duties enshrined in constitutional law.

A second point to make is that at least some socio-economic entitlements have for some time entered the bloodstream of federal constitutional law—despite their continued absence from the text of the U.S. Constitution—via decisions of the U.S. Supreme Court (USSC). The support of Roosevelt’s administration for socio-economic rights generally translated into wider national (congressional) power in the area. Connections between interstate commerce and labour practices, equality and education (concerning racially segregated public school systems), poverty and criminal law (free legal representation on their first appeal of a criminal conviction), the right to free movement and the receipt of social welfare benefits (waiting period for new residents in California), and the constitutional protection of property and social welfare entitlements (property interest in social security) were acknowledged by the USSC between the late 1930s and mid-1970s. An increasingly restrictive approach of the Court, following judicial appointments by President Nixon and starting with Dundridge v. Williams, brought this jurisprudence to a halt. In Dundridge, the USSC confirmed that the U.S. Constitution contains no affirmative state obligation to care for the poor. The decision was followed by

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9 F. D. Roosevelt, State of the Union Message to Congress of 11 January 1944.
10 Sunstein (2004), p. 62.
11 Michelman (2008), pp. 664–666.
12 National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).
13 Brown v. Board of Education, 347 U.S. 483 (1954).
14 Douglas v. California, 372 U.S. 353 (1963).
15 Shapiro v. Thompson, 394 U.S. 618 (1969).
16 Mathews v. Eldridge, 424 U.S. 319 (1975).
17 Dundridge v. Williams, 397 U.S. 471 (1970).
restrictive rulings concerning housing (eviction proceedings)\(^\text{18}\) and the right to education.\(^\text{19}\) This trend has continued in recent years.\(^\text{20}\)

Some socio-economic entitlements, finally, can be found at state level. This is true for the right to education, which is mentioned in state constitutions across the country and has been litigated successfully not only in the context of equal access claims but also with respect to adequate (substantive) levels of education.\(^\text{21}\) A particularly striking decision in terms of the right to adequate education is \textit{Gannon v. Kansas}, which displays the increasing willingness of state judges to inquire into the levels of public financing as well as the substantive quality of public school curricula.\(^\text{22}\) Other areas sometimes addressed in state constitutions are welfare assistance,\(^\text{23}\) housing\(^\text{24}\) and health care.\(^\text{25}\) Some of these provisions have provided individual entitlements such as the right to emergency shelter for homeless persons in New York\(^\text{26}\) while others merely place obligations on states to expand access via legislative programs and funding. The latter is largely true for the provision of health care.

\section*{Remedies}

Individual remedies related to the fight against poverty or the right to development, widely defined, depend very much on the system engaged (federal or state) and the entitlement involved. Actions aimed at judicial review offer the best chances of success; in many of the cases cited in this chapter, individual relief was provided simply by invalidating unconstitutional state legislation that restricted access to a particular entitlement. Decisions that are more exceptional have required public authorities to actively provide relief. State courts have thus crafted remedies that oblige public authorities to offer a sufficient number of beds and prescribe in some

\(^{18}\) \textit{Lindsay v. Normet}, 405 U.S. 56 (1972).

\(^{19}\) \textit{San Antonio Independent School District v. Rodriguez}, 411 U.S. 1 (1973).

\(^{20}\) See, e.g., \textit{Department of Housing and Urban Development v. Rucker}, 535 U.S. 125 (2002) concerning the eviction of residents from public housing units in cases of drug-related activities by a household member or guest and \textit{Kelo v. City of New London}, Connecticut, 125 S. Ct. 2655 concerning the confiscation of property on the basis of eminent domain power for the purpose of economic development.

\(^{21}\) See, e.g., \textit{Edgewood Independent School District v. Kirby}, 777 S.W.2d 391 (Texas 1989); \textit{Rose v. Council for Better Education}, 790 S.W.2d 186 (Kentucky 1989) and \textit{Campaign for Fiscal Equality v. The State of New York}, 719 N.Y.S.2d 475 (New York 2001).

\(^{22}\) \textit{Gannon v. State of Kansas}, P.3d 1196 (Kansas 2014).

\(^{23}\) \textit{New York State Constitution} (1938), Article XVII.

\(^{24}\) Ibid. Article XVIII.

\(^{25}\) Alaska, Hawaii, Michigan, Mississippi, North Carolina, New York, South Carolina and Wyoming.

\(^{26}\) \textit{Callahan v. Carey}, \textit{New York County Supreme Court}, Index No. 42582/79.
detail the spatial and sanitary arrangements that have to be made for individuals in need of emergency shelter.\textsuperscript{27} In the large majority of instances, however, courts have refrained from ordering specific remedies and left it to the executive and legislative branches of government to address perceived shortcomings—for example with respect to the financing of schools, curricular standards, the training of school teachers or the physical infrastructure of educational facilities (desks, chairs and textbooks)—in ways deemed most appropriate in light of competing policy considerations. Courts take a similar position when it comes to the constitutional duty of states to provide health care. This speaks to the cautious approach that American judges take with regard to disputes that raise separation of powers issues.

\section*{National Claims and International Review Mechanisms}

The link between the enforcement of socio-economic entitlements at the national level and regional and/or international review mechanisms is tenuous at best. As pointed out above, there is considerable reluctance in the United States to subject its own national interests, representatives, companies, citizens or, more generally, its legal system to external standards or control by outside courts, tribunals or commissions. U.S. courts often display considerable reluctance to engage with foreign ideas or principles of international law. This is particularly true for the area of human rights protection. The comparative argument as well as references to international instruments are nevertheless advocated as a strategy to engage with the world outside on matters of mutual concern\textsuperscript{28} and, in particular, to move state courts towards a more progressive stance in the interpretation of state constitutions.\textsuperscript{29}

\section*{Essential Core and Progressive Realization in U.S. Law}

The ‘essential core’ approach or strategies attempting to achieve the protection of socio-economic entitlements progressively or as a function of growing economic government capacity do not have a clear domestic parallel in U.S. legislation or case law. Emergency medical treatment is free of charge and must be offered to the needy regardless of their health insurance status; and the provision of emergency shelter has been identified as a core obligation under state constitutional law. These ‘entitlements’ arguably reflect essential core thinking. Limited resources and competing public needs, factors closely linked to the debate surrounding the realization

\textsuperscript{27}Callahan Consent Decree: Establishing a Legal Right to Shelter for Homeless Individuals in New York City (August 1981).
\textsuperscript{28}Jackson (2007), p. 7 ff.
\textsuperscript{29}Albisa and Schultz (2009), p. 248.
of socio-economic rights in light of finite capacities, feature in the national conver-
sation surrounding health care, housing, or food stamps. Courts tend to see limited
government resources as a reason to limit judicial intervention in cases involving
socio-economic claims and have not established a link between (potentially) grow-
ing public budgets and a corresponding realization of socio-economic entitlements.
There is currently very little expectation that this is set to change in the years to
come. This is especially true in times of shrinking public budgets.

The U.S. Contribution to International Developments in the Field

The U.S. Constitution—very much a product of a different age—does not address
the fight against poverty or a right to development beyond the country’s borders.
Scepticism, in particular, towards the recognition of a right to development played
out in the United Nations on occasion of the vote on the 1986 General Assembly
Declaration on the Right to Development; the United States was the only country to
oppose the Declaration. Subsequent initiatives by the United Nations have
received negative responses from Washington for decades. A shift in this position
occurred under the administration of President Barack Obama—the United States
does endorse the United Nations Sustainable Development Goals of 2015. It
should be noted, however, that the granting of foreign aid has for a long time been
institutionally linked to and regarded as part of foreign policy and, more specifically,
as an integral component of national security considerations. Diplomacy and inter-
national development efforts complement military capacity as key instruments in
shaping the country’s national security strategy. Federal spending on development
has been considerable in the past, regardless of the wider political outlook of the
White House, and it is only under President Trump that serious budget cuts have
been suggested in this area.

More importantly, there have always been striking similarities between the
international approach to development and its functional equivalents in the United
States. This suggests that opposition to an international model of development is
more political in nature than a question of substance. Much of the dispute stems from
the American insistence that the provision of development aid remain a sovereign
political decision of donor countries rather than a binding obligation under interna-
tional law. Other reasons include the country’s own experience with development
(based on self-reliance, entrepreneurship and economic liberty); insistence on the
promotion of civil and political rights as a key ingredient of a successful develop-
ment strategy; the belief that the right to development is aspirational and progressive

30Resolution 128/41 was passed with a vote of 146:1 with eight abstentions.
31For a summary of the position of the U.S. see Marks (2004), pp. 141–152.
32Resolution A/70/1 of 25 September 2015.
in character rather than a fundamental and enforceable entitlement; and jurisdictional concerns with respect to adjacent areas of international law (in particular international trade) that should not be conflated with—and possibly compromised by—human rights considerations. The United States again raised these issues in the context of the United Nations Sustainable Development Goals. The U.S. were happy to see a strong recognition of the need to eradicate extreme poverty (Goal 1) but issued critical statements with respect to potential ripple effects on related policy areas (in particular trade); the decisions, processes, actions, and governance of autonomous institutions such as the World Trade Organization (WTO); the integrity TRIPS; and the voluntary nature of any technology transfer. The right to development was again singled out as a ‘non-binding and non-consensus document’ that should not be specifically referenced in the Post-2015 Development Agenda. This general policy outlook is unlikely to change for some time should Republicans retain their hold on national politics after November 2020.

The U.S. approach to development at the international level—despite the country’s criticism of many initiatives pursued by the United Nations in past decades—nevertheless features many conceptual similarities with the right to development as set out in the 1986 Declaration. A rough comparison between the Declaration and what is perhaps the closest U.S. equivalent, the Millennium Challenge Account, shows that both recognise a duty of developed nations to share their wealth by committing substantial resources to the task; a need for accountability and good governance on the side of recipient nations; a focus on health, education and food; active cooperation (partnership) with respect to specific projects; and economic growth as a key to development. The U.S. approach may, however, place more emphasis on what are regarded sound economic policies that foster enterprise and entrepreneurship including, inter alia, open markets, sustainable budget policies, and initiatives of the private sector. Another difference lies in the choice of the performance indicators that determine the eligibility of projects for funding. The MCA focuses less on human rights considerations and more on government effectiveness, the control of corruption, the rule of law, macro-economic factors (such as a country’s credit rating, inflation rate or budget deficit), and an empowerment of the private sector. Development through economic growth, finally, is perhaps the third element which distinguishes the U.S. approach (albeit in a nuanced fashion) from the right to development as endorsed by the majority of countries. Free market principles, increased productivity and the creation of jobs play a decisive role here.

33WTO Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995.
34Closing statement and explanation of position by Ambassador Elizabeth Cousens, U.S. Representative to the Economic and Social Council, at the Open Working Group on Sustainable Development Goals, New York (19 July 2014).
35U.S. Statement on July 30 Draft, Post-2015 Intergovernmental Negotiations (30 July 2015).
36On the Millennium Challenge Corporation generally see Tarnoff (2018).
37USAID, Millennium Challenge Account (Press Release of 3 June 2002).
The International Right to Development from a U.S. Perspective

The United States, as indicated above, formally endorses the Sustainable Development Goals; the key national agency in the area, the U.S. Agency for International Development (USAID), subscribes to the SDGs. That said, there are serious doubts about the level of engagement in future years. The Joint Strategy Plan of the U.S. State Department and USAID for 2018–2022 clearly focuses on the strategic interests of the United States and harnesses the potential of USAID for the benefit of the country’s global political reach and national economic development.38 Goal 2.2 of the Joint Strategy Plan thus states that the U.S. will ‘promote healthy, educated and productive populations in partner countries to drive inclusive and sustainable development, open new markets and support U.S. prosperity and security objectives.’39 The document does not at any point mention the international right to development model or the United Nations Sustainable Development Goals. The website of the Department of State provides only a mere link to the SDGs.40 This suggests that engagement of the United States in the global conversation and the 2015 consensus on the right to development is waning.

The Sustainable Development Goals in the U.S.

The United States does have a policy framework in place that is in large part compatible with the Sustainable Development Goals, including SDG 1 (end poverty in all its forms everywhere), and is administered by agencies like USAID and the Millennium Challenge Corporation. USAID’s mission statement, a key component of the agency’s development policy,41 currently states:

On behalf of the American people, we promote and demonstrate democratic values abroad, and advance a free, peaceful, and prosperous world. In support of America’s foreign policy, the U.S. Agency for International Development leads the U.S. Government’s international development and disaster assistance through partnerships and investments that save lives, reduce poverty, strengthen democratic governance, and help people emerge from humanitarian crises and progress beyond assistance.

Our objective is to support partners to become self-reliant and capable of leading their own development journeys. We make progress toward this by reducing the reach of conflict, preventing the spread of pandemic disease, and counteracting the drivers of violence, instability, transnational crime and other security threats. We promote American prosperity

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38 U.S. Department of State and U.S. Agency for International Development, Joint Strategic Plan FY 2018–2022 (February 2018), 3 (Goals 1–4).
39 Ibid. Goal 2.2. (emphasis provided by the author).
40 See https://www.state.gov/globalgoals/ (last accessed on 28 February 2019).
41 See USAID, ADS Chapter 200, Development Policy, at 200.3.3.1.
through investments that expand markets for U.S. exports; create a level playing field for U.S. businesses; and support more stable, resilient, and democratic societies. We stand with people when disaster strikes or crisis emerges as the world leader in humanitarian assistance.42

There are a few marked and a number of more nuanced differences between the U.S. model of international development and its United Nations counterpart, but while these seemed to have mattered less in practice under the administration of President Obama the gap has again widened considerably under his successor. The Joint Strategy Plan of the U.S. Department of State and USAID, published only very recently, defines the country’s development policy through the prism of U.S. security and economic interests. International cooperation aimed at combatting poverty as a global challenge regardless of immediate national interests is not part of this strategy. This is not to say that future U.S.-funded development initiatives will completely disengage from the Sustainable Development Goals of 2015. Paired with the expected long-term budget cuts for both diplomacy and development cooperation, the right to development as conceptualised by the U.N. General Assembly will, however, very likely receive less support from the United States.

**The Role of Civil Society in U.S. Development Policy**

USAID, which administers by far the largest share of U.S. funding, maintains elaborate programming policy guidelines that are transparent but largely driven by the organization itself and coordinated with the Department of State. This programming framework is described as evidence-based, inclusive, sustainable and coherent.43 In particular, USAID declares that development policies be

inclusive by ensuring practices and approaches are grounded in participation, non-discrimination, and accountability. All groups of people should be able to participate in development programs, share the benefits of such efforts, and participate in decision-making processes.44

The ability of individuals or NGOs to engage with U.S. development or anti-poverty policy is nevertheless limited. The most significant way of interacting with USAID is at the level of specific development projects. The private sector is encouraged to participate in common initiatives but these are based on the development goals already set by USAID rather than a collaborative process leading up to a common definition of what should be achieved in conceptual terms.

42See https://www.usaid.gov/who-we-are/mission-vision-values.
43USAID, ADS Chapter 200, Development Policy, at 200.3.1.
44Ibid. at 200.3.2.1.
International Agreements

The United States, as pointed out above, is reluctant to enter into binding international policy agreements concerning the fight against poverty or the right to development. The main obstacle to bi- or multilateral agreements in this policy area is the fear that they could compromise national sovereignty with respect to the aims pursued and resources deployed. While the United States does engage with other players, both public and private, at the level of specific development projects (both USAID and the Millennium Challenge Account interact with a large number of partner countries in executing U.S. development policy), it is not a system that would provide much guidance with respect to the creation and implementation of legal mechanisms that could be adopted at the regional or global levels.

The most visible engagement of the United States with the fight against poverty or the right to development in recent years is the Millennium Challenge Account, together with the Millennium Challenge Corporation, which was created by U.S. Congress in 2004 to emulate unilaterally at the national level the 1986 General Assembly Declaration on the Right to Development. The initiative is focused on good governance and development through economic growth. The budget allocated to it is far smaller than initially planned but not insubstantial. In conceptual terms, the initiative is geared towards a competitive process that rewards countries for past actions measured by objective performance indicators. It seeks to reduce poverty mainly through economic growth; focuses its resources on countries that feature broad-based civil society involvement; requires recipient countries to create similar development funds, agencies and programs (known as ‘compacts’); and places much emphasis on accountability and public transparency. Candidate countries must fall below the threshold of upper-middle income nations established by the World Bank. The limit for 2017 was a Gross National Income (GNI) per capita of $3955. Local sustainability, effective measures to curb corruption, and local ownership of the envisaged development effort—including substantial stakeholder participation—are further indicators for support. Measurable results are critical. Congress is, however, debating substantial budget cuts in this area; resources available to the Account could be reduced by as much as 11% in the mid-term.

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45 Tarnoff (2018), 1/2.
46 See MCC, Compact Development Guidance, at https://www.mcc.gov/resources/pub-pdf/guidance-compact-development-guidance.
47 For a summary of MCC’s mission see MCC, NEXT: A Strategy for MCC’s Future, available at https://www.mcc.gov/resources/doc/next.
Comparative Constitutional Law

Constitutional transition and reform—including socio-economic rights, the distribution of resources within a country, and challenges of multi-level governance—have been key issues in many regions over the past decade. Questions of development, including constitutional mechanisms that help establish and secure even levels of social and economic opportunity across a given territory, are often discussed but rarely given sufficient attention in the drafting of new constitutional arrangements.

The constitutional framework of a country can support or stifle development. Three points deserve emphasis. Systems like South Africa display—sometimes quite dramatically—48 the limits of constitutionally protected socio-economic rights in light of limited government resources. Despite these challenges, these systems also seem to offer some potential for long-term success given that the constitutional framework creates powerful incentives for gradual but sustained, transparent and accountable legislative and administrative efforts with respect to key areas such as health care, food, water, housing and education. The United States, conversely, also displays quite dramatic shortcomings in just these areas despite comparatively vast resources but very limited constitutional socio-economic entitlements. This suggests that development efforts at the national, regional or global level should also take into account constitutional mechanisms that can help address poverty and inequality. Constitutional and non-constitutional tools need to be combined.

Another observation concerns the distribution of development efforts within a country. Experience from Germany (in the years following reunification of West Germany and the German Democratic Republic in 1990) or the United Kingdom (growing economic disparity between Greater London and the rest of the country) indicates that uneven levels of access to socio-economic opportunities can undermine the political stability of a system and lead to internal migration—and in the worst case displacement—with additional and long-term consequences for the provision of populations with adequate housing, health care, education or economic opportunities. Constitutional safeguards such as specific rules on the distribution of resources between different levels of government via mechanisms of financial equalization, rights to local or regional socio-economic development or—a paradigm of constitutionally encouraged cooperation between political adversaries, different tiers of government or historically distinct parts of a country (cooperative forms of governance) can help limit the risk of uneven development. Federalism in the United States, by contrast, is characterized by a highly competitive approach to the distribution of resources that relies more on political deals involving the exercise of federal authority to spend for the general welfare—49 than constitutionally defined mechanisms that might foster even development across the country. The

48See the difficult choices that had to be made by the Constitutional Court of South Africa in Soobramoney v Minister of Health (Case CCT 32/97) and Government of the Republic of South Africa and Others v Grootboom and Others (Case CCT 11/00).
49Art. 1, Section 8 U.S. Constitution.
economic disparity between states—often a result of geographic coincidence rather than political acumen—is as pronounced as their varying ability to provide for their citizens. This leads to considerable interstate migration and all the negative consequences that come with it for both the regions left behind and those attracting large numbers of incoming migrants seeking jobs, housing or schools. The bicentennial census and corresponding adjustment of congressional districts makes this process very visible as far as the representation of states in the House of Representatives is concerned.

Constitutional engineering, finally, is not limited to the area of socio-economic rights or even specific development efforts within a country. Reforms of the Constitution of Egypt in 2014 attempted to tie specific shares of the national GDP to socio-economic efforts such as the improvement of health care\textsuperscript{50} or the education system.\textsuperscript{51} It is not clear whether these mechanisms will achieve the desired effect especially in light of the considerable uncertainties concerning their legal (rather than political) enforcement. Developments in Egypt since the overthrow of the Muslim Brotherhood and the constitutional reforms of 2014 cast considerable doubt on the effectiveness of this approach. The Egyptian case shows, however, that a range of different constitutional tools can foster development and that a more creative use of the discipline may bear more fruit in the future.\textsuperscript{52}

Legal frameworks support development. This is particularly true with respect to constitutional law. Substantive entitlements, administrative procedures, development as an obligation of the state or a right of particular regions, the distribution of resources or the dedication of shares of the national GDP to specific socio-economic needs are good examples of how constitutional engineering can not only raise awareness for but also offer mechanisms to resolve conflicts surrounding poverty and the lack of development. Human rights protection more generally and safeguards against corruption provide further examples.

Conclusion

America has many lessons to offer when it comes to the choice between addressing socio-economic needs through constitutional law or (ordinary) social legislation. The U.S. Constitution was drafted at a time when much emphasis was placed on the protection of rights and freedoms from undue government interference; it is a system that focusses on the defensive dimension of human rights protection. The need for socio-economic safeguards has since been acknowledged by many observers but never developed sufficient momentum to overcome the considerable hurdles

\textsuperscript{50} Constitution of Egypt (2014), Article 18.
\textsuperscript{51} Ibid. Article 19.
\textsuperscript{52} On constitutional transition in Egypt see Carter Center, Pre-Referendum Statement of January 6, 2014.
connected to formal constitutional amendment. Such change is not likely to happen in the near future either, which means that statutory reforms of the social security system—widely defined—will continue to determine the political agenda especially in election times. Disputes in distinct areas like education may also invite the courts to play a more active role in the protection of socio-economic entitlements. The internal pressure to provide more opportunities to disadvantaged individuals and communities is, in any case, very likely to increase. Will these developments translate into a different outlook with respect to America’s engagement with the outside world? The picture that emerges from this analysis suggests that the differences between the United States and the international community with respect to combatting poverty and fostering development may be too large to overcome anytime soon. Recent decisions of the Trump administration, for example its stance on the World Health Organization, indicate that the gap is more likely to widen. A change in the country’s leadership would probably soften this position but America’s approach to most of the issues discussed in this chapter has followed a clear trajectory for decades regardless of the general political outlook of changing majorities in Washington. This trajectory is not likely to change.

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