

The Role of the Adversary System in Human Security

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The adversary system is a development arising from the concept of “trial by combat.” It is a forum in which opposing sides present evidence, call witnesses and present arguments they believe best express their position. Both sides present their case before a jury, comprised of members of the community who make a determination. In contrast to some Civil systems, it is not a bureaucratic system in which tribunals, staffed by professionals conduct their own investigations, also staffed by professionals who commence cases and then dispense justice. The civil system is a development of Roman Law and Napoleonic law. The adversary system developed from the common law traditions of England. Individual cases were presented to the court. The outcome was determined by a jury. The compilation of these cases is the common law. Common law is the foundation of American jurisprudence. It has much to offer in the resolution of the issues of human security.

The adversary system allows those who seek redress an opportunity to choose a forum which they can argue as they see fit and present those arguments they wish to express to the trier of fact. The historical development of the adversary system is a compilation of individual cases and the development of a body of law, which is expressed in the common law. The common law is that part of the English Law derived from judicial precedent. This precedent is the holdings or results in prior cases. This is contrasted to the statutes and laws which comprise Civil Law. Civil Law is based on statutes and laws.

The benefits of the adversary system are that it allows for those with an interest in the outcome to present evidence, choose their representatives and argue their case before a non-biased trier of fact, often a jury. The case is presided over by a Judge without a stake in the outcome. The system allows those with the strongest interest to “fight” for their position. Both sides are permitted to present their cases. The rule of law is strengthened and aided by the adversary system which allows individuals to enforce their rights and have their grievances addressed. It protects restrictions on individuals by institutions and authoritarian forces. It directs those in power or acting in an authoritarian manner to comply with their obligations. When their actions result in a violation of the rule of law or an infringement of someone’s rights, it assures access to the courts and a remedy when people are not being

treated equally before the law. When constituents feel they are being treated unfairly or actions against them are in violation of the Constitution, the adversary system presents them with an opportunity to “go to Court.” There are numerous cases in which citizens have asked the courts to protect their practice of religion and to permit equal treatment in education, healthcare, and freedom of movement. These protections, among many others, have allowed citizens to preserve their basic rights, many of which are considered central to their human security interests today. They form the basis of constitutional law in the United States. Their holdings and the development of constitutionalism as shown in the caselaw in the United States offer a potential for resolution of many human security interests. The cases display the American interest to be free from force by the government and the ability to assert basic rights. The adversary system is a strong protection from potential authoritarian controls by the government or other groups, institutions and individuals. The adversary system does not require the involvement of government agencies or bureaucratic agencies to initiate or maintain the actions.

The access to the court system and the opportunity to have rights resolved in a fair forum is a hallmark of the American judicial system. It is also an effective means to contribute to an understanding and advancement of human security issues.

Human security can be described as the ability of people to exercise those basic human rights which are what we would consider to be valuable to all human beings and are central to those experiences which are at the very core of human existence and the meaning of what it means to be a human being. It involves freedoms like religion, speech, education and health. It includes things which we view both as necessary to a full life and freedom from other forces, which negatively affect our lives. When human concerns were addressed by Franklin Delano Roosevelt in 1941, he stated:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

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--which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants--everywhere in the world.

The fourth is freedom from fear--which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor--anywhere in the world.

The statement of Roosevelt expressed the issues which later formed the foundation for human security. The concerns and the importance of these basic human rights contained in the statement continued to develop and were expanded to reflect the historical events which followed the statement. The formation of the United Nations was an important step in the development of the rights, including those sought to be protected by subsequent treaties.

When Secretary-General Kofi Annan addressed world leaders at the General Assembly on November 10, 2001, he again dealt with the importance of human security and the actions of the United Nations. He emphasized the importance of human security at the United Nations. The concept of human security has continued to evolve and its development is hardly recognizable from its initial parameters. Human security now involves such areas as freedom from violence, freedom from prejudice, human trafficking issues, access to food, access to healthcare, access to water, access to food, access to employment and personal safety. The protections of human security not only involve personal issues important to individuals on a personal basis, they also encompass issues of the individual as members of a larger group. Large-scale human rights go beyond the rights for which individuals are entitled, but they impact society as a whole. Human societal issues such as migration, immigration, climate change, water rights, effects of increased heat on the environment, desertification, flooding and all the effects of global warming and its impact on rising sea levels and weather are critical to the survival of our world and those who inhabit it. The human security paradigm will continue to be influenced by traditional concerns of the effect of warfare on non-combatants and the now all too common situation where specific populations are targeted by both governmental and non-state actors. What was once the exception may be argued is the rule in certain areas. These developments can be viewed as a continuation of the historical factors which resulted in the formation of the United Nations and the numerous treaties and agreements which followed.

The Second World War and the horrors inflicted on entire populations resulted in the displacement and human crisis of incredible magnitude. As a result of the loss of life and atrocities committed on a previously unknown scale, the countries in what was later to become the United Nations sought a forum to resolve issues. The existence of nuclear powers and the results of genocide or ethnic cleansing created issues still being dealt with today. The adversary system is a system which offers protections to individuals from authoritarian governments and ideas. The adversary system is an important tool in maintaining lawsuits and enforcing basic rights. The actions against certain religions and ethnic groups today is highlighted by recent events portrayed in the media against these minority ethnic groups and certain religions. The development of organizations with antagonistic views toward specific groups also warrants concern. These organizations must be held accountable in courts by those affected by their actions. The actions taken against certain ethnic groups or certain religions is an example of the need to have a vibrant adversary system complete with the ability to bring both government and non-governmental actors to be held accountable for their actions.

The United Nations Charter was signed on June 26, 1945. Initially, human security was not central to its formation. The shadow of the atrocities and the displacements which resulted from World War II led to the formation of the United Nations. The actions of the United Nations protected citizens. Undoubtedly, the openness of the forum exerted a pressure on the countries who were members. It was a positive force to influence countries to seek conformance to certain ethical norms. This pressure continues to exert its influence today within the worldwide forum in order to pressure governments to comply with ethical norms. The pressure has continued to increase exponentially with the advancement of worldwide news media and global access to the internet. These developments should be viewed as positive developments.

The development of human rights which was adopted in 1948 set forth human rights and the protection of human rights and established basic human guarantees to all people. The initial focus provided guarantees to all people. The central provisions were set forth in subsequent human rights conventions and treaties. As Bertrand Ramcharan noted in "Human Rights and Human Security":

The link between security and human rights is important. This link is reinforced if we consider that human rights define human security. Individual, international, and national development requires the protection of human rights; therefore you cannot have security without the protection of human rights. Development requires respect for human rights, and respect for human rights prevents conflicts. Peacemaking must be built on human rights foundations and peacekeeping and peace-building must likewise give a central place to human rights considerations as indeed must incorporate human rights strategies.

The concept of human security has developed and become an influential force in today's thinking. Variations of the topic would increase the references exponentially. If the search included the media it would reflect a worldwide awareness of the many issues affecting human security and the daily life of the people of the world. These developments must be welcomed.

The worldwide exposure of the numerous human security areas creates opportunities to address, remediate or correct human security issues. These concerns involve the individual and his human security, both physical and non-physical. They can involve his ability to be free from violence, torture, or abuse. They can promote his ability to have shelter, food, employment and access to health care. In terms of his nonphysical rights, human security also involves his ability to practice his religion, to express himself, to take part in the government, and to be free of unequal treatment due to his ethnic background or religion, to name a few.

The protection of human rights is best protected by the adversary system. The adversary system and its impact on the rule of law permits an opportunity to protect basic human rights. The adversary system provides an opportunity to resolve disputes.

I have been a trial attorney for over 30 years. During that time, I have had selected many juries and have spoken to a large number of potential jurors. I have conducted over one hundred trials. These trials have included being an adversary on both sides of the conflicts. I have had an opportunity to conduct these trials in both State and Federal cases. I have discussed the outcomes of those cases with the jurors themselves. My experience also includes Appellate practice and innumerable arbitrations and mediations. I have also participated in many trials where there was no jury, but before judges. These experiences have informed me of the value of the adversary system. This value of the adversary system is discussed at length in the remaining sections.

I would like to provide a particular orientation as a trial attorney to the value of the adversary system. Trials today, and in the historical development of the adversary system rely on jurors. This particular fact is often not addressed in discussions dealing with the legal system. The analysis often deals with the holdings or relevance of a particular case. The analysis often ignores the central aspect of all cases; they are decided by jurors.

The use of jurors places a particular emphasis on the human element in dispute resolution. This human element is a key component in the successful advancement of rule of law. This element is particularly relevant in dealing with human security issues.

The adversaries in the adversary system go through a process of selecting a jury. The system used today in the modern court would be familiar to the process used by attorneys hundreds of years ago. The process would also be familiar to the potential jurors. Jurors are called to the Court and are chosen at random to potentially sit as jurors on a case. They are sent to a room, where they may have their name called from a tumbler picked by a party or otherwise selected in a manner where chance selects who will be chosen. Today jurors may fill out a questionnaire. However, this is solely an aide in what comes next, the questioning of the jurors by counsel to select an unbiased jury. While experienced litigators may concede the selection of a jury is an opportunity to obtain an advantage, it is generally accepted the expert questioning by two opposing adversaries is a reasonable way to arrive at an impartial jury. (In some circumstances the court may pick a jury. Even in those situations the adversaries are consulted and the jury selection is in an open setting before all of the adversaries.)

In conclusion, in my experience, the advocacy system, where each party's interests are represented by an able professional advocate, in a process presided over by a neutral magistrate, culminating in a legally binding decision by a neutral decision-maker, is among the surest guarantees of the fundamental legal rights that are a cornerstone of human security.