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Economic and Social Rights

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Introduction

The most important document for economic and social human rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the UN General Assembly in Res. 2200A (XXI) of December 16, 1966 and entered into force on January 3, 1976. By 2008 the ICESCR had been ratified by 159 countries. The ICESCR transforms the provisions on economic and social human rights recognized in the Universal Declaration of Human Rights (UDHR) into legally binding obligations. The document recognizes the right of peoples to self-determination, defines the general nature of states' parties obligations, enumerates specific substantive rights, and discusses international implementation.

Although the ICESCR does not make an explicit differentiation between economic rights and social rights, the international diplomatic community after World War II made the following distinction: Economic rights refer to the right to property, the right to work, and the right to social security. The right to work stands for the opportunity to earn a living wage in a safe environment and affirms the freedom to organize and bargain collectively (UDHR, articles 17, 22, 23, 25; ICESCR, articles 6, 7, 8, 9; Convention on the Rights of the Child [CRC], article 26; Eide 1995:31).

Social rights are those entitlements necessary for an adequate standard of living, including rights to food, housing, health, and education. The right to food calls for states to cooperate in the equitable distribution of global food supplies and assure the ability of people to feed themselves. The right to housing provides guarantees against forced eviction and access to a safe, habitable, and affordable home. The right to health guarantees access to adequate health care, nutrition, sanitation, and to clean water and air. The right to education promotes free and compulsory primary education and equal access to secondary and higher education (UDHR, article 25; ICESCR, articles 11, 12, 13, 14; CRC, article 27; Hunt 1996:2).

Many scholars and commentators ignore this distinction as it is difficult to maintain a sharp dividing line between

economic and social rights. In fact, the original rationale for this division may have been purely bureaucratic. The issues and rights of concern to the International Labor Organization (ILO) were assumed to be "economic" (ICESCR, articles 6–9), while those relevant to the Food and Agriculture Organization (FAO), the World Health Organization (WHO), and other social welfare agencies of the UN were understood to be "social" (Steiner et al. 2008:276). Virginia Bonoan–Dandan, the former Chair of the Committee on Economic, Social and Cultural Rights, believes that it is totally arbitrary to draw a line between economic and social rights. Since economic rights have a social basis, and social rights have an economic basis, both classifications are of equal importance and interdependent (Felice 2003:78).

Major Intellectual and Social Dimensions

The intellectual and social dimensions of economic and social rights have evolved from at least four spheres: religion, philosophy, politics, and law.

Religion and Philosophy

Long before humanity was divided into separate "nation-states," and well before the ideas of economic and social human rights were drafted into international law, individuals and groups debated and accepted obligations to help the needy and prevent suffering. There were both religious and secular dimensions to these undertakings.

Paul Lauren (2003:5–6) notes that "all of the great religious traditions share a universal dissatisfaction with the world as it is and a determination to make it better by addressing the meaning of human life, the worth and dignity of all persons, and, consequently, the duty toward those who suffer." To a significant degree, the modern understanding of "economic and social rights" evolved from these faith based attempts to define individual duties and obligations to assist the poor and alleviate human suffering. These global faith traditions sought to identify the ways in which we are our "brother's and sister's keeper."

Early notions of economic and social rights are found in all of the world's major religions. The Hebrew Bible, for example, stresses the importance of protecting contracts and the right to property with its injunctions "thou shall not steal" or "covet [...] anything that is thy neighbor's" (Exodus 20:13–14). The right to property should not come at the expense of the poor: "[W]hen you knock down the fruit of your olive tree, you shalt not go over the branches a second time: it shall be for the stranger, for the fatherless and for the widow" (Deuteronomy 24:20–1). The poor man should not be refused a loan and interest should not be extracted from him (Exodus 22:20–7). Christianity upholds the importance of basic equality and condemns greed as seen in Jesus' famous statement that "it is easier for a camel to pass through the eye of a needle, than for a rich man to enter the kingdom of God" (Mark 10:25–6). Papal encyclicals in the Catholic Church have consistently endorsed the importance of the right to subsistence with dignity (see for example: Pope Leo XIII 1891; Pope John XXIII 1961). The Quran also recognizes basic economic and social rights, including protection against poverty (Surah 22:7–8), rights to a place of residence (Surah 2:85), and rights to sustenance (Surah 17:70). In addition, an integral part of Islamic teaching is the doctrine of social service defined in terms of alleviating suffering and helping the needy. Confucius maintained that a benevolent leader would protect the economic well-being of his or her people, and concluded that "where there is even distribution there is no such thing as poverty." Confucius continues, "A gentleman gives to help the needy and not to maintain the rich in style" (Ishay 2004:35–40).

In Hinduism, the world's oldest religion, believers are to faithfully fulfill their responsibilities to all people by practicing selfless concern for their pain, particularly for the hungry, the sick, the homeless, and the unfortunate. Buddhist principles, elaborated by Siddhartha Gautama approximately 2500 years ago, pay attention to the problem of human suffering (*dukkha*), and emphasize the duty to overcome selfish desires and private fulfillment by practicing charity (*dana*), lovingkindness (*metta*), and compassion (*karunā*) toward those in need. The Dalai Lama recently stated that the world's problems would be solved only by showing kindness, love, and respect "for all humanity as brothers and sisters" and "if we understand each other's fundamental humanity, respect each other's rights, share each other's problems and sufferings" (Lauren 2003:5–7).

Philosophers, state leaders, and scholars as diverse as King Hammurabi, Plato (360 BCE/1942), Thomas Paine (1792/1974), Immanuel Kant (1793/1970), Karl Marx (1891/1977), and John Rawls (1971) have emphasized the importance of economic and social rights. Micheline Ishay (2007:40–5) notes that King Hammurabi (1728–1686 BCE) established laws securing both creditors' and employees' rights and regulated work relationships. The fundamental questions of property rights that divided Socrates and Aristotle remain contentious in the twenty-first century. Socrates warns in *The Republic* (360 BCE) that property rights could fragment the polity and tear "the city in pieces by differing about 'mine' and 'not mine,'" and

thereby undermining the common end. Aristotle, on the other hand, defends the importance of property rights, stating, "When everyone has his own separate sphere of interest, there will not be the same ground for quarrels" (Ishay 2007).

In the Middle East, Africa and the pre-Columbus civilizations in the Americas, philosophical positions were expressed regarding the dignity of the person and the importance of social justice. In the tenth century, the Islamic philosopher Abu Al-Farabi wrote that in a moral society, individuals were endowed with rights and lived in charity with their neighbors. Customs in traditional African societies upheld norms of distributive justice that ensured the welfare of all. Early ideas regarding economic and social rights thus did not originate exclusively in the West nor with any particular economic or political system of governance (Lauren 2003:11-12).

In the West, however, "natural rights" theorists in the seventeenth century and the "Enlightenment" philosophers of the eighteenth century did play a pivotal role in the development of economic and social rights. The leading philosophers of the time challenged traditional authority and dogma and raised questions that still resonate today regarding the proper relationship between the state and the market (Locke 1690/1980; Rousseau 1762/1973). These ideas, which inspired revolutionaries in America and France, included declarations of rights to possess property and a basic belief in equality and fraternity. Yet the unrestricted expansion of global capitalism in the eighteenth and nineteenth centuries had led to great inequalities between an elite rich and an ever-expanding poor. Efforts to redress economic and social inequities moved the discussion of economic justice into the world of politics and law.

Politics and Law

Modern economic and social rights are above all the product of millions of individuals organizing and fighting against the abusive exploitation that accompanied raw capitalist expansion in the nineteenth and twentieth centuries. These individuals declared that the foundation of all human rights depended upon the material conditions of each society. These human rights advocates thus proclaimed an interdependence between civil and political rights and economic and social rights and criticized those who made too sharp a distinction between them. Their claim was for the establishment of a minimum level of social protection and welfare whose attainment should be sought by all states whatever their politics.

As the progress of capitalism brought socialism to the forefront in the nineteenth century, workers around the world organized to demand economic and political power. Ishay (2004:118) notes how Marx and Engels proposed a "materialist understanding of rights sensitive to economic forces, historical change, and conflicting class interests. Armed with a new approach they confronted early Enlightenment assumptions, asking [...] whether a capitalist state could ever truly represent the people's interests." Marxist, socialist, and social-democratic political organizations championed the rights of the poor and the working class. The economic and social rights eventually codified into international law in the late twentieth century were a direct product of this socialist movement. The international socialist movement articulated the fact that economic inequality could make liberty a hollow concept (Lauren 2003:37-70; Ishay 2004:118-72).

As a result of these people's movements for economic justice, economic and social rights were formulated in the Mexican Constitution of 1917, the Declaration of Rights of the Working and Exploited Peoples of 1918 (which was incorporated into the Soviet Constitution), the Weimar Constitution of Germany in 1919, the Constitution of the Spanish Republic of 1931, and the Constitution of Ireland of 1937. In most of these efforts economic rights were fundamentally linked to political rights.

The position of economic and social rights in modern international law was significantly advanced by the work of the International Labor Organization (ILO). To counter the impact of the successful Bolshevik revolution and the rise of socialist ideology, the Western-states created the ILO in the Treaty of Versailles in 1919 to abolish the "injustice, hardship and privation" that workers suffered and to guarantee "fair and humane conditions of labour." The ILO was the first international organization to make the claim that a government's treatment of its citizens is not solely an internal affair. Instead, the ILO attempted to define minimal standards of behavior toward the working class that all governments must observe. ILO conventions have established labor standards on a wide range of issues from the most general (such as freedom of association) to the specific (such as road transport). The basic human rights conventions prioritized by the ILO are: freedom of association and collective bargaining, abolition of forced labor, equal remuneration, and nondiscrimination in employment. Virginia Leary (1996:28) notes that the ILO's basic human rights conventions are widely ratified and collectively establish the minimum of international labor standards.

The UN also has a corpus of international treaties addressing economic and social rights, the most important of which is the ICESCR. The decision to divide the rights claims in the UDHR into two separate covenants, the ICESCR and the International Covenant on Civil and Political Rights, was approved in General Assembly Resolution 543 (VI) on February 5,

1952 after intense US lobbying by a vote of 27 to 20 with three abstentions. Many countries, including Chile, Egypt, Pakistan, and Yugoslavia, had called for a single human rights covenant that affirmed the interdependent nature of civil, political, economic, social, and cultural rights claims. The US and other Western nations, on the other hand, argued for the primacy of civil and political rights and questioned the validity of economic and social rights claims (Normand and Zaidi 2008:204–8). Ann Elizabeth Mayer (2007:16) points out that it is often overlooked that Muslim countries generally endorsed the ideas of economic and social rights while the United States has consistently opposed these claims at the UN.

The UN Committee on Economic, Social and Cultural Rights has clarified the legal obligations and duties of state and non-state actors contained within the ICESCR (Craven 1995). The UN's approach is to hold governments accountable for the provision of basic social services, including health care, employment, and education. States have obligations to respect, protect, and fulfill economic and social rights. This three-part approach to economic and social human rights was first formulated by Henry Shue (1980). As the UN's special rapporteur on the right to food, Asbjørn Eide (1989) further developed these categories. This tripartite approach has been succinctly summarized as follows: "The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labor standards may amount to a violation of the right to work or the right to just and favorable conditions of work. The obligation to *fulfill* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures toward the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation" (Maastricht 1997).

On a regional basis, the member states of the Council of Europe have accepted the legal obligations in international law to respect, protect, and fulfill economic and social human rights. Membership in the Council is conditioned *de facto* upon adherence to the European Convention on Human Rights and Fundamental Freedoms and its 11 protocols. In 1961 the European Social Charter (ESC) was adopted, which extensively validated the key economic and social rights found in the ICESCR. Furthermore, the European Committee of Social Rights (ECSR) was established to determine whether member states honor their commitments in the ESC. The ESC and the ECSR represent the most impressive, robust, and developed regional economic and human rights system in the world today (Felice 2006).

Key Issues and Debates: A Review of Classical and Current Literature

Are Economic and Social Rights "Justiciable"?

A central debate over economic and social rights relates to their legal validity. Some scholars argue that by their very nature, economic and social rights are not "justiciable," which is to say that they are not capable of being brought to a court of law and applied by a judge. E.W. Vierdag (1978:103), for example, believes that the state's obligations under existing treaties on economic and social rights are predominately of a "political," as opposed to a legal, character. Furthermore, judicial remedies, while useful to monitor "obligations of conduct," are not that helpful regarding the "obligations of result" at the core of economic and social rights claims.

Agreeing with this position, Aryeh Neier (2006) suggests that claims like the right to housing and shelter "get into territory that is unmanageable through the judicial process" and instead should be sorted out within the democratic process. Neier writes, "Indeed, whenever you get to these broad assertions of shelter or housing or other economic resources, the question becomes: What shelter, employment, security, or level of education and health care is the person entitled to? It is only possible to deal with this question through the process of negotiation and compromise [...] [A] court is not the place where it is possible to engage in [the necessary] sort of negotiation and compromise [...] That is the heart of the political process."

A second argument against a legal approach to issues of economic and social justice is made by neoclassical liberal economists. In essence, Friedrich von Hayek (1944/2006) and others maintain that an injustice can only be the result of an intentional act. For example, while there may be great suffering caused by extreme weather (hurricanes, floods, and so on), these harms are not considered "injustices" because they are not intentionally inflicted. No one's "rights" were infringed, because the suffering, while real, was not intentional. This logic is then applied to the operation of free market economies. The overall outcome of the market and, in particular, the distribution of income and wealth are not intended by the individual buyers and sellers. The ultimate distribution of resources is an unintended consequence of market activity and is thus not wrongful. It is thus incorrect to claim that it is an "injustice" when some individuals' share of

resources falls below the minimal level needed to survive. From this perspective markets do not produce injustice and therefore there is no case for individuals to assert economic and social rights claims against such outcomes.

A third argument countering a legal approach to economic and social rights fulfillment concerns the issue of the duty bearer. Who is legally responsible when there is an infringement of an individual's economic rights? Plant (2003) succinctly summarizes this argument, "[A related issue concerns ...] the question about the relationship between the wrongfulness of the infringement of a right and the identification of the individual who is under the duty to respect the right and has committed the wrong [...] In the case of social and economic rights, however [...] it is not clear who is the duty bearer. Is it an individual so that another individual without means to meet his social and economic rights has a direct right in respect of the resources of the first individual, and this first individual has a duty in respect of the [second] individual's right?"

After debating these issues, a group of distinguished experts in international law in 1986 at the University of Limburg (Maastricht, the Netherlands) drafted guidelines on the nature and scope of states' obligations under the ICESCR. On the tenth anniversary of the "Limburg Principles," a group of experts again met in Maastricht to further elaborate and develop the nature and scope of legal obligations and violations of economic, social, and cultural rights and appropriate remedies. This 1997 meeting resulted in the "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights." This document reflects the emerging consensus among the members of the Committee on Economic, Social and Cultural Rights as to state responsibility and accountability under the ICESCR. The legal validity of economic and social rights is strongly affirmed in the Maastricht guidelines (Maastricht 1997).

According to the Maastricht guidelines, the state is legally responsible for implementing international economic and social rights. While acknowledging the global forces that have severely weakened an individual state's ability to control its own economic destiny, the guidelines forcefully claim that "as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights." The approach of the UN's Office of the High Commissioner for Human Rights is thus to hold governments accountable for the provision of basic social services, including health care, employment, and education. As noted above, states have obligations to respect, protect and fulfill economic and social rights.

This UN approach thus rejects the neoclassical liberal economic argument that since market outcomes are unintended there is no wrong or injustice committed. In fact, in the aggregate, market outcomes can be foreseen and predicted and therefore there is a collective state responsibility to protect the vulnerable and weak. Unfortunately, the "creative destruction" of capitalism creates suffering and hardship, which the state has a legal duty under human rights law to ameliorate. Furthermore, the UN does see at least some of the economic and social rights claims as "justiciable." As the Committee on Economic, Social and Cultural Rights (1998) observed: "It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions."

Furthermore, the Maastricht guidelines outline violations through acts of commission (direct action by states) and omission (failure of states to act). Acts of commission include the formal removal of legislation and/or funding necessary for the continued enjoyment of an economic or social right, the active denial of such rights to particular individuals or groups, and the reduction of specific public expenditures to protect social welfare resulting in the denial of minimum subsistence rights for everyone. Violations of omission include the failure to enforce legislation designed to implement provisions of the covenant and the failure to utilize the maximum of available resources toward the full realization of the covenant. A state violates the covenant when it fails to satisfy "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...] Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant" (Maastricht 1997).

In addition, states are required to ensure that private entities, including multinational corporations, within their jurisdiction, do not deprive individuals of social or economic rights. "States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behavior of such non-state actors" (Maastricht 1997).

A final point regarding the "justiciability" of economic and social rights concerns national implementation. Economic and social human rights have been clarified and interpreted in concrete cases and situations. National case law, and the case law of regional human rights systems, demonstrate the many ways in which economic and social rights are justiciable

(Gomes 2005). The Indian Supreme Court, for example, considered the "right to food" within the context of public interest litigation brought by the People's Union for Civil Liberties. As a consequence of this legal action, the court devised a range of affordable measures that subsequent governments implemented (Alston 2008).

Philip Alston (1987:352) asserts that there is an identifiable "minimum core content" to each of the economic and social rights claims found in the ICESCR. Alston writes, "The fact that there may exist such a core [... is] a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a 'claim' to the status of a right (with all the connotations that this concept is usually assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the right holders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement, in the absence of which a state party is to be considered to be in violation of its obligations." Flexibility was written into the ICESCR to give each state the ability to choose for itself the policy measures it determined would best meet its legal obligations under the Covenant. As long as the spirit of the Covenant is not violated, the Committee on Economic, Social and Cultural Rights allows each state-party to interpret and implement the Convention in a manner appropriate to its particular legal and constitutional system.

Through its "General Comments," the UN Committee on Economic, Social and Cultural Rights has clarified and articulated the minimum core content of the ICESCR. Through these general comments, the committee provides state and non-state actors with a clearly defined understanding of the obligations and duties these rights entail. The general comments spell out the legal duties of states in key areas, including rights to education, food, health care, housing, water, work, and so on. These general comments provide the clearest articulation of economic and social rights in international law. It is no longer credible to argue that economic and social rights are too vague to enforce. The general comments are clear and substantive. It is now the legal duty of states, regardless of their political and social systems, to respect, protect and fulfill these core rights for all citizens. (The General Comments of the Committee on Economic, Social and Cultural Rights are at www2.ohchr.org/english/bodies/cescr/comments.htm.)

Poverty and Economic and Social Human Rights

Scholars have linked economic and social rights claims to meeting basic human needs and the alleviation of global poverty. Johan Galtung (1994), for example, locates human needs inside individual human beings, whereas human rights are situated between them. He justifies economic and social rights by their relationship to fulfilling human needs. To identify human needs, he asks, "What is it you cannot do without?" This human needs approach places the economic human rights debate firmly among the suffering, where the nonsatisfaction of minimal subsistence needs has drastic consequences. In a similar vein, Christian Bay (1990) uses the analogy of any reputable hospital, which would serve the most severely injured and in need first. The claims of those in global poverty deserve preferential treatment. Basic human needs are powerful facts, not just philosophical speculation, and should inform the content of economic and social human rights. Bay writes, "Provided we take the universality of basic human needs and of need-based rights seriously enough, we may envisage an expanding world-wide human rights movement as a viable third way toward a more human and sustainable world, post-liberal and post-Marxist."

On the other extreme, some scholars argue against the justification of human rights on the basis of directly meeting basic human needs and poverty alleviation. Jack Donnelly (1989), for example, rejects the idea that human rights are based on human needs, like food, shelter, sanitation, and so on. He argues that there is no scientific way to establish such a set of agreed-upon human needs, and therefore it is dignity, rather than needs, that should serve as the basis for human rights. However, Freeman (2002:65-8) and other scholars point out that the link between human rights and "dignity" is as problematic as the link with "needs." While the connection between needs and rights is certainly complex, in the economic and social realm some aspects seem clear. The need for food seems to be the basis for some human rights and necessary for a life of dignity as well. In fact, basing economic and social human rights on the alleviation of suffering grounds these claims in the fulfillment of the basic, minimal needs of those most vulnerable (Felice 1996:69-89).

With the development of the idea of "basic rights," Henry Shue (1980:32) presented perhaps the most influential case for economic and social human rights. Shue argues passionately and effectively for "subsistence" as a basic right. All development programs and economic theories must insure a minimal floor of economic security for all citizens. In fact, all human rights are contingent upon these development rights being respected. All people are entitled to make minimal reasonable demands upon the rest of humanity to have basic rights met. Shue writes, "Basic Rights are the morality of the depths. They specify the line beneath which no one is to be allowed to sink." Subsistence rights meet basic human needs and are essential because without them other rights cannot be realized. For all human beings to be able to fully function in today's world, their subsistence rights must be respected. Shue calls this the transitivity principle for rights: "If

everyone has a right to y , and the enjoyment of x is necessary for the enjoyment of y , then everyone also has a right to x ."

Arguing along similar lines, Thomas Pogge (2005) links human rights fulfillment to the alleviation of poverty. "Piecing together the current global record, we find that most of the current massive underfulfilment of human rights is more or less directly connected to poverty. The connection is direct in the case of basic social and economic rights, such as the right to a standard of living adequate for the health and well-being of oneself and one's family, including food, clothing, housing and medical care." Pogge (2002) situates the problem of global poverty within a framework of international human rights. He links human flourishing and well-being to global economic justice and moral universalism. Eradicating systemic poverty, he argues, will involve acting on a new understanding of global responsibility and breaking out of stifling conceptions of "sovereignty" and nationalism, and enacting a series of modest and feasible reforms in international law and organization. He documents, for example, the ways in which the current global structures reinforce and perpetuate undemocratic and elitist practices in the less developed countries (LDC). He cites two "international privileges" that benefit the developed countries and the elites in the LDC at the expense of the poor populations of resource-rich developing countries: an international borrowing privilege and an international resource privilege. When a corrupt regime comes to power in an LDC, it is immediately given the privilege to borrow in the country's name (international borrowing privilege) and freely dispose of the country's natural resources (international resource privilege). In fact, the mere existence of these international privileges provides powerful incentives to corrupt local elites to seize power arbitrarily.

The international borrowing privilege is, perhaps, the most insidious. It puts a country's full credit and borrowing at the disposal of even the most ruthless rulers. It is indifferent to how these rulers came to power, thus providing a strong incentive for coup attempts. And even when the dictatorship is overthrown, the new government is saddled with the huge debts of its former oppressors. Pogge convincingly demonstrates the ways in which the global economic order, through the granting of these two "privileges," promotes authoritarian rulers and contributes to the persistence of severe poverty and the denial of economic and social human rights to the world's poorest people.

The World Bank, in response to some of these concerns, has incorporated human rights discourse into its public documents. A 1999 World Bank statement, for example, reads: "By helping to fight corruption, improve transparency and accountability in governance, strengthen judicial systems, and modernize financial sectors, the Bank contributes to building environments in which people are better able to pursue a broader range of human rights." Yet, according to Uvin (2004:88), much of this World Bank "human rights conversion still amounts to little more than rhetorical repackaging; that is, policies that were once justified by their potential to improve investor confidence are now justified for their human rights benefits, at least in brochures destined for the human rights community."

The Right to Development

In the 1960s and 1970s the newly created independent states in the southern hemisphere attempted to articulate a new normative framework to correct for the economic distortions left by the legacy of colonial domination. Leaders of these developing states argued that hundreds of years of exploitation by the colonial powers had depleted their natural wealth and created conditions of extreme poverty. These LDC advocates pointed to Article 28 of the UDHR, which declares: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." The creation of such a just international economic order became the overwhelming priority for the poorest countries. The UN attempted to address these issues with the articulation of a collective "right to development."

One of the first experts to define the right to development was Senegalese jurist Keba M'Baye (1981), the former Chair of the UN Commission on Human Rights. M'Baye defined this right as "the recognized prerogative of every individual and every people to enjoy in just measure the goods and services produced thanks to the effort of solidarity of the members of the community." The right to development was based on the idea that colonialist economic policies could be considered a violation of fundamental human rights and that the former colonial powers thus had a legal obligation to cooperate and assist with development. Development cooperation and assistance would no longer be seen as "charity" but as a legal duty to correct for this history of exploitation (Sengupta et al. 2005).

The UN General Assembly adopted the Declaration on the Right to Development (DRD) in 1986, a carefully negotiated statement with no legally binding qualities. The DRD defines development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." A central element to the DRD is the affirmation of the need for international cooperation to overcome the legacy of colonialism. Examine the following DRD articles. Article 3(1) charges states with the legal duty and

obligation to "create national and international conditions favorable to the realization of the right to development." Article 3(3) calls on states to "co-operate with each other in ensuring development and eliminating obstacles to development." Article 4(1) proclaims that states are to "take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development." And Article 4(2) states, "Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development" (DRD 1986).

Mohammed Bedjaoui (1991) expressively argues that the human right to development claim "goes something like this: 'Before giving me charity or offering me your aid, give me my due. Perhaps charity is no more than the screen behind which you expropriate what is due to me. Such charity does not deserve to be so called; it is my own property you are handing back to me in this way and, what is more, not all of it.'" Arjun Sengupta (2002), the UN Independent Expert on the Right to Development for the Human Rights Commission, writes that the right to development can be considered a legal right because the concrete mechanisms for the realization of that right have been established. He claims that the recognition of the right to development as a human right raises "the status of that right to one with universal applicability and inviolability. It also specifies a norm of action for the people, the institution or the state and the international community on which the claim for that right is made. It confers on the implementation of that right a first-priority claim to national and international resources and capacities and, furthermore, obliges the state and the international community, as well as other agencies of society, including individuals, to implement that right."

A challenge to the regime of economic and social human rights is to carve out an area of protection for the most vulnerable that is exempt from the often inequitable and harsh effects of global capitalism. The DRD focuses on the right to equal access to the benefits of development. Article 8(1) calls on states to ensure "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income." Article 2(3) declares, "States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals [...] and in the fair distribution of the benefits resulting therefrom." This is a plea to give everyone an equal chance to participate fully in an economic system that can be unjust if protective measures are not taken. State and non-state actors with power over others, according to the DRD, must strive to prevent the human suffering caused by the evolution of the modern vigorous global capitalist economic system. These powerful actors have a legal duty to strive to uphold a minimum economic floor for all, which is to meet basic subsistence requirements. According to human rights law, every person should be given an equal chance to participate freely and fully in the global economy (Felice 1996).

Sengupta (2002) writes, "The 'have-nots' of the international economy would have a right to share equally in the decision making privileges as well as in the distribution of the benefits, just as the rich developed countries." The development needs of the bottom half of the world's population provide a compelling moral framework to locate economic and social human rights. This right to development approach has the potential to create a degree of legal accountability for states to address the needs of the poorest in their economic planning. The integration of development issues into a human rights framework of clear entitlements and duty holders creates a more responsible development process. The international human rights structures within the OHCHR have instituted a series of programs of transparency and accountability to hold states accountable to the economic and social human rights obligations called for in the DRD and the ICESCR (Felice 2003:49-93).

In addition, it is possible to see the right to development as a process toward a comprehensive program that takes into account the realization of all human rights - economic, social, cultural, civil, and political. According to Sengupta (2002), the right to development should be viewed as a process of development, i.e., "a metaright to the set of recognized human rights and fundamental freedoms [...] The right to that process is different from the right to the outcomes of that process. But it is expected that the process would lead with a high probability to the realization of all these outcome rights. The right to that process of development is thus a metaright to all these human rights."

Some human rights scholars, however, remain skeptical of the basis and utility of the right to development. Donnelly (1985), for example, views the collective right to development as a confusing concept. Human rights, he argues, rest on the view of the "individual person as separate from, and endowed with inalienable rights held primarily in relation to, society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail." Critics further charge that it remains unclear what this right actually entails. Is it an individual right or a right of people or a right of states? The struggle to achieve economic and social rights fulfillment is not advanced by a

statement that merely calls for the enjoyment of all existing human rights (Donnelly 1985).

Furthermore, the United States, and some other developed countries, reject the right to development because of the implied legal obligations of the rich to assist the poor. The rich nations do not want to lose control over development assistance through the establishment of a legal regime dictating the duties and responsibilities to certain poor states. In addition, some leaders in the developed world point to the high levels of corruption that exist in LDC and question whether increased flows of resources to these governments would really help the poor. A further problem is that corrupt elites in the LDC could argue that the right to develop is a precondition for other human rights, delaying the promotion and protection of civil and political rights. As a result, critics believe that a focus on the vague right to development could ultimately prove to be counterproductive. These critics thus believe that the poor would be better served by attention to the specific rights elaborated in the ICESCR (food, education, health care, and so on) (Howard 1985; Normand and Zaidi 2008:289–315).

The Capabilities Approach

Perhaps the most promising new approach to economic and social rights is Amartya Sen's (1992:49; 1999:20-1) capabilities approach, which provides a clear normative framework useful for resolving some of the dilemmas and debates surrounding a rights-based methodology to public economic and social policy. The capabilities approach focuses on what individuals need for adequate functioning. Sen asks us to not only examine low income to determine poverty, but rather to scrutinize the "deprivation of basic capabilities," reflected in "premature mortality, significant undernourishment (especially of children), persistent morbidity, widespread illiteracy and other failures." This focus allows public policy to be tailored to meet the needs of specific groups within society who are denied basic capabilities and, thus, denied the freedom to achieve. Attention is thus paid, for example, to women and racial minorities who often face unequal conditions, discrimination, and a lack of real opportunity (Sen 1999:3).

Mary Robinson (2000), the former UN high commissioner for human rights, acknowledged the impact of Sen's capabilities approach on the work of the UN. "A new dialogue is taking place between development and human rights experts which has brought about convergences and given depth to the law-based approaches of traditional human rights thinking. It has been enriched by Amartya Sen's work on capability rights. This approach recognizes that human development and human rights are mutually reinforcing in that they expand capabilities by protecting rights. This dialogue has contributed to the development of people-centered sustainable development." (document posted online at www.unhcr.ch/hurricane.nsf/0/F31C625AA489D31BC125690A0053C8DE?opendocument)

Sen argues that an adequate way of considering real equality of opportunity is through equality of capabilities. His focus is on the ability to function and the freedom to achieve. Functions include being well-nourished, avoiding escapable morbidity and premature mortality, having self-respect, and being able to take part in the life of the community. Capability is thus directly related to the freedom to achieve these valuable functions. "In the capability-based assessment of justice, individual claims are not to be assessed in terms of the resources or primary goods the persons respectively hold, but by the freedoms they actually enjoy to choose the lives that they have reason to value" (Sen 1992:81).

To have the "freedom to achieve" requires that certain needs are met one way or another. Sen mentions well-nourishment and the avoidance of escapable morbidity. To be able to live as one would value, desire, and choose requires freedom from hunger, malaria, and other maladies. Inequalities across the world lead to a loss of basic freedoms such as preventable morbidity and escapable hunger. A capability-centered perspective gives us a better understanding of what is involved in the challenge of poverty. For example, an African American male in Harlem may have more resources and live in a country with a higher standard of living than a citizen of the state of Costa Rica. Yet, due to social achievements in Costa Rica, the citizen from this LDC may have more freedom to achieve and capability to function. Costa Rica may suffer income poverty, yet its focus on communal health services, medical care, and basic education has led to remarkable life expectancy rates. These insights can inform public policy for the fulfillment of economic and social human rights. Policies can be evaluated through this lens: which policy provides for an adequate distribution of resources to provide for the opportunity for adequate functioning for all people (Sen 1992:151)?

"Development," Sen writes, "requires the removal of major sources of unfreedom: Poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states" (1999). The practical policy implications of this thesis are radical and offer a direction to state agencies and international development organizations. The capability approach to development minimally would

require substantial investments in public health, substantial investments in primary and secondary schooling, the enactment and enforcement of laws to eliminate all forms of discrimination against women and minorities, and open public discussions of all economic and social policies.

As Martha Nussbaum (1999:34) writes, "This approach to quality-of-life measurement and the goals of public policy holds that we should focus on the questions: What are the people of the group or country in question actually able to do and to be? Unlike a focus on opulence (say, GNP per capita), this approach asks about the distribution of resources and opportunities. In principle, it asks how each and every individual is doing with respect to all the functions deemed important."

Nussbaum develops a list of "Central Human Functional Capabilities" that marks the most significant difference between her approach and Sen's: Sen never made such a list. This list of capabilities includes ten broad areas: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's political and material environment. Nussbaum's goal is to establish acceptable social minimums, contending that the structure and function of community and political organizations should be designed to meet these needs at a threshold level. This minimum threshold is central to her argument as these human rights claims trump culture, family, and religion (Nussbaum 2000:75).

Nussbaum's Central Human Functional Capabilities list supports existing economic and social human rights claims and can be linked directly to international law. The capabilities approach provides a framework to articulate and measure public policy to achieve these human rights. Through this lens we are able to evaluate what prevents the poor from realizing basic economic and social rights, and attain, to use Sen's phrase, "the freedom to achieve adequate function." The capabilities approach can help to direct public policy (in education, health care, and so on) to create an environment for the realization of all economic and social human rights (Felice 2003:43-6).

The prominence of economic and social human rights in fundamental instruments of international law following World War II raised expectations that perhaps the minimal claims of the poor for decent treatment would gain a privileged status. Unfortunately, this category of human rights faced strong opposition from the world's most powerful states, and thus these bold ideas remain for the most part frozen in the realm of theory. Perhaps the capabilities approach can provide the insight needed to push these human rights claims more directly into the realm of public policy.

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