Meeting 2: Economic and social rights: legally enforceable rights?

Speakers: Katarina Tomasevski, Lund University
John Mackinnon, Freelance Economic Consultant

Chair: Michael Anderson, UK Department for International Development

Meeting Summary

The first speaker, Katarina Tomasevski, stressed the difficulties involved in developing a common language that can be used by both development professionals and human right lawyers because of their different starting points; whilst the former need to be optimists, the latter are by nature pessimists. She outlined a number of concerns with quantitative development targets from a human rights perspective. Tomasevski concluded by demonstrating the importance of human rights law to the realisation of economic and social rights by setting out three of its strengths: the creation of legal obligations for states; their immediate and continuing nature; and the association of freedom with responsibility.

The second speaker, John Mackinnon, highlighted how human rights contribute conceptually to the approaches taken by economists. He then asked whether human rights add something in practice by strengthening our ability to combat poverty. In doing so, he noted the difficulties relating to translating legal commitments into actual benefits for poor people in low-income countries. Mackinnon concluded by presenting a five-part taxonomy of rights comprising traditional human rights, extended negative rights, positive service rights, positive process rights and property rights, and described some of the complexities of each in practice in the context of poverty reduction.

Whilst the distinction between positive and negative rights was challenged during the discussion, there was some agreement that it could be useful in practice. The need to make decisions regarding public policy priorities, and the value of the concept of 'progressive realisation' in relation to this, was discussed. Concern was expressed with what was perceived to be a narrow focus on gender over human rights by many aid agencies. A number of issues regarding the best mechanisms for implementation were raised, including the importance of public information and accountability structures grounded in the rule of law.

Katarina Tomasevski

I am extremely pleased to be here because it enables me to explain some of the difficulties that occur when human rights lawyers and development professionals try to talk to one another. A common language has yet to be developed. To begin with, their starting points are completely different. If you work in development, you have to be an optimist; you have to believe that development is possible and that governments are committed to it. If you work in human rights, you have to be a pessimist because your job is to look for abuses of power. These opposite positions illustrate the difficulties in trying to develop a common language.

Human rights and development targets

I will illustrate these difficulties by saying how, as a human rights lawyer, I view some of the current development targets. When I hear the pledge to halve the number of people in poverty, my first reaction is fear. Will the other half be killed or left to starve? Will they be defined as the 'superfluous poor'? People can be eliminated in much gentler, but not necessarily less harmful, ways. They can be eliminated statistically. A discussion I had with officials at the Ministry of Education in the People's Republic of China about education statistics demonstrates this. In China, primary education is compulsory and, with 99% of children at school, the statistics look fantastic. However, I looked out of the window and pointed to the street children who were obviously not at school and asked, 'what about them?'. The reply was that they did not count because they are internal migrants. But how many internal migrants are there in China? 100 million? 140 million? No one really knows. My fear therefore is that there are a large number of children in China who are not attending school but who do not count because they are not included in the official statistics. They do not exist statistically and therefore their fate is unlikely to be represented by Chinese statistics, which may nevertheless portray success in the achievement of quantitative targets.

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A second concern relating to the pledge to halve the number of people living in poverty is that it affirms in advance of the target year that, even if we only consider the people included in the statistics, half will remain in extreme poverty in 2015. One half will benefit from poverty-eradication measures and the other half will not. But what are the criteria for deciding who is in each half? The human rights approach would alter the premise of this promise. First, it would challenge the acceptance of the denial of human rights today in the name of a future development target. Second, it would question the acceptance of a statistical victory whereby poverty continues for the half who fails to benefit from whatever development interventions might be used to attain the target. Denying equal rights recalls the apartheid system, which granted and denied rights according to pigmentation. This amounted to saying: 'the whiter you are, the more rights you have; the darker you are, the fewer rights you have'. Because the vast majority of the poor are not white, the criteria may inadvertently legitimise racially-discriminatory policies that have not yet been eliminated from many countries in the world.

Another form of discrimination that continues to be widespread is the denial of equal rights to women. It is a reminder that abuses of power continue and are often open, legal and institutionalised. Unequal rights for women are the rule rather than the exception, particularly in relation to their economic rights. This is illustrated by global statistics that show how little property is owned by women. Quite often, women are not even treated as people but are instead the property of their husbands or fathers. One court case heard by the Supreme Court of Cameroon in 1998, which I cite in my background paper (Tomasevski, this volume), involved a husband who had inherited his wife. The wife had been treated as a part of his deceased brothers property and he was legally claiming that she return to him because she was his. This example alerts us to the fact that, if women are to benefit from anti-poverty measures, we must ensure that they are deemed to be people with rights rather than chattel.

The third point that I would like to make about global quantative targets is that they remind me of the former Yugoslavia, a centrally-planned economy in which I worked as a young university professor. I learnt from the Dean of my Law School how to cope with quantitative targets. When the time came for reporting, I began to diligently count the number of books, pencils, students, etc. that we needed to account for. The Dean told me that I needed a telephone directory instead because the way to comply with reporting on quantitative targets was to open a telephone directory and copy the random numbers into the report. Nobody knew the real numbers and so nobody could check.

For example, in Colombia, the statistics relating to people cannot be accurate because nobody knows how many Colombians there are. The last census was 14 years ago and the country has had four decades of violent conflict. Today, seemingly precise statistics can be produced on any topic using mathematical modelling and nobody can dispute their accuracy because nobody has counted the people. This is a substantial improvement on copying random figures from a telephone directory but does not resolve the disjuncture between generated statistics and reality.

Advantages to legal enforcement

I move now to my final and most important point, namely, why it is that I claim that the law has advantages, particularly in terms of the enforcement of economic and social rights. One of its strengths is that it creates obligations for states. The Millennium Development Goals (MDGs) and their associated quantitative targets are political commitments made by governments and are not

binding in the event of a change of government. It is not unusual for a new government to fail to honour the commitments of its predecessor. By contrast, human rights law is sustained beyond changes of government because parliament creates obligations that bind the state. This means that people continue to be entitled to justice if the states' obligations corresponding to their rights are not duly performed. This is one of the benefits of using what I call pro-poor law rather than merely development goals or targets.

The second advantage of the law is that the obligations it creates are immediate and continuing. What concerns me (again to use an example from education) is that the promise of education for all the world's children has been made at least once every ten years during the past five decades and every single one has been betrayed. The difference between human rights lawyers and development professionals is apparent here. Human rights lawyers look at previous promises and diagnose more of the same. By contrast, development is forward looking and uses the most recent promise as its baseline date. Another difference is that, for a human rights lawyer, the promise that all children will complete primary education by the year 2015 means a denial that they have a right to education today. The principal advantage of having rights, in this case the right to education, is that a betrayal of promises on the part of the state, through the failure to meet its obligations, entails legal responsibility. My background paper summarises cases whereby betrayed promises have become expensive for governments. The political price is the determination that a government is a human rights violator. The financial price is compensation for the victim and the deployment of resources so that similar violations do not occur in the future.

Law is symmetrical and rights entail duties, while freedom entails responsibility. Welfare rights cannot function without welfare duties because the legal responsibility of states is premised on their willingness and ability to generate necessary revenue. Of course, our diverse world cannot support a one-size-fits-all model. Within the European Union, we are able to guarantee the right to holidays with pay because our economies can sustain this right. Since before I was born, people have been saying that Nordic welfare rights are unsustainable. The Swedish Prime Minister has described the welfare state model as a bumble bee. By scientific criteria, a bumble bee cannot fly but this does not prevent it from flying. It is the same with the welfare-state model. Why does it fly? Because rights give people a stake and they accept the associated duties because these sustain rights. Welfare rights cannot be taken from the Nordic system and implanted in Ethiopia or Peru without also transplanting the associated duties. Thus, international human rights law postulates progressive realisation of economic and social rights.

Finally, human rights law associates freedom with responsibility. It does not encroach on the government's discretion to design and apply development strategies. Human rights lawyers neither posses nor claim expertise in designing budgets or costing vaccination campaigns. Rather, law is a yardstick for assessing governments' performance and for measuring whether their performance matches their postulated priorities. Its novelty lies in its definition of the poor as people with rights rather than objects of development interventions. Their enforceable rights strengthen governments' accountability.

The need for law can also be demonstrated with examples from the European Union. Through the European Stability Pact, EU governments pledged to implement their obligations, including the limits on the size of their fiscal deficit. Did they? No. They will therefore have to be dragged before the European Court of Justice or their constitutional courts because they have to be forced to implement what they had solemnly promised to do. We need law as a neutral arbiter. Rather than taking over the function of designing budgets or fiscal policy from government, it ensures that governments' powers to do so are not abused.

Again, this means doing what we do best in human rights and that is looking for abuses of power, seeing how to prevent them and, if abuses have been detected, to hold up decision-making processes and call the government to account. This is the biggest and proudest success of human rights because legal enforcement operates on two levels. The right to challenge and to hold the government to account has been accepted, albeit grudgingly, as the pillar of the rule of law.

'The principal advantage of having rights ... is that a betrayal of promises on the part of the state ... entails legal responsibility.'

John Mackinnon

The first question that I will be looking at is whether a human rights-based approach substitutes for other socio-economic approaches to poverty reduction. Should we think of replacing the given structure that we work with as economists, be that utilitarian or capability theory, etc., with a more general human rights-based approach? A second question, and a rather more modest aim, is whether a human rights-based approach strengthens what we are otherwise already doing in poverty reduction. My third, and final, question is whether there are problems. Are there cases where a human rights-based approach conflicts with aspects of poverty reduction? While I do not think that there are conflicts in principle, there can be in practice.

The concept of human rights in the perspective of poverty reduction

Firstly, a word on what human rights are. The previous speaker focused on practical applications but, thinking this through, I found that one needed to say a little about theory. Broadly speaking, economists, whether they are traditional, utilitarian, neo-classical or capability theorists inspired by Amartya Sen (and there are less differences between those views than people often imagine), work by assuming that people have a certain set of preferences and that they try to expand their choices. How do human rights factor into this? Well, one way of looking at this is to say that human rights really just rephrase it in a different language and therefore do not add much conceptually. However, there are other ways of understanding human rights and I have noted three:

i. The traditional view of human rights as a limit on the state. In this formulation, there are desirable things that we would want to promote but there are also certain fundamental limits that the state should not go beyond in the way it tries to influence people's lives.
ii. Thinking about human rights as a condition of choice. Yes, we want to increase people's choices but a human right might be something that people must have before they are equipped to make a sensible choice – for instance, without basic education people's choices will not be informed.
iii. There is a notion of human rights that covers the range of decisions that people take. For instance, one of the frequent objections to economistic measures of poverty is that a woman may have a quite high income and/or expenditure but still have very limited choice about how those expenditures are allocated. This is a case where human rights do seem to inject something beyond what a standard economistic measure is able to (though the capabilities approach was partly developed with this case in mind). Spelling out these ideas indicates that there are a number of different intellectual traditions that have fed into the idea of human rights and these can conflict. I will be providing examples of this.

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Another point is about who benefits from rights. I think it is important to bear in mind that some rights are important, not because they are in the interest of the person who has the right, but because they are in a broader social interest or the interest of other people. Freedom of speech, I think, is an important example. The most fundamental arguments for the freedom of speech do not necessarily turn on the interests of the speaker. While economists have a terminology for this in terms of 'externalities', the practical importance of this right for economic performance has been little discussed except in Amartya Sen's work on the role of a free press in preventing acute famine.

The practical importance of human rights

So, what do human rights do in practice? Even if the idea of human rights does not add anything conceptually, even if human rights were simply a way of dressing up what economists or capability theorists have already said, they might still add something practically. I think they do. We might start by thinking of human rights as being a set of general moral entitlements with corresponding obligations but we can also see them as being practically implemented through international commitments and/or national legal or political commitments.

The point that I want to make quite strongly here is that it is my experience that legal commitments can sit on the books for a very long time in the kinds of low-income countries that we are referring to. The legal system is simply overstressed to begin with. Statutes do not necessarily translate into benefits for society through the implementation of actual obligations, except to the extent that what is in the law can capture the public imagination. This is quite difficult to predict, however.

For instance, I was quite taken aback on a recent trip to India. Some Indian states have introduced quite progressive ideas about land inheritance into their legislation. Knowledge of this had reached even the male farmers whom I met in a village and they were asking interesting questions such as, 'are we going to have to bequeath land to daughters as well as sons'. Therefore, something that is on the statute book but is probably not that legally enforceable has nevertheless caught people's imagination. It is controversial, and may or may not survive, but it has certainly injected an idea into that society.

In other cases, however, I think that it is political commitment that has made a real difference, as demonstrated by the example of primary education in Uganda. Uganda introduced essentially free primary education and, three years later, essentially free primary health care. This led to a quite startling increase in demand, which was greater than anyone had imagined. Gross enrolment rates jumped, more or less overnight, from 75% to about 150%. This was the result of a

single speech given by the President, who people were inclined to believe. How long the Ugandan government retains that credibility partly depends on the extent to which it delivers on these things but the power of a single public announcement saying, 'you are going to get this free service, turn up and demand it', can be enormous. It is a mistake to think that it is particularly difficult to spread information about an entitlement. It is actually quite easy to make a society aware of one.

Human rights and poverty reduction: a taxonomy

My next step in thinking about this was to develop a schema of the types of rights that are introduced in a human rights-based approach to development:

i. *Traditional human rights*, such as freedom from political repression, freedom from arbitrary arrest, freedom from political and civil violence, the right to a fair trial, freedom from torture, and so on. Pretty much everybody agrees that those are appropriate types of human rights.

ii. *Extended set of negative rights*. Again, these focus on things – restrictions or violence – that should not be done to people, rather than positive entitlements, and include things like freedom from domestic violence, freedom from cultural discrimination, working conditions, etc.

iii. *Positive service rights*, which typically include rights such as education and health or, as looked at by the UN declaration on human rights, those such as housing, clothing and water. I have also included productive services but with a question mark next to them, and I will come back to this later as it raises an important point about whether the current rhetoric is privileging some services relative to others.

iv. Rights that might be described as *positive process rights*, such as participation, consultation, and so on.

v. *Property rights*. Are property rights human rights? This is an indelible question and one that is addressed in recent work by the UN's Office of the High Commissioner for Human Rights (OHCHR), which achieves more than I expected on this. For instance, it says that it is one thing to say that the procedure by which property is allocated does not violate people's rights, in the sense that, for instance, women can inherit their own property. It is another thing to say that women actually have property rights because a legal system can exist whereby women are fully entitled to own property but 90% of land continues to be owned by men. This important point is often missed in discussion of 'property rights'.

Traditional human rights

What I wanted to do was briefly set out some of the complexities that define these questions of rights in the context of poverty reduction strategies. I think that everyone who works on conflict-affected societies now considers conflict as the single biggest cause of poverty in that context. In Uganda, for instance, where the Northern part of the country has been afflicted by conflict for the past twenty years, there has been a steady widening of the gap between the North and the rest of the country. In this context, it is difficult to assess who is responsible for negative rights and for ending the conflict, and how these rights can be fulfilled. Political consensus regarding this is certainly absent from Ugandan society. For instance, the role that military action should play in assuring security is a controversial question and the evidence in Uganda is actually mixed. There are cases where military action has produced dramatic improvements to security and there have been other cases where it has basically failed to deliver any improvements and has made the situation worse.

The human rights approach therefore needs to be complemented by conflict resolution. Simply saying people have a right to security does not tell us how they actually achieve this right in conflict situations. This raises questions about whether we can find an institutional way of addressing human rights while conflicts are going on. The worst episodes of human rights violations in the countries that I have worked in recently have been during conflict. Whilst the best thing is obviously to eliminate conflict, given how long and intractable some of these conflicts have been, there is also a question about whether one could develop some system of restraint even during periods of civil conflict.

In terms of legal process, in some contexts there can be resource constraints even in relation to very basic rights. For instance, in the Rwandan case, there are a large number of people in prison suspected of committing murder during the genocide. Not only do they suffer but their families suffer. Women in Rwanda, or a significant sub-set of the Rwandan female population, are spending their time delivering lunch to their husbands in prisons. But the question of how you resolve this situation raises tensions between the right to timely trial and other types of rights, such as rights of due process and the rights of victims. It has been calculated that it would take about 72,000 years to deal with all the Rwandan genocide suspects under the UN system. A more rapid response is needed, not only within the international arena, but also within the normal functioning of any criminal justice system.

Consideration of the rights of the accused in isolation might suggest that there should be an element of amnesty or that those accused should be released pending trial rather than being held for a period of several years or more. But the rights of actual and potential victims and the needs for national security and reconciliation are at least equally important. The general point that emerges is that even what seem basic and simple human rights, such as the right to due process and timely trial, can be resource-constrained and that, in this context, there can be difficult trade-offs between the rights of different groups that

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would not emerge in a less resource-constrained environment.

Similarly, in order for the rule of law to be upheld, it is necessary for there to be an adequate police force. However, there is a serious question in some low-income countries about whether it is better or not to have a police force. If you look, for instance, at participatory studies in Bihar (India), the view that the police add to insecurity emerges quite strongly. Until recently, in Uganda, many urban residents' main contact with the police was through traffic fines that were widely perceived to be corruptly administered and arbitrary. (This problem has been addressed by changing the system of payment of the fines; a sign that simple accounting changes can sometimes have strong implications for relations between the citizen and the state.) Given the resource constraints, the right to policing as a service is actually a double-edged sword.

Lawyers can sometimes be reluctant to extend the mandate of the lowest, cheapest levels of the legal system, a process which is actually taking place in Uganda as a result of criminal justice reform. Here, local council courts have had their mandates extended and, I think, this offers cheaper, quicker and, generally, better justice for a lot of poor people. At the same time, there are concerns that the local courts may represent more conservative views, with implications for human rights. If, for instance, a woman has been beaten by her husband and goes to the local court, it is very often her husband's friends who will be running the court and she will be gently advised to return home. So, there is a trade off.

Extended negative rights

I would like to also raise some issues in relation to extended negative rights. The implementation of rights, such as the right to cultural values and to be educated in your mother tongue, has made a real difference to primary schools enrolment in Ethiopia. It is a practical issue, as well as being a cultural issue in its own right. I also think that mobility is an important extended negative right. This right has sometimes been restricted because of security concerns, as was the case in the years immediately following the genocide in Rwanda. It has also been traditionally denied under a number of quite authoritarian regimes, including the Derg (the communist government that fell in 1991) in Ethiopia. Some of the least responsible development economics that I have seen has been by people who think that urban migration is a problem and have therefore recommended restricting or prohibiting it. This is an extremely powerful way of increasing rural impoverishment; in most of the poorest countries, all the indicators suggest that rural areas are on average poorer than urban areas, and restriction of the flow of people to urban areas reduces the options available to people in rural areas.

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The prevention of polygamy is another extended negative right and one which highlights a tension. Some official reports suggest that oppressive practices should be prohibited and many people would view polygamy, as it functions in practice, as a highly oppressive practice. This raises the question of how we think about polygamy and the rights of adults to do what they choose, vis-à-vis property rights and the rights of autonomy of women.

I also think that it is important in the debate on human rights to recognise that there is not necessarily a liberal consensus in the societies that one is looking at. For instance, the idea of restraint on the powers of the state is an idea that is applied very differently in different countries within Europe (as the headscarf issue shows), and is applied differently again in many developing countries. In the Uganda case, for instance, there is, apparently, a strong popular demand that adultery should be illegal under the constitution – something that would now seem surprising in a European context.

Positive service rights

I think the application of human rights is at its most problematic in relation to positive rights. First of all, there is the question of whether one is talking about rights to services or outcomes. It is easier to apply the structure of rights and obligations to the delivery of a service than it is to an outcome but, ultimately, it is the outcome that is most important. This is a tension within human rights and also within all public settings. If you are going to talk about service rights, there is a major question of prioritisation. Something that concerns me in relation to human rights-based approaches is that there is an assumption that things like health and education are rights but little is said about the right to agricultural technology, for instance. In fact, the case for the right to agricultural technology may be *de facto* as strong as the case for education. In some contexts, it might be more beneficial to health to improve agricultural technology than to build more health clinics. In my view, agricultural technology is something that has been massively underinvested in. However, I do not think that this sort of question can be resolved within a human rights-based approach. It needs the kind of cost-benefit analysis that economists have, in principle, been doing for a long time. The movement away from econometric ways of thinking has actually led to an underestimation of the importance of really trying to quantify these trade offs and we may be getting some things dramatically wrong.

Property rights

I turn now to property rights, an area where there is, in my opinion, a lot of confusion. Broadly speaking, there is an increasing consensus that explicit discrimination in relation to property rights should end. However, the question of whether there is a right to non-discriminatory practice is more controversial in some societies. There is also a complementary question about interpreting existing rights. For instance, the colonial regime in Uganda established a rather unusual kind of tenure in parts of the country, known as *mailo*, under which most of the property rights effectively

rested with the tenants and the residual rights of 'owners' were very limited (tenants could sell the tenancy and had secure tenure), and rent was controlled and very low. How to treat this form of tenancy when modernising the system raises a conflict of interests between 'owners' and 'tenants' with potentially major impacts on poverty.

Finally, there is the question of whether human rights have relevance in relation to the distribution of assets and, in a sense, this is a question of how politically radical human rights are prepared to be. Both human rights and economics provide enough intellectual ammunition to be radical as you like. In other words, you can make a solid case for the redistribution of property, but people working in different disciplines are likely to put this case in different ways. The attraction of a human rights-based approach in this context is the idea of identifying a minimal level of property that everyone should have access to and it might be possible to aim at implementing this without massive redistribution in the structure of wealth (simply because the existing inequality of wealth in most societies means that a large proportional increase in the wealth of the poorest could be funded by a much smaller reduction in the wealth of the better-off). It may also be quite beneficial. I think there is scope for some quite creative work in this area, which may lead to something like a minimum level of wealth as an implementable guaranteed right.

'Both human rights and economics provide enough intellectual ammunition to be radical as you like.'

Strengthening pro-poor law: Legal enforcement of economic and social rights

*Katarina Tomasevski**

1. Introduction

Over the last two decades, a number of bilateral and multilateral donors have adopted rights-based approaches to development. The relative recentness of this process requires a sharing of knowledge and experience across professional and disciplinary boundaries. This paper focuses on the pillar of human rights work, exposing and opposing violations of economic and social rights. Its purpose is to summarise key lessons of human rights litigation that can support anti-poverty policies, using an array of real-life cases from different corners of the world.

Enforcing human rights is benefited by the mobilising power of the human face and the human fate of victims, and conveys their courage in challenging abuses of power. Unlike anti-poverty strategies, which rely on statistics and which tend to be numbing rather than mobilising, exposing and opposing human rights violations portrays victims as individuals. This helps people understand the obstacles that poor people – especially women – face, and their experiences in challenging and eliminating these obstacles.

The most important feature of legal enforcement is the fact that authorities are already committed to the rights in question under the country's constitutions and laws. The rule of law requires no more of them, but also no less, than to translate their commitments into reality. And yet, these authorities often have to be forced to comply. Otherwise, there is room left for the law to be transgressed with impunity, something which happens often when the victims of violations are poor.

This feature of legal enforcement forms a conceptual bridge to anti-poverty strategies, in that the poor are victimised by violations much more than the rich. Sharing experiences becomes easier because the underlying logic is similar. Making the law work for the poor often necessitates international action to facilitate change. Universality of human rights legitimises and supports such action. Legitimacy derives from minimum human rights standards laid down by the states themselves. Because the key precepts are intended for global application, they have been field-tested in different corners of the world, creating a wealth of experience.

2. The rule of law

The insistence on the rule of law in human rights stems from the fact that governance is the exercise of power and human rights are safeguards against the abuse of power. Two consequences flow from the grounding of human rights in the rule of law.

First, the postulate of equal rights aims to provide those who are disempowered with a legal entitlement. Thus, children have stronger entitlements than adults. For example, human rights obligations regarding street children reach beyond preventing abuses of physical power by the police, exemplified by 'social cleansing', to include 'access to conditions that guarantee [the children's] dignified existence'.[1] That children cannot develop unless they are nourished, housed, clothed, and educated is self-evident. Indeed, the establishment of the rights of the child has been one of the major global successes in the field of human rights, with the convention spelling them out accepted by 192 countries. Parents have the primary responsibility for their children, but children should not be left to die if their parents are abusive or if they are parentless. Children acquire political rights with adulthood; in most countries, they are legally deprived of the right to claim and defend their own rights. A case in Nepal illustrates this: child labourers were precluded by law from forming a trade union to vindicate their labour rights, because they were children. Owing to the armed conflict and the consequent paralysis of public authorities, this case has not as yet been adjudicated. An older case in Tanzania tackled women's status as perpetual children, minors in law, and modified discriminatory customary law so as to affirm that women had the right to acquire and sell land.[2]

The second consequence of the rule of law is that only those rights bestowed upon people by law can be legally enforced. Legally recognised economic and social rights are few. Comparative analyses of country constitutions show that the most recognised right is the right to education, followed by the right to health; the right to housing is included in the constitutions of half of the countries in the world. The right to work forms part of the heritage of Soviet-inspired constitutions and is not recognised by the European Union. This is also the practice of the International Labour Organization, whose Declaration on Fundamental Principles and Rights at Work affirms freedom of association, freedom from forced and child labour, and freedom from discrimination. The Constitutional Court of Benin has confirmed that the right to work 'cannot be due from the State'.[3] However, trade union freedoms form part of global minimum guarantees and are legally enforced nationally and internationally. As early as 1985, the ILO rejected laws demanding that at least 60% of members of a trade union should

be literate, so as to enable agricultural workers to defend their economic and social rights.[4]

Many more economic and social rights, such as the right to development or the right to lifelong learning, have been advocated through human rights activism in the past four decades. Labelling a phenomenon a human rights violation is as popular a mobilisation tool as is the inclusion of the rhetoric of rights in demands for additional entitlements. However, many violations of economic and social rights do not revolve around state-provided benefits. An illustrative violation is the prevention of people with disabilities from earning their own livelihood. The Constitutional Court of Senegal invalidated in 2000 an automatic exclusion of all physically disabled people from teaching.[5]

3. Judicial action against distorted governmental priorities

Colombia's rich constitutional jurisprudence in safeguarding economic and social rights offers fascinating cases. Alongside violations of individual rights, the Court diagnoses situations of unconstitutionality, where governmental policies and budgetary allocations impede the realisation of guaranteed rights.

The Court ruled in February 2004 that formal constitutional guarantees related to economic and social rights of the internally displaced had not been translated into governmental policies and supported by appropriate budgetary allocations. The plight of the internally displaced, after four decades of armed conflict and political violence, was known to all. Nevertheless, they were marginalised rather than prioritised. The Constitutional Court, in the words of Manuel José Cepeda, who delivered the judgment, faulted the government for its denial of the constitutionally guaranteed rights of the displaced. As a consequence, an unknown but large number of the displaced, probably over a million, were neither registered nor informed of their rights. Only a minority were provided with humanitarian assistance or housing, while budgetary allocations were diminished rather than increased with time. Having defined this situation as unconstitutional, the Court has elaborated the list of basic rights of the displaced and laid down a timeframe for the government's compliance with its human rights obligations.[6] The government was ordered to develop a time-bound plan within 54 days, and to allocate resources and secure the basic rights of the internally displaced under the continued supervision of the Court. This paradigmatic case has highlighted the core purpose of enforcement: halting and reversing governmental practice of denial of basic rights to a large, dispersed, impoverished and politically voiceless population.

This case illustrates two important considerations. First, unlike releasing an arbitrarily detained person, securing the right to education or health requires extensive and efficient institutional infrastructure which cannot be created overnight. Secondly, the task of the Court is to enforce the constitutional obligations of the government. These include policy design and implementation, which remain the government's prerogative as long as the constitutionally mandated minimum standards are met.

4. How to tackle development harmful to human rights?

Protection against harmful development interventions has generated a great deal of human rights jurisprudence. A retrospective assessment of the exploitation of natural resources in Nigeria has found violations of human rights through 'the destructive and selfish role played by oil development, closely tied with the repressive tactics of the Nigerian government, and the lack of material benefits accruing to the local population'.[7]

Impoverishment resulting from forced displacement or a poisonous industry has been a particularly frequent cause of challenges to violations of economic and social rights. It is never easy to balance legitimate but conflicting priorities. The closure of a polluting tannery brings 'unemployment and loss of revenue' but environmental protection may have 'greater importance to the people', as the Supreme Court of India ruled in 1987.[8]

A particularly helpful innovation has been the establishment of global minimum standards, such as those of the World Bank Inspection Panel, because they are tailored to development and allow challenging decisions made on a supra-national level. Sometimes, the very filing of a case, and the expected publicity surrounding it, leads to the rectification of prospective harm to economic and social rights. For example, a request was filed in 1999 by CELS (Centro de Estudios Legales Y Sociales) in Argentina because budgetary reductions were threatening to annihilate a programme assisting the poorest to grow their own food. This resulted in an immediate change: the budget for the programme was doubled (Argentina: Special Structural Adjustment Loan 4405-AR).

Economic and social rights may be worded as individual entitlements or as corresponding governmental obligations. The Supreme Court of India has made huge strides throughout the past decades in specifying how constitutionally defined governmental obligations should be enforced. In May 1986, Chief Justice Bhagwati pointed out that the law had 'a social purpose and an economic mission'. At the time, a judicial definition of freedom from hunger required identifying governmental human rights obligations to prevent starvation deaths during a famine. This was not an aspect of charity or state benevolence, the Court explained, but a constitutional obligation to 'mitigate hunger, poverty, starvation deaths'. The state had to

undertake adequate measures but could accomplish no more than mitigation.[9] To clarify governmental responsibility in the elimination of child labour, the Court has also acknowledged that this cannot be achieved without tackling underlying poverty. In terms of hazardous child labour, the Court suggested alternatives: ensuring work for an adult family member in lieu of the child, or a stipend to the family in order to enable the child to attend school.[10] Rectifying divergent policies of consecutive governments, however, has proved to be a long-term process, requiring patience and persistence. The Supreme Court ruled on education in 1993, stating that education was a fundamental right, albeit not absolute, as it was 'subject to limits of economic capacity and development of the state'. It posited that 'every child/citizen of this country has a right to free education until he completes the age of fourteen years'.[11] However, it took until 2002 to constitutionalise this right, and the implementing legislation to ensure it for all school-age children is still being drafted.

5. How can women escape poverty if they are precluded from owning anything?

Often, the reason that women are poorer than men amongst the rural poor is the existence of a denial of their rights to inherit and own land. More often than not, it is customary law that denies daughters or wives land rights, and the courts in individual countries may uphold such discriminatory exclusions. Indeed, the Supreme Court of Zimbabwe did exactly that. It stated that 'a lady' could not inherit her father's estate 'when there is a man'.[12]

This case highlighted the importance of the universality of human rights. International human rights law operates vertically and horizontally. Vertically, human rights law defines the protection of the people *from* their government and *by* their government. Horizontally, it provides a solid legal basis for donors to demand that other states comply with human rights obligations *vis-à-vis* their population. Most importantly, international human rights law has taken away from individual governments the role of arbiter. Since non-discrimination is the key human rights principle, women should not remain 'rights-less'. Indeed, the Protocol to the CEDAW Convention (Convention on the Elimination of All Forms of Discrimination against Women) has instituted access to two types of international remedy. One bestows upon victims the right to pursue their case internationally when violations of their rights were not remedied domestically; another enables inquiries into grave and systematic violations of women's rights with a broad-based right of initiative. The CEDAW Convention explicitly lists women's economic and social rights; the Protocol came into force rapidly for more than 70 countries and is open to others. This has added a gender-specific component to international complaints procedures. Together, these procedures bestow upon individuals the right to hold governments legally accountable for failure to implement human rights obligations, both domestically and internationally.

6. Coping with the last vestiges of the Cold War: subsidy instead of liberty

Self-assessments by the governments of Cuba or North Korea offer an image that all economic and social rights are guaranteed to all. This model continues the Cold War notion of 'rights' as government-provided, often imposed, services. However, there is no freedom to complain. Indeed, both governments are on the agenda of the United Nations Commission on Human Rights for violations.

Global ideological disputes during the Cold War legitimised this extreme as well as the other, epitomised by the US, which denied that economic and social rights were human rights. The United Nations imported guarantees of all-encompassing, fully subsidised public services into some of the older human rights instruments. However, human rights jurisprudence has clarified that education can be made compulsory only when freedom of choice is guaranteed, and that public health measures (such as vaccination) can be made obligatory only under strictly defined conditions.

7. The free or for-fee dilemma

Two post-Cold War changes have profoundly affected economic and social rights. One is the obliteration of the previous expectation that the state will provide all public services to everybody, free of charge. The other is the institutionalisation of legal duality of services, whereby these continue as recognised rights but are also traded, domestically and internationally. The combined effects of these two changes have generated more heat than light, owing to the fact that they are new and the practice of state has not yet settled. As was seen in Bolivia, in the aftermath of the shift from the supply of water as a free public service to a freely traded service, the absence of human rights safeguards can trigger a profound, painful and prolonged crisis. The background was privatisation of water supply, with major involvement of international agencies and multinational companies, which steeply increased prices (Secretary General, 2003: paras 36-7).

In economic and social rights, the corresponding obligation of governments is to enable people to provide for themselves and, exceptionally, to be providers of the last resort. Taxation is a duty, enforced in particular under the European Convention on Human Rights. The human rights discourse tends to be hostile towards the concept of individual duties, although these represent the logical consequence of rights. It is hard to imagine how any state would raise the revenue to finance health, education, water and sanitation, or assistance for those too young or too old to work, were it not for taxation. The European Court of Human Rights has legitimised 'the States' power to pass whatever fiscal laws they considered desirable' so as to

secure the payment of taxes, provided that judicial remedies exist lest taxation amounts to arbitrary confiscation.[13] This is a reminder that most services are paid for, whether through taxation or direct charges. However, the difference between taxation and direct charges is fundamental. The human rights jurisprudence regarding taxation has affirmed the principle of ability to contribute: those with insufficient income are not taxed. The imposition of charges for basic public services (such as vaccination of children or primary schooling) upon those who cannot pay them amounts, then, to regressive taxation. Legal challenges have been mounted in countries as different as the Czech Republic[14] and the Dominican Republic.[15] Their scarcity is the result of the absence of information on the rights that people should have, or the absence of the rule of law, which invalidates formally proclaimed constitutional rights.

8. Translating law into practice: the realm of the possible

Law is symmetrical. No government can be legally obliged to do the impossible. The illogic of burdening any actor with obligations it cannot perform would collapse the rule of law. Accordingly, universal human rights are few and the corresponding governmental obligations are set at a minimum feasible in all corners of the world. Governmental obligations corresponding to economic and social rights are defined in terms of progressive realisation. Although the European Court of Justice can state that 'the right to paid leave is a social right conferred on all workers by Community law',[16] paid leave is a distant dream for many workers in many developing countries. Even more important than the list of enforceable substantive rights is the notion of progressive realisation, which mandates improvement. However, economic circumstances change and curtailing acquired social rights may become necessary. In a case concerning old-age pensions of previous public employees, the Inter-American Court of Human Rights ruled that the rights of a privileged minority had to be balanced against the misery of the majority, who did not enjoy any pension rights.[17]

In education, the universal minimum is defined as primary schooling. When a government is unable to ensure all-encompassing free and compulsory primary education, it should develop a strategy for doing so and seek international assistance. Pre-school education is not defined as a right in most countries. Post-primary education is subject to progressive realisation and guarantees vary. Education which is legally defined as compulsory should be free; laws vary regarding university education. Indeed, in most countries the latter is not free, although jurisprudence in Argentina and Venezuela has confirmed that it should be.

In health, the right itself is defined in relative terms, as the highest attainable standard of health. Judicial interpretations of the right to health have focused on public health, such as vaccination or prevention of epidemics. Entitlements to health services vary enormously. The huge difference between wealthy and poor countries has been reflected in the judicial protection against expulsion of an AIDS patient from the United Kingdom to St Kitts, on the grounds that he would not have had an effective entitlement to health services in the latter.[18]

With regard to housing, a frequent misconception is that having the right to housing means obtaining free housing at the government's expense. The Constitutional Court of South Africa has clarified that the government should realise the right to housing progressively, through a 'reasonable provision within its available resources'. This necessitates strengthening 'the capacity of institutions responsible for implementing the programme'. However, excluding from the programme those 'with no access to land, no roof over their heads, and who are living in intolerable conditions' cannot qualify as reasonable.[19]

By definition, progressive realisation has to do with differences in the stage of development and, especially, financial constraints. As put by Mark Malloch Brown, 'you cannot legislate good health and jobs. You need an economy strong enough to provide them' (UNDP, 2000: iii). Nonetheless, the government can ensure that resources that can be invested in health or education do not disappear through corruption. Paradoxically, the government itself can be the principal culprit. It took a change of government in Zambia for the parliament to remove in 2002 the immunity of former President Chiluba, so as to start proceedings for corruption. Lesotho made the headlines that same year with the first convictions in a major bribery scandal concerning the Highlands Water Project.

9. Focus on poverty caused by discrimination

Commentaries of the jurisprudence of South Africa's Constitutional Court regarding economic and social rights have often depicted these as 'rights of the poor.' There and elsewhere, previous human rights litigation was seen to vindicate individual liberties while ignoring the plight of the poor. The racial and gender profile of poverty facilitated human rights litigation by demonstrating that discrimination – rather than poverty – was at issue. Those who could not – still cannot – afford to finance their own housing, education or health services tended to be both black and female. Both domestically and internationally, legal enforcement of economic and social rights has been particularly successful in exposing and opposing discrimination on the grounds of gender, race, and indigenous or minority status. This results from the human rights principle of equality. The primary characteristic of human rights is that no particular feature attaching to any individual can affect his or her entitlement to human rights. Although social and economic rights should be realised progressively, it is settled jurisprudence that non-discrimination applies fully and immediately.

Much of the jurisprudence related to women's rights is recent. Denials of property rights to women were overturned by the Supreme Court of Vanuatu in 1994,[20] as was a company policy as late as 1997 in the Philippines not to employ married women.[21] Women's legal situations can be much worse where they are treated as property of their husband. In Cameroon in 1998, the Supreme Court dismissed as contrary to the CEDAW Convention a husband's demand for a judicial order to force his levirate wife to return to him on the grounds that she was part of his late brother's property.[22]

As early as 1977, the Inter-American Commission on Human Rights ruled that indigenous health rights could be violated through inappropriate development policies.[23] Gross abuses, such as massacres of indigenous communities in the exploitation of gold or timber, generated jurisprudence specifying governmental obligations.[24] Protection of indigenous land rights as an economic and environmental base has entailed adjudication of collective complaints mounted by indigenous communities to vindicate their 'communal ownership of the collective property of land'.[25] Indigenous land rights have been constitutionalised in countries such as Brazil and the Philippines, followed by complex delimitation, demarcation and formalisation of land titles.

One of the most controversial issues in discrimination is the differentiation between citizens and non-citizens concerning economic and social rights, a bone of contention in countries as different as Latvia and Côte d'Ivoire. The International Covenant on Economic, Social and Cultural Rights has explicitly affirmed that developing countries may determine the extent of guarantees to non-citizens. Developed countries do this also, prompting numerous legal challenges with, as yet, unsettled jurisprudence.

10. Judicial activism and judicial restraint

Human rights guarantees act as correctives for budgetary allocations. This is explicitly anticipated in mandating the deployment of 'the maximum available resources' for progressive realisation of economic and social rights. The International Covenant on Economic, Social and Cultural Rights obliges in Article 2 each party to take steps 'to the maximum of its available resources', both domestically and also 'through international assistance and cooperation'. The Convention on the Rights of the Child stipulates in Article 4: 'With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.' This formulation indicates why legal enforcement is crucial. It would be impossible to define in the abstract those resources that might be 'available' for investment in economic and social rights or to specify what 'the maximum' might be. Moreover, the boundaries of the judiciary are defined by the remits of the legislature and the executive. Judges do not have constituencies whose interests they should articulate and defend. Furthermore, they are lawyers. No constitution in the world has empowered (or is likely to) the judiciary to design and adopt the government's budget. However, the judiciary *can* furnish safeguards against misappropriation of the budget, as was shown in the early, precedent-setting case against the Estate of Ferdinand E. Marcos, which succeeded in returning some of the misappropriated funds to the Philippines.[26]

Accountability necessitates explicit standards against which a government's performance is measured, and procedures to ensure that these standards are met. In assessing whether a government has complied with its obligation to invest the available resources to their maximum for the progressive realisation of human rights, constitutional courts have advanced the common, global understanding of economic and social rights and the corresponding governmental obligations. Three important clarifications stem from this jurisprudence.

First, human rights obligations do not necessarily prevail over other obligations of the state. This has been affirmed in the Philippines, in a unique case of weighting repayment of foreign debt against the constitutional priority for education. A group of senators challenged in 1991 the constitutionality of the budgetary allocation of P86 billion for debt servicing as compared with P27 billion for education. The Constitution of the Philippines obliges the government to assign the highest budgetary priority to education. The issue to be decided was whether debt servicing, at more than three times the budgetary allocation for education, was unconstitutional. The Court found that education should obtain the largest allocation as the Constitution required, but that debt servicing was necessary for the creditworthiness of the country and, thus, the survival of its economy.[27] This highlights the need to integrate human rights in the policies and practices of creditors and donors.

Secondly, the courts are not empowered nor are lawyers equipped to address inherently political decisions, such as budgetary priorities, or areas such as health or education where the executive has the professional expertise lacking to the courts. The Constitutional Court of South Africa has defined the boundaries that the judiciary should not cross. In the area of health, it has emphasised that 'a holistic approach to the larger needs of society' may often prevail over an individual right to health services.[28] Moreover, it has added that 'in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum standards should be nor for deciding how public revenues should most effectively be spent'.[29]

Thirdly, the courts are required to uphold the rule of law. This includes holding the executive accountable for keeping within the law and, for constitutional courts, also verifying whether the legislation is in conformity with the constitution.

The practice of the Constitutional Court of Hungary, for example, has confirmed that the Court should protect social rights against austerity measures justified by economic crises. In a widely publicised case, the Court invalidated in 1995 large parts of the austerity package negotiated with the IMF.[30] It ruled that respecting parliamentary powers to determine how social rights should be actualised did not preclude the Court from ensuring that no violation occurred. The Court has acknowledged that living standards can decrease in response to worsening economic conditions, but also that measures which dramatically and immediately reduce almost all social entitlements are impermissible. The means that, although the government ensures that minimum standards guaranteed by the Constitution are beyond the Court's remit, those affected ought to be provided with time and opportunity to seek alternatives.

11. Pro-poor law to strengthen pro-poor development strategies

The focus on governmental human rights obligations is particularly well suited to poverty reduction, because poverty does not conveniently slice itself into portions pertaining to health, housing, education or food. The Committee on Economic, Social and Cultural Rights (CESCR) has called for a strengthening of the capacity of the judiciary 'to protect the rights of the most vulnerable and disadvantaged groups in society' (CESCR, 1998). An important reason behind the fact that the supply of this type of human rights litigation does not match the range of problems is that human rights litigation remains dangerous. The consistently high casualty rate among human rights lawyers has led to special regional and global procedures for protecting human rights defenders.

Because legal proceedings are routinely lengthy and undertaken only by trained lawyers, ombudsman-type institutions have proved a useful complement. In its first annual report, the Uganda Human Rights Commission (1997: 13) put it thus: 'Most complainants are simply vulnerable people, who say that court procedures are too complicated for them and that they do not have the money to engage private lawyers to pursue their cases'.

In most developing countries, much of the work of national human rights commissions is taken up by economic and social rights. For example, 44.5% of the caseload of Indonesia's Human Rights Commission (2001: 69) was in 2001 classified as 'violations of the right to welfare'. Such institutions tend to provide open access to all potential complainants, a cost-free procedure, and flexibility in methods of work. However, they do not have powers to interpret law and, thus, complement rather than supplant the judiciary.

The judiciary interprets formal, and necessarily abstract, human rights guarantees in specific circumstances. Courts do not act on their own motion but follow complaints of human rights violations or requests for judicial review where a claim has been made that harm to human rights is imminent or inevitable. The interplay between abstract legal norms and factual circumstances enables precise definitions of rights and violations. The government is a party to the case, and can present all factual and legal arguments, and explain and justify its policy decisions or strategic choices. The courts have to provide reasons for their decisions which are, increasingly, reviewed internationally.

Human rights law has affirmed that each individual is the subject of rights and, consequently, has provided a broad basis for claiming and vindicating them. Because no right can exist without remedy, the evolution of human rights law has been accompanied by the establishment of domestic institutions to provide remedies for violations. The experiences of these institutions provide inspiration for replication or adaptation of innovative models for enforcing the rights of the poor and, thus, strengthening anti-poverty policies.

Endnotes

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