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Freedom from Poverty as a Human Right

Volume 2

Theory and Politics

Edited by Thomas Pogge

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Freedom from Poverty as a Human Right
Theory and Politics

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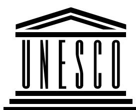

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Foreword

The present publication is a selection of papers commissioned as part of a UNESCO project on poverty and human rights launched in 2002.* The project focuses on conceptual analyses of poverty understood as a human rights issue.

The first phase of the project aimed to understand poverty and clarify its relationship to human rights and corresponding duties from the perspective of a philosophical analysis. Scholars within and beyond the philosophical community were invited to analyse the key concepts pertaining to poverty and human rights. One of the main challenges here was – and remains – to investigate how UNESCO could stimulate the commitment of the world community by addressing the moral obligation to take action to eradicate poverty and to contribute to the full realization of the fundamental basic rights of all peoples without discrimination.

In this context, UNESCO has published the collection *Freedom from Poverty as a Human Right*, composed of four volumes, each addressing the issue within a particular scope. A philosophical approach was developed in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, edited by Thomas Pogge; a legal approach was taken in *Freedom from Poverty as a Human Right: Law's Duty to the Poor*, edited by Geraldine Van Bueren; a political science perspective was elaborated in *Freedom from Poverty as a Human Right: Theory and Politics*, edited by Thomas Pogge; and the economics point of view was developed in *Freedom from Poverty as a Human Right: Economic Perspectives*, edited by Arjun Sengupta, Stephen Marks and Bård Andreassen.

The present volume, reflecting contributions from renowned political theorists of different schools, is an appropriate and refreshing collection of ideas and proposals that analyse current conceptual trends regarding poverty and its elimination. It encompasses crucial notions such as conditionality, debt relief, and human rights as a current political practice. It also envisages how the right not to be poor could be included within a wider right to equality, and how violations of cultural rights are related to violations of individual rights. The volume before you addresses concepts such as the need for a global theory of justice; ethics of distribution; the necessary definition of priorities among the activities to be undertaken to eradicate poverty; the call for a questioning of our social, political and economic structures, institutions and policies; and the role of courts and constitutions in the enforcement of economic and social rights. It examines these issues in the light of case studies drawn from countries that include India, South Africa, China and Brazil.

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* Project originally entitled: 'Ethical and Human Rights Dimensions of Poverty: Towards a New Paradigm in the Fight against Poverty'.

One of the main virtues of this volume is that it is not purely conceptual or analytical, but also deals with putting theories of justice and human rights into practice and translating them into concrete actions. The authors of this volume call for a democratic reconfiguration of global governance and a measured spreading of sovereignty. Thus, while paying true attention to a justice-based human rights paradigm as the normative foundation for international relations, they also take into account the modus vivendi in the world. The opening part of the book focuses on the conceptual foundations of human rights and offers a theoretical basis for the general topic. It also presents good examples of applied political philosophy, providing an interesting mix of theory and practice.

To be effective, the right not to be poor must become a part of a moral consensus within society, which means that rights have to become inherent to our societies and that we accept that responsibility concerns us all. One of the crucial questions here concerns the source of the moral judgment regarding poverty, particularly global poverty, and how to deal with the latter worldwide: what kind of actions should be pursued? By whom? Which actors should be involved and how? To what level of responsibility? Are aid and debt parts of these actions? Should one go beyond them?

We also have to look deeply at the reshaping of many legal systems around the developing world, in particular under the social pressure of civil society actors. The role and actions of the latter must also be studied and evaluated since it is fundamental to know how and to what extent they help to foster the efficiency of the legal structures in favour of the poorest, bringing them 'into the light' and allowing them to be treated and to live as citizens rather than as 'stigmatized' persons.

Constitutional rights are of utmost importance, but struggling with efficacy against poverty also means planning in order to schedule and implement reforms. Here it is a matter of changing mentalities and behaviours. Democracy can never be understood as an everlasting good, nor taken for granted. One has always to fight to keep it alive and efficient for each and every citizen, regardless of colour, belief or economic status. Given that each citizen is above all a human being, he or she has to be treated and considered as such by all institutional, state, judicial and economic structures.

Global justice is precisely an issue in political philosophy that stems from the fact that the world is not a fair one for all. Billions of people are extremely poor, while a few are tremendously rich; the former often lack the protection of the law, while the latter are sometimes above the law. Many people still live under hard regimes. Many are exposed to extreme violence, disease and starvation. Many die prematurely. How should we understand and respond to these facts? What do the inhabitants of the world owe one another? What institutions and what ethical standards should we recognize and apply worldwide? What could be the foundations for a sustainable respect of socioeconomic rights? Who should be accountable for it?

Three related questions, concerning the extent of justice, justice in the distribution of wealth, and the institutions accountable for justice, are central to the discussion on global justice.

The present volume reveals an interesting debate: realists argue that there are no global ethical standards. In their views, states are the main actors, and should always try to act rationally in their own interests. Particularists claim that ethical standards arise out of shared meanings and practices. Each society has its own, different, standards, and only those within it are bound by those standards and can properly criticize them if needed. Nationalists argue that distributive justice is an issue within nations but not necessarily between them. In the society of states tradition, states are seen as individual entities that can mutually agree on common interests, including moral rules, in much the same way as human individuals can.

Cosmopolitans argue that some form of moral universalism is true, and therefore that all human individuals, and not merely compatriots or fellow citizens, fall within the scope of justice. Cosmopolitans differ, however, over which shared human characteristics are morally significant. Consequentialist cosmopolitans argue that the proper standard of moral judgement for actions, practices or institutions is their consequences, and that the measure of consequences is the welfare of humans. This means that the fact that some people suffer terrible deprivations of welfare, caused by poverty, creates a moral demand for anyone who is able to help them to do so. Neither the physical distance between the rich and the poor, nor the fact that they are typically citizens of different countries, has any moral relevance.

All cosmopolitans believe that individuals, and not states, nations, or other groups, are the ultimate focus of universal moral standards. Cosmopolitans also believe that the contemporary world fails spectacularly to live up to such standards, and that doing so would require considerable changes in the actions of wealthy individuals and states. It might, for instance, require them to transfer most of their wealth to the poor. It might require the building of international institutions able to limit, or even replace, the self-interested action of powerful states and corporations. It might require each of us to do much more than most currently do.

In the midst of these debates, one must never forget that the prominent characteristic of our time is the continuation and deepening of poverty. We care about the victims of wars and natural disasters, but there is no rational foundation to our acceptance of the contradiction between the equality proclaimed in human rights treaties and growing inequality.

It would seem, nevertheless, that the standards are evolving. The international community has set, as a priority for the millennium, the Millennium Development Goals (MDGs), the first of which is to 'eradicate extreme poverty and hunger'. The quantitative target, by which success in poverty eradication will be measured, is to reduce by half, by 2015, the proportion of people living in extreme poverty.

But this approach does not exhaust the issue. For one thing, the intended target will not easily be reached. And even if it were successfully achieved, the basic question would still remain untouched: can persistent poverty be tolerated at all?

The problem has to be tackled from another angle. As long as we consider poverty as a quantitative, natural deficit to be made up, the political will to reduce it will not be energized. Poverty will only cease when it is recognized as a violation of human rights and, as such, abolished.

Of the five families of human rights – civil, political, cultural, economic and social – proclaimed by the Universal Declaration of Human Rights, poverty violates the fifth, always; the fourth, generally; often the third; sometimes the second; and even the first. As was recognized at the World Conference on Human Rights held in Vienna in 1993, there is an organic link between poverty and the violation of human rights.

Because when we talk about poverty we talk about lack of access, lack of resources, deprivation of capabilities and lack of power for some, in societies where others do have access, resources, capabilities and power. We are therefore talking about inequalities. Inequality is a human rights issue.

When we talk about poverty, we do not talk about groups or classes in society. We talk about masses, about figures, about people who are voiceless and hence invisible, in other words people who are denied their individual dignity. Now the preamble of the Universal Declaration of Human Rights starts by recognizing that dignity is inherent to all members of the human family. When you take that away you exclude those people from the human family; here again we are talking about human rights.

The preamble further states that the highest aspiration of humankind is the attainment of a world free from terror and misery. That aspiration is blatantly defiled by the persistence of poverty. Here again we are talking of human rights.

The issue for me therefore is not poverty. The issue is human rights – all human rights, political and social. It is about achieving universality in the regime of implementation so that no one is excluded (Art. 7 of the Universal Declaration of Human Rights). It is about monitoring and combating violations so that everyone can obtain protection and redress under a regime of law (Art. 8). It is about exercising reason and conscience and acting towards one another in a spirit of brotherhood (Art. 1). It is about creating a social and international order that makes possible the enjoyment of all the rights contained in the Declaration (Art. 28). It is about effective implementation of Art. 30, which stipulates that nothing in the Declaration can be interpreted as giving a right to anyone to take an action aimed at the destruction of the rights and freedoms contained in the Declaration. Such violations must be abolished; poverty therefore must stop. The claim sounds naïve, and may even bring a smile to many lips.

Condescension would be misguided, however, as well as inappropriate. There is nothing to smile at in distress, misery, dereliction and death, which march in grim parade with poverty. We should, indeed, be ashamed. But the issue is also substantive: the abolition of poverty is the only fulcrum that offers the leverage to defeat poverty.

Leverage, in this case, comes from investments, national and international reforms, and policies to remedy the deficiencies of all kinds that are the backdrop to poverty. Fortunately, humanity now has the means to answer the challenge: never have we been so rich, so technically competent and so well informed. But in the absence of a fulcrum these forces cannot act as effectively as they might, and without this fulcrum political will cannot be galvanized to organize redistribution on a global scale.

If, however, poverty were declared to be abolished, as it should with regard to its status as a massive, systematic and continuous violation of human rights, its persistence would no longer be a regrettable feature of the nature of things. It would become a denial of justice. The burden of proof would shift. The poor, once they have been recognized as the injured party, would acquire a right to reparation for which governments, the international community and, ultimately, each citizen would be jointly liable. A strong interest would thus be established in eliminating, as a matter of urgency, the grounds of liability, which might be expected to unleash much stronger forces than those that compassion, charity, or even concern for one's own security, are likely to mobilize for the benefit of others.

The violations of human rights here are the policies, legislations and actions (or lack thereof) that constitute breaches of the state's obligations encapsulated in the international human rights treaties it has ratified. I am speaking here of any policy, legislation or public action (national or international) that plunges whole categories of people into situations of poverty, maintains them in that state or prevents them from overcoming that condition.

By endowing the poor with the rights they are entitled to, the abolition of poverty would obviously not cause poverty to disappear overnight. It would, however, create the conditions for the cause of poverty to be enshrined as the highest of priorities and as the common interest of all – not just as a secondary concern for the enlightened or merely charitable. No more than the abolition of slavery caused the crime to vanish or the abolition of political apartheid ended racism and discrimination, no more than the abolition of domestic violence or genocide have eliminated such violations of the human conscience, will the legal abolition of poverty make poverty disappear. But it will place poverty in the conscience of humankind at the same level as those past injustices, the present survival of which challenges, shocks, and calls us to action.

The principle of justice thus implemented and the force of law mobilized in its service are of enormous power. This, after all, is how slavery, colonialism and apartheid were ended. But while there has been an active struggle against colonialism and apartheid, poverty dehumanizes half the planet to a chorus of utter indifference. It is, undoubtedly, the most acute moral question of the new century to understand how such massive and systematic violations, day in, day out, do not trouble the conscience of the good people who look down upon them. While equality of rights is proclaimed, growing inequalities in the distribution of goods persist and are entrenched by unjust economic and social policies at national and global levels.

To deal with poverty as a violation of human rights means going beyond the idea of international justice – which is concerned with relations between states and nations – towards the creation of global justice and global development, which applies to relations between human beings living in a global society and enjoying absolute and inalienable rights – such as the right to life – that are guaranteed by the international community. Such rights do not belong to the citizens of states but, universally, to human beings as such, for whom they are the necessary condition of life on the planet. The principle of global justice thus establishes the conditions

for a fairer distribution of the planet's resources between its inhabitants in the light of certain absolute rights, thus making global development possible.

What we must note is that today nearly 3 billion people receive only about 1.2 per cent of world income, while 1 billion people in the rich countries receive 80 per cent. An annual income transfer of 1 per cent from one group to the other would suffice to eliminate extreme poverty. Yet in fact, the transfer continues to operate in the opposite direction, despite efforts towards debt reduction and development aid.

At the end of the day, there is a simple choice. Not between a 'pragmatic' approach, based on aid granted by the rich to the poor, and the alternative sketched here. The real choice is between the abolition of poverty and the only other way for the poor to obtain rights, which is for them to take them by force. Needless to say, the latter solution usually causes misery for all: social strife, rampant crime, fundamentalism, mass uncontrolled migration, smuggling and trafficking are the only things to flourish. But what moral basis do we have to demand moral behaviour from people to whom we deny any opportunity to live a healthy life? What rights have we to demand that they respect our rights? The sombre option will become increasingly probable if nothing is done – or too little, as tends to be the case with pragmatism, however deserving.

And what are the *threats* of this sombre perspective? We are all familiar with them: security states established to control migrations and migrants, with those controls eventually extended to citizens; security laws to confront 'terrorists' that eventually curtail the freedoms of all; mounting xenophobia, political alignment with blood, race and religion, which eventually undermine democracy; and 'preventive' wars to grab and control natural resources, leading to chaos, lawlessness and insecurity for all. Such a global world is obviously undesirable for the majority of the world population.

The options thus come down to a single choice, which is the only one compatible with the categorical imperative to respect human rights: to abolish poverty in order to eradicate it and to draw from this principle all the consequences that free acceptance of it implies. The proclaimed abolition must, first, create rights and obligations, and thereby mobilize the true forces that can correct the state of a world plagued by poverty and injustice. By simply setting an effective and binding priority, abolition changes the ground rules and contributes to the creation of a new world. Such is the price to pay to give globalization a human face; such is also the greatest opportunity for global development that we can hope to grasp.

Ultimately, the way is to mobilize public opinion and the global citizenry for a universal human rights regime that is within our reach. Its emergence has been lengthy – very lengthy. From the Universal Declaration of Human Rights to the Rome Conference that established the International Criminal Court, the emergence of universal justice has been defiled by acts of barbarity that have grossly infringed human dignity. Now, however, the legal instruments are there, and, step by step, experiments and initiatives give hope. It remains to energize political will through unceasing mobilization, true thinking, the contributions of experts and support for the victims.

What promises does such global justice bear? Let me quote Nobel Laureate Jose Saramago: 'Were such justice to exist, there would no longer be a single human being dying of hunger or of diseases that are curable for some but not for others. Were such justice to exist, life would no longer be, for half of humanity, the dreadful sentence it has hitherto been. And for such justice, we already have a practical code that has been laid down sixty years ago in the Universal Declaration of Human Rights, a declaration that might profitably replace, as far as rightness of principles and clarity of objectives are concerned, the manifestos of all the political parties of the world.'

Indeed, all too often we care only for victims of our own creed, of our own political persuasion. All too often we tend to explain away violations visited on the other side. The challenge for the Human Rights movement at this historical juncture and as we celebrate the sixtieth anniversary of the Universal Declaration of Human Rights, is clearly to stand up against the dehumanization of the other.

From its side, UNESCO does not want merely to inject a human rights approach into poverty eradication strategies, but, conversely, to bring poverty into the realm of human rights. The advantage of defining poverty as a human rights issue means that the response to such questions is political will and the mobilization of public opinion to galvanize it.

Another relevant aim for UNESCO is to make sure that the poor are really seen as victims, and not as ignorant people who do not know their rights, and who would, above all have, to be educated. In this case, the response to poverty is education. But the poor lack capacity, so empowerment is a paramount answer. They know perfectly well that when police officers are beating them, their rights are being violated. They know that they should not be in prison without unbiased judgment. People know intuitively when their rights are being violated.

In this regard, it suffices to read the reports of the World Bank,** where we can see clearly that the poor themselves have identified the reasons for the continuous state of inequality: lack of participation, their treatment by the police, etc. The issue is not so much one of telling them about their rights.

Another goal is to identify the perpetrators. If we say that a right has been violated, that there is a victim, then there is somebody who has violated that right. And there we need to go beyond governments and try to identify those individuals who have taken the decision. 'Who took the decision in my country to introduce school fees in primary education that I cannot afford to pay?' Those who signed the decrees introducing school fees in primary education, and therefore excluded poor people from primary education, are perpetrators of a human rights violation.

Finally, we must succeed in unifying the different actors. UNESCO cannot work directly at the community level, but it has to work with governments, NGOs, and the academic community. UNESCO does not work in villages; NGOs are better placed to work there. These are the key stakeholders that can develop campaigns that will change the approach to poverty.

** Narayan, D. 2000. *Voices of the Poor*. Washington, DC, World Bank.

There is an imperative work of awareness-raising on the reality of poverty, which one often does not know as well as one thinks. It is necessary to think 'outside the box', e.g. to understand that although the persistence of poverty does depend on local factors, it is also linked to the history of inequality among nations (slavery, colonialism, forced work, apartheid, etc.). Poverty and inequality are correlated, and current injustices reflect past injustices. We have to remember that we have a moral responsibility and a legal obligation regarding poverty and the poor.

Several statements have been encouraging in this very endeavour. I would like to mention a recent Note by the United Nations Department of Economic and Social Affairs (UNDESA) on the International Day for the Eradication of Poverty and the sixtieth anniversary of the Universal Declaration of Human Rights, where it is explicitly mentioned that 'the international community has acknowledged that poverty is a violation of human rights and that promoting human rights can reduce poverty.'*** It is also worth recalling the Report of the Secretary-General of the United Nations on the Eradication of Poverty, in which it was said: 'The fact that poverty persists in many parts of the world points not only to an inequitable distribution of economic, social and political opportunities, but also to a violation of human rights.'****

Let us hope that these statements will be closely followed by concrete actions.

We must never fail to remember, as pointed out during the celebrations of the sixtieth anniversary of the Universal Declaration of Human Rights, that poverty is never just a matter of being deprived of food. It is much more than this and fully implies all human rights, as well as global ethical governance.

Pierre Sané

Assistant Director-General
for Social and Human Sciences, UNESCO

*** http://www.un.org/esa/socdev/social/intldays/IntlDay/2008intlday.html

**** Observance of the International Day for the Eradication of Poverty. Report of the Secretary-General, 5 September 2006 (A/61/308).

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List of Contributors

Christian Barry teaches in the Philosophy Program of the School of Humanities and is Research Fellow in the Center for Applied Philosophy and Public Ethics at the Australian National University. He holds a Ph.D. in Philosophy from Columbia University, where he was also a fellow at the Center for Law and Philosophy. Barry has served as a contributing author to three of the United Nations Development Programme's *Human Development Reports*, and was formerly editor of the journal *Ethics & International Affairs*. He has published widely on the topic of international economic justice, most recently a book on international trade (co-authored with Sanjay Reddy) entitled *International Trade and Labor Standards: A Proposal for Linkage* (Columbia University Press, 2008) and a book on sovereign debt (co-edited with Barry Herman and Lydia Tomitova) entitled *Dealing Fairly with Developing Country Debt* (Blackwell Publishing, 2007).

Charles R. Beitz is Edwards S. Sanford Professor of Politics at Princeton University, where he has taught since 2001. Previously he was Dean for Academic Affairs and Professor of Government at Bowdoin College and, before that, Professor of Political Science at Swarthmore College. He has held fellowships from the Guggenheim, MacArthur and Rockefeller Foundations, the American Council of Learned Societies and the American Council on Education. He has written articles in international political theory, democratic theory, and the theory of human rights, among other topics, and is the author of *Political Theory and International Relations* (revised edition 1999) and *Political Equality* (1989). He is currently finishing a book on the philosophy of human rights.

Daniel Brinks is Assistant Professor of Government at the University of Texas at Austin, where he teaches Comparative Politics and Public Law. His research on democracy and the role of the law and courts in supporting or extending rights has appeared in journals such as *Comparative Politics*, *Studies in Comparative International Development*, *Comparative Political Studies*, and the *Texas International Law Journal*. He has a Ph.D. in Political Science from the University of Notre Dame, and a J.D. from the University of Michigan Law School.

Neera Chandhoke teaches Political Theory and the History of Political Ideas at the University of Delhi, where she holds a professorship in the Department of Political Science. She is the author of *State and Civil Society: Explorations in Political Theory* (Delhi, Sage, 1995); *Beyond Secularism: The Rights of Religious Minorities* (Delhi, OUP, 1999), and *The Conceits of Civil Society* (Delhi, OUP, 2003). She has published widely in reputed journals on global civil society, social and economic rights, and representation. She is currently working on two manuscripts on the concept of secession, and on the state and globalization.

Jiwei Ci is Professor of Philosophy at the University of Hong Kong and the author of *Dialectic of the Chinese Revolution: From Utopianism to Hedonism* (Stanford University Press, 1994) and *The Two Faces of Justice* (Harvard University Press, 2006).

Paulette Dieterlen is Researcher at the Institute of Philosophical Investigations at the National Autonomous University of Mexico, where she also teaches Political Philosophy. One of her books, *Poverty. A Philosophical Approach*, has been translated into English by Rodopi (Amsterdam, 2005). She has published articles on liberalism, democracy, distributive justice and human rights. She is Counselor of the Mexican National Human Rights Commission.

Cécile Fabre is Professor of Political Theory at the University of Edinburgh. She is the author of *Government and the Decent Life* (2000) and *Whose Body is it Anyway?* (OUP, 2006), and has published articles on global distributive justice, rights, theories of property, and the ethics of killing. Her current research project focuses on the ethics of war from a cosmopolitan perspective.

Varun Gauri is a Senior Economist in the Development Research Group of the World Bank, where his current research focuses on politics and governance in the social sectors. He has published on a wide variety of topics, including the political economy of government responses to HIV and AIDS, the strategic choices of development NGOs, maternal and child health in Brazil, the use of vouchers for basic education, and immunization in developing countries. He is also the author of *School Choice in Chile: Two Decades of Educational Reform* (1998).

Sebastiano Maffettone is Professore Ordinario di Filosofia Politica (Full Professor in Political Philosophy) at LUISS University, Rome, and Director of the Centro di Ricerca e Studi sui Diritti Umani (CERSDU), Rome. He is also President of Humanity, a group that works on human rights and public policy, and former (first) President of the SIFP (Società Italiana di Filosofia Politica). He is Editor of the journal *Filosofia e questioni pubbliche*, and a member of the Ethical Committee of Capitalia. He has authored 12 books in the area of moral, political and social philosophy, including *Valori comuni* (Il Saggiatore), *Ermeneutica e scelta collettiva* (Guida), *Le ragioni degli altri* (Il Saggiatore), *I Fondamenti del Liberalismo* (Laterza, with Ronald Dworkin), *Il Valore della Vita* (Mondadori), *Etica Pubblica* (Il Saggiatore), and *La Pensabilità del Mondo* (Il Saggiatore, 2006). He has also translated *A Theory of Justice* into Italian.

Frank I. Michelman is Robert Walmsley University Professor, Harvard University, where he has taught since 1963. He is the author of *Brennan and Democracy* (1999), and has published widely in the fields of constitutional law and theory, property law and theory, local government law, and jurisprudence. Professor Michelman is a past President of the American Society for Political and Legal Philosophy, and a fellow of the American Academy of Arts and Sciences.

In 2005, he was awarded the American Philosophical Society's Phillips Prize in Jurisprudence. He is a member of the Board of Directors of the United States Association of Constitutional Law and of the National Advisory Board of the American Constitution Society. Over the past several years, he has maintained an active interest in matters of constitutionalism in South Africa.

Jennifer Rubenstein is Assistant Professor of Political Science at the University of Virginia. She received her Ph.D. in Political Science from the University of Chicago in 2005, and after that was a fellow in the Society of Fellows at Princeton University. Her articles have appeared in *Journal of Politics* and *Journal of Political Philosophy*. She is currently working on a book entitled *Just Samaritans? The Politics and Ethics of Humanitarian Office*.

Oscar Vilhena Vieira is Professor of Constitutional Law at Fundação Getúlio Vargas Law School in São Paulo, where he coordinates the Graduate Program on Law and Development. He is also Legal Director of Conectas Human Rights, an international human rights organization based in São Paulo. Vieira obtained his LLM at Columbia University Law School in New York, and his Ph.D. in Political Science at the University of São Paulo. He was appointed Sérgio Vieira de Mello Human Rights Fellow at St. Antony's College, Oxford, in 2007. His most recent books are *Direitos Fundamentais*, *Direito Global* and *Constitutição e sua Reserva de Justiça.*

Jeremy Waldron is University Professor, based in the School of Law at New York University. He formerly taught at Columbia University and Princeton, Berkeley, Edinburgh, and Oxford. Professor Waldron has delivered numerous lectures around the world, including the Carlyle Lectures at Oxford (1999), the Seeley Lectures at Cambridge (1994), the Wesson Lectures at Stanford (2005), and the Herbert Jacobson Lecture at the Hebrew University of Jerusalem (2005). He has written extensively on issues of social justice, including property, poverty and homelessness. He has also written about issues of rights jurisprudence and political philosophy in relation to national security (especially the use of torture), religious toleration, culture, indigeneity, and democracy. He has also written on the history of political philosophy (from Aristotle to Arendt, and particularly J. Locke and J. S. Mill). His recent books include *Law and Disagreement* (OUP, 1999) and *God, Locke, and Equality* (CUP, 2002).

Edward Wamala is Senior Lecturer and Head, Makerere University Philosophy Department. He has been a visiting scholar at the Catholic University of America, and at the University of Bergen, Norway. His areas of interest are philosophy of development, African philosophy and the philosophical foundations of human rights. He has co-edited a book on *Africa in World Affairs, Challenges to Humanities*. He is currently undertaking research on challenges in establishing the rule of law in sub-Saharan Africa, with special reference to Uganda.

John J. Williams (Ph.D. University of Illinois at Urbana-Champaign, USA) is a Professor of Governance and Development Planning in the School of Government, University of the Western Cape (UWC), South Africa. He is the Chair of the Research Committee of the Economic and Management Sciences and serves on several Senate Committees at UWC. Prior to joining the faculty at UWC he was a Principal Planner (Policy and Research) in the City of Cape Town for 14 years. His publications have appeared in journals such as *Cities*, *IDS Bulletin*, *Visual Anthropology, Development Southern Africa*, *Critical Arts, South African Labour Bulletin,* and *Ecquid Novi*. His current research interests include: social change, democratic governance, public policy analysis, community participation and development planning in local government.

List of Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress (South Africa)
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AU	African Union
BIMARU	Bihar, Madhya Pradesh, Rajasthan, Uttar Pradesh (India)
COSATU	Congress of South African Trade Unions
CSO	Civil society organization
ECOWAS	Economic Community of West African States
ES	Economic and social (rights)
EU	European Union
EZLN	Ejército Zapatista de Liberación Nacional (Zapatista National Liberation Army, Mexico)
FTAP	Fair and Transparent Arbitration Process
GDP	Gross domestic product
HIPC	Highly-indebted poor countries
HIV	Human Immunodeficiency Virus
HRP	Human right not to be subjected to severe poverty
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary Fund
IMSS	Instituto Mexicano del Seguro Social (Mexican Social Security Institute)
IPEA	Instituto de Pesquisa Econômica Aplicada (Institute for Applied Economic Research, Brazil)
ISSSTE	Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado (Social Security and Services Institute for State Workers, Mexico)
LRA	Lord's Resistance Army (Uganda)
MDG	Millennium Development Goals
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
NSS	National Sample Survey
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCC	Partido Comunista Colombiano (Colombian Communist Party)
PMA	Programme for the Modernization of Agriculture (Uganda)
PPP	Public-private partnership
STD	Sexually transmitted disease
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights

UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund
USA	United States of America
WTO	World Trade Organization

Chapter Summaries

Christian Barry's chapter examines whether policies that make the conferral to developing countries of benefits such as aid, debt relief, or additional trading opportunities conditional upon their taking adequate steps to reduce the poverty of their people can be justified. Focusing in particular on the issue of debt relief, he argues that while critics of 'conditionality' are correct in saying that there is a real danger that poorly designed and implemented policies of this kind may be seriously morally objectionable on consequentialist and non-consquentialist grounds, there is reason to believe that conditions on debt relief can be designed that would effectively guard against such danger and serve the interests of developing countries, and in particular of the less advantaged people within them.

Charles R. Beitz considers anti-poverty rights from the perspective of the agents who might be called upon to take action to ensure that these rights are satisfied. He considers two kinds of sceptical doubt that there are sufficiently good reasons for these agents to take the required actions. The first is conceptual: it holds that, for any authentic human right, it should be possible to allocate responsibilities to act such that, if these actions were carried out, the right would be satisfied for everyone in a position to claim it. The second is moral: it holds that the responsibilities that would have to be carried out in order for the right to be satisfied for all would be unreasonably demanding. He argues that the key to understanding why we should not be persuaded by these doubts lies in adopting an accurate picture of human rights as an actually existing political practice – that is, something we can observe in the world.

Neera Chandhoke suggests that policy concerns about legislating a right to freedom from poverty merely skim the surface of the issue, simply because these concerns appear to be indifferent to the social, the economic, the cultural, and the political context within which people are poor. If scholars wish to rescue the right to freedom from poverty from ending up as just another exercise in populist rhetoric, the right not to be poor has to be situated in a generalized moral consensus on the wider right to equality. But not only is the concept of equality a complex one, the conceptual hyphen between equality and distributive justice appears to be shaky at best. She illustrates these complexities with reference to the Indian experience with protective discrimination policies for the doubly disadvantaged.

Jiwei Ci explores the nature of poverty in terms of the basic human needs that require material resources for their satisfaction and that give rise to what he calls the stakes of poverty. He identifies three such basic human needs and distinguishes three types of poverty accordingly. Of these, Ci argues, the worst is agency poverty, in the absence of which subsistence poverty becomes a lesser and more easily resolvable problem and status poverty need not present a serious cause for moral

alarm. It is a sad comment on the state of world poverty today that much of what may look like simple material scarcity is actually the combination of all three types of poverty and, worse, that many of the world's poor are so weighed down by (avoidable and unfair) subsistence poverty that for them the question of agency poverty can hardly even arise. Besides providing a philosophical analysis of this state of affairs, Ci's chapter is also an attempt to look for answers, with extensive reference to the Chinese experience, both positive and negative.

Paulette Dieterlen discusses three ways of thinking about human rights. The first one refers to cultural rights and indigenous claims which have been defended mainly in countries with a heterogeneous population. She posits that violations of cultural rights are in fact violations of individual rights. The second view on human rights she discusses, called minimalist, has been sustained by philosophers who think that human rights only imply negative duties, that is to say, the duty not to do something to someone. According to this position only political and civil rights deserve the name of rights, as opposed to economic and social rights which are just valid claims. Dieterlen criticizes both ways of thinking and defends instead the maximalist view that sees economic and social rights as also generating negative duties, such as not letting people starve. She thinks that the satisfaction of rights as they are stated in Article 25 of the Universal Declaration of Human Rights (UDHR) is a necessary tool for fighting against poverty. Finally she highlights the very special way in which economic and social rights relate to the respect owed to people and to the satisfaction of basic needs.

Cécile Fabre's chapter posits that all human beings, wherever they live, have a human right against foreign affluent states and citizens not to be subjected to severe poverty. Rather than provide a justification for it, it assesses whether the very poor are entitled to wage war against the affluent on the grounds that the latter are derelict in their duty not to subject them to severe poverty. In so doing, it explores connections and tensions between the ethics of distribution and the ethics of war.

Varun Gauri and Daniel Brinks examine the causes and consequences of economic and social rights litigation. Based on a collaborative research project that examines Brazil, India, Indonesia, Nigeria and South Africa, their chapter analyses how much, and on which issues, civil-society and other actors resort to courts; what conditions must be present for claimants to be able to make extensive use of legal strategies; and under what circumstances court cases generalize and affect social policy more broadly. Detailing how constitutionally incorporated and judicially enforced economic and social rights have allowed poor people to claim medications that are essential for life, have compelled governments to increase financing for education, and have blocked governments and landlords from evicting families who live in informal settlements, the authors ask: What are the consequences of giving courts a more prominent role in economic and social policy making? Do legal processes inevitably favour the 'haves' so that more

judicial involvement will benefit those who are already better off? Why do judicial decisions seem so frequent and prominent in some countries and in some issue areas but not in others?

Sebastiano Maffettone identifies two prominent but flawed approaches to the question of global justice and argues for a liberal conception of global justice that takes a middle course between them. He acknowledges that the moral challenge of rising global poverty and inequality creates some duties for the affluent, and seeks to establish what the scope and justification of those duties are. He addresses the two prominent responses to global inequality: cosmopolitanism and statism. Following recent statist critiques of cosmopolitanism, Maffettone argues that a robust moral cosmopolitanism, which entails an egalitarian approach to the global distribution of resources, suffers from important flaws. First, the current state of global institutions is insufficient to create the bonds of reciprocity that are necessary to establish a duty of egalitarian redistribution. Maffettone then makes two separate anti-monistic arguments. In the first, he argues that the wide institutional gap between domestic and international politics means that the duties of justice that apply domestically should not apply globally, since global institutions are not sufficiently robust to create the same level of moral obligations to redistribute resources. In the second anti-monist argument, he argues that cosmopolitanism risks imposing a single moral framework on a global scale, which may not accommodate sufficiently the diversity of moral conceptions held by individuals and societies.

However, recognizing the extreme poverty suffered by so many persons around the world, Maffettone does not adopt the statist argument that there is no place for duties of justice outside the domestic sphere. Instead, he makes the case for a middle ground, whereby all people have a duty to ensure a minimum threshold of material welfare to all persons that is sufficient to allow for basic human flourishing. Since this approach is not based on either the presence of shared institutions or on a robust moral conception, it is able to overcome the statist objections, while meeting the basic moral obligations that people have to one another as fellow human beings. The chapter concludes by speculating that by raising all people to a minimum level of flourishing that includes basic subsistence, health care and education, the adoption of the proposed liberal conception of global justice is likely to advance the cause of justice within states, and gradually to bring about the sort of transnational institutions that would establish more robust duties of global justice.

Frank I. Michelman suggests that the moral and political case for legal recognition of socioeconomic rights goes best when the focus is on what is morally required of a country's constitutional law, as opposed to its ordinary statute law. The political (including the moral) case for installing socioeconomic guarantees into constitutional law is markedly plainer, he urges, than the case for any concrete legislative programme catering for basic needs can ever be. The lesson he draws for advocates is not that they should focus their efforts on constitutional revision

or amendment, but that they should frame their arguments to ordinary legislators in terms of what constitutional law would provide were it fully adequate to the burden we mean for it to carry in our country's life and affairs.

Michelman further urges that the most compelling political-moral case for including socioeconomic guarantees in a constitutional bill of rights has nothing to say about moral rights and obligations as they might arise in conditions of no-law or 'state-of-nature', in this way differing from typical arguments for giving legal effect to 'garden-variety' rights such as those against assault, contract-breaking, and the like. By proceeding directly from the fact that legal ordering exists in the countries concerned, the most compelling argument circumvents the question (which Michelman does not address) of moral duties to aid in pre-legal conditions.

Jennifer Rubenstein examines the implications of 'global poverty pluralism': the view (which she takes to be widely-held) that there are several valid moral reasons for well-off actors to help alleviate global poverty. She argues that this view raises two questions, which are rarely explicitly addressed: If a given actor has many reasons to alleviate global poverty, and these reasons point to different poverty-alleviating activities, yet doing all of the activities is impossible or overly burdensome, how should the actor set priorities among the different activities? Likewise, if there are several reasons to alleviate a particular case of severe poverty, and these reasons point to different actors as being responsible, yet there is a need to assign responsibility more precisely, which actor(s) should be deemed responsible? Rubenstein argues that in both cases, responsibility should be assigned on the basis of context-specific judgments about the strongest reason or set of reasons. So, rather than ask, for example, whether causal responsibility is generally stronger than the duty of aid, we should ask whether a particular causal relationship is stronger than a particular duty of aid. The chapter concludes by considering what recourse is available to poverty opponents when assigning responsibility on the basis of the strongest moral reason(s) conflicts with maximally alleviating poverty.

Oscar Vilhena Vieira explores in his chapter the relationship between the rule of law and social and economic inequality. He claims that profound and persistent levels of social and economic inequality obliterate the core value of a rule of law system, which is legal impartiality, causing the *invisibility* of the extremely poor, the *demonization* of those who challenge the system, and the *immunity* of the privileged, in the eyes of individuals and legal institutions. In synthesis, extreme and persistent social and economic inequality erodes reciprocity, both in the moral and the mutual advantage sense, thus impairing the integrity of the rule of law. Vieira further argues that even in a partial rule of law, human rights advocacy and strategic litigation are essential to cause short-circuits in the legal system, bringing moral value to the *invisible* and the *demonized*, and restricting the privileges of the *immune*.

Jeremy Waldron, in his chapter, explores the relation between socioeconomic rights and theories of justice. There is an evident contrast between the way rights are presented and argued for, and the way theories of justice are elaborated. Rights, including socioeconomic rights, tend to be presented in a sort of slogan-esque line-item way, and they are defended as particular provisions, without much attention to broader issues of social justice. Theories of justice, by contrast – and Waldron has in mind particularly Rawls's *A Theory of Justice* – are presented as very elaborate but quite abstract constructions, purporting to address all issues about the basic structure of a society and its impact on the life prospects of those who live under it. Yet obviously claims about socioeconomic rights have an important relation to theories of justice. Waldron argues that a theory of justice provides a context for considering such claims, which requires their proponents to address not just the needs of those who are said to have such rights, but all competing demands that might be placed on the services and resources that socioeconomic rights require. A theory of justice insists on there being a single matrix for the consideration of all such claims, and as such, it provides a better basis for thinking about socioeconomic rights than arguments that simply address the rights claim itself, in isolation.

Edward Wamala, in his examination of poverty discourse in sub-Saharan Africa, points out that poverty stands out as a peculiar kind of problem with respect to human rights observance because the poor, by the very nature of their poverty, cannot champion the cause of their rights against deprivation and poverty. Theorists who could do so have generally not sufficiently explored what causes and impedes poverty, and those who did, very largely blamed the victim – the poor themselves. Gailbraith's insight of looking at poverty as a structural problem provides us with a clue as to how to deal with the attendant human rights matters that relate to poverty. If poverty is related to the way our social, political, economic institutions, structures, and policies are made (and executed), these are the very ones we need to interrogate and evaluate (and overhaul) if need be, within the human rights framework.

John J. Williams posits that in post-apartheid South Africa the voices, noises and choices of citizenship are the new struggle for fundamental social change, especially in relation to the basic needs of ordinary people. In this regard, it would appear that the statistical record signals a glaring disjuncture between the actual lived experiences of poor people and their constitutionally-guaranteed rights. This chapter highlights the case of the Wallacedene community that took the planning authorities to court to have their constitutional rights of access to adequate housing and related services enforced. The implications of this court case vis-à-vis integrated development planning are considered and apposite recommendations are proffered to ensure that poor people are accorded their rights as entrenched in what is arguably the world's most 'progressive' constitution. More importantly, perhaps, the conceptual and theoretical significance of this landmark court case is considered in relation to the contention that 'poverty is a human rights violation'.

Part I

Conceptual Foundations

1

Protections Against Poverty in the Practice of Human Rights[1]

Charles R. Beitz

From one point of view, it can be hard to imagine how anything could be less controversial than the anti-poverty provisions of contemporary international human rights doctrine, summarized in the Universal Declaration of Human Right's guarantee of an adequate standard of living ('including food, clothing, housing and medical care and necessary social services') and the separate guarantee of free elementary education (UDHR, Articles 25.1 and 26). These rights promise protection against the most devastating consequences of severe poverty: malnutrition, lack of clothing and shelter, disease and ignorance. The interests in avoiding these harms (henceforth, 'subsistence interests') are among the most unambiguously important of human interests – it would be reasonable to regard their satisfaction as an urgent matter whatever else a person cares about.

Yet assertions that anti-poverty rights belong in any reasonable catalogue of human rights continue to elicit at least two kinds of sceptical doubt. One is conceptual. It holds that, for any authentic human right, there should be a criterion or process for assigning responsibilities such that, if these responsibilities were to be carried out, the right would be satisfied for everyone. The sceptical position holds that this cannot be done for anti-poverty rights. The other sceptical doubt is normative and, although easily conflated with the first, it has independent standing. This second doubt holds that the demands for action associated with anti-poverty rights, taken in aggregate, require unreasonably much of those on whom these rights impose responsibilities to act. This is not the claim that there is no practicable assignment of responsibilities that would result in the satisfaction of the right for all. Instead, it is that the burdens imposed by any such assignment of responsibilities would be greater than their assignees might reasonably be expected to bear. To put it differently and perhaps more clearly, however the responsibilities are assigned, their assignees would not, in general, have sufficient reason to act on them (though they might, in special cases).

1. This chapter draws on and elaborates portions of my book, *The Idea of Human Rights* (Oxford: Oxford University Press, forthcoming). I am grateful to Thomas Pogge and Mike Ravvin for comments on an earlier draft of the chapter.

In this chapter I shall argue that both of these doubts miss their target because they misunderstand the nature of international human rights. These doubts gain their grip by invoking an idea of human rights as a species of moral claim – right of the kind that holds between individual persons. But this idea is distorting. Part of the problem is that it fails to register the fact that human rights, as we find them in international doctrine, are in the first instance conditions for institutions rather than for individual persons taken seriatim.[2] This, however, is only part of a larger and more systematic distortion, one that arises from a failure to take seriously the fact that international human rights constitute a public, discursive practice. This practice has a doctrinal content consisting of a set of norms for the regulation of the behaviour of various public agents, together with a range of forms of legal and political action, for which the norms are understood to provide reasons. Moreover, its norms apply to a distinctive variety of agents found in global political life and are constrained in their requirements by the structure of the political order in which they operate. Once we understand more clearly the role played by claims of right within this public practice, we see that doubts of the kinds I have mentioned are not in any straightforward way grounds for scepticism about anti-poverty rights.[3]

1.1. THE PRACTICE OF HUMAN RIGHTS

If I were to assert that there is a human right to do or to have something, what, exactly, would I be asserting? There are several ways one might try to answer this question. A common approach among philosophers is to adopt a conception of a right from some other context and to interpret the notion of a human right in light of this adopted conception. One might, for example, look to the history of thought about 'natural' or 'fundamental' rights in the hope of finding a model to which the idea of a human right can be assimilated. Or one might believe that we already have a notion of human (or basic, or fundamental) rights in ordinary moral thought that with suitable refinement can serve as a basis for interpreting claims about particular human rights.

Perhaps there are speculative reasons to take an interest in an understanding of human rights with this kind of derivation. Our interest, however, is practical rather than speculative, and this requires a different approach to conceptualizing human rights. We have on hand an international doctrine whose authoritative statements include anti-poverty rights. We are confronted with sceptical claims holding that the inclusion of these rights in international doctrine is an error. To

2. On the importance of an 'institutional' rather than an 'interactional' conception of human rights, see Pogge (2002: 64–67, 170–72). I am not certain that Pogge's idea of an 'institutional understanding' is identical to the view suggested in this chapter.
3. I have also discussed anti-poverty rights as elements of a practice of human rights in 'Human Rights and "The Law of Peoples"' (Beitz 2004: 193–214). The present chapter characterizes the practice somewhat differently and, I hope, more accurately, and advances a different view about the normativity of anti-poverty rights.

decide if we should agree with these claims, we need a grasp of the idea of a human right as it is found in international doctrine and in the discursive practice to which it gives rise.

To say this, of course, is to suppose that there is such a thing as an international practice of human rights. I doubt that readers of this volume will need to be persuaded that this is true, but it is worth saying quickly what I mean by it. The practice of human rights is normative and discursive. It consists of a series of norms for the regulation of behaviour, together with a diverse array of forms of legal and political action for which the norms are taken by participants in the practice to provide reasons. People appeal to these norms to justify claims on various agents and to appraise their conduct. This practice has developed on several fronts since the end of World War II, when its doctrinal foundations were laid in the Universal Declaration and subsequently in the two covenants. It has grown particularly rapidly since the Helsinki Accords of 1975 and the end of the Cold War around 1990. We see elements of the practice expressed in international law, in the monitoring and reporting activities of global and regional institutions devoted to human rights, in the policies of other international organizations, in the conduct of foreign policy by (mostly liberal democratic) states, and in the activities of a broad and diverse array of non-governmental organizations. Today the international practice of human rights is an elaborate enterprise both doctrinally and politically.

We would arrive at a 'practical' conception of human rights by examining the role played by the idea of a human right within this practice. Human rights claims are supposed to be reason-giving for various kinds of political action that are open to a range of agents. We understand the concept of a human right by asking for what kinds of actions, by which kinds of agents, and in which kinds of circumstances human rights claims may be understood to give reasons.

The working out of a practical conception of human rights would therefore require an analysis of the history of the contemporary human rights system and of its political dynamics. Since I cannot do this in the space of a single chapter, I will simply stipulate what I shall call a 'two-level model', which I believe describes the idea of a human right as we find it in global politics today. Like any model, this is in some ways an idealization, but I believe its main elements are grounded fairly clearly in observable features of existing doctrine and practice.

The two-level model expresses a division of labour between states as the bearers of the primary responsibilities to respect and protect human rights and agents of the international community as the guarantor of these responsibilities. There are three main elements.[4]

First, human rights are requirements whose object is to protect urgent individual interests against predictable dangers to which they are vulnerable under the general circumstances of life in the modern world.

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4. For the main ideas I am indebted to Shue (1996) in Chapter 1, and the important remarks about institutional duties in the 1996 Afterword, and to Nickel (2006: chs. 1–4). For a similar view about the nature of human rights, see Sen (2004: 315–56).

Second, human rights apply in the first instance to the political institutions of states, including their constitutions, laws and public policies. Each state is responsible for protecting the human rights of its citizens and others residing in its territory. The nature of the protection called for will vary with the content of the right and the social and political context, but as a general matter, human rights may impose at least three kinds of requirements on states: to respect the underlying interests in its laws and policies; to protect these interests against threats from other agents; and to help those who are involuntarily victims of deprivation.[5]

Third, a state's failure to protect the human rights of its members may be a source of reasons for action for agents outside the state. The international community has a general responsibility to hold states accountable for respecting their people's human rights. It does so primarily by monitoring the human rights performance of states, making public evidence of substantial failures to comply and calling upon infringing states to explain themselves in an international forum. Moreover, states and non-state agents with the means to act effectively have pro tanto reasons to assist an individual state to satisfy human rights standards in cases in which the state itself lacks the capacity to do so. They also have pro tanto reasons to take steps to protect human rights in cases in which the state fails through a lack of will to do so.

For the most part I will have to leave the defence and elaboration of this model to my readers' imagination, but let me call attention to four features that have special relevance to anti-poverty rights. The first involves the idea of a violation of human rights, which we must understand more broadly than we would if we were to think of human rights on the model of moral claim-rights. Human rights, in the first instance, are requirements for institutions. As I have observed, they may impose several types of requirements (both 'negative' and 'positive'). A 'violation' may be said to occur when a protected interest is set back as a result of a government's failure to satisfy any of these requirements, whether through lack of capacity or of will. This means that a government might be said to have violated a human right even when there is no intention to do so (e.g., through a lack of capacity or poor policy planning) and when the proximate cause of the deprivation is something other than government action (e.g., when a government fails to take the appropriate preventative or remedial steps).

Second, according to the model, human rights violations are reason-giving for external agents. The declaration refers to human rights as 'common standards of aspiration,' but it is a mistake to interpret this as meaning that well-founded claims of human right are normatively inert. Human rights are supposed to be action-guiding. A state's default on its responsibility to protect the human rights of its people supplies pro tanto reasons for outside agents to

5. This typology of duties is due to Shue (1996: ch. 3). As he observes, these combine what are conventionally classified as 'negative' and 'positive' requirements.

act. Such reasons are of course genuine reasons, but they are not necessarily conclusory: they may need to be combined with other reasons to act arising under the same circumstances, perhaps including reasons arising from the violation or potential violation of other human rights. Human rights doctrine does not present a set of standards that can always be expected to be satisfied simultaneously and it does not include priority rules for settling conflicts when they arise. There is nothing formally wrong in holding both that the violation of a human right provides a reason to act and that under the circumstances it would be wrong, all things considered, to do so, because doing so would endanger other important values, including perhaps those protected by other human rights.

Third, in contemporary international practice human rights violations supply reasons for many different kinds of international or transnational political action. It is natural to think of military intervention as the paradigm of international action to protect human rights, but this is artificially narrow.[6] The array of means available to states to promote and protect human rights in other states also includes non-violent forms of coercive interference (e.g., economic sanctions), the imposition of conditions on participation in international cooperative activities and the offering of other kinds of political and economic incentives (bilateral and multilateral aid conditionality, political standards for membership in regional organizations), and the provision of consensual economic and political assistance to governments. These are in addition to the forms of action carried out within the UN human rights system itself, with its procedures for monitoring and reporting. Finally, and of increasing salience, human rights violations supply reasons for various forms of contestation by non-state actors, ranging from reporting and advocacy to transnational political organizing.

Fourth, the features I have listed, taken together, characterize human rights as the constitutive elements of a public political doctrine that claims to regulate relations among states and other international agents. Human rights aspire to a role in global political life in one way analogous to that of a sense of justice in domestic society: they are publicly available norms to which appeal can be made to justify political action. This fact has two corollaries. First, as public standards, human rights need not presuppose the general acceptance of any particular philosophical or religious view about their moral basis (though of course they are not equally accessible from every such view). Human rights are open to a variety of justifications. As Maritain put it, reflecting on the rights of the Universal Declaration, human rights are 'practical conclusions which,

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6. This thought might be encouraged by the conception of human rights set forth by Rawls (1999*a*: sec. 10.2), who conceives of human rights as standards whose satisfaction is sufficient to guarantee a state against reform-oriented intervention by other states. I believe he is right to conceptualize human rights in terms of the type of political action their violation might justify. But it is not faithful to contemporary practice to fix exclusively on coercive intervention as the definitive type. For a further discussion, see Beitz (2004: 202–03).

although justified in different ways by different persons, are principles of action with a common ground of similarity for everyone' (Maritain 1949: 10). Second, and relatedly, human rights are norms crafted to apply to whole classes of cases whose empirical characteristics are likely to be quite diverse. The weights to be attached to the reasons for action arising from actual or potential violations in any particular case, and the array of possibly conflicting reasons that might be at play in that case, will vary with these background characteristics. The application of norms to cases will therefore require judgment, and one should not be surprised to discover that such judgments might be controversial. In this sense, Cohen is correct to say that human rights define a 'terrain of deliberation and argument' rather than a set of fixed points for social policy (Cohen 2004: 195; also Sen 2004: 322–24 for a similar idea). That they do so ought not to be regarded as a deficiency of the practice of human rights; it is part of its point.

1.2. THE CONCEPTUAL CHALLENGE

One source of scepticism about anti-poverty rights is conceptual. It holds that once we understand what it is for something to be a right, we will see that there cannot be anti-poverty human rights. They are ruled out ab initio because they lack some essential features of rights.

Many people have held this view in one or another form (Cranston 1973: 65–71; Williams 2005: 63–65). I shall concentrate here on the position taken by O'Neill (2005). She distinguishes between 'normative' and 'aspirational' views of rights and argues that a value cannot count as a right, on a 'normative' view, unless it can be seen as the ground of a claim that specifically identifiable other agents have obligations to act or refrain from acting in ways that would result in the claimant's having or being able to enjoy the value. 'We normally regard supposed claims or entitlements that nobody is obligated to respect and honour as null and void, indeed undefined' (O'Neill 2005: 430). The values expressed in such claims are better conceived of as 'aspirations': they describe resources or conditions that their beneficiaries have reason to want but that no identifiable agent necessarily has an obligation to provide. O'Neill thinks it obvious that the familiar 'rights of man' to freedom, property and security can count as rights on a 'normative' view because the inferences to be drawn from claims of right about the deontic situations of other agents are clear: everybody has an obligation to respect these rights. As a result, when a right is violated, we know who is at fault. She believes that the same cannot be said about rights to 'abstract goods and services, now seen as universal human rights,' such as rights to food and health care. This is because these rights do not generate obligations for specific agents, the performance of which would result in enjoyment by all of the substance of the rights. When somebody's 'right' to food or health care is unsatisfied, we have no way of saying who is at fault. We must regard rights of this latter kind as 'merely aspirational' (O'Neill 2005: 428); since they do not serve to guide the actions of any agent, they are without normative force.

Joel Feinberg took what might appear to be a similar position when he described economic rights as 'manifesto rights'.[7] Since this characterization has been influential (and because I believe it has been misunderstood), it is worthwhile to consider his understanding of these rights. Manifesto rights, in Feinberg's view, 'are not necessarily correlated with the duties of any assignable persons' because 'under widely prevalent conditions of scarcity and conflict, [they may] be impossible for *anyone* to discharge' (Feinberg 1973: 94, emphasis in original). Feinberg appears to have believed, as an empirical matter, that there is no possible assignment of duties to agents with the capacity to satisfy their requirements such that their performance would result in the satisfaction of anti-poverty rights. Today, of course, this is almost certainly false. But leave the empirical question aside for the moment. The important point for our purposes is that in Feinberg's view, even if a manifesto right cannot be satisfied in the present, it might still be action-guiding. He thought we should understand the assertion of manifesto rights as 'expressing the conviction that they ought to be recognized by states as potential rights and consequently as determinants of present aspirations and guides to present policies' (Feinberg 1973: 67). Feinberg did not disparage manifesto rights as normatively inert. He held that they can guide action even if they are not correlated with duties to see to the satisfaction of the right for any particular person in need. They do so by establishing as a priority goal of political action the creation of conditions in which it would be possible to satisfy the right, and hence to assign duties to see to its satisfaction.

Another way to put the point is this. A government's failure to prevent or remediate a deprivation might give rise to two different types of reasons for action for external agents. 'Direct' reasons are reasons to act in ways whose success would bring about enjoyment of the substance of the right for those deprived. Reasons of this type can call for various kinds of action. These might include, for example, ceasing activities that bring about or contribute to the deprivation, offering protection against threats of deprivation by other agents or by natural forces, and providing aid that would offset or compensate for the effects of the deprivation (Shue 1996: 51–60). 'Indirect' reasons are those that count in favour of actions by which an agent can help establish conditions in which those deprived, or their similarly deprived successors, could enjoy the substance of the right in the future. A particularly important indirect reason is the reason one may have to contribute to the establishment and operation of cooperative schemes designed to undertake such actions. An agent's situation would be analogous to what it might be in an unjust society: although there would be no duty to comply with the rules that would apply if the society's institutions were just, one might have a duty to help establish just arrangements with which one would have a duty to comply once they were established, at least when this could be done without excessive sacrifice.[8]

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7. Feinberg (1973: 67, 95). To the best of my knowledge, Feinberg is the source of this phrase in philosophical writing about human rights. O'Neill uses the phrase, although without mentioning Feinberg, in an earlier work criticizing the 'rhetoric of rights.' (See O'Neill 2000: 99–100.)
8. I adapt Rawls's formulation of the natural duty of justice (Rawls 1999*b*: sec. 19).

What the idea of a manifesto right shows is that although circumstances may be such that there are no direct reasons for action available (perhaps, as Feinberg thought, because resources are scarce, or perhaps, as O'Neill suggests, because there is no institutional mechanism for assigning obligations to act), there may nevertheless be indirect reasons. Those who conclude from classifying certain alleged human rights as manifesto rights that these rights provide no reasons for action are not entitled to the conclusion. Manifesto rights can be action-guiding.

Let me add an observation about the empirical question set aside earlier. Feinberg appears to have believed that limitations of resources and capability explain why an assignment of obligations is impossible. As I noted, today this is probably false. But suppose something like it is true. This still does not mean that nobody has any direct reasons to act. Even if it were not possible to satisfy everyone's anti-poverty rights in the present, it might be feasible to satisfy the rights of some, or to increase the level of satisfaction of the rights of all. Possibilities like these may be what was intended by the idea of 'progressive realization' found in the covenant. These possibilities are capable of supplying reasons for action in the present even if none would result directly in the enjoyment of the substance of anti-poverty rights for all those presently deprived.

To return to O'Neill: in her view, if a right cannot be classified as 'normative,' then it must count as 'merely aspirational,' in which case it would be normatively inert. We can now see that the distinction between the 'normative' and the 'aspirational' is incomplete. It does not follow from the (supposed) fact that there is no assignment of obligations under which everyone's enjoyment of the substance of the right would be secure that such a right cannot generate reasons for action. There may be direct reasons to help some people, even if it is not possible to help all. And there may be indirect reasons to help create more favourable conditions. The distinction between 'normative' and 'aspirational' interpretations of anti-poverty rights obscures these ways that anti-poverty rights can be action-guiding. It has the effect of ruling out an interpretation of anti-poverty rights more in keeping with a practical conception of human rights than either of O'Neill's alternatives.

Of course, it would be open to someone who takes a view like O'Neill's to argue that the contemporary human rights enterprise is ill-conceived. One might think, for example, that it generates a culture of recipience rather than of action, or that it fails to concentrate political energy on the most damaging of social evils, or that the language of human rights is too abstract and unspecific to mobilize political action when it is most needed. These are substantive claims about the human rights enterprise and, although I do not find them tempting, nothing I have said so far argues against them. The only conclusion for which I have argued is that if the question is whether anti-poverty rights are appropriately included in a catalogue of human rights conceived as the kinds of norms we find in international human rights practice, the conceptual challenge does not give us a good reason to say no.

It is a further question whether and why anyone, and in particular prospective donors, should care about violations of anti-poverty rights, even if they are not conceptually suspect. This is a normative question, and there is doubt about it, too.

1.3. THE NORMATIVE CHALLENGE

Our second sceptical view differs from the first in accepting that anti-poverty rights might count as bona fide human rights, even if they do not serve as grounds of assignable obligations whose successful performance would satisfy the interests that the rights protect. The view proceeds from the less demanding and more plausible position that any candidate for recognition as a human right should satisfy what we might call the 'sufficient reason' condition. Roughly speaking, this holds that a government's persistent failure (either of will or capacity) to prevent or remediate violations should generate reasons that would be sufficient to justify action by outside agents under reasonably foreseeable circumstances.[9] The normative challenge holds that in typical cases in which people's subsistence interests are threatened, the sufficient reason condition is not likely to be satisfied.

As I observed earlier, there is no real doubt about the urgency of the interests protected by anti-poverty rights, so we might begin by asking how the normative challenge gets off the ground. In response, we should recall the obvious: that the actions for which violations of anti-poverty rights might provide reasons, although aimed at protecting and satisfying the interests of their beneficiaries, are also likely to be costly to their prospective agents. It can always be asked why this or that agent should incur a cost in order to satisfy the interests of others. In certain circumstances (for example, those of 'easy rescue') it may be enough to reply that the interest is urgent and the prospective agent is in a position to satisfy or protect it, but as a general matter, considerations of urgency and capacity will not be enough to determine whether potential agents have sufficient reason to act to protect or satisfy a threatened interest. Typically more needs to be said, for example, about the causes of the threat, the nature of the historical and contemporary relationship between those deprived and the potential agents (and particularly whether there are special grounds for attributions of responsibility to any of these agents), and the consequences for third parties of protecting the interest or allowing it to go unsatisfied.

The normative challenge arises from doubt that enough more *can* be said. The doubt can have various sources. I am not interested, here, in doubt that reflects a more general alienation from morality (doubt, that is, that arises from scepticism that we can ever owe each other anything). One can take moral considerations seriously yet still believe that the considerations at hand are not likely to be strong enough to command action. This is the kind of doubt that interests me. It consists of the belief that in the typical case in which subsistence interests are threatened, the reasons for action likely to be available to any prospective external agent are

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9. I say 'roughly speaking' because the idea of a reason being 'sufficient … under reasonably foreseeable circumstances' is vague. But rendering the idea more precisely is not simple. We need something like the idea of reasons that would be decisive for some set of external agents in some nearby possible world. I cannot say more about this here. I owe this formulation to Ryan Davis.

not strong or weighty enough to offset the other reasons for action (in other realms) likely to be in competition for that agent's allegiance.

Suppose, for example, that one accepts the following two sets of beliefs. One might believe, first, that although severe poverty is always an occasion for beneficence, reasons of beneficence can exercise only limited command over our lives and resources.[10] This is not only because there are some goods and commitments we reasonably judge to be too important or too central to the conduct of our own lives to be given up.[11] It is also because, in living our lives, we regularly find ourselves having to resolve conflicts between reasons of beneficence and (other-regarding) reasons of various other kinds – for example, to take care of dependents, to contribute to cooperative schemes from which we benefit, to pay our debts, and so forth. One might think that those other kinds of reasons would typically be weightier. Second, one might believe that severe poverty, at least when it occurs in another society, is not usually an occasion for any particular other kind of reason for action. Perhaps one thinks the sources of severe poverty are so diverse that it is impossible to generalize in ways that would enable responsibility for ameliorative action to be fixed in any agent or set of agents. Poverty may be brought about or sustained by features of the local culture and political traditions; it may be the legacy of historical injustice; or it may be imposed or sustained by patterns of exploitative international economic transactions or the exercise of unequal bargaining power by other societies. If one grants that an agent's reasons for action in response to a threat to someone else's urgent interests depend on the agent's relationship to the threat, then it may seem that no single account can explain why and to what extent extreme poverty, wherever it occurs, should provide a reason for potential agents in other societies to bear the costs of its alleviation. The conjunction of these beliefs produces the conclusion that, in the general case, the violation of anti-poverty rights does not provide a distinctive reason for action to external agents. There is always beneficence, but in a world with limited resources and multiple demands, some of the time reasons of beneficence may be trumped by other reasons. If this is right, then in typical cases of violation, anti-poverty rights may not be action-guiding for international agents. They would fail to satisfy the 'sufficient reason' condition.

I have stated the normative challenge at some length because I believe that advocates of anti-poverty human rights have tended to underestimate its force. What can be said in response?

One thing that might be said is that the normative challenge depends on a faulty judgment about the weight of considerations of beneficence as they apply to cases of severe poverty. I believe there is much to be said for this line

10. I do not mean to say that 'beneficence' names a single, distinctive kind of reason; it may operate as a label for various types of reasons, differentiated by their object (relieve pain, relieve starvation, protect against gratuitous physical assault, etc.), which have in common the fact that their aim is to provide some benefit or to avert some burden for another person's sake.
11. This point is emphasized in Scanlon's (1999: 224) remarks on reasons to give aid. For an illuminating discussion of this aspect of Scanlon's view, see Ashford (2003).

of response. Subsistence interests are indeed urgent, and the costs to the affluent countries of taking steps that could produce a significant improvement in satisfaction are modest relative to their economic capacities.[12] To this we should add the familiar observation that the idea that reasons of beneficence can only exercise limited command over our lives and resources applies differently to whole societies than to individuals. One reason why we are inclined to accept this idea, at the level of interpersonal morality, is the perception that by contributing to the satisfaction of the interests of third parties under circumstances in which others cannot be expected to do the same, one sets oneself at a relative disadvantage. But matters look different when we think of human rights as institutional rather than interpersonal standards. When a local government is unable to prevent or remediate deprivations of anti-poverty rights, the international agents who have reasons for action are collective agents – other states, international organizations, private non-governmental organizations, and the like. Most such agents have a capacity to minimize problems of individual relative disadvantage by distributing the cost of acting across whole populations. So considerations of beneficence may command a larger contribution when the actions they support are taken or coordinated by institutional agents than when the same considerations are acted on seriatim by individuals. The tendency to think of human rights as individual claim-rights obscures this fact.

There is more to be said about this, but I shall set it aside and turn to a more basic point. What makes the normative challenge seem plausible is a background belief that the only reason for action that we can be sure will arise for external agents in cases of severe poverty is a reason of beneficence.[13] As I have stated it, however, this is ambiguous. One interpretation – the 'no single reason' view – holds that, beneficence aside, there is no one reason or kind of reason for action that will arise for external agents throughout the range of what I have called standard cases of severe poverty. A different interpretation – the 'no reason at all' view – holds that, beneficence aside, in most cases of severe poverty no other reason for action, of any kind, will arise for any external agents.

The 'no single reason' view is suggested by a thought I mentioned earlier: that the causes of poverty are too diverse to allow for generalizations that would enable responsibility to be placed. Perhaps there is no persuasive general reply to the question whether poverty tends to be generated or sustained by natural facts (for example, location or resource endowments) or contingent internal forces (for example, a society's political culture or traditions of government) or,

12. There is no non-controversial way to evaluate these costs. Sachs (2005: ch. 15) reports a range of estimates, with varying assumptions as to the kind and extent of investments required, between 0.5 per cent and 0.7 per cent of the GDP of the rich countries. See also Collier (2007: esp. ch. 11).

13. This belief is sometimes rendered as the claim that we have reasons of beneficence to care about global poverty but not reasons of justice. A difficulty with this formulation is that there are several kinds of 'reasons of justice', some of which apply more plausibly to the global case than others. To avoid confusion, in what follows I try to distinguish some of these and refer to them separately.

instead, is imposed or aggravated by aspects of the global political-economic order (for example, international property law, the policies of international financial institutions, global trade agreements, and the like). If this is true, then we cannot say that severe poverty, wherever it occurs, typically gives rise to the same distinctive reason for action. Different cases must be treated differently. If claims of right must be interpreted as always demanding action for the same distinctive kind of reason, then there may be trouble ahead for anti-poverty rights.

But it is hardly obvious that we should accept the 'no single reason' view. Human rights, as I have said, is a public normative practice. Within this practice, human rights operate in the same way that middle-level principles operate within a political theory. In the latter case, we expect principles to rest on some deeper level of reasoning in which a variety of basic ethical concerns are brought together with facts about the world in a way that shows the theory's principles to be trustworthy guides to action in the range of circumstances that we are likely to confront in practice. So, for example, the principle of freedom of expression might be thought to summarize and bring into focus an array of underlying ethical and practical considerations lying at a more fundamental level of practical reasoning.[14] It is not an objection that the circumstances to which the principle will have to apply may vary in their morally significant features, or that, as a result, different elements of the principle's basis will justify its application in different circumstances. This is just how political principles work.

It is the same for human rights. As the constitutive norms of a public doctrine, human rights should afford reasons for action across a wide range of more-or-less likely circumstances ('typical' or 'standard' cases). But we have no more reason here than in the case of the principles of a political theory to require that the same reason or weighted set of reasons motivate the application of a human right to every set of circumstances to which it applies.

So the question we should care about is not whether a single analysis of the sources of poverty applies to all standard cases, so that, in all such cases, external agents would face the same kind of reason to act. The question is whether, for each type of case in the central range, we can discern some reason or set of reasons, in addition to reasons of beneficence, that would be sufficient to require external agents to act in some foreseeable circumstances. It need not be the same kind of reason in every case.

In the space available I can only offer this as a conjecture, but I believe the answer is yes. To see why this is plausible, one has only to consider the various patterns of interaction that might exist between societies containing substantial amounts of severe poverty and more affluent societies, and ask in each case what kinds of reasons for action would be available to external agents.[15] The

14. Consider, for example, the argument for liberty of thought and discussion given by Mill (1859: ch. 2).

15. One might think of this exercise as an attempt to be more specific about the patterns of interaction that might exist in a world economy whose structure allows for various forms of interdependence among societies but lacks the properties of closure and completeness

possibilities begin with two limiting cases. One is autarchy; here, by hypothesis, there are no reasons other than those of beneficence in play. The other is benign interdependence, in which poor and non-poor societies cooperate as equals. The most important reasons in this case have to do with the fairness of individual transactions and of whatever cooperative practices and institutions there are. These polar cases are, however, unlikely. There are several intermediate and, on the whole, more likely possibilities, which I hope can be suggested with descriptive labels: for example, harmful interaction,[16] historical injustice,[17] non-harmful exploitation,[18] and political dependence.[19] Each pattern evokes a different kind of reason for action: for example, not to cause harm, to compensate for the results of harm done earlier, not to exploit one's bargaining advantage, and to respect the interest in collective self-determination. This does not exhaust the possibilities but it will illustrate the point. The relationships that characterize the various dyads of interacting poor and affluent societies are diverse, not only in the patterns of interaction they instantiate but also in the reasons why these patterns are morally salient. But it seems plausible that most such dyads are characterized by one or more of these or similarly salient patterns. Except for autarchy, each pattern suggests a different reason for action that would arise for the rich country from poverty in the poor one. This means that members of affluent societies are likely to have some reason to act to reduce poverty or to mitigate its effects in most poor societies with which they actually interact, but that these reasons will vary in strength and perhaps in the forms of action for which they are reasons.

Two further considerations reinforce this conjecture. The first concerns uncertainty. There is reasonable disagreement about the causes of societal poverty and wealth. The disagreement manifests itself at the aggregate level and in connection with many, and perhaps even most, individual cases.[20] In any dyadic relationship it may not be known to what extent the parties' present or past interactions contribute or contributed to the affluence of one or the poverty

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that would apply to an autarchic, internally interdependent system. Compare Julius (2006: 189–90).

16. To simplify excessively: a rich country trades with a poor country and invests in it. As a result of their participation in these relationships, people in the poor country are worse off than they would have been in the absence of the relationship. (The impact on the rich country does not matter.)
17. There was harmful interaction in the past. Today there is benign interdependence. But as a result of past interactions, the poor country's position today is worse than it would have been if harmful interaction had not taken place.
18. A rich country trades with a poor country and invests in it. As a result, both are better off than they would be under autarchy, but the poor country's gain is less than its fair share of the social product of the relationship. Wertheimer (1996: 14) calls this pattern of interaction 'mutually advantageous exploitation.'
19. Termination of their economic relationships would be asymmetrically costly for the poor country. The vulnerability thus induced renders the poor country effectively unable to defend its interests.
20. One way to see this is to consider the difficulties in devising a theory of economic growth capable of explaining inter-country differences in growth rates in sufficiently specific terms to guide policy. There is an instructive survey in Rodrik (2007: ch. 1).

of the other. A workable public practice of human rights must abstract from these uncertainties. The parties' asymmetrical vulnerability to error supplies a reason to resolve the uncertainty in favour of the party more vulnerable to error.[21]

The other consideration concerns the international structure. I presented the diversity of reasons for action as arising from a range of patterns of dyadic interaction among individual agents, but in practice, of course, these patterns are frequently organized and facilitated by international property law and the international institutions that regulate trade and finance. To the extent that features of the international structure enable or facilitate patterns of interaction that are objectionable in one of the ways we have distinguished, those in a position to benefit may come under pressure from an additional kind of reason for action, one requiring them to reform the structure or compensate for its undesirable effects on those who cannot avoid them at reasonable cost.

All of this suggests that, if we accept the two-level model's characterization of a human right as a norm in a discursive practice, then we can say that there can be anti-poverty rights even if there is no single distinct reason or category of reason for action that explains why each potential agent should contribute to the relief of severe poverty wherever it occurs. Consider again the analogy with freedom of expression. When one invokes the principle of free speech, one is saying, among other things, that we have reasons to want institutions to offer some reliable form of protection against various interferences with expression that could reasonably be anticipated under a society's general circumstances. Different kinds of interferences might be objectionable for different reasons and might call for different kinds of protection. The nature and strength of the reasons, and the kind of protection required, are matters to be worked out, so to speak, at the 'point of application'. Similarly, when one asserts a human right, say, to an adequate standard of living, one is saying, among other things, that external agents have reasons to act when domestic governments either fail or are unable to provide the protections such a right calls for. We have good grounds for believing that in many, probably most, cases of severe poverty, there will be reasons for action of significant weight. But the details of these reasons and the nature and extent of the required action depend on the features of each individual case.

1.4. THE COST OF SAVING APPEARANCES

The main aim of this discussion is to suggest that two kinds of scepticism about the justification for counting anti-poverty rights as human rights will be less troubling if we adopt a conception of human rights in keeping with the contemporary practice. We construed this practice according to a two-level model, in which violations at the domestic level count as pro tanto reasons for action for appropriately placed external agents. If the suggestion is right, then we need not be sceptical that anti-

21. Thanks to Thomas Pogge for this observation.

poverty rights belong in an international doctrine of human rights. This saves appearances, but someone might think the cost of doing so is too great. I would like to conclude by considering two quite different reasons for thinking so.

One reason is this. A practice-based approach takes its understanding of the nature and role of human rights from the discursive practice as we observe it. But regarded from a moral point of view, this might lead to excessively conservative conclusions. According to the two-level model, the governments of states have the primary responsibilities to satisfy human rights, and international agents have secondary responsibilities to act when states fail or default. This is in accord with the authoritative documents of international human rights, but one might regard it as too narrow. Why should not human rights requirements apply directly ('in the first instance') to agents other than states – to international institutions, for instance, or to multinational firms? After all, these types of agents are capable of setting back the interests protected by human rights in many of the same ways as the governments of states. For example, assuming arguendo that enforcement of the TRIPS agreement leads to avoidable deprivations of life-saving medications, why should we not say that the agreement violates anti-poverty rights? And that, if the two-level model denies the propriety of making such a claim, so much the worse for the model?[22]

I believe the best response to this objection is to deny its premise. International institutions such as the trade regime, of which the TRIPS agreement is a component, are creatures of states. They are the outcomes of international negotiations, and exercise whatever authority they possess as agents of their members. A state that adheres to an agreement whose enforcement results in deprivations of the interests protected by a human right for its own people violates that right. And the prospect of the violation supplies a reason for other states to refrain from adhering themselves, or insisting on adherence by others, or perhaps to revise the terms. This suggests that there may be nothing one might want to say about the bearing of human rights standards on international institutions that would be foreclosed by accepting the two-level model.

Things are more complicated in the cases of multinational firms and other non-state actors that cannot be regarded as the agents of states. It is true that business firms are usually chartered by one or another state and that their operations fall within the jurisdictions of states. States that fail to regulate their conduct in ways aimed at avoiding deprivations of interests protected by human rights might therefore be said to be violators. And perhaps business firms, like non-governmental organizations, can be counted among the external agents that can acquire secondary obligations to act when the governments of states default. But it would require an artificial stretch to say, within the terms of the two-level model, that multinational firms can be primary violators of human rights. The question is what to make of this fact. It does not count against the two-level view as

22. Thanks to Thomas Pogge for pressing this question. A similar question is raised by O'Neill (2005: 434–35).

a model of contemporary human rights practice; that practice, by design, primarily regulates relations between states. And it is not necessarily a reason to believe that a practical approach is excessively conservative. One might well conclude, however, after considering the effectiveness of the practice, that the limitation of human rights enforcement to states is ineffective against certain kinds of threats and that the practice is in need of reform. The reformist argument would have to be that the point or purpose of the practice is frustrated by its own existing limitations. I have some sympathy for this argument but it is beyond my scope to pursue it here.[23] All I mean to suggest is that a practical approach to human rights does not foreclose criticism of the structure of the practice.

There is also a second way that the approach taken here may seem to pay too high a price to accommodate anti-poverty rights. A consequence of thinking about human rights in the way I have suggested is that human rights claims may often leave more to be worked out at the 'point of application' than one might wish. This is because the grounds and force of a claim will vary with the context in which it is made, and because the reasons supporting the claim will have to be reconciled with whatever conflicting reasons exist under the circumstances of the case. This picture of human rights as privileged but not necessarily decisive norms of action stands in contrast to another picture of human rights that people sometimes entertain. In that alternative picture, human rights claims are expected to function as conversation-stoppers: that is, as if, once it is established that an assertion of right is warranted under the circumstances, no more needs to be said about whether action is required. If systematic torture, genocide or widespread political repression are going on, they should stop. What else might there be to say? But human rights as the two-level model characterizes them do not operate in this way. On this characterization, human rights claims serve two related purposes: they call attention to the likelihood that without some form of political action, urgent human interests are likely to be set back, and they recall that in most such cases, at least some agents who are in a position to take action are likely to have relatively strong reasons to do so. Human rights claims do not stop conversations or dictate decisions about how to act; instead, they frame a problem and call for a judgment. But from a point of view that regards human rights as the most important of political values and their violation as a matter of urgent concern, this may seem too anaemic.

The defence for taking such a view is that this is, in fact, how human rights seem to function in the discursive practice of contemporary global political life. The kinds of cases mentioned earlier – torture, genocide, widespread political repression – are particular; in such cases, the threatened interests are uncontroversially urgent, and, given plausible assumptions about the empirical background, there are unlikely to be offsetting reasons that would count in favour of the threat and there are likely to be possible means by which to eliminate or

23. The UN-sponsored Global Compact is one example of an attempt to extend human rights standards to corporate conduct. For a discussion, see Kuper (2005: 359–80) and Ratner (2001: 443–545).

contain it. But many of the human rights of international practice are not like this. Anti-poverty rights, in particular, protect against complicated threats whose lasting elimination or containment pose a complex challenge to public policy and may take many years to achieve. (This is also true, although perhaps not as obviously, of political rights.)

I once described human rights as the language of a global sense of justice (Beitz 2001: 269). I now believe this was inaccurate: human rights are not the whole of justice, even of global justice. But what I believe was correct in that formulation was the suggestion that human rights have come to occupy a privileged place in the normative discourse of global political life. They are public standards for domestic-level institutions, to which appeal can be made in claims for international help. In this sense human rights are matters of legitimate international concern. Their privileged place is based on the urgency of the underlying interests and the likelihood that international agents will have good reasons to act when local governments fail to protect adequately these interests against predictable threats. The combination of the normative ambition of human rights doctrine taken as a whole and the diversity of situation among the world's societies makes it inevitable that these standards will exhibit a substantial amount of open texture. So it would be unrealistic, even if it were not a mistake for other reasons, to expect even well-founded assertions of human rights to determine decisions about who should act, in what ways, and in all cases in order for these assertions to have normative force. This is not the nature of the enterprise.

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2

Socioeconomic Rights and Theories of Justice

Jeremy Waldron

What is the relation between socioeconomic rights and theories of justice? By socioeconomic rights, I mean rights of the kind we see listed in Articles 23–26 of the Universal Declaration of Human Rights (UDHR), Articles 9–13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in national instruments such as the Bill of Rights (Articles 26–29) associated with South Africa's Constitution. Now the articles just mentioned are legal or quasi-legal provisions. I really want to ask about the principles they embody or seek to embody. What is the relation between something like the principle that everyone has the right to social assistance if they are unable to support themselves, and the principles typically comprised in a theory of justice?

By a theory of justice, I mean something that does the sort of thing done by Rawls in his *A Theory of Justice* (1971) – that is, set out and defend some very general principles governing the basic structure of society in regard to its impact on the life prospects of and the enjoyment of primary goods by individuals. I do not by any means regard Rawls's work as canonical. Later in the chapter I shall refer to two alternative theories, at least one of them quite stridently opposed to Rawls's. But Rawls's work affords a fine example of the sort of thing I mean by 'a theory of justice', and it makes clear the difficulty of the question I want to ask. Rawls's theory is certainly not hostile to the idea of welfare provision, but principles of the kind alluded to in the previous paragraph do not feature among Rawls's two basic principles of justice as fairness – the principles that constitute his conception of justice. Why is this? The most plausible explanation is that socioeconomic rights, or principles embodying socioeconomic rights, are usually formulated at the wrong level of generality or abstraction to be included among the most fundamental principles of a theory such as Rawls's. But then we should ask: what is the relationship between abstract principles of justice and these somewhat less abstract principles requiring welfare provision?

For the purpose of answering this question, Rawls's theory has the advantage of complexity, both in the set of abstract principles that it yields and in its internal structure and the system of argumentation associated with it. His theory is built up on the basis of certain (by now familiar) model-theoretic ideas, such as the original position and the veil of ignorance. It comprises a number of meta-ethical conceptions about reflective equilibrium and the relation of a philosophical construction to commonsense precepts and our considered judgments about

justice. It includes an account of the relation between justice and the theory of the person. In the elaboration of the theory's practical implications, there is the 'four-stage sequence', there are theories of institutional competence and institutional responsibility, there is an argument about the pure procedural characteristics of what Rawls calls the 'basic structure', and there is a complex account of the relation between the two principles of justice as fairness and certain detailed theorems in public policy. All of this makes Rawls's theory structurally a good paradigm for our purposes. As I said, this is not because it is the last word on justice. Rather, it is because the theory offers numerous possible points of access for argument on socioeconomic rights, making it interesting to consider where in this complex structure such arguments are most appropriately located.

I think considering this question can be very helpful in political philosophy. Here is one way it can help. Some well-known theories of justice give the impression of being hostile to socioeconomic rights. Nozick's (1974: 238) theory of historical entitlement in *Anarchy, State and Utopia* is a good example. (Whether that impression is ultimately justified is another matter.) (Waldron 2005: 81). If we want to figure out what to think about this hostility – whether it is justified or whether it can be answered – we also have to ask: what *is* the proper relation between socioeconomic rights and a theory of justice? Only then can we assess whether the theorist in question has made a convincing case for denying that there is any justification for socioeconomic rights.

You might think that it is unnecessary to confront questions like these, or that confronting them is a purely academic exercise. If we are independently convinced that a case can be made for principles like those embodied in UDHR Article 25(1), for example, or in ICESCR Article 11(1), why should we care how that relates to a highly abstract theory like John Rawls's or to a conception of justice founded on principles widely believed to be hostile to socioeconomic rights, like that of Nozick? Moral philosophers may be preoccupied with the delicacies of Nozick's or Rawls's model–theoretic conceptions. But these conceptions are so remote in their abstraction from the compelling matters of life and death, sickness and health, poverty and human flourishing that proponents of socioeconomic rights have to address, that they are best left to languish in their ivory towers where they will not distract us from the more urgent concerns of human well-being.

I think saying that would be a mistake. The structural relation between socioeconomic rights and theories of justice is certainly a fascinating intellectual conundrum. But it is of more than academic interest. The claim that there are socioeconomic rights, that they really are human rights, that they deserve to be taken as seriously as, say, civil and political rights, and that the failure to fulfil them is in the same normative category as rights-violations like torture, censorship, disenfranchisement, or detention without trial is controversial even on its own ground. Politically it is attacked by those who claim priority for property rights and market structures, by those who deplore the way in which welfare provision privileges the lazy and the feckless over the responsible and the deserving, as well as by those who simply believe in other fiscal or macroeconomic priorities in a world of limited resources. These attacks cannot be dismissed; they require (and,

in my view, they can be given) an answer. But they are not adequately answered just by saying that the case for welfare provision is urgent and should command a very high place in the order of moral priorities. Even if one can defend the claim that socioeconomic rights are important, the nature of their priority over other concerns is not self-evident. There are all sorts of priorities in this area of moral and political life, and we need to develop an articulate account of what kind of priority we are talking about.

For example, nobody these days seriously imagines an economy either at the national level or at the international level in which private property and markets do not loom large, or in which the question of incentives for and rewards to the deserving are not thought important, or in which there is not a multitude of other claims on the public purse (or a host of other macroeconomic concerns) competing with demands for welfare provision. Though these considerations obviously compete with claims about socioeconomic rights, they are not to be dismissed simply on account of their being inimical to such claims. They need to be given their due in an overall account of the concerns that the organization of the basic structure of a society (national or international) ought to respond to. Formulating such an account, articulating and elaborating it, is precisely the task of a theory of justice.

Of course, existing philosophical defences of socioeconomic rights already do a fair bit of this (Copp 1992: 231). They defend such rights against some of the more obvious criticisms, and they seek either to discredit property, desert, and other fiscal priorities or to show that these are much less important than they claim to be. It is not hard to make a rhetorically convincing case along these lines, precisely because socioeconomic rights purport to address the claims of direst need directly and vividly – and often as a last resort – whereas the importance of these other competing claims (about property, markets, desert, and fiscal and macroeconomic concerns) is presented a little further back from the margins of life and death. Or to put it more crudely: it is easy for defenders of socioeconomic rights to make their opponents sound heartless. But just that advantage should put us on warning that it might be worth exploring the competition between these various claims from other angles too, if only as a reality check to ensure that our use of the rhetoric of dire need is not just a way of browbeating our opponents, bullying the moderates, and intoxicating ourselves with our own righteousness.

On the other hand, I do not want to leave the impression that the disparity between the tone and rhetoric of argument for socioeconomic rights (intense, concrete, and passionately concerned) and the tone and rhetoric of argument for theories of justice (dry, detached, abstract, and impossibly elaborate) is just a matter of personal style as between (say) welfare advocates and philosophers. I certainly do not mean to suggest that defenders of socioeconomic rights cheat on their arguments or sell short the sort of fundamental values, like respect for persons, human dignity, autonomy, and basic equality, that ought to anchor our views about justice. On the contrary, defenders of socioeconomic rights (in this volume and elsewhere) are second to none in their taking these fundamental premises seriously and in their determination to bring out the practical implications that

they really have for the concrete predicament of impoverished men, women, and children in the world. They rightly convey that arguing from premises like these cannot be regarded as a game or merely academic exercise.

The disparity that interests me is not so much in the premises that are used as in the conclusions that the respective bodies of argument are aiming at. Defenders of socioeconomic rights are interested in arguing from fundamental premises for something quite specific (health care, social security, minimum income, etc.) in a sort of line-item way, while proponents of a theory of justice are arguing from fundamental premises for principles (like Rawls's Difference Principle) that are intended to operate at a much more general level. What I am urging, when I say that it would be a good idea to bring these bodies of argument into relation with one another, is that we need a better sense of how the line-item claims that we call socioeconomic rights fit into a bigger picture that also takes these fundamental values seriously.

I emphasize that last point. The aim of this chapter is not to haul socioeconomic rights before some tribunal of efficiency or aggregate utility. Critics who regard efficiency or aggregate utility as the be-all and end-all of public policy have already committed serious mistakes: they have an impoverished conception of value; and they pursue the values that they recognize in an inappropriate way, by concentrating on arithmetical aggregates rather than on individualized or distributive concerns. Theorists of justice avoid mistakes like these. They may not agree with one another about the proper conception of value for public policy (welfare, primary goods, human capacities, etc.), or what exactly the distributive structure of an appropriate theory ought to be. But they are committed to evaluating social policy in terms that take individuals seriously and that have the capacity to take the special concerns of poor people seriously. The game is not rigged against the distributive concerns of the theorist of socioeconomic rights as it is in the economic critique. One could say that to ask about the proper relation between a theory of socioeconomic rights and a theory of justice is to ask a *fair* (as opposed to an unfair) question.

Benefits, I believe, will accrue to both sides when theories of socioeconomic rights are brought together with theories of justice. Theories of justice sometimes tend to consign their consideration of specific lines of public policy to an afterthought, tacked on to the main structure and argued for half-heartedly and often superficially. This is certainly true of such comments as Rawls makes about welfare provision and what he calls 'the social minimum' (Rawls 1971: 244–5). A clearer sense, within a theory of justice, of how particular public policy commitments could rise to the status of rights would improve matters. Such consideration would take fully into account the need to consider the public policy line in question in relation to other competing claims and commitments, but it would also be looking to justify it, in this context, *as a right*, i.e. as something that would have standing in public policy as a matter of principle, not just as a contingent and variable output of the theory.

Equally, from the point of view of the proponents of socioeconomic rights, I believe that pursuing the argument about these rights under the auspices of a theory of justice may enable us to make a better case for them than arguing for them

directly in the way their proponents currently do. This is for the reason already mentioned: a theory of justice necessarily brings together with the consideration of socioeconomic rights a consideration of all the claims and principles with which such rights might be thought to compete or conflict. If the resources that socioeconomic rights require are scarce (relative to these and other requirements), then it is to a theory of justice that we must look for allocation under scarcity. Or, if the resources that socioeconomic rights require are privately owned, or subject in some other way to others' claims (on the basis, for example, of labour, desert, or wealth-creation), then we need more than a theory of socioeconomic rights to show that they should nevertheless be made available for welfare provision; we need a theory of justice to provide a general matrix for considering and reconciling these competing claims. The general point here is that theories of rights do good work when it comes to explaining why each right is important, but they are notoriously bad at thinking about conflict or competition among rights or among claims that aspire to be treated as rights.[24] Theories of justice may be a little too abstract for the taste of those who are used to line-item consideration of some quite concretely specified rights, but their *raison d'être* is the consideration of competing claims and interests in a distributive context where it is understood that not everyone can get what they want or even what ideally we would like to secure for them. It is surely appropriate then to bring this second perspective to bear on the first.

If it is known that the case for a right like that in ICESCR Article 11(1) has been made without proper consideration of competing claims, then the alleged right is easy to discredit, easy to dismiss as naïve and unrealistic. If, however, the alleged socioeconomic right has been properly defended in the context of a theory of justice, then it may be presented more confidently and more effectively in political and philosophical argument. Its presentation can be associated with a sense that competing claims (to property, desert or whatever) have had a fair chance of consideration in a way that takes *their* normative aspirations seriously. And this way of defending the socioeconomic right will also be a way of illustrating and driving home the point that when claims of right are in the air, recourse to a utilitarian or economic matrix is not always appropriate.

What follows is not a comprehensive survey. It is certainly not a comprehensive survey of theories of justice. Rawls's theory will often serve as an illustration, though in some places I will also consider Nozick's theory of historical entitlement. The aim, however, is not to oppose these theories to one another, but rather to get a taste of the variety of ways in which claims about socioeconomic rights may figure in a broader theoretical conception. Also I will not offer an exhaustive review of the ways in which socioeconomic rights might be related to or emerge from a complex theory of justice. I have chosen seven main areas to focus on: (1) the role of considered judgments about welfare and the relief of poverty in the formation of

24. For a sampling of the sparse literature on conflicts of rights, see Waldron (1989: 503) and Kamm (2001: 239).

a theory of justice; (2) the importance of scarcity and issues of priority in defining the agenda for justice and the constraints facing the proponents of any costly right; (3) the difference between allocative and structural/procedural approaches to justice; (4) the use of contractarian ideas to argue for particular principles of justice; (5) the importance that a theory of justice will attach to choice and personal responsibility; (6) the relation between first-best and second-best accounts; and (7) the relation between the more abstract and the more policy-oriented aspects of a theory of justice. Other facets of the relationship are no doubt worth examining too, but the ones I have listed will be enough to begin with. This chapter is just a start; I hope it affords a basis for others to build on.

2.1. OUR CONSIDERED JUDGMENTS

Our theories of justice are motivated, driven, and to a certain extent constrained by what we sometimes call our intuitions about justice, but which might more accurately be described as our considered but on-the-whole pre-theoretical judgments about some of the matters that justice deals with. Whether or not one adopts Rawls's methodology of reflective equilibrium (Rawls 1971: 48–53), these considered judgments play an important role both in specifying what it is that we want to think about, and also in fixing our sense of what we expect our theory of justice to validate or make sense of. They may also provide 'reality checks' at various stages of our argumentation about justice; we may find a given theoretical position plausible or implausible (*intuitively* plausible or implausible as we say) because of its consonance or dissonance with one or more of these considered judgments.

These judgments need not be just the sentiments of private individuals. They may have the status among us of 'precepts of justice' – commonsense truths shared to a certain extent in the culture even among philosophers (Rawls 1971: 31–32). There is no doubt that claims about socioeconomic rights are supported by many of these judgments and precepts. Many of us believe, for example, that if a child is in danger of starvation in a society with a prosperous economy and if the child's parents are incapable of supporting it, then there ought to be some provision for social support and that state-run agencies have a responsibility to see that this is provided. Many of us would regard it as a serious objection to a theory of justice if it implied that this need not be done or that it should not be done. (A lot of the early hostility to Nozick's theory stemmed from the fact that Nozick gave the impression that such provision might be unjust or at any rate not required by justice. People thought that if Nozick's was just one theory competing for our attention, this might be a reason to look elsewhere for theoretical illumination on the topic of justice.)[25]

25. See, for example, Barry (1975: 331–32): '[T]he intellectual texture is of a sort of cuteness that would be wearing in a graduate student and seems to me quite indecent in someone who, from the lofty heights of a professorial chair, is proposing to starve or humiliate ten per cent

Of course, nobody's considered judgments are self-validating. For one thing, considered judgments about provision for need may have to be reconciled with other considered judgments of ours that seem to pull in an opposite direction. Many people hold the view, pre-theoretically, that each person is entitled to the fruits of his/her labour (e.g. to the income that others have paid him/her for work he/she has done), and they believe that it would count against a theory of justice if such a theory were to hold that his/her income were simply to be made available against his/her will for the satisfying of other people's needs. These two judgments may not directly contradict one another, but they are in tension, and the task of a theory of justice is to reconcile whatever is important in one with whatever is important in the other, in the context of their application to thousands or millions of individuals in a society or in the world. If this is true, then we should not expect either judgment to survive its consideration in a theory of justice in an unmodified form. Our considered judgments are like inputs to the theory, but the outputs may look somewhat different. Of course that is not inevitable; maybe one or other judgment will emerge largely intact. But a theory of justice offers no guarantees in this regard, and this may be important for how we think about socioeconomic rights. Inasmuch as the case for them is largely intuitive or based simply on the fact that they embody one set of strong convictions that we hold, then we have to be open to the possibility that they will not survive in the form that a simple rights-slogan expresses when they emerge from serious consideration under the auspices of a theory of justice.

Also, a theory of justice may sometimes be radical or quite revisionary so far as our considered judgments are concerned. People sometimes approach the topic of justice with a pre-theoretical conviction that individuals deserve certain things – for example, that hard-working and prudent people deserve the wealth that they have created on the basis of the moral merit evinced in their abstemious industriousness. (This too is sometimes put forward as being in tension with the 'intuitions' embodied in claims about socioeconomic rights.) But in *A Theory of Justice*, Rawls criticizes such claims. He does not just strike a different balance between the claims of need and the claims of desert; he argues that the latter are mostly misconceived (Rawls 1971: 88–89). He may or may not be right about that. The point is that a theory of justice cannot promise immunity in advance against such revision to any set of 'intuitions'. (See Murphy and Nagel (2004) for another example.)

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or so of his fellow citizens (if he recognizes the word) by eliminating all transfer payments through the state, leaving the sick, the old, the disabled, the mothers with young children and no breadwinner, and so on, to the tender mercies of private charity, given at the whim and pleasure of the donors and on any terms that they choose to impose. This is, no doubt, an emotional response, but there are, I believe, occasions when an emotional response is the only *intellectually* honest one. … [A] book whose argument would entail the repeal of even the Elizabethan Poor Law must either be regarded as a huge joke or as a case of *trahison des clercs*, giving spurious intellectual respectability to the reactionary backlash that is already visible in other ways in the United States.'

The role of considered judgments and precepts helps us understand the complexity of the relation between rights and justice. On the one hand, our convictions about rights often present themselves to us as obvious, in a way that does not require much philosophical elaboration: 'We hold these truths to be self-evident….' But theoretical work on justice gets underway when it becomes apparent that not all the things that appear self-evident (one by one) to a person, or to a group of people, or a whole society or civilization can be held together, at least in unadulterated form. This fact has convinced some people that the language of rights is inappropriate for political discourse: '[It] is from beginning to end so much flat assertion … It lays down as a fundamental and inviolable principle whatever is in dispute. … The strength of this argument is in proportion to the strength of lungs in those who use it' (Bentham 1987: 73–74). But that is too extreme a reaction. Intuitive convictions about rights play a healthy role in stimulating theories of justice and, as we shall see, some of the conclusions of theorizing about justice are properly presented in the language of rights.

2.2. SCARCITY AND ISSUES OF PRIORITY

Some critics argue that, even considered as commonsense precepts, claims about socioeconomic rights have to be rejected, because they violate the logical principle '*ought* implies *can*.' Many states, say these critics, do not have the resources to provide even minimal economic security for masses of their citizens, and since states differ considerably in this regard, it hardly makes sense to regard economic provision as a matter of universal human entitlement (see, e.g., Cranston 1967: 50–51). A theory of justice will make this difficulty apparent (if it is a difficulty) at an early stage, because its entire apparatus is predicated upon a presupposition of scarcity: like the limited altruism of human beings, the scarcity of material resources is a fact of life and a basic circumstance of all our talk about justice (Rawls 1971: 109–12. See also Hume 1978: 493–95).

But the argument is too quick. It is true that the resources and services that socioeconomic rights need to draw upon are scarce relative to the whole set of demands that are placed upon them. But what this indicates is that there needs to be some sorting, balancing and prioritization among these demands. It does not follow that one subset of the demands (socioeconomic rights) must be abandoned in advance as impossible. There is no reason to suppose that there are not enough resources in the world to feed or house or provide basic medical care to everybody in it, as, for example, Articles 11 and 12 of the ICESCR require. The difficulty is that there are also other demands on these resources – other fiscal priorities and other uses that individuals and firms might have for the income and wealth that would have to be taxed (or otherwise accessed) if fiscal capacity were to be increased. If it *did* follow from scarcity (in this sense) that we should abandon some subset of the demands that are placed upon scarce resources, then we would need to hear arguments back and forth about which subset of demands this should be. For example, demands for the provision of weapons compete fiscally with demands

for socioeconomic provision. Why not abandon the former rather than the latter? I do not mean this as a rhetorical question. I mean to ask for an answer and to ask also for the hard work – including hard work in our theory of justice – that would be necessary to explain and defend a given answer.

All this is particularly important when it comes to thinking about the relation between socioeconomic claims and property rights. The alleged impossibility of socioeconomic claims – the difficulty with '*ought* implies *can*' – is often based on an assumption that the existing distribution of property is to remain largely undisturbed. When a conservative government in the West says, for example, in response to some plea for welfare provision, 'The money simply isn't there,' what is usually meant is that it would be impolitic to try and raise it from existing income earners by taxation. But where resources are scarce relative to human wants, *any* system of rights or entitlements will seem demanding to those who are constrained by it. If an economic system includes provision for welfare assistance, that may seem overly demanding to taxpayers. But if it does not include such provision, then the system of *property rights* in such an economy will seem overly demanding to the poor, requiring as it does that they refrain from making use of resources that they need in order to survive. As usual, the question is not whether we are to have a system of demanding rights, but how the costs of the demands are to be distributed.

Nozick may be guilty of a fallacy along these lines when he voices the following general misgiving about socioeconomic rights:[26]

> The major objection to speaking of everyone's having a right to various things such as equality of opportunity, life, and so on, and enforcing this right, is that these 'rights' require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over. Other people's rights and entitlements to *particular things* (*that* pencil, *their* body, and so on) and how they choose to exercise these rights and entitlements fix the external environment of any given individual and the means that will be available to him...
>
> There are particular rights over particular things held by particular persons, and particular rights to reach agreements with others, if you and they together can acquire the means to reach an agreement. ... No rights exist in conflict with this substructure of particular rights. Since no neatly contoured [socioeconomic] right … will avoid incompatibility with this substructure, no such rights exist. The particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition. The reverse theory would place only such universally held general 'rights to'

26. The remainder of this section is adapted from Waldron (2005).

> achieve goals or to be in a certain material condition into its substructure so as to determine all else; to my knowledge no serious attempt has been made to state this 'reverse' theory. (Nozick 1974: 238)

Nozick's argument here assumes that claims based on need occupy a relatively superficial role in a general theory of economic entitlement. It is as though we first figure out who owns what, applying the principles that determine property rights and *then* figure out whose needs are left unsatisfied and what is to be done about them. On this approach, socioeconomic rights (if there are any) live only in the interstices of property. Some of what Nozick says suggests that this subordination of welfare to property is more or less unavoidable: 'Things come into the world already attached to people having entitlements over them' (Nozick 1974: 160). He thinks this is clearest in the case of body parts: you may need these kidneys or this retina, but my entitlement to them is necessarily prior to yours for we cannot even grasp my status as a person without comprising in that status a rightful claim to the limbs, cells and organs that make me who I am (Nozick 1974: 206). He thinks it holds for some external objects as well, appealing to the intuition we cited earlier: 'Isn't it implausible that how holdings are produced and come to exist has no effect at all on who should hold what?' (Nozick 1974: 155). The trouble with socioeconomic rights, on this account, is that they 'treat objects as if they appeared from nowhere, out of nothing' (Nozick 1974: 160).

Nozick's position is that 'particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition.' He maintains that the alternative is to stipulate the socioeconomic rights first, and then try to fit property entitlements around them, and he says in the long passage I quoted that no serious attempt has been made to state the 'reverse'.[27] In fact, Nozick's own view has certain features that involve this alternative structure. Nozick, like John Locke before him, believes that the initial acquisition of property rights must not be conducted in a way that is indifferent to the predicament of needy individuals who might be constrained by the rights in question. Nozick is committed to the following proposition, as a proviso qualifying his account of the acquisition of property:

27. In fact some philosophers have toyed with versions of such a 'reverse' approach. Held (1979: 550) compared acquisitive economic activity to a game, where winners and losers compete on friendly terms as if engaged in a sporting event. The idea was that winners are allowed to keep their winnings and 'losers may prefer having had a chance to play the game and especially having a chance to play again and win, than to … be assured all along of an even apportionment of all proceeds.' But Held did not think that this game-playing could trump socioeconomic rights: 'Economic justice is a serious matter. While those with moral rights to decent lives are deprived of these rights, playing games is not only frivolous but immoral. However, if such rights *were* respected..., and if, on utilitarian grounds, playing economic games could be justified in terms of the maximization of interests, well then there might be nothing wrong with capitalist games between consenting adults. But first, the children ought to be fed' (Held 1979: 579).

> A process normally giving rise to a permanent bequeathable property right in a particular thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened. (Nozick 1974: 178)

What is this, if it is not a statement of what Nozick called the 'reverse' theory? It gives priority to the right not to have one's material situation worsened, whether that situation consists in holding property rights or just in having access of some kind to the resources needed for a decent life. It gives these rights priority in exactly the sense that the 'reverse' theory is supposed to give priority to socioeconomic rights: property entitlements must work round them and no such entitlements are recognized if they are incompatible with these rights.

Nor is this an inadvertent slip on Nozick's part. Almost all philosophical defenders of private property acknowledge the need to develop principles for the acquisition and use of property that respect each person's fundamental right to derive sustenance from this world that is our common heritage.[28] (Locke, for example, recognizes it by allowing a right of recourse to all property in the last resort for the needy – see Locke 1988: para. 42.) Few are willing to say that property rights are justified utterly without reference to the interests or needs of those whom they exclude from access to resources. The reason is obvious: to justify a property right in X is not only to feel justified *oneself* in coercively excluding others from X, but to justify *other people's* recognition of a *duty* to refrain from using X even when one is not around oneself to physically defend it.

My reason for including this lengthy consideration of Nozick's proviso is to help us see that a theory of justice may take on board compelling principles about human need in ways that are unfamiliar or disconcerting. We were expecting to see them surface as free-standing rights, yet here they surface as conditions or provisos on principles of historic entitlement. Someone may claim of course that, although Nozick's proviso does represent *a way* of acknowledging the sort of needs that are also acknowledged in claims of socioeconomic rights, it is not an *adequate* way of acknowledging the force of such considerations. But that will have to be argued. We are not proceeding with any guarantee that the form in which welfare considerations emerge in a theory of justice exactly matches the form in which they present themselves in our considered judgments, in our commonsense precepts, or for that matter in some legal or internal formulations.

Certainly, Nozick's way of thinking about the relation between the claims of need and claims related to property in the context of a theory of justice is not the only way we can think about this. In Section 2.4, I shall consider the quite different way in which Rawls deals with these matters in Chapter Five of *A Theory of Justice*. Rawls's approach is probably more congenial to defenders of socioeconomic rights than Nozick's. But I have to say again: we are not entitled to take the emergence of a familiar-looking socioeconomic right as a criterion of adequacy for a theory

28. For a survey, see Torne (1992).

of justice. Adequacy means that the relevant claims have been given proper consideration, not that the conclusion coincides with the views we began with.

2.3. ALLOCATION VERSUS STRUCTURE AND PROCEDURE

One might think about the relation between a theory of justice and socioeconomic rights in the following way:

> Distributive justice involves choosing criteria for the distribution of something valuable (like money or other goods) among people who have some claim upon a common stock or a common fund. These criteria are embodied in principles. One possible allocative principle is P_n: 'To each according to his or her needs.' So a belief in socioeconomic rights is a belief that something like this distributive principle should be one of the outputs that a theory of justice comes up with, and that it should be applied to the resources that society has at its disposal. Of course there are other candidates; for example, P_d: 'To each according to his or her desert' is an alternative principle that is often heard. To think that there are socioeconomic rights, therefore, is to think that theorizing about distributive justice will show that P_n is a correct principle (at least over some important range of needs) and that P_d is not a correct principle to the extent that it is incompatible with P_n.

Theories of distributive justice that aspire to yield principles like P_n or P_d are sometimes called allocative theories. Allocative theories have a venerable history in the discussion of justice: they have a prominent place in Aristotle's discussion of distributive justice, particularly in his discussion of the proper distribution of political power (Aristotle 1954: Bk. V, Ch. 2; Aristotle 1988: Bk. III, Ch. 12). But most modern theorists of justice reject the allocative approach, or at best confine it to a very special range of cases where there is a common stock of resources upon which a number of identifiable individuals have undoubted – but so far unquantified – claims. (The division of matrimonial assets upon divorce might be an example.)

Nozick's theory is adamantly opposed to the allocative approach. The reason is straightforward: allocation treats goods as though they were simply there, awaiting distribution, as though the process by which they were produced had no relevance to that. It is part of his rejection of what he calls 'patterned' principles, principles that try to pattern the distribution of goods on something else like need or desert:

> Isn't it implausible that how holdings are produced and come to exist has no effect at all on who should hold what? … To think that the task of distributive justice is to fill in the blank in 'to each according to his ____' is to be predisposed to search for a pattern; and the separate treatment of 'from

> each according to his ___' treats production and distribution as two separate and independent issues. On an entitlement view these are not two separate questions. (Nozick 1974: 155; 159–60)

Nozick's own substantive position is that '[w]hoever makes something … is entitled to it' (Nozick 1974: 160). We need to accept this in order to accept his critique of the allocative approach. But his view is only one way of linking production and distributive issues together; there may be others. The more abstract point is that production issues and distributive issues do need to be linked somehow, and justice does need to deal with both of them together. We need principles of justice that apply not to distribution considered apart from production or vice versa, but to the structure of production-enmeshed-with-distribution that we are likely to see in a real working economy.

The holistic emphasis on structure, as opposed to distributive questions posed in isolation, is typical of Rawls's approach as well. Rawls too is anxious that the task of a theory of justice not be understood simply as an allocation of distributive shares: who gets what when and how? 'We must not assume,' he says, 'that there is much similarity from the standpoint of justice between an administrative allotment of goods to specific persons and the appropriate design of society' (Rawls 1971: 64). He also says that '[i]f it is asked in the abstract whether one distribution of a given stock of things to definite individuals … is better than another, then there is simply no answer to this question' (Rawls 1971: 88). Thus, for example, Rawls's 'Difference Principle' is not to be interpreted as dictating that the worst-off group be *given* a certain share of resources.[29] Instead, the effect of the principle is that when we are designing or (more likely) evaluating and reforming the network of rules and procedures that constitute the institutional structure of an economy, we should do so in a way that is oriented towards the advantage of the worst-off group. With that criterion satisfied at the level of basic design, the institutions should be able to operate in a way that does not require subsequent second-guessing. On Rawls's approach, we are not to meddle with the outcomes of a just institutional structure, even if we think that by doing so we could make the array of outcomes even more just from a distributive point of view.

In a book on social justice published in the mid-1970s, Hayek took these comments by Rawls to indicate that the difference between Rawls's approach and his own is 'more verbal than substantial' (Hayek 1976: xiii). Rawls's work, he says, has been 'wrongly ... interpreted as lending support to socialist demands' (Hayek

29. The Difference Principle certainly reveals a spirit congenial to something like welfare provision inasmuch as it requires particular attention to the plight of the worst-off members of society. On the other hand, it also suggests that it might be possible to justify great inequalities, which on some accounts it is the task of socioeconomic rights to mitigate. In general the Difference Principle is too abstract to generate, by itself, any particular case for welfare provision. It is a principle governing the most abstract distributive implications of the basic structure, and it deals with them holistically, without regard to particular institutional arrangements or sources of advantage or disadvantage. If the Difference Principle provides the basis of a case for socioeconomic rights, it does so in the context of its further detailed elaboration.

1976: 100 and 183n). He takes Rawls to agree with his own central claim that '[j]ustice is not concerned with those unintended consequences of a spontaneous order [such as a market] which have not been deliberately brought about by anybody' (Hayek 1976: 38 and 166n).

I think Hayek is mistaken about this, and that he exaggerates the implications of Rawls's refusal to consider the justice of particular allocations of goods. Rawls's position may be illuminated as follows. Suppose that, on one occasion, the institutions of our economy happen to yield a distribution of wealth, D_1, that is judged inferior in terms of the Difference Principle to another distribution D_2. Should we immediately interfere and reallocate wealth so that we change D_1 into D_2? Rawls's answer, like Hayek's, is 'No.' For Hayek the matter ends there. But for Rawls there is a further question to be addressed: can we change the institutional structure so as to render it more likely in the future that the normal operation of our economy will yield distributions like D_2 rather than D_1? The answer to this may also be 'No,' because the proposed change might be incompatible with institutional virtues like publicity, stability and the rule of law (Rawls 1971: 54–60; 235–43). The new institutions that are being suggested may not, as it were, hold up as institutions. Still – and this is what Hayek overlooks – the answer is not necessarily 'No.' If change is possible and if the resulting institutional structure would be viable, stable etc., then we are required as a matter of justice to implement it, for the Difference Principle requires us to arrange (and, if necessary, rearrange) our institutions so that social and economic inequalities are to the greatest benefit of the least advantaged. So, for example, if we find ourselves in a market society that lacks basic welfare provision, we have to consider whether the institutional structure of a market economy would be wrecked qua institutional structure by the addition of what Rawls calls a 'transfer branch,' charged with administering a social minimum. Would that make it impossible for the economic structure as a whole to operate predictably, publicly, impersonally and in accordance with other institutional virtues? Hayek has devoted a large part of his life to arguing that it would: that the modern regulated welfare state is incompatible with the rule of law (Hayek 1944; 1960). It is pretty clear that Rawls disagrees with him about that.[30] But the deeper disagreement is that Rawls thinks it is the job of a theory of justice to select principles for evaluating economic institutions along exactly these lines, whereas Hayek simply denies that that is a legitimate concern about justice.

I have taken this digression into the Hayek–Rawls misunderstanding because I wanted to stress that in a theory of justice like Rawls's we cannot guarantee that socioeconomic rights will emerge in a familiar or predictable form. As an abstract matter we can say, with the drafters of Article 25 of the UDHR, that everyone has 'the right to a standard of living adequate for the health and well-being of himself and his family.' But that may not necessarily emerge as a specific legal or constitutional guarantee: a just society may not have a *rule* to that effect, nor even

30. Otherwise he would not take it for granted that a just basic structure will have a transfer branch which 'guarantees a certain level of well-being and honors the claims of need' (Rawls 1971: 276).

any particular agency charged with administering this standard. There may be a variety of provisions and arrangements, ranging from tax-breaks to educational opportunities to rent control (or its abolition) to unemployment insurance schemes – all of which taken together may represent the best (and *genuinely* the best) that can be done in an institutional framework to honour the underlying claim for the individuals on whose behalf it can be made.

2.4. CONTRACTARIAN ARGUMENTS FOR PRINCIPLES OF JUSTICE

I said at the beginning of this chapter that it is not devoted specifically to Rawls's theory of justice or to the implications of that particular theory for socioeconomic rights. Still, Rawls's theory is a good paradigm to work with and it has contributed to the study of justice a number of ideas that have more general application. One of them is the contractarian idea of the original position:[31] the idea that it might be fruitful to approach questions of justice by imagining people making decisions about important structural aspects of their society behind a veil of ignorance, in which they prescinded from all knowledge of their own particulars that might give them an idea of how such arrangements would impact on their own well-being. So, for example, people might be required to imagine themselves considering arrangements about racial discrimination without knowing what race they belonged to or arrangements about the state's relation to religion without knowing what particular creed they affirmed.

Would it be appropriate to approach the principles underlying socioeconomic rights from this perspective? Could one argue for example that principles roughly similar to those that I mentioned at the beginning of this chapter – the principles of socioeconomic rights that one finds in the UDHR, the ICESCR, or the South African Constitution – might emerge from a contractarian theory, as the upshot of asking what people would agree to from behind the Rawlsian veil of ignorance?

In light of what was said in the previous section, one might imagine a Rawlsian response to the effect that a non-allocative theory simply does not generate principles of that sort in this direct way. Rawls might say that if justice requires welfare payments, for example, then that will emerge in the course of the detailed elaboration of what is implied as a matter of public policy by the very abstract propositions that are the subject-matter of decision in the original position. (We will examine this in Section 2.7.) But, he will say, it misconstrues the order of argument in Rawls's conception to think that welfare can emerge as a matter of right as a result of directly applying the idea of choice behind the veil of ignorance.

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31. For other uses of contractarian or quasi-contractarian approaches, see Ackerman (1980); Scanlon (1998).

But actually that is not quite right, at least so far as Rawls's own theory is concerned. The 'First Principle' of Rawls's conception of justice as fairness contains what he refers to as 'equal basic liberties,' under which heading we find many principles that are conventionally regarded as human rights. These include political liberties, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person, and freedom from arbitrary arrest (Rawls 1971: 53). According to Rawls, these are argued for directly using the idea of the Original Position. For example, the argument for the right of freedom of conscience is that 'persons in the original position … cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or suppress others if it wishes' (Rawls 1971: 207). So we might ask: if this is an appropriate way of arguing for rights of religious liberty, why would it not also be an appropriate way of arguing for other rights such as socioeconomic rights?

One contrast between a theory of justice and a theory of rights is that the latter is often just presented as a list, without addressing issues of conflict and priority, whereas the former aspires to a more unified and systematic account. But in fact, Rawls's theory of justice turns out to have some list-like aspects too. '[I]t is essential,' he says, 'to observe that the basic liberties are given by a list of such liberties' (Rawls 1971: 53). This might encourage us to think that we could just insert a list of social and economic rights in our theory of justice, as Rawls inserted a list of civil and political rights in his First Principle. In a later discussion, Rawls says:

> Some may think that to specify the basic liberties by a list is a makeshift which a philosophical conception of justice should do without. We are accustomed to moral doctrines presented in the form of general definitions and comprehensive first principles. Note, however, that if we can find a list of liberties which … leads the parties in the original position to agree to these principles rather than to the other principles available to them, then what we may call 'the initial aim' of justice as fairness is achieved. This aim is to show that the two principles of justice provide a better understanding of the claims of freedom and equality in a democratic society than the first principles associated with the traditional doctrines of utilitarianism…. (Rawls 1996: 292)

He goes on to say that, for this purpose, the list can be drawn up by considering 'which liberties are essential social conditions for the adequate development and full exercise … of moral personality over a complete life,' and we bring that together with a survey of 'the constitutions of democratic states,' particularly those that have worked well, to see which of these liberties are normally protected' (Rawls 1996: 292–93). We might try out various lists, moving back and forth between the criteria just mentioned and a sense of what would be accepted in the original position, until we have come up with a 'last preferred list' (Rawls 1996: 293).

Well, then, we might say that there is no reason why such a methodology should not take us beyond traditional civil and political rights into the realm

of socioeconomic rights. Prominent international human rights instruments now include these, as do certain well-functioning constitutions (such as that of South Africa). Those who believe in such rights defend them by arguing that they indeed represent 'essential social conditions for the adequate development and full exercise … of moral personality.' And, as we shall see in a moment, there might well be a direct Original-Position argument to be made in their favour. If all this is true, then the list-ness of socioeconomic rights – the fact that they are not theorized holistically in the way that theories of justice normally theorize things – need not be an obstacle, at least if we accept the general outlines of Rawls's methodology in this regard and buy into his rejection of the criticism (which is more or less a version of the criticism with which I began this chapter) that the use of such a list of rights in a theory of justice is a disreputable 'makeshift'.

All that is quite persuasive. On the other hand, there may possibly be reasons specifically for *not* treating socioeconomic rights in this manner, which do not apply straightforwardly to the civil and political liberties on Rawls's list. Consider, for example, Rawls's reasons for not including the fair value of liberty – the material resources that enable one to use one's liberties to one's advantage – under the heading of the First Principle. Rawls writes:

> The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty…. (Rawls 1971: 179)

The point of this distinction is not to heartlessly brush aside questions about poverty and lack of means. Rawls did not believe that a society could pride itself on offering its poorer citizens civil and political rights, in this narrow sense, without paying any attention to their material condition. But it is precisely the task of the Second Principle governing social and economic inequalities to pay attention to this matter. The connection between a 'liberty' and 'the worth of that liberty' binds the two principles of justice together, by indicating the importance of economic well-being in determining whether the liberties governed by the First Principle are actually worth having. But if the worth of liberty had to be dealt with under the First Principle, then there would be precious little for the Second Principle to deal with, because almost all the primary goods affected by the Second Principle have some direct or indirect relevance to the effective use that one can make of the rights governed by the First Principle.

In general, it is arguable that the civil and political liberties on Rawls's list can be dealt with qua rights, separately from the other concerns of a theory of justice. In and of themselves, the civil and political liberties do not have massive implications for the issues of social and economic distribution that Rawls's other principle addresses. (I do not mean that civil and political rights have no resource implications at all [see Holmes and Sunstein 1999; Shue 1980]; I mean that their resource implications are patchy, sporadic and often indirect.) Socioeconomic

rights, on the other hand, have very substantial implications, both for the resources that Rawls's Second Principle is likely to govern and for the basis of our overall assessment of the impact of the basic structure on people's life prospects. This means, first, that if socioeconomic rights were included in the First Principle, then the First Principle would do much of the work supposedly allocated to the Second.[32] And it means, secondly, that if socioeconomic rights were inserted in this fashion anywhere in Rawls's theory (not necessarily under the auspices of the First Principle), then it would turn out to be the case that a very substantial part of the work of the theory would consist simply in a list of rights, and its systematic theoretical character would be largely lost. One gets the impression that much, if not most, of the conclusions of Rawls's theory are supposed to be presented as derivations from 'general definitions and comprehensive first principles,' even if the list of basic liberties is not. But if socioeconomic rights are articulated in the way we have been imagining, then it will be the case that the whole theory begins to look makeshift, not just a part of it.

All this leaves open the possibility, however, that when it comes to the elaboration and defence of his Second Principle, Rawls might be constrained by the Original-Position method to include fundamental constraints that require attention to the issue of poverty and deprivation. After all, the Second Principle is itself complex: it conjoins the Difference Principle with a Principle of Equal Opportunity that constrains its operation, and it is not unimaginable that we might say that one or both of these is also constrained by (something like) socio-economic rights.

Would persons in the Original Position insist on such constraints? The answer is 'Possibly, yes' – in fact, the claim that they would insist on some such constraint might be more plausible than the claim that they would adopt the Difference Principle as it is ordinarily understood. Let me explain. Rawls's own view is that any individual behind the veil of ignorance choosing principles to govern the basic structure of society in which he or she was to live would insist on a principle that ensured that social and economic inequalities were regulated to the advantage, in the first instance, of the least-well-off group (Rawls 1971: 75–78). This is the Rawlsian Difference Principle. (As we have seen, that principle is not itself supposed to determine what anyone is entitled to; but it would not be surprising if it commanded the institution of something like a modern system of tax-and-transfer.) Many critics, however, find it incredible that people in the Original Position would be so solicitous of the worst-off group in all circumstances (see, for example, Harsanyi 1975: 594; 595–8). They concede that such solicitude might be intelligible on the assumption that members of the worst-off group are suffering serious deprivation. But if everyone is enjoying great luxury, it seems odd to commit oneself to a principle that we must always pay attention to the

32. Hart (1989: 230; 236–37) made an analogous criticism of Rawls's early suggestion that the First Principle governed the distribution of liberty in general, not just specific basic liberties. Since all resource allocation involves the allocation of liberty via the right to use and the right to exclude, such an agenda would cover the whole domain of resource use.

plight of members of the group enjoying the least luxury (if necessary sacrificing the possibility of more luxury overall). This suggests that the reasons for parties in the Original Position to choose something like the Difference Principle (which in turn is likely to generate something like socioeconomic rights) evaporate as the actual level of well-being of the worst-off group improves. Of course, the parties behind the veil of ignorance are assumed not to know what the level of general prosperity is. But they might adopt a conditional principle. They might say: 'If the worst-off group is below a certain (specified) absolute level of deprivation then all social and economic inequalities should be oriented to their advantage; but if they are above that level of deprivation, then that exclusive concern may not be appropriate.' In other words, individuals choosing from behind the veil of ignorance would explicitly adopt some principle of social minimum.[33] They might reason, for example, that it is crucial to make efforts to avoid radical deprivation, of a sort that might undermine the most important aspects of human functioning (the nutrition necessary for ordinary action and reproduction; the shelter and clothing necessary for life; and so on). They might figure that serious limitations on the upside prospects of social arrangements would be justified for the sake of avoiding these desperate possibilities. If this was their approach, then they would, in effect, have adopted something very like what we call socioeconomic rights – rights calculated to ensure that those in a society who are materially radically disadvantaged are, if possible, raised by collective provision above the level of radical disadvantage.[34]

It seems to me that this is a most promising avenue for the generation of something like a fundamental right to welfare provision. But it is worth noting that given the level at which it emerges in (say) a neo-Rawlsian theory of justice, there is much more work to be done before we can conclude that such a theory requires that people in a well-ordered society actually be vested with such a right. I will discuss this further in Section 2.7.

2.5. CHOICE AND PERSONAL RESPONSIBILITY

Many of those who would benefit if socioeconomic rights were recognized are destitute and in need of the assistance that these rights afford through no fault of their own. Others, however, are destitute because of bad choices they have made. Some are in need because of sheer bad luck that has nothing to do with choices they made; others are in need because they chose to take (and hoped to benefit from) a risk that had penury as one of its possible outcomes. Again, some are in need of the help that such rights require because neither they nor their parents nor their grandparents ever had access to anything remotely like a fair share of

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33. A principle oriented to the social minimum would be different from the social minimum policy discussed by Rawls (1971: 276). See also Rawls 2001: 127 ff.
34. Elsewhere I have argued that this position is also supported by what Rawls says about the impact of 'strains of commitment' on reasoning in the Original Position. See Waldron 1986: 21.

their society's (or the world's) wealth or a fair opportunity to make a decent and self-sufficient life for themselves; but this is not true of everyone, for some may have squandered a fair share and need assistance now on account of their own lack of prudence.

It is possible to defend socioeconomic rights in a way that makes distinctions like these irrelevant at a certain level of compelling need. A starving person is a starving person, we might say, and they have a right to our help, even when they are responsible for their predicament or even when they have previously been given a fair share so far as the requirements of distributive justice are concerned. However, it is widely believed – certainly as a matter of pre-theoretic considered judgment – that these distinctions are not altogether irrelevant for a theory of justice. It is possible, I guess, that a theory of justice might repudiate these distinctions altogether. Sometimes Rawls gives that impression in his comments about desert (Rawls 1971: 310–15). And neither the argument for the Difference Principle nor the Rawlsian social minimum argument outlined in the previous section seems to pay any attention to the question of a person's own responsibility for his or her membership in the worst-off group (see, for example, Dworkin 2006: 103–04). Still, we might insist, a theory of justice is inadequate if it says nothing to address this question or allay the concerns that it raises. Even if it is believed that choice and responsibility should not matter at the extremity of need, some account must be given of why the intuitions that underlie them and that make them important in the eyes of some people for some or all cases do not have the importance for *these* cases that their proponents say they have.

Some theories of justice have made these distinctions fundamental. In Dworkin's account of equality of resources, for example, we are to think in terms of a model in which each person is assigned an equal share of resources (configured by processes that treat him or her as an equal in determining how things should be divided or how non-fungible items should be treated etc.) (Dworkin 1981: 283). But once resources are assigned, we assume that holdings will quickly become unequal, as a result of various processes:

> Some may be more skillful than others at producing what others want and will trade to get. Some may like to work, or to work in a way that will produce more to trade, while others like not to work or prefer to work at what will bring them less. Some will stay healthy while others fall sick, or lightning will strike the farms of others but avoid theirs. For any of these and dozens of other reasons some people will prefer the bundle others have in say, five years, to their own. (Dworkin 1981: 293)

Some of the hardest work that Dworkin's model then requires involves distinguishing, among these various ways in which people's holdings might become unequal, those that represent the results of fair choices (investments, gambles, preferences for leisure over work) and those that represent brute bad luck. It has always been Dworkin's position that one does not treat people as equals if one requires that they be insulated from the consequences of their own free choices.

The person who worked or saved in order to have enough resources for a rainy day is not treated with equal dignity if he/she is required to subsidize the person who did not work or save despite being conscious of what the consequences of that would be and despite having had the opportunity to do so. As Dworkin puts it, ideals of equality and justice must treat us as having in the first instance a responsibility to determine by our own choices how our lives should go (Dworkin 2006: 17–21; 102–6). But opportunities for work or savings may not have been equal, people may be handicapped or struck by illness, and in these instances a plausible case can be made for social assistance that does not involve an affront to the dignity of personal responsibility. What the extent of that assistance should be is determined in Dworkin's model by imagining various markets, actual and hypothetical, for insurance. People who begin with equal holdings are imagined also to have had a fair and equal opportunity to insure against bad luck such as illness or unemployment. If such insurance opportunities are not available – again through no fault of their own – then they are said to be entitled to the assistance that they would have received in a fair insurance market had such a market existed. The details of this account need not detain us here. What is important to understand is that these model-theoretic assumptions – an equal initial assignment of resources, responsibility for chosen outcomes even when these are unequal, and the provision of either an equal opportunity to insure against brute bad luck or the payouts that a fair insurance market would have provided – work in the infrastructure of the theory to provide perspectives for thinking about the actual hazards and inequalities of the real world. Dworkin is not arguing for the setting up of any particular social insurance mechanisms as a matter of policy; instead he is using these devices as a way of thinking through the tangled issues about choice, luck and responsibility that he believes are unavoidable in a theory of justice.

Dworkin's is just one theory; there are other theories of justice that engage in similar analysis. And there are some – as we have seen, like Rawls's theory – that give these issues much less prominence. It may seem that a proponent of socioeconomic rights – someone who takes seriously Article 11(1) of the ICESCR: 'the right of everyone to an adequate standard of living for himself and his family' – should always favour theories that minimize the importance of personal responsibility over theories that emphasize it. But quite apart from general difficulties of derivation that assumes that we already know what socioeconomic rights are justified, it is to assume that we have already chosen between (say) the conditional formulations in the UDHR, Article 25(1)[35] and the unconditional formulation from the ICESCR just quoted. One is entitled to ask: how can we know that, without having considered what is to be said in favour of a theory of justice of the Dworkinian kind as against a theory of justice of the Rawlsian kind?

35. UDHR, Article 25(1): 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood *in circumstances beyond his control*.' (my emphasis).

We cannot just 'intuit' it, for as we saw in Section 2.1, our intuitions on this are all over the place. There is no substitute for doing the hard work that theorizing about justice requires, and that involves thinking through what might actually justify taking sides in the Rawls/Dworkin dispute.

2.6. SECOND-BEST THEORY

In actual fact, no one has been assigned an initially equal share of resources, nor have most people had an opportunity to insure themselves in a fair market against lack of talent, disability or various forms of bad luck. They are stuck in the real world, cursed with a heritage of what almost anyone would have to describe as injustice, and that is the world in which they suffer unemployment, deprivation, and insecurity, in which their children go hungry, and in which they have to make whatever appalling choices are left open to them. Rawls's theory is similarly unrealistic. None of us was put in an Original Position and asked what principles we would choose to adopt or what principles we would be prepared to put up with to govern the basic structure of our society. To the extent that it is governed by principles at all, the basic structure of our society is governed by principles manifestly rigged to the advantage of some and the detriment of others. Or even when it is governed by fair principles, we play the game that those principles define – the market game, for example – with radically disparate initial endowments of property and other resources. Even Nozick has to acknowledge the prominence of injustice in the real world. No one thinks that current holdings of property are respectable by the historical standards that he articulates. The pedigrees of all our holdings are contaminated with the cruelest injustice, and when some wealthy person is required to support the meagre lifestyle of someone much less fortunate, it is quite unclear whether he is being required to do so out of resources that are morally his or out of ill-gotten resources that are 'his' only in the shallowest of legal senses.

In general, theories of justice do not seem to be designed for the real world. But the socioeconomic rights that people talk about are. They are designed exactly to operate in a real world that does not answer to the ideal models of the philosophers. '[T]he right of everyone to an adequate standard of living for himself and his family' laid down in Article 11(1) of the ICESCR is supposed to apply in real-world situations, whether or not those situations are properly governed by the strictures of whatever turns out to be the best theory of justice. True, accounts of socioeconomic rights are sometimes accused of being utopian; we considered this above in Section 2.2. But assuming that what these rights require *can* be done, the position of their proponents is that it *ought* to be done, without further ado, and certainly without waiting for the rest of a theory of justice to swing cumbersomely into application.

On the other hand, the thought that socioeconomic rights ought to have this immediate real-world application does not mean that they can be considered entirely apart from theories of justice. Most theorists of justice defend their

emphasis on ideal theory because they think it illuminates and provides the best basis for approaching issues of non-ideal theory. Rawls is typical:

> I examine the principles of justice that would regulate a well-ordered society. Everyone is presumed to act justly and to do his part in upholding just institutions. … Thus I consider primarily what I call strict compliance as opposed to partial compliance theory…. The latter studies the principles that govern how we are to deal with injustice. … Obviously the problems of partial compliance theory are the pressing and urgent matters. These are the things that we are faced with in everyday life. The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems. … At least I shall assume that a deeper understanding can be gained in no other way….
> (Rawls 1971: 8–9)

The need for a 'systematic grasp' is important. The disordered world we live in is certainly the product of injustice. But which aspects of the disorder that we see are to be attributed to injustice? If the existing situation is unjust, then something needs to be done about it. But what? And are we sure we can distinguish intuitively and without theoretical consideration what would ameliorate and what would aggravate an unjust situation? I do not mean that we must simply sit on our hands until the theorists of justice laboriously get round to considering second-best theory. But it is not clear how it is safe to proceed without someone doing some second-best theory – if only to be sure that the rights we propose to enforce actually do a good job of capturing what justice requires in this fraught and terrible situation.

In this regard, Nozick's comments about injustice in the real world are particularly interesting. Nozick was never prepared to say that the historical-entitlement critique of equality and welfarism in *Anarchy, State and Utopia* amounted to a defence of actually existing market institutions, nor would he pretend that the sort of Lockean defence of property he advocated could go any distance towards legitimizing contemporary disparities of wealth in (for example) the United States. On the contrary, he thought it undeniable that contemporary holdings would be condemned as unjust by any remotely plausible conception of historical entitlement. (The point of Nozick's argument in Chapters 7 and 8 of *Anarchy, State and Utopia* was that egalitarians were condemning the existing distribution for the wrong reason – e.g. simply as unequal – rather than on account of the violence, fraud, expropriation, ethnic cleansing, state corruption, etc. involved in the history of most holdings of property in the United States.) He acknowledged that, once actual historical injustice was established, the burden would fall on the part of his conception dealing with the rectification of injustice. The ideal part of Nozick's theory might reject welfare transfers out of hand, as violations of property-owner's rights; it might condemn income taxes as amounting to illicit and coercive seizure of labour from honest workers. But he doubted whether these condemnations could be sustained once one started figuring out how to deal with the burden of actual injustice:

> These issues are very complex and are best left to a full treatment of the principle of rectification. In the absence of such a treatment applied to a particular society, one *cannot* use the analysis and theory presented here to condemn any particular scheme of transfer payments, unless it is clear that no considerations of rectification of injustice could apply to justify it. (Nozick 1974: 231; emphasis in the original)

That is a remarkable and honest concession. But if we accept it, we also have to accept the corollary that the schemes of transfer that seem most obvious to us – as proponents of socioeconomic rights – may not be exactly (or even approximately) the schemes of transfer that rectification requires. It may not be easy to say what rectification requires, but it is worth considering at the very least whether there are any important pitfalls and over-simplifications that it requires us to steer clear of.

2.7. JUSTICE AND PUBLIC POLICY

In Rawls's theory and in other theories of justice there is considerable distance between the models that the theory uses and the principles that it generates, on the one hand, and particular policy recommendations, on the other. (This is as true of non-ideal theory as of ideal theory: there is likely to be considerable distance between the theory of what Rawls calls 'partial-compliance' or the theory of what Nozick calls 'rectification', on the one hand, and particular policy recommendations, on the other.)[36] How is this distance to be navigated? There are two ways of answering. One is to consider the substantive reasoning that is involved in using principles of justice to generate public policy recommendations. The other is to consider the institutional processes by which this reasoning is actually conducted.

Substantively, we should try to ensure that the route taken from abstract principles to particular policy recommendations passes through a consideration of the way in which the laws and institutions that impact upon people operate as a whole. We know that what we do about health care, for example, may affect employment opportunities; or the quality and fairness of the provision that is made for public education may determine how badly the impoverishment of certain families affects the prospects and opportunities for the next generation. I think Rawls is right to insist that the subject of justice is the basic structure of society *taken as a whole* and considered in respect of the impact it has *as a system* on the life-chances of each individual (Rawls 1971: 7, 9–10, and 54). Socioeconomic rights, as commonly formulated, do not take this perspective. Instead they deal,

36. There may also be some distance between socioeconomic rights (formulated as human rights or constitutional rights) and social policy recommendations: an actual system of welfare provision, however generous, is much more than just a positivization of propositions like Article 25(1) of the UDHR or Article 11(1) of the ICESCR. But the distance is likely to be much less in this case.

in what I have said is a sort of line-item way, with particular areas of public policy – with education, social security, health care, provision for the very poor, and so on – each area with its right or set of rights. A list of socioeconomic rights does not have the capacity that a theory of justice has to consider and evaluate the net impact that the basic structure comprising all these aspects taken together will have on the life prospects of various individuals.

Of course specific public policy prescriptions will focus on particular topics; they will not themselves be holistic. And claims of socioeconomic rights are like them in this regard. So we may say that the socioeconomic rights represent (or are very close to) policy outputs, and that a mistake has been made in this chapter by comparing them to principles of justice, which are not identifiable with output-prescriptions in the same way. That is fair as far as it goes. The trouble is that claims of rights often present themselves, not just as specific policy demands, but as each sitting on its own bottom, so to speak, with its own separate foundations. Rights present themselves as separable *both* in their formulation *and* in their foundations. Just as the principle of free speech is justified in a way that is quite separate from (say) the right not to be tortured, so (the idea is) Article 11 of the ICESCR will have its own justification; Article 12 will have a somewhat different justification; and so on. Each right stands on its own and demands attention. In that regard, rights differ quite radically from the policy prescriptions that emerge from the application of a theory of justice like Rawls's theory. Superficially they may resemble one another, but what the Rawlsian theory generates, regarding what is required in the way of (say) education, will emerge from a process in which both the competition between education and other demands on resources and the relation between the impact of educational arrangements and the impact of other arrangements on people's life prospects have been properly considered together. That is unlikely to be true of claims about socioeconomic rights.

Let me emphasize that I do not rule out the possibility that some claims may emerge from a theory of justice in a form that is both particular and more or less absolute. We considered this in Section 2.4. Maybe elementary education, for example, is so important in and of itself to children's life prospects that even taking into account other impacts and other demands that compete for the same resources, it must emerge in its own right as an uncompromising demand. That is certainly a possibility and, I am saying, that if it can be argued for, then that is a way to establish that there are socioeconomic rights. Merely citing or consulting a list of demands is not.

Turning now to the institutional context, we might note that one advantage of working through these issues in the context of a theory of justice is that it postpones as long as possible commitment to any particular political or institutional process. Introducing the language of rights tends to tilt matters decisively towards judicial rather than legislative or executive processes. In many political systems, rights are entrusted as a matter of course to courts for administration or enforcement. It is true that sometimes legislation may be devoted to a scheme for the implementation of people's rights: one thinks of the Civil Rights Acts in the United States, for example. In general, however, it is commonly thought to be the task of the courts

to determine finally whether a legislative scheme properly respects people's rights and whether particular legislation unduly encroaches on or undermines people's rights.[37]

This makes a certain amount of sense in the case of ordinary civil and political rights. Though there are issues of interpretation, the rights themselves are generally self-contained, and any issues of conflicts between rights are of a sufficiently modest character to be dealt with case-by-case using some sort of balancing test. In the case of socioeconomic rights, however, we are dealing with entitlements, each of which represents a claim to a share of arguably scarce resources made available first under the auspices of the state. As such, welfare claims compete with one another and with other demands for funding. Also, since the resources they demand are resources made available through taxation, they inevitably compete with other priorities – personal as well as fiscal – that taxpayers may have. The result is that socioeconomic rights claims in court are not just interpretive (as other rights claims are), but they are also inherently *budgetary* – that is, they have very extensive fiscal implications. It is far from clear that a courtroom is the right place for such claims to be resolved; many have argued that it is not.[38] On the other hand, some judges and legal scholars have come up with sophisticated and imaginative ways in which courts can vindicate claims of this kind without encroaching too far into the fiscal responsibilities of the elective branches of government.[39] Even so, it would be a pity if courts came to be seen as the main way or the only way to vindicate these claims. If we assume that it is important for these claims to be pursued also in a political context, then the justification for elaborating socioeconomic claims in the context of a theory of justice is evident. Theories of justice offer us principled ways of thinking about rival demands in politics that take seriously their individualized distributive dimension, while at the same time not flinching from the fact that they do compete with other demands. The early introduction of rights-formulations prevents this, or makes it more difficult, or makes its success depend precariously on the presence of complex structures dealing with possible conflicts of rights that, as things stand, many modern theories of human rights lack.

37. Elsewhere I have criticized the practice of rights-based judicial review of legislation, but I do not propose to take up that general issue here: see Waldron 2006: 1346.
38. See, for example, Neier (2006: 2): '[W]henever 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. Not everybody can have everything. There have to be certain decisions and choices that are made when one comes to the question of benefits, and a court is not the place where it is possible to engage in that sort of negotiation and compromise.'
39. The work of the South African Constitutional Court has been exemplary in this regard: see, e.g. *Government of the RSA v. Grootboom* 2000 (11) BCLR 1169 (CC) and *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1033 (CC). See also the discussion in Tushnet 2004: 1895.

2.8. CONCLUSION

It is an unhappy feature of the language of rights that it expresses demanding moral claims in a sort of 'line-item' way, presenting each individual's case peremptorily, as though it brooked no denial, no balancing, no compromise. That feature of rights has always troubled those who are sensitive to the fact that individuals live in a social environment where the things that they may reasonably expect must be adjusted constantly to reflect similar expectations on the part of others. The language of absolute and uncompromisable demands is simply inapt to capture anything important about our moral situation in such an environment. I think this applies as well to socioeconomic rights as to other rights-claims. It may be said that there is no difference in this regard between theories of rights and theories of justice, for the latter can be uncompromising also: *fiat iustitia ruat caelum*. But in fact they are not on a par. A general theory of justice purports to take into account urgent claims of all kinds (including whatever claims there are about wrongness or desirability of the sky's falling). It generates its conclusions on the basis of such considerations. And then it treats the *conclusions* as absolute. Theories of rights generally do not do that; their absolutism is posited upfront, at a stage prior to that at which the importance of competing demands is considered. The best one can hope for is that the rights-formulations will embody constraints of equality and universalizability; but all too often even this dimension of argument about rights is rudimentary and sophisticated treatment of conflicts of rights is non-existent.

It seems best, therefore, to postpone talking about socioeconomic rights until we have considered how various socioeconomic claims fare in a theory of justice. I do not mean to deny that some claims of the sort that we find in Articles 9–13 of the ICESCR or in Articles 23–26 of the UDHR may turn out to be justified. The point is that a stronger and more compelling case can be made for them if they are validated within the context of theorizing that enables other claims, other demands and other moral considerations to make their best pitch against them. Theorizing about justice offers just such a context. For that reason, I think it is better to let socioeconomic rights emerge from a theory of justice than to try to defend them, line by line, on their own merits.

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3

Universal Duty and Global Justice[40]

Sebastiano Maffettone

You who live secure
In your warm houses,
Who return at evening to find
Hot food and friendly faces.
Consider if this is a man
Who labours in the mud
Who knows no peace
Who fights for a crust of bread
Who dies for a yes or a no.
(exergo from *If This is a Man*, by Primo Levi)

3.1. INTRODUCTION

The world we live in is characterized by huge disparity in wealth and power. By most accounts, the progressive liberalization of international trade and economic globalization contribute to an increasing gap between the global rich and poor. Statistics seem to confirm this disquieting situation: we know that nearly 20 per cent of the world population lives on less than a dollar a day, and 45 per cent on less than two. In the meantime, because the processes of globalization are not only economic but also cultural and political, they are gradually giving rise to a global community, and reducing the influence of states in the lives of individuals. Even among states there are huge inequalities in income and power: just as in the case

40. I thank particularly Thomas Pogge for the invitation to write this chapter and for the extremely generous scientific help during its elaboration. A great part of the chapter was written when I was spending a period – during the academic year 2006/07 – as a Fellow at the Italian Academy of Columbia University. The Italian Academy provided an extraordinary intellectual environment in which I could work. I thank also the participants in the Political Theory Seminar at Columbia University where I presented the paper. I also have a deep intellectual debt toward my colleagues and students of the Ph.D. in Political Theory at LUISS University in Rome. Finally, I want to thank OUP and the anonymous readers who not only transformed as much as they could my 'Neapolitan' English into something more standard, but also provided precious theoretical comments.

of individuals, there are rich and poor states, weak and strong states. Quite a few of us, granting that there is excessive worldwide inequality among peoples and states, would also uphold that such an inequality is unjust. To say that an injustice of this type exists means that – at a global level – the most important economic goods fail to be distributed among individuals and states in a morally acceptable manner. This injustice is even more outrageous when extreme poverty leads many human beings to their death or makes it impossible for them to lead a dignified life. Premises of this type give rise to a widespread demand for greater justice at the global level.[41]

Consensus, however, tends to end here, and the roads branch out in separate directions. According to a few, inequality should be handled, and hopefully reduced, from the point of view of the relations among individuals. In this view, which may be defined *cosmopolitanism*, injustice relates to the relations among the individual persons who inhabit the globe.[42] Instead, according to others, to think of global politics in terms of relations among individuals is misleading. In this second view, which may be called *statism*,[43] there are historically different peoples and states whose presence may not be neglected if we are to talk about the world in which we actually live.[44] To counter what they believe to be an unlikely or undesirable cosmopolitan utopia, the statists propose a minimalist view of global justice. This view envisions not a world of persons who are more directly equal, but a world of states and peoples that all behave in a reasonably fair manner in order to attain a more egalitarian society.[45]

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41. In this chapter, by global justice I only mean what is usually called 'distributive justice', although acknowledging that there are other cases of global justice, for instance commutative justice – which depends on the fairness of international economic trade – or retributive justice – which may result from an attempt to redress previous injustices, as in the case of colonialism (see Van Parijs 2007 and Jones 1999).
42. My definition of cosmopolitanism is tailored for the sake of the argument. Of course, I take for granted that there can be different forms of cosmopolitanism (see Lu 2000). Here, I am interested in cosmopolitanism about justice (see Beitz 1999; Tan 2004). Even if there are different forms of cosmopolitanism, I think that it is plausible to assume that all forms of liberal cosmopolitanism share the individualistic presupposition according to which individuals are 'the ultimate unit of moral concern' as said by Pogge (2002: 169). See also Beitz (2005: 17).
43. It must be clearly understood that here 'statism' is not the same as the classical statism of the advocates of the so-called 'political realism', such as Morgenthau (1985), Waltz (1979) and others.
44. It goes without saying that the distinction between cosmopolitanism and statism is not only interesting from the point of view of political philosophy and political science. Indeed, it has a significant tradition within the context of international law and the interpretation of its main sources. If, for instance, we take the UN Charter, we may see that it has a general statist approach, starting from Article 2 that defends the territorial integrity of states from the interference of others by force. On the other hand, the entire discipline on so-called humanitarian law and human rights is largely inspired by cosmopolitanism. It is to be hoped that the theoretical debate might also influence the interpretation of the texts of international law, even though in this chapter I am only going to deal with distributive justice.
45. This conception is called by Beitz 'the morality of states', whose main theorem is that within the international realm the morality of the individuals is transformed into the morality of the states (Beitz 2005: 15).

The advocates of cosmopolitanism usually believe in the potential for a global distributive justice theory and in the full attainment of human rights. In other words, they bet on the potentials of 'strong global justice'.[46] In contrast, the advocates of statism place little trust in global justice, although they often accept the soundness of some human rights and the existence of humanitarian reasons to support the least advantaged in the world. As a whole, this chapter is devoted to a critical analysis of the arguments of both the former and the latter. As we are going to see, I uphold the thesis that there is the possibility of a third course – more realistic than the thesis endorsed by the cosmopolitans and more utopian than the thesis espoused by the statists.

This thesis rests on a further and, usually, more neglected consideration. When we deal with these themes, we mix up two types of arguments furthering greater social justice in the world. On the one hand, there are global distributive justice theories that, speaking in a rough and ready fashion, extend the paradigms of domestic social justice to the global case. These theories focus on relative inequality, according to which the worst-off of the planet are affected by an impervious (the exit from it is difficult), pervasive and avoidable inequality that is comparable with domestic inequality.[47] On the other hand, there are the approaches based on the soundness and effectiveness of socioeconomic human rights. Usually these approaches are 'sufficientist', in the sense that they try to take care of absolute poverty rather than relative inequality, and for this very reason do not compare global inequality to domestic inequality.[48] The failure to differentiate these two courses gives rise to considerable confusion and, in my opinion, engenders substantial theoretical difficulties with respect to the issue.

As a rule, cosmopolitans subscribe to the global distributive justice model, reducing socioeconomic rights to a corollary of their theories of justice. Statists, instead, reject the idea of global distributive justice. The third option that I will propose recognizes that, at this time, a comprehensive ideal of global distributive justice – founded on the domestic distributive justice model – is not yet theoretically justifiable, although it does not deserve the scepticism expressed by many statists. However, a broad and convincing interpretation of socioeconomic rights may do a great deal to reduce social injustice in today's globalized world. This position is sufficientist in the way defined above, starting from a reduction of extreme poverty and, over time, enabling peoples to decide their own fate. It may be affirmed that this thesis, which moves our attention from relative inequality to radical deprivations, is based on a more modest

46. Within the cosmopolitan point of view, there can be stronger and weaker forms of cosmopolitanism (see Miller 2000: 174).
47. I use 'relative inequality' to differentiate it from the expression 'radical inequality' used by Nagel (1977). The reformulation of inequality as impervious, pervasive and avoidable is Pogge's (2005: 37).
48. The word 'sufficientist' has been suggested to me by Kok Chor-Tan and Gianfranco Pellegrino. The idea of distinguishing domestic and global justice according their comparative nature (principles of global justice are non-comparative, whereas principles of domestic justice are comparative) is Miller's (1998: 171).

ideal than global equality, an ideal that may be called 'weak global distributive justice'.

In my opinion, this intermediate option meets another requirement of some significance, at least for a political theorist with a liberal background. Cosmopolitans have a propensity for a radical moralization of international politics, whose institutions are considered at the service of their favourite moral ideals. Statists, on the contrary, tend to cut to a minimum the space of morals in international politics. I believe that, for a liberal, both positions should prove scarcely convincing. This is the reason why I have called this third position of mine – based on a weak ideal of global justice and being neither moralistic nor sceptical – a 'liberal conception'.

This chapter will present the liberal conception with a focus on the distinction between an institutional argument and an anti-monistic argument. These arguments will be presented in Section 3.2 through a discussion of one of their latest versions, recently formulated by Nagel under the name of 'political conception' (Nagel 2005). I then try to separate, in the second part of Section 3.2, two meanings of anti-monism, labelled here 'anti-monism 1' and 'anti-monism 2', where anti-monism 1 is strictly concerned with the institutional argument and anti-monism 2 is relatively independent from it. Nagel's political conception is subsequently examined, starting from a plausible cosmopolitan criticism. Here, I will argue that this criticism often fails to adequately consider the need to draw a distinction between the institutional argument and the twofold anti-monistic argument I mentioned before. In Section 3.3, I will argue for the possibility of making progress in the direction of global justice, starting from the political conception, even though a full idea of global distributive justice may not yet be supported. Then, in Section 3.4, I will uphold the main thesis within my liberal conception: i.e. that there are 'basic rights', that is to say human rights that are fundamental for survival and subsistence, which can create obligations and do not violate Rawls's anti-monism. These rights – based on what I call a 'universal duty of justice' – represent a sort of minimum moral threshold for the human community. The chapter concludes with Sections 3.5 and 3.6. In Section 3.5 the liberal conception is developed within the fabric of the socioeconomic human rights. The final section provides a further qualification of the liberal conception within a Rawlsian model of global distributive justice.

3.2. THE 'LIBERAL CONCEPTION'

The statist position, as here considered, has been recently presented by Nagel, who, in an article published in *Philosophy & Public Affairs*, asserts the problematic nature of 'global justice' (Nagel 2005). In his article, by 'global justice' Nagel means distributive global justice, leaving aside other problems of justice that are not related to economic inequality. According to Nagel, this type of justice is not possible outside what is traditionally meant by the state. This is the reason why the

identification of Nagel by Cohen and Sabel as a 'strong statist' is accurate (Cohen and Sabel 2006).

Nagel, to be clear, does not present in this article a renewed version of political realism.[49] On the contrary, Nagel does recognize a normative level of international relations, and humanitarian-type duties of solidarity among persons and groups that are not citizens of the same state may not be ruled out. However, in his opinion, these duties do not depend on a distributive justice theory extended from the domestic to the global case. For instance, it would be inappropriate to try to apply to the world something like Rawls's Difference Principle.[50] At the most, global commitments will have a humanitarian character and will more closely resemble charity than justice.[51]

Nagel's mentors are Hobbes and Rawls. In fact, according to Nagel, Hobbes argues that there is no justice without full sovereignty, and because the latter is missing on a global scale, there can be no such thing as global justice. On the other hand, according to Nagel, Rawls's ideal of global justice is of a world populated by separate states that internally are roughly just. In both cases, for Hobbes just as for Rawls, the genuinely political nature of distributive justice would prevent its extension beyond the domestic community. As Nagel states:

> If Hobbes is right, the idea of global justice without world government is a chimera. If Rawls is right, perhaps there can be something that might be called justice or injustice in the relations between states, but it bears only on a distant relation to the evaluation of societies themselves as just or unjust: for the most part, the ideal of a just world for Rawls would be the ideal of internally just states. (Nagel 2005: 116)

On a Hobbesian understanding, this conclusion depends – as we are well aware – on the rational and self-interested motivations of individuals. Hobbesian individuals are not willing to assign part of their advantages to others on their own accord. Without the coercive power of the state, individuals could not be forced to fall in line with the principles of a theory of global justice. However, through his article, Nagel proves to be much less Hobbesian than would be expected based on his initial statements, given that he ends up accepting the idea that there is a certain normativity within the context of international relations. For Nagel, the global civil society is not a desert where no moral motive takes root.

Just on account of this reason, the most interesting aspect of Nagel's thesis is where he affirms the impossibility of a theory of global distributive justice starting

49. See Section 3.1
50. According to Rawls's Difference Principle, a just society is one whose institutions are organized in such a way that inequalities are allowed only in order to improve the condition of the worst-off. However, there is no such obligation at a global level. As regards this subject, see Freeman (2006*a* and 2006*b*).
51. If, in his article, Nagel is clear about his propensity for statism, not as much can be said about his view of humanitarian-type duties. (See Nagel 2005: 118.)

from Rawls's paradigm.[52] Hence, Nagel's thesis is of direct interest to those who follow the developments of this paradigm, since Nagel firmly objects to those cosmopolitan Rawlsians (such as Beitz, Pogge, Richards, and Kok Chor-Tan) who attempt to extend the Rawlsian theory of justice to international relations.[53] Nagel's proposed reading of the Rawlsian theory – which proves impossible as a theory of global justice – is called by Nagel the 'political conception'.[54] According to the political conception, distributive justice duties may not be applied on a global scale. The nature of this impossibility is plainly political. From Rawls's point of view, persuasively interpreted by Nagel, states are not institutional instruments whose purpose is to attain goals other than those that are properly political, even if we have in mind the most noble among these goals, such as greater fairness in the distribution of the world resources. Only cooperative relationships within a particular state create among fellow citizens, and only among them, 'associative' obligations.[55] These obligations may not be extended to those who do not belong to the association and, therefore, beyond the state there is no justice.

This thesis has an overbearing evidence of its own, if we read the nature of the political obligation from a simplified perspective of the social contract view. Obviously, a social contract, just like any other contract, only binds its signatories – in the case at hand its ideal signatories – which are, *rebus sic stantibus,* the members of the domestic community. It is only among them that those constraints that warrant possible obligations of justice would apply.

However, Rawls's political conception – as interpreted by Nagel – offers two different arguments for the impossibility of extending the obligations of justice beyond the state. I consider it important to draw a neat distinction between these two arguments on which the impossibility theorem of the political conception is based. I will call the first argument, which is somehow the most striking but also the most trivial, the 'institutional argument', while I will call the second argument, which seems less clear but perhaps more profound, the 'anti-monistic argument'. In Nagel's view, these two arguments strengthen the aforementioned impossibility theorem.[56]

The institutional argument is essentially based on the non-existence at a global level of a 'basic structure' such as there is at the state level. In fact, if

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52. In fact, Rawls neatly separates what he calls 'three levels of justice', namely 'local justice', 'domestic justice' and 'global justice', with the consequence that principles suitable for domestic justice are not applicable in the other two domains (see Rawls 2001: 11-12).
53. As regards this issue, see also Freeman (2006*b*).
54. Rawls forced out the term 'political conception' for the first time in Rawls, 1985. This idea is central in his later *Political Liberalism* (Rawls 1996 [1993]).
55. The expression 'associative obligations' is Dworkin's (1986: 195–205).
56. A profound critique of the institutional argument interpreted à la Nagel may be found in Pogge (2002). A critique of the anti-monistic argument may be found in Tan (2000). These two books precede the article by Nagel I am referring to and, therefore, rather than criticizing it, they voice different opinions and, at times, opposing views. Besides, owing to reasons that will soon become clear to the reader, given that I have emphasized here the distinction between the institutional argument and the anti-monistic argument, the reasons against one or the other often overlap in both Pogge and Tan.

something similar were to exist already, this would entail also the existence of those associative obligations whose actual deficit makes global distributive justice impossible. In Nagel's view, today's world is witnessing the significant and increasing presence of many international institutions, and it is unquestionable that the interdependence between nations is much stronger now than before, for instance in the days of Hobbes. This fact should imply less scepticism about the existence of a global civil society and the presence of normative constraints at a worldwide level. Still, this civil society *in nuce* is not comparable with the civil society within the state and the associative-type constraints on which, in Nagel's view, the obligations of justice should depend.

I would like to highlight the specific nature of Nagel's interpretation on this point.[57] In his opinion, the difference between the domestic basic structure and the global basic structure is not merely quantitative. In short, it is not a question of the state having powers and authority that, for the time being, the global community does not have. Indeed, it is something deeper, the nature of which has something to do with the idea of liberal-democracy, as it has evolved from Rousseau and Kant up to our times. Only the state succeeds in causing the authors of the laws and those subject to the laws to coincide. Therefore, claims Nagel, only the citizens who are the authors of their laws may succeed in creating among themselves those associative constraints on which the obligations of justice depend.[58]

The anti-monistic argument permits two interpretations. Both interpretations concern the relation between the individual and the institutions, but the first is based on the scope of the argument, whereas the second on its content. Anti-monism 1 has to do mainly with the domestic-international distinction and is therefore more connected with the institutional argument. As formulated by Nagel, it states that Rawls's principles of justice do not apply to individuals if not through institutions, and, given the difference between domestic and international institutions, they do not apply among members of different polities. Because, as Nagel firmly maintains: 'these are different cases or types of relations, and the principles that govern them have to be arrived at separately' (Murphy 1998: 254). That is why principles of global justice cannot be reached simply by extending the principles that govern domestic justice. Here, the term 'monism' depends on what is the fundamental subject of justice. Cosmopolitans are monist, in these terms, because they believe that theories of justice apply directly to individuals. On the contrary, statists à la Nagel cannot accept this form of monism, because principles of justice apply to institutions and not directly to individuals. And of

57. Here Nagel has a similar claim to Blake (2001), according to which the institutional side of the statist position depends on the mere fact of coercion and its justification. This distinction is nicely clarified by Tan (2006).

58. This is also Dworkin's thesis in *Law's Empire* (1986). According to Habermas (2008), this thesis could be bypassed given the actual context that makes the correspondence between nation and constitution old-fashioned. The correspondence between nation and constitution – still for Habermas – depended on the revolutionary nature of liberal constitutions and from the idea that sovereignty must be indivisible. Now, since both of these aspects are not so relevant any more, we may hope for a global constitutionalization of international law.

course they maintain that domestic institutions are different from global ones. This is the reason why anti-monism 1 philosophically rejects the individualistic moral consistency defended by cosmopolitans.

Anti-monism 2 has to do with the classical anti-perfectionism and anti-utilitarianism that are typical of a Rawlsian pluralist reading of liberalism.[59] According to Murphy, Rawls's entire political philosophy is characterized by an intense dualism that roughly corresponds to what I call here anti-monism 2.[60] The intent of anti-monism 2 is to keep moral personal conduct separate from political institutional analysis, supporting a neat division of labour between institutions on one side and individual conduct on the other side. In other words, anti-monism 2 is based on a principle, according to which there may be no straightforward continuity between personal conceptions of the good and political visions of justice. As a result, anti-monism 2 involves a proviso: public institutions should not be directed towards goals that correspond to the private values of individuals (or groups), even if those values and goals are as noble as greater equality in the world. Monist cosmopolitanism tends to bypass this proviso. By so doing, it does not respect the freestanding nature of political institutions, and introduces directly comprehensive moral views into the political realm. That is why monist cosmopolitanism violates the dictates of pluralist liberalism, in a way that is not too different from comprehensive doctrines inspired to perfectionism and utilitarianism.

Now, on this basis, it is easier to understand Rawls's criticism of the cosmopolitan conceptions (Rawls 1999).[61] Cosmopolitan conceptions deal with the relations of equality among individuals, while for Rawls, what matters more for the purpose of justice is at an institutional level. Here, it is anti-monism 1 that straightforwardly blocks any cosmopolitan vision. From another point of view, however, it is anti-monism 2 and the pluralist soul of Rawlsian liberalism that prevents a conception of global justice from being taken in earnest. In fact, Rawls takes off from the assumption that major institutions are somehow freestanding, that is to say independent from the conceptions of the good. Any attempt to adapt them to a specific view of the world would mean to betray their eminently public nature (see Freeman 2006*b*: 41). But it is this that cosmopolitans try to do, if we follow a Rawlsian perspective, when they pretend to normatively model global justice independently from the actual situation of the world institutions. And, adopting this comprehensive view, the ethical obscures the political. That is why

59. Partially reviewed by Rawls (1977), now included in Rawls (1996 [1993]). Actually, this form of Rawlsian anti-monism has been noted and criticized by Murphy (1998).

60. Actually Murphy points to a certain dualism in Rawls, rather than anti-monism. His article criticizes Rawls's dualism in the name of a greater consistency between personal commitment and just institutions. I accept here Nagel's suggestion, according to which the term 'anti-monism' works better than the term 'dualism', since Rawls is supposedly an advocate of a pluralist rather than a dualistic view.

61. Rawls famously writes: 'The ultimate concern of a cosmopolitan view is the well being of individuals and not the justice of societies … What is important to the Law of Peoples is the justice and stability for the right reasons of liberal and decent societies' (1999: 119–120).

any freestanding political conception – inspired by anti-monism 2 – should reject monist cosmopolitanism.

Summarizing my reading of Nagel, his political conception cannot accept the idea of global distributive justice owing to these two arguments (the institutional and the anti-monistic). While these arguments may be added together, they differ to a significant extent one from the other. According to the first one, legislative autonomy and cooperative constraints correspond at the domestic level (and such a correspondence is missing in the global community). According to the second one, the fundamental subjects, from the point of view of social justice, are not individuals but institutions (anti-monism 1), and public obligations cannot originate from comprehensive moral visions that fail to consider the fact of pluralism and the independence of institutions from comprehensive visions (anti-monism 2).

If this analysis is persuasive, it should not be surprising that one can attack the political conception, and its impossibility theorem on global justice, in two thoroughly different ways (I am not going to differentiate between Rawls's and Nagel's theses, even though they are not identical).

The first type of criticism maintains that the interdependence among nations and the growth of international institutions are sufficient evidence to enable us to view the strong statism – that is supposedly the basis of Nagel's thesis – as obsolete. While existing international institutions are not the same as the basic structure of the state, they take concrete form in a sort of global quasi-order that is partially institutionalized and certainly effective (see Cohen and Sabel 2006).

The second type of criticism dwells on anti-monism, though this is not always well-articulated. On one hand, it is possible to attack anti-monism 1 as a mere by-product of a successful criticism of the institutional argument. After all, if something analogous to the domestic basic structure could exist at the global level, then to conceive individuals as fundamental subjects in the perspective of global justice would be natural. Here, the argument is clearly parasitic on the institutional thesis (Cohen and Sabel 2006).

It is more difficult to criticize anti-monism 2. What counts here is to defend the substance of a theory of justice against a kind of fetishism of the rules that would seem to characterize Rawlsian liberalism when it aims to protect the freestanding nature of institutions independently from what they do.[62] This criticism can take the form of a proposal for more continuity between personal and institutional morality. As Murphy puts it, opting for monism against Rawls's supposed anti-monism: 'What monism rejects, then, is that there could be a plausible fundamental normative principle for the evaluation of legal and other institutions that does not apply in the realm of personal conduct' (Murphy 1998: 254).

A simplified form of the monist (or anti-anti-monist) thesis, aiming to make personal and institutional morality more continuous, has been discussed

62. The point is nicely put by Murphy (1998: 280), according to whom contrary to dualism and anti-monism 2, which limit our moral worries to the institutional framework, '… monism tells people to do what they can to bring about an improvement directly'.

for over thirty years, since the publication of Singer's famous article.[63] It should be noted that, in a different manner, this thesis is also supported by those liberal cosmopolitans – from Beitz (1979) to Tan (2000) – who attempt to apply Rawls's second principle of justice (the Difference Principle) to global justice or who, somehow or other, advocate the global extension of a comprehensive liberalism (as opposed to political liberalism).

The two arguments that give rise to the liberal thesis, namely the institutional and the anti-monistic argument, fail to have the same relevance in my eyes. In fact, I suspect that the polemics between cosmopolitans and statists cannot be decided at the level of the institutional argument. As we shall see in Section 3.3, I do not think that on this point either cosmopolitans or statists can close their own argument. Moreover, given that anti-monism 1 is strongly connected to the institutional thesis that I wish to defend, I think that it is particularly interesting to see whether it is possible to defend global justice via principles that can bypass anti-monism 2.

3.3. TOWARDS GLOBAL JUSTICE

The main argument used by the statists to counter the cosmopolitan conception is that the global basic structure is not comparable with the domestic basic structure.[64] If we follow Nagel, this difference is not merely quantitative. In other words, it is not only a question of the supposed existence at a global level of a series of relations and institutions that are not yet sufficient to warrant a cooperation likely to create the bases for actual associative obligations.[65] It is rather a question of a qualitative difference. The domestic basic structure corresponds to a genuine political society, while the global basic structure does not correspond to a genuine political society. The statist thesis, according to which in the global case and in the domestic case we witness two entirely different types of cooperation, relies on this qualitative difference. For instance, what is missing in the global case is that type of reciprocity that ensures cooperation in the domestic case. Hence, the adoption of principles of global distributive justice would somehow mean that the central

63. See Singer (1972). According to this thesis, starting off from a utilitarian background and allowing the existence of a certain decreasing marginal utility of basic commodities, greater equalitarism in the world certainly amounts to greater justice. Such a thesis has a highly revisionist content: famine in the world is a scandal and we need to make every possible direct effort and create in the shortest possible time new institutions, if there are none today, in order to solve the huge moral problem it engenders.
64. For this differentialist thesis, see Miller (1999).
65. This is a further reason that makes the so-called empirical objection to the political conception (its description of reality being supposed to be false) very difficult. For this objection, see Beitz (1975). More recently the same objection has been discussed by Miller (2006). In particular, Miller writes, 'The empirical claim is the most intractable … for political philosophers at least' (2006: 195).

idea of cooperation as a source of distributive obligations is not taken seriously enough.[66]

In Nagel's version of the political conception, distributive justice is not an end in itself. If we are to put it in Rawlsian terms, even the difference principle is not a politically neutral tool. Rather, it is a model for political institutions, the application of which proves meaningless where the presuppositions, starting from cooperation and reciprocity, which allow the political nature of that institution, are nonexistent. Distributive justice itself – always in the (Rawlsian) political conception – serves a political purpose, and this is another reason why I believe that Nagel talks about a 'political conception'. It is believed that an excessive income or status difference does not allow actual freedom and equality and, therefore, is likely to distort the original political relations (of equality and liberty) among fellow citizens within their political community. Obviously, the corollary of this reasoning is that, since there is nothing like a worldwide state – a state that, for the time being, cannot even be imagined – the same type of political argument does not apply at a global level. This is why the maximum ideal of global justice within the political conception is a world populated by states that are internally relatively just. This is quite different from any cosmopolitan project of global justice.

One may legitimately wonder why, at a global level, the statists rule out the possibility that there might be something comparable to the domestic basic structure. Considering Rawls in *The Law of Peoples*, it may be appreciated that, in his opinion, the structure of the international system is the society of peoples. For the statists, however, this is entirely different from the basic structure of the domestic society. As previously pointed out, the chief difference between the two levels would seem to be the relation between authority and citizens. Within a political community, citizens are the authors of the laws that may be coercively imposed on them, while something similar does not currently exist at a global level. This difference explains why the entry into the society of peoples – in Rawls's internationalist model – takes place at the level of 'decency', meaning a lower level than that required for participation in a domestic liberal society.

If we consider cosmopolitan critiques of the statists, such as the recent ones by Cohen and Sabel and the earlier ones by Pogge, it may be noted that they actually deal mainly with this issue. According to them, given the increased weight of international relations and institutions, it is not the case that at the global level we lack that correspondence between authors of laws and persons compelled to respect them that is necessary to create genuine obligations of distributive justice. The rules enacted by the International Monetary Fund, the World Trade Organization and the International Labour Organization, for instance, create constraints on the policies a state may implement, and are in effect over different state territories. These rules are enacted in the name and on behalf of the citizens of the states that must accept them. Even if there is the possibility that the citizens of that state find those rules wrong or unjust, that does not seem to go against the

66. This thesis is accurately developed by Freeman (2006*b*).

idea that, even in this case, there is a sort of co-authorship, however *sui generis* it may be. Indeed, Cohen and Sabel insist, the very fact that citizens are permitted to protest against these rules gives them a sense of being fellow participants.

In order to refute this partial co-authorship hypothesis, it may be objected that the protests of those citizens who suffer the consequences of rules laid down by international organizations that they fail to share, are not made against an international authority but against their own state, which has ratified and incorporated those rules domestically. The fact is that, in the final analysis, in case of disagreement – at least in democratic regimes – citizens have to pronounce, through their vote, their desire to maintain these rules. I frankly think that such a controversy is not at all easy to solve. On the one hand, there is no doubt that the national state acts as an intermediary between international organizations and citizens. On the other, it seems more and more likely that the rules enacted by international organizations are being coercively imposed on the citizens of individual states.

There are two major objections raised by Nagel to the claim that norms enacted by international institutions may have a fully political meaning: one based on the voluntariness of the agreements, and one based on their arbitrariness. According to the first one, the international agreements are similar to the commitments undertaken by voluntary and occasional associations.[67] They do imply individual and collective obligations, but only on specific occasions and for limited purposes. This is why, within the context of the political conception, no obligations of justice may derive from them. The second objection is based on the arbitrariness of this type of relation: the contingent nature of international relations does not allow thinking about the existence of any continuing cooperation and reciprocity, on which actual duties of distributive justice would depend.

Cosmopolitans counter these objections by rejecting this way of conceiving international relations. In their version, the discontinuity and occasional nature of international relations would be more the exception than the rule. Moreover, as contended by Cohen and Sabel, Nagel's anti-monism 1 would actually give rise to a form of dualism rather than to the form of pluralism that he invokes. Ultimately, there are supposedly only two options in Nagel as reread by moderate cosmopolitans (such as Cohen and Sabel): either the full continuity of political relations in the domestic case, or the dominion of voluntaristic arbitrariness in the global case. Cosmopolitans invoke a third option, where the creation of ever more stable and lasting international constraints generates a form of embryonic political community where cooperation and reciprocity progressively gain ground.

In so doing, cosmopolitans single out an element of weakness in statism. In a changing international situation, there seems to be no reason why the state should be the only one to determine normative constraints among its citizens. In particular, it is hard to see the need for all-or-nothing reasoning. Perhaps

67. Nagel explicitly states that justice cannot be applied to '… a voluntary association or contract among independent parties concerned to advance their common interests' (2005: 140).

these normative constraints grow side by side with international institutions and global interdependence. The example of the European Union (EU) is emblematic. The proliferation of foreign trade between European countries, and its progressive liberalization, have promoted over time the establishment of a partial political community. Does this type of hybrid community create normative constraints that have the same weight as those between fellow-citizens in the state-nation? Probably not, as Europe is not a federal state (see Rawls and Van Parijs 2003). Does it create no constraints at all? The answer is again 'no', as the laws of the EU apply equally to the citizens of various states. The progressive regionalization of a few areas of the world, beginning from Europe, seems to prop up the idea of a continuity of the normative constraints, popular among the cosmopolitans, rather than the idea of a discontinuity, popular among the statists. More generally, what is so truly *sui generis* in the domestic basic structure that would be inconceivable at global level? Substantially, it is its social institutional effectiveness over time and its ability to create a truly social dimension. However, I believe it reasonable to affirm that such an effect is not entirely impossible in principle in the global community.

This type of reasoning, however, meets with at least two obstacles. Firstly, taking the last example, regionalization is not tantamount to globalization. Indeed, the different regionalizations (such as ASEAN, NAFTA, AU, APEC, OAS, ECOWAS) could give rise to a global system of mutual competition among regional areas. After all, going back to the EU, the European nations have a common history and a series of shared institutions, and this is something that, for instance, does not apply between the latter and the African nations. Therefore, the regionalization case does not solve the matter of global justice. Secondly, the fact that there is a tendency towards a greater global institutionalization, leading to less voluntaristic and arbitrary constraints among peoples, does not mean that, at present, there are already all the conditions warranting normative constraints among citizens throughout the world. After all, an ideal goal to be aimed at is not tantamount to an acquired right. For instance, one of the bases for cooperation within the domestic basic structure – from which, according to Rawlsian reasoning, duties of justice are supposed to derive – is reciprocity. Indeed, it is quite hard to assume that the same type of reciprocity we have at the domestic level can now exist also at a global level.

These conclusions cause me to think that the political conception (and the statist thesis) is not fully wrong when we consider a fair evaluation of institutional arguments in its support. In other words, I believe that, to date, a full normative justification of global justice on an institutional basis is hardly tenable, *rebus sic stantibus*. It is as if the cosmopolitans were to put the cart before the horse: the moral thesis, in their arguments, dominates its political counterpart. This is not acceptable for a liberal who shares the classical philosophical view of liberalism – based on anti-monism 2 – proposed by Rawls. From this point of view, statism is also static and this, in my opinion, is a far from negligible fault. In other words, there could be a justification in embryo of a global distributive justice, even if there is not yet a full normative justification for it.

If we reflect upon the way in which global society is ordered today, we can be driven to uphold the idea that eventually continuity rather than discontinuity will describe the relationship between domestic and global basic structures. The global space, after all, finds collective recognition within a worldwide organization such as the United Nations (UN). Of course, the UN is more a club of states than a world government in progress, but its work to protect human rights and humanitarian law is cosmopolitan rather than statist in nature. In particular, the UN project dedicated to the Millennium Development Goals neatly defines conditions for global justice.[68] Parallel targets are pursued by a complex constellation of international organizations, often coordinated in a complex worldwide network (see Slaughter 2004).

All things considered, given the existing doubts, it does not seem advisable to criticize statism only on institutional arguments, as I have called them before. This conclusion appears all the more evident if we reason not only in the light of the content of global justice, but also in the light of those who are supposed to implement it. Who is supposed to decide on the application of the Difference Principle – or any other principle of justice – at a global level? Where is the democratic legitimation of those who are required to decide on matters that are so relevant both socially and politically supposed to come from?[69]

The difficulties facing a critique of statism from an institutional perspective make me think that a successful revision of statism can take place only if we are able to challenge the other premise of the statist thesis, namely the anti-monistic argument. But, as we have seen, anti-monism 1 is parasitic on the institutional argument, and so we are bound to face with it the same troubles we have found with the institutional side of statism. So, it seems wise to direct our attention toward anti-monism 2. According to anti-monism 2, the Difference Principle – and any vision of distributive justice – is a political principle, and therefore its application to the global community is not fully justified by standard cosmopolitan arguments of a moral nature. It seems important to check the meaning and the validity of such a statement.

3.4. BASIC RIGHTS

In the preceding section, I have tried to show that the institutional argument used by the cosmopolitans when they criticize statism presents a view of global distributive justice that, everything considered, is not easily acceptable due to the lack of a global institutional system. On the other hand, in this section I would like to argue for my positive thesis: even if we were convinced of the wrongness of the cosmopolitan thesis that upholds the presence of a global basic structure, this does not entail the acceptance of statism. Our duties towards inequality and poverty in

68. See www.un.org.millenniumgoals/index.shtml.
69. This further difficulty of cosmopolitanism has been brought to my attention by Nadia Urbinati.

the world still depend on some notion of justice. I will argue that there is another source of moral obligations, based on justice, towards the poor of the globe, and that this source does not depend directly on the existence of a controversial global basic structure. The obligations conceived in such a manner should not violate the anti-perfectionist principles treasured by the political conception. They should be, in other words, anti-monism 2-resistant. Secondly, they are less demanding than those that depend on the soundness of a theory of global distributive justice. They are not the outcome of choices that are, all in all, super-erogatory, as statists view them. From this standpoint, they may be viewed as falling within the standard way of conceiving socioeconomic human rights.

In order to uphold such a thesis, I must take into consideration Nagel's two major statist arguments against cosmopolitanism, showing that they do not affect the liberal conception that I am proposing. Therefore, I have to show that:

1. the liberal conception of the obligation to assist the poor of the world does not depend on the existence of a global basic structure similar to the basic structure of the domestic community;
2. the liberal conception may overcome the objection based on anti-monism that Nagel attributes to Rawls and that applies to his political conception.

Failure to respect (1) would take for granted something that is at the moment still controversial. Failure to take into consideration (2) would be at odds with a Rawlsian liberal framework.

Are we required to think that, if we reject the cosmopolitan argument based on interdependence and institutionalization, there may be no moral obligations towards the poor of the globe? My answer to this question is 'no'. This negative answer is warranted by the fact that the obligations I have in mind do not need to have an associative nature, as claimed by Nagel, about the obligations deriving from distributive justice and implicitly accepted by his cosmopolitan critics. According to my thesis, there is another source of moral obligations towards the poor of the earth, a source that establishes duties independently of the alleged existence of an actual structure of cooperation at a global level.[70] Actually, I believe that there is such a source and that it consists in a general and universal duty of justice. It is this idea that, among other things, gave rise to my decision to include as exergo in this chapter the words that Levi used at the beginning of his book *If This is a Man*.

According to this universal duty of justice, we have a duty to protect human dignity in all its forms, regardless of the presence of a real global basic structure.[71] Besides, as a counterpart to our duty to protect in such a manner everybody's human dignity, we must make sure that a few fundamental basic rights are guaranteed. Quite naturally, these basic rights include a few socioeconomic human rights, such as those to subsistence, health, and a minimum education. It

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70. A similar thesis is upheld by Buchanan (1990). Buchanan's idea is to set the duties apart from the idea of reciprocity in order to link them with the idea of subjectivity.
71. Within a contractarian framework, Richards (1982) upholds a similar thesis.

goes without saying that the protection of these basic rights does require either the controversial presence of a strong interdependence or the effectiveness of operational international institutions. Indeed, as Levi happened to write, when one is in the presence of a systematic 'demolition of a man' there is little reason to argue and to wait.

One of the advantages connected with this alternative type of foundation is that we must help whoever is in extreme difficulty, with no need to take the trouble to ascertain whether, somehow, we are personally or collectively responsible for his/her hopeless situation. What's more, given the complexity of the global network of socioeconomic relations, I deem it reassuring to be able to think that first we have the obligation to save someone who is dying of hunger or illness and only later do we need to establish the quality of our relations with him or her. Even Pogge's thesis, which endeavours to transform a vaguer positive right to help into a more certain negative right to refrain from damaging innocent third parties, actually proves to be much more complicated than the thesis I am proposing here.[72] This is due to the fact that given the utmost complexity of social relations at a global level, it is often extremely hard to establish whether or not a particular individual is responsible for maintaining an unjust international status quo. The existence of a general universal duty of justice solves this type of problem.

The existence of a general universal duty of justice avoids the more obvious difficulties of the cosmopolitan argument and the relative critiques by the statists. In any event, at this point it is legitimate to ask ourselves what the theoretical basis of this type of argument is. This question may be answered in two different manners that, taken together, could provide a sufficient solution to the problem it poses. On the one hand, one may try to elucidate the type of duty being considered, starting from the right that corresponds to it. On the other hand, one may try to trace its origins in a broader historical-critical line of reasoning. I will be quite concise with respect to the first point, while I will linger longer over the second one. The reason for this choice is that only a far-ranging historical-critical reasoning allows us to overcome the statist objection based on the anti-monism 2 of the political conception.

As for the first issue, I will start by stating that the humanitarian duty of justice – as proposed here – is based on the idea that, as members of the same species, we must endeavour to enable each person to exercise his/her own essential functions as a human being.[73] There are quite a few arguments to justify this type of assertion. As a rule, the basis of these arguments is that there are human rights, including the main socioeconomic rights, where the failure to protect them makes it impossible for people to exercise the majority

72. Pogge, rereading himself, claims that the core duties he has in mind are either negative duties or intermediate duties (between a negative and a positive duty) depending on past violations like colonialism (see Pogge 2005: 34).

73. In this respect, it is not too different from Sen's approach based on capabilities and functioning.

of their other rights and, therefore, makes it impossible to live one's life in full. Something similar is reflected in the main human rights that safeguard the life of individuals and guarantee its fundamental functionalities. We may call this type of fundamental rights 'basic rights', taking up Shue's apt expression (Shue 1980). Now, such basic rights include the right of subsistence and, therefore, rights having a socioeconomic nature. We may conceive of them, as Shue does, as a sort of meta-rights, namely rights without which no other rights or opportunities may be enjoyed. In this case, they would be a requirement to live one's life. More or less the same conception of meta-rights may also be supported in a less substantive and more formal manner, as Gewirth has done.[74] In this case, by simplifying to a considerable extent his complex argument, it may be affirmed that the basic rights are conceptual prerequisites that dictate the conditions required for carrying out every human action and for the very exercise of freedom. In conclusion, the universal duty I have been talking about until now is a duty to ensure to all the members of our kind a few conditions of liveability and agency.

In any event, as previously pointed out, what interests me the most is to trace back the origin or the source of such a duty. It is a sort of a sui generis natural duty. This is the reason why it is not subject to the scrutiny of pluralism, it is not controversial and does not depend on a single specific conception of the good, because it precedes the conceptions of the good or is supposed to be a part of all of them. The very idea of a meta-right, that is to say a right to right, highlights this unifying capacity of the universal duty. In my opinion, however, this general universal duty clings – as I have already said – to a farther-reaching historical-critical reasoning. Something similar is expressed in the concept of 'ethical meta-comprehension of the species' proposed by Habermas (2001). Habermas has used this concept in a specific bioethical perspective, particularly in the light of a critique of a few likely permanent changes in our genetic inheritance. However, I believe that this concept may be applied to the case of the universal right I am talking about.

I believe that without basic rights corresponding to the general universal duty, we cannot self-understand each other as human beings. In other words, our ethical self-comprehension would fail. In fact, our ethical self-comprehension is embedded in the fact that we consider ourselves, both as individuals and as humankind, persons responsible for our own biographies. Indeed, should there be no basic rights to security and subsistence, something similar would be missing. From this point of view, fundamental human rights ensure that each life has a value and, therefore, is protected as such, through a guarantee of security and subsistence. At the same time, however, basic rights allow each person to choose their own life course, thereby retaining the liberal pluralist goal of guaranteeing agency, but advancing a particular notion of well-being.

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74. See the chapter in the preceding book of the same series.

The basic rights and the correspondent universal duty rest on the characteristic of human vulnerability.[75] They are imposed by the fact that our weakness as human beings requires a necessary support that cannot be neglected. I feel that it is indeed this type of argument that offers a valuable solution to liberals who are, just as I am, particularly affected by the anti-monism 2 argument. Indeed, this pluralism makes the direct passage from a given view of the world to the institutional realization of its fundamental principles impossible for a liberal Rawlsian. And, as always for a liberal Rawlsian, all this is connected with the well-known distinction between what is good within a given view of the world, and what is right. The thesis that founds a universal duty on the ethical self-comprehension of the human species predicates an overlapping of the good and the right in a specific ambit and in limited cases. When the very sense of the community of all human beings is at risk, because the vulnerability of a few is not adequately protected, then the good of assistance to ensure the basic right to subsistence to those who lack everything, turns also into a duty of justice. This happens because the good and the right together presuppose that general moral community.

As a rule, in a post-metaphysical world, as Habermas calls it, the metaphysical level of group ethics may not be transferred – in the name of pluralism – to the universal morals of justice. In any event, I feel that there are exceptions. The Holocaust, as dealt with by Levi, is perhaps the most typical exception of this kind. In the presence of such an event, whether or not we are responsible for it and whatever our opinions as human beings, we cannot wash our hands of it. However, the genocide of millions of persons who lack the basic rights to security and subsistence – a genocide that we are all substantially aware of – is similar to the Holocaust. In the horizon of such a far-reaching drama, it is reasonable to transform a good, the universal duty, into a right, that is a valid and legally binding obligation. In different words, the exceptionality at stake here allows us to overcome anti-monism 2, since the bond of human morals and of species is based on the protection of vulnerability. Without basic rights to subsistence, we could no longer legitimately consider ourselves human beings.

Now, as Pogge recognized in an article devoted to Cohen and Murphy's criticisms of Rawls, anti-monism 2 would seem to apply when we set ourselves ambitious targets or 'supergoals' (Pogge 2000). In my opinion, however, anti-monism is much less justified when – as in the case we have just debated – the goals are minimal. Security and survival are typical minimal objectives and, therefore, to resort to the defence of pluralism against those who propose them seems specious and unreasonable. As Pogge says in the aforementioned article: 'Monism could be more plausible if specified through a less ambitious goal, such as the goal that all human beings have access to freedom and resources above some minimal resources' (Pogge 2000: 163). The consequence of this reasoning is both theoretically and practically relevant. If, as I have upheld, in a few

75. The term is used in a consequentialist framework by Goodin (1985).

special cases – such as the genocide of the poor – the good coincides with the right, then the obligations deriving from the universal duty of justice, although having a humanitarian nature, are no longer optional but indeed binding. There is nothing super-erogatory in them. Indeed, they legitimately fall within a theory of distributive justice that is certainly less strong than the one based on cosmopolitan assumption, but not as minimal as the statist postulation.

Note here that one could legitimately ask what this anti-monism 2 prerogative has to do with global justice. This question can be formulated in two different ways. First, one can wonder why we should be worried about anti-monism 2 just at the global level. What, in other words, makes this global level particularly sensitive to the risk of incurring the pitfalls connected with anti-monism2? My answer here is that cosmopolitans very often anticipate too much moral flesh within the global political setting. They moralize global politics, in other words, and that is why they run into the problem of anti-monism 2. Second, one can think that a liberal political conception à la Rawls already tried to avoid the risk of incurring anti-monism 2 at the domestic level. Why should this risk come back when we leave the domestic level to approach the global one? My answer here is more articulated. On the one side, I could repeat what I have already said about the first objection. It is the attempt to moralize global politics that pushes many cosmopolitans toward reintroducing at the global level comprehensive visions of politics already discharged at the domestic level. On the other side, I also believe that often cosmopolitanism avoids considering how much the 'reasonable' is context-dependent. When we leave the safe benches of the domestic basic structure, we will find another political situation, in which we cannot take for granted that our vision of what is reasonable and what is comprehensive is widely shared. Substantially, behind the will to keep a liberal position distant from anti-monism 2, there could be also a desire to avoid cultural and political imperialism.

3.5. SOCIOECONOMIC HUMAN RIGHTS

The main source for obligations of global justice consists – in my reconstruction – in a universal duty to protect the security and the subsistence of all human beings. I do not see this duty as a purely humanitarian duty, because, as I have said from the beginning of this chapter, the subject matter corresponds to the content of the most important socioeconomic human rights. I think that this is a significant element, because one of the attractions of the cosmopolitan project consists in the fact that we often believe there are normative constraints that exceed mere humanitarianism at the global level. Perhaps, I suggest, global politics requires more demanding norms than those dictated by mere humanitarianism, but less demanding norms than the ones recommended by a cosmopolitan egalitarian approach.

The connection between the universal duty of justice and some human rights can provide the required institutional mediation. In fact, these human rights can

be considered as a first step toward a process of global constitutionalization in progress (Held 1985). In 2004, the Secretary-General of the UN nominated an authoritative world commission, the 'High Panel on Threats, Challenges and Change'. This Commission presented at the end of its work a report entitled 'A More Secure World: Our Shared Responsibility', a document that still today constitutes one of the most promising texts concerning the relationship between human rights and political globalization.[76] This report does not specifically treat economic and social matters, but it does recognize that the socioeconomic rights at the core of the empowerment of individuals and nations are now in danger.

The main socioeconomic human rights include moral principles, but they are also binding since their validity is not only moral but also legal. They have been recognized as legitimate rights by the Vienna World Conference on Human Rights (1993). What is most important, however, is that they have been fully acknowledged in the most important ethical-political and legal document in the matter, namely the Universal Declaration of Human Rights of the United Nations (1948). In its Preamble, it deals with social progress and its universal promotion, while several articles of the declaration deal with such socioeconomic rights as work, rest and education. More clearly than any other, Article 25 upholds: 'Everyone has the right to a standard of living adequate for the health and the well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. The Commission on Human Rights of the United Nations worked for a number of years with a view to specifying the nature of socioeconomic rights, until it got to the famous covenants of 1966, one on economic and social rights and the other on civil and political rights.

When dealing with socioeconomic rights, it is important to pose the problem of the limit. Up to what point are rights such as the right to work and the right to health supposed to be implemented? What is the cut-off point? It is not at all easy to answer such a question and, perhaps, we need to consider one case at a time. However, I am under the impression that the cosmopolitan solution, based on the adoption of a theory of global distributive justice, tends to place the cut-off point too high and, in so doing, to be too demanding. In other words, it asks too much from rich countries and, in general, requires what many see as supererogatory conduct on the part of their inhabitants. The solution based on human rights seems, instead, to require a less demanding commitment, as it concentrates on guaranteeing security and subsistence to the individuals who lack them and a general right of assistance to what Rawls called 'burdened societies'. Both the rights to subsistence and the duty of assistance should not consist in the assignment of a share of one's wealth based on an obligation to reciprocity; rather they should entail a socioeconomic contribution to the political autonomy of the individuals in burdened societies. If the attainment of political justice is impossible without

76. United Nations Department of Public Information 2004, New York.

a minimum level of well-being, the rights to subsistence and the right of assistance consist in contributing to the construction of this minimum level. In other words, these rights correspond to an ethical-political threshold that all should succeed in reaching. This allows for a clear cut-off point, which corresponds to the possibility of action in the contemporary global political environment.

Once this threshold – this welfare minimum to be politically autonomous – is reached, the citizens of the individual least advantaged states will be able to decide on their own and in a democratic manner on the policies to be adopted.[77] For example, they will be in a position to choose which investment policies or expense policies to adopt. Their future will depend on this since, should they make the wrong choices, they will not be entitled later on to lay justified claims on the income and wealth of other countries that, in the past, have made better decisions than they have.[78] As it is customary for a liberal to think, fundamental rights enable people to have a starting position of relative equality, while the subsequent voluntary choices determine different outcomes, which may be better or worse depending on individual cases. This principle is what counts, while the methods to attain its goals count up to a certain point. Ultimately, human rights and the duty of assistance to burdened societies – which Rawls presents as two different aspects of the foreign policy of a liberal state (Rawls 1999) – may also be conceived as being actually two faces of the same coin that may coincide in an extended version of socioeconomic human rights that enables everyone to make political choices. This would also allow for the attainment of one of the major purposes of Rawlsian liberalism: to conceive distributive justice and equality in general as instruments to achieve a liberal-democratic political equilibrium rather than as independent moral purposes.

3.6. THE GLOBAL DISTRIBUTIVE JUSTICE MODEL

I would like to get back in this last section to the Rawlsian anti-monism that, in my opinion, remains an important aspect in any liberal conception of justice – including the 'weak' one outlined here. In fact, it could be surmised that in *The Law of Peoples* (Rawls 1999), Rawls is too unwilling to extend his theory of domestic justice to the global level owing to a sort of nationalism. Instead, what seems interesting to me is that the problem is somehow independent of the domestic-global distinction. In other words, Rawls is not a mere nationalist or, at least, this is not the most interesting part of his argument. On the other hand, as pointed out a number of times following Nagel and Murphy, he is certainly an anti-monistic

77. Of course, it must be proved that citizens are able to decide upon their own state policies, and sometimes such an option is surely unavailable.

78. The example that Rawls uses in *The Law of Peoples* to rule out the possibility of global justice actually relates to the different conduct of two states after having reached the threshold of autonomy based on the socioeconomic minimum. If one state behaves like a cicada and the other like an ant, is the latter state – having become richer in consequence of its prudent choices – supposed to recompense the former based on the global justice issue? Rawls says no.

theoretician. To appreciate this properly, we need to consider that the international model in *The Law of Peoples* is inspired by the constitutionalist and domestic model in *Political Liberalism* (Rawls 1996). Following this model, Rawls says that any liberal theory of human rights must avoid relying on a comprehensive doctrine (Rawls 1999: 68).

It is starting from *Political Liberalism* that Rawls partially bypasses the Difference Principle, the most strongly egalitarian core of his justice theory, from a view of justice that can withstand the test of pluralism. Ultimately, while the basic liberties – as Rawls admits in *Political Liberalism* – must be left untouched, the Difference Principle is and remains a controversial issue. Therefore, when the Rawlsians in favour of global justice are critical of Rawls, and would like the Difference Principle to be included in the theory of international justice, they should thoroughly consider the fact that even Rawls considers the Difference Principle as controversial, even at a domestic level. Therefore, what holds him back is not an excess of nationalism, but rather a form of liberal pluralist and anti-monistic caution.

My thesis, as presented up to now, could appear to be following blindly Rawls's thesis in *The Law of Peoples* (and, perhaps, even Nagel's political conception), trying to find at the most a route differing from his explicit course to get there. This is not the case, and – before closing – I will endeavour to explain why. In *Political Liberalism*, if Rawls isolates the Difference Principle in the name of anti-monism 2 and pluralism, he makes up for it by attaching the utmost substantial significance to the foundations of the constitutionalist liberalism, causing it to include conditions of material equality that, usually, are not a part of it. In so doing, the egalitarian implications of political liberalism include a decent distribution of income, equal opportunities in education, basic health care for citizens, public funding of elections, and the state as employer of last resort. However, there is no trace of these implications in *The Law of Peoples*. No such substantial requirements may be found in either its view of human rights or the right of assistance to burdened societies. For Rawls, liberalism has always coincided with a strong defence of equality of opportunity. In any event, the Rawlsian equality of opportunity is not the classical 'negative' equality of opportunity of the liberals, substantially based on the exclusion of any discrimination. It is a 'positive' or fair equality of opportunity, in whose context the state must make considerable efforts to place all the citizens on the same level, starting from education and health care. This substantive equality of opportunity level – present in both *A Theory of Justice* and *Political Liberalism* – is absent from *The Law of Peoples*.

This means that, even without adopting the Difference Principle as Rawlsian cosmopolitans would prefer, Rawls could have nonetheless insisted in *The Law of Peoples* on a minimal egalitarian approach. In my opinion, this means that there is no need to adopt the strong global justice view, as required by the cosmopolitans, in order to obtain greater global distributive justice within a framework that does not misinterpret Rawls's liberal and pluralist caution. The same applies with reference to the threshold problem discussed above. The aforementioned egalitarian implications would have made it easier to get to the threshold of

democracy for those peoples who are currently unable to reach it. On the other hand, the meagre view of human rights proposed by Rawls and the opaque view of the duty of assistance do not seem likely to obtain such a result. Obviously, I uphold the thesis that the liberal conception based on a weak global justice, as presented in this chapter, is likely to extend Rawls's principles of international justice in this direction. This happens also because the universal duty of justice, in the version here formulated, disentangles the notion of justice from the notion of reciprocity, differently from the political conception.

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4

Pluralism about Global Poverty[79]

Jennifer Rubenstein

The horrifying magnitude of severe poverty in the contemporary world has prompted many people, including many theorists and philosophers, to ask whether well-off actors have any moral responsibility to help alleviate poverty outside of their home countries.[80] These efforts have yielded an embarrassment of riches, in the form of a long list of proposed reasons why well-off actors – including individuals, states, corporations, and 'peoples' – might have such responsibilities. These reasons (which I describe more fully below) include claims that actors should help to alleviate poverty if they caused, contributed to, benefited from, or intended it; if they can alleviate it at little cost to themselves; if they have ties of history, family, solidarity or friendship to those in need, or simply because of the terrible yet avoidable suffering that severe poverty generates.

There is ongoing disagreement about many of these claims. But there is also widespread agreement that several of them are valid. I do not mean that there is a core group of universally-accepted reasons why well-off actors are obliged to help alleviate global poverty. Rather, there is widespread agreement *that* several such reasons are valid – even though there is disagreement about *which* reasons those are. I will call the latter view (that there are several valid moral reasons to

79. I thank Christian Barry, Barbara Buckinx, Ryan Davis, Gerald Doppelt, Chad Flanders, Peter Furia, John Goldberg, George Klosko, Troy Kozma, Thomas Pogge, Mike Ravvin, Robert Talisse, Leif Wenar and audiences at the Midwest Political Science Association Annual Meeting, a meeting of the Princeton Society of Fellows in the liberal arts, and the Vanderbilt seminar on Responsibility and Global Justice for extremely helpful comments on previous versions of this chapter.

80. I leave aside poor people's responsibility for alleviating their own poverty. I take it that they have such a responsibility, but that they often cannot escape poverty entirely on their own. While there undoubtedly are some poor people who wish not to be poor and who could alleviate their own poverty, but fail to do so, such cases probably constitute a small proportion of the extant severe poverty in the world. Moreover, even if people are partly to blame for their own poverty, it is not obvious that they should be left to die or suffer horribly as a result (Anderson 1999). I also leave aside the responsibilities of well-off people toward their poorer compatriots, as this raises different issues. Finally, I assume that well-off actors can in fact help to alleviate global poverty, but I take no position as to what form effective assistance would take – or even if it would look like 'assistance' at all: for instance, the 'help' that non-poor outsiders provide might involve removing obstacles that they themselves had previously placed in front of poor people, or working in solidarity with poor people to make institutions fairer and more inclusive.

alleviate global poverty) 'pluralism about reasons to alleviate global poverty' or 'global poverty pluralism' for short.[81]

The aim of this chapter is to explore the implications of global poverty pluralism for how we think about responsibility for alleviating global poverty.[82] I will therefore assume, for the purposes of this chapter, that there are, in fact, several valid moral reasons to alleviate global poverty. If true, this proposition appears at first to be entirely good news for poverty opponents: the more routes there are to the conclusion that advantaged people ought to do more to help alleviate global poverty, the better. There is no dearth of severe poverty to be addressed – and so, it would seem, no need to be concerned about a surfeit of reasons to address it.

But what initially looks like an unmitigated good has two unexpected drawbacks. First, as the list of accepted reasons why well-off actors are obliged to help alleviate global poverty has grown longer, it has become, paradoxically, more difficult to say which poverty-alleviating activity or activities any given well-off actor should undertake.[83] This is because *different reasons to alleviate poverty often* (though not always) *point toward different poverty-reducing activities.* For example, if an actor caused poverty in one place but can alleviate it most efficiently elsewhere, causality-based reasons for alleviating poverty will prompt the actor to undertake different activities than will efficiency-based reasons. (Acting on causality-based reasons will also likely lead the actor to alleviate less poverty overall than will acting on efficiency-based reasons, insofar as only the latter type of reason focuses entirely on getting the most poverty-alleviating 'bang for the buck.')[84] The more reasons to alleviate poverty that are accepted, therefore, the larger the *quantity* and the greater the *diversity* of poverty-alleviating activities any given actor is likely to have reason(s) to undertake.

This is all well and good from the perspective of the poverty opponent. The problem arises when the list of poverty-alleviating activities that an actor has reason(s) to undertake becomes so long that it is impossible or overly burdensome for the actor to undertake all of them. (Or the actor simply refuses to undertake all of them.) In these cases, decisions must be made, by the actor and/or those able to pressure or control the actor, about which poverty-alleviating activities the actor should prioritize.[85] I will call questions about these decisions *actor-centred* questions. They take the following form:

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81. According to the *Stanford Encyclopedia of Philosophy* entry on 'Value Pluralism,' '[t]he word "pluralism" generally refers to the view that there are many of the things in question (concepts, scientific world views, discourses, viewpoints etc.)' (Mason 2006).
82. I will understand 'poverty' to mean the absence of the basic capabilities necessary to lead a decent life (i.e. the capability to procure adequate food, clothing, housing, medical care, basic education, and protection from abuse) (Sen 2000).
83. By 'activity' I mean not only one-off, small-scale acts like digging a well, but also longer-term, larger-scale initiatives, campaigns, strategies, etc.
84. And insofar as acting directly on the basis of efficiency-based reasons does not have perverse effects.
85. If an actor refuses to do his/her fair share of poverty alleviation, a first response is to try to persuade him/her to do more, but if that fails, the subject must at some point change from

> If an actor has many reasons to alleviate global poverty, and these reasons point to different poverty-alleviating activities, yet doing all of the activities is impossible or overly burdensome (or the actor refuses to do all of them), how should priorities be set among the different activities?

This question might at first seem nitpicky or churlish. Should not actors who take it upon themselves to help alleviate poverty retain discretion over how they do so? Sometimes, yes. But in other cases, actors do have discernible (and in some cases even strong) moral reasons to prioritize one poverty-alleviating activity over another – or so I shall argue. In addition, without answers to these questions, global poverty pluralists can only offer a very vague account of actors' moral responsibilities to alleviate global poverty. This vagueness, in turn, can make it easier for actors to evade their responsibilities. In short, global poverty pluralists should want to find answers to actor-centred questions both because finding the right answer – if there is one – is morally important and because having *any* answer makes it easier to hold actors accountable for poverty relief.

Alongside actor-centred questions, global poverty pluralism also raises what I will call *case-centred* questions. These questions take the following form:

> If there are several reasons to alleviate a particular case of severe poverty, and these reasons point to different actors as being morally responsible, yet there is a need to assign responsibility more precisely (to just one or more actors), which actor(s) should be deemed most morally responsible?

Global poverty pluralism generates case-centred questions because the more reasons to alleviate global poverty that are recognized as valid, the more likely it is that several actors can plausibly be assigned responsibility for alleviating (or helping to alleviate) a given case of severe poverty. From the perspective of the poverty opponent, this might seem entirely positive (just as a given actor having many reasons to undertake many different poverty-alleviating activities also at first seemed entirely positive). In particular, it might seem as if the more actors who can be deemed responsible for alleviating a given case of severe poverty, the more likely it is that the case will actually be addressed. However, when many different actors can plausibly be assigned responsibility, it can be easier for each of them to pass the buck to someone else. To avoid this outcome, it is sometimes desirable to ask which actor (or small group of actors) is *most* morally responsible for alleviating poverty in a given case. As with actor-centred questions, then, there are two reasons why we should want to answer case-centred questions: because doing so can strengthen accountability for alleviating global poverty, and because it is morally important that the subset of actors who are ultimately held responsible – politically, economically, legally, etc. – for alleviating a particular case of severe

'how much poverty relief?' to 'which poverty-alleviating activities?' I discuss the relationship between these two questions in this chapter's conclusion.

poverty are those who are the most morally responsible for alleviating it (if this can be determined).

Actor-centred and case-centred questions are closely connected. They differ primarily in the perspective that they take: actor-centred questions look at responsibility for alleviating global poverty from the perspective of a particular actor. They ask which poverty-alleviating activities that actor should prioritize when it has different (sets of) moral reasons to undertake different poverty-alleviating activities. In contrast, case-centred questions look at responsibility for alleviating global poverty from the perspective of a particular case or instance of severe poverty; they ask which actor(s) should be held responsible for alleviating that case, when different actors have different (sets of) moral reasons to do so.

In the rest of this chapter, I will explain why actor-centred and case-centred questions are worth asking, discuss why answering them is difficult, and sketch what I see as the most promising way of responding to them. In so doing, I hope to contribute to our understanding of what is at stake in actual, on-the-ground decisions about poverty alleviation. The arguments presented here are, however, unfortunately rather schematic and abstract. This is because I am trying to examine the implications of global poverty pluralism without proclaiming that a particular set of moral reasons to alleviate poverty is valid (a task that would require far more than a single chapter). A more robust response to the complications raised by global poverty pluralism would, I think, combine the lines of argument pursued in this chapter with a more definitive account of what are and are not valid sources of moral responsibility for alleviating poverty. But that is not something that I can do here. My goal is to make some headway on the question of how to deal with global poverty pluralism in a way that is as independent as possible of, and so will get bogged down as little as possible by, debates about which reasons to alleviate poverty are valid.

In the next section, I describe what I mean by 'global poverty pluralism' and suggest that it is a plausible view. Section 4.2 shows how global poverty pluralism generates actor-centred and case-centred questions. It also addresses several objections to even asking these questions in the first place: that they are too nitpicky, given the enormity of severe poverty in the world; that they are too demanding of actors who are already helping to alleviate poverty, and that they are beside the point, because most actors do not act on *any* moral reasons to alleviate poverty, anyway. In Section 4.3, I examine three strategies for responding to actor-centred and case-centred questions; I argue that the first two strategies fail, while the third is more promising. In Section 4.4 I consider what recourse might be available to poverty opponents when responding to actor-centred and case-centred questions in the way that I sketch in Section 4.3 conflicts with maximally alleviating global poverty. I conclude by examining the relationship between actor-centred and case-centred questions, on the one hand, and broader questions about moral responsibility to help alleviate global poverty, on the other hand.

4.1. THE PLAUSIBILITY OF PLURALISM ABOUT GLOBAL POVERTY

I will begin by briefly describing several moral reasons to alleviate global poverty that theorists and philosophers have endorsed. By 'moral reasons to alleviate poverty' I mean sources of moral responsibility: reasons that actors must take into account to avoid being blameworthy. My goals here are both bibliographic and conceptual. Bibliographically, I want to show that global poverty pluralism is a widely-held view: not only have many moral reasons to alleviate poverty been proposed, but many authors endorse several of these reasons. Conceptually, I want to illustrate (though I will not defend this point explicitly) that these reasons really are different from each other. Yet, it is important to note that boundaries between reasons – i.e. where one ends and another begins – are not entirely rigid or given; there are often several plausible ways of distinguishing between two or more reasons. For example, while I group 'cause' and 'help to cause' together as one reason, they could be construed as different reasons (Barry 2005*a*).

This list is not exhaustive, and some of the reasons are more widely-accepted than others. But they give a sense of the kinds of claims about responsibility for alleviating global poverty that a global poverty pluralist might support. To be precise, these are proposed reasons why actors are (1) morally responsible *for alleviating* severe poverty, i.e. reasons why they would be blameworthy for not alleviating it. This is different from (2) being morally responsible for severe poverty *having occurred*. It is also different from (3) having *caused* severe poverty. While (3) often leads to (2) and (2) often leads to (1), these types of claims are analytically distinct and can occur separately. An example of (1) on its own is the fire fighter who is responsible for fighting fires, but is not causally or morally responsible for their occurrence. An example of (2) on its own is the parent of a child who drowns because the parent, who cannot swim, was absorbed in a novel at the beach. The parent is (at least partly) morally responsible for her child having drowned, but not causally responsible for the child drowning or morally responsible for saving the child (because the parent cannot swim). An example of (3) on its own is a toddler who mistakenly falls on another child and injures him: the toddler is causally responsible for injuring the other child, but not morally responsible for the injury occurring or for alleviating it. What follows, then, are eight moral reasons why actors are responsible for alleviating severe poverty that are found in the literature.

1. The *causal* reason. One should help to alleviate the severe poverty that one caused, helped to cause, or to which one contributed, directly or indirectly. The most prominent contemporary defender of this view is Pogge, who argues that 'severe poverty is an ongoing harm we ["citizens of the rich countries"] inflict upon the global poor' (Pogge 2005; 2002).[86] Proponents of

86. Caney (2006) discusses some practical difficulties with acting on causal responsibility in the context of global warming.

this reason argue that actors should stop causing the severe poverty that they are currently causing, provide reparations for severe poverty that they caused in the past, and, if they cannot avoid causing severe poverty, compensate those whose poverty they cause (Pogge 2002). According to some authors, the causal relationships that generate responsibility for alleviating poverty can be quite indirect. For example, Young (2006) argues that 'all actors who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.'[87] And Pogge himself sometimes suggests that actors 'cause' global poverty when they impose a system of rules on the social order that results in more poverty than would result from another possible system of rules (Pogge 2002: 201). (As was just noted, however, causing severe poverty does not necessarily make one morally responsible for alleviating it. For example, a poor street vendor who unintentionally drives another vendor into poverty by selling the same goods at lower prices does not necessarily have a moral responsibility to assist that other vendor [adapted from Miller 2001].)

2. The *promise-based* reason. One should help to alleviate global poverty if one has promised to do so, implicitly or explicitly. Governments, for example, sometimes promise to provide foreign aid but then fail to follow through on their promises. This is the message of a recent Oxfam International briefing paper, entitled *The World is Still Waiting: Broken G8 promises are costing millions of lives*.[88] Although it falls outside of my focus (which is on responsibility across borders), it is worth noting that promise-based responsibility can also arise in the context of governments' promises to alleviate the poverty of their own citizens and denizens: De Waal argues that 'political contracts' between leaders and their citizens are essential for avoiding famines (De Waal 1997). Promising to alleviate poverty creates a prima facie moral responsibility to do so, regardless of the reason why the promise was made in the first place.[89]
3. The *office-based* reason. One should help to alleviate poverty if doing so is one's official duty. Sabl defines an 'office' as 'a position, devoted to a characteristic kind of action, whose existence is judged to serve worthy purposes, and whose grounding in those purposes *gives rise to particular duties* and privileges that derive from the position' (Sabl 2002: 1, my italics; see also Thompson 1987). Office-holders can be individuals, e.g. high-level employees of the World Bank or UNICEF; they can also be organizations or institutions, e.g. Save the Children or Oxfam. Office-based reasons do not explain why or how anyone comes to occupy an office in the first place (or

87. Young (2006) distinguishes her 'social connection' model from the 'liability model,' which is closely associated with causation, but according to Young, the social connection model also makes 'reference to causes of wrongs.'
88. Oxfam International briefing paper 103, May 2007. Online at http://www.oxfam.org/en/files/bp103_g8_world_is_still_waiting.pdf/view?searchterm=None
89. I here leave aside many complications, including those associated with promises made by democratic representatives on behalf of their constituencies.

why the office exists), but they do explain why, once an actor occupies an office, he/she has a responsibility to perform the official duties associated with that office. Office-based reasons to alleviate poverty incorporate elements of other reasons, such as promising and benefiting (see below), but they are not reducible to these other reasons.

4. The *associative* reason. One should help to alleviate the poverty of those to whom one has associative ties. Such ties might be based on friendship, family, shared history, shared political commitments, or political community (Miller 2001; Walzer 1983; Tan 2004; Barry 2005*a*; Kolodny 2002; Scheffler 2001).[90] Walzer, for example, argues that '[m]embership is important because of what the members of a political community owe to one another and to no one else, or to no one else in the same degree. And the first thing they owe is communal provision of security and welfare' (Walzer 1983: 64). At the international level, Walzer argues that political communities have a responsibility to assist persecuted people in other countries who share their basic values and beliefs (by allowing them to immigrate) (Walzer 1983: ch. 2). Associative reasons are a double-edged sword when it comes to global poverty. On the one hand, they can be used to justify prioritizing aid to a specific group (e.g. one's compatriots), even if members of that group are less poor or more expensive to assist than non-members (Tan 2004). On the other hand, as an empirical matter, felt associative ties motivate the transfer of significant resources from well-off and moderately poor people in wealthy countries to much poorer people in poor countries. For example, members of particular religions aid other members of the same religion; former refugees aid current refugees; and migrants send billions of dollars in remittances annually to their own families (although often at terrible personal cost).[91]
5. The *ability* reason. One should help to alleviate global poverty simply because one can do so, even at significant cost to oneself. When resources are scarce, this line of argument also tends to suggest that actors should alleviate poverty as efficiently as possible, so that they can alleviate as much of it as possible with the resources at their disposal. For utilitarian theorists such as Singer and Unger, the responsibility to provide aid simply because one can continues up to the point that total utility (understood in terms of poverty reduction) is maximized (Singer 1972; 2002; 2004; Unger 1996). However, because this chapter focuses on the implications of pluralism about global poverty, I am primarily interested in versions of the ability reason that can be incorporated into a pluralistic conception of responsibility for alleviating global poverty – not monistic moral theories such as strong versions of utilitarianism.

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90. Some authors argue that there is an important moral difference between ties of friendship and family, on the one hand, and ties of nationhood and co-citizenship, on the other.
91. According to *The New York Times,* migrants sent US$300 billion home in 2006 (De Parle 2007). The World Bank (2006) reports that US$167 billion in remittances was sent to developing countries in 2005.

6. The '*duty of aid*.' This umbrella term is meant to indicate a family of related duties that includes 'humanitarianism,' the 'duty of rescue,' and 'Good Samaritanism' (Waldron 1986; Kleinig 1976; Miller 1999: 75–6; Williams 1995). The term 'duty of aid' is meant to evoke Rawls's conception of a 'natural duty' of 'mutual aid' to 'persons generally' that requires 'helping another if he is in need or jeopardy providing that one can do so without excessive risk or loss to oneself' (Rawls 1971: 114). (Rawls [1999] himself means these duties to apply domestically; his argument for aiding burdened societies in the *Law of Peoples* has a different basis.) The aforementioned duties of aid involve a responsibility to provide a rudimentary level of short- or medium-term aid to people with urgent needs. Conceptually, there are (at least) two main differences between the ability reason and the duty of aid: the duty of aid is strictly limited by the costs imposed on the actor(s) providing aid, while the ability reason is less limited in this regard. In addition, the duty of aid only requires those who provide aid to bring those they assist up to a very minimal level of well-being, while the ability reason can require doing much more.[92]
7. The *benefiting* reason. Actors should help to alleviate severe poverty if they have benefited from it, or from something that caused it, directly or indirectly. Anwander (2005) argues that benefiting from others' severe poverty is not wrong in and of itself, but when one benefits from another's poverty, one has a positive duty to help alleviate it – regardless of whether that poverty was caused by unjust treatment by third parties or by bad luck (Anwander 2005; Barry 2005*a*; Pogge 2005; Caney 2006). For example, if Sarah benefited because vandals burned down her competitor John's store, thereby rendering John destitute, Sarah has a duty, akin to the duty of gratitude, to use some of her additional earnings to help John get back on his feet. For Anwander, then, contributing to severe poverty and benefiting from it provide independent sources of responsibility for alleviating global poverty. In contrast, Pogge implies that benefiting from global poverty does not generate responsibilities on its own, but rather increases the duties of those who also contribute to it (Pogge 2005: 197). For Pogge, in other words, the benefiting reason to alleviate poverty only comes into effect in the presence of the causal reason.
8. The *intention* reason. Actors should help to alleviate global poverty if they intended to cause it (Barry 2005*a*: ch. 2). This reason is relevant because many actors, ranging from states to corporations, have an interest in keeping particular groups powerless (which often means keeping them poor). Even more than the benefiting reason, this reason seems to have force primarily when it accompanies other reasons. In particular, an intention to cause poverty that was formed and acted upon unsuccessfully would seem to

92. I thank Leif Wenar and Christian Barry for pushing me to clarify the distinction between the duty of aid and the ability reason. While some readers might still think that these two reasons should be merged, this would make no substantive difference for the argument.

generate a stronger obligation than an intention that was only formed but not acted upon, and a weaker obligation than an intention that was formed and acted upon successfully.[93]

4.1.1. Why Pluralism about Global Poverty is Plausible

The central problematic of this chapter is only relevant if there are, in fact, several valid moral reasons for actors to help alleviate global poverty. However, my argument does not depend on any of the foregoing reasons, in particular, being correct. There is a large literature critically assessing these and other claims about who has a moral responsibility to help alleviate global poverty, and why.[94] But in this chapter, I bypass these questions. There is enough agreement *that* several reasons to alleviate poverty are valid for it to be worth exploring the implications of global poverty pluralism – even though, as noted above, disagreement persists about *which* reasons are valid.

That said, it is worth noting that many people, including many philosophers, endorse several reasons to alleviate global poverty (including, but not limited to, the reasons listed above). For example, David Miller argues that what he calls his four 'criteria' of 'capacity,' 'community,' 'moral responsibility,' and 'causal responsibility' are widely agreed-upon (Miller 2001; see also Barry 2004). Green argues that most people accept both arguments based on causal responsibility and those based on special obligations (Green 2002). Pogge argues that there are positive, intermediate and negative duties to assist the global poor (Pogge 2005 and 2007*a*). More generally, in everyday life we commonly recognize that several different moral reasons to alleviate global poverty seem persuasive.

Of course, some of these reasons are inconsistent with others. For example, one cannot be a strong-act utilitarian (and so endorse the ability reason) and also endorse the causal reason as a first-order source of moral responsibility. More generally, different reasons to alleviate poverty are often associated with different, and seemingly incompatible, broader political or moral theories. For example, promise-based responsibility is often associated with libertarianism, the duty of aid with Rawlsian liberalism, and ability-based reasons with utilitarianism. But these associations are not one-to-one pairings: libertarians can endorse both promise-based and causal responsibility; liberals can endorse those two reasons along with several others (including the duty of aid). Moderate utilitarians can also endorse two or more moral reasons to alleviate poverty, as can people who do not subscribe to a single coherent moral theory. Generally speaking, few moral theories other than strong versions of utilitarianism are monistic, in the sense of endorsing only one 'mid-level' moral reason to alleviate poverty of the kind

93. I thank Mike Ravvin for help with this point.
94. Noteworthy recent volumes include Pogge (2007*b*), Weinstock (2005), Chatterjee (2004), and Shapiro and Brilmayer (1999). Noteworthy reasons left out of my list include those based on human rights, religious obligation, and virtue ethics.

described above. But nor do these theories, in many cases, provide the conceptual resources necessary to answer actor-centred and problem-centred questions. In short, proponents of several versions of several different overarching theoretical approaches, as well as people who do not adhere to a single approach, are likely to be global poverty pluralists.

4.2. ACTOR-CENTRED AND CASE-CENTRED QUESTIONS

I have not tried to argue that global poverty pluralism is definitively correct, but I hope to have shown that there is nothing obviously contradictory or misguided about it. I now want to suggest that it raises two types of questions that are rarely explicitly addressed in debates about responsibility for alleviating global poverty: actor-centred questions and case-centred questions.

4.2.1. Actor-Centred Questions

As I stated above, actor-centred questions take the following form:

> If an actor has many reasons to alleviate global poverty, and these reasons point to different poverty-alleviating activities, yet doing all of the activities is impossible or overly burdensome (or the actor refuses to do all of them), how should priorities be set among the different activities?

For example, should a transnational corporation operating in a poor country pay its workers a living wage, or clean up a chemical spill that it helped to cause? Should a government prioritize aid to a country that it invaded and occupied on false pretences, even though such aid might not do much good, or should it instead send that money to a different country where it is more likely to effectively alleviate severe poverty?

As these examples suggest, determining when actor-centred questions ought to be asked is a tricky business. This is because actor-centred questions assume that a tradeoff among different poverty-alleviating activities must be made – but such tradeoffs are not always necessary.[95] Assuming or accepting that a tradeoff is necessary when it is not is tantamount to letting an actor off the hook for poverty relief. A corporation's insistence that it cannot possibly pay a living wage *and* clean up the chemical spill might just be a ruse. It can be difficult for outsiders (as well as individuals within collective actors) to determine when an actor is *really* unable to act on all of its moral reasons to alleviate poverty, when doing so would impose an undue burden – or when the actor is simply trying to

95. For a broader discussion of the dangers for normative reasoning of unwarranted assumptions about empirical constraints, see Reddy (2004).

shirk its responsibilities. Third parties and internal reformers must make subtle practical political judgments about when to press an actor to fulfil all of (what they take to be) its responsibilities, when to shift the focus to which poverty-alleviating activities the actor should prioritize, and when to do both simultaneously.[96]

These difficulties are compounded when the actor in question is large, public, and internally complex, with many roles and constituencies. Yet, while actor-centred questions can be asked about any type of actor, they tend to be most revealing when they are asked about large-scale, institutional, and/or public actors, rather than about ordinary, private individuals. This is because large, public actors tend to have more capacity to alleviate poverty, and more (moral and non-moral) reasons to do so, than private individuals. They are also more likely to fulfil a few of their responsibilities with great fanfare, so as to distract from their failure to respond adequately to other, perhaps more important or pressing, responsibilities. Finally, public institutions, in particular, tend to have greater responsibilities of transparency and non-arbitrariness, including responsibilities to disclose the reasoning behind their actions, than do private actors.

The fewer concrete ways of alleviating poverty that a given actor has, the fewer discrete activities it will have reason to rank-order, and the less salient actor-centred questions will be, with regard to that actor.[97] Ordinary individuals, for example, cannot authorize humanitarian military intervention, and corporations cannot sign inter-state agreements on poverty reduction, so they have no need to determine the relative priority of these activities (for themselves). However, the existence of democratic governments, transnational advocacy coalitions and international NGOs makes it easier for individuals to support a diverse array of poverty-fighting activities. Not only can individuals choose which poverty-alleviating activities (if any) they themselves will support in response to their own moral responsibilities, they can also pressure more powerful actors to undertake particular activities in response to their (the powerful actors') moral responsibilities. (Often these two kinds of decisions are connected, as when an individual decides to fulfil his/her own moral responsibilities by donating to an organization that pressures large-scale public actors, such as the World Bank, to set different priorities.)

While global poverty pluralists face actor-centred questions, global poverty monists (i.e. people who think that there is just one reason to alleviate global poverty) can also face questions about how to set priorities among different poverty-alleviating activities. For example, a given actor might not be able or willing to alleviate all of the poverty that it has caused, and so must set priorities among different cases. But it is easier to set priorities among poverty-alleviating

96. The question is not only how many resources an actor should devote to poverty alleviation as opposed to more self-interested objectives, but also how many resources it should devote to poverty alleviation as opposed to other other-regarding objectives, such as protecting the environment. I address this issue in Section 4.4.

97. If an actor has several reasons to alleviate poverty, but these reasons all point to the same (doable) activity, then actor-centred questions are also irrelevant.

activities when one accepts only one reason to alleviate poverty than when one accepts many such reasons. When only one reason is accepted, the internal logic of that reason can offer some guidance in ranking different activities (or programmes, strategies, policies, etc.). For example, if the reason that is recognized is promise-based responsibility, an actor might fulfil its most explicit or overdue promises before its less explicit or overdue ones; if the reason that is recognized is office-based responsibility, the actor might prioritize the duties that are most central to its office's mission over those that are less central, etc.

In contrast, when several reasons to alleviate poverty are recognized as valid, the range of poverty-alleviating activities that a given actor has reason to undertake is likely to be larger and more diverse than when only one reason is recognized (though this depends, of course, on how one distinguishes among 'different' activities and how one measures diversity). It is also not possible to appeal to the internal logic of any one reason in order to set priorities among different activities. The question is not how to set priorities among (for example) the various cases of severe poverty that a given actor has helped to cause; the question instead is how to set priorities among (for example) providing reparations to some people, fulfilling official duties to the same people, honouring promises to others, and alleviating poverty yet somewhere else, where one can do so most efficiently. Thus, if a corporation has a causal responsibility to fund a water-improvement project in a town whose water supply it contaminated, but has promised to build a health centre in another town, it cannot use the underlying logic of either reason to choose between these activities. To make matters even more confusing, an actor might have just one reason to undertake one poverty-alleviating activity, but several reasons to undertake another activity. In short, the existence of several valid reasons to alleviate poverty makes the task of setting priorities among different poverty-alleviating activities much more complicated than it otherwise would be.

4.2.2. Case-Centred Questions

Case-centred questions are similarly complex. Recall that these questions take the following form:

> If there are several reasons to alleviate a particular case of severe poverty, and these reasons point to different actors as being morally responsible, yet there is a need to assign responsibility more precisely (to just one or more actors), which actor(s) should be deemed most morally responsible?

Miller (2001) offers an example of a case-centred question. Who, he asks, should be responsible for alleviating 'the current [in 2001] plight of Iraqi children who are malnourished and lack access to proper medical care[?]' Likewise, one might also ask: who (if anyone) should be held responsible for alleviating poverty in the destitute towns around Nigerian oil pipelines? Who (if anyone) should be considered most responsible for alleviating poverty on a remote island caused in

part by global climate change? (Recall that by 'most responsible' we do not mean causally or morally responsible for poverty having occurred, but rather morally responsible for alleviating it.)

As with actor-centred questions, political judgment is required to decide when case-centred questions ought to be asked. Just as actors can sometimes act on all of their moral reasons to alleviate poverty, such that the actor-centred question does not arise, sometimes a particular case of severe poverty can be alleviated collectively, by all of those with some moral responsibility for addressing it, such that the case-centred question does not arise. In other situations, however, it is necessary to identify, from among those who have some moral responsibility to alleviate a case of severe poverty, the subset of actors who have the *most* responsibility for alleviating it. To answer case-centred questions we must find some criteria or method for doing this.

Like actor-centred questions, case-centred questions can be asked about all types of actors, but are generally more fruitfully posed with regard to large, public actors. Also like actor-centred questions, case-centred questions are more challenging for global poverty pluralists than they are for global poverty monists. If causal responsibility, for example, were the only valid reason to alleviate poverty, then several actors might be considered morally responsible for alleviating a particular case of severe poverty because they all helped to cause it. However, because causal responsibility was seen as the *only* valid reason, it could offer guidance in helping to determine which actor/s was/were most responsible: that/those with the most significant causal role. In contrast, if several reasons to alleviate poverty are recognized, then not only is there likely to be a larger number of actors with some moral reason to help address a given case, but the internal logic of any one reason can no longer be used to determine which actor or actors is most responsible.[98]

4.2.3. Three Objections

Before discussing how we might respond to actor-centred and case-centred questions, I want to briefly address three objections to even asking these questions

98. Viewing actor-centred and case-centred questions together helps us to see how actors' decisions are – or should be – dependent on each other. For example, the answer to a given actor-centered question ('which poverty-alleviating activity – X,Y, or Z – should A prioritize?') depends in part on answers to several case-centred questions ('to whom – A, B, or C – should X [and Y and Z] ideally be assigned?'). Conversely, the answer to a given case-centred question ('who – A, B, or C – should be deemed responsible for addressing X?') depends in part on answers to several actor-centred questions ('what activities, X,Y and Z, should A [and B and C] each prioritize?'). Answers to actor-centred and case-centred questions can come into conflict when a given actor is judged to be most responsible for alleviating a particular case of poverty, but that case is low on that actor's list of priorities. For example, while responsibility for severe poverty in Mexico near the Mexico–US border might best be laid at the feet of the United States (compared to, say, France or Luxembourg or United Kingdom), it is arguably low on the United States' list of priorities (compared to, say, Darfur).

in the first place. The first objection is that global poverty is *so* horrible that nit-picking about which poverty-alleviating activity is the *most* important for an actor to undertake, and which actors are *most* responsible for alleviating a given case of severe poverty, amounts to a kind of misrecognition of the situation at hand. On this view, it does not matter what reasons actors act on when they alleviate poverty, so long as they alleviate as much poverty as possible; likewise, it does not matter that the most responsible actor is held responsible for alleviating a particular case of severe poverty, so long as that poverty is in fact addressed.

I am sympathetic to the sense of urgency motivating this objection, but I do not think that the objection is persuasive. Strong versions of it seem to reject global poverty pluralism in favour of the idea that actors should help to alleviate poverty simply on the basis of the ability reason. Because I am interested in the challenges faced by global poverty *pluralists*, the issue of whether monists who endorse only the ability reason face difficulties in setting priorities among different activities falls outside of the purview of my analysis (although it has been extensively discussed elsewhere by critics of utilitarianism).

Weaker versions of the objection do not reject global poverty pluralism, but they do seem to place too little weight on the distinctiveness of actors' reasons to alleviate poverty. If a reason is worth taking seriously as a reason to alleviate poverty, then it is worth doing the kind of poverty alleviation that the reason dictates. For example, if the causal reason provides a reason to alleviate poverty, then it provides a reason to alleviate the poverty *that one has caused* (as much as that can be determined).[99] And if it is worth doing the kind of poverty alleviation that a given reason dictates, then it is worth asking how strong the reason is compared to other reasons, when different reasons demand different activities and not all reasons can be acted upon. (This is not to deny that an actor should retain some discretion in setting priorities among different poverty-alleviating activities, especially if the reasons that it has to alleviate poverty are all very weak and/or indeterminate in what they require.)

The argument in the previous paragraph applies primarily to actor-centred questions. With regard to case-centred questions, the rejoinder to the 'too nitpicky' objection is that poor people often – and justifiably – care that resources are transferred to them for the right reasons (Fraser 2000).[100] In particular, people who believe that they have been victims of injustice generally do not want to be paid to shut up and go away. They do not want a handout because they are poor. What they want is an official, public acknowledgment that they are receiving symbolic and/or material reparation for past unjust treatment (Walker 2006). It is, to them, a matter of justice that they receive resources from those who, in their view, are most morally responsible for alleviating their condition: those who committed injustices against them in the past. These justice- and recognition-based claims

99. As Pogge (2002) and others have noted, making this determination can be difficult.
100. Pogge (2007*a*) disagrees, arguing that knowing they were not provided aid from NGOs on the basis of a fair lottery does not benefit poor people. (At least, the benefits are unlikely to outweigh the costs of running the lottery.)

will not always trump other considerations. But they help to explain why case-centred questions are not too nitpicky from the victims' perspective. Case-centred questions are, of course, important not only to victims, but also to those who might potentially be held responsible for alleviating a particular case of severe poverty. Fairness to them seems to require that the actor or actors who are finally held responsible should be those who are *most* responsible, morally-speaking.[101]

A final reason why poverty opponents should want to answer actor-centred and case-centred questions is that, as I mentioned above, having answers to these questions makes it easier to hold actors accountable. As Miller writes with regard to case-centred questions, '[r]esponsibility that is widely dispersed is no good, because then everyone will attempt to hang back in the hope that someone else will step in first, no-one will be particularly liable to censure if the bad condition is not remedied, and so on' (Miller 2001). This point also applies to actor-centred questions: setting priorities among the various poverty-alleviating activities that an actor has reason to undertake makes that actor's responsibilities more specific, and thereby makes it easier for third parties to hold that actor accountable. Again, it is not always possible to discern answers to actor-centred and case-centred questions, but increased accountability is a good reason to try.

A second, almost diametrically opposed objection to asking actor-centred and case-centred questions is that they are too demanding – not because the severity of poverty makes them nitpicky, but because they ask too much of well-off actors who are already helping to alleviate global poverty. Another way to put this objection is to say that the obligation to alleviate poverty is an *imperfect* duty: while actors have some responsibility to alleviate poverty, they retain the discretion to decide when, where, how, etc. (O'Neill 2000; Rainbolt 2000). This objection thus applies primarily to actor-centred questions. It suggests that so long as actors do some poverty alleviation, the reasons that they act on, and the activities that they undertake, are not proper subjects of moral evaluation.

Yet, as Section 4.1 indicated, not all reasons to alleviate poverty fall into the category of 'imperfect' obligations. Obligations to fulfil promises and provide reparations for past harms are generally seen as 'perfect' (or toward the perfect end of the spectrum) – yet they are also widely seen as moral reasons to alleviate poverty. In addition, the ability reason seems to transcend the perfect/imperfect duty distinction, by directing actors to provide aid in a very particular way – so as to maximize utility – but not giving actors a basis on which to make claims on third parties (since the point is to maximize utility, not discharge responsibilities to particular others). In short, the existence of relatively perfect and neither perfect nor imperfect reasons to alleviate poverty suggests that actor-centred and case-centred questions cannot be dismissed as too demanding. (These observations might seem to suggest that the best way to respond to actor-centred and case-centred questions is for actors to prioritize more perfect over less perfect duties, and to assign responsibility for alleviating particular cases of poverty to actors

101. I return to and qualify this statement in Section 4.4.

with more perfect responsibilities for addressing those cases. I will argue in the next section, however, that this strategy works less well than it appears to at first.)

Finally, to our third objection: what about the fact that many actors comply little or not at all with *any* of the moral reasons that they have to help alleviate global poverty? Given this state of affairs, is it not pie-in-the-sky to spend time thinking about which reason or set of reasons is most important? The argument in this chapter is idealized insofar as it assumes that the actors in actor-centred questions are willing to act on the strongest moral reasons, and that, when it comes to case-centred questions, the actors most morally responsible for a given case of severe poverty will be willing to help alleviate it. (The argument is 'non-ideal,' in Rawls's sense of that term, in that it assumes: (a) a world of significant scarcity and (b) non-compliance with principles of justice [Rawls 1971].) In any case, as is painfully apparent, actors are often unwilling to act consistently with any moral reasons to alleviate poverty, let alone the strongest reasons. But there are nonetheless two reasons why it is worthwhile to examine actor-centred and case-centred questions.

One is that, as mentioned above, even when an actor is resistant to acting on its moral responsibilities, there are often morally-motivated third parties willing and able to pressure that actor (e.g. citizens willing to pressure their government; activists willing to pressure corporations). The arguments in this chapter can be taken as directed toward these third parties. A second reason is that, at a psychological and practical level, some acknowledgement of the conceptual and practical difficulties that arise when several reasons to alleviate poverty are recognized as valid might well be *more* motivating, not less, to actors who currently fail to act on any of the moral reasons to alleviate poverty that apply to them. In other words, I think that there is at least a chance that addressing some of the ambiguities created by global poverty pluralism will help to motivate better compliance by presenting not a disconnected heap of reasons that point in different directions, but rather a somewhat more coherent, actionable scheme.

4.3. THREE RESPONSES

Having addressed some potential objections to asking actor-centred and case-centred questions, I now want to describe three possible ways of responding to the questions themselves. The first two have some initial appeal, though I will argue that neither is persuasive. The third response is more promising.

4.3.1. Counting Reasons

One way of responding to actor-centred and case-centred questions is to prioritize those activities that actors have the most reasons to undertake. For example, if an NGO had office- and contract-based reasons to provide classes to a women's cooperative, but only a contractual responsibility to provide seeds to a farming

cooperative, it would prioritize the former, because two reasons are better than one. Likewise, if one actor had two reasons to address a particular case of severe poverty and a second actor had just one reason, responsibility would be assigned to the first actor. Alas, a moment's reflection suggests that this approach is untenable. Not only can one strong reason outweigh two (or three) weak ones, but any such calculation would be dependent on how the boundaries among different reasons were drawn.

More generally, Christian Barry argues that reasons to alleviate poverty are not analogous to grains of sand that can simply be added up.[102] They are, he writes, more like atoms, which, when combined in different configurations, create molecules with different properties. For example, as I stated above, having an intention to exacerbate poverty arguably does not on its own generate much of an obligation to help alleviate poverty. But when the intention to exacerbate poverty is combined with causal responsibility – when an actor both intends to cause poverty and actually succeeds in doing so – then having had the intention seems to increase the actor's responsibility to alleviate poverty more than it would if the actor had not successfully exacerbated it. In short, because of what we might think of, roughly, as 'interaction effects' among different reasons, and because (as I argue below) different instantiations of reasons of the same general type can be stronger or weaker, adding up reasons like grains of sand does not seem to be a reliable method for setting priorities among poverty-alleviating activities.

4.3.2. Relying on a General Rank Ordering of Reasons

A second possible approach to answering actor-centred and case-centred questions would be to do so on the basis of an across-the-board rank ordering of different reasons to alleviate poverty. Two particular ways of ranking reasons come to mind: prioritizing so-called 'perfect' duties over so-called 'imperfect' duties (mentioned above), and prioritizing so-called 'negative' duties over so-called 'positive' duties (Rawls 1971: 114). Shue offers a concise account of these two distinctions:

> If [a duty] is negative, it requires us not to do things. If it is positive, it requires us to do or provide things… . If [a duty] is perfect, it is owed to specifiable individuals who have a right to its performance. If it is imperfect, it is not owed to specifiable individuals and no one can rightfully demand that its performance be directed at him. (Shue 1988)[103]

102. Barry 2005*a*, Ch. 2. The rest of this paragraph also draws on this source.
103. Shue rejects the distinction between positive and negative duties, and is sceptical about the distinction between perfect and imperfect duties. While he claims that duties are 'either' negative or positive and either perfect or imperfect, Rainbolt (2000) conceives of the perfect/imperfect distinction as a continuum rather than a dichotomy.

I agree with Shue that both of these distinctions are rather simplistic and can be misleading in some contexts. But here they serve a useful purpose by helping us to articulate and evaluate two likely intuitions about how to answer actor-centred and case-centred questions.

According to both dichotomies, causal and promissory duties to alleviate poverty should always be prioritized over the duty of aid and duties based on the ability to provide aid, because the former are both more negative and more perfect than the latter (see, e.g., Rawls 1971: 114). But this conclusion does not bear scrutiny. For example, the duty to provide life-saving aid to others when one can do so at a low cost to oneself appears to be stronger than the duty to avoid inflicting a small increase in poverty on someone else. It might well be that *all else equal*, negative duties are more pressing than positive duties, and highly perfect duties are more pressing than less perfect ones. But this observation is not particularly relevant, because situations in which actor-centred and case-centred questions arise are rarely ceteris paribus. What matters for the purpose of answering these questions is not that perfect duties are stronger than imperfect duties or that negative duties are stronger than positive duties all else equal, but rather, that *some* perfect duties are more forceful than some imperfect duties, and *some* positive duties are stronger than some negative duties. In other words, the issue is not whether, e.g., promise-based reasons in general are more forceful reasons than the duty of aid in general; rather, the question is about the relative force of *this particular* promise versus *that particular* duty of aid.

Put yet another way, each of the moral reasons to alleviate poverty described in Section 4.1 can be conceptualized as a series of concentric circles. The centre ring of each circle represents the strongest instantiation (or example or version) of that reason, while progressively larger rings, that are further from the centre, represent progressively weaker versions. For example, the centre ring of the causal reason might represent a situation in which the actor who caused poverty did so directly and acting alone. More remote rings of the causal reason might involve more indirection; for example, the existence of mediating processes, or other actors who also played a causal role. Thus, even if the centre ring of reason A (say, the duty of aid) is weaker than the centre ring of reason B (say, the causal reason), the centre ring of reason A might be stronger than the outermost ring of reason B. That is, the strongest version of the duty of aid might be stronger than the weakest version of the causal reason. So even if Miller is correct that 'our strongest remedial responsibilities are to those whose predicament we are *plainly* outcome responsible for creating (Miller 2006, my italics; see also Barry 2005*b*), the duty to aid the victims of a recent natural disaster (a strong duty of aid) might still be more pressing than the duty to compensate poor people whom one has only possibly played a minor role in helping to make worse-off (a weak causal responsibility).

The extent to which we can recognize stronger and weaker versions of a reason depends on, among other things, how the boundaries among different reasons are divided up. For example, if we define 'causation' broadly, we might distinguish between a strong causal reason, which would involve an actor who

caused severe poverty (a) definitely, (b) directly (c) intentionally and (d) acting alone, and a weak causal reason, which would involve an actor who caused severe poverty (a) possibly, (b) indirectly, (c) unintentionally and (d) acting with others.[104] Alternatively, if we defined causation more narrowly, then some of the features just mentioned, such as intentionality, would look more like independent moral reasons to alleviate poverty, distinct from causation. (That is how I presented things in Section 4.1, but as I said there, for intending to cause poverty to have normative force, it seemingly must coincide with actually helping or trying to help cause poverty.) In any case, the broader point that I wish to establish here is that it makes sense to think of a given reason as having stronger and weaker versions, just as there can be lighter and darker versions of the colour red.

The idea that there can be stronger and weaker versions of a given reason supports the conclusion that a *general* rank ordering of reasons is unlikely to be a persuasive way of setting priorities among different poverty-alleviating activities. This does not mean that there are no patterns or probabilistic tendencies in our considered judgments about the relative importance of different types of moral reasons to alleviate poverty across some sets of cases. But it does suggest that these patterns are less robust than they might initially appear, especially when comparisons are being made (as they virtually always are) among cases that involve (1) different numbers of reasons; (2) different configurations of reasons; and (3) strong versions of some reasons and weak versions of other reasons.

4.3.3. Context-Specific Constellations of Reasons

I turn now to a third approach to answering actor-centred and case-centred questions. While certainly not perfect, this approach seems preferable to the two strategies just canvassed. It involves trying to rank the *context-specific constellations of reasons* that actors have for undertaking different poverty-alleviating activities. This approach is in some respects similar to Miller's proposed way of answering (what amount to) case-centred questions, which he calls the 'connection theory':

> Our overriding interest is to identify an agent who can remedy the deprivation or suffering that concerns us, and in pursuit of that aim we fix on whoever is linked to [some patient] P according to one of the theory's four criteria ['capacity,' 'community,' 'moral responsibility,' and 'causal responsibility'], about which there is widespread agreement. Where two or more of the principles apply, the theory tells us to look at the strength of the

104. There is debate about whether shared causal responsibility decreases the moral responsibility of the actors who share it: a murderer will not necessarily receive a weaker sentence just because someone else participated in committing the crime. But as Barry (forthcoming) argues, if a pedestrian and a driver were both partly to blame for the driver hitting the pedestrian, the insurance company might divide up the total cost between the driver and the pedestrian in proportion to their causal role. The latter example seems more analogous to severe poverty, because the issue is who will pay, not who will be punished.

> various connections… . This means, of course, that when connections have to be weighed against each other, we can do no more than appeal to shared moral intuitions about which is the stronger (Miller 2001).

While Miller offers the connection theory as a response to case-centred questions, it can easily be applied to actor-centred questions: it would simply say that an actor with different reasons to alleviate poverty that point to different activities, should prioritize those activities to which it has the strongest connection.

Miller's theory is a good starting point, but it needs to be expanded somewhat to suit our purposes. In particular, we must incorporate the points made above about the need to recognize interaction effects among different reasons and acknowledge that, while some reasons might be ceteris paribus stronger than others, a strong version of a generally weak reason might be stronger than a weak version of a generally strong reason. Together, these observations suggest that actors should set priorities among different poverty-alleviating activities – i.e. they should answer actor-centred questions – on the basis of which activity they have the *strongest context-specific constellation of moral reasons* to undertake. Likewise, judgments about which actor or small group of actors is most morally responsible for alleviating a particular case of severe poverty – i.e. responses to case-centred questions – should be based on which actor has the *strongest context-specific constellation of moral reasons* to address that case.

This approach does not obviate the need for debate and judgment about actor-centred and case-centred questions. Among other things, it does nothing to resolve disagreements about which moral reasons to alleviate poverty are generally valid, or about which particular reason or set of reasons is stronger in a particular case.[105] Rather than try to settle these disagreements, my objective has been to identify, as precisely as possible, the questions that global poverty pluralism raises, the most promising routes to answering those questions, and the axes of disagreement that are – and are not – likely to be salient as we proceed along those routes.

105. As George Klosko has pointed out to me, there is debate about whether this sort of weighing of different reasons can be done in any meaningful way. On the broader issue of value commensuration and comparability, see the essays in Chang (1997), especially the 'Introduction' and contributions by Anderson and Millgram. I cannot enter into this debate here, except to say that (a) the worries voiced by Anderson and others about comparability in the realm of aesthetics do not apply to the case of global poverty; and (b) one can be quite sceptical about the possibility of comparing or commensurating different reasons for alleviating poverty, but still find the conceptual clarification offered here conducive to (at least marginally) better decision-making.

4.4. STRONGEST CONTEXT-SPECIFIC CONSTELLATION OF MORAL REASONS VERSUS MAXIMALLY ALLEVIATING POVERTY

Throughout this chapter, I have been discussing a predicament faced by actors who have two characteristics: they oppose global poverty and they are global poverty pluralists, i.e. they think that global poverty is a bad thing, and they think that there are several valid moral reasons why actors should help to alleviate global poverty. One potential drawback to the conclusion that I drew at the end of the previous section is that it drives a wedge between – or, at least, it highlights the tensions between – these two characteristics. If one accepts a wide range of reasons to alleviate global poverty, that is, if one is a global poverty pluralist, then acting on the strongest context-specific constellation of moral reasons will not necessarily be consistent with maximally reducing poverty. Maximally reducing poverty entails acting always and only on the basis of efficiency considerations. However, many moral reasons to alleviate poverty direct actors to undertake poverty-alleviating activities that are not necessarily maximally efficient (e.g. fulfilling promises or discharging official duties).

In this section I want to consider whether there is any way out of this conundrum. One way out would be to argue that efficiency-based reasons in particular, and strongly consequentialist or forward-looking reasons more generally, are the only valid reasons to alleviate global poverty (and, perhaps, that acting directly on the basis of these reasons would in fact maximally alleviate poverty).[106] However, because the goal of this chapter is to explore the implications of pluralism about global poverty, I will not take this route. I will instead ask whether there are any other ways to make my proposed strategy for answering actor-centred and case-centred questions – prioritizing the strongest context-specific constellation of moral reasons – more consistent with maximally alleviating poverty.

Why should maximally alleviating poverty get this special treatment?[107] Why not ask how acting on the strongest context-specific constellation of moral reasons could be made more consistent with some other outcome – say, the outcome that would result from actors acting only on the basis of causal responsibility? The reason is simply that, like many other people, I have what might be called an extra-philosophical commitment to the idea that unchosen severe poverty is a horrible thing for anyone to have to endure. I therefore hope that philosophical inquiry yields the conclusion that well-off actors have stringent moral responsibilities to help alleviate global poverty. The question that I am asking in this section – whether answering actor-centred and case-centred questions on the basis of the strongest

106. Depending on the content of what they demand, non-consequentialist reasons can be preferable to consequentialist reasons on consequentialist grounds. On the consequentialist benefits of relying on non-consequentialist reasons, see Kymlicka (2002: ch. 2); Williams (1973); and Pettit (2005).

107. Thanks to Leif Wenar for pressing this point.

context-specific constellation of moral reasons can be made to yield the same outcome as maximally alleviating poverty – reflects this hope.[108] I will discuss two possible approaches to doing this, each of which exploits a different way in which responsibility is not only discovered, philosophically, but also created, politically. I am not suggesting that anyone has a *responsibility* to create responsibility in these two ways. Rather, my objective is to reveal the responsibility-creating potential or implications of activities that are to some extent already taking place anyway (or will take place for other reasons). Poverty opponents who recognize these dynamics then have the option to undertake these activities themselves, support third parties in undertaking them, or simply recognize them as conducive to poverty alleviation.

4.4.1. Approach No. 1: Strengthening Specific Versions of Already-Accepted Moral Reasons

Recall that, as I argued above, different versions of the same moral reason to alleviate poverty can be stronger or weaker. The duty of aid, associative duties, office-based reasons, and several other moral reasons to alleviate poverty can generate moral responsibilities that, depending on the circumstances, require more or less poverty relief. So, a first strategy for making my 'strongest context-specific constellation of moral reasons' approach more consistent with maximizing poverty alleviation is to alter the circumstances surrounding already-accepted moral reasons to alleviate poverty, so that acting on those reasons generates more poverty relief.

For example, putting lifesaving equipment near the edge of a raging river makes it less costly for passers-by to save someone who is drowning. Because the duty of aid is stronger when the cost of providing aid is weaker, the presence of the lifesaving equipment strengthens the duty of passers-by to aid anyone they see drowning in the river. Likewise, the existence of international NGOs makes it easier for individuals, corporations, and governments in wealthy countries to help alleviate severe poverty in poor countries. By lowering the cost of providing aid to distant strangers, the existence of effective NGOs strengthens potential donors' duties to provide this aid, according to the duty of aid. The existence of NGOs also helps to strengthen the ability reason, though in a slightly different way. NGOs do not make the ability reason more demanding than it was previously, but they do make acting on it more effective: for many actors, acting on the basis of this reason by donating to NGOs generates more poverty alleviation than would have been generated otherwise (e.g. by actors making uncoordinated, piecemeal efforts to alleviate poverty on their own). Other technologies, practices, and institutions that make poverty relief more cost-effective can strengthen the duty of aid and

108. This is similar (but not identical) to the process of trying to achieve 'reflective equilibrium' (Rawls, 1971).

yield the result that actors acting on the ability reason generate more poverty relief than they would otherwise.

Other moral reasons to alleviate poverty can also be strengthened by altering background conditions. For example, the causal reason can potentially be strengthened by inducing actors to join institutional schemes that also involve poor people. Simon Caney argues that one drawback to the 'institutional account' of moral responsibility for alleviating global poverty is that it creates a negative incentive for wealthy actors to join institutional schemes involving poor people, because doing so will increase their moral responsibilities to assist those poor people (Caney 2007). I am making the converse point: if the prospect of developing a moral obligation is enough to keep actors from joining institutional schemes, then inducing them to join such schemes is enough to increase their moral responsibility. Poverty opponents therefore have reason to support such inducements, especially if they think that actors will actually fulfil the moral responsibilities that develop as a result.[109]

Recent efforts by theorists and others to show that various kinds of actors are already involved in institutional schemes that perpetuate global poverty serve a related purpose. These arguments are attempts to show that an already widely-accepted moral reason to alleviate poverty (the causal reason) applies more widely and with more force than was previously recognized. These arguments do not strengthen responsibility in the way that putting a lifesaver next to a raging river strengthens responsibility; rather, they *reveal* that some actors' responsibility to alleviate poverty is *already* stronger than it was thought to be.

This strategy is not limited to altering on-the-ground conditions. As the NGO example suggests, it can also involve creating new actors.[110] Judgments about case-centred questions, in particular (i.e. judgments about who should be held responsible for alleviating a given case of severe poverty) must be open to the possibility that the best actor to hold responsible does not yet exist, and must be created from scratch or constructed by merging or significantly retooling existing actors. While actors often create other actors in order to avoid responsibility and shield themselves from accountability, the example of NGOs illustrates the potential benefit of creating new actors, especially when these new actors can alleviate poverty more efficiently or have more political room to manœuvre than existing actors.

Just as the set of actors who might be held responsible for alleviating global poverty can be altered, so can the boundaries of 'global poverty' itself. In the contemporary political theory and philosophy literature, global poverty is often conceived of in one of two ways. One way is as one big problem, called

109. Much depends here on the conception of 'cause' that is being used. It would be perverse to induce an actor to help cause global poverty only so that the actor could then be held responsible for alleviating the poverty that it caused.

110. This possibility is most relevant to case-centred questions. But it also has implications for actor-centred questions, in that significantly reshaping an actor so as to modify its capacities or role can alter its moral responsibilities.

'global poverty,' 'world poverty,' or 'severe poverty.' For example, Wenar writes that his 'ultimate aim will be to apply [his] hypothesis concerning the location of responsibility to *the case of severe poverty*' (Wenar 2007: 258, my emphasis). In contrast, Miller seems to conceive of global poverty as (roughly speaking) an amalgam of many smaller problems, such as the example he uses to elucidate the connection theory ('the current [2001] plight of Iraqi children who are malnourished and lack access to proper medical care' [Miller 2001]).

Each of these perspectives clarifies some aspects of global poverty and obscures others. A large-scale view is more helpful for analysing global structures, patterns, and causal relationships; a small-scale view is more useful for understanding local political and social dynamics and the lived experiences of poor people. However, a third way of conceptualizing the issue of global poverty has a benefit that both the large-scale and small-scale perspectives lack: it can help to strengthen actors' moral responsibility for alleviating poverty, and reveal that their responsibility is already stronger than had been recognized. As was noted above, Miller frames his discussion of his 'connection theory' using the example of malnourished Iraqi children. But he never explains or justifies the boundaries of this case: why Iraqi children but not Iraqi adults? Why all Iraqi children rather than just those in Baghdad? Despite their seeming arbitrariness, these boundaries play a crucial role in Miller's analysis, because he argues that one or a few actors must be identified as responsible for *this* problem. Yet, if we conceptualize global poverty in a more fluid manner, we might be able to address it more effectively, by approaching it from two directions at once: in addition to finding the best actor(s) to address a given problem, as Miller suggests, or even creating a new actor to address the problem, as I suggested above, we can also reconceptualize the problem itself, so as to better fit existing actors and the reasons that those actors have for alleviating severe poverty. For example, if the issue of malnourished Iraqi children were divided up into smaller problems, there might emerge a wider range of actors who could be said to have some moral responsibility for ameliorating the situation, such as Iraqi NGOs.

In short, just as it is possible to develop new kinds of actors that can plausibly be said to have moral responsibility for alleviating particular cases of severe poverty, it is also possible to redraw boundaries so as to create 'new cases' that are more amenable to being successfully addressed by existing – or new – types of actors. An example is a recent effort by a consortium of international organizations to treat as one integrated issue prophylaxis for several tropical diseases that had previously been viewed as separate issues. As the *New York Times* reported, '[m]uch of the challenge [to implementing this integrated approach] stems from the fact that each drive against a disease – polio, measles, malaria – has its own leaders, charitable groups and donors at the international level' (Dugger 2006).[111]

111. The same point applies to reconceptualizing situations that cross the boundaries of what had been seen as entirely distinct spheres, such as global poverty and environmental degradation.

Even for relatively powerful actors, however, the strategies that I have just described, for making acting on the strongest context-specific constellation of moral reasons more consistent with maximally alleviating poverty, are likely to yield only modest results. It is difficult to make already-accepted reasons to alleviate poverty much more demanding by altering the circumstances in which those reasons apply. This is especially the case for those forms of moral responsibility, such as promise-based responsibility, that derive their force primarily from an actor's explicitly accepting responsibility.

4.4.2. Approach No. 2: Creating Responsibility Conventionally

A second approach to creating responsibility focuses not on strengthening the moral responsibility of discrete actors, but rather on using conventional means (e.g. domestic legislation, international treaties, or contracts between parties) to create legal responsibility that is morally justifiable. This second approach has the potential to alter responsibility more significantly than the previous approach and is also in a sense more democratic. However, it runs a higher risk of being unfair to, or dominating, those to whom responsibility is being assigned. (While I distinguish them for the sake of conceptual clarity, there are of course connections and overlaps between this approach and the approach described above.)

To understand what I mean by conventionally-created legal responsibility, consider the following example. In most states in the United States, rear drivers are responsible for avoiding traffic accidents with drivers ahead of them.[112] If a driver rear-ends a driver ahead of him/her, the rear driver (or his/her insurance company) must generally pay damages. The justification for assigning responsibility in this way does not rest entirely on the rear driver's moral responsibility for paying for accidents. Insofar as it is easier for the rear driver to avoid accidents than the front driver, insofar as one is more responsible for avoiding harm if one can do so easily, and insofar as, in the case of car accidents, moral responsibility for causing the accident yields a moral responsibility to pay for it, rear drivers have a stronger moral responsibility to pay for rear-end accidents than do front drivers. But if we were trying to assign moral responsibility for paying for car accidents on a case-by-case basis, we would no doubt look at factors in addition to who was the rear driver and who was the front driver. For example, we might consider whether the front driver was not paying attention and slammed on the brakes. There would no doubt be some cases in which, all things considered, the front driver could be judged to be as morally responsible, or more so, for the cost of the accident than the rear driver.

Yet, there are moral and practical reasons for assigning responsibility for car accidents to rear drivers, in general and in advance, even though this assignment

112. I am indebted here to Wenar's (2007) discussion of this example.

of legal responsibility does not always precisely track moral responsibility. First, it helps to avoid bad outcomes, such as situations in which front and rear drivers both think that the other will get out of their way. It is also efficient; it can create good incentives, as well as reduce unfair or arbitrary assignments of responsibility, and allow actors to plan ahead (including, in some cases, planning to avoid acquiring legal responsibility). Thus, when responsibility for paying for accidents is assigned to rear drivers, the emphasis is more on achieving good outcomes in a morally justifiable way than it is on tracking individual drivers' pre-existing moral responsibility.[113]

Another example of conventionally-created responsibility is Good Samaritan legal statutes. Such statutes (which are law in some states in the United States, but rarely enforced) create a *legal* duty for bystanders to provide emergency aid when they can do so easily and no one more qualified is available to help. These statutes differ from the rear driver example in that many people think that there is already a moral responsibility to aid others in emergencies when one can do so at little cost to oneself. But the similarity between the examples is that, like assignations of responsibility to rear drivers, Good Samaritan statutes create legal responsibility conventionally. While these statues are (according to their proponents) morally justifiable, their primary aim is to achieve good outcomes, not reflect individual moral responsibility.

If we apply this mode of reasoning to the context of global poverty, we can see that legal responsibility for alleviating poverty can be assigned to actors in ways that are morally justifiable, but are not simply a markup on actors' moral responsibility for alleviating global poverty. An immediate objection that one might have to this approach is that it seems unfair to burden actors with legal responsibility for alleviating poverty that they had no prior moral responsibility (or only a weak moral responsibility) to address. But this is not necessarily the case, so long as several conditions are met. First, the poverty-alleviating burdens placed on actors must be the result of legitimate – usually democratic – procedures. This suggests the need for international institutions and coordination, though not necessarily a world government. Second, the activities endorsed by the legitimate procedures must be morally important (alleviating severe poverty would seem to qualify). Third, these activities must not be overly burdensome on any one actor, as this would be unfair to and/or disrespectful of that actor.[114] Fourth, there must be attention to issues of equity among the actors sharing the burden (although there can be some tension between considerations of equity, which can involve distributing the burden widely, and accountability, which can require sharing it out only narrowly). Finally, if the distribution of legal or financial responsibility

113. The driving example is dis-analogous to global poverty in two ways: everyone is sometimes a front driver and sometimes a rear driver, so assigning the responsibility to the rear driver distributes the burden among all actors. In contrast, everyone is not sometimes very poor. In addition, while one can avoid paying for a traffic accident by avoiding hitting drivers in front, because global poverty already exists, there is no way for everyone to avoid paying for it by being careful.

114. Caney (2007) makes this point in terms of respect rather than fairness.

for alleviating poverty does not track pre-existing moral responsibility, there must be compelling moral and/or practical reasons for this, just as there are compelling moral and practical reasons to assign responsibility for traffic accidents to rear drivers and responsibility for helping in emergencies to bystanders.

In sum, it might be possible to create legal responsibility for alleviating global poverty that is morally justifiable, but does not precisely track the moral responsibility of discrete actors for alleviating poverty. It seems that, to be justifiable, this kind of legal responsibility could not diverge too greatly from moral responsibility, but I am not sure how to determine how much divergence is too much. But if we accept that some divergence between legal responsibility and moral responsibility is acceptable, then creating legal responsibility to alleviate global poverty is one way to (1) retain the idea that moral responsibility should be based on the strongest context-specific constellation of reasons, while also (2) maximizing poverty alleviation.

4.5. CONCLUSION

Actor-centred and case-centred questions are probably not the most important questions that one could ask about moral responsibilities to help alleviate global poverty. More important, in all likelihood, are questions about the net quantity of poverty alleviation that various kinds of actors have a responsibility to provide. It might seem as if actor-centred and case-centred questions are entirely parasitic on these more important questions, that is, that actor-centred and case-centred questions can only be addressed once the more important questions have been resolved. I do not think that this is the case, however. To the contrary, asking actor-centred and case-centred questions can help us to think more clearly about these other, more important questions.

Actor-centred questions help us to think more clearly because they are very concrete: they force us to confront exactly what is being given up, or who is being passed over, when a particular tradeoff is made. Asking the actor-centred question about a given actor before fully settling the question of what net quantity of aid is required from that actor can lead to the conclusion that more poverty alleviation is required than had previously been thought. Judgments about net quantity of poverty alleviation and how to set priorities among poverty-alleviating activities should be, and generally are, reciprocal, with each informing the other. This idea is captured in an episode of the sitcom *Friends*, in which Phoebe's brother, overwhelmed by caring for his young triplets, begs her to take one in. 'Which one?' she asks. In the process of describing the unique qualities of each, her brother concludes that he cannot give up any of them. In the same way, focusing on concrete tradeoffs can shift people's judgments about what net quantity of aid is morally required, and sometimes, even, about what is practically possible (when faced with having to make a particular tradeoff, actors sometimes magically find more resources or some other way to avoid having to make the tradeoff, just as Phoebe's brother decided that he could take care of all three triplets after all). We

should not accept the need to make a tradeoff prematurely (as I discussed above), but nor should we make judgments about the net quantity of poverty alleviation required from particular actors without thinking about the specific tradeoffs or sacrifices that providing that quantity of aid, and no more, would entail.

The same point holds with regard to the question of whether many actors with a moral responsibility to address a particular case of severe poverty can be held responsible for it, or whether it is necessary to specify responsibility more precisely. It appears at first as if this question is entirely prior to the case-centred question, that the case-centred question only arises once it has been determined that there is a need to identify only one or a few actors as most responsible for alleviating poverty in a given case. However, asking which actor is most morally responsible for alleviating a particular case of severe poverty can lead to the conclusion that some kind of institutional mechanism must be put in place to distribute responsibility among a larger number of actors, without allowing any to shirk their responsibilities. Again, our thinking about the two kinds of questions – whether it is necessary to specify a small group of actors as responsible and who would be specified if doing so were necessary – ought to be reciprocal, with each informing the other.

Practical judgments about how to set priorities among different poverty-alleviating activities (actor-centred questions), or how to assign responsibility for alleviating particular cases of severe poverty (case-centred questions), are extremely difficult. I have tried to show why they are especially complex when a wide variety of different moral reasons to alleviate poverty are seen as valid. No theoretical account can begin to capture the intricacy or, often, the wrenching difficulty of even a single actual, real-world decision about these issues. My objective has been to clarify some of what is at stake in some of those decisions, and to offer an account of how practical judgments in the context of them might proceed.

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Part II

… as Applied to Specific Countries (China, India, Mexico)

5

Agency and Other Stakes of Poverty[115]

Jiwei Ci

The nature of poverty resides in the character of those basic human needs that require material resources for their satisfaction. The needs in question are various and represent what may be called the 'stakes of poverty'. It is these stakes that make poverty the evil that it is and give the task of preventing or removing poverty its importance. Every investigation of poverty, whether normative or empirical, expresses or implies some view of the stakes of poverty. In this chapter I place the stakes of poverty at the centre of my inquiry, giving particular attention to the relation in which these stakes stand to one another.

5.1. SUBSISTENCE POVERTY AND STATUS POVERTY

It is something of a commonplace that poverty can affect both subsistence and status. To be poor is to have a shortfall in one or both of these goods, which correspond to two different dimensions of a human being – as a biological being with needs of subsistence, and as a social being with a need for respect or recognition.[116] This commonplace distinction is worth pursuing.

As a matter of subsistence, poverty is a simple and straightforward condition, however complex its causal story and controversial the assignment of responsibility for eradicating it.[117] It is a species of physical neediness and, as such, has nothing intrinsically and directly demeaning about it. What can make subsistence poverty demeaning is the character of those social relations that systematically cause and maintain it. In themselves, subsistence needs are purely physical needs, and being

115. I am indebted to Thomas Pogge for his valuable help as editor, not least for finding an acute reader for an earlier version of this chapter. To that reader, Mike Ravvin, I owe special thanks for the perceptive and challenging comments that have helped me clarify and strengthen my arguments considerably. My thanks also go to the two anonymous referees from Oxford University Press for their helpful comments or suggestions.

116. For the most part, I use the term 'respect' in a broad sense, without distinguishing between respect and esteem, and interchangeably with 'recognition'. I will have occasion to consider the respect/esteem distinction in Section 5.8 on 'Agency Despite Status Poverty'.

117. The question of the causes of poverty, of whatever variety, and of responsibility for relieving it is not my focus in this chapter. Insofar as I touch on the question, I do so in the simplified context of a domestic society. For insights into this question, especially in the global context, see Pogge (2002).

unable to meet them adequately is a condition that is obviously bad for those who are in a state of material poverty. But material poverty need not create any intrinsically negative social meaning for those who are in this condition.

As a matter of status, on the other hand, poverty does carry an intrinsically negative meaning: the poor here are those who have the lowest social status by virtue of, or as reflected in, their having the lowest income. Call it status poverty – not lack of status as such (for one can lack status, be poor *in* status, in many ways) but a special kind of lack of status that is characteristic of a society in which money is an all-important marker of social standing. Such poverty represents a shortfall with reference not to subsistence needs but to the need for respect. It is still income that is lacking, but the needs for which income is lacking are not physical but social. In status poverty, what a very low income makes difficult or impossible is not subsistence, but rather participation in a range of social activities that form the basis of respectable status.[118]

Now, subsistence poverty has a more or less fixed point of reference in human biology. Basic physical needs can go unsatisfied because of extreme scarcity or extremely inequitable distribution. But such needs are not themselves competitive or comparative and therefore are in principle capable of being satisfied for each and all. Status poverty is different. It is found in societies in which social status is closely linked to things that only money allows one to do; i.e. the lower one's economic position, the fewer things one is able to do, and the greater one's social exclusion. In such societies the economically worst-off will make up the status poor, whatever their absolute level of income. Status poverty is thus a strictly relative condition that derives from the hierarchical nature of a society's distribution of recognition on the basis of material wealth as a necessary means of participation in status-conferring social activities. For this reason, status poverty cannot be alleviated by improving material conditions alone, or by any other means that stop short of removing, or at least weakening, the link between status and income.[119]

5.2. THE ASSIMILATION OF SUBSISTENCE POVERTY TO STATUS POVERTY

Given that subsistence poverty and status poverty are conceptually distinct, three scenarios are possible. First, although those who suffer from status poverty have the least resources overall relative to others, they may have enough resources to meet their basic subsistence needs. This scenario is typical of the poor in so-called developed societies, although subsistence poverty is far from unknown in such societies. Second, it is possible for those who suffer from subsistence poverty to be

118. Gorz (1980) distinguishes between destitution and poverty, which correspond roughly to what I call subsistence poverty and status poverty. For the effects of poverty on participation in normal social activities, see also Sen (2000).

119. This is especially true of modern, industrial societies, with their distinct ways of perpetuating status poverty through such mechanisms as 'polarization' and 'obsolescence' (see Illich 1973).

free from status poverty, as when they happen to be members of a society in which income is not a significant marker of status. This was largely true, for example, of Mao's China, as we shall see.

Finally, although, strictly speaking, status poverty is a function of lack of material resources for participation rather than for subsistence, in practice it is almost inevitable that in a society that permits status poverty, those who lack material resources for subsistence will also lack material resources for those activities that form the basis of respectable status. Thus, people can suffer simultaneously from subsistence poverty and status poverty, a possibility that is commonly realized in societies that are both underdeveloped and marked by a hierarchical structure of recognition based substantially on levels of income as necessary means of participation. This is the form that much of the poverty in the world takes today.[120]

It should not be surprising if the combination of status poverty and subsistence poverty causes the negative social meaning associated with the former to be attached to the latter as well. After all, the low level of income that makes subsistence difficult is also what prevents participation in normal social activities, and thus a low level of income per se will generally carry negative social meaning, irrespective of its effects on subsistence or status. There is nevertheless a sense in which this negative meaning belongs directly to status poverty rather than subsistence poverty.[121] We may think of the process involved as the inevitable superimposition of negative social meaning onto subsistence poverty via status poverty, indeed the assimilation of subsistence poverty to status poverty.[122]

As a result, a simple case of subsistence poverty that is otherwise free of social meaning receives a stigma whose effect can only be described as adding

120. For poignant descriptions of poverty in present-day China which often involves hardship and low status at the same time, see Yongping et al. (2004); Xiao and Xiaoyan (2006).

121. It is indicative of this that low-income earners, even in rich societies, are often tempted to sacrifice subsistence for participation (see Sen 1992: ch. 7).

122. Such superimposition of negative meaning onto subsistence poverty is aided by a powerful social mechanism. Insofar as people are called poor solely on account of their condition, without any explanation of this condition, the superimposition is blocked. If poverty is explained by tracing its causes to factors other than the poor themselves, say to social injustice or even to bad luck, then again the superimposition is blocked. But a predominant explanation involves attribution of a special kind of responsibility to the poor for their own condition. The poor are poor, according to this explanation, because they lack either the willingness (moral virtues) or the ability (instrumental virtues) to be otherwise. Where some such explanation is accepted, subsistence poverty takes on a negative meaning that is not intrinsic to it, and status poverty takes on an *extra* negative meaning that reinforces its intrinsically negative meaning. In either case, poverty, which does not attract blame by itself, is turned into a proxy for things that do. Distinct from whether one is responsible for one's condition of poverty in this sense, and even more important, is whether one has chosen this condition. The crucial role of choice is evident in a comparison of poverty and asceticism, which I will pursue shortly. The sting of the blame for poverty is the idea that the poor, in being responsible for their own condition, nevertheless are responsible in a way that does not bespeak autonomy. The poor do not choose poverty: they would prefer not to be in their condition but supposedly lack the moral or instrumental virtues to avoid it. This combination of being responsible for one's poverty and yet not properly choosing it helps make possible the negative social meaning that poverty often has.

insult to injury.[123] This is not in itself an indictment of status poverty, but it is impossible to protest against the social assimilation of subsistence poverty to status poverty without in some way taking issue with the very presence of status poverty that makes this possible. Since the added insult to those in the grip of subsistence poverty is unavoidable in a society that also permits status poverty, there is something morally problematic with any society that allows the existence of subsistence and status poverty at the same time. At the very least, until subsistence poverty is overcome through the creation of more wealth or a more equitable distribution of existing wealth, status poverty is a luxury that exacts too high a moral cost.[124]

5.3. SUBSISTENCE POVERTY AND STATUS POVERTY IN CHINA

It may help move our discussion forward on a surer footing if I bring the distinction developed so far to bear on the People's Republic of China's record of fighting poverty. On the one hand, China is sometimes credited with having made great strides in the fight against poverty since the start of the Reform era in the late 1970s. On the other hand, it is no less often claimed that poverty has become a worse problem in China today than it was in Mao's time. Both claims contain an element of truth, in my view, and the distinction between subsistence and status poverty is especially useful for capturing what is true in each claim.

Material scarcity was undoubtedly a very serious problem in Mao's time. It was treated, however, as a matter of subsistence poverty alone, with no significant implications for status. The fight against material scarcity thus conceived was in turn framed by the collective pursuit of the goal of communism. Though it was something to be overcome on the road to communism, subsistence poverty was nevertheless a spur to action aimed at bringing about collective prosperity and eventually communism, or so it was believed, and as such it was regarded as the source of the ascetic virtues required for the transition to communism. In this spirit, the entire population embraced the condition of material scarcity, which was a fact of Chinese society to begin with, and in so doing turned necessity into choice. The important thing is not so much that people were by and large equally poor, but rather that in their condition of equal poverty they were united in the common struggle to overcome poverty and realize a better future.[125] Not only did the largely

123. In the context of discussing Nietzsche, Danto (1988: 21) introduces a useful distinction between 'extensional suffering and intensional suffering, where the latter consists in an interpretation of the former'. If subsistence poverty is a kind of extensional suffering, the negative meaning given to it can be a source of additional, intensional suffering. As Danto observes (in expounding Nietzsche), 'while extensional suffering is bad enough, often it is many times compounded by our interpretations of it, which are often far worse than the disorder itself'.

124. This is continuous in spirit with Shue's 'priority principle' (Shue 1980: 114–19).

125. Insofar as some social groups were economically less well-off than others, say 'workers' and 'peasants' in comparison with 'intellectuals', the former were compensated, as it were, in the

equal distribution of material resources block the rise of status poverty and prevent subsistence poverty from acquiring any negative meaning, the collective cause of communism actually gave positive social meaning to subsistence poverty.[126] In the context of this cause, subsistence poverty was not an obstacle to participation in social life and the formation of a valued self. Rather, subsistence poverty made possible participation in a special kind of social life and the formation of a special kind of self – an ascetic self that was based on collectivistic values informed by a communist *telos*. This communist ascetic self was the only kind of self that was socially valued and allowed to serve as a basis of respect. Far from being a barrier to participation in normal activities constitutive of this self, the lack of individual wealth and possession was valorized in political terms and treated as an enabling or even necessary condition for participation in such activities.[127]

Now, some three decades into what is still called the Reform, the goal of communism has been given up, except in occasional rhetoric, and the ascetic self that used to make sense in the context of the collective pursuit of communism is no longer a social ideal. As a result, subsistence poverty has become empty of all positive significance – no longer redeemed by association with ascetic virtues, solidarity in a common cause, or the prospect of material and spiritual plenitude for everyone with the advent of communism. This withdrawal of positive meaning from subsistence poverty is compounded by the simultaneous rise of status poverty and a new valorization of individual wealth. Formerly the necessary condition for a kind of valorized (ascetic) self, serious lack of wealth is now an obstacle to participation in the normal activities of education, employment, and consumption that are constitutive of the new kind of (hedonistic) self that is increasingly the social ideal in post-Mao China.[128] With the shift from one paradigm of normal, self-constituting activities to another, social exclusion has come to be based on wealth rather than on political standing, and so, however substantial the success in reducing subsistence poverty, that success is now part of a larger picture in which the new problem of status poverty looms larger and larger.[129] It is only in

form of higher political standing and greater cultural representation. Against this background, the comparative economic disadvantage of 'workers' and 'peasants' took on a different social meaning under Deng Xiaoping and his successor Jiang Zemin, in that the countervailing factors characteristic of the Mao era had gradually disappeared. In this later period, those who were at the receiving end of political and cultural exclusion on top of economic disadvantage must have felt an especially damaging combination of deprivation and demoralization. This potentially explosive situation has been ameliorated to some degree in the past few years. For a theoretical account of social relations in terms of multiple dimensions of superiority and inferiority, see Bourdieu (1985).

126. The largely equal distribution was made possible by the state's control of almost all the means of production and its providing almost everyone with a livelihood, however minimal, including such levels of education and medical care as resources permitted.

127. There was nothing like the kind of competing demands for subsistence and participation that Sen (1992: ch. 7) speaks of.

128. For an account of the practice of asceticism in Mao's China and the shift to hedonism in post-Mao China, see Ci (1994: Introduction, and ch. 4).

129. For a detailed account of the new social exclusion, with special reference to the plight of laid-off female workers, see Tong (2004).

the context of the new phenomenon of status poverty that we can grasp the cause and significance of the sharp rise in inequality of income in post-Mao China. The poor are now those who are worst off in both subsistence and status, even though in most cases their absolute level of subsistence is higher than it was (or would have been) in Mao's time. Thus, the problem of poverty has been reduced in one dimension and enlarged in another.

There is no obvious way of comparing the overall situation of poverty in Mao's time to that of ours and saying which is worse. What makes one hesitant to say that things are better now, however, is the pervasive appearance of status poverty in a society which, given its general level of material prosperity, still can ill afford it. The result is the compounding of subsistence poverty with status poverty in the life of a new underclass. Even if this is not enough for concluding that things are worse, one can nevertheless say with reasonable confidence that since the start of the Reform, poverty has acquired a new dimension and a new meaning – and, with these, a new source of social suffering.

5.4. POVERTY AND ASCETICISM

What the experience of coping with material scarcity in Mao's China confirms and illustrates is that material scarcity can be treated as a matter of subsistence poverty alone, and that subsistence poverty on its own need carry no negative social meaning. This experience also suggests that there is a lot to be said for preventing subsistence poverty from being associated with negative social meaning, especially under conditions of severe material scarcity. What is even more revealing about this experience is how subsistence poverty can be interpreted so as to receive *positive* social meaning. This is something I want to explore further now, by way of reflecting on the distinction between poverty and asceticism to which I briefly referred in my account of the fight against poverty in Mao's China.

A poor person and an ascetic have in common that each has a minimum of material resources. But this similarity is only external. From the internal point of view, an ascetic, in what may be treated as the typical case, *chooses* to deprive him/herself of material resources that otherwise would be or might be available, and for this reason we cannot speak of material *deprivation* in the standard sense. Alternatively, an ascetic (as in Mao's China) may embrace a condition of limited material resources that happens to be one's lot and thereby turn a life of poverty into an ascetic life. Thus, an ascetic is someone who either chooses to be poor or makes a virtue of the necessity of being poor. In both cases, though more so in the first than in the second, one can be said to *will* a life of material scarcity. To be more precise, what one wills is subsistence poverty, and because one wills it in order to better participate in those activities that make up one's chosen conception of the good life, no status poverty will result, at least in one's own eyes. Whereas disrespect is part of the social meaning of status poverty, and all too often even of subsistence poverty through superimposition, it need not be, and tends not to be, part of the social meaning of asceticism – thanks to the exercise of choice. And

whereas disrespect is highly reflexive for the (unwilling) poor,[130] it is not so for an ascetic even in the unlikely event that he/she is an object of disrespect – again thanks to the exercise of choice. In asceticism, then, status poverty is either absent or non-reflexive, and subsistence poverty is made positive by choice and by the resultant intactness of self-respect.

The upshot is that subsistence poverty, normally an undesirable condition, can be redeemed and made compatible with agency and self-respect; it is indeed required for an ascetic's kind of agency and self-respect. That this is possible – and this is my main reason for examining the case of the ascetic[131] – suggests the need for a third, more complex notion of poverty. Some such notion is necessary if we are to make sense of the condition of the ascetic: even if we ourselves do not subscribe to an ascetic conception of the good life, we can at least appreciate what makes material scarcity not such a bad thing for someone who does. There is clearly a difference between an ascetic, who is materially poor by choice, and a person who is equally materially poor but does not want to be. That difference, I suggest, is that the person in the latter case is in a condition of what I will call 'agency poverty', by which I mean a lack of material resources that causes a reduction or loss of agency, and with it self-respect. In order to say more about this notion of poverty, I must first say something about my notion of agency, along the way also giving more systematic content to the notion of self-respect.

5.5. AGENCY AND AGENCY POVERTY

My account of agency rests on the distinction between power and subjectivity.[132] I mean by power largely what Nietzsche means by it. Thus, power consists of both the ability to act, broadly construed, and actually acting in one way or another. Some of the things Nietzsche has to say about power lend themselves at first sight to a narrower interpretation than I am giving them. Where this is the case, a charitable approach calls for understanding the notion of power more broadly than Nietzsche appears to do, in at least two ways. First, to be sure, the physical, sensuous dimension of power is unavoidable insofar as the being that expends power is a physical, sensuous being.[133] But we must allow that power can take forms that are not totally physical or sensuous and that cannot be reduced to the purely physical or sensuous. Think, for example, of so-called intellectual power

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130. On the reflexivity of respect and disrespect, see Walzer (1983: 272–73).
131. What is true of the ascetic can also be true of those who for ecological reasons prefer to live a life that is frugal to the point of poverty from an external point of view. For such people, 'physical poverty is not humiliating when it proceeds from choosing to be satisfied with less and not from being relegated to the lower ranks of society' (Gorz 1980: 32).
132. In working with this distinction, I draw significantly on Warren (1988).
133. In its physical, sensuous dimension, power is energy or strength, and, as such, something to be 'discharged' or 'expended'. It is this aspect of power that Nietzsche refers to when he writes that 'A living thing seeks above all to *discharge* its strength – life itself is *will to power*' (Nietzsche 1966: aphorism 13).

or power of the mind. Thus, power must be understood in a sufficiently abstract way to cover all of its forms, physical or otherwise. In this more abstract sense power is, in a nutshell, acting, doing, getting done. Second, Nietzsche's claim that 'life itself is essentially appropriation, injury, overpowering of what is alien and weaker; suppression, hardness, imposition of one's own forms, incorporation and at least, at its mildest, exploitation' (Nietzsche 1966: aphorism 259) needs to be construed more abstractly, in terms of acting *upon*, doing *to*, or causing to happen. Power thus understood may or may not literally take the form of injury, suppression, or exploitation. As a general characterization of power, Nietzsche's expression 'overpowering of what is alien' is plausible only if taken in this more abstract sense.

There is no doubt that power matters to human beings as agents. But why it matters is a question that must be answered with reference to subjectivity. For what is fundamentally at stake in power for human beings is subjectivity – the formation and maintenance of a self, along with its reflexive dimension in the shape of a *sense* of self. A self is not given but rather is made possible only by experiences of power. It is only through such experiences, cumulatively and unceasingly, that a self is able to emerge and persist: a subject who forms so-called intentions and causes things to happen in accord with such intentions (thereby giving *content* or *identity* to the self) registers such intentions and the effects of carrying them out as emanating from and belonging to a self (thereby forming a more or less *reflexive* relationship with the self and turning it into an '*inner*' self), and attaches value to this self and its activities (thereby affirming the self and acquiring *self-respect*).[134] Thus, power is invariably expended as the power of a self already formed or being formed, or else it would be an expenditure of energy devoid of all distinctively human motivation. Conversely, a self can be formed and remain formed only through power, through intentional and goal-directed activities, or else it would be nothing more than a potential. In the final analysis, all worthwhile human power is the power *of* a self, and hence has the self in it, and accordingly what Nietzsche calls the 'will to power' is actually the will to selfhood through power.[135] In this sense, power and subjectivity form a unity (whenever things go well for a human being): power organized as subjectivity, as Warren (1988: 59) aptly puts it, or subjectivity achieved through power. Following Warren, I use the term 'agency' to refer to such a unity.

It is in terms of agency that self-respect is best understood. When one is in possession of a subjectivity that is securely grounded on experiences of power and to which one attaches positive value, one will feel good about oneself. Self-respect is none other than this feeling – an epiphenomenon that attends upon the unity

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134. The success of this self-constituting process depends, of course, on conditions that involve others and the (natural and social) environment.

135. Nietzsche's insight here is twofold: seeing selfhood as systematically dependent on power and, more radically, showing that even the self, not just our picture of the external world, is in an important sense a construction. Nietzsche writes, for example, that 'the "subject" is not something given, it is something added and invented and projected behind what there is' (Nietzsche 1967: aphorism 481).

of power and subjectivity, and that of course typically relies to some degree on respect from the right quarters. Like the term 'subjectivity', 'self-respect' connotes the evaluative reflexivity that is an integral part of being a human agent.

Given this account of agency, agency poverty can be understood in the following way.[136] In agency poverty, the material resources one lacks are those required for self-constituting activities. The significance of this material deprivation is that it leads to power deprivation, which in turn poses a threat to subjectivity, a threat whose adverse effects are registered in the epiphenomenon of lack of self-respect. Thus, what should deeply worry us about agency poverty is not material deprivation as such, though this is important up to a point, nor even power deprivation as such, though this is more directly important, but the fact that material deprivation can lead to power deprivation, which in turn can lead to subjectivity or agency deprivation. Agency poverty is nothing less than a condition in which those involved are prevented by material deprivation from engaging in self-constituting experiences of power and thus from maintaining themselves as subjects. Whenever material deprivation leads to agency deprivation, it undermines the respect for oneself that is part and parcel of a self. More than merely debilitating and humiliating, agency poverty is positively dehumanizing.

Agency poverty, thus understood, is not only bad in itself but also absolutely (because dehumanizingly) bad and irredeemably bad. The same is not true of either subsistence poverty or status poverty. Subsistence poverty is bad in itself, but it can be redeemed or made positive by an exercise of choice, as in asceticism. Every instance in which subsistence poverty appears to be absolutely bad is one in which agency poverty is also present. This can be the case either because subsistence poverty is given a social meaning that undermines agency and self-respect, or because the scarcity of resources is so severe that subsistence poverty is no longer compatible with freedom from agency poverty. Otherwise, subsistence poverty, even if not redeemed or made positive as in asceticism, need not be absolutely bad.

Likewise, status poverty, if bad in itself, need not be absolutely bad if it is not so serious as to cause agency poverty. Status poverty and agency poverty have in common that there is a shortfall in resources for participation in activities. But there the similarity ends. To begin with, status poverty is intrinsically relative, whereas agency poverty need not be: it does not make sense to say that all members of a society suffer from status poverty or are equal in status poverty, whereas it is possible for all members of a society to suffer from agency poverty, say as a result of extreme material scarcity. Moreover, where both status poverty and agency poverty

136. What I call agency poverty or agency deprivation is different from Sen's concept of 'capability deprivation' (Sen 2000: ch. 4). The main difference is that agency, as I use the term, is an internally differentiated concept that gives pride of place to subjectivity and self-constitution. It is not entirely clear whether capability as used by Sen involves both power and subjectivity or power alone; on the face of it at least, the emphasis seems to be on power. Even if capability is extensionally identical to agency as I use the term, and hence capability deprivation is extensionally identical to agency poverty, the intensional difference remains and this difference is important, not least with regard to the explanatory thrust of the two concepts.

involve lack of respect, agency poverty occurs only if the lack of respect is reflexive (this is why an ascetic is immune from agency poverty), whereas status poverty does not depend on such reflexivity. Thus, one can be in a position of status poverty without suffering from agency poverty, with the blocking of reflexivity, just as one can be in a position of agency poverty without suffering from status poverty, as in a situation of evenly distributed extreme material scarcity. It is therefore possible for a society to have agency poverty without status poverty. Whether the converse is also possible is a question I will pick up later.

Thus, it is true of both subsistence poverty and status poverty that what appears absolutely bad about it is actually the agency poverty that goes with it (when it does). In this sense agency poverty may be said to be the real sting of subsistence poverty and status poverty. It is therefore especially important to examine the relation in which subsistence poverty and status poverty stand to agency poverty.

5.6. AGENCY DESPITE SUBSISTENCE POVERTY: ALIGNMENT AND DE-ALIGNMENT

One of the lessons that can be drawn from the fight against poverty in Mao's China, as we saw earlier, is that even quite severe material scarcity, short of the magnitude of a disaster, need not prevent a society from developing a range of social activities that constitute the basis of agency and self-respect. It is worth pursuing this line of thinking at a higher level of abstraction, that is, in terms of the general question of what can and should be done to make agency available to all members of society when conditions of subsistence poverty prevail.

On the face of it, a society that lacks material resources for meeting the subsistence needs of its members may be expected also to lack material resources for satisfying their need for agency. Agency requires a level of resources that is sufficient for a degree of power that is in turn sufficient for the formation and continuation of one or another form of subjectivity. Freedom from agency poverty thus conceived seems a taller order than freedom from mere subsistence poverty. The Chinese experience we have considered, however, shows that the opposite can be the case.

Clearly, what a society can do about subsistence poverty depends on the level of material resources available to it. It is entirely possible that even when a society really does as much as it can subject to the resource constraint, the results may still be insufficient by any reasonable standard of human subsistence. Yet no society can reasonably be required to do more.

If freedom from subsistence poverty is rather rigidly subject to the resource constraint, freedom from agency poverty is not. While subsistence is amenable to relatively clear definition and reasonably objective measurement, participation, power, and subjectivity allow for a considerable degree of social flexibility and cross-societal variability. The important thing is that it is both possible and reasonable to think of the standard that defines agency poverty and informs efforts

to prevent or remove it as something that is internal to the society in question. The standard should be internal because of what it measures: not material resources as such, and not powers in themselves, but material resources as constituents of powers and powers in turn as necessary conditions of subjectivity.

Working with this internal notion of agency poverty, we can approach a society's understanding of itself as an organized collection of agents (no society can do without such an understanding, if only implicit), and, by clarifying and extrapolating from this self-understanding, arrive at a standard for the prevention or removal of agency poverty. Thus, the normal range of participation includes those activities that all normally functioning members of society are expected to be able to perform and that serve as the social bases of respect and self-respect. If people are expected to have a job or risk losing respect and self-respect, then having a job is within the normal range of participation. The same is true of being able to find a mate, to afford certain consumer goods, and so on, as long as the activities involved make up what it means to be a normally functioning member of society, whether or not these activities are considered worthwhile or necessary from an external point of view. Likewise, being able, and under normal circumstances being motivated, to participate in the political process is an integral part of agency in a society that conceives of itself as a democracy and of its members as equal citizens. The important thing is that we judge a society, in the first instance, by a standard that is implicit in its own self-understanding of what the society is or realistically aspires to be.[137]

Given this internal standard of agency and agency poverty, a society that suffers from a considerable degree of subsistence poverty despite its best efforts can still meet a sufficient standard of freedom from agency poverty. For the standard is determined in keeping with a society's own (implicit) understanding of agency and of the normal range of activities necessary for such agency, and thus it follows that the society can reasonably be presumed to have the ability to handle its regular level of material scarcity in such a way as to place every member within *its own* normal agency range.[138] Here, 'ought' is supported by 'can' according to a society's own self-understanding and self-assessment. If a society fails to bring its standard of normal agency within the reach of every member, therefore, it will not be for lack of resources, the resource constraint notwithstanding.

Instead, every instance of material deprivation that pulls a member of society's agency below the normal level implicit in the society's own self-understanding (and that is not attributable to lack of reasonable effort on the part of the member involved) must be explained in terms of the society's failure to attach sufficient priority to this most important of its moral responsibilities. Since this responsibility

137. How this self-understanding comes about is in turn something to be judged by an internal standard, in the first instance. I say 'in the first instance' in both cases in order to leave room for the possibility of legitimate criticism from an external point of view – for example, criticism in terms of adaptive preferences. How such criticism is exactly to be conceived is beyond my present concerns, however.

138. With due allowance for some types of exceptions, such as the severely handicapped, the satisfaction of whose needs for agency presents a different kind of challenge.

is internally generated, a society that fails to meet it exposes itself to the charge that it is not taking its own moral standards seriously. Behind this charge is an internal argument for – or internal critique in support of – the right to freedom from agency poverty, even under conditions of subsistence poverty.

What if a society's self-understanding is very *undemanding* when it comes to its conception of agency and hence of what it should do about agency poverty? If this is indeed the case, then of course this society does not have to do much by virtue of its own collective self-understanding. There is, however, a significant price to be paid. This is because no modern state can escape the need for legitimacy, and in order to secure legitimacy the state has to pitch its (often implicit) notion of agency and its corresponding responsibility toward its citizens at a reasonably high level. Think of this in terms of a choice: the choice between an *agency deficit* that is likely to occur if agency is pitched at a reasonably high level for purposes of legitimacy, and a *legitimacy deficit* the probability of which is increased in proportion as the standard of agency is lowered and the likelihood of agency deficit reduced. Not surprisingly, the choice tends to be made in favour of aiming for a relatively high standard of agency and tolerating the resulting risk of an agency deficit, if only because a government or political party that promises very little and is prepared to do very little, even in political rhetoric, lays itself open to competition and attack from those who will have an easy time showing that more can and should be done. To be sure, the existence of any serious agency deficit by a society's own standard has the potential to internally undermine claims to legitimacy based on that standard. After all, legitimacy requires not only promising a reasonably high level of agency, but also making good on that promise. Thus, pitching agency at a reasonably high level to satisfy the need for legitimacy is itself the source of a different kind of threat to legitimacy. But even this does not weaken the need to pitch agency at a reasonably high level in order to lay an initial claim to potential legitimacy.

It is the need to aim for a reasonably high standard of agency, along with the possibility of agency deficit that opens up as a result, that prevents a society's self-understanding of agency from being so undemanding as to leave little room for internal critique. The room for internal critique that is created in this way is not unlimited, but it can be quite large. The size and locus of this space vary from society to society, of course, and are always subject to contestation and revision. But I will hazard the following claim: a society can and should remove agency poverty according to a reasonably high standard that is (implicitly) part of its self-understanding as an organized collection of agents; any society that is not in this category must either be in a state of extreme scarcity, or else must be suffering from a serious (potential) legitimacy deficit, one whose threat to the political system and the government can only be met by brute force.[139]

139. The unconstrained use of the space for internal critique presupposes a democratic organization of political society with its attendant freedoms. Indeed, this presupposition can be regarded as an *internal* argument for democracy. One of the grave defects of a non-democratic society is that its members cannot freely and effectively hold their government and their society at large

I make this claim on the assumption, of course, that the standard of agency that serves as the point of reference here is a society's own. This claim is meant to hold even under the insistence that the standard be reasonably high. What makes the standard *reasonably* high is that it allows *as much as possible* to be done to promote agency and respect under conditions of subsistence poverty. It is necessary to elaborate on the idea of a reasonably high standard, and this brings me to the core of the internal argument for freedom from agency poverty despite subsistence poverty.

The most important feature of an internally generated standard is its flexibility, and what is most flexible about it is the relation between agency and material conditions. Agency poverty, as we have seen, consists in a particular relation between level of economic resources and level of agency rather than in any absolute level of economic resources itself. Given that agency poverty is relational, the task of doing something about it must be relational, too: a matter of finding the right relation between the two elements involved. Thus, a society's task to remove agency poverty is a matter not of lessening the resource constraint (this would be covered by the task of removing subsistence poverty) but of aligning its understanding of agency with its resource constraint, such as it is, in such a way that it is possible for every member to have enough resources for purposes of agency and respect by the society's own standard.

The flexibility of this task gives rise to a special power and responsibility with respect to the prevention or removal of agency poverty. It follows that, barring conditions of extreme scarcity, if a society's resource constraint is such as not to allow each and every member access to sufficient resources for agency and respect, then, given its power and responsibility, the society is itself to blame for sticking to a norm of agency that is out of keeping with its material conditions. Accordingly, the moral burden is on the society either to modify its norm of agency, with its range of self-constituting activities, or to improve its material conditions so that these two elements can be properly aligned. A society must stand accused of fundamental injustice if it does not reform itself to bring about an alignment of agency and material conditions that gives each and every one of its members the wherewithal to participate in self-constituting activities and live the life of an agent worthy of respect and self-respect by the society's own standard.

It is worth emphasizing that a society's modification of its norm of agency in line with its unfavourable material conditions does not imply a lowering of the norm of agency. What is higher or lower is the level of material resources required for normal agency, not the level of agency itself. For example, in a very poor

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to account for agency deficits in general and agency poverty in particular. The space for internal critique of agency poverty can easily be neutralized in a society that lacks the necessary political conditions. A similar argument for democracy can be derived from Pogge's institutional (as opposed to interactional) understanding of human rights, in that members of a non-democratic society cannot be held responsible, with any reasonable degree of stringency, for harm arising from an unjust institutional order and for not taking strong action to reform that order. For the distinction between an institutional and an interactional understanding of human rights, see Pogge (2002: 64–67).

society it would not be a good idea to require a normal agent, say in the process of acquiring and maintaining a job, to display a degree of cleanliness that only easy access to a washing machine and a shower facility makes possible. Depending on the exact material conditions, it could also be misguided to include among the necessary means of normal agency the possession of a television set, a telephone, and so on, not to mention a comfortable apartment, a car, or enough savings for a vacation away from home. As a matter of fact, all of these things, with the possible exception of a car, are more or less necessary conditions for normal agency and respectability in China today, while none of them was in Mao's China. As these examples show, when a poor society aligns its standard of normal agency with its unfavourable material circumstances, it is not thereby adopting a lower standard of agency. What it is doing instead is simply making sure that the standard of normal agency is not pegged to things that only some members of society would be able to afford. Of course, the level of material resources required for normal agency is lower, but this need not mean that the standard of agency itself is lower, except on the (unsupported) assumption that there is a straightforwardly positive correlation between level of material resources and level of agency. My idea of alignment of agency and resources thus boils down to this: a society's standard of normal agency should be so conceived that it does not require the production and consumption of things of which there could not be enough for everyone, given the resource constraint.

This is not to suggest, of course, that discharging the duty of alignment will be easy, but it makes a world of difference that the difficulty does not issue in any inflexible way from the resource constraint. Bear in mind that we understand material scarcity here in terms of its effects on agency and understand agency in turn in an internal fashion, such that material scarcity is strictly relative to the self-constituting activities that happen to make up agency in the society in question. Given this understanding, relative material abundance is neither a necessary nor a sufficient condition for fulfilling the alignment requirement.

That relative material abundance is not a necessary condition for fulfilling the duty of alignment makes it possible for a relatively materially poor society to be free from agency poverty. Thus, a society that is regarded as materially poor by some external standard can do very well, by its own standard and to its credit, if it secures for each of its members sufficient resources for purposes of agency and respect. In such a society (think of the examples I have given about Mao's China), material possessions are unlikely to figure as one of the defining bases of participation and recognition; or, to the extent that they do, they are likely to be more or less equally distributed. In either case, resources that look meagre from an external point of view but suffice for internal purposes of participation in normal self-constituting activities do not, from an internal point of view, lead to agency poverty.

By the same token – and this shows that relative material abundance is not a sufficient condition for carrying out the duty of alignment – a society that is materially rich by some external standard can do a bad job of preventing or removing agency poverty, by its own standards, if it attaches great importance to

individual wealth as a means of social participation, systematically linking wealth to recognition, and at the same time permits a sharp inequality in wealth, with many people falling below the level that is socially deemed necessary to support a normal level of agency and respect. What is important is not material abundance as such, nor even a relatively equal share in material abundance, but rather the alignment of a society's standard of agency and the material resources at its disposal, an alignment that should allow everyone to live a life compatible with respect and self-respect.

The duty of alignment is itself a requirement of an internal kind that calls for the provision of sufficient resources for every member of society for purposes of agency and respect as conceived by the society itself, subject to its own resource constraint. As such, the duty is flexible, and the only fixed point of reference is the avoidance of agency poverty given the prevailing level of subsistence poverty. There is one particular form, however, that the alignment may sometimes have to take in the case of extreme or nearly extreme subsistence poverty. When subsistence poverty reaches a critical level, the struggle against it can turn into a desperate fight for survival. In such a fight, the human need for agency and respect, though still at stake, is pushed into the background, so desperately absorbing is the struggle to maintain life itself. It is understandable if, for those who happen to be in such dire straits and for those others who identify with them in their fight against poverty, the *only* stake in poverty appears to be subsistence and survival.

In the event that a society finds itself in this kind of crisis, it may well be that the only proper alignment of agency and material resources is complete dealignment, that is, the severing of any links that happen to exist between socially valued forms of agency on the one hand and levels of income on the other, so that agency can no longer be undermined by low levels of income. Once such links are severed through a revolution in the society's conception of agency, the twofold threat that extreme subsistence poverty poses in the case of the worst-off – to their agency and their sheer life – becomes simplified into a single threat to sheer life. This is no mean outcome, halving the effects of poverty, as it were, by positively removing the insult and leaving only the injury. In this way agency and respect are preserved because they are no longer tied to income and material possession – and this for the simple yet all-important reason that under the circumstances in question such links would be incompatible with giving every member of society enough resources to live a life of normal agency, and perhaps even with the preservation of every member of society.

Two important implications flow from the uncoupling of agency from income. First, given that agency and respect are no longer tied to material possessions, all values and institutions that rest upon this connection (not least private property rights), along with the inequalities they justify, cease to have any basis. Second, given that the only thing that remains at stake in the access to resources is subsistence, all values and institutions that serve to regulate the distribution of resources for purposes beyond subsistence (private property rights again being a pre-eminent example) must be adjusted or abandoned in favour of the most effective preservation of human life. These implications will hold until

the crisis of extreme subsistence poverty is sufficiently reduced that an alignment of agency and resources can be brought to bear on it without having to cut the connection between agency and resources altogether.

5.7. AGENCY DESPITE SUBSISTENCE POVERTY: THE CASE OF CHINA

To my earlier discussion of subsistence poverty and status poverty in China, it is worth adding a brief account of agency poverty. When Mao's China is said to have an impressive record of fighting poverty, it is usually subsistence poverty that is under consideration. What I believe is more distinctive of that record, however, has to do with the prevention or removal of agency poverty. This was accomplished by cutting the link between income and all socially valued forms of agency, including self-respect as their epiphenomenon. Not only was individual wealth not treated as a necessary condition of any socially valued forms of agency, it was perceived as a source of bourgeois vices and, as such, an obstacle to the realization of the forms of agency envisioned by socialism. As part of this realignment of values, individual subsistence poverty came to be socially regarded both as a marker of membership in politically sound classes and as a source of proletarian virtues. What remained undesirable about poverty – the miseries of hunger and cold and so on – had to do with the material dimension of human life alone. Poverty was a matter of subsistence rather than participation, agency, and respect.

In this way, the daunting problems of material scarcity that the Communist Party inherited were reconceived through the simplification of poverty into a problem of sheer subsistence on the one hand and through the revaluation of subsistence poverty on the other. This radical reconceptualization of poverty laid the foundation for instituting a scheme of largely equal distribution of material resources,[140] although this scheme was somewhat compromised by the haphazard application of the so-called socialist principle of reward based on contribution, and was severely compromised by the city/countryside divide and the relegation of the entire rural population to effectively second-class status with respect to a range of rights and entitlements.[141] These compromises notwithstanding, the reconceptualization of poverty and the largely equal distribution of resources informed by it added up to a momentous, and foundational, success in the fight

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140. This equality did not amount, however, to the disappearance or even reduction of the hierarchical nature of Chinese society. What happened was not the removal of hierarchy as such but the removal of wealth as a basis of hierarchy and hence the removal of status poverty. It is arguable that the replacement of one basis of hierarchy (wealth) with another (political performance) was a rather limited achievement, if at all, in its own right. Nevertheless, there seems little doubt that this replacement helped prevent the already serious subsistence poverty present in China at the time from being compounded by agency and status poverty, a scenario which would have been morally less acceptable.
141. For an analysis of the city/countryside divide in terms of political economy, see Knight et al. (2004).

against material scarcity. A rather different, and narrower, kind of success came only later, this time in the already simplified struggle against subsistence poverty, a success that took the form of increased agricultural outputs and so on.[142]

There is little doubt that the fight against subsistence poverty has been taken much further since Mao's time.[143] But then precisely because material conditions have improved it has become harder to conceive poverty as essentially a problem of subsistence. One of the most profound changes that have taken place in post-Mao China is the gradual but unmistakable re-coupling of agency and wealth as a means of social participation. Divested of all positive value in Mao's time, individual wealth has made a resounding comeback as a basis of agency and status since then – so much so that, as one (by no means unrepresentative) rural slogan has it, it is glorious to become rich and cowardly to remain poor.[144] In this new ethos, an extremely large number of people whose condition of subsistence has improved compared with their own condition or their counterparts' in Mao's time find themselves having to cope with a problem that did not exist then – the problem of agency poverty. It should come as no surprise that agency poverty in the absence of acute subsistence poverty can feel a lot worse than a considerably higher degree of subsistence poverty that is not compounded by agency poverty. In this sense it may even be said that poverty is a worse problem in China today than in Mao's time – an assessment that is pointedly expressed in a popular saying that has the worse-off (not the absolutely worst-off) of today cursing even as they have at long last become able to afford a diet rich in meat (a luxury item in Mao's time).

What is responsible for this state of affairs is, of course, not that material conditions have improved, nor even that wealth is more unevenly distributed, but rather that more is now at stake in wealth. The growing inequality, with its devastating effects on the poor, is but a byproduct of the increased stakes in the competition for wealth as a means of social participation. The still influential Confucian idea that what is to be feared is not scarcity but unequal distribution can be interpreted in this light. Not that extreme scarcity is not a bad thing,

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142. The record of combating poverty in Mao's China is far from one of unmitigated success. After all, a disaster in a class of its own happened in the domain of sheer subsistence as a result of the huge political mistake known as the Great Leap Forward. That this mistake was clearly avoidable both makes those responsible for it (especially Mao) less forgivable and preserves the otherwise positive lessons of the Chinese experience as a whole.

143. The extent of subsistence poverty that remains or has emerged since must not be underestimated, however. Perhaps the most threatening element of subsistence poverty in China today is the unaffordability of medical treatment (especially for relatively serious conditions) for extremely large numbers of people, who regularly have to choose between food and medical care. This situation is made worse by the increasing costs of education, which can lead to agency poverty and status poverty directly and to subsistence poverty both directly and indirectly. All too often, the poor in China today have to strike an impossible, and degrading, balance among the needs for food, for health, and for (their children's) education. Something is being done about this, but it is obviously too little, if not too late. For an empirical account of increasing inequalities in health care and education, see Xiaobo (2002: 209-28).

144. See Jinqing 2000: 263. The idea contained in this slogan is endorsed by Shuguang (2002: 635-59; see esp. 650). Zhang's position is quite in keeping with the general spirit of the Reform era.

but next to sheer survival the most fundamental threat to a human being is an inadequate level of recognition as a human being, on the (often true) assumption that there is a significant link between wealth and recognition. Thus interpreted, the saying contains a kernel of wisdom in treating misrecognition as a great evil and envisioning equal distribution as a default solution for want of any better and more reliable alternative. After all, who has come up with a better and more reliable alternative for maintaining equal respect under conditions of subsistence poverty?

5.8. AGENCY DESPITE STATUS POVERTY

I now turn to the relation in which status poverty stands to agency poverty. Status poverty is obviously problematic, as we have seen, when conjoined with subsistence poverty, assimilating the latter to itself and adding insult to injury. Status poverty is also obviously problematic, as I have observed, if it causes agency poverty. The question that remains to be addressed is whether in a society free of subsistence poverty it is possible for status poverty to be compatible with freedom from agency poverty. Since status poverty clearly can translate into agency poverty, a situation in which it is difficult or impossible for those who have the lowest economic/social status to achieve a normal level of agency, the question can be formulated more precisely as asking whether, and in what ways, such translation can be prevented.

Now, whether status poverty causes agency poverty (even in the absence of subsistence poverty) is a matter of the relation in which those who suffer from status poverty stand to the normal level of agency of the society in question. To be sure, status poverty in itself has nothing positive about it. It is not simply a function of comparative lack of material resources, but is a relational condition of a worse kind, one in which those who occupy the lowest economic position stand in a relation of *social* inferiority to *all* other members of society. To the extent that status poverty implies comparison, the poor are worse off than not just some but all other members of their society. It is this *absolute* status of being at the *bottom* that can make the poor stand apart from the rest of society, where most people are worse off than only some people. Despite the unattractiveness of status poverty as such, its normative (and psychological) acceptability depends on whether status poverty leads to agency poverty. It is one thing if some members of society are in a condition of status poverty and yet all of them have enough resources to attain the normal level of agency. It is something altogether different if these members of society fall below that level as a result of status poverty.

How can the first situation (as a minimum) be achieved and the second avoided? In a manner of speaking, the trick is to bring it about that the so-called middle class absorbs all members of society below it into its ranks, since it is safe to assume that members of the middle class already attain the normal level of agency. One consequence of this levelling-up is, of course, that the middle class will cease to occupy the middle position (and so cease to be the middle class, literally speaking), for there are no longer members of society below it, nor indeed

any category of such members of society. In thus becoming part of the bottom of society, as it were, members of the hitherto middle class will find themselves in a new situation of status poverty. Since this happens as a result of the formerly worst-off rising to the level of the middle class instead of the latter sinking to theirs, however, neither the old nor the new members of the now defunct middle class need suffer from agency poverty, although both will be in a condition of status poverty.

Thus, the reason for which it is conventionally considered desirable to have a sizable middle class should be just as compelling a reason for having no members of society live below the level of what would otherwise be the middle class. The underlying rationale is that what is essential about the middle class is not so much their being situated in the middle in terms of economic/social position as their meeting their society's standard of normal agency – at least the lower end of that standard, as it were. If this rationale is at all plausible, we may hypothesize that what keeps the middle class reasonably happy despite their economic/social inferiority to those in the upper reaches of their society will remain true, even in the event that all those who have hitherto made up the bottom of society rise to their level so that the middle class retain their level of agency but cease to occupy a middle position. What is crucial, on this hypothesis, is not how many people occupy the so-called bottom of society, but whether those who do have to suffer from agency poverty on top of status poverty.

This hypothesis, no doubt rather optimistic, supports the hope that agency poverty can be avoided without removing status poverty altogether – on the assumption that the removal of status poverty is a much more difficult and normatively contentious task. The biggest obstacle to the realization of this hope is what appears to be an ineradicable feature of human society: hierarchy caused by human beings' desire to feel superior to (at least some) others in order to feel good about themselves. It is not impossible that such a desire informs the self-understanding of the middle class to some degree, and if so, one defining feature of members of this class is their *middle* position – their superiority to the underclass called the poor.[145] In other words, the middle class, on this understanding, defines itself in relation to the class that is socially and economically situated below it (as well as, of course, in relation to the class above it), and not on the basis of some standard that could in principle be simultaneously reached by all members of society. Implicit here is an acknowledgment that at least to some extent social hierarchy and the desire for superiority are unavoidable.[146] If this is true, and it seems naïve to rule out that possibility, then the challenge is to eradicate agency poverty not only despite status poverty but also despite the troubling desire for superiority that may underpin it.

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145. Williams (1961: 320) says of the modern British class system that 'this fundamental class system, with the force of the rising middle class right behind it, requires a "lower" class if it is to retain any social meaning'.
146. As Walzer (1983: 274) puts it, 'men and women value themselves – just as they are valued – in comparison with others'.

Perhaps the most promising response to this challenge consists in the bifurcation, especially characteristic of modern, liberal-democratic societies, of recognition into respect and esteem.[147] Corresponding to this bifurcation is the division of human activity into two broad domains (call them 'domains of agency'), the public domain of citizenship and the private domain of work, family life, and consumption. What this division makes possible is a certain equality of respect in the first domain, while a certain inequality of esteem is permitted in the second domain subject to considerations of fairness and efficiency. In other words, instead of being a single measure of either equality or inequality, recognition is split into two, whereby respect becomes a function of citizenship and is distributed equally, and esteem becomes a function of personal qualities and accomplishments and is distributed according to merit and, in practice, unequally (see Honneth 2003: 140-41). Thus, even those who fare worst in the second domain and as a result have the lowest esteem can still enjoy equal citizenship with others, inasmuch as 'democratic citizenship is a status radically disconnected from every kind of hierarchy', as reflected in 'a kind of self-respect that isn't dependent on any particular social position' (Walzer 1983: 277). With this bifurcation, what we have been calling 'status poverty' is something that is confined entirely to the second domain.

Is this bifurcation sufficient to raise every member of a society to a normal level of agency and thereby eliminate agency poverty, despite the continuing presence of status poverty (in the second domain)? It all depends on whether the first domain is sufficiently important and the second sufficiently unimportant that equality in the first can outweigh inequality in the second.

It is generally assumed in liberal political philosophy that the first domain of agency is more fundamental than the second. It can be granted, even before examining this assumption, that the bifurcation of recognition into equal respect and unequal esteem is already a great improvement over an unequal distribution of an undivided good of recognition. It can also be granted that the bifurcation is real to a significant degree rather than merely ideological. Still, a great deal of its force rests on the assumption that the first domain of agency matters more fundamentally than the second. For the achievement of equal respect is consequential only to the extent that the domain in which it happens is important.

It is here that the significance of this achievement can be exaggerated. It is not a coincidence that the bifurcation of recognition into equal respect and unequal esteem has been accompanied by a shift in importance, noted by Constant, from the 'freedoms of the ancients' to the 'freedoms of the moderns'.[148] Put in the terms we are using, Constant is in effect saying that the second domain of agency is more fundamental than the first for members of modern societies. This is because it is in the second domain that members of modern societies can find the most extensive scope for self-constituting activities, activities that are required for the normal

147. For the distinction between respect and esteem, see Walzer (1983: ch. 11).
148. See Constant (1988), in particular the essay entitled 'The Liberty of the Ancients Compared with that of the Moderns', pp. 309–28.

level of agency. If Constant is largely right about this, and I think he clearly is, then it must be admitted that the achievement of equality, however indispensable, has occurred in a domain that cannot be said to be more fundamental than the domain in which inequality remains.

Thus, the bifurcation of recognition into respect and esteem and the establishment of equal respect are not enough to ensure that every member of society meets the normal level of agency. A large part of being a normal agent in any modern society involves enjoying a minimal degree of esteem based on self-constituting activities in the private domain, together with the equality of respect guaranteed in the public domain. What this minimal degree of esteem actually consists in is not something about which much can be said, since it is relative to what happens to be the normal level of agency operative in the society in question, and this level is in turn a matter internal to that society. Nevertheless, it is possible to indicate in a general way what it takes to make this minimal degree of esteem available, whatever a society's normal level of agency.

It is important for ensuring a minimal degree of esteem that the distribution of esteem proceeds in a way that is regarded as fair. One particularly influential construal of this condition is in terms of some notion of equality of opportunity such that those who receive less esteem are not unfairly disadvantaged in the competition for more. What counts as fairness in the distribution of esteem is open to contestation, but one thing is clear: no matter what conception of fairness is adopted, the distribution of esteem, unlike that of respect, is an inherently competitive and differentiating practice, one that ranks people higher and lower according to some standard of merit or achievement. Even if this practice is based on the least objectionable conception of merit or achievement that can be agreed upon, some will still rank lower than others and some will rank the lowest of all. The best thing about such a distribution is that those who fare less well or least well have little to complain about in the system itself. But this is also the worst feature of the distribution, in that the only thing they can fairly complain about is some aspect of themselves, depending on what it is to which they attribute their lower or lowest level of achievement and hence esteem. In this way, resentment against society may be blocked, but only at the expense of self-esteem: the already low self-esteem that results from low achievement and low esteem is compounded by the attribution of low achievement and low esteem to some fault of one's own. Indeed, the fairer one takes the system to be, the more one is forced to blame oneself and hence the greater one's loss of self-esteem. In status poverty, what hurts is not only the relative lack of material resources but, far more importantly, the meaning of such lack as *deserved* lack of esteem and self-esteem. Even at its fairest in its own terms, the inherently unequal distribution of esteem is capable of producing what have been aptly called the 'hidden injuries of class'.[149]

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149. See Sennett and Cobb (1973: 256), who point out that 'a system of unequal classes is actually reinforced by the ideas of equality and charity formulated in the past. The idea of potential equality of power has been given a form peculiarly fitted to a competitive society where *in*equality of power is the rule and expectation. If all men start on some basis of equal potential

Given that the distribution of esteem has no internal mechanism for preventing too low a level of esteem by the normal standard of agency, any solution to this problem will have to be introduced from the outside. One possible such solution is to make esteem and self-esteem carry significantly less weight in the constitution of normal agents than they do now. This is to overturn, or at least radically modify, the shift in centrality from the freedoms of the ancients to the freedoms of the moderns that Constant identified as a principal feature of modern societies. Although such a prospect is not in the offing and might not be straightforwardly welcome, another possibility is to enlarge the range of esteem-supporting rights and entitlements that are treated as part and parcel of equal citizenship (see Honneth 2003: 149, 188).

As long as the freedoms of the moderns retain their central importance and esteem continues to play a central role in the constitution of normal agents, however, there is a limit to how much this approach can achieve. Quite clearly, beyond a certain level wealth has meaning for human beings only as agents. This level is easily reachable for every member of any relatively affluent society, provided that wealth is not distributed too unevenly. The question is why, beyond this level, anyone would still have a strong preference for a higher to a lower income and join the race for wealth. The only plausible answer I can think of is that in any society of which this is true, wealth has *not* been relegated to a domain of secondary importance. It is only to the extent that the bifurcation of recognition fails to make equal citizenship (as an expression of equal respect) the pre-eminent basis of a normal level of agency that wealth (as a marker of unequal esteem) can matter enough to motivate a keen competition for it on a society-wide scale. In such a society, the principal – if not sole – stake in the competition for money, beyond the modest level of resources needed for subsistence, is the esteem that is accorded to certain forms of agency for which income serves as a proxy.[150] This fact in turn gives distributive justice its precise meaning in those modern societies that are more or less free from subsistence poverty: what distributive justice regulates in such societies is, at bottom, the distribution of things that form the social basis of (unequal) esteem, which in turn contributes significantly to the constitution of (unequal) agency.

Thus, neither of the two options considered so far can do the trick: it does not seem possible to devise a system for the fair distribution of esteem that can by itself prevent an excessively low level of esteem for some members of society; nor is it possible to reduce the importance of esteem for the constitution of normal agents to a sufficient degree to counteract the inequality of esteem. So

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ability, then the inequalities they experience in their lives are *not* arbitrary, they are the logical consequence of different personal drives to use those powers – in other words, social differences can now appear as questions of character, of moral resolve, will, and competence'. See also Honneth's (2003: 148) discussion of the achievement principle.

150. Gorz (1980: 31) is right on the mark when he says that 'differences in consumption are often no more than the *means* through which the hierarchical nature of society is expressed'. This is true of differences in income in general, and the hierarchy in question is ultimately that of esteem as a social basis of self-constitution.

a third option, simple and traditional-looking as it is, has an indispensable role to play. That is to find a way of ensuring, in addition to equality of respect, that the distribution of esteem – that is, the distribution of things that form the social basis of esteem – is sufficiently equal so that no one has less than is required for becoming or continuing to be a normal agent, and hence no one will suffer from agency poverty as a result of status poverty. The equality that ultimately matters is neither of respect alone (not a sufficient condition) nor of esteem alone (not a necessary condition), but something comprehensive.[151] If it is not advisable to cut the link between wealth and agency altogether in an affluent society, it is clearly necessary to weaken this link through a *relatively* equal distribution of wealth – on the assumption that wealth matters for agency and recognition and therefore is worth equalizing. Otherwise, in a society in which wealth is neither largely uncoupled from agency nor relatively equally distributed, there is scant guarantee that status poverty will not turn into agency poverty despite affluence and the bifurcation of recognition.

5.9. CONCLUSION

Ultimately, the worst evil of poverty is its detrimental effect on agency, the most essential feature of human beings as human beings. In the absence of agency poverty, status poverty need not be a cause for moral alarm, even though some of us prefer a society which recognizes 'a diversity, rather than a hierarchy of talents' (Sennett and Cobb 1973: 261; see also Gorz 1980: 34, 41). And in the absence of agency poverty (and of status poverty as a potential cause of agency poverty), subsistence poverty is a lesser and, just as important, a more easily resolvable evil. Much of the poverty in the world today that may pass for simple material scarcity is in fact the worst possible combination – of subsistence poverty, status poverty, and agency poverty. True, the subsistence poverty that figures in this combination is sometimes of such severity and magnitude that in comparison status poverty and even agency poverty pale temporarily into insignificance. Many of the world's poor are so devastated and numbed by the sheer injury of subsistence poverty that they can hardly recognize the insult of status and agency poverty. That this is all too often the case, and that relieving the plight of these people commands the highest moral priority, does not reduce the gravity of the insult, but only shows how desperately poor many of our fellow human beings are, and how far there is to go before the injury of subsistence poverty is sufficiently ameliorated to reveal the hidden insult of agency poverty.

151. Miller's (1995) idea of a fundamental equality of status, developed as an interpretation of Walzer's notion of complex equality, is suggestive as an attempt to bring about this comprehensive equality. Miller's main argument, a reformulation of Walzer's, is that equal citizenship complemented by distributive pluralism can yield equality of status. Whether this argument will work depends, in my view, on the effectiveness of distributive pluralism in bringing every member of a society to its normal level of agency and recognition, not in preventing systematic outranking as such.

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6

Why Should People *Not* be Poor?

Neera Chandhoke[152]

> The important question of how poverty is to be abolished is one of the most disturbing problems which agitate modern society.
> (Hegel 1820: para 244)

6.1. BUILDING A MORAL CONSENSUS ON FREEDOM FROM POVERTY

Hegel, in his magnificently crafted *Philosophy of Right*, had written, with some despair, of the moral squalor and of the ravages that poverty brings in its wake. He argued that the state of poverty is not an aberration; it is a product of industrial society; of the overproduction and under-consumption that marks this particular social order. But it is precisely this social order that banishes its victims to the twilight zone of poverty. Here, removed from the advantages of solidarity that civil society has to offer, the poor are reduced to a heap of fragmented atoms, rabble, *poebel*.

> When the standard of living of a large mass of people falls below a certain subsistence level … and when there is a consequent loss of the sense of right and wrong, of honesty and the self-respect which makes man insist on maintaining himself by his own work and effort, the result is the creation of a rabble of paupers … . Poverty in itself does not make men into a rabble; a rabble is created only when there is joined to poverty a disposition of mind, an inner indignation against the rich, against society, against the government, etc. A further consequence of this attitude is that through their dependence on chance men become frivolous and idle… . In this way there is born in the rabble the evil of lacking self-respect enough to secure subsistence by its own labour and yet at the same time of claiming to receive subsistence as its right. Against nature man can claim no right, but once society is established,

152. I am grateful to Thomas Pogge and Michael Ravvin for their insightful and incisive comments on a previous version of this chapter.

> poverty immediately takes the form of a wrong done to one class by another. (Hegel 1820: para 244)

Hegel's analysis of the causes and consequences of poverty might, perchance, help us to negotiate the question posed in this paper: why should people *not* be poor? First, it is clear that society is complicit in the creation and recreation of poverty. Secondly, poverty breeds unfortunate consequences such as suffering, which demoralizes human beings. Thirdly, the existence of a large number of poor poses a direct threat to the social and political order, simply because the poor are (justly) resentful of their exclusion from the benefits of civil society. Each of these three insights can arguably form the axis of separate and distinct arguments on the reasons for, as well as on the detrimental effects of, poverty.

Take, for instance, Hegel's argument that poverty is the outcome of one of the primary components of civil society: the system of needs. Logically, if the economic ordering of society is responsible for poverty, and for the ill-being that accompanies poverty, then society is obliged to remedy the wrongs that it has visited upon the heads of the poor. This constitutes a basic code of justice. If I, while driving on the highway, suddenly halt my car and cause an accident, I am solely to blame, and have to compensate the driver whose car has been damaged. But if another driver bangs into my car, which is stationary at a red light, the said driver is at fault, and for that reason obliged to compensate me. Yet even though Hegel scripts some of the most fervent pieces of prose on the social origins and moral offensiveness of poverty, the poor simply do not form part of his project to organize civil society on ethical principles and to create, thereby, a perfect universal state. The poor were of concern to the philosopher, but they remained outside the pale of his own ethical project. As far as Hegel was concerned, the poor were non-members of civil society.[153]

We have come a long way since Hegel authored his influential *Philosophy of Right* in 1820. From the last decades of the nineteenth century, right into the first decade of the twenty-first, the victims of history began to speak back to histories of marginalization, to histories of oppression, and to histories of exploitation. Political movements of the working classes, of the peasantry, of women who were denied political rights and the right to property, of the colonized, and of religious, linguistic, and racial minorities, have challenged poverty and ill-being as a violation of what is due to human beings: equality, freedom, justice, democracy, and citizenship rights. As this upsurge imprinted collective consciousness, it impacted both political practices and normative political theory. Today political

153. It was Marx who, in the course of a few decades after the *Philosophy of Right* was published, brought in the poor from the metaphorical cold. In his 1842 writings on wood thefts, Marx romanticized the poor as the elemental class of civil society. Since the poor did not possess property, they were liberated from the false conceptions and the artificiality of the propertied classes. It was later that Marx replaced the category of the poor with that of the working class. The working class was the victim of deep injustice, yet it was this working class that would challenge deprivation. The elemental class of civil society was the proletariat (Chandhoke 1995: ch. 4).

philosophers realize that bare concern about the roots and the costs of poverty is simply not enough. For poverty, which traps human beings in a never-ending spiral of want and deprivation, diminishes and humiliates people. We realize that the existence and the reproduction of poverty contravenes our basic moral conviction that every person should live a life that we recognize as uniquely human. This commits us to the proposition that every person has the right *not* to be poor, because to be poor is to be forced to beg for those very preconditions of existence (basic rights), to which every human being has a right by virtue of his or her humanity. In sum, we believe that the social collective owes certain things to human beings, and among these things is the right not to be poor.

Arguably, our obligations to persons supervene upon the fact that they have rights. Certainly sentiments that are independent of a rights-laden tongue, such as care, benevolence, charity, sympathy, pity, and love, are good things in themselves. Any society that is not marked by the presence of these sentiments would be sadly impoverished. But unless we recognize that obligations *supervene* upon rights, the recipient of these obligations is rendered dependent on our 'construction' of care or benevolence. We might feel, for instance, that whereas P deserves our sympathy, and therefore we have a moral obligation to him/her, Q does not evoke quite the same sensibility and, therefore, we owe him/her nothing. Or that Q's status, or rather his/her lack of status, is neither here nor there as far as we are concerned. Bearers of rights, on the other hand, possess irreducible standing as persons who matter, or at least who should matter, equally. That is, obligations are not attached to either P or Q as persons with specific traits, but to P *and* to Q because both P and Q belong to a category that we term human.

The contemporary political moment is particularly felicitous for conceptualizing and legislating a right *not* to be poor, or the right to be free from poverty. The World Bank has propelled the issue of poverty reduction to the centre stage of the political agenda, and it is difficult to fault the World Bank's stress on heeding the 'voices of the poor', or its adoption of the Comprehensive Development Framework, which has elbowed out the Washington Consensus of yore. The UN General Assembly in the year 2000 adopted the Millennium Declaration, which seeks to create a generic moral obligation to reduce poverty, and which aims to halve extreme poverty by the year 2015.[154] Yet the political agenda seems somewhat incomplete, somewhat lacking, as if it merely skims the surface of the issue. The right not to be poor is, however, decidedly an important one. Therefore, reflective scholars committed to removing disabilities that cramp human beings need to substantiate the agenda, in order to rescue the right from ending up as just another exercise in populist/electoral rhetoric, or as the theme of pious declarations, which might well be destined to remain unfulfilled.

The shortfall of the current focus on freeing people from poverty is simply this: the agenda lacks awareness of, and sensitivity to, the social and political

154. UN General Assembly, 2000, United Nations Millennium Declaration, UN Doc A/RES/55/2 at http://www.un.org/summit20052005/documents.html, Section III, Clause 11, Clause 19. [Accessed on 15 October 2006.]

context within which persons are poor, or within which they have the right *not* to be poor. But the right not to be poor, like other rights, can hardly be conceptualized in abstraction, or in isolation from wider social relations in a given society, because poverty happens to be a relational phenomenon. It is not only that in a given society some persons are poor beyond belief, and others are rich beyond belief; poverty is both comparative and relative. For instance, the magnitude of poverty can be understood, measured and evaluated only in comparative terms, in relation to 'non-poverty'[155] or the levels of wealth in a given society, and between societies. P is poor, we can say, when he/she does not possess access to those basic resources that enable Q, or S, or M to consume nutritious food, avoid ill health, attend school, take up a job, and own a home, let alone go on holiday or own a car. But this means that P is not just poor, he/she is *unequal* to Q, S, or M, since the latter three, unlike P, have access to certain advantages that P does not. In short, poverty is the effect of inequality as well as the prime signifier of inequality.

These inequalities are reinforced and compounded because poverty breeds multiple deprivations. The poor are not only denied access to basic material requirements that enable them to live a decent life, they are likely to be socially marginalized, politically insignificant in terms of the politics of voice, humiliated, dismissed, and subjected to intense disrespect in and through the practices of everyday life.[156] To be poor is to be denied the opportunity to participate in social, economic, and cultural transactions from a plane of equality. To put the point across starkly, the presence of large numbers of poor reflects sharply and pejoratively on the kind of social relations we find in a given society: because these social relations are indisputably unequal, they cannot but be entrenched in massive discrimination and exploitation. Can we reflect on the right not to be poor without *taking on* these background inequalities in society? And unless we confront these background inequalities directly, will not poverty continue to be produced and reproduced along with the production and reproduction of an unequal social order, indeed as an integral part of this social order?

Moreover, is it enough to enact a right not to be poor and leave it at that? Is that all we owe the victims of poverty? Should we not be working towards the creation of a moral and political consensus in society that poverty is undesirable, precisely because it massively and fundamentally violates the basic presumption of equality? Should we not, as partners in this shared project, concentrate on thinking through what a just society based on equality should look like? It might be far better for our task, let me suggest, to situate and to ground the right not to be poor in a moral consensus that persons have to be treated in 'this' way not 'that', for at least three reasons.

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155. Society can be conceptualized in national or in global terms. This argument focuses on national society, though a powerful case can be made for viewing poverty in global terms as Pogge (2002) has done.
156. I will argue below that poverty is not the only cause of multiple deprivations. In many societies women, the lower castes, and ethnic minorities lack a voice even if they are not poor, but poverty is certainly one of the main causes of deprivation, because it is trans-caste, trans-gender, and trans-ethnicity.

First, the notion of a right does not stand alone; a right is always a right to some good, which we have reason to value. Let me suggest that the specific right not to be poor can be best articulated as an integral part of the generic right to equality.[157] Equality as a palpably moral norm codifies a powerful presumption: the equal moral worth of persons. Persons are equal because each human being has certain capacities in common with other human beings, for instance the capacity to make their own histories in concert with other similarly endowed human beings.[158] Of course the histories that persons make might not be the histories they choose, but this is not the issue at hand. What is important is that each person possesses this ability.

The principle of equal moral worth/standing generates at least two robust principles of political morality. For one, equality is a relation that obtains between persons in respect of some fundamental characteristic that they share in common. Equality is, morally speaking, a default principle. Therefore, and this is the second postulate, persons should not be discriminated against on grounds such as race, caste, gender, ethnicity, disability, or class. These features of the human condition are morally irrelevant.

These two postulates of political morality yield the following implications. To treat persons equally because they possess equal moral worth is to treat them with respect. The Kantian idea that one should treat persons with respect, not only because some of these persons possess some special skill or talent, for example skilled cricketers, gifted musicians, or literary giants, but because persons are human beings, is by now part of common sense morality.[159] If someone were to ask 'equality *for* what', we can answer that equality assures equal standing and respect, and respect is an essential prerequisite for the inculcation of self-respect, and for the making of confident and positive human beings. Further, though equality should be a constitutive feature of various social, economic, political, and cultural transactions, political equality is non-negotiable. For instance, political rights

157. We can be committed to equality for a number of different reasons, and the concept of equality comes to us in many avatars such as equality of opportunity and equality before the law. However, formal notions of equality can be faulted because these are insensitive to background inequalities. Therefore, a more persuasive notion of equality is egalitarianism, which argues that people ought to be treated as if they possessed equal moral worth. Egalitarianism suggests that equality is good in itself because it validates equal moral worth. The presumption of equality thus generates a principle of distributive justice, or policies that favour redistribution of resources which are disproportionately held by a few, because egalitarians feel that it is unjust and unfair for some to be worse off than others through no fault of their own. I therefore employ the concept of equality as interchangeable with egalitarianism in this chapter.

158. Certainly it is not necessary to justify the proposition that all human beings are of equal value at this stage of our common history. But I speak from and for a society that has historically been organized along the axis of inequality; i.e. the caste system. In India we need to reiterate basic propositions because deep commitment to the value of equality has proved elusive in a society where caste still rules social transactions.

159. Darwall has an interesting take on respect. Distinguishing between 'appraisal' respect or respect based on a positive assessment of the merits of individuals, and 'recognition' respect which is a disposition to give appropriate weight in one's deliberations to the fact that someone is a person, Darwall argues that, 'there is no puzzle at all in thinking both that persons are entitled to respect just by virtue of their being persons and that persons are deserving of more or less respect by virtue of their personal characteristics' (Darwall 1977: 46).

cannot be traded for social and economic rights, for political rights are weapons that ensure distributive justice. Finally, because equal rights cannot be sustained in conditions of extreme hardship such as poverty, the state is obliged to eradicate, or at least ameliorate, factors that perpetuate inequality, such as poverty.

The second reason why the argument for freedom from poverty should be located in a moral consensus is that moral consensus on the deeper values around which a just society should be arranged might serve to both inform and justify particular arguments, whether the argument is about the undesirability of capital punishment, or about the right of persons not to be poor. Society can, perhaps, be convinced of the merits of a specific case, *if* the arguments for that case appeal beyond the parameters of the specific case on offer, and invoke deep values. The proposition that 'this is not the way a just society, or a society of equals, should be treating its citizens' might prove a more effective way of approaching crucial and contentious issues than detached arguments about why certain persons should not be subjected to certain kinds of treatment.

More significantly, though rights constitute the dominant currency of political vocabularies today, we cannot just invent or discover a right, and leave it to do its own work: that of garnering a degree of social and political acceptance and legitimacy. If a right is violated, citizens should be exercised or agitated about this violation. But for this to occur, for society to feel deeply about the right on offer, the incorporation of a right into political thinking, into moral values, and into vocabularies that are ritually employed in and through an activity the ancient Greeks termed 'politics', requires a great deal of hard work. The right not to be poor has to be grounded in antecedent moral values; to be underpinned by a moral consensus, and be legitimized by referral to these values. It might be difficult to legitimize the right of persons not to be poor if a moral consensus on the desirability of equality as a value has been demoted or abandoned.

The construction and the consolidation of this moral and political consensus is, of course, a project requiring the harnessing of creative imagination and courage on the one hand, and careful reasoning, persuasion, and dialogue on the other. The task also demands the investment of rather high degrees of energy and time. But this is essential because a moral consensus on what constitutes, or should constitute, the basic rules of society is central to our collective lives. To put the point across in Rawlsian language, social unity in a well-ordered society can only take the form of an overlapping consensus, in which political conceptions of justice are affirmed by citizens who themselves hold conflicting moral, political, and religious doctrines.[160] But the political is not a given, it has to be constructed, as Marx had told us long ago, through determined and sustained political intervention.

160. 'While in a well-ordered society all citizens affirm the same political conception of justice, we do not assume that they do so for all the same reasons, all the way down. Citizens have conflicting religious, philosophical, and moral views and so they affirm the political conception from within different and opposing comprehensive doctrines, and so, in part at least, for different reasons. But this does not prevent the political conception from being a shared point of view from which they can resolve questions concerning the constitutional essentials' (Rawls 2001: 32).

In India the creation of this moral consensus is a difficult task simply because Indian society is not only plural; it is deeply unequal. Poverty is deeply implicated in social hierarchies and discrimination based on caste. It is not easy to tackle both social and economic marginality at the same time, but we have to do so. Presumably, reasoning, persuasion, and dialogue constitute far more effective ways of making rights morally and politically acceptable than the mere enactment of laws, which can easily be interpreted as an imposition.

The third reason for locating the right not to be poor in a political consensus is pragmatic. The fulfilment of this right demands a degree of redistribution in society, where resources have been disproportionately monopolized by particular groups. Resources will, therefore, need to be transferred from the well-off to the worse-off through deliberate political intervention such as progressive taxation, land reform, and ceilings on property. This process can, however, prove contentious. Why should persons part with the profits they have earned through hard work, through entrepreneurship, and through innovative creativity? In many circles, taxation is seen as theft in accordance with the Lockean principle that I have rights over what I mix my labour with.

Certainly it is unjust to prevent persons from enjoying the benefits of transactions that involve the entrepreneurial self, the hard-working self, and the energetic self. To be an egalitarian is not to deny this, neither is it to argue that persons' conditions should be made the same in every respect. All that egalitarians ask for is that all human beings should be given an equal chance to access opportunities that enable them to hone *their* skills and *their* talents, so that they can also benefit from their particular transactions. All that egalitarians ask for is recognition that social, political, and economic institutions systematically disadvantage many persons and deny them access to structures of opportunity. To be poor in a wealthy society, to be born into a lower-caste family in a casteist society, to belong to a religious minority in a communal society, or to be born into a race that is discriminated against in a racist society, is also to be denied freedom. Desirably, equality constitutes a companion concept of a particular notion of freedom: equal freedom.

In short, redistribution of resources via, say, taxation, can be justified in terms of putative obligations that we owe our fellow beings only when redistribution is grounded in a moral consensus in society that people have a right to 'equal freedom', or to 'equality', for this reason or that. If background inequalities force certain people to live below the poverty line, this should be seen as constituting a serious violation of basic rights. Phrased in this way, society might possibly come to feel that it is just that profits be taxed to some extent, because this rectifies a wrong done to the rights holder. In sum, unless the transfer of resources is located within a normative framework, and unless it is legitimized by referral to this normative framework, the transfer can prove deeply contentious, which may delegitimize efforts to make persons free of mind-numbing poverty.

6.2. POVERTY, INEQUALITY, AND EQUALITY

How do we go about creating and consolidating a moral consensus that poverty violates the basic right to equal moral worth in India? The Indian case provides us with a supreme example of a paradox. The GDP grew by an impressive 7 per cent per annum in the years 2002/2003 to 2006/2007, the period of the Tenth Five Year Plan. But, as the Approach Paper to the Eleventh Five Year Plan (2007–2012) states clearly, although official figures for poverty in the years 1999/2000 indicated that the percentage of population in poverty had declined from 36 per cent in 1993/1994 to 26 per cent in 1999/2000, revised estimates show that the pace of reduction of poverty had been overstated. The data from the sixty-first round of the National Sample Survey (NSS) conducted in 2004/2005, which is comparable to the data garnered in the fiftieth round of the National Sample Survey conducted in 1993/1994,[161] shows that the percentage of people living below the poverty line in 2004/2005 was above 28 per cent, which is higher than the numbers provided by official figures earlier. The reduction in poverty between 1993/1994 and 2004/2005 was 0.74 points per year, rather than 1.66 points per year, as implied by the earlier 1999/2000 data (Planning Commission 2006: 58; Himanshu 2007).

In absolute terms, the number of persons below the official poverty line is huge – an estimated 260 million people (*National Human Development Report* 2002: 38), of which 193 million live in rural areas and 67 million in urban areas. These are persons who are unable to access the minimal consumption basket. In the 'backward' states of North India, more than 25–33 per cent of people live below the poverty line (Radhakrishnan and Shovan Ray 2005: 41). Not only do a quarter of the world's poor live in India, the number of illiterates, school drop-outs, persons suffering from communicable diseases, and infant, child and maternal deaths amount to a staggering proportion of world totals.[162]

The problem of multiple deprivations in India is both acute and pressing, and it is easy for concerned scholars to articulate a case that persons should not be poor from vantage points other than equality. How on earth does it matter, someone can ask, that 260 million poor Indians are unequal to others, such as

161. The data of the fifty-fifth NSS survey conducted in 1999/2000 proved controversial, and scholars challenged claims of poverty reduction based on this data set.

162. The contradiction between a growth-propelled India and the tremendous poverty that stalks the lives of 260 million people is glaring. The 2004 ILO report on *Economic Security for a Better World* compliments India for maintaining high growth in the past two decades, but also comments adversely on the country's record of social security. India is ranked seventy-four out of ninety countries on the economic security index constructed by the ILO. On income security India ranks ninety-four out of ninety-six countries, only above Congo and Sierra Leone, both of which happen to be mired in civil war. The index is constructed on seven indicators: income, work, representation, job, employment protection, labour market, and skill reproduction. It is not that the rather striking coexistence of affluence and absolute deprivation is not of concern to policy planners. The five-year plans that lay out political priorities and set the parameters of policy detail hundreds of social policy schemes, all of which are meant to alleviate poverty. However, the presence of 260 million poor does not seem to be a compelling reason for the Indian state to undertake dramatic policy measures despite rhetorical flourishes to the contrary.

the 300 million of the 'new' middle class? Why should the discussion of poverty be conflated with inequality or rendered dependent on equality? It might be far more useful, and more efficacious, to provide the poor with resources *sufficient* to provide reasonable prospects of a good life, than to worry about the gap between the poor and the non-poor. Equality, it can be argued persuasively, is not the issue; sufficiency is. Or as Frankfurt puts it, 'with respect to the distribution of economic assets, what *is* important from the point of view of morality is not that everyone should have *the same* but that each should have enough. I shall refer to this alternative to egalitarianism … as the "doctrine of sufficiency"' (Frankfurt 1987: 21–22, italics in the original).

The problem is, however, not just one of providing the poor with sufficient resources and leaving equality aside. Poverty is not created and recreated in a social vacuum; it is produced and reproduced through practices that are both relational and unequal. At an obvious level, poverty is a product of the market economy, in which capital, income, and employment are disproportionately distributed among the population. Patterns of ownership, the production and the labour process, and unemployment produce and reproduce poverty. In India, the majority of the poor live in rural areas, but between 2002 and 2006/2007 the contribution of agriculture to the growth rate of the GDP went down from 2 per cent to 1.8 per cent, that of industry rose from 4.6 per cent to 8 per cent, and that of services rose from 8.1 per cent to 8.9 per cent.[163] The labour market in rural areas is marked by near zero elasticity of employment, leading to landlessness and unviable land holdings. Consequently, we witness a steady stream of migrants to towns and cities, where they become a part of the massive informal sector. Of the working population of about 390 million, 90 to 93 per cent are in the unorganized sector, which is marked by low wages and the absence of unionization, and which lies outside the pale of the regulatory structure. Of this number, 62 per cent of unorganized workers are in agriculture, 11 per cent in industry and 27 per cent in the service sector. Of the 10 per cent of the workers employed in the formal sector, 6 per cent have jobs in the public sector. But here the onset of economic reforms has led to a decline in employment opportunities. The economy is doing well, but this is not matched by commensurate growth in economic opportunities, leading to the phenomenon of jobless growth.

Notably, the causes of poverty in the country are not merely economic, and it is precisely here that we can discern the problem with extricating poverty from inequality. Consider that more than half the poor belong to the Scheduled Castes or the former 'untouchables', some 'backward' castes that have been socially and educationally marginalized because of their lowly position in the caste system, or the Scheduled Tribes that have historically been outside the caste system. In 1999/2000, 81 per cent of the rural poor belonged to these three categories. The percentage of the Scheduled Tribes in poverty figures went up in the 1990s, and the percentage of the Scheduled Castes, or dalits, remained the same. Punjab, for

163. Planning Commission (2006: 43).

instance, has one of the lowest percentages of people living below the poverty line in the country – 6 per cent – yet dalits account for 76 per cent of the poor (Radhakrishnan and Shovan Ray 2005: 46).

Let me focus on the dalit community, simply because this community is doubly disadvantaged.[164] A majority of the dalits not only suffer from economic deprivation, but also social discrimination. Since throughout India's history, the dalits have been stigmatized as the 'untouchable', the 'impure' and the 'polluting', members of the community have been prevented from accessing education and skills, and condemned to performing menial tasks. It is not surprising that though the majority of India's poor do not belong to the dalit community, a majority of the dalits, particularly in the rural areas, are poor.[165] The significant point is that members of the so-called lower castes are poor not only because they lack skills and resources; they lack skills and resources because they belong to a caste that has been wilfully denied such access in the past. Though in the post-independence period, the government has institutionalized policies that ban caste discrimination and introduced affirmative action or protective discrimination in education and in public employment, the legacies of history are not so easily neutralized. Economic marginality in this specific case is the outcome of discriminatory social practices or flows from social marginality.

India is not alone in this. In the USA, the March 2001 Current Population Survey conducted by the Census Bureau concluded that the poverty rate in the country was 11.3 per cent of the population, or 31.1 million poor, and that several groups set record *low* poverty levels in 2000. Groups with significant poverty rate decreases were Blacks, Hispanics, and female-headed households. Blacks (22.1 per cent) and female-headed families (24.5 per cent) had their lowest measured poverty rates in 2000. The poverty rates fell for Hispanics from 22.8 per cent to 21.2 per cent between 1999 and 2000. Yet Blacks, Hispanics, and female-headed households remained disproportionately poor compared to the rest of American society, highlighting the phenomenon of double disadvantage (Dalakar 2001: 7, 9), that of class/race and that of class/race/gender. In many other countries the phenomenon of double disadvantage is not unknown; recollect the close correlation between migrants and poverty, or people who belong to a minority ethnic group and poverty.

164. The official term for the dalits is Scheduled Castes, but the dalit movement has foregrounded the concept of dalit, or that of the oppressed who struggle against exploitation, indicating thereby that the dalits possess agency. This is in contrast to the Gandhian notion of members of this caste being the special children of God. Though it is mainly Hinduism that is premised upon caste hierarchies, these hierarchies have also penetrated religious groups that disdain inequality on the basis of ascriptive privileges – Christianity, Sikhism, and Islam.

165. For this formulation I am indebted to my colleague Achin Vanaik, except that he uses the term 'landless labour' instead of 'the poor'.

6.3. DISTRIBUTIVE JUSTICE AND EQUALITY

Let me now proceed to state the question that confronts societies in which significant numbers of persons suffer from double disadvantage. Even if the poor are provided with sufficient resources, will that make them equal to other persons? Can any approach to freeing persons from poverty be indifferent to social inequalities and injustice? The basic tenets of egalitarianism are that the objective of freeing persons from poverty is (a) to ensure equal standing and (b) to enable persons to participate in social relationships from a position of equality. There is more to removal of poverty in egalitarian world views than provision of sufficient resources. But the sufficiency approach is not concerned with egalitarianism. Therefore, we have to look to egalitarianism to provide us with a strategy that will ensure double advantage: freedom from material deprivation as well as enabling equal moral worth.

Let me phrase the issue in this way: since egalitarianism is premised on equal moral worth, this presumption should generate a principle of distributive justice. Conversely the principle of distributive justice should validate the principle of equal moral worth. The presumption of egalitarianism, and the principle this presumption generates, should not, in principle, be separated, not if we subscribe to egalitarianism. The relevant question then becomes the following: how *exactly* does the presumption of equal moral worth translate into a principle of distributive justice? Equally, do principles of distributive justice always validate the equality presumption? The conceptual link between a presumption of equality and principles of distributive justice might well prove weak. The focus on distributive justice might well be at the expense of equality of moral worth.

Consider the arguments offered by an influential school of liberal egalitarians to the first of the questions posed above: how exactly does equality translate into principles of distributive justice? Some liberal egalitarians are driven by the conviction that persons should not be worse off than others, if they happen to be the victims of circumstances that are not of their own making, or over which they have no control. According to Dworkin, the state is obliged to eliminate all inequalities that are due to 'brute luck', but it is not so obliged when it comes to inequalities that result from the making of deliberate choices, including risky choices that result in losses for the chooser (Dworkin 2000; Arneson 1989; Roemer 1998). Distinguishing between choice and circumstance, Dworkin suggests that the state should compensate the victims of 'brute luck' through a transfer of resources. From a different vantage point, Cohen defends a system of distributive justice, or 'equal access to advantage', based on the idea that the fundamental distinction for an egalitarian is between choice and luck in the shaping of people's fates (Cohen 1989: 907). Equalizing access to advantages involves eliminating the effects of brute luck on distribution because the disadvantages of those who suffer from brute luck are 'unchosen' or 'imposed' upon them (Cohen 1989: 908). Cohen opts for equal opportunity for welfare. If someone is left worse off by virtue of having more expensive tastes, it is unfair only to the extent that the person is not responsible for these tastes. 'I distinguish among expensive tastes according to

whether or not their bearer can reasonably be held responsible for them. There are those which he could not have helped forming and/or could not now unform, and then there are those for which, by contrast, he can be held responsible, because he could have forestalled them and/or because he could now unlearn them' (Cohen 1989: 923). Arneson, defending a version of prioritarianism as a form of liberal egalitarian ideology, suggests that 'the idea is that justice requires us to maximize a function of human well-being that gives priority to improving the well-being of those who are badly off and of those who if badly off, are not substantially responsible for their condition in virtue of their prior conduct' (Arneson 2000: 340; Arneson 1989).

Despite conceptual differences between Dworkin's egalitarianism and that of Cohen and Arneson, the primary aim of liberal egalitarians is to eliminate the influence of 'bad luck' on the distribution of resources. The distinction between choice and circumstance serves to link presumptions of equality and distributive justice on the one hand, and legitimize transfer of resources to the deserving on the other. This strain of reasoning has, however, not gone unchallenged. Critics argue that these theorists do not question the institutional structure that generates disadvantages but merely seek to rectify distortions, that liberal egalitarians are not concerned with tackling oppression and exploitation, and that they have waylaid the egalitarian project by concentrating on individual choices.[166] Of some interest is the critique launched by Wolff on liberal egalitarians. Wolff argues that since claimants for benefits must show that they lack the opportunities of those who are in work, the brute luck argument singles out the poor for insulting levels of scrutiny. 'Think', urges Wolff, 'how it must feel – how demeaning it must be – to have to admit to oneself and then convince others that one has not been able to secure a job, despite one's best efforts, at a time when others appear to obtain employment with ease. This removes any last shred of dignity from those already in a very unfortunate position' (Wolff 1998: 114). Wolff accordingly suggests that egalitarians should not only be motivated by a concern for fairness, but also by the idea of respect. There is more to a society of equals, argues Wolff, 'than a just scheme of distribution of material goods. There may also be goods that depend on the attitude people have towards each other' (Wolff 1998: 104). But these two values, both of which are authentically part of the egalitarian ethos, can conflict. Therefore, in some cases, respect should take priority over equality.

The problem is fairly evident: principles of distributive justice that are derived from presumptions of equality might actually end up diminishing the sense of equal worth, or respect might be sacrificed at the altar of redistribution. Anderson, in a hard-hitting critique, suggests that in focusing on bad luck instead

166. Young (2000), for instance, claims that liberal egalitarians have pursued a 'distributive' approach to social justice at the expense of a critical examination of institutions, and Kymlicka suggests that Dworkin's suggestions are primarily focused on 'ex post facto corrections to the inequalities generated by the market' (Young 2000: 8; see also Kymlicka 2002: 82). Anderson (1999) focuses on the second and the third critique. Phillips (1999: 59) suggests that liberal egalitarians obscure structural inequalities that cannot be understood in individualist terms.

of oppression, egalitarians have entirely neglected the victims of racist and sexist injustice, and served up disrespect and pity for the victims of bad luck (Anderson 1999: 289). 'The proper negative aim of egalitarian justice', she claims, 'is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others' (Anderson 1999: 288–89).

To some extent Anderson has pinpointed the issue at stake well. How does a principle of distributive justice validate the principle of equal moral worth? Scheffler puts this point across well. Equality, he writes, 'is not, in the first instance, a distributive ideal, and its aim is not to compensate for misfortune. It is, instead, a moral ideal governing the relations in which people stand to one another… . It claims that human relations must be conducted on the basis of an assumption that everyone's life is equally important, and that all members of a society have equal standing' (Scheffler 2003*a*: 21–22; Scheffler 2003*b*: 199–206). The objective of egalitarianism is indisputably the constitution of a society of equals. Contemporary theories of equality concentrate on justifying the transfer of resources from the well-off to the worse-off. Elaborate conceptual systems of justification, which tell the well-off why they should part with a degree of their resources, has, in effect, sidelined the essential idea that inequality is bad in itself. For this reason alone people should not be poor. Certainly, liberal egalitarians have contributed a great deal toward reinforcing principles of justice by advancing the notion that victims of poverty (but not those who choose to fritter away their resources) cannot be held responsible for their situation. But these theories also serve to highlight the rather tenuous nature of the link between the presumption of equal moral worth and the fashioning of a principle of distributive justice.

Starkly put, the problem is the following: if we concentrate on distributive justice, this might come at the expense of equal moral worth. Let me illustrate this problem through a brief narrative of how affirmative action or protective discrimination has fared in India. Since dalits have been historically denied access to opportunities because of caste prejudices, the Constitution and the Government of India designed policies of affirmative action, according to which 15 per cent of seats in educational institutions and an equal percentage of public jobs were reserved for members of the community, in addition to group representation in decision-making institutions ranging from Parliament to local self-government bodies.[167] It was assumed that these measures would secure access to resources – both material and symbolic –, freedom from poverty, as well as freedom from disrespect. Towards the latter end, caste discrimination is a punishable offence.

167. An additional 7.5 per cent of the seats are reserved for members of the Scheduled Tribes. In 2006 the government enacted legislation according to which 27 per cent of seats in educational institutions and faculty positions will be reserved for members of the 'backward' castes, bringing the total number of reserved seats to 49 per cent. I focus on the case of the dalit community because of the factor of double disadvantage. Though some sections of the 'backward' castes are educationally and socially 'backward', by and large this community does not constitute the former 'untouchables'.

How have policies of affirmative action, or what in India is called protective discrimination, worked? Thirty-one years ago, the sociologist I. P. Desai studied the impact of protective discrimination policies on untouchability in rural Gujarat. In public arenas that were governed by law such as schools and post offices, he told us, untouchability was least practised. Only one school in 59 villages had separate seating arrangements for dalit children, and only 4 per cent of the post offices practised discrimination in their transactions with dalits. When it came to the private sphere of social transactions, however, matters were different (Desai 1976). In 90 per cent of the villages that he surveyed, Desai found that dalits were not allowed to enter the houses of caste Hindus. Barbers, shopkeepers, and potters kept their distance from dalits, who continued to be thought of as polluting. Dalits were prohibited from entering temples frequented by caste Hindus. In 10 per cent of the villages that were surveyed, dalits were not allowed direct access to common water sources. They were consequently dependent on caste Hindus for access to water (Desai 1976: 62–63). Other villages had created separate wells for dalits.

Desai concluded that dalits had benefited, because 'they do not have to suffer humiliation every day at the hands of the savarna' (Desai 1976: 114).[168] But though the attitude of caste Hindus had changed at least in public transactions, their beliefs about untouchability had not been altered. In sum, dalits had advanced in the sphere of public transactions that are governed by law, but not in the sphere of private relationships – friendship, intimacy, dining together, visiting each other – that lie outside the formal jurisdiction of the law. Though Desai did not see non-entry into the private domain of social transaction as significant, this domain is arguably important, and it is not unconnected from the public sphere. Where we spend our time and with whom, who our children go to school with, what neighbourhood we live in, what clubs we belong to, and what sort of persons our children marry, have an inescapable effect on material things like jobs, promotions, and placements. If dalits continue to be discriminated against in the private sphere, their opportunities in the public sphere are undoubtedly curtailed.

One would have thought that matters would be different today. The last two-and-a-half decades have witnessed the dalit movement and dalit parties moving to the centre stage of Indian politics. The caste question has been foregrounded in the collective consciousness. The Chief Minister of one of the largest states in the country, Uttar Pradesh, is a dalit; one of the former presidents of India was a dalit; and the present Chief Justice of the Supreme Court at the time of writing is a dalit. Widely respected dalit intellectuals have aggressively fought out the caste issue in political and intellectual circles. The dalit movement has raised, and continues to raise, vexing issues of caste discrimination publicly. Activists have dragged persons and institutions to court, as well as to the Scheduled Caste Commission, on charges of discrimination. A dalit university has been set up in the country. Prominent literary figures writing in English invariably have a dalit protagonist

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168. Savarnas are the upper castes.

as the linchpin of their story, *pace* Rohinton Mistry and Arundhati Roy.[169] No election can be fought without reference to the caste issue. And dalit politics have finally generated a politically correct vocabulary in at least the public domain.

Have the dalits finally come into their own as citizens of India? Perhaps yes, despite all odds. Most works on protective discrimination conclude that policies have worked rather well given the anarchic nature of the Indian political system and the entrenchment of caste discrimination, and that some resources have been transferred to some sections of this category (see Joshi 1982).[170] A more troubling question follows: have the dalits finally come into their own as agents who possess equal moral worth in the public as well as in the private sphere? The response to this question is mixed, but on the whole disappointing.

Consider the conclusions of the recent research carried out by Gaikwad, who interviewed about 200 college students and employed dalits in Aurangabad. Publishing his findings in 1999, Gaikwad suggests that despite the institutionalization of protective discrimination policies in the public sphere, attitudes of caste Hindus have not changed (Gaikwad 1999). Whereas all of the respondents 'were eager to do away with caste stigmatizing identity', they felt deeply that they continued to be discriminated against (Gaikwad 1999: 190). And while 80.5 per cent of the dalits expected that their relationship with caste Hindus would be based on equality, the latter did not invite dalits to their homes, dine with them, or enter into meaningful and rewarding social relationships. Sixty-six per cent of the respondents reported that they continued to feel humiliated and discriminated against. There have been changes in the secular aspects of the dalit's life, concluded Gaikwad, but other aspects of his or her life have not changed (Gaikwad 1999: 193). In 2006, a research project conducted by scholars and social activists on the practice of untouchability in 565 villages in 11 states of India revealed systematic evidence of the continued existence of untouchability, and atrocities on the lower castes, despite a powerful dalit movement, despite laws that render untouchability an offence, and despite protective discrimination policies (Shah et el. 2006).

These findings give cause for some despondency. Certainly India represents a troublesome and extreme case inasmuch as the caste system denies respect to persons on grounds other than poverty. But it is precisely such cases that help us to understand the complexities of inequality. We can assume that even a random social analysis of poverty will inform us that the poor are most likely to belong to groups that are victims of social and cultural marginalization. For this very reason, though the dual objectives of securing freedom from poverty as well as

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169. Earlier novels such as *The Untouchable* written by Mulk Raj Anand had dealt with the disturbing issue of caste discrimination. And regional literatures have systematically carried a critique of caste discrimination, particularly the kind of literature produced by the intellectuals of the dalit Panther movement. But the kind of visibility that has attached itself to contemporary Indian writing in English makes engagement with the caste question both perceptible as well as public.
170. Charsley and Karanth (1998: Introduction) suggest that though it is not as if nothing has changed for the dalits, their current situation remains paradoxical. That protective discrimination policies have fetched mixed results had been pointed out by Galanter (1984).

assuring equal social standing and respect are difficult, the task is a pressing one. Admittedly, a concept of respect that includes equal moral worth is elusive, not only because it belongs to the nebulous and treacherous realm of social attitudes, but because respect is a matter that is not so easily commanded by politics. Politics can negotiate distribution of scarce resources. This particular mode of politics demands vision, courage and commitment, but as history has shown us, it can be done. How does politics negotiate respect? How does it lay down parameters of what human beings owe one another by virtue of being human? These are large and complex questions, and any attempt to negotiate these questions must necessarily be hesitant and qualified. For we are no longer confident that equalization of access to resources will necessarily lead to equality. The socialist project has fallen into disarray, and in a much more modest post-socialist world, all that egalitarians can hope for is that persons are not systematically and systemically disadvantaged.

6.4. EQUALITY AND DISTRIBUTIVE JUSTICE

I have suggested that the conceptual link between presumptions of equality and principles of distributive justice is a tenuous one, because the latter do not always validate the principle of equal moral worth. The significant question then becomes: how can we design a principle of distributive justice that validates that of equality? Correspondingly, how exactly does the presumption of equal worth generate a principle of distributive justice?

Let us consider the sequence of an argument that seeks to construct such a link. Equality as a condition that obtains between human beings is important in itself because it is based on the precept of equal moral worth, and thereby respect. This is the minimum we owe people, because equal respect ensures self-assured and positive human beings, and not the kind of degraded individuals who are stripped of self-respect, a phenomenon that Hegel had lamented so eloquently. But the presumption of equality also enables persons to participate in various social, cultural, and political transactions with a fair degree of self-confidence. If (a) people are caught up in a morass of poverty and (b) this poverty is traceable to social discrimination that among other things prevents access to resources, what should egalitarians do? It follows that egalitarians have to argue for distribution of resources in a way that would also validate equal moral worth of all persons.

Towards this end, let us proceed to think out what the implications of the presumption of equal moral worth are. The first implication, of course, is that of equal political rights. We can no longer believe that amidst social and economic inequality, equal political rights are a bourgeois fiction at worst, and inadequate at best. Simply put, political and civil rights enable mobilization and demands for substantive rights, or social and economic equality. Without social and economic rights, political and civil rights are incomplete, but without political and civil rights, civil societies are simply not empowered to assert the right not to be poor. The two sets of rights cannot be substituted for each other or reduced to each

other, for each of these rights is an indispensable prerequisite for the realization of other rights (Chandhoke 2006).

Take the case of India, where formal democracy coexists with a high level of economic and social unfreedom and inequality. If this form of democracy has any virtue, it is that democratic rights enable movements of the marginalized as well as campaigns by non-governmental organizations (NGOs) to demand what is due to the citizens of India. In recent history, NGOs and social activists have employed the vocabulary of political and civil rights as codified in part III of the Indian Constitution to struggle for the realization of social and economic rights. Though social and economic rights form part of part IV of the Constitution, these rights, unlike civil and political rights, are not justiciable. But political and civil rights have *inspired as well as empowered* collective action for the implementation of social and economic rights. Collective action has served to substantiate social and economic rights through the enactment of social policy, via an expansion of the vocabulary and the conceptual repertoire of rights. For instance, a major campaign launched by social activists and NGOs since 2001 has resulted in the enactment of the National Rural Employment Guarantee Act. The right to work has created a government-sponsored scheme for generating employment that is among the largest in the world. The Act entitles all rural households in the country to 100 days of employment per annum, at minimum wages. If eligible applicants do not find work within two weeks, they are entitled to unemployment benefits.

However, we still need to answer the question: how exactly does article 14 of the Indian Constitution, which grants the right to equality, generate a principle of distributive justice? What does the political equality presumption (equality before the law and equal treatment by the law) mean when it comes to the social and the economic domain which is indisputably unequal? Any negotiation of this particular question will need to recognize the concern identified earlier, that principles of distributive justice have to validate the presumption of equality.

This double link, between the presumption of equal moral worth and distributive justice, can perchance be realized when we conceive of human beings as co-sharers in the collective resources of a society by reasons of right. Or that each human being by virtue of being born into a given society has an equal right to the collective resources of that society (Hinton 2002). If these resources have been disproportionately monopolized by certain groups, and if unequal command over resources is reflected in institutions, disadvantaged persons have the right to demand that they be granted their default share by virtue of a right.[171]

What would be a fair share? A fair share in the common resources of a society amounts to ownership of enough resources to allow human beings to have a reasonable chance of making their histories, irrespective of the kinds of histories they wish to make. I conceive of a fair share not in sufficientarian terms, as Frankfurt does, but in relative terms. That is, what counts as a fair share

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171. Whether these resources are natural or the product of labour is an important debate, but we need not go into the details in this particular argument.

depends on the average affluence of the society in question. All persons should have access to basic goods that allow them to live a life that we recognize as human. It follows that the concept of basic goods is *objective* inasmuch as it is *independent* of the agent's own perception of what is good for him/her. A wine drinker may believe that regular intake of wine is a primary need, but experts know better. It is more important that our wine drinker consumes a regular and a nutritious diet even if his/her own preference is for wine over food. Parfit refers to an account of primary goods that meet basic needs as the 'objective list' theory, which determines what makes someone's life optimal: 'certain things are good or bad for people, whether or not these people would want to have the good things, or to avoid the bad things' (Parfit 1984: 499). Some scholars, therefore, argue that the very objectivity of the concept of basic goods is disagreeable, because it results in the domination of expertise over individual perceptions and desires (Fitzgerald 1977: 211). Further, when experts take over the domain of basic needs, or indeed any other domain, people's own ideas of what is good for them may well fly out of the window. However, basic goods are arguably *not* completely independent of subjective desires or preferences. Assume for a moment that an individual begins to list the requirements that she or he considers indispensable for life itself. And then consider whether a home, clothing, food, health, education, and political and civil rights will not *top* any such list? If we presume that a consumer starting from scratch begins to acquire some of the resources that she or he needs, basic goods are the desires she or he may be expected to prioritize before she or he turns to others (Dasgupta 1995).

The egalitarian objective of assuring citizens' basic goods is not only so that persons can live a minimally decent life, but so that they can participate in social, political, cultural, and political transactions from a plane of (admittedly rough) equality. A publicly funded education and health system go a long way in helping persons translate their skills into talents. This is a necessary prerequisite for competing for jobs and for other advantages that are coded in the principle of equality of opportunity. The right to work will also go a long way toward ensuring that citizens are not forced to beg for what is rightfully theirs and thereby stripped of their right to equal moral worth. In other words, if equal political and civil rights are the signifier of equality in the political domain, the institutionalization of conditions that make it possible to ensure access to structures of opportunity is the signifier of equality in the social and economic domain. The precondition is that the state has to equip its citizens with the capacities that would enable them to access as well as profit from these opportunities.

Correspondingly, since the task of providing citizens with work, health, education, and shelter on non-market principles requires public funding, the well-off are obliged to part with some of the profits they have earned. This is part of their putative obligations to rectify violation of rights. Society is obliged to rectify the violation of a right to equality, irrespective of whether poverty is the result of choice or brute luck. For, even if some individuals have chosen to gamble away their savings, should we leave them to that ill-chosen fate, simply because they chose to make their own history, and that of their dependent children and spouses,

badly? This runs contrary to the luck-egalitarian suggestion that we remedy only those aspects of the human condition for which persons are not responsible. Nevertheless, to condemn human beings to ill-being just because they made bad choices does not make for good political morality.

The proposition that persons by virtue of being born into a society possess an equal claim on the collective resources of that society might conceivably help us constitute the double link between the presumption of equality and that of distributive justice. Firstly, legitimate claims to basic goods supervene onto the right to equality. Accordingly poverty is a violation of the right to a fair share of basic goods. Secondly, the state, as the institution which is in a position to affect the realization of this right, is obliged to rectify this violation through a transfer of resources via progressive taxation, a ceiling on property, land reforms, income-generating schemes, and social security measures.

This is the first stage of rectifying historical wrongs. Once each citizen has been provided with basic goods, the special needs of the doubly disadvantaged – caste/class, class/gender, class/religious, class/ethnic minorities – have to be considered, and affirmative action policies must be designed for them. To embrace affirmative action policies in the abstract, or in isolation from a moral and political consensus on equality and distributive justice, is simply to invite acrimony. Arguably, affirmative action policies in India have been embroiled in controversy, and the beneficiaries of these policies have been subjected to animosity, simply because these policies have been instituted in a political space not informed by a generalized consensus on what human beings are due or by a moral and political consensus that poverty represents a violation of the right to equality.

For instance, in India initially reservations in educational institutions and employment formed part of a more inclusive agenda of social justice, particularly land reforms, which were meant to benefit all those who live below the poverty line in general, and dalits in particular. However, the implementation of land reforms in the initial years of independence suffered from serious shortcomings. Intermediaries were abolished, and land was transferred to the tenants through a series of legislations. But land reforms were confined to only 40 per cent of the cultivated area. Administered by often recalcitrant bureaucrats, land reforms failed to transfer land to the tiller, failed to correct imbalances in the structure of land relations, failed to provide security to tenants, and failed to secure implementation of land ceiling laws. More significantly, land reforms slowed down because the issue of compensation to erstwhile landowners was bogged down in massive litigation, except in the state of Jammu and Kashmir, where land was transferred to the tiller without compensation being paid to the erstwhile landowner.

By the 1990s land reform was set on the backburner, and the subdivision and fragmentation of land weakened the case for a lowering of the land ceiling. This happened despite the fact that massive dispossession of land from communities that live off the produce of the land reduced many to penury. The decade also heralded the liberalization of land laws to further corporate farming, in sharp contrast to the post-independence period when considerations of equity and social justice governed land reforms. Therefore, whereas by the end of the Eighth Five Year Plan

(1992–1997) 5.2 million acres out of a ceiling surplus of 7.5 million acres were distributed among 5.5 million beneficiaries, the position remained unchanged at the end of the Ninth Five Year Plan (1997–2002). The net result is that in major parts of the country the poorest of the poor, mainly belonging to the Scheduled Castes, have been unable to access land, productive assets, and skills (Planning Commission 2002: 301). In sum, instead of locating protective discrimination measures in a wider agenda of redistributive justice and in the right to equality, political elites have not only paid lip service to protective discrimination, but have also narrowed down protective discrimination to the idea of quotas in educational institutions and public jobs.

We can draw a significant lesson from the manner in which affirmative action policies in the country have been conceptualized and implemented. For one, the notion of compensation on grounds of 'harm done' or brute luck is simply inadequate, *if* it is left to stand on its own. In India the entire case for protective discrimination rests on a particular reading of history: a reading of history as a story of collective complicity and guilt, on the one hand, and collective victimization and harm on the other. Though the general feeling at the time of forging the Constitution was and continues to be that those who have benefited from history should be willing to pay the costs, over time this consensus has been watered down. For the idea that 'we' owe something to 'them', in abstraction from a moral consensus on why people are owed restitution for historical wrongs, divides society along the axis of 'we-ism' and 'they-ism', and dissolves solidarity. Over time younger generations have begun to raise the following questions: how long should we pay compensation? Why should our generation be made responsible for the sins of our forebears? Why should those who have no talent, no merit, and no ability to compete be allowed secure access to educational institutions and government jobs? And why should someone from the lower caste who has benefited from these policies continue to enjoy advantages from affirmative action policies?

To put it bluntly, since our public discourse over reservations is conducted in a moral and political vacuum, in the absence of a consensus on the desirability of redistribution and the right to equality, this discourse undermines both reservations and the beneficiaries of reservations. Reservations are seen not as a justified component of egalitarianism, but as unjustified rewards. Resentment and hostility, in turn, have been expressed through the perpetuation of demeaning caste stereotypes and stigmatizing imagery, which has reproduced humiliation. This has occurred despite the best efforts of the powerful dalit movement, social activists and reformers to reinstate members of the community into social relations on terms of equality. But since the political class refuses to engage in the time- and energy-consuming task of building up a moral consensus that each citizen has a right to equality and that violations of this right should be redressed, political defences of such policies are rendered wafer thin. The case for compensation becomes less compelling than it should. In the process, the double link between the presumption of equality and distributive justice becomes even weaker.

To come back to the argument, protective discrimination policies are a second step toward the realization of equality. The first step is that all citizens

have the right to basic goods on non-market principles (assurance of income, free education, subsidized or free food, free health, accommodation, and political and civil rights) that will free them from poverty. More importantly, the right not to be poor should be enacted within a generalized moral consensus that persons who have been denied their rights should be given their due, that all persons are owed basic goods, and that the state should engage in additional measures to remedy harm done to the doubly disadvantaged. The proviso is that protective discrimination has to be taken seriously and employed sparingly. It has to be invoked only for the doubly disprivileged, because protection for those who do not qualify on this criterion can seriously hamper the construction of this consensus on egalitarianism.

6.5. WRAPPING UP

I have argued that the answer to the question why people should not be poor can be negotiated adequately only when we perceive poverty as a violation of the core moral right to equality. Consequently, the current focus on freeing persons from poverty should be located in a moral consensus on equality and justice. Poverty is unacceptable because it massively violates our basic convictions that no one should be compelled to lead a life that is not distinctively human. But more importantly, poverty is a violation of the fundamental axiom that human beings possess equal moral worth. This proposition generates a principle of distributive justice that concentrates on giving to the disadvantaged what they have a right to.

Finally, does our task as egalitarians end at the proposition that people have the right not to be poor? Should we disclaim any further responsibility for the disadvantaged? Should all of us not be moving constantly towards a shared vision of egalitarian democracy where people can live fulfilling lives, instead of remaining mired in notions of minimal compensation? Should we not strive to strengthen the moral consensus on the desirability of foregrounding the value of equality, of essaying obligations to people whose rights have been seriously hampered, and persuading other citizens to participate in debates on what constitutes a just society? For it is only when we concentrate on the construction of a moral consensus in society that we can dissolve the uncomfortable distinction between 'us' and 'them' that bedevils much of the case for redistribution. In sum, unless the right not to be poor is located in a strong version of equality as a good that has intrinsic value, as well as a good that enables access to other goods such as the ability to equally profit from structures of opportunity, the right not to be poor might prove no more compelling than other pious wishes for the human condition, which remain on the lips of politicians, or on statute books.

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7

Taking Economic and Social Rights Seriously: A Way to Fight against Poverty

Paulette Dieterlen

7.1. INTRODUCTION

Articles 25 and 28 of the Universal Declaration of Human Rights state the following: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care …. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (UDHR 2006).

Certain countries have also incorporated in their respective constitutions some of the same rights enshrined in the UDHR. For instance, Article 4 of the Mexican Constitution stipulates that '[e]very person has a right to the protection of health. The Law shall set forth the bases and the means for access to health services and shall likewise lay down the complementary responsibilities of the Federation and its Federated States in matters of general health. … Each person has the right to an adequate environment for his or her development and well-being…' (Constitución Política de los Estados Unidos Mexicanos 2002).

In addition, in the year 2000, at the Millennium Summit of the United Nations, 189 world leaders agreed to the Millennium Development Goals, a series of measurable objectives for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women, with a series of deadlines for achieving them. The conference also agreed to set up a world development programme: the Millennium Project (United Nations 2000). Paragraph III.11 of the introduction to the document establishing this project reads: 'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected' (United Nations 2000).

It is common knowledge, however, that the rights referred to as economic and social rights have not been complied with, and the goals of the Millennium Summit are very far from being reached. At the present time, 'some 2,800 million or 46 per cent of humankind live below the World Bank's US$2/day poverty line – precisely: in households whose income per person per day has less purchasing

power than US$2.15 had in the US in 1993. On average, the people living below this line fall 44.4 per cent below it. Over 1,200 million of them live on less than half, below the World Bank's better known $1/day poverty line' (Pogge 2002: 2). In Mexico, in 2005, about 18 million people fell below the extreme poverty line, that is to say, they live on less than a dollar a day (Secretaría de desarrollo social 2005).

The figures mentioned above should prompt us to ask whether social and economic rights are only pious words, or whether they constitute a serious source of duties upon national and international institutions. In many countries such rights are ignored, while other nations have recourse to the economic claim that their available resources are not sufficient to satisfy even the most basic rights, or that economic development has not yet reached the level that would enable poverty to be reduced. This problem is made even more challenging because it is not clear that economic growth is even possible under conditions of extreme poverty. According to a World Bank report (Perry et al. 2006), while it is true that growth is key to the reduction of poverty, poverty itself makes it more difficult to attain high and sustained rates of growth in Latin America, a region that remains one of the most unequal in the world, with a quarter of its overall population having an income of under US$2 a day.

But the problems involved in taking economic and social rights seriously are not only practical; they are also present in philosophical theories. There are thinkers who claim that such rights are too concerned with the individual, and therefore fail to take into account the cultural realities within and among different countries (Kymlicka 1996).

This thesis originates among those theorists who wish to defend the integrity of different cultural traditions and who believe that human rights correspond to a model of the nation state that views citizens in a homogeneous way.[172] On the other hand, a considerable number of philosophers, such as Feinberg (1973), believe that the only rights that can be regarded as valid are those to which corresponding obligations can be legally assigned. This means that if we identify a rights holder, we must likewise be able to identify the holder of a corresponding obligation. These authors uphold a minimalist vision of rights, as against a maximalist one, as we shall see further on (Pogge 2002: 64).

In the following sections of this chapter I will examine the two above-mentioned views on rights, following which I shall focus on theories that defend the possibility of taking economic and social rights seriously through what I call a 'maximalist conception' of rights.

172. In Mexico, Villoro (1997) has defended this idea.

7.2. 'RIGHTS OF PEOPLES' OR CULTURAL RIGHTS

In Mexico, as in other Latin American countries, the issue of poverty cannot be simply reduced to cultural factors, and yet unfortunately the discussion about cultural diversity has weighed much more heavily in the national agenda than the one about poverty itself. Further on I will attempt to establish the importance of economic and social rights as stated by the UDHR. However, it is worthwhile to start by considering the position of those who defend cultural rights. When we speak of positions that attack human rights for their 'individualist' character and for overlooking cultural diversity, it is important to make an initial differentiation. There are some countries where great cultural diversity exists, and where members of minority cultures have reached an economic and political level comparable to those of the majority. This is the case, for example, of the Catalans in Spain or the Quebecois in Canada. In other countries, however, we find minority communities whose customs and usages are very different from those of the majority, and who, at the same time, occupy a very low socioeconomic position relative to the majority culture. This often makes it difficult for these minority groups to make their presence felt in the political life of their countries. This is the case in Mexico and many other Latin American countries with considerable indigenous populations. It is important to make this distinction because, as we shall see further on, if the cultural objection to human rights can be made in the case of relatively wealthy and politically integrated communities, it is indefensible in the case of poor and politically alienated cultural groups. It is the latter case that characterizes the predicament of many indigenous communities in Latin America, and especially in Mexico. I shall therefore begin by addressing criticism of the rights proclaimed in the UDHR that has been voiced in Mexico.

The importance of the subject of cultural rights is shown by the fact that on 10 December 1992, in a ceremony in New York marking the official start of the International Year of the World's Indigenous Peoples, Boutros Boutros-Ghali, then Secretary-General of the United Nations, declared that the protection of indigenous peoples would constitute in the future a decisive proof of the integrity and effectiveness of the UN's entire human rights system (Daes 2003: 36). Likewise, Article 7 of Convention 169 of the International Labour Organization (ILO) (1989) upholds the right of indigenous and tribal peoples to control 'to the extent possible' their own development and that of the lands they traditionally occupy or exploit. Articles 5 and 8 of the Convention recognize the right of indigenous peoples to maintain their own legal systems and institutions, and Articles 13–19 deal with rights and traditions regarding lands. Articles 4 and 6 stipulate that governments must seek to obtain the consent of indigenous peoples before taking any measure that might affect them directly or that could give them preferential treatment relative to other citizens. Articles 2 and 3 provide for indigenous peoples to enjoy, to the extent that they choose, the same rights and privileges as other citizens (Daes 2003: 40). That means their individual rights.

This section of my chapter will offer, as an exemplary case, the discussion that has taken place in Mexico on the rights of peoples, a controversy that burst into

the political agenda following the uprising of the Zapatista National Liberation Army (Ejército Zapatista de Liberación Nacional: EZLN) in 1994.[173] The armed movement presented itself as a champion of the country's indigenous peoples as a whole, and especially those living in the state of Chiapas. The uprising not only brought about an increased awareness of the situation; it also set off a legal debate that led to changes in the Constitution involving the incorporation of certain cultural rights that had previously been limited by guarantees of individual rights.[174] Before that, negotiation tables were established between members of the EZLN and members of the Senate. Notwithstanding the fact that, as I mentioned before, certain cultural rights were incorporated into the Constitution, members of the EZLN considered those provisions insufficient for the needs of indigenous peoples. The rejection of the provisions for cultural rights in the Constitution served as a pretext for five communities, named Los Caracoles, to proclaim their autonomy from the Mexican state in July 2003. The discussion about whether to allow the existence of autonomous communities in Mexico, and under what conditions, continues until today (Marcos 2003). This seems to have fulfilled the predictions of some multicultural theorists, such as Kymlicka, who observed that: 'Since the end of the Cold War, ethnocultural conflicts have become the most common source of political violence in the world, and they show no sign of abating' (Kymlicka 1996: 1).

For the purpose of this chapter, I take the World Bank's definition of indigenous peoples as 'any group having its own identity within the nation in which it lives', as well as the following four features:

1. Customs, beliefs, forms of social organization and other elements that confer on them a cultural identity that gives them cohesion as human groups and sets them apart from the rest of the population.
2. An indigenous mother tongue, different from the national language.
3. The lands and territories which they inhabit have a special meaning for them.
4. Traditional economic, political, social and cultural institutions conserved wholly or in part. (World Bank 1997)

If we take as our starting point this conception of an indigenous people then, according to international law and the United Nations Charter, 'all historical communities that fulfil the four requirements indicated shall have the right to self-determination, and not only existing nation-states'.[175] But granting self-

173. This armed movement appeared on the day following the coming into force of the North American Free Trade Agreement (NAFTA) signed by the governments of the United States, Canada and Mexico. It was interesting to discover that while Mexico had pretensions to being a 'modern' nation, this self-conception was challenged by the existence of indigenous groups living in a state of subsistence poverty.

174. Article 2 of the Constitución Política de los Estados Unidos Mexicanos.

175. This Declaration (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations) was drawn up in the form of an authorized construal of the United Nations Charter, and not as

determination to such groups may come at the expense of an intolerable sacrifice of basic social and economic human rights.

Defenders of the rights of peoples claim that the notion of human rights is peculiar to the context of the nation state and to an individualist conception of citizenship. One of the aims of such states has been to establish homogeneous conditions for all citizens, and they have thus overlooked the differences of particular cultural groups living within their territory. As a result, a diversity of groups has been subjected to the legislation of nation states, ignoring the fact that many communities, especially indigenous communities, govern themselves by what are often called 'customs and usages' that are distinct from the national laws. Likewise, in Mexico, social programmes have been implemented from the centre by the federal government, ignoring the particular social norms and cultural conditions of such groups. Educational syllabi, for instance, have been mainly written in Spanish, thus ignoring the languages, the history and the past of indigenous peoples.[176] For instance, in Mexico, Villoro has seen the need to:

> acknowledge indigenous peoples in the general Constitution. The State must promote, as a constitutional guarantee, the acknowledgment of the right to *free determination* of the indigenous people – by which should be understood the descendants of populations that inhabited the country in times of the Conquest and Colonization and in times of the establishment of the actual State frontiers, and who, regardless of their juridical situation, conserve their own social, economic, cultural and political institutions, or at least part of them. The awareness of their *indigenous identity* must be considered a fundamental criterion for determining the groups to which the dispositions for indigenous peoples will be applied. (Villoro 1995: 258, italics added)

Villoro's use of the 'free determination' and 'cultural identity' concepts implies that the Constitution of the United Mexican States, by acknowledging the rights of indigenous peoples, allows indigenous communities not to be bound by the individual rights and guarantees established by the Constitution. Those who defend the rights of peoples argue that the nation state regards its citizens as homogenous, despite the fact that in certain communities the term 'human rights' is not even meaningful, because their members think exclusively in terms of the rules that apply to the community as a whole. For example, members of some indigenous communities, such as the Huicholes or the Tojolabales,[177] identify themselves more strongly as members of these specific communities than as Mexican citizens. Therefore it is argued that the Constitution should commit to guaranteeing the

a modification of it. I take this note from the editors of Daes (2003: 89).

176. It is well worth stressing that in Mexico an increasing effort has been made to provide a bilingual education and to modify the obligatory texts distributed by the Public Education Ministry. This has been a considerable challenge for the Mexican educational authorities, since at present there are 62 recognized ethnic groups, each with their respective languages.

177. Indigenous communities living in Mexico in the states of Jalisco and Chiapas, respectively.

rights of peoples, since these are in some cases more meaningful for indigenous communities.

Now, without wishing to disregard the importance of this subject, it is my contention that proponents of the concept of the rights of peoples must take into account the human rights that are set out in the UDHR, since many of the problems faced by indigenous communities are a consequence of their poverty, and not of their happening to belong to a particular people or ethnic group. Despite the incorporation of recognition of indigenous peoples into the Mexican Constitution, in Mexico 1.5 million members of indigenous communities continue to live in extreme poverty. I would therefore like to suggest that the solution to the problem of the indigenous communities cannot possibly be reached through a denial of the value of economic and social rights but, on the contrary, requires that such rights be guaranteed. The state of neglect suffered by these peoples is due to their lack of economic resources and reflects the lack of concern with which they have been regarded by the authorities of their respective states. This was clearly raised by Guillermo Morales Hernández, the Chairman of the Indigenous Council of Oaxaca, in a speech directed at President Vicente Fox on 9 August 2002, during the celebration of the International Day of the World's Indigenous People. The statement included the following claim: 'We do not wish to cease being indigenous people. What we do want is not to continue to be poor.'[178]

Stavenhagen, Special Rapporteur on the situation of human rights and basic liberties of indigenous people at the Office of the High Commission on Human Rights in Mexico to the UN, has denounced the following violations of the rights of members of the indigenous communities:

> They have not only been marginalized; they have also been threatened constantly by paramilitary groups. They have been subjected to trial in Spanish without being allowed the assistance of interpreters, and this has led to their being imprisoned at times without even being aware of the offense of which they stand accused. They have been despoiled of their lands, and their properties, and their rights to possession thereof have not been recognized. … As regards the agrarian question, one can observe a systematic default in the administration and imparting of justice and procrastination in procedures to resolve conflicts… (Stavenhagen 2003)

As this statement points out, the members of indigenous communities have had their cultural rights flagrantly violated, which is why the EZLN movement is still very powerful.

Nevertheless, while it is important to know that indigenous people face peculiar problems, as I pointed out earlier, poverty is a problem that concerns not only them; we must remember that 16.5 million non-indigenous persons live on

178. Speech broadcast on the television news programme *Noticiero con Joaquín López Dóriga* (Televisa, Channel 2) 9 August 2002.

less than a dollar a day in Mexico. That is why we need to focus our attention on universal human rights, particularly as they concern basic social and economic rights, in order to propose public policies to attend the basic universal needs of all persons regardless of their complex gender, cultural or religious situation.

The thesis I wish to defend is that poverty is a universal problem, because it applies to all human beings regardless of their cultural group. The privation suffered by individuals in extreme poverty cannot be reduced to their cultural conditions. Extreme poverty affects people regardless of their cultural affiliation. Extreme poverty has criteria that are universal and objectively identifiable. There is no reason to assume that basic social rights and economic rights must come at the expense of rights of peoples. In fact, it can be argued that it is only through the protection of basic rights that cultural groups can preserve their identity. Therefore, the cultural argument against individual human rights fails. Cultural considerations should certainly be taken into account in order to meet the demands of basic human rights in particular contexts in the most effective manner, but they are not relevant for the purpose of stipulating what such needs are. For example, the amount of calories a person needs to consume every day is determined by factors of a universal nature; what may change is the form in which we consume them. The same happens with education: children must receive education, but it can be done in Spanish or in the native language or both. When cultural rights are incorporated into national constitutions, as is the case in Mexico, it must always be done within the limits determined by individual rights.

In regards to arguments that criticize human rights for being too individualistic, it must be asserted that the negation of such rights may contribute to an increase in levels of poverty. Irrespective of their cultural situation, when people are denied basic economic and social rights, their human right to a decent and respectable life is violated. Furthermore, people living in extreme poverty lack the ability to fulfil their cultural lives, making the protection of basic universal human rights a necessary condition for the meaningful protection of cultural rights. In Mexico, a large number of people, both indigenous and non-indigenous, live in a state of extreme poverty, which is why I deem it necessary to defend the economic and social articles that the UDHR establishes. Compliance with these basic human rights would guarantee that the battle against poverty is fought for each and every one of the country's citizens.

7.3. MINIMALIST ACCOUNT OF RIGHTS

Another source of criticism of economic and social rights comes from those thinkers who defend a minimalist account of human rights, which holds that economic and social rights have no legal force because they do not generate specific corresponding duties for specific actors.

In philosophical, political and legal literature we often meet with the point of view that the only human rights that really deserve to be called rights are 'negative' or 'minimal' rights. This conception of rights is based on the thesis that all human

rights are negative rights in the sense that all the duties they entail are negative duties. If we take this to mean that rights are only negative and can only create negative duties of 'not to do something' (not to kill somebody, for instance), then it follows that any reference to rights that correspond to positive duties (such as helping others not to starve) is simply an inappropriate use of the concept of a right. We thus end up confusing non-rights claims, good intentions, political convenience, or manifestos with what really counts as rights.

For example, if a national constitution states that all citizens have the right to enjoy the protection of their health, what is really being said is that 'it would be a good thing if it were so'. It is indeed a fact that in many countries where such a right is deemed to exist, the state lacks the necessary resources for it to be satisfied. Such is the case of Mexico. The only rights that the state can undertake to satisfy with a binding force are those that protect the political and civil rights of citizens. The same negative conception of rights seems to be reflected in the Universal Declaration of Human Rights, where, according to some, binding force can only be imputed to certain articles such as Article 2, which prohibits racial and other forms of discrimination. The negative rights of freedom from discrimination can be contrasted with the rights enshrined in Article 25, which states: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care.' The defenders of a minimalist conception of rights think that this article of the Universal Declaration of Human Rights is nothing more than a bundle of good intentions.

Defenders of the minimalist point of view believe that whereas the 'valid claims or demands' of people who work *must* be satisfied by means of payment in some form that will enable individuals to obtain the goods and services they need, people who are unemployed *may* enjoy the benefit of charitable, philanthropic or altruistic acts. A state *may* promote such actions by means of appropriate tax deductions. Nonetheless, as even minimalists would agree, we *are* violating a right when we *fail to* protect individuals against aggression by agents of the state or other persons, or when we *fail to* permit them to express their political or religious opinions. The same ought to be true in the case of our *failing to* take counter-measures to avoid a situation in which individuals live, for example, in a state of poverty, malnutrition and illiteracy.

This line of thought leads us to question the reasons why it is not possible to establish the relation between economic and social rights and negative duties. For example, if a country has sufficient resources to give all its members minimal health care, it is not clear why economic and social rights cannot be considered to have corresponding negative duties to prevent its citizens from suffering easily preventable ills or dying easily preventable deaths. It therefore seems that for the rights proclaimed in Article 25 of the UDHR to have a direct correlation with negative duties, we need to arrange our political and economic institutions in such a way that non-compliance can be seen as a violation of those rights; and they can be seen as such particularly because failure to comply gives rise, for a large part of the population, to a state of insecurity and incapacity to fully exercise their

citizenship. To view rights in this way implies the acceptance of negative duties 'not to' allow people to live in a state of poverty, illiteracy or malnutrition. This enables us to regard economic and social rights as rights in the full sense of the word. We must thus design our redistributive economic and political systems so that everybody has the satisfaction of these rights guaranteed.

I will now address three prominent minimalist critiques of social and economic rights. First, minimalists claim that social and economic rights are not justiciable. Against this we may say that is the case only when positive rights are not clearly defined. Indeed, they require specification and interpretation, just like rights to speech and assembly. But as long as we have a clear definition of social and economic rights (such as a defined minimum income, for example), we should be able to draw a clear line.

Second, minimalists claim that positive social and economic rights create duties that perhaps cannot be met: some very poor countries cannot meet the burden of even a minimum provision of social and economic rights to their citizens. But in any reasonable account of human rights, their correlative duties should have an 'insofar-as-possible' rider attached, since 'ought' implies 'can'. In any case, a proposed human right is not defeated by the fact that it cannot be fully realized now. Moreover, since we are discussing universal human rights, there is an obligation on all people to make sure they are met. This could be done today at very little cost to the wealthy world, so long as the standard of human rights is set to prohibit only extreme or severe poverty.

Third, minimalists claim that negative rights correspond only to duties not to cause some form of harm, and therefore social and economic conditions are not the proper focus of rights. However, a strong argument has been advanced by Pogge, who points out that international institutions actually do cause a great deal of the world's poverty. Therefore, Pogge argues, as a derivative of our negative duty not to cause harm, we have a positive obligation (entailed by the negative duty) to change those harmful institutions and to compensate the victims of those institutions. Pogge's argument is indeed negative, though. It is not that we have a duty to help people, but that we have a duty *not* to cause them harm through unjust institutions (Pogge 2002: 64). Note that this argument is made in negative terms in order to demonstrate, against those who hold the minimalist position, that the negative right not to be harmed implies a positive duty of a certain kind. This formulation circumvents the problems associated with the argument that positive rights are also sources of duties.

Pogge does not go far enough, for his negative argument does not require us to prevent all extreme poverty, but only the extreme poverty that we are somehow responsible for. We also need a positive argument stating that human rights are deserved by people simply because they are human beings, because those rights are necessary in order to fulfil the notion of personhood. Its fulfilment requires both negative and positive rights. Personhood means that people are moral beings who are characterized by their autonomy and who deserve respect. Therefore, people have a human right not to live in the sort of extreme poverty that prevents them from being autonomous and have self-respect. As I will show further on,

people have a human right to have their basic needs met. That is why, so long as we are able to, all people have a duty to work towards ensuring that all other people have a minimum level of well-being. Thus the arguments that some countries are not capable of meeting this minimum level, or that we are responsible only for alleviating the extreme poverty that we have caused, ignore the universal duties that a human right implies.[179]

While I have defended the individual nature of human rights against those who would deny their universal character, it seems to me that there are two different bases for upholding these rights at the personal level. The first consists of regarding rights as elements enabling us to establish a position in conflict situations: if someone denies me the possibility to obtain a job on account of my race, gender or religion, I can state that my human rights as established by the UDHR have been violated. The second basis lies in seeing them as guarantees that we obtain as a consequence of belonging to a community. If we see them in this way we can postulate that rights are a means of guaranteeing what we need to be active and participating members of society. If certain members of a society lack a standard of living adequate for their own and their families' health and well-being – including food, clothing, housing and medical care – the state and the community are not fulfilling their negative duties towards their citizens. Furthermore, if problems of health and illiteracy exist in a community, its members will be unable to act as an integral part of it, and this can also be viewed as a form of discrimination. Rights conceived in this way are not seen merely negatively as limits protecting individual members of the community against harm or against possible actions of the state, but as positive conditions making it possible to relate to our fellow human beings in an egalitarian manner.

This raises the question of whether a state may violate human rights through action only, or also through omission. Judgment regarding political acts of omission is a complicated philosophical problem – among other things, because of the difficulty of determining when a series of events is due to an action or an omission, that of distinguishing between the point of view of the agent and that of the moral critic, and the impossibility of our feeling responsible for all our omissions.

Despite the considerable philosophical reflection required to arrive at a sound theory of action and omission, the thesis can at least be upheld that it is possible to violate a human right by omission. It is easy to condemn, for example, the violation of the right of all persons to exercise the freedom of religion: a state violates by action this right when it persecutes certain religious practices or when it allows the members of one religion to persecute those of another. In the same way, it is possible to argue that the state commits the same kind of fault when, by omission, it allows people to live in poverty and marginalization, since such people are, in a similar way, deprived of their right to exercise another kind of freedom.

179. I am indebted to Thomas Pogge and Mike Ravvin for suggesting these ideas.

Of course, talking about economic and social rights, as we saw, always begs the question of the state's capacity to satisfy them. Obviously the fulfilment of social and economic rights depends in many cases on the economic resources available to a country. The ability of a state to fulfil a right such as the protection of health will depend on the health-service infrastructure that a particular state has developed. For example, as I have already mentioned, Article 4 of the Mexican Constitution establishes that 'every person has the right to the protection of his or her health';[180] however, in a recent study on health in Mexico carried out by the Organisation for Economic Co-operation and Development (OECD), serious problems were detected that effectively prevent the fulfilment of Article 25 of the UDHR (*Enfoque* 2005: 10). Nevertheless, most of these problems have to do with the excessive and avoidable expenditure in the administration of the health services, with labour and employment problems and, particularly, with the lack of an adequate taxation system that would allow the state to have greater resources to spend on health care.

Governments have the obligation to respect the rights of individuals and not to violate them, whether by action or by omission. Citizens, on the other hand, have the obligation to cooperate so that everybody has access to the services stipulated in Article 25 of the UDHR. I wish to insist that, in the example mentioned above, the right to health protection should be seen as something that is assured to all by virtue of their membership in the community. And it is also important to remember that when the economic resources available to a country are insufficient, this often is due to unjust policies by other countries or to unjust global institutional arrangements.

Thus global institutions and individual states fail to fulfil their obligations when they do not provide, for example, security against violence, and the same applies regarding the protection of health. In Mexico, 50 million people do not have access to adequate health care because they are not right holders[181] in any health system and thus have to pay for health care out of their own pockets (OECD 2005: 27). This results in one of the so-called vicious circles of poverty. Those who are not guaranteed protection of their health have to spend their own money to acquire it, and by so doing increase their level of poverty. It should be evident that it is impossible to guarantee human rights in a situation of extreme poverty and unsatisfied basic needs.

180. Constitución Política de los Estados Unidos Mexicanos: 11.
181. 'Right holder' means only those individuals who, on account of their work situation, are enrolled with one of the two major public health institutions: IMSS and ISSSTE. Other options do exist, however, such as the Health Ministry public clinics. Although one of the goals of the Mexican Government has been to provide full health care coverage for the entire population, this has still not been achieved.

7.4. THE MAXIMALIST ACCOUNT OF RIGHTS

The basic ideas of the maximalist account of rights are reflected in Articles 25 and 28 of the UDHR, as well as the Millennium Objectives. The ideas underlying this account are firstly that all individuals have basic human rights, and, secondly, that it is institutions, both national and international, that have the obligation to satisfy these rights. To my mind, the concept at the basis of the idea of rights is that of the respect that all human beings deserve. As I shall later show, a necessary consequence of non-compliance with economic and social rights is the existence of a large number of people whose basic needs are not satisfied, and therefore who are denied the respect that they deserve.

7.4.1. Rights and Respect

In order to explain the concept of respect I shall set off from an idea proposed by Rawls. When speaking of primary goods as units of distribution that a theory of justice ought to take into consideration, he refers to the social bases of self-respect. Rawls says:

> The social bases of self-respect are those aspects of basic institutions that are normally essential if citizens are to have a lively sense of their own worth as moral persons and to be able to realize their highest-order interests and advance their ends with self-confidence. (Rawls 1999: 366)
>
> We may define self-respect (or self-esteem) as having two aspects. First of all [...] it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is in one's power, to fulfill one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavors. (Rawls 1971: 92)

It is worth noting that philosophers who concern themselves with matters involving the idea of a just world have emphasized the ethical aspect of poverty. According to this point of view, as I said before, poverty has an economic character but also an ethical dimension. The lack of goods and services necessary to satisfy basic needs condemns individuals to a level of subsistence that prevents them from making the choices necessary to construct their own life plans and to put them into effect. This places them at the mercy of the forces of nature and the will of other individuals. When addressing the problem of people who live in a state of poverty and marginalization, we need to be aware of the direct relation between the economic and the moral aspects of these situations.

As I have already mentioned, for individuals to be regarded as agents worthy of respect, it is necessary for them first to acquire the capacity to overcome the dangers presented by natural contingencies. In Mexico, particularly in some rural environments, there are areas of settlement where there is an extreme shortage of water. People who live in these areas may spend as much as seven hours a day in search of water. On the other hand, a large number of men and women depend for their nutritional, health and educational needs exclusively on the social programmes provided by the state. This total dependency prevents them from exercising their autonomy and choosing goals even in the short term. Situations like those I have just mentioned deny individuals the respect they deserve, and lead them to be regarded as mere quantifiable objects for measuring the degree of success or failure of social policies, as numbers serving to announce political achievements but rarely as human beings deserving respect.

For this reason, any theory or practice that aims to combat poverty must have the idea of respect for individuals in mind. Any social policy that fails to take into account the moral dimension of poverty runs the risk of failure. The struggle against poverty must seek to increase individuals' income and improve their well-being by providing them with the tools to pursue their own ends. Material welfare and well-being have instrumental value to the fulfilment of higher order rights: the right to autonomy and self-respect. This idea of the respect that individuals deserve has been advocated by Beitz, who states that '[a]n important motive of egalitarian social thought has been concern about the debilitating effects of material deprivation on self-respect and the capacity for self-direction. In part this concern has derived from an ideal of society as a community of equals; but in part it also reflects a non-comparative conception of the minimum conditions of a decent human life…' (Beitz 2001: 117). Poverty is an offence against the dignity of persons, irrespective of race, gender and nationality, and prevents them from being treated with respect. This calls for the inclusion of the prevention of poverty among the conditions necessary for compliance with Article 1 of the UDHR, which states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood' (UDHR 2006).

7.4.2. Rights and Basic Needs

The right to a standard of living adequate for one's own and one's family's health and well-being, including food, clothing, housing and medical care, is intimately related to the notion of basic needs. If, as we have already seen, over 1,200 million people live below the World Bank's $1/day poverty line, this means that we live in a world in which the basic needs of an enormous number of people are unsatisfied.

What makes a need basic is the fact that failure to satisfy it causes harm in a double sense. It causes physiological harm, in Daniels' terms, to individuals seen as typical, normal members of a species (Daniels 2001: 26). Such harm is related

to medical attention, nutrition and decent accommodation. However, there is also damage done to individuals as moral beings (as contrasted with the merely biological damage). Thus the failure to satisfy basic needs is also intimately related to the incapacity to make choices and to manifest preferences. As I mentioned above, dependence on the forces of nature or on social programmes, which in turn depend on the whims of the politicians who hold power, considerably reduces the possibility for people to acquire the social bases of self-respect.

It also seems necessary to mention that the relation between rights – as they are stipulated in Article 25 of the UDHR – and needs is twofold. On the one hand, those people whose basic needs are not covered can only with great difficulty take advantage of the benefits that their rights guarantee them. On the other hand, if such rights are not satisfied, these men and women will find that the non-satisfaction of their needs increases, and they may thus suffer harm that cannot be repaired. For example, in Mexico, a person who lives in a rural environment is regarded as having the right to protection of health satisfied if there is a hospital near to where he or she lives. 'Near' is defined as within two kilometres by rural roads, five kilometres by state highway, or ten kilometres by federal highway. It is obvious that in the case of serious health emergencies, the distance patients have to travel can, in some circumstances, be excessive. Thus the more serious the emergency the less possibility there is of satisfying their right to the protection of health. Besides, the rural areas only have clinics that provide a basic level of medical care;[182] they cannot, therefore, attend to cases involving very severe illness. For this reason, in reference to the obstetric problems facing women, the following is a typical report: 'In the poorest zones of Mexico, the clinics that provide a basic level of attention are very far from the women they are supposed to serve and, as a consequence, in an obstetric emergency patients often die on the way to hospital from avoidable complications' (Torres Ruiz 2006). This example demonstrates once again the vicious circle of poverty: those who are in most urgent need of medical services, despite the constitutional guarantee, may find their access to them blocked – it is not easy to travel two kilometres of rural tracks, for instance, in the Lacandon Rainforest. Likewise, those who do make it to medical services find that the inadequate conditions of the clinics, and their inability to pay out of their own pockets, mean that they cannot be attended to adequately and that their state of insecurity and likelihood of suffering harm are heightened.

Let us remember that a state and its citizens that permit the existence of people whose basic needs are unsatisfied together form a society that fails to comply with its obligations and is exercising a form of coercion upon many of its members by denying them the possibility of choice. On the other hand, the existence of a social programme may cause people to remain trapped in their situation of extreme poverty out of fear of losing their benefits. Thus societies fail

182. The first-level clinics focus on the promotion of individual, family and community health; on prevention and the ambulatory treatment of the most common illnesses. They lack specialized services.

to respect individuals and subject them to a situation of continuous humiliation. One way of preventing situations like these lies in the capacity of individuals and civil society organizations to sue and punish the state when this happens. It is therefore necessary for the legislative and judicial branches of the state to examine the adequacy and monitor the application of social programmes. Likewise, citizens must understand that they have obligations toward the most vulnerable sectors of the population. It would also be a good thing if international institutions like the World Bank, the Inter-American Development Bank, the OECD and UNICEF, for example, could exercise some kind of sanction against countries that tolerate the existence of individuals living in a situation of extreme poverty.

7.5. THINKING ABOUT POSSIBLE SOLUTIONS

As I have already mentioned, in spite of the stipulation of social and economic rights, poverty has increased worldwide, particularly in the developing countries. In order to struggle against this tendency it is necessary to propose solutions. We need to improve our policies in order to achieve the satisfaction of social and economic rights for all human beings.

First it is necessary to show that human rights as a concept are able to resist criticism from those who reject their homogeneous and universal character. We must not forget that respect for rights constitutes, on the one hand, a necessary condition for cultural life, and, on the other, a limit upon certain practices when they are harmful to individuals. It would be useful, however, to discuss the possible relations between individual and cultural rights. For example, in some indigenous communities, for the right to education to be made a practical reality, bilingual teaching is required.

Secondly, as part of our strategy, we must demonstrate the importance of the defence of minimalist rights. Unfortunately, in many places of Latin America, violence has increased. A culture of minimalist rights is necessary if our institutions are to be taken seriously. Theoretical discussions on the rights to protection from the state and other citizens will doubtless help victims to know what actions legal institutions may and may not perform. For example, as we have already seen, in certain indigenous communities these rights are being violated by permitting a situation in which people are put on trial in Spanish without providing them with the assistance of an interpreter, and this has caused many to be sent to prison without their even being fully aware of what they were accused of. Likewise men and women who live in a state of poverty face considerable difficulties to file accusations when a crime is committed against them.

Thirdly, we cannot fail to insist on our institutions taking seriously the contents of Article 25 of the UDHR. The defence of economic and social rights must aim at two goals: to reduce poverty and to combat inequality. It is not difficult to show how these circumstances humiliate people and prevent them from being able to imagine the possibility of living a decent life and of being respected. The right to an acceptable standard of living is an ethical imperative.

Another matter is the need to monitor the programmes for combating poverty that emanate directly from central governments and that are applied to all those who find themselves in a situation of poverty. Their results need to be evaluated both at the national and international levels. This obligation falls upon public and private institutions and upon citizens. The programmes for combating poverty must be accompanied by educational efforts regarding the culture of human rights, in order to make the concept of human rights known to people with few resources and to enable them to effectively demand their fulfilment.

Aside from central government programmes, a special interest must be placed in those initiatives that strengthen relations among communities and municipalities, federal states or provinces and the central government. In countries where extreme poverty exists, two kinds of social programmes are needed. There must be policies aimed at assistance as well as policies designed to offer people ways to begin productive activities. The former are indispensable to enable people to escape from situations of extreme poverty; the latter are necessary to help those who are in a disadvantageous situation to be incorporated in the productive process. It is essential to reduce the inequality that exists between different parts of a country since, in Mexico for instance, there are enormous differences between the resources generated and received in the states of the north and those of the south. In order to improve the conditions of people who live in a state of poverty, both the OECD and the World Bank have insisted that countries where high levels of inequality exist, particularly in Latin America, must make structural corrections to their fiscal systems since the shortcomings of these increase the vicious circle of inequality (Perry et al. 2006).

It is a fact, however, that we live in a globalized world; domestic economies depend to a large extent on international policies. In 2004 the World Bank drew up a document on poverty in Mexico, and in 2005 the OECD published a critical study of the country's policies on health care. While the former document recognizes a certain degree of success in some programmes designed to fight poverty, it concludes that a considerable amount must still be done in order to comply with the Millennium Development Goals. Thus international organizations have the obligation to monitor whether resources are being utilized in the best way possible; this may help to prevent waste, and help, among other things, to fight corruption. On the other hand, local institutions have the obligation to negotiate with international organizations to ensure that international agreements do not affect the exercise of their sovereignty or their ability to meet citizens' needs.

Finally, I should like to add that, in order to achieve the satisfaction of the human rights stated in Article 25 of the UDHR, it is necessary that *all* people should have their basic needs satisfied, irrespective of the communities to which they belong. We must therefore continue to defend the universal character of human rights. Likewise, social programmes of various kinds must be set up at both national and international levels, so as to enable men and women to choose those that are most suitable to their particular life plans. It is also necessary for social policies to be governed by laws and not to depend on the whims of the administration that happens to be in power at a particular time. In the area of social development,

a secure legal framework makes it possible to identify when a violation is being committed, who is to be sanctioned for non-compliance, and the nature of the penalty incurred. It must be possible therefore to impute responsibility. If we take rights to be part of our lives in the community, responsibility falls on all its members.

We must not cease to struggle, in theory and practice, until the right of all people to a standard of living adequate for the health and well-being of themselves and their families, including food, clothing, housing and medical care, is satisfied. Unfortunately there are still many countries in which Articles 25 and 28 of the Universal Declaration of Human Rights are constantly violated. We must find a way to fight this intolerable situation.

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Part III

Human Rights and the Law

8

Why Constitutional Law is Where Socioeconomic Rights Belong

Frank I. Michelman

Both in morals and in law, rights are warrants for demands. To attribute to someone a right to *X* – where *X* is an act or state of affairs falling under a certain description – is to imbue that person with a warrant of some kind, moral or legal, for demanding *X*. By my understanding, the expression 'socioeconomic rights' connotes demands for a certain class of social outcomes – roughly, that the right holders should at no time lack the means of access to levels deemed adequate of subsistence, housing, health and health care, education, and safety, or to the means of providing the same (say through available, remunerated work) for themselves and their dependents. These are demands, then, that some agent or agents, in whose power it supposedly lies to produce the targeted outcomes, shall so conduct themselves that the targets are met. Socioeconomic rights thus do not start out as rights to any specific class of acts or forbearances on the part of the correlatively obligated agents, but rather as rights to *some* line of conduct on the agents' part by which the demanded result will be produced. They are rights in the nature of guarantees.

Never mind how many questions I have just begged. The inquiry to follow evades most of them – an important exception being, as we shall see, the question of who are the agents bearing the duties correlative to socioeconomic rights.

8.1. TWO CLAIMS

I aim in this chapter to establish two claims; or it might be better to say to sketch out arguments leading to the claims, because I do not here undertake to defend every possibly controversial philosophical or jurisprudential proposition I lay down along the way. I want rather to chart the path of an argument or a line of thought.[183] The first claim is that the most compelling political–moral case for giving legal force to socioeconomic rights – say, by including socioeconomic

183. I have drawn from several prior works of mine, where more extensive discussions of some points may be found (see Michelman 2003*a*; 2003*b*; 2003*d*; 2004; 2006*a*; 2006*b*).

guarantees in a constitutional bill of rights – has nothing to say about moral rights and obligations as they might arise in conditions of no-law or 'state-of-nature'. In this respect, as I shall explain, socioeconomic rights appear to differ from legal rights protecting against assault, theft, and the like. Debates over the morally proper scope of such garden-variety legal rights typically reach back to pre-legal, 'background' rights and obligations as the source of a demand upon law-makers to do the correspondingly right thing (see Green 2001; Dworkin 1977: 93). The best political–moral case for installing socioeconomic rights in a country's laws does not proceed in that way. It rather starts from the fact that law exists in the country. It makes that fact a premise in the argument, thus bypassing speculation about moral duties to aid under pre-legal conditions.

One might think here of Dworkin's well-known model of 'background' (moral) rights as a motivating source for 'institutional' (legal) rights (Dworkin 1977: 93). In Dworkin's terms, I can be read as posing the possibility that a class of background moral obligations – here it would be obligations on law-makers respecting socioeconomic rights – might depend for its existence on a prior fact of legal ordering in that country and not arise at all in pre-legal 'nature'. As will appear, though, I do not mean to carry my suggestion so far. I aim only to show that *the best political argument* in support of a background obligation upon law-makers to establish socioeconomic rights in a country's law is one that circumvents the question of moral duties to aid in pre-legal conditions.

My second claim grows out of the first. It is that the moral and political case for legal recognition of socioeconomic rights goes best when the focus is on what is morally required of *constitutional* law, as opposed to 'ordinary' law (or we may as well say statute law, because in no country that I know of do judges find in the common law much in the way of socioeconomic rights). The political (including the moral) case for installing socioeconomic guarantees into constitutional law is markedly plainer, I shall suggest, than the case for any concrete legislative programme catering for basic needs can ever be.

I must immediately make clear that it does not follow, and I do not mean, that advocates of legal socioeconomic rights are therefore always well-advised to focus their efforts first on constitutional revision, in countries such as the United States where the entrenched view is that no such rights are to be found in extant constitutional law.[184] There are sundry, obvious reasons why a sought-for alteration in a country's constitutional law may be harder to obtain, at any given moment, than a corresponding piece of ordinary legislation. The claim I shall defend below is that *the affirmative argument for* inscribing socioeconomic rights in a country's constitutional law is always clearer than that in support of any given statutory proposal in that field (granting that the institutional and political–cultural obstacles to constitutional–legal revision may greatly exceed those in the way of ordinary legislation). Thus the lesson for advocates may be not that they should

184. See *Deshaney v. Winnebago County Dept. of Social Services*, 2004, 489 U.S. 189 (1989); *Town of Castle Rock v. Gonzales*, 545 U.S. 748.

focus their efforts on constitutional revision or amendment, but that they should frame their arguments to ordinary legislators in terms of what constitutional law would provide were it fully adequate to the burden we mean for it to carry in our country's life and affairs.

Even as thus qualified, the second claim may strike readers as blatantly counter-intuitive, a point over which it is worth pausing for a moment before turning to fuller explanation and defence of the two claims.

Every proposal for legislative enactment of a government programme catering for socioeconomic needs meets some level of good faith, reasoned objection. Some fraction of the legislature and citizenry – 'libertarians,' to wit – will find all such enactments to be morally wrongful incursions on general rights of liberty and property.[185] Any concrete proposal will draw, in addition, pragmatic objections from some who are sympathetic to its humanitarian aims: it will fail to achieve those aims, such objections may run, and so will be wasteful and diversionary; or indeed it will make matters worse by what the objectors take to be widely accepted measures; or even if it will improve the situation somewhat, it will do so at excessive cost in other values that a different and no less efficacious measure would avoid.

With regard to any given legislative proposal, the sum of the moral and pragmatic objections will attain some level of cogency and weight, be that level what it may: call it x_p. This factor, x_p, is the measure of a politically perceptible ex ante detriment or 'cost' – a risk or probability of a cost – attaching to the proposal. It is a proxy for good-faith political resistance that the proposal will have to overcome in order to secure legislative enactment. Suppose we could identify a super-astute legislative package for the complete fulfilment of socioeconomic rights (however we define and delimit such rights), for which this measure would be at its lowest possible level. Call this minimum attainable quantum of good-faith resistance $min(x_p)$.

Embedding in a country's constitutional law an obligation to fulfil socio-economic rights by legislation is tantamount to imposing a constant, relentless demand of law that at least this level of honest objection – $min(x_p)$ – give way or be overridden. But proposals for constitutionalization are bound to draw certain further objections that are specific to the constitutionalization of rights (and that are often thought to apply with especial force to socioeconomic rights): that the democratic will is thereby wrongly thwarted or curbed and that the judicial branch of government is thereby drawn into affairs beyond its ken or its institutional capacity for governance.[186] These objections, too, have some level of perceived cogency and weight, call it y. Since $y > 0$, then $(min(x_p) + y) > min(x_p)$. Objections to constitutionalization come on top of the minimum possible quantum of good-faith resistance to any concrete legislative package catering for basic needs. Thus it

185. See, e.g. D. Kelley, *Is There a Right to Health Care?*, available on line at http://www.objectivistcenter.org/ct-14-Is_There_Right_Health_Care.aspx.

186. For a lucid account of these objections by a writer who supports the moral case for constitutionalized socioeconomic rights, see Sager (2004).

would seem that the case for constitutionalization of socioeconomic rights must be harder to make than the case for at least some instances of socioeconomic legislation sans constitutional requirement. My second claim says the reverse is true.

8.2. DEFENCE OF THE FIRST CLAIM

We turn now to discussion of my first claim: that the clearest political–moral case for setting up guarantees of socioeconomic rights in a country's laws grows out of the fact that law exists in that country; it does not stem directly from morality as it might be in conditions of no-law or 'state-of-nature'.

Suppose it is somewhere declared that 'everyone has the right to have access to adequate housing.'[187] Assume for now that the declaration's terms contain the answers to every questionable case, so that the declaration specifies completely the scope of the right whose existence it posits. (What if I have no house but am offered materials sufficient for building one? What if I have neither but a job is available that would pay me enough to be able to afford an adequate house along with coverage of my other basic needs? What if we – a married couple with two young children – cannot get a house of our own but my aunt has a house with room enough for us? We assume the proposition's terms contain clear answers to all such questions.)

The declaration might posit the existence of either a moral right or a legal right. If it posits a legal right, then most probably it intends a *constitutional*–legal right, an imposition by constitutional law-makers on ordinary law-makers of a continuing legal obligation to see to the actual, effective implementation of the right. We easily understand the distinction between moral and legal rights. Moral rights refer to demands that hold regardless of what any law may have to say. Legal rights refer to demands warranted by positive law – demands whose non-fulfilment will thus presumably attract at least the condemnatory judgments of legal officials and also, in what we may regard as the normal case, will beget some sort of remedial intervention by a court of law. Thus there can perfectly possibly be a moral right to housing but no legal right to it – in which case the law may seem to be at least prima facie morally deficient. Conversely, there can be a legal right, even a constitutional–legal right, to housing but no moral right to it (independent of any general moral duty there may be to comply with the law) – in which case the law establishing the legal right is either morally faulty (as some libertarians would have it) or morally optional. At any rate, either sort of right can be found to exist or not without any finding or implication that the other sort exists or not.

That is all at the analytical level of probing for the right's 'existence', in morals or in law. On a prescriptive level, the separation seems not to be so clean and the

187. Compare the Constitution of South Africa, 1996, s 26 (1).

two sorts of rights-propositions seem no longer to stand on an equal footing. True, the existence or non-existence of a legal right to housing is commonly thought to tell us nothing about whether a moral right to housing lies in the background. (The law, we commonly think, can be morally off-base.) But the converse does not hold, for it seems that to posit a moral right to housing is tantamount to declaring that there ought to be a legal right to housing, at least presumptively to the point where weighty justification is required for the absence of the legal right. Recognition of the moral right's existence implies a prima facie justified demand for the right's installation in law, but there is no converse inference from the existence of the legal right to a justified demand for the moral right's recognition. (The very fact that some particular constitutional law-makers have seen fit to establish the right in constitutional law might figure for some as probative testimony to the moral right's existence – why would they do it otherwise? – but that would be controversial and anyway is a different question.) Thus, on the prescriptive level, the moral right dominates or leads the constitutional–legal right; the moral right comes first and the legal right follows.

Such is the intuitive common view, and it suffuses advocacy on behalf of the constitutional–legal establishment of socioeconomic rights. For how, in fact, do we advocate for such establishment or defend the idea against criticism? We start, and feel we must start, by making the moral case for socioeconomic assurances.[188] If the moral case fails, we feel, the case for constitutional–legal establishment fails a fortiori, because there are those widely conceded special institutional worries – of justiciability, over-extension of the judiciary, and alleged undue encroachment on democratic self-government – that attend upon the recognition of a constitutional–legal right to housing (say) that simply do not pertain to recognition of a moral right to housing. The moral right can provide a platform for public complaint against a sitting government's failure to fulfil it, without raising the institutional worries attendant upon a constitutional–legal right.

I think this view is basically correct. It hews to an important sense in which the priority of morality to law stands beyond any possible doubt – that being the same as the sense in which law but not morality is a politically decidable matter. The existence or not of a constitutional–legal right to this or that is a question for some law-making process to resolve; if the process answers no, then no it is.[189] Moral rights, by contrast, are what they are regardless of what any person, body, or political process may say or do about them. No constitutional or other law-making process can decree away a moral right that otherwise would exist.

Is that correct? No doubt moral rights can be *contingent on* political choices – indeed, I shall be showing how a moral right to socioeconomic assurances might be thought contingent on a prior political choice for legal ordering – but my point is they are not *decidable by* political choices. Any moral right against infringement of a registered, proprietary patent must be contingent on prior legislative enactment

188. I offer myself as example. See Michelman (2003*d*: 22–25).
189. See, e.g., Dworkin (1996: 36) (denying that American constitutional law as it stands contains socioeconomic guarantees while 'wishing' for moral reasons that it did).

of a proprietary patent registration system. Regardless of whatever background moral obligation there might be to enact such a system into law, it is plain that without the actuality of such an enactment, there can be no registered patents and hence no rights against infringements of them. A right to legislation of a patent system is one thing, a right against infringement of a patent is another thing, and it would be a bad mistake to get the two confused in practice – say by holding someone guilty of patent-infringement where no system of patent registration exists. Once given the enactment of such a system, however, the possible attachment to patents registered under it of a general, background moral duty to respect property rights is no longer a matter of political choice or decision. Law-makers cannot control the moral consequences of the legislative choices they make (except, of course, by modifying those choices). Accordingly, there can be no possible inference from the existence (or non-existence) of a legal right to the justification (or lack of it) for recognizing any moral right, although the converse inference – from recognition of the moral right to (lack of) justification for (the absence of) the legal right – remains entirely possible if not always totally compelling or conclusive. Moral rights are in that way prior to legal rights.

I raise here no question about that way of thinking. What I do wish to put to rest is any thought that the moral issues surrounding socioeconomic rights are prior to law in the sense that the moral issues would or could exist in the form they do were certain legal–institutional facts not also on the table. I want to show that indeed, in this instance, law precedes morality in the sense that in the absence of law – of legal ordering, of a legal system – the moral case for socioeconomic assurances would be greatly weakened, if it would not collapse altogether. The best political–moral case for establishing socioeconomic rights in the law is immediately anchored, I mean to say, not in some morality-prior-to-law but in what we might call, with a bow to Lon Fuller, the morality *of law* (Fuller 1972). It is anchored in the fact of legal ordering in our societies, and our wholehearted, not to say desperate, embrace of that fact.

Application of the line of thought I have in mind is not necessarily limited to socioeconomic rights; it may be extended also to so-called first-generation or garden-variety legal rights. It is, however, not nearly so crucial to the defence of the latter as of the former. Noticing the difference is a good way to get my argument rolling.

Take a first-generation right, the existence and extent of which, as a legal right, is currently contested in various countries: a right to be secure in one's home and other off-public sites against electronic and photographic snooping.[190] We have no trouble conceiving how this might exist as a moral right (I have not said that it *does* thus exist, which is a different question) without existing as a legal right. The case then would simply be that everyone stands under a correlative moral duty to refrain from spying on others in their homes, although violations beget

190. See, e.g., *von Hannover v. Germany* (European Court of Human Rights, Application no. 59320/00, decided 24 June 2004), available on line at http://www.worldlii.org/eu/cases/ECHR/2004/294.html.

no legal–institutional response. We might then judge the law to be morally out of whack, but the law's default would be no impeachment of the moral standard by which we judged it faulty.

Nor, accordingly, would the total absence of a legal system be any impeachment of the existence of moral rights *tout court*, or of the personal moral duties correlative to them. In the absence of a legal system, everyone might stand under a moral duty to collaborate actively in the establishment of a morally suitable one – Kant (1797) thinks so – but failure in the prosecution of any such morally mandated joint venture would not release anyone from whatever personal moral duty there may be not to spy on others in their homes. (Compare the effect of absence of a patent registration law on personal duties not to infringe patents.) People can have homes in the absence of a legal system, just as they can have bodies (but not patents). Moral rights against unprovoked physical assault do not lapse in the notional absence of a legal system, nor do the moral duties correlative to such rights, and neither would the duties correlative to moral rights (if there are such moral rights) against being spied on in one's home. As a general proposition, the existence of a legal system seems not to be a condition precedent to the existence of moral duties correlative to those moral rights that correspond to garden-variety legal rights – or, hence, to the existence of those moral rights.

Does the same hold for rights to housing or other socioeconomic rights? There is good reason to conclude that it does not. A key question here is where – upon what agent or agent class – we place the duties correlative to such rights. To say that everyone has a moral right to have access to housing is to say that some agent or class of agents stands under obligation to see that everyone does have it. Now it would be extremely morally contentious to attribute that obligation to any or every individual person. It is one thing to debate whether you or I stand under a moral duty to take in overnight in sub-zero weather the homeless person who fetches up at our doorstep. It is a very different and hugely more contentious thing to suggest that you or I stand under a moral duty to sell everything we have, and mortgage everything we may ever have, in order to give to the poor.

Fried has shown convincingly this difference in contentiousness (Fried 1978: 118–31). Fried has not, however, as some libertarians do, gone on to conclude that there can be no moral right to housing, nor any individual moral duties pertaining to such a right. What is required for the existence of such a moral right is an agent who can morally be held bound by the correlative duty. Such an agent is in sight wherever there is a state and a government, capable of imposing a fair and workable distribution of the burdens connected to fulfilment of the right.[191] To attribute such moral duties to governments may also be – let us say that it is – to attribute certain moral duties to individual citizens of states: duties, say, to support and actively to seek the creation of tax-supported government programmes for ensuring the availability of housing to everyone, not to mention to pay the taxes unresistingly.

191. Note that to speak in this way of burdens and fair distributions is not to endorse the idea of a property right in pre-tax earnings or wealth, of the sort skewered by Murphy and Nagel (2002).

But then we see that the morally less contentious duties and duty-bound agents incident to a right to housing are all creatures of law: the state, its citizens, its programmes, taxes, taxpayers – all of them creatures of law, inconceivable in law's absence. If so, then to speak of a moral right to housing where there is no law, no legal system, is an order of magnitude more contentious – if indeed it makes sense at all – than to speak of a moral right to be secure against assault or spying where there is no law.

I want to be careful here. If we are disposed to affirm (as I soon shall) the existence, wherever there is legal ordering, of duties to support socioeconomic guarantees, and if we also are disposed to accept (as I do) Kant's (1797) claim of the existence at all times of moral duties on everyone to support and sustain systems of legal ordering, then we cannot call excessively contentious the claim that there exists in pre-legal 'nature' a background moral duty respecting socioeconomic guarantees. For we then would be conceding the existence in 'nature' of a moral duty to do a thing (collaborate in establishing and sustaining a legal order), the doing of which would trigger in relatively non-contentious form moral duties respecting socioeconomic guarantees. It nevertheless remains true that the less contentious moral case for legal socioeconomic rights depends on legal ordering in a way that the moral case for garden-variety legal rights is not usually thought to do. Just as no right against patent infringement can arise so long as the putative moral duty to enact a patent system into law remains unperformed, so the relatively non-contentious moral case for the legal establishment of socioeconomic rights takes wing only if and where the moral duty to maintain a legal system is actually performed.

That is one way in which the actual or notional absence of a legal system seriously complicates the moral case for socioeconomic rights: if no law, then no government to which comfortably to attribute the duties correlative to such rights. This may not matter much in practice because of the ubiquity of legal systems and governments in all of the precincts of planet Earth where economic reality allows a right to housing to get beyond the pipe-dream stage. But there is a further sense in which the moral case for legal socioeconomic rights would be gravely hampered by bracketing the fact of legal ordering out of the picture, which is that the plainest argument for the establishment in law of socioeconomic rights would then be lost to us. That argument, to be sketched out below, is that the coercion attendant upon legal ordering cannot be morally justified in an order that does not expressly recognize such rights and give them standing in the law. If we expunge from the total picture the existence of systems of legal ordering and our anxiety to justify their existence, we lose touch with that argument.

So here is the point: invoking only general humanitarian grounds, it has proven very hard to mount a widely convincing political argument that you or I should be held individually *obligated* for, say, emergency aid to distant strangers whose needs we have not actively and culpably caused. By adducing the fact of social cooperation in the form of legal ordering, and the very widely and strongly felt attachment to it, we turn up a plain reason – a *moral* reason, as I soon shall explain – for including socioeconomic guarantees in our country's constitutional law, to

which most people will grant great force. (Two caveats are in order. First, I intend no denial of the true existence of moral duties to aid in pre-legal 'nature'. Rather, my claim goes to the comparative demonstrability in public reason [to adopt the Rawlsian expression] of a moral obligation to create legal socioeconomic rights, with and without a fact of legal ordering already in the picture. Second, I leave unaddressed the question whether facts-on-the-ground of social cooperation, not amounting to legal ordering in the fullest sense, might support an argument along the lines I am about to sketch. There can be no doubt that the argument emerges most plainly and compellingly from the case of full-fledged legal ordering.)

Having thus far exposed the argument, I expect that readers will anticipate how it unfolds, so I shall not belabour it at length. Here is a summary version.

What is the justification for empowering majorities by their votes to coerce others by force of law? The question is of utmost importance to citizens in constitutional–democratic countries, most of whom would agree on brief reflection that the vital interests of everyone hinge on ensuring compliance by everyone with approximately all the laws that the judges in that country treat as validly in force (perhaps leaving room for contained occasions of civil disobedience and conscientious refusal) (see Rawls 1971: 363–91). Without society's known and proven readiness to step in as needed to insist on such compliance, regardless of how much it hurts (of course good laws can build in excuses and exemptions for exceptional and excessive hurts), and regardless of clashing views of the moral and other merits – and vices – of various specific rules and rulings of law, a country's practice of government by law, by which those vital interests are secured, could not reasonably be expected to hold together.

Thus do most inhabitants of constitutional–democratic countries deeply believe. They believe – they take for granted – that legal ordering, or call it government by law, is morally obligatory for them and for others, so crucial is this condition to everyone's chances for a morally and otherwise decent life. Government by law prevails to the extent that inhabitants of a country are predominantly disposed (a) to conform their conduct to rules and principles pronounced to be law there by some distinct class or classes of officials, (b) to organize their activities with a view to compatibility with such official pronouncements, and (c) to support, or at least to accept, the use of social pressure and, where necessary, force to secure compliance in general with such pronouncements. Government by law, most of us feel certain, carries with it incalculable benefits to everyone, achievable in no other way: call them social peace and cooperation, call them civic friendship and community, call them justice. Abraham Lincoln called them 'union'. Rawls, quoting Mill, connects them to 'the very groundwork of our existence' (Rawls 2001: 189). I have no doubt that almost every reader will concur.

The taken-for-granted supposition, to be clear, is that a governmental and legal order – at any rate any form of such an order that we remotely would regard as falling within the outermost bounds of decency – makes available to everyone involved those mentioned, inestimable goods of union when the baseline for comparison is a world without government by law. It is not that our extant legal order is free of non-trivial deficiencies of justice, morality, and plain pragmatic

good sense. And the problem, then, is this: law is at bottom a practice of social cooperation. Its persistence depends on – consists in – the persistence in society of general compliance with the laws and legal interpretations that issue from the practice.

We believe that such compliance cannot rightly be demanded, and cannot be expected to persist among humankind, unless persons in general have their own good reasons to comply with law as such, which they can have only as long as others by and large are doing so. We believe we therefore must provide for everyone a warranted expectation that everyone else will more-or-less abide by *all* the laws that issue from the specific regime of legal government that currently is established in the country, not picking and choosing for themselves which ones they will respect and which they will not. (We call that the rule of law, and place enormous stock in it.) We believe, finally, that such a warranted expectation depends on visible and credible guarantees of institutional backup using force if needed. Rawls (1971: 240) calls this 'Hobbes's thesis'. (Rawls also has called the *Leviathan* 'surely the greatest work of political philosophy in English' [Rawls 2001: 1].) And why would force ever be needed? Because, for one reason, we know that we cannot demonstrate publicly that all of the concrete laws that political majorities enact, and the applications thereof whose coercive effectuation we help to sponsor, are congenial to everyone's interests or otherwise unobjectionable on grounds of morality or policy. Indeed most of us honestly doubt (to put it mildly) that all of them are or ever possibly could be.

All this will be admitted, I believe, by most citizens of constitutional democracies. They will accordingly share the view not only that it must be possible to justify morally one's collaboration in the coercive enforcement of this or that legal rule or ruling, but that it must be possible to do so on some ground other than the publicly demonstrable justice and rightness of that concrete law or its compatibility with the interests of everyone. But then in what other attribute of that rule or ruling could the needed justification be found, if not in its demonstrable rightness on the merits?

An answer that will immediately ring true for many readers is: the law's constitutionality. The law in question having issued duly from a *system for law-making* – a 'constitution' – that everyone accepts or has reason to accept (or so we stand ready to maintain), and having so far escaped conviction of substantive unconstitutionality by those authorized to issue such convictions, every as-it-were party to the constitutional deal has a sufficient ground for demanding compliance by every as-it-were co-party, no further questions asked.

Assume for now that such is *your* answer. I concede that it might not be – it is not exactly my own answer (Michelman 2003*b*) – but I expect that yours, like mine, will be close enough to it to let the assumption ride for a while. We shall reconsider it just before finishing. I assume until further notice that you understand your country's constitution to consist of a special body of mandates that are binding as law on ordinary law-makers. You understand these mandates to cover both (a) 'the general structure of government and the political process: the powers of the legislature, executive and the judiciary [and] the scope of

majority rule,' and (b) 'equal basic rights and liberties of citizenship that legislative majorities are to respect' (Rawls 1993). And you justify demands for compliance with concrete laws and legal rulings by saying that the constitutional system from which they issue is one that everyone has prevailing reasons of his or her own to accept and abide by.

You thus would be relying for political and legal justification on appeals to constitutionality, as if the constitution were a contract binding on everyone. Of course no one thinks the constitution *is* a contract. No one pretends that everyone we wish to regard as bound in this way by the constitution would really agree – much less has really agreed – to all of its material terms. Agreement in this case is not only hypothetical but counterfactual. Hypothetical or counterfactual agreement sometimes may suffice in law to establish a 'quasi' contract (meaning *not* a contract, but with consequences somewhat resembling those of a contract), but certainly not a contract.[192] Somewhat comparably, political justification in constitutional democracies appeals to constitutions, which plainly are not contracts, as if they were.

Rawls offers a philosophical version of the constitution-as-contract conception. Philosophical trappings aside, my suggestion is that Rawls's version registers well the everyday, tacit beliefs of citizens at large in constitutional democracies.

The challenge, says Rawls, is to supply a moral warrant for the application of collective force in support of laws produced by non-consensual means, against individual members of a population of presumptively free and equal persons. For countries under democratic rule, this means explaining how 'citizens [may] by their vote properly exercise their coercive political power over one another.' It means explaining how your or my exercises of our shares of political power may be rendered 'justifiable to others as free and equal' (Rawls 1993: 217). Rawls offers in response what he calls the 'liberal principle of legitimacy':

> Our . . . political power is . . . justifiable [to others as free and equal] . . . when it is exercised in accordance with a constitution the essentials of which all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. (Rawls 1993: 217)

That exemplifies perfectly what we may call a constitutional–contractarian approach to political justification. In Rawls's formulation, political coercion is justified when it is exercised in support of laws issuing from a constitutional regime – prescribing, remember, both a structure of government and also rights that the government is to respect – on condition that the regime is one that all may

192. I am here eliding the law's struggle with the conceptual gap between agreement and outward signification of agreement, and with the parallel practical question of how to treat cases in which one party is judged to have good enough reason to attribute agreement to the other party, when the other did not really agree.

be expected to endorse, assuming everyone to be not only rationally self-interested but also 'reasonable'.

'Reasonable' here means three things. First, a reasonable person accepts the moral and prudential inevitability of positive legal ordering. He/she does not pretend we somehow are going to get along without law-makers making laws that have to bind everyone regardless of who in particular likes or approves each law and who does not. Second, a reasonable person accepts the fact of deep and enduring conflicts of interests and ethical visions within his/her society – what Rawls calls the 'fact of reasonable pluralism' (Rawls 1993: 36–37). Third, a reasonable person is imbued with the Jeffersonian spirit (let us so name it) of mutual recognition by persons of each other as individually free and equal. It results that a reasonable person stands ready to accept the run of concrete laws and legal rulings as long as (a) he/she sees everyone else generally supporting and complying with these laws and rulings, and (b) he/she sees how these laws are ones that merit joint acceptance by members of a competently reasoning group of persons, all of whom desire, and suppose each other all to desire, to devise and abide by laws reflecting fair terms of social cooperation in conditions of deep and enduring conflicts of interests and reasonable disagreement over questions of the good (Rawls 1993: xliv, xlvi, 226–27; Rawls 1999: 573, 576–79, 581, 605–06).

But wait a minute. No matter how reasonable we ask each other to be, surely none of us really expects that every discrete act of law-making could pass a test of rational acceptability to every supposedly reasonable inhabitant of a modern, plural society. Realistically, the hope is more modest, and more procedural. It is that an aptly designed *general system or regime* for law-making – or call it a constitution – might be able to pass such a test. Maybe we can imagine some such regime, about which we would be prepared to say that *it* ought to be found acceptable, as a regime, by every rational person who also is reasonable. If so, then we might further maintain that the rational acceptability to you, as reasonable, of the constitutional regime commits you to acceptance of whatever specific laws may issue from the regime (Freeman 1992). That, after all, is exactly the point of Rawls's claim, in his 'liberal principle of legitimacy', that exercises of political coercion are justifiable insofar as they issue from '*a constitution*, the essentials of which all citizens may be expected to endorse' (Rawls 1993).

In effect, we have arrived at the idea of a *sufficient, legitimating constitutional agreement*. Four terms compose this idea, as follows:

1. First, what is supposed to be 'legitimated' (in the sense of justified morally) by this agreement is some specific practice of *positive legal ordering* – of the coercive exercise of collective power, through law-making, by and among citizens considered as individually free and equal.
2. Second, what is supposed to have the desired legitimating effect is *agreement* by each person affected. Not, however, actual agreement but hypothetical (what some would call 'counterfactual') agreement – the 'acceptability' of the political practice among persons affected by it, envisioning those persons not only as rational but also as reasonable.

3. Third, the legitimating hypothetical agreement is a *constitutional* agreement. We do not apply the universal–reasonable acceptability test to each and every specific law that crops up in a country's politics. We rather apply it to the country's system for law-making, its 'constitution'.
4. Lastly, then, 'sufficiency'. In order to meet the test of rational acceptability to every reasonable person, a law-making system has to include a principle or guarantee affecting every topic for which a rational person, responding reasonably, would demand a guarantee as a condition of willing support for the system as a whole. The set must be extensive enough to compose a system for political decision-making, about which every affected, supposedly reasonable person rationally can say: *'A system measuring up to these principles and terms – all of them – is sufficiently regardful of my and everyone's interests and status as free and equal persons that I ought in all reason to support it and its legislative products, provided everyone else does.'*

The constitutional–contractarian case for inclusion of socioeconomic guarantees in a country's constitution is now plain and compelling. The nub of it is that we cannot reasonably call on everyone to submit their fates to the tender mercies of a democratic–majoritarian law-making system, without also committing the system to run itself in ways designed to constitute and sustain every person as a competent contributor to political exchange and contestation, and furthermore to social and economic life at large. It is on that basis that Rawls finally concluded that 'a social minimum providing for the basic needs of all citizens' is a 'constitutional essential' (Rawls 2001: 47–48; Rawls 1993: 166, 236–37). Others would reject a social minimum in favour of a constitutional commitment to policies and measures ensuring adequately remunerative, decent work for everyone capable of working (Forbath 2001: 1821–92). But social rights guarantees of some kind, in some form, must compose an essential part of any constitutional quasi-contract capable of doing the justificatory work we count on the constitution to do.

Thus concludes the constitutional–contractarian case for constitutional–legal recognition of socioeconomic rights. That case will not sweep all before it. My suggestion is only that it builds persuasively on intuitions that reflective citizens in constitutional democracies cannot easily shunt aside, and that it addresses, more compellingly than humanitarian appeals unhinged from political–justificational pressures can do, the question of *obligation* to attend in some way to needs of sundry strangers. (I have to justify my support of the coercions of our legal system to all who fall under its sway.)

Discussion of this chapter's first main claim – that the plainest political case for a moral obligation to install socioeconomic rights in a country's laws starts out from the fact that law exists in the country, thus bypassing speculation about moral duties to aid under pre-legal conditions – is now all but complete. What remains is the promised relaxation of my provisional assumption that the *constitutionality* of a widely controverted law is the property in that law to which we appeal for justification of coercive enforcement of it.

It is evident that by 'constitutionality' there I meant a law's consonance with a distinctly cognizable, discretely bounded corpus of 'higher' legal norms called the 'constitution' or 'constitutional law'. You might well ask (I have asked it myself) what need political justification really has for this notion of a discrete body of constitutional law, binding ordinary law-makers as a contract binds the parties to it (Michelman 2003*b*; 2003*c*: 609–11). Yes, we have a moral need to justify to the recalcitrant our demands for their approximately full compliance with all the laws, noble or tawdry as the case may be, that issue from the governmental and legal practice now in operation in our country. And yes, we must therefore make a showing that the totality of that practice measures up to certain obligations of provision for everyone's basic needs. But why would it not suffice just to point out that legislation now in force does measure up (if it does), never mind what any binding higher law pretends to require in that regard?

The answer comes in three steps. The first is that we cannot count on current performance always and incontestably measuring up. (Does it right now in your country, would you say?) The second is that a credible expression of commitment to keep at it as best we are able can perhaps satisfy the justificatory need even so. (What alternative arrangement then could provide better hope of fulfilling the linked moral demands for legal ordering and for assurance to all of the means of access to fulfilment of basic needs?) And the third is that such an expression of commitment is required for political justification, even where current legislative performance does concededly measure up. (Occurrence of an act that would satisfy a certain contract is not 'as good as' having the contract. My having greeted you civilly in the street every day for the past month is not the same as an obligation I owe you never to insult or demean you. Charity is not insurance, nor does it give rise to it.) Credible expression of commitment to socioeconomic assurances thus is key to political justification.

None of this – if you buy all of it – yet settles that the manifestation of commitment has to go in a legal 'constitution' or a cognizably discrete body of constitutional law; it might, after all, go elsewhere. But whoever says 'elsewhere' has the burden of explaining where elsewhere might be. Constitutional law undoubtedly is *one* place where the requisite expression of commitment might go, and it is furthermore a place that seems natural and fitting for such a commitment, in a constitutional–democratic political culture. Is there some other place to put it that will not turn out to be constitutional law in all but name? Pending someone's explanation of where that might be, I have to say I doubt it. I shall say a bit more about this just at the end.

8.3. DEFENCE OF THE SECOND CLAIM

We are carried, at long last, to this chapter's second main claim. That claim, you will recall, is that the moral and political case for legal recognition of socioeconomic rights goes best when the focus is on what is morally required of constitutional law, as opposed to ordinary legislation. I have just finished outlining the moral

case for inclusion of socioeconomic assurances in constitutional law. With that case accepted, the defence of the second claim is simple. It is that the moral case for assurances at the constitutional level is stronger than the whole political case can ever be for concrete social legislation aimed at fulfilling them, because the case for constitutional assurances is impervious to cogent pragmatic objections that inevitably will bedevil any and every concrete proposal for legislative implementation.

I hear your groan of protest. It is grotesque, you say, for me to suggest that the case is stronger for socioeconomic assurances at the constitutional level than for any instance of implementing legislation at the statutory level, giving as my reason that the constitutional assurances will not ever be satisfiable by legislation not open to cogent or at least reasonable pragmatic objection. For, you say, if that reason is true (and is it not?), then the case for constitutional-level assurances has not been boosted; it has rather been destroyed! And now crashing down around our heads comes the standard package of objections to constitutionalization of socioeconomic rights: that it leads to the ruination of the constitution, or of constitutionalism, or of law, or of democracy, or of all of the above.

There are three separable kinds of objections in this package, and it pays to sort them out. The package contains concerns about curbing democracy unduly, about overextending the judiciary, and about debasement of the rule of law. The three types of concerns link up, but they are distinct.

Curbs on democracy first. Suppose you think that a constitution's list of guaranteed rights is also its demarcation of the respective zones of supremacy of the judicial and other branches of government. In other words, you think that constitutional rights are for courts and always for courts to apply or put into action. Every proclamation of a constitutional right thus invites the judiciary to add some further sphere or spheres of public decision-making to the ones in which it already feels licensed to take a sometimes heavy hand. If that is how you see matters, you very well may think that to constitutionalize socioeconomic rights is to turn over to an unelected judiciary a share of control over policy-making that is far too extensive to be tolerable in a democracy (Sager 2004).

Of course we do not have to accept the view that a norm cannot be constitutional law, cannot count as constitutional law, without its being turned over to judges for enforcement. Many indeed are primed to deny that constitutional law enforced by judges has to be all the constitutional law there is or that matters. We maintain that constitutional law outside the courts can figure importantly in the conduct of public affairs. We insist that contention outside the courts over constitutional–legal meanings and obligations very possibly can be a politically cogent activity, a site for democracy in action (Tushnet 1999; West 2006; Michelman 2003*d*: 18–21). Is there any reason why we who take this view should hesitate on democracy's behalf to constitutionalize socioeconomic rights? It seems we can do so while telling courts to get lost when such matters are in contention, thus at no cost in suppression of democracy. Is that not so?

Why is it? Supposing that courts will abstain totally from trying to enforce constitutionalized socioeconomic rights, there are two possibilities. The legislature

will respond as if bound by an obligation of law-abidingness that reaches this part of constitutional law, or it will not. If it will not, then what would be the point of writing the socioeconomic guarantees into the constitution? What would be the point of naming something a constitutional right that we do not mean, and expect to be treated as binding, by public officials presumed conscientious? But if, then, we do suppose that our legislature really will act as if bound by the constitution's clauses on socioeconomic rights, would not the inclusion of such clauses impose serious curbs on its policy-making discretion and that of the current democratic majorities whose will it supposedly carries out?

Grant that it would impose some curbs. Would those curbs be democracy-defeating? Might they better be regarded as democracy-enhancing? It depends, in part, on exactly what you mean by 'democracy,' a large topic on which we cannot here embark (see, for discussion, Michelman 2006*a*: 137–41). Suffice it for now to say this: given the irreducible uncertainty, contestability, and contingency on changing conditions of choices in the field of socioeconomic policy, and given a decent respect for democratic rule, it seems inevitable that any constitutionalized socioeconomic guarantee will be a relatively abstract guarantee. Witness, for example, South Africa's cautious commitment to 'reasonable legislative measures'[193] in pursuit of everyone's right of 'access to adequate housing'.[194] Such a constitutional declaration leaves just about every major issue of public policy still to be decided. Its maximum, but maybe not trivial, effect on democratic decision-making (the courts being kept away) would be a certain pressure on the frame of mind in which citizens and their elected representatives would approach those questions. In Rawlsian language, the act of inscribing socioeconomic rights in a country's constitutional law gives a certain inflection to that country's political public reason. Across a very broad swathe of public issues, the inscription generates a demand of law – a demand on the law-abiding – that those issues be approached as occasions for exercises of *judgment* (which choices are in keeping with a commitment to ensure access for everyone to adequate housing?), rather than as invitations to press and to vote one's own naked interests and preferences.

Of course, to call these matters of judgment is to see that they are matters on which opinions can and will differ markedly, reasonably, and sincerely, and very probably not independently of people's particular social situations and related interests. (In today's United States, factory workers doubtless will tend on average to see some of them differently than bond traders will, young mothers differently from senior corporate personnel managers, and so on.) But what harm to democracy lies there? Why should not disagreements over constitutional–interpretive judgment make as good a seed-bed for democracy, or better, than do raw conflicts of interest and preference?

Out of the frying pan, into the fire? Have we not just now been fanning the flames of concern about overextension of the judiciary? What if Parliament decides

193. Constitution of South Africa, 1996, s 26(2).
194. Constitution of South Africa, 1996, s 26(1).

that a jobs policy is the fastest way to get from here to there, or the best way in view of other equally morally mandatory constitutional commitments (some of them welfarist, some libertarian)? What if Parliament opts outright for a Thatcherite, tough-love strategy? It might be good faith, it might not, but how is a court of law judges to tell, or to establish the slightest credibility for its judgment, if that departs from the government's? Does South Africa's cautious use of a 'reasonable measures' standard really help? Is that a 'justiciable' standard? Have law courts got at their competent disposals modes of intervention – legal 'remedies' – that have much hope of making a difference for the better? And if law courts are, for any or all of these reasons, to be kept *hors de combat* when it comes to socioeconomic claims – here comes the concern about debasement of the rule of law – then is the expression of these claims as constitutional *law* anything more than political theatre? And fraudulent theatre at that, an inducement of political cooperation or docility by a shadow of contract without the substance? A dangerous dilution, then, of the coinage of legality and of constitutionalism?

All those are real problems, hotly and widely debated. The debates contain increasingly familiar and more-or-less plausible responses to each and every challenge. Maybe, as we have noted, law should not necessarily be held to imply judicial remediation (see Sager 2004). Maybe judicial pronouncements of a government's obligations under the law can make a difference that matters, even without firm and concrete remedial orders (see, e.g., Tushnet 2004: 1895–1919). Maybe judicially administrable remedies can sometimes be effective and benign (Sunstein 2001: ch. 10).

By no means do these responses close the door or stop the debate in its tracks. That is where the constitutional–contractarian argument leading to my first claim – that *constitutional law* is where socioeconomic guarantees have in the first place got to be lodged – is primed to do its work. The cash value of that argument is in the moral pressure it mounts for accepting, even if somewhat *dubitante*, answers that might otherwise be accounted weak to objections to constitutionalization that might otherwise be accounted strong.

Or maybe the value lies in the possibility the argument suggests of evading the objections in form while overcoming them in substance. Remember what I wrote near the beginning: 'The lesson for advocates may be not that they should focus their efforts on constitutional revision or amendment, but that they should frame their arguments to ordinary legislators in terms of what constitutional law would provide were it fully adequate to the burden we mean for it to carry in the country's life and affairs' – and now let us add, 'assuming it could be thus adequate and still fall within the bounds off what you consider to be law.'

The beauty of that formulation is the way it addresses cases of alleged absence of constitutional law. After all, if a country has no constitutional law, then constitutional law cannot be where socioeconomic rights in that country belong. We put aside here whether absence of constitutional law is a possibility in a legally ordered territory (see Michelman 2006*b*), and simply accept that legal thought in some democratic countries denies the existence of constitutional law in our sense of 'a distinctly cognizable, discretely bounded corpus of higher legal norms.'

To such bodies of legal thought we say: 'The plainest political case for a moral obligation to install socioeconomic rights in your country's law matches the constitutional–contractarian case for installing such rights into the constitutional law your country would have if it had any.'

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9

The Impact of Legal Strategies for Claiming Economic and Social Rights

Varun Gauri and Daniel Brinks

There exist several pathways through which human rights could mitigate world poverty.[195] Many are extra-legal. For instance, human rights norms, such as those embodied in the Universal Declaration of Human Rights, might directly influence developing country officials and politicians when they formulate and implement government policies on topics such as school fees, child labour, taxation, and social assistance. They might also influence governments in rich countries to increase development assistance, or to change rules that govern the cross-national flows of goods, services, capital, and people. Human rights norms have encouraged the formation and probably promoted the effectiveness of civil society organizations (CSOs), both in developing and rich countries; and CSOs have in turn both pressured governments and provided direct services to poor people. Human rights norms can change the practices of multinational firms, making them more responsive to the needs of poor people in developing countries. Indeed, some of the most interesting developments in human rights are related to the scrutiny that some multinational corporations now give to labour standards at all stages of their supply chains. Finally, human rights norms can raise the expectations of citizens regarding what they are entitled to.

There are also legal pathways through which human rights could address poverty. Applicants have used international human rights principles to argue for social entitlements or to defend themselves against state actions in international, regional, and national courts. It is in national courts that human rights norms, understood as legal principles, currently exhibit the most power to address poverty. Constitutionally-incorporated and judicially-enforced economic and social rights have, for instance, allowed poor people to claim medications that are essential for life but are not available from government facilities and are too expensive in private pharmacies. They have compelled governments to implement plans to enhance dilapidated and poorly managed schools in which textbooks and even

195. The following presents a synopsis of early findings from Gauri and Brinks (2008). Contributors to that volume, from whose work the country sections below draw, include Chidi Anselm Odinkalu (Nigeria), Bivitri Sustanti (Indonesia), Jonathan Berger (South Africa), Shylashri Shankar and Pratap Bhanu Mehta (India), and Florian Hoffmann and R.N.M. Bentes (Brazil).

teachers are often missing. They have blocked governments and landlords from evicting families who live in informal settlements, and have prevented companies from using common law employment contracts to dismiss workers engaged in collective action. Because of instances such as these, many international and national-level human rights advocates and civil society organizations support the incorporation of judicially enforceable economic and social rights into domestic law.

But is this a good idea? Not everyone thinks so. For some time in fact, many, if not most, constitutional legal theorists have been sceptical. Tushnet has noted that:

> the conventional wisdom among scholars of US constitutional law is that the Constitution – and indeed constitutions more generally – should not recognize, or be interpreted to recognize, so-called second generational social welfare rights, such as the right to shelter or to a minimum subsistence. (Tushnet 2004: 1895)

The debate on this question has been extensive. Without reviewing it in detail, it is possible to summarize the arguments in the broadest terms.[196] In one line of argument, economic and social (ES) rights are not rights at all because, unlike civil and political rights, ES rights do not refer to a single duty-holder, require actions and not restraints, or require action on the part of non-state actors. Other critics focus less on the character of the ES rights and more on their review by courts or quasi-judicial institutions (though, of course, there is overlap with the prior set of arguments concerning the nature of ES rights). These critics have argued that the judicial enforcement of economic and social rights could be enormously costly, and could involve judges in policy questions, such as pharmaceutical research, the benefits of privatization, taxation, and economic productivity, on which they have little expertise. Moreover, when judges substitute their own judgments on budgetary questions for those of a democratically elected legislature – the branch of government explicitly designed both to represent the policy preferences of citizens and to make the political deals necessary to win public support for policies – then the ensuing policy trajectories could be less legitimate and less politically sustainable. A different group of critics has worried that because judges typically represent elite and business interests, granting courts power over economic and social decision-making could only make matters worse for poor people.

Others have responded that there is little difference between civil/political and ES rights: the fulfilment of both sets of rights requires positive action in addition to forbearance and requires active support from non-state actors whose identities cannot always be specified in advance. In addition, when judges enforce

196. For a review from advocates, see Scott and Macklem (1992); for a review from the point of view of sceptics, see Dennis and Stewart (2004); for a recent assessment, see Langford (2006) and Abramovich (2005). For the philosophical debate, see Shue (1996), Pogge (2002), and Sen (2004).

civil and political rights, such as to physical security, and in rulings on prison systems, voting procedures, and law enforcement methods, their judgments lead to significant budgetary outlays. The same is true of high-stakes and often very technical judicial rulings in the areas of bankruptcy, anti-trust, and patents, all of which can have significant economic consequences. To address complex subject areas, courts have already developed a repertoire of procedures and techniques that include the use of expert witnesses and the appointment of special masters or technical organizations to oversee implementation orders. And concerns related to the separation of powers should not be considered in the abstract: the legitimacy of judicial involvement is related to the responsiveness of the other branches of government, which in many instances is demonstrably low. Finally, the point about the regressive character of courts also needs to be considered in perspective; in some instances, courts have promoted redistributive causes, and in any case this is a context-specific issue.

Alongside, and often quite apart from these theoretical debates, courts have in fact begun to enforce constitutionally incorporated economic and social rights. To begin with, more and more constitutions recognize or establish the existence of economic and social rights, particularly the more recent ones:

> A review conducted for this paper assessed constitutional rights to education and health care in 187 countries. Of the 165 countries with available written constitutions, 116 made reference to a right to education and 73 to a right to health care. Ninety-five, moreover, stipulated free education and 29 free health care for at least some population subgroups and services. (Gauri 2004: 465)

At the same time, these rights are increasingly being used to justify claims against the state and other entities; and courts and other quasi-judicial entities (such as human rights commissions) are increasingly the venues in which these claims are being made. Any number of examples could be given, but here, for illustrative purposes, are a few. (A number of other cases will be cited below.) The inclusion of social and economic rights provisions in the constitutions of Hungary and Russia, and their invocation by constitutional courts, strengthened the hand of national governments when negotiating austerity programmes with the IMF (Scheppele 2004). An NGO in Colombia filed a series of cases from 1997–2001 on the right to AIDS treatment, with the result that highly active antiretroviral treatment was extended to a broad class of individuals (Hogerzeil et al. 2006). Perhaps most famously, and discussed in more detail in Chapter 14 of this book, the *Grootboom* decision of the South African Constitutional Court in 2000, finding a right to housing on behalf of impoverished squatters, raised the hopes of housing and anti-poverty activists around the world, and changed the way that constitutional theorists approach ES rights (Sunstein 2004).

An empirical study of the politics and impact of these cases would address many of the theoretical controversies surrounding ES rights. Given the extent and range of ES rights litigation now ongoing throughout the world, it should be able

to answer questions such as these: Are courts actually becoming more involved in economic and social policy or is the 'judicialization' phenomenon (Tate and Vallinder 1995) a mirage? Are their interventions meaningful for policy-making, or just so much window dressing? If judicial interventions are becoming more important, why? Why do judicial decisions seem so frequent and prominent in some countries and in some issue areas but not in others?

Perhaps more importantly, what are the consequences of giving courts a more prominent role in economic and social policy-making? Do legal processes inevitably favour the 'haves' so that more judicial involvement will benefit those who are already better off? Do courts usurp the policy-making power of more representative branches of government?

There do exist a few comparative and empirical studies of the role of courts in supporting basic rights. Some accounts are generally optimistic about the impact of litigation on economic and social rights. A review of leading case studies (COHRE 2003), for instance, suggests that given enough resources and guided by the right legal strategies, activists can use courts to promote economic and social rights in the same way that they have used them to enhance civil and political liberties in many contexts. A prominent and generally sanguine study of the role of courts in promoting women's rights and criminal justice in the United States, Canada and India emphasizes the importance of legal resources and legal support networks in creating 'rights revolutions' (Epp 2003).

On the other hand, Hirschl argues that courts, in interpreting constitutional rights, will advance 'a predominantly neo-liberal conception of rights that reflects and promotes the ideological premises of the new "global economic order" – social atomism, anti-unionism, formal equality, and "minimal state" policies' (Hirschl 2000). In his view, placing public policy in the hands of courts is inimical to social justice and equality, redistributive policies, and more democratic majoritarian politics, a position inconsistent with a finding that courts are promoting significant extensions of economic and social rights around the world. Drawing on the United States experience, Rosenberg (1993) similarly argues that a litigation strategy for social change is not merely ineffective, but a dangerous diversion of resources from other, potentially more productive, policy-making venues. The courts, in his view, are 'flypaper' for would-be social reformers that have succumbed to the lure of litigation. The idea, implicit in Hirschl's and Rosenberg's arguments, is that the exercise of juridical rights does little to resolve, and perhaps is a distraction from, more important battles regarding social relations and raw political power, a notion with roots in Marx's analysis of civil rights in *On the Jewish Question* (1978 [1844]).

9.1. FIVE COUNTRIES

This chapter briefly compares the extent and forms of litigation on economic and social rights, and explains the reasons for variation, in five countries: Nigeria, Indonesia, South Africa, India, and Brazil. These five countries include both

common law (India, South Africa, Nigeria) and civil law countries (Brazil and Indonesia). In some countries the constitutions are relatively old (by global standards), and in others quite recent. Judicial review is abstract and centralized in Indonesia, concrete and diffuse in India and Nigeria, and a blend in Brazil and South Africa. The countries also vary in levels of national income and state capacity.

The chapter focuses on two principal rights: the rights to health and education. Health and education are almost always considered basic economic and social rights. These two policy areas also exhibit important differences, with a generally larger private sector for health care in most countries, and wider use of public sector health facilities than of state schools on the part of the middle and upper classes.

9.1.1. Nigeria

Nigeria's constitution of 1999 delineates economic and social rights but recognizes them as 'Fundamental Objectives and Directive Principles of State,' which has motivated the opinion, widely held in Nigerian courts, that economic and social rights are not justiciable. The constitution does not by itself, however, determine the extent and nature of litigation in a country because judges do not, we believe, mechanistically apply written texts to legal disputes. Judges, rather, are strategic actors because, although basing their opinions on written law, they of necessity rely on the other branches of government to execute their judgments, and craft their rulings so as not to alienate entirely politicians and government officials. The Indian constitution, for example, similarly presents economic and social rights as explicitly non-justiciable directives of state policy; but the Indian judiciary, in a series of opinions beginning in the early 1980s, nevertheless decided to enforce them, basing their doctrinal move on the idea that economic and social rights are implicit in 'the right to life,' which is enforceable. A similar move has always been available to the Nigerian courts. For instance, the African Charter on Human and Peoples' Rights is domestic law in Nigeria, and includes enforceable economic and social rights. The Nigerian Supreme Court might have used this to introduce a degree of justiciability to economic and social rights in Nigeria; it opted, instead, to use the non-justiciability of those rights under the Nigerian constitution to render inoperable those aspects of the Charter (*Chief Gani Fawehinmi v. Sani Abacha* [2000] Nig. Weekly L. Reps. [Pt. 660] 228). The Nigerian courts might also have opted to use equality provisions to begin enforcing economic and social rights, a strategy employed in other common law countries.

An examination of the case law in three Nigerian states over the past decade found no more than a few dozen cases dealing with the rights to health and education. Almost all of the education cases that reached the courts concerned university education. The Nigerian courts have supported the right to establish and maintain private schools and universities on the basis of the rights to property and free expression, but have maintained that the state can license and accredit

private educational institutions. Nigerian courts have also issued opinions that universities must grant due process rights to students before expelling them or withdrawing certifications or degrees. No challenges to the government's education policies, such as cases questioning educational financing, structure, or quality, have reached the Nigerian courts. There have been no cases demanding greater or wider provision of education services.

The majority of health care cases that have reached the Nigerian courts have involved the right to bail so as to obtain health care. Generally speaking, the Nigerian courts have ruled that detained individuals should be temporarily released or transferred so that they can obtain appropriate health care, though at least one High Court has ruled that general ill-health not characterized by a sudden attack or emergency is not sufficient to grant bail on health grounds. The African Commission on Human and Peoples' Rights found that hazardous oil field operations in the Niger Delta violated the right to health and a clean environment of the Ogoni community; but this opinion was not binding under Nigerian law (*SERAC v. Nigeria* Africa Human Rights Law Reports 60, 2001). There have been no cases challenging the extent, quality, or financing of primary or hospital-based care in Nigeria.

Overall, there have been few ES rights cases in Nigeria. In two circumscribed areas – the rights of university students against arbitrary expulsion, and the rights of prisoners to medical treatment – Nigerian courts have been willing to support petitioners.

9.1.2. Indonesia

The Indonesian constitution, essentially rewritten in a series of amendments from 1999–2002, includes economic and social rights that mirror the rights contained in the three principal international human rights treaties: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. When Indonesia's Constitutional Court was established in 2003, this opened the possibility, for the first time, of petitions for the judicial review of legislation that might violate the constitutional rights of individuals. Previously, economic and social rights cases had been premised on administrative law or the incompatibility of regulations with their enabling legislation.

A review of case law from 1995–2005 identified seven court cases related to the right to health care. Three involved medical malpractice, a kind of legal claim not typically analysed under the rubric of the right to health, but which, when enforced by courts, can have a significant effect on health care quality, and which can shade into a more typical right to health claim. This was the case in Indonesia when a two-year-old boy was paralysed after allegedly receiving poorly produced polio vaccine during an immunization drive in a rural area (*Opik v. Republic of Indonesia Government*, Civil Court, Cibadak, West Java Case Number: No.13/Pdt.G/2005/Pn.Cbd). In that case, as is common for all categories of legal

disputes in Indonesia, the plaintiff withdrew his claim and negotiated a settlement with the defendant under secret terms. In two cases, communities claimed that the central government failed to protect them from industrial pollution. In neither case did the plaintiffs succeed in obtaining a judgment against the government; but the government did issue a policy change in one of them (notably, the case in Jakarta, not the one in rural areas). In another case, a group of NGOs, including the Jakarta Legal Aid Bureau, sued the government when it failed to provide health care, sanitation, nutrition, and housing to Indonesian migrants forced to return from Malaysia. In the case, which was founded on the new constitution and the human rights law of 1999, the court ordered the government to take steps to provide relief to the returning migrants; but it refused to order the government to pass general legislation to protect migrant workers. Nevertheless, the government did pass such a law two years later.

In one education case, university students who had been suspended for protesting new fee policies at their school successfully argued that they should be reinstated. In another, a group of parents and teachers challenged a land swap deal in which a middle school would be relocated so as to accommodate new shopping areas, but lost the case. The broadest ES claims in Indonesia involved a series of three cases challenging the constitutionality of the central government budgets of 2005 and 2006 on the grounds that the budget did not allocate 20 per cent to (non-salary) educational expenditures, as required in the constitution and in the basic law organizing the education sector. The Constitutional Court agreed that the budget law was unconstitutional, but chose not to declare it null and void because of the resulting policy consequences. The central government non-salary education budget has increased in recent years despite the lack of a remedy offered by the Constitutional Court, and some portion of this increase could be attributable to legal pressure (World Bank 2007; *Jakarta Post*, 2 May 2007, 'No More Money for Education, Government Tells Court').

Three patterns emerge regarding litigation for ES rights in Indonesia. First, although in the past there have been no cases challenging the extent and financing of government obligations, such cases now seem to be emerging. Second, legal claims are often settled during the course of (and even more frequently, prior to) litigation; and claimants can receive some benefits, and occasionally even a policy change, despite not formally winning the case. Third, in some instances there appear to be conflicts between the interest of appellants who seek basic compensation, and their legal representation, such as NGOs, who seek broader policy changes.

9.1.3. South Africa

South Africa's post-apartheid constitution of 1996 explicitly includes rights to housing, health care, food and water, education, and social security. South Africa's Constitutional Court argued early on, during the certification of the new constitution, that these rights are justiciable:

> [T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [text before the Constitutional Court for certification] will give rise to similar budgetary implications without compromising their justiciability. The fact that socioeconomic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socioeconomic rights can be negatively protected from improper invasion. (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) – 6 September 1996)

Given the predisposition of the courts to enforce economic and social rights, a broad social consensus in support of social transformation and a redress of the social inequities from previous decades, and the significant influence of the South African courts on constitutional theories in other countries, one might have expected the range and impact of South African economic and social rights cases to be more robust. A review of cases in non-specialized courts, at the level of the High Court and above, found thirty-seven economic and social rights cases dealing with health, education, water, social security, and housing since 1996. A few cases have had a significant effect on government policies, particularly those involving the failure of the government to provide antiretroviral treatment to AIDS patients in prison, to pregnant women so as to prevent the transmission of HIV to their children, and to the general population with clinical AIDS. In other cases, such as a frequently cited case involving the right to housing (*Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) – 4 October 2000) and a series of cases involving the arbitrary suspension of social grants programmes or the arbitrary exclusion of potential beneficiaries in the Eastern Cape, Limpopo province, and elsewhere, supportive judicial opinions have had mixed or little impact on government policies or even, in some cases, on the applicants themselves. In other cases, South African courts have taken the side of businesses and against applicants claiming economic and social rights. For instance, in one case in the Supreme Court of Appeal, the second most influential court in the country, a private hospital successfully argued that it was not liable for negligence on the part of a nurse it employed because of an exemption clause the patient had seen in pre-admission paperwork (*Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA) – 31 May 2002).

Two themes stand out in the South African case law on economic and social rights. First, the large majority of the cases have used economic and social rights in a defensive manner. This is particularly true of the housing rights cases, which largely focus on unlawful evictions, but also true of the social security cases, which have generally involved individuals or classes of individuals in certain provinces wrongfully excluded from some legislatively enacted programme that functions tolerably well elsewhere in the country (though not funded at high enough levels, many have argued). A theme in the education cases involves efforts to resist government orders, such as administrative actions taken to close down single

language schools. The one water rights case involved a government decision to disconnect a community from the water supply. Second, despite relatively strong constitutional language, many South African courts have exhibited substantial deference toward government. In many cases, they have avoided economic and social rights as much as possible, preferring to ground their judgments on the constitutional right to just administrative action, constitutional provisions regarding fairness and equality, and other concerns.

9.1.4. India

Starting in the early 1980s, India's Supreme Court began to take the position that economic and social rights are judicially enforceable. But perhaps as important was a significant expansion in access to the courts that occurred in the same era: the Indian courts established a category of claims, called Public Interest Litigation, in which applicants to courts need not demonstrate that they themselves have suffered harm in order to have standing; the courts lowered the standard for a writ petition, so that even letters to the court could qualify; and the Supreme Court itself began to examine social concerns on its own initiative. Some have doubted whether the legal resources have been available to trigger a 'rights revolution' in India (Epp 2003), and poverty obviously remains an enormous problem in India despite the exaggerated expectations that some have placed on courts (Hirschl 2000). Nonetheless, the Indian courts have taken a large number of cases, and resultant changes in government policy are visible in several policy areas.

A review of cases since the early 1980s found 209 cases involving the right to health and 173 involving the right to education. Cases reached courts in all regions of India, but it is noteworthy that only 14 per cent of those cases originated in the poor and so-called BIMARU states (Bihar, Madhya Pradesh, Rajasthan, Uttar Pradesh), which together account for about 40 per cent of India's population. Nationwide, applicants won 81 per cent of the cases. Major areas of litigation included reimbursement for medical expenses on the part of government employees, public health (including industrial pollution, sanitation, and potable water), HIV prevention and AIDS treatment, medical negligence, university admissions and fees, and the establishment of private schools. Indian courts are known for their sweeping judgments, and in many instances it appeared that supervision of court orders was difficult and enforcement lax. But in establishing new rules that enable patients to claim medical negligence or misconduct, help create a reliable blood bank, provoke some states to establish midday meals programmes in schools, clarify rules regarding university fees and set-asides for the so-called 'scheduled and other backward castes and tribes', and limit air and water pollution, the Indian courts have used economic and social rights to change government policies.

Two themes stand out in the Indian cases. First, most cases in India concerned government regulation of health care facilities or schools, or the relative liberties and obligations of service providers and service recipients; most did not involve

claims for government provision in areas where the government was not already acting. Second, the majority of cases concerned the interests of the lower-middle or the middle classes, not the interests of the extremely poor. There were more cases related to university than to primary education, and more cases per capita in rich than in poor states.

9.1.5. Brazil

Brazil's constitution of 1988 is a programmatic document that puts significant emphasis on social rights. It holds that education is a 'subjective' right of all persons and a duty of the state and the family (the word 'subjective' suggests that the entitlement can be claimed in courts); that all public education, basic and higher, should be provided for free; and that the federal government should spend 18 per cent of its resources on education while states and municipalities should spend 25 per cent (Schwartzmann 2003). The constitution also holds that health care is 'a right of all persons and a duty of the state,' and legislation establishing the government health care system, the Sistema Único de Saúde, similarly provides for all necessary health care services to be provided to the public without charge. Constitutional amendment 29, in September of 2000, established minimal expenditures on health, as a share of revenues, for the federal, state, and municipal governments.

Since 1996, thousands of Brazilian claimants have filed largely successful court cases involving the rights to health care and education. Most of these have been demands for medications either not regularly provided by governments or provided in theory but not available in practice. Several states, including Rio de Janeiro, São Paulo, and Rio Grande do Sul, have each witnessed thousands of court cases of this kind; but numbers of cases have been dramatically lower in some parts of Brazil, such as the more rural and poor north-east. There have also been a large number of cases invoking the right to health against private health insurance companies, arguing that a specific procedure should be reimbursable in spite of contractual language. Right to education cases at the basic and secondary levels have been far less numerous, but still number in the hundreds. Significant themes in right to education cases have been the mainstreaming of disabled children, and school repair in rural and urban areas. The large majority of court cases on the rights to health and education, over 90 per cent, have been decided in favour of the applicants. Some of the cases, particularly those related to medications, have had significant budgetary consequences. For instance, in São Paulo State, it has been estimated that expenditures related to judicially awarded medications constitute 5–10 per cent of the state health budget. These medication cases now serve as an informal feedback mechanism for the official government pharmaceutical formulary, providing information to governments when formulary revisions are being demanded.

Several patterns stand out in the Brazilian court cases related to economic and social rights. First, unlike all of the other countries, the great majority of

cases have involved claims for direct state provision of services, particularly medications. There have been other kinds of cases as well, but it is only in Brazil that the classic understanding of economic and social rights claims – demands on the state for financing and/or provision – have formed the majority of cases. Second, most of the cases have been individual cases in which claims are usually conceded. A legal institution relatively unique in its influence and autonomy, the Brazilian Ministério Público, has brought a number of the collective cases that seek to change policy. Generally speaking, courts have been far more reluctant to challenge government policies than to award medications or other social services that the government has already committed itself to providing. The highest Brazilian court, the Supremo Tribunal Federal, has explicitly stated that it will not find government programmes unconstitutional for policy omissions. But the Ministério Público, even by initiating an inquiry into a potential legal action, has been successful in spurring new policy initiatives in some states; and the relative independence of Brazilian courts has led some courts to challenge state policies more directly. Third, Brazilian courts have usually relied on a variety of constitutional provisions, particularly the right to life, as well as the existence of legislation implementing the constitutional provisions on the right to health care, when requiring the state to provide medications.

9.2. THE CAUSES AND CONSEQUENCES OF THE LEGALIZATION OF ECONOMIC AND SOCIAL RIGHTS

To analyse the conditions under which demands for economic and social rights take a legal form, and the impact of legalizing economic and social rights, it is useful to conceptualize legal strategies as a four-step process. The first of these steps is the legal mobilization of demands. That is, actors choose to take demands to courts and not (merely) to political authorities, social contacts, NGOs, family members, or some other channel. In the second step the court makes a consequential statement about this demand; often a substantive negative or positive decision, but sometimes a decision to abstain. The third step is the response by the target of the demand to the court's decision. This is often characterized as a dichotomous decision to comply or not, but it often has a more intermediate or iterative quality, in which the target must return to the court to show some progress, or to ask for further instructions. Even when the target chooses to comply, it has the option of limiting the demand to the specific litigant or of extending it to others who might be similarly situated. The fourth step, which can trigger a whole new round, is a new decision by the original litigants or by people who for one reason or another perceive themselves to be potential beneficiaries of the process, to follow up on the initial judicial statement in light of the target's response.

We view these four decisions as interdependent. They are best understood, we believe, as decisions made by strategic actors, albeit with limited capabilities and limited information about what will happen once they make their choice. The

decision at each step is the product of factors directly related to the decision at hand and to some consideration of what will happen at the next stages.

The first question to present itself involves the causes of the legalization of economic and social rights. Under what conditions do actors, individuals and groups use courts to claim economic and social rights? Some analysts have argued for the existence of a key necessary and sufficient condition, such as the availability of a legal support structure – that is, organized and well-funded legal organizations oriented to the advancement of the public interest – to explain where human rights litigation arises. We think that the answer is more complex. The level of legal mobilization – the first step and the original decision to legalize economic and social rights – is a function of demand-, supply-, and response-side variables.[197] On the demand side are the capabilities and strategic calculations of those mobilizing around a particular issue. On the supply side are the features of the legal system with which they must interact if they will press a legal claim, including the likely judicial response. On the response side are the characteristics of the targets of potential demands, including their likely level of resistance, their latent capacity, and their organizational development.

Reviewing the country experiences in light of this (very brief) account, it is apparent that in Brazil a favourable demand structure, a hospitable judiciary, and a state disposed to comply with judicial requests all contributed to the large number of economic and social rights cases documented in the country. Following the movement that precipitated the return to democracy in the late 1980s, and the mobilization surrounding HIV/AIDS policies that began around the same time, the demands for health rights are relatively well organized in Brazil (Gauri and Lieberman 2006). At the same time, the judiciary can employ legal principles clearly based in the widely accepted constitution of 1988, and the state is generally supportive of health care rights (indeed, appeals of lower court judgments are usually based not on resistance to the court order but on disputes about which entity – federal, state, or municipal government – is responsible for providing the medication in question). In India, it seems that supply-side changes, particularly looser rules on standing and a court-led effort to refocus the judiciary on issues of poverty (motivated, many argue, by remorse over the judiciary's own role in supporting Indira Gandhi's Emergency), circumvented what at the time was a relatively weak demand for judicial services and eventually led to an active docket on economic and social rights (Sathe 2002). In South Africa, mobilization on the part of AIDS activists has led to a series of important cases in that policy area; but demand-side mobilization in other policy areas has not been sufficient to overcome traditional rules of standing and a cautious judiciary. In Nigeria and Indonesia, the courts are (socially and, in the case of Indonesia, geographically) remote from poor people; and organized civil society remains incipient outside of major cities.

197. The supply and demand in this formulation refer to the supply of and demand for judicial services. The response side refers to the target of the demand, to whom a judicial order would be addressed.

What factors explain judicial support? The content of national constitutions and legislation are important, but not determinative, as the contrasting interpretations of similarly structured economic and social rights in Nigeria and India reveal. Judicial attitudes are important, as well. Probably most important are the positions of respondents to legal claims. It is practically impossible for courts to enforce judgments in the face of determined political resistance (Rosenberg 1993). With the possible exception of a few judgments in India, in no case did courts require a government to formulate and implement an entirely new social programme in an area in which none existed. Rather, even the most aggressive court decisions have tended to justify their rulings with the observation that the governments have already committed themselves to the policy directive being ordered. The observed behaviour of courts is very far from a story of anti-democratic judicial usurpation. Rather, courts have been extremely cognizant, perhaps to a fault, of the likely government, elite, and popular support for their rulings.

When do the benefits of legal strategies generalize? Legal strategies, especially when they are successful but even when they are not, can lead to legislated policy changes that benefit all similarly situated individuals, regardless of their access to legal channels of demand. A relatively small, predominantly urban NGO, such as the Treatment Action Campaign in South Africa, can trigger a nationwide change in policy regarding the free provision of antiretrovirals that benefits poor women in rural provinces. The accumulation of individual demands for the supply of particular new medications at government expense in Brazil has led to their inclusion in public health posts and their routine dispensing, even to those who do not file lawsuits. Even unsuccessful litigation, such as the case involving the Nunukan refugees in Indonesia, can pressure the government to provide services to the litigants and to all those who are in a similar situation.

Finally, when does a course of litigation promote the interests of the poor? A priori, one might have reason to believe that this happens rarely, if ever. After all, it is the rich and upper-middle classes who have access to the legal resources to initiate litigation, and one would presume that the judiciary would be most responsive to the concerns of people like themselves. There is confirmatory evidence for this proposition in the cases we study. For instance, there are more cases originating in urban than rural areas, more cases per capita in the rich than poor states of India, more cases on university than basic education, and more cases on health care (because the middle classes tend to use public health facilities) than on education (because the middle classes have typically exited the state schools). Nevertheless, there are at least three pathways by which a course of litigation can benefit poor people. First, the state can finance organizations whose objective is to promote the interests of poor people and of society as a whole, such as the Brazilian Ministério Público or certain capable NGOs in India. Second, after the middle-class patients have blazed the way in litigation, succeeding and similar cases are less costly to mount, and can fall within the budget constraints of groups of poor people. Something like this appears to have happened with the medications cases in Brazil. Third, where the middle classes and the poor have overlapping interests, as is the case with public goods, such as infectious diseases

and industrial pollution, poor people can benefit from litigation for economic and social rights.

9.3. CONCLUSION

Constitutions and courts are crucial, and in some ways even paradigmatic, means by which economic and social rights can mitigate poverty. The debate over the role of courts in promoting the 'positive' rights has occurred largely in the abstract. A number of courts in developing countries have been ruling on and enforcing economic and social rights for over a decade, and it is possible to examine that historical record to determine if the critics or supporters of the judicial enforcement of economic and social rights have been more accurate. An examination of five countries finds that alleged problems relating to judicial expertise, separation of powers, and usurpation of the other branches of government have not been significant consequences of or impediments to judicial activity. On the other hand, there appear to be grounds for the concern that the legalization of economic and social rights might not benefit the poorest and most destitute individuals, at least not initially. There appear to be conditions under which legal strategies for enforcing economic and social rights will benefit poor people, but the conditions are far from universal, and it may take time before the benefits of legalizing economic and social rights reach the people most in need of them.

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10

Inequality and the Subversion of the Rule of Law[198]

Oscar Vilhena Vieira

10.1. INTRODUCTION

How does profound and persistent social and economic inequality impact the integrity of the rule of law? The main objective of this chapter is to try to understand the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the rule of law: that people should be treated impartially by the law and by those responsible for its implementation. The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, obliterates legal impartiality, causing the *invisibility* of the extremely poor, the *demonization* of those who challenge the system, and the *immunity* of the privileged in the eyes of individuals and institutions. In summary, extreme and persistent social and economic inequality erodes reciprocity, both in the moral and the mutual advantage sense, thus impairing the integrity of the rule of law.

This paper is divided into three sections, followed by some conclusions. In Section 10.2 I will summarize a substantive and a formalist conception of the rule of law, and try to understand why this ideal has become almost unanimously embraced in our time. The challenge in Section 10.3 is to provide at least some explanation of why states and people would comply with the rule of law standards discussed in the first section. Section 10.4 will consider the impact of extreme and persistent inequality on the rule of law. In this section I will draw on my familiarity with the Brazilian experience – and this is not an entirely arbitrary choice. Although it may claim to be a reasonably modern legal system and an independent judiciary, in accordance with most of the so-called virtues of the rule

198. I would like to acknowledge Denise Dora and Leslie Bethel for all the support received from the Ford Foundation and the Centre for Brazilian Studies at Oxford University, where, as Sérgio Vieira de Mello Human Rights Fellow, 2007, I had the opportunity to write and the privilege to present and debate this paper. I am also deeply in debt to Thomas Pogge and Michael Ravvin, who made all the efforts to make this chapter more readable in English. Finally I would like to acknowledge Ary Oswldo Mattos Filho, Dean of Fundação Getúlio Vargas School of Law, for granting me the time to write this chapter.

of law, Brazil holds a mixed record in terms of compliance with the rule of law, especially in terms of how the law is implemented. One explanation for this is inequality. I hope the reference to Brazil will not jeopardize my intention to draw some more general conclusions about the relationship between the rule of law and inequality. The final section will not be pessimistic, however. The focus will be on how even an incomplete rule of law system can be employed or challenged to empower the *invisible,* humanize the *demonized*, and bring the *immune* back to the realm of law.

10.2. THE CONCEPT OF THE RULE OF LAW

The idea of the rule of law has become almost unanimously embraced in our days. It has served as an extremely powerful ideal for those who have fought authoritarianism and totalitarianism in the last two decades, and is considered by many to be one of the main pillars of a democratic regime (O'Donnell 2004). For human rights advocates, the rule of law is perceived as an indispensable tool to avoid discrimination and the arbitrary use of force (Vieira 1996). At the same time, the idea of the rule of law revived by libertarians like Hayek in the middle of the twentieth century was fervently espoused by international financial agencies and legal development aid institutions as a fundamental prerequisite for the establishment of efficient market economies (Carothers 2006: 3–13). On the other side of the political spectrum, even Marxists, who in the past viewed the rule of law as merely a formal superstructural mechanism to preserve the power of elites, started to recognize it as an unconditional human good (Thompson 1987: 357). It would be hard to find any other political ideal praised by such a diverse audience. But the question is: are we all praising the very same ideal? It is clear that people are either talking about different concepts of the rule of law or are emphasizing distinct characteristics of a more abstract notion of the rule of law.

The classical concept of the rule of law was subjected to significant re-evaluation in the first two decades of the last century. Thinkers like Weber (1984: 603–20) warned us of the process of deformalization of law, as a consequence of transformations in the public sphere. The years that followed Weber's work were marked by tense intellectual and political struggle over the capacity of the *Rechtsstaat* to comply with the new challenges posed by the social-democratic Weimar Constitution. This struggle is exemplified in the debate between conservatives such as Carl Schmitt and social democrats such as Franz Neumann (Unger 1979: 225–228). Hayek (1944) responded to these sceptical perspectives about the rule of law in his influential *The Road to Serfdom.*

For Hayek, state intervention in the economy and the growing discretionary power of bureaucrats to establish and pursue social goals threatened economic efficiency; as a consequence of transformations in the functions of the state, law declined as a substantial instrument in the protection of liberty. However, the opposing notion that the state had not only the obligation to treat its citizens equally before the law, but also to ensure substantive justice, was accompanied

by the argument by later legal theorists that the traditional concept of the rule of law had become incompatible with the new reality. Different theories of law such as positivism, legal realism and jurisprudence of interest constructed a desubstantialized notion of law that liberated the state from the inherent limitations imposed by a substantive concept of law.

To overcome this situation of 'oppression', in which the state can coerce its citizens – through normative acts – without the necessity of justifying its action in a general and abstract law, it was necessary for Hayek to return to the origins of the rule of law. For this purpose Hayek revisited history and established a list of essential normative elements of the rule of law as the instrument *par excellence* for securing liberty. In his version, rule of law cannot be compared to the principle of legality developed by administrative law, because it is a material conception concerning what the law ought to be. Hayek developed a meta-legal doctrine and a political ideal that would serve the cause of freedom, and not a mere conception of a government acting in accordance with norms. The rule of law should be structured, according to Hayek, by the following elements: (a) law should be general, abstract, and prospective, so that the legislator cannot arbitrarily choose one person to be the target of its coercion or privilege; (b) law should be known and certain, so that citizens can plan – for Hayek this is one of the main factors contributing to the West's prosperity; (c) law should be equally applied to all citizens and government officials, so that the incentive to enact unjust laws decreases; (d) there should be a separation between the law-givers and those with the power to apply the law, i.e. judges and administrators, so that rules will not be made with particular cases in mind; (e) judicial review of administrative discretionary decisions should be possible to correct any misapplications of the law; (f) legislation and policy should be also separated, and state coercion should be legitimized only by legislation, to prevent the coercion of citizens for individual purposes; and (g) there should be a non-exhaustive bill of rights to protect the private sphere (Hayek 1990: 87–97).

Thus, Hayek's conception of the rule of law embodies a substantive conception of law, a strict notion of separation of powers, and the existence of liberal rights to guarantee the private sphere. The rule of law is therefore modelled to serve as an instrument to protect private property and a market economy. The major problem with this conception is that the rule of law becomes captive of this particular political ideal.

In reaction to this and other kinds of substantive formulations of the rule of law, such as the more socially oriented one that resulted from the Delhi Congress of the International Commission of Jurists in 1959, Raz proposed a more formalist conception, which would avoid confusion between several social or ideological goals and the intrinsic virtues of the rule of law. For Raz, 'if the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function' (Raz 1979: 211).

For Raz, the rule of law in a broader sense 'means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to

it' (Raz 1979: 212). Raz's construction requires that laws be understood as general rules, so they can effectively guide actions. In this sense law is not just a fact of power, but it needs to have a particular form. Raz, however, does not shift to the position espoused by Hayek that only abstract and general rules can constitute a rule of law system. For Raz, it would be impossible to govern with general rules only; any concrete system must be composed of general and particular rules, which in turn should be consistent with the general ones. To comply with the objective of a legal system that can guide individual action, Raz creates his own list of rule of law principles, according to which laws should be prospective, open, clear, and relatively stable; and the making of particular laws should be guided by open, stable, clear and general rules.

But these rules will only make sense if there are institutions responsible for their consistent implementation, so that law can become an effective rule to guide individual action. Raz's construction, therefore, requires the existence of an impartial and congruent judiciary, because if rules are reasons for action, and the judiciary is responsible for applying these rules, then it would be futile to guide one's action by the law if the courts could take other reasons besides the law into consideration when adjudicating cases. For the same reason, principles of due process, such as fair hearings and impartiality, should be contemplated. The rule of law also requires that courts have the power to review acts of the other branches of the government, in order to ensure conformity with the rule of law. Courts must be easily accessible so as not to frustrate the rule of law. Lastly, the discretionary powers of crime prevention agencies should not be allowed to pervert the law, in the sense that neither the prosecutor nor the police should have the discretion to allocate its resources to combat crime on bases other than those established by the law (Raz 1979: 216–17).

From this perspective, the idea of the rule of law is a formal concept according to which legal systems can be measured not from a substantive point of view, such as justice or freedom, but by their functionality. The main function of a legal system is to serve as a secure guide for human action. And that is the first reason why a formalist concept of the rule of law, such as the one formulated by Raz, receives broad support from different political perspectives. It is extremely valuable for governments in general to have an efficient tool for guiding human behaviour. However, the adaptability of a formalist conception of the rule of law to different political perspectives does not mean that it is compatible with all kinds of political regimes. By favouring predictability, transparency, generality, impartiality and granting integrity to the implementation of law, the idea of the rule of law becomes the antithesis to arbitrary power (Raz 1979: 220). So the distinct political perspectives that embrace the rule of law have in common an aversion to the arbitrary use of power. This is one important reason why the rule of law is embraced by democrats, liberal egalitarians, neo-liberals and human rights activists alike. Regardless of their differences, they are all in favour of curbing arbitrary rule. In an open and pluralist society, which offers space for competing ideals of the public good, the notion of the rule of law becomes a common protection against arbitrary power.

There is, however, a less noble explanation for this broad support for the rule of law that we should be aware of. Since the rule of law is a multifaceted concept, if we take each of its constitutive elements separately they will be extremely valuable to the advance of different and sometimes competing values or interests, like market efficiency, equality, human dignity or freedom. For those pushing for market reforms, the idea of a legal system that provides predictability and stability is of the utmost importance. For democrats, generality, impartiality and transparency are essential, and for human rights advocates equal treatment and the integrity of law enforcement agencies are indispensable. So, what also helps to explain the attraction of so many to the rule of law is the partial reading of a multifaceted concept made by distinct political conceptions. Therefore when we find someone praising the rule of law we must be cautious and check whether or not they are favouring only those characteristics of the rule of law that support the social goals they want to advance.

10.3. COMPLIANCE WITH THE RULE OF LAW

A significant problem with the kind of conceptualizations of the rule of law outlined above (both substantive and formalistic) is that they do not help us to understand what external (social, economic or political) conditions favour the adherence of a legal system to the rule of law, and the compliance by both state officials and individuals with the law. That is why Maravall and Przeworski are so disappointed with the kind of jurists' lists discussed above, which they regard as 'implausible as a description' and 'incomplete as an explanation' (2003: 1). So the first challenge is to try to understand which conditions or mechanisms trigger adherence to the rule of law. Why would any government with indisputable control over the means of coercion submit itself to the rule of law? And why would any of us comply with the law? Let us start with the first question.

10.3.1. Why Would a Ruler Adhere to the Rule of Law?

According to Holmes, there are two main features of the rule of law: 'predictability and equality'. To explore why some rulers would embrace the rule of law, thereby making their behaviour more predictable, Holmes first turns to Machiavelli, according to whom 'governments are driven to make their own behaviour predictable for the sake of cooperation. Governments tend to behave as if they were "bound" by law, rather than using law unpredictably as a stick to discipline subject populations … because they have specific goals that require a high degree of voluntary cooperation …' (Holmes 2003: 19–20). So law will be used parsimoniously by the ruler to gain cooperation from specific groups within society, which the ruler would not have without showing some respect for their interests. As the ruler needs more support, more groups will benefit from predictable behaviour by the ruler. However, since the ruler needs the cooperation

of some groups more than the cooperation of others, 'it has no reason or incentive to treat all groups equally' (Holmes 2003: 21). This will lead to an imperfect or partial rule of law system, insofar as it does not include the dimension of equality, which is claimed to be an intrinsic feature of the ideal of the rule of law. To resolve this problem, Holmes turns to Rousseau. Although Rousseau is sceptical about the possibility of an inclusive rule of law in an unequal society, equality before the law can be enlarged if new groups are able to gain 'some leverage over the government' (Holmes 2003: 23). One way that groups and individuals are able to gain leverage over the government is through the establishment of rights, which are claims against the government to which the government is bound to adhere.

The distribution of rights is a key device to obtain cooperation in pluralist societies. Indeed, this is how the rule of law evolved from the Middle Ages, by slowly extending legal standing to different groups. The Magna Carta is perhaps the first symbol of this process of expansion of legal entitlements that has culminated in the International Bill of Rights in the twentieth century and in the rights charters of contemporary constitutional democracies. Marshal, in his classic work *Class, Citizenship and Social Development* (1969), gives a clear description of the evolution of citizenship through the inclusion of people under the wings of law in Western countries. New groups struggled to achieve legal status through the extension of civil, political, social and economic rights, acquiring different levels of inclusion under the rule of law in return for their cooperation. So even if we cannot conflate the rule of law with the rights of citizens, it is difficult to dissociate historically the expansion of citizenship from the extension of the rule of law. Generality of the law and impartial implementation of the law, as internal virtues of a rule of law system, are directly associated with the notion of equality before the law that is obtained by the expansion of citizenship (Bendix 1964: 92).

In contemporary democratic regimes, where legitimacy and cooperation are dependent on high levels of inclusion, rights tend to be distributed more generously. However, even a democratic regime does not need cooperation from every group on equal terms, so it has no incentive to treat everyone equally under the law all the time. More than that, since groups hold disproportional social, economic and political power in society, the cost of their cooperation will also be disproportionate, which means that law and its implementation may be shaped in terms of different clusters of privileges, rather than on the principles of the rule of law.

This means that any approximation to the idea of the rule of law depends not merely on the expansion of rights on paper, but also, and perhaps more critically, on how consistently these rights are implemented by the state. This is the challenge faced by democratic regimes with high levels of social inequality. Although equal rights are recognized on paper, governments do not feel constrained to comply with the obligations correlated to these rights on equal terms for all members of society. And since the costs of claiming the implementation of rights through the rule of law system are disproportionately larger for some members of society than for others, the rule of law becomes a partial good, favouring mostly those who have the power and resources to demand it from the state and to take advantage of it. In other words, the formal equality provided by the language of rights does not

necessarily convert into equal access to the rule of law or impartial implementation of laws and rights.[199] So it is possible to have rights, but not sufficient resources to claim their implementation. Therefore it is more appropriate to think of the rule of law not in terms of existence or non-existence, but in terms of levels of inclusiveness. Democratic processes can expand the rule of law. But even in democratic regimes, in societies with extreme levels of inequality, where people and groups possess disproportionate resources and power, the rule of law tends to be less able to protect the poor and make the powerful accountable to the law.

The control of state power and its submission to the rule of law is not only a consequence of how power is socially distributed. In modern societies, institutions are created to shape behaviour through numerous forms of incentives. Institutions can also be designed to check each other. As perceived by Madison, when ambition is disposed to restrain ambition, the possibility of keeping the government under control is increased (Hamilton et al. 1988: ch. 51). Foundational moments then become very important. When competing social powers are not sufficiently strong to overcome each other, they tend to compromise on the creation of political structures with fragmented powers. The least empowered groups can benefit from these struggles. This is the basic logic that informs modern constitutionalism.

However, the rule of law aims for more than having government under legal or constitutional control. It also intends to guide individual behaviour and social interaction. Therefore it is also necessary to explore why people would comply with the law. What are the reasons that we all take into account before complying with the law?

10.3.2. Why Would People Comply with the Law?

Cognitive reasons. The first set of reasons for individual compliance with the law is cognitive, and concerns our ability to understand the basic concepts of law, such as the notions of rules and rights. Without such basic cultural assumptions we cannot think about the possibility of respecting the law. This is not a trivial matter. In many societies, the notion that people are endowed with equal rights, and that the law should be impartially enforced, are often contrary to day-to-day experience. Class privileges and hierarchical entitlements are entrenched in different cultural systems, making the experience of the generality of law unobservable. Besides understanding the structural function of basic legal concepts, it is important that people have an understanding of the basic rules that govern their own societies, and of their own obligations and rights. In societies with high levels of poverty and illiteracy, this condition is very difficult to achieve.[200]

199. I thank Persio Arida for this observation.
200. In this respect it is important to note that the level of knowledge about the political constitution in South America is very low; just 30 per cent of Latin Americans know something/much about their fundamental laws, and only 34 per cent have knowledge about their duties and obligations (Latinobarometro 2005: 14).

Instrumental reasons. The second set of reasons for complying with the rule of law is linked to our ability to think instrumentally, to calculate the risks and potential benefits of the actions we intend to perform. People respect the law and the rights of others in order to obtain rewards or escape punishment. Taking a narrow instrumental view, respect for the law is reinforced if disrespecting it is clearly damaging to one's pocket, freedom, image, physical well-being or integrity, and if respecting it is likewise beneficial for the same reasons. To have instrumental value, the rule of law must make one better-off. Through this instrumental reasoning, individuals seek to maximize social and economic utility. Two instrumental reasons bear discussion in this context – fear of state coercion and mutual advantage reciprocity.

To the extent that people fear and expect punishment or reward from the state, they tend to respect the rule of law. This could be called the 'Hobbesian argument'. State coercion can be an effective instrument for the rule of law in some circumstances, and is necessary because some degree of illegal behaviour will always exist that cannot be otherwise controlled. Impunity that is caused by state inefficiency, corruption or selectivity jeopardizes the threat of coercion as a means of obtaining compliance. It should also be taken into account that the state, in many circumstances, has to be provoked by individuals before it exercises coercion. People must often file complaints, file lawsuits, or inform the police about certain unlawful facts in order for the state to take action. So lack of resources or distrust of authorities can have a strong impact on the mobilization of state power, allowing those who do not comply with the law to act with impunity.

It would be untenable for any society to bear the cost of the level of state coercion needed to ensure compliance with all legal standards if fear of coercion were the only reason that people had to comply. Imagine, for instance, if the threat of a fine or prison was the only reason for people not to go through a red light or commit other crimes. The experience of totalitarian states shows that to achieve obedience by surveillance is both immensely expensive and, even if the costs could be borne, absolutely undesirable.

Instrumental reasons for compliance with the law should therefore extend beyond the state coercion framework. People are part of social spheres, groups and communities that shape and determine their actions (Galligan 2007: 310–26). Hence a second instrumental reason for respecting the law is an expectation of reprisal or benefit from a community or a social sphere to which one belongs or in which one circulates. Deceit in the market or in marriage can have serious consequences. Credibility is a major asset in any group. Losing it by breaking the law could damage one's position, curtailing one's capacity to engage in new relationships with other members of that social sphere. That is why people usually act in accordance with the law, even in the absence of state authority (Ellickson 1991: 281–83).

In a mutually advantageous relationship, the golden rule is that I do not do to others what I would not like others to do to me. Not being a substantive moral principle, this neither affirms nor denies the existence of a deeper moral

framework. Mutually advantageous relationships, however, can help to obtain compliance with the law, if only on fragile terms. Even within a structure that is supposed to be designed for mutual advantage, in circumstances of disparity of power, individuals may have an incentive to cheat: what is in my interest is that everybody else cooperates and I defect (Barry 1999: 51). Peer pressure can also be problematic, because the social environment can be infused with a culture of non-compliance or, worse, the internal culture of obedience challenges the rule of law, as in the case of the Mafia and other forms of organized crime enterprises. Consequently, instrumental reasons represented by coercion or mutual advantage, both of which are essentially self-interested, cannot fully explain why people would comply with the law. However necessary, instrumental reasons are insufficient as a condition for the rule of law.

Moral reasons. Morality has been neglected by most recent analyses of the efficacy of the law, especially those advanced by formalist legal thinkers or rational choice researchers (Becker 1968: 169–217). In this sense, Fuller's claim that moral reciprocity is a fundamental element for the existence of a legal system becomes particularly interesting (Fuller 1969: 21–25). The establishment of the rule of law would be considerably easier in those societies in which individuals agree to value others and their rights to the same extent that they value themselves, as far as the law is concerned. These rights, equally distributed, are not a gift from heaven, but a social construction; a decision made by the community to value individuals on equal terms, and to ground the exercise of power on these basic rights (Habermas 1996: 119). This means that collective decisions are only valid if they derive from the will of autonomous individuals, and if they respect the sphere of human dignity delineated by these same rights (Habermas 1996: 82). Laws made through such a process command the moral commitment of all citizens.

In a system in which there is a moral commitment to the rule of law, each citizen has the status of a rights holder and is recognized as such by other citizens and the state. In this sense, respect for the rights of others is the fundamental basis for the generalization of expectations that leads to the establishment of the rule of law. As these expectations of respect for everyone's rights become generalized, the establishment of an authentic rule of law also becomes possible.

One can argue, however, that reciprocity always has a utilitarian origin, that is, my respect for others does not arise from the fact that I ascribe them some value (Kantian reciprocity), but from the fact that we have entered into a non-aggression pact that serves our interests (Hobbesian reciprocity). As argued above, there is a difference between moral reciprocity based on the notion of human dignity, and mutual advantage reciprocity based on strategic calculation. Going back to the traffic light example, according to the moral notion of reciprocity, I would stop my car because I firmly believe that other drivers or pedestrians have the same right that I have to cross the junction in safety, and therefore I have a correlated obligation to stop. In a community bound by moral reciprocity based on rights, law would be easier to implement. It is far more difficult to build moral reciprocity in a society characterized by profound social and economic disparities among its

members, because these deep inequalities make the sense of reciprocity necessary for the rule of law difficult to achieve.

The idea of morality, however, could be more formal, as found in work by contractual authors like Rousseau. In this case, the moral justification for compliance with the law does not derive from the fact that a given legal system is in harmony with a pre-established set of values entrenched by rights. Compliance is due to the fact that citizens themselves, under a fair procedure, produce the laws that regulate social organization. The fairness of the procedure guarantees that self-interest is neutralized, so that people can make decisions in terms of the public good, which then creates a moral obligation on all citizens to accept the results of the procedure (Rousseau 1955: 339–40). If we follow Rousseau's rule of law theory here, the outcome of such a procedure would be general laws that are inherently fair, due to the fairness of the procedure through which they were legislated. It is important to stress that procedural justice is not limited to a process that leads to the enactment of general laws, which would be accepted by all participants in the political process, but also includes how these laws are implemented by the state. Again following Rousseau, one of the major causes of the decline of democracy is the distortion of general laws by magistrates who, in enforcing the laws, tend to advance their own private interests to the detriment of the general will expressed by the law (Rousseau 1955: 418). So the fairness of the implementation of laws is as important as the fairness of the creation of laws. If the law is not enforced without impartiality, in accordance with the due process standards set forth by the law itself, the rule of law will lose its authority, and consequently people will not take it as an acceptable guide to their action (Tyler 1990).

To summarize the argument advanced in this section, individual compliance with the law is supported by three major sets of reasons: cognitive, instrumental and moral. As I have tried to argue, all these reasons are important in explaining why individuals, both citizens and officials, act in accordance with the rule of law, even though the weight of each reason will vary in conformity to the nature of the action, the actors involved, the circumstances, or the social spheres where the actions are taking place. For the purpose of this chapter, the major question to be addressed is how social and economic inequality negatively affects all of these mechanisms.

In the following section, it will be argued that inequality obliterates the comprehension of basic legal concepts, subverts the impartial enforcement of laws and use of coercion, and acts against the constructions of reciprocity, both on moral and mutual advantage terms. Bearing in mind the three bases for the rule of law discussed above, I will try to demonstrate that the Brazilian legal system, although for the most part in conformity with the formal elements of the rule of law, does not achieve impartiality or even congruency. Through an examination of the Brazilian case, I will try to demonstrate that a minimum level of social and economic equality among individuals is crucial to the establishment of relationships of reciprocity and the existence of a rule of law system.

10.4. INEQUALITY AND THE RULE OF LAW

In 1988, Brazil adopted a new constitution after more than two decades under an authoritarian regime. In reaction to the experience of arbitrary rule and a past of social injustice and inequality, the new constitution was forged under the principles of the rule of law, democracy and human rights. Its bill of rights guarantees civil, political, social and economic rights, including the rights of vulnerable groups such as Indians, the elderly and children. These rights receive special protection, and cannot be abolished even by constitutional amendments. Brazil is today part of the main international human rights conventions that have a direct effect on the Brazilian legal system. Therefore all the substantive and procedural guarantees of the International Bill of Rights have been incorporated into the Brazilian legal system.

According to the Brazilian Constitution, only the law, enacted by Congress in accordance with the Constitution, can impose legal obligations on individuals. Decrees and regulations issued by the executive are only valid if they are in strict conformity with the law. Every person is 'equal before the law', without any distinction on the basis of class, race, religion, or gender, etc. Laws are prospective, entering into force only after their publication; retroactive laws are only admitted if they benefit individuals, therefore you cannot create a post facto law establishing a crime or a tax, but you can abolish a criminal law, and this abolition will benefit those who have violated this law in the past. There are no secret laws. In case of emergency the president can enact provisional measures that have to be approved by Congress within a period of sixty days to become law, otherwise they lose their efficacy retroactively to their enactment. In sum, although many Brazilian laws would not pass Hayek's test of generality, since they have a specific and individualized purpose (as do many laws enacted in any post-liberal society), they certainly would be acceptable according to Raz's formulation of the concept of law, where particular rules are admissible if they are consistent with general rules. Brazilian laws can in general be considered understandable, not contradictory, and reasonably stable.

In relation to the institutions responsible for the implementation of law, the Brazilian legal system could also formally be considered to be in accordance with Raz's requirements for the rule of law. The Constitution embodies a system of separation of powers, differentiating between those with the responsibility to create and to apply the law. As in many contemporary systems, a balance of the several branches of government is achieved through the separation and partial overlap of powers. The executive has powers to regulate and to make administrative adjudication in particular areas. The judiciary holds extensive power to review legislation and administrative acts that conflict with the Constitution. The legislature has more power than to simply enact general and abstract laws; it can control the executive and investigate malpractice. This flexible notion of separation of powers is similar to what is found in many other democracies.

Although on paper this institutional setting seems to conform to Raz's rule of law model, the Brazilian legal system suffers from a severe lack of congruency between the laws and the actual behaviour of individuals or state officials.

There is today a growing awareness in Brazil that law and rights still play a very minor role in determining individual or official behaviour. According to the 2005 Latinobarometro Report,[201] there is a high degree of distrust in the capacity of the state to impartially implement legislation and, more problematically, only 21 per cent of Brazilians respect the law themselves. According to O'Donnell, most countries in Latin America were not able to consolidate a rule of law system after the transition to democracy. He argues that extreme inequality throughout the region is one of the major obstacles to an impartial implementation of the rule of law. Brazil, as one of the most unequal countries in the continent, could be characterized as an *unrule* of law system instead of a law empire (O'Donnell 1998: 37–57).

Democratization and liberalization were not sufficient to overcome entrenched obstacles to the implementation of the rule of law in Brazil. The failures to significantly improve the distribution of resources and break the very hierarchical Brazilian social fabric have kept the law from performing its role as a reason for actions for several sectors of Brazilian society. Brazil stands as the tenth largest economy in the world. However it holds one of the worst records in terms of unequal wealth distribution (58.0 gini index). According to IPEA, a research institute linked to the Ministry of Planning, 49 million people are poor in Brazil, and 18.7 million are in a condition of extreme poverty, out of a population of 186 million people. In the last decade the richest 1 per cent of the population shared almost the same wealth as the poorest 50 per cent. These, among many other indicators of the gross inequalities within Brazilian society, have a strong effect on the impartiality required from institutions responsible for implementing the law in the country. As in many of the countries faced with such a degree of inequality, the Brazilian state is usually sweet to the powerful, insensible to the excluded, and harsh to those who challenge the hierarchical stability of society.

10.4.1. Invisibility, Demonization and Immunity

The central claim advanced here is that social and economic exclusion, deriving from extreme and persistent levels of inequality, causes the *invisibility* of the extremely poor, the *demonization* of those who challenge the system, and the *immunity* of the privileged, obliterating the legal impartiality that is required by the rule of law. In synthesis, extreme and persistent social and economic inequality provokes the erosion of the integrity of the rule of law. Under such circumstances, law and rights can often appear as a farce, a means of empowering the lucky few who are able to dictate the terms for those who are excluded.

Invisibility means here that the human suffering of certain segments of society does not cause a remedial moral or political reaction from the most advantaged and does not trigger an adequate legal response from state officials.

201. Latinobarometro (2005: 17).

The loss of human lives and the offence to the human dignity of poor people, although reported and extensively acknowledged, is invisible in the sense that it does not result in a political and legal reaction or encourage social change.

Besides misery itself, and all of its deplorable consequences in terms of rights violations, one of the most dramatic expressions of invisibility in Brazil is the extremely high rate of homicide that victimizes predominantly poor populations. As the World Health Organization presented in its last report on violence, Latin America holds the worst record in terms of homicide rates on the planet. Brazil, one of the most violent countries in the region, accumulated more than 800,000 deaths by intentional homicide in the last two decades (IBGE 2005). By comparison, more people become victims of homicide every year in Brazil than in the Iraq war.[202] It is important to note that the vast majority of those killed are poor, uneducated, young black men who live in the Brazilian social periphery (Cardia et al. 2003: 60). As cautiously demonstrated by Fajnzylber et al. (2002), there is a robust causal relationship between inequality and violent crime rates across countries, including Brazil.

When added to other crime rates, and the fact that many poor neighbourhoods in large cities are controlled by organized crime with the complicity of state officials, these figures send the message that the law is not able to serve as a reason for action in some environments, and most of all, that legal constraints, such as the criminal legal system, are insufficient to protect vulnerable groups within society. Obscene levels of impunity for some members of society, besides allowing human losses among the poor not to receive an appropriate response from the legal system, reinforce the perverse notion that these lives are not valuable. This vicious circle of elevated levels of violent criminality and impunity brutalizes interpersonal relationships and reduces capacity for compassion and solidarity.

Invisibility becomes a particularly troublesome trend in a democratized regime and consumer-oriented context. For some of those who have not experienced being treated with equal concern and respect by those responsible for implementing the law and by society in general, there is no reason to act in accordance with the law. In other words, for those raised among the invisible classes in non-traditional societies, there are fewer moral or instrumental reasons to comply with the law. By challenging invisibility through violent means, these individuals start to be perceived as a dangerous class, to which no protection of the law should be granted.

Demonization, the process by which society deconstructs the human image of its enemies who from then on will not deserve to be included under the realm of law, is therefore the result. As in the famous phrase of Greene, they became part of the 'torturable classes'. Any attempt to eliminate or inflict harm on the demonized is socially legitimized and legally immune.

To understand the meaning of *demonization* in Brazil, we turn our attention to gross human rights violations. The persistence of the arbitrary use of force by

202. The United Nations estimates that 34,000 Iraqis lost their lives in 2006 against 46,000 in Brazil.

state officials, or other armed groups with official complicity, against *demonized* people such as suspects, ordinary criminals, inmates, and even members of social movements is well recorded every year by domestic and international human rights organizations. The press database of the Centre for the Study of Violence of the University of São Paulo registered more than 6,000 cases of the arbitrary use of lethal force by the Brazilian police from 1980 to 2000. Each of these cases resulted in at least one death (Cardia et al. 2003: 49).

According to the Human Rights Watch 2006 Report, 'police violence – including excessive use of force, extra judicial executions, torture and other forms of ill-treatment – persists as one of Brazil's most intractable human rights problems' (Human Rights Watch, *World Report 2006*: 185). In 2006, the police in the state of Rio de Janeiro alone killed more than 1,000 people.

Torture remains a common practice both in police investigations and as a disciplinary method used in the prison system and in juvenile detention facilities. As reported by the former United Nations Special Rapporteur on Torture, Rodley:

> Torture and similar ill-treatment are meted out on a widespread and systematic basis in most of the parts of the country visited by the Special Rapporteur… . It does not happen to all or everywhere; mainly it happens to poor, black common criminals involved in petty crimes or small-scale drug distribution. … Conditions of detention in many places are, as candidly advertised by the authorities themselves, subhuman … The Special Rapporteur feels constrained to note the intolerable assault on the senses he encountered in many of the places of detention, especially police lock-ups he visited. The problem was not mitigated by the fact that the authorities were often aware and warned him of the conditions he would discover. He could only sympathize with the common statement he heard from those herded inside, to the effect that 'they treat us like animals and they expect us to behave like human beings when we get out'.[203]

Rodley captured in this sentence the essence of *demonization*. Human beings who are treated like animals have no reason to behave lawfully. *Demonization*, besides being a violation of the law in itself, creates a downward spiral of violence and barbarous behaviour on the part of individuals against each other, which helps to explain not just outrageous homicide rates, but also the extreme cruelty of some manifestations of criminality.

Immunity before the law, for those who occupy an extremely privileged position in society, is the third consequence of extreme inequality to be mentioned here. In a very hierarchical and unequal society, the rich and powerful, or those acting on their behalf, view themselves as being above the law and *immune* to

203. www.unhchr.ch/Huridocda/Huridoca.nsf/0/b573b69cf6c3da28c1256a2b00498ded/$FILE/g0112323.doc

obligations derived from other people's rights. The idea of immunity can be understood by focusing on the impunity with which human rights violators or those involved in corruption, who are predominantly among the powerful or the rich, are able to act.

Impunity for human rights violators is endemic in Brazil, as reported by major human rights organizations, and also recognized by federal authorities. Cases like Vigario Geral (1993), Candelária (1993), Corumbiara (1995), Eldorado de Carajas (1996), Catelinho (2002), or the police reaction to PCC attacks in 2006, resulted in hundreds of victims of extra-judicial killings, without any major attempt to bring state officials to account. Perhaps the most notorious case of impunity for a gross human rights violation was the acquittal of Colonel Ubiratan Guimarães by the São Paulo State Supreme Court in 2005. Ubiratan Guimarães was in charge of the police operation that resulted in the death of 111 inmates during a prison riot in 1992. After thirteen years no one was convicted for the 'Carandiru Massacre'. The State Governor and the Secretary of Security at that time were not even investigated for their involvement in this incident, sending a clear sign that demonized people are not included under the protection of the law.

Immunity is also a pattern for those involved in corruption. Even though Brazil received an overall moderate rating in the 2006 Corruption Perception Index published every year by Transparency International – it was ranked as number seventy among the 163 nations analysed – the unmet challenge of impartial implementation of the law cannot be ignored. In the last two decades, there have been hundreds of scandals involving politicians, businesses, and members of the judiciary. The enormous majority end in impunity for those involved. In the last ten years, of the twenty-six cases of corruption involving members of the House of Representatives that arrived at the Supreme Court, no one was found guilty. As this chapter was being written, the majority of Supreme Court justices declared the anti-corruption law that allowed politicians and other public officials to be sentenced by trial judges unconstitutional.[204] If this decision is sustained by the Court plenary, it is estimated that more than 14,000 legal charges against officials around the country will be summarily closed, amplifying the perception that the law does not apply to the powerful in the same way that it is enforced against the disenfranchised.[205]

Disproportional distribution of resources among individuals and groups within society subverts institutions, including those agencies with the responsibility to implement the law. An analysis of the Brazilian penitentiary census shows that the poor and uneducated are selected almost exclusively by the Brazilian criminal system for incarceration. That is the conclusion of Glaeser, Scheinkman and Shleifer, after an econometric analysis of the impact of inequality on institutions of justice: 'inequality … enables the rich to subvert political, regulatory, and legal institutions of society for their own benefit. If a person is sufficiently richer than

204. Case filed by former President Fernando Henrique Cardoso, through Reclamação 2138.
205. Even though the majority of the Supreme Court justices already decided that the law is unconstitutional, they are allowed to change their decision at any time until the end of the trial.

another, and the courts are corruptible, then the legal system will favour the rich, not the just. Likewise, if political and regulatory institutions can be moved by wealth and influence, they will favour the established, not the efficient' (Glaeser et al. 2002: 3). As stated by Gilda Carvalho, the Brazilian Deputy General Federal Attorney, 'the corruption problem is a direct consequence of the perverse concentration of income in Brazil' (Tautz 2006). The conclusion is that de facto immunity from the law, although a general phenomenon in Brazil, is more prominent among the privileged.

10.4.2. The Erosion of the Law's Authority

As the Brazilian experience shows, extreme levels of social and economic inequality that polarize the poor on one side and the affluent on the other create a severe obstacle to the integrity of the rule of law. By fomenting gross power disparities within societies, inequality places the poor in a disadvantaged position, in which they are socially marginalized in the eyes of the better-off as well as in the eyes of state officials, who are captive to the interests of those who have more power in society. This creates a hierarchy within society, where second-rate individuals cannot achieve a real status of full citizenship and are not fully recognized as rights holders (even though they may formally be so). Discrimination, in this sense, tends to loosen the bonds of reciprocity within the community, softening the sense of moral obligation by the powerful towards those who are excluded and, in turn, by those who are excluded towards society as a whole. Once the disadvantaged members of society cease to be regarded as worthy of equal treatment, they are quickly deprived of the rights that protect other citizens. Therefore, one cannot achieve reciprocity in a society where great inequality among individuals exists. Consequently, in such circumstances, the law will hardly be effective as an instrument of social organization and pacification.

The same rationale may be applied to the effect of self-interested reciprocity in the construction of a peaceful social order. If the reciprocal interests of all agents in a community are not satisfied, the underprivileged agents will hardly have reasons to behave according to the rules of a game that systematically harms their interests. From the other side, the privileged feel that there is no social constraint on the maximization of their interests. This situation eliminates incentives on both sides for compliance with the rules and respect for rights in the sphere of interpersonal relations.

Deprived of social and economic status, invisible individuals are socialized to place themselves in a position of inferiority vis-à-vis the immune individuals and to accept the arbitrariness of public authorities. They cease to expect that their rights will be respected by others or by the institutions with the responsibility to implement the law. Those who react to this degrading position are regarded as a threat to the social order and are treated as enemies. At the same time, immune individuals do not consider themselves bound to respect those they consider inferior or enemies. The same applies to the co-opted authorities. In this situation,

a large number of people are below the law while a group of privileged individuals is beyond the control of the state. In this manner, the state, which is supposedly responsible for the fair application of formal mechanisms of social control in accordance with the law, begins to reproduce socially generalized standards. The result is that the state is negligent towards the invisible, violent and arbitrary towards the outcasts, and docile and friendly towards the privileged who place themselves beyond the law. So even though there may be a legal system that formally complies with the several virtues of the rule of law, the lack of a minimum of social and economic equality will inhibit reciprocity, thereby subverting the rule of law.

10.5. CONCLUSION

The conclusion that long and persistent inequality tears social bonds, causing invisibility, demonization and immunity, and impairs compliance with the rule of law, should not mean that the idea of the rule of law is futile in these circumstances. In new democratic regimes, such as Brazil and many other developing countries, constitutions tend to be a reaction to a past of authoritarianism and major social injustices, and are designed to foster social cooperation and legitimacy. New constitutions normally bring a generous bill of rights, which recognize civil and political rights, and also a large range of social rights. They also recognize the major institutional elements of the rule of law and representative democracy. More than that, these post-authoritarian constitutions create new institutions, like ombudsmen, public defenders, human rights commissions and public ministries to monitor compliance with the rule of law and to protect the constitutional rights of individuals and vulnerable groups.

This reconfiguration of legal systems around the developing world has also been a consequence of pressure from civil society. Forged during the struggle against arbitrary rule and strengthened throughout democratization, civil society organizations are key players in denouncing abuses, making governments more accountable, and providing alternative polices to alleviate major social problems. For example, the number of non-profit organizations in Brazil has more than doubled in recent decades. From the 270,000 civil society organizations legally established in the country, almost one fifth are dedicated to the 'development and protection of rights' (IPEA 2005: 35). The question, therefore, is how these new players are using their institutional and social power to challenge the formal legal systems to become more impartial and to overcome their inability to apply the law equally to all citizens.

It would be naïve to attribute to legal systems the capacity to produce their own efficacy, but it would also be inadequate to disregard the potentialities of new actors to promote social change through the employment of legal strategies. Even a fragile legal system can provide mechanisms that, duly used, will enhance impartiality and equal recognition of legal subjects. Public interest law, human rights advocacy, strategic litigation, pro bono and public defence offices can mobilize legal resources in favour of less-empowered interests or against over-

represented interests. This move from within the legal system to empower the weak, protect the demonized, and destabilize entrenched privileges, should not be viewed, however, as a new panacea, but only as part of a larger effort to construct more reciprocal societies, where the rule of law can take hold. This effort is based on the presumption that the legal system occupies a special intermediary position between politics and society. As a product of social relations and political decisions, legal systems are also a vector for these relations and decisions. Law should not only mirror the distribution of power within society. It is far more important that modern legal systems are characterized by fair rules and procedures aimed at obtaining legitimacy and cooperation.

Therefore the question for those social and institutional agents concerned with inequality from a rule of law perspective is how to mobilize the 'inner morality of law', as termed by Fuller, to reduce invisibility, demonization and immunity. How can the legal system enhance the position of those who are below the law, breach the comfort of those above the law, and recover the loyalty of those who are against the law?

Lawyers and judges cannot do much to change society; in fact they are normally interested in reinforcing the status quo. But they can have some impact when challenged by other social actors. As the recent experience of many extremely unequal countries like India, South Africa, Brazil or Colombia shows, the legal community in general and courts in particular can, in some circumstances, be responsive to the demands of the poor when they seek redress through the legal system (Gargarella et al. 2006). Therefore any attempt to make use of the law to improve the rule of law itself presupposes that there is political and social mobilization backing it. Due to the egalitarian characteristics of the rule of law, as discussed above, interests that would be squashed in a purely political arena can gain some status through a legal system characterized by the rule of law. Although legal institutions are also vulnerable to subversion by the powerful, they can eventually balance out inequalities in the political system. In translating a social demand into a legal demand we move from a pure power competition to a process in which decisions are justified in legal terms. The need for legal justification reduces the space for pure discretion, which tends to be to the disadvantage of the weaker members of society. In these circumstances the legal system can give public visibility, in terms of rights recognition, to those who are disregarded by the political system and by society itself. In the same direction, the generality of law, and the transparency and congruency claimed by the idea of the rule of law, can trap the privileged, bringing them back to compliance with the law. It is important to re-emphasize, however, that this kind of legal social activism should be viewed only as a piece of a much larger scheme of initiatives to promote a society in which everyone is treated with equal concern and respect.

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11

Human Rights Conditionality in Sovereign Debt Relief

Christian Barry[206]

International policies often make the conferral of aid, debt relief, or additional trading opportunities to a country depend upon its having successfully implemented specific policies, achieved certain social or economic outcomes, or demonstrated a commitment to conducting itself in specified ways. We can refer to policies of these kinds as *conditionality arrangements.*[207] In this chapter, I will discuss whether conditionality arrangements that would make the conferral of debt relief depend on whether the debtor country achieves a certain status with respect to the human rights fulfilment of its population can be justified. My ambitions in this chapter are relatively modest: I do not offer a comprehensive defence of human rights conditionality in debt relief nor do I seek to develop any detailed proposal regarding the form that such an arrangement ought to take. Rather, I aim to show that many objections that are typically advanced against conditionality arrangements are not decisive, and that the possible benefits of human rights conditionality in debt relief are sufficient to warrant further intellectual and practical exploration. Whether establishing human rights conditionality in debt relief should be a priority for action cannot be determined in advance of such exploration. An examination of some of the objections to conditionality helps to identify the features that human rights conditionality arrangements for debt relief must have to be ethically plausible.

In Section 11.1, I briefly describe the understanding of human rights adopted in this chapter, and explain how sovereign debt can raise serious human rights concerns. In Section 11.2, I explain and rebut arguments that purport to show that even if sovereign debt does raise human rights concerns, creditors

206. I am grateful to Bob Goodin, Matthew Peterson and Lydia Tomitova for very helpful suggestions, and Thomas Pogge, Michael Ravvin and Jennifer Rubenstein for their detailed and incisive written comments on earlier versions of this essay.

207. Policy analysts sometimes distinguish between 'conditionality', which they understand as a policy in which benefits of some kind are provided to prospective recipients only on condition that they meet certain conditions, and 'selectivity', which they understand as a policy whereby prospective recipients of some benefit can expect to receive a larger amount than others depending on their satisfaction of certain conditions. In this chapter I will understand conditionality as encompassing both types of policies.

nevertheless lack human rights-based obligations to reduce their claims on debtor governments, and are generally justified in pushing their claims to repayment, even when doing so reduces significantly the resources the government could otherwise use to further the fulfilment of human rights. In Section 11.3, I argue that despite the fact that creditors very often do have human rights-based obligations to reduce the hardships suffered by populations of debtor countries, it does not follow that they must (or even may) grant debt relief to the governments of these countries. In Section 11.4, I present the prima facie case for making debt relief conditional on debtors having achieved a certain status with respect to human rights. I then attempt to rebut arguments to the effect that such conditionality would nevertheless be ethically inappropriate (even if it would lead to desirable outcomes).

11.1. HUMAN RIGHTS-BASED CONCERNS ABOUT SOVEREIGN DEBT

11.1.1. Human Rights

A person's human rights are *fulfilled* when he/she has access to the natural and social resources that are ordinarily required for persons to achieve a level of civic status and standard of living that are *minimally* adequate, and when his/her access to these resources is secure.[208] A person's *human rights claims* are claims that social affairs be arranged so that he/she has access to these resources, and that this access be secure. We can refer to cases in which people fail to command the resources ordinarily required to achieve a minimally adequate level of civic status and standard of living, or where their command over such resources is insecure, as *human rights underfulfilment*.

The generally perceived conditions that qualify a person as having a minimally adequate level of civic status and standard of living are, *at the very least*, (1) protection from various forms of mistreatment, such as slavery, torture, arbitrary arrest, and egregious forms of discrimination; (2) having some meaningful role in shaping the policies and social institutions of the society in which one lives; having protection of freedoms (such as freedom of speech and association) that would ordinarily be required to play such a role; and that the political process take some account of one's interests; (3) being able to command the basic necessities (food, drink, shelter) necessary to meet elementary needs that all human beings have.[209]

208. The brief account here is based on Pogge (2002: chapter 2; and Wenar 2005: 285–94).
209. For further discussion of these elements, see Beitz 2001. I take the characterization of human rights here to be consistent with Beitz's understanding of the 'public political doctrine' of human rights. See his 'Protections Against Poverty in the Practice of Human Rights' in this volume pp. 3–20.

Like any analysis of human rights, this one is hardly uncontroversial. It does not include (though it also does not rule out) significantly more demanding standards as have been articulated in various human rights instruments, such as the right to vote in periodic and genuine elections, or the right to the highest attainable standard of physical and mental health.[210] It also includes more (particularly under heading [3]) in the category of human rights than many theorists would allow. Finally, it is quite open-ended, since it leaves open the nature of the duties correlative to human rights claims of particular persons, as well as what more precisely a minimally adequate level of civic status and standard of living consist in. Since many of the issues I will discuss in the remainder of this chapter arise regardless of the more specific conception of human rights that is adopted, however, this account will suffice for the purposes of this chapter.[211]

11.1.2. The Human Rights Consequences of Sovereign Debt

Sovereign debt obtains when agents have lent resources to the national governments of sovereign states, and these agents have claims to repayment that have at least prima facie legal validity.[212] The claim to repayment, in turn, depends on the existence of a *debt contract* involving the national government and the lender.

Sovereign debt contracts are entered, on the borrower side, by national governments ('sovereign debtors') and, on the lender side, by national governments ('official/bilateral creditors'), international financial institutions, such as the International Monetary Fund (IMF), the World Bank, or regional development banks ('multilateral creditors'), or bondholders ('private creditors'). Until the early 1980s, private lending constituted credit extended by commercial bank syndicates, but virtually all of their claims have been passed on in the bond market. The ability of national governments to enter into debt contracts can serve an important role in the sound management of their affairs, and thus also their ability to fulfil the human rights of their populations. Governments can smooth out their spending over revenue cycles through short-term borrowing during months of revenue shortfall, and repay the debt in surplus months. By taking out short-term loans in foreign currency, they can smooth international transactions over time and thus help to limit short-term volatility in the exchange rate. Similarly, governments can maintain spending without having to raise taxes during periods of economic

210. For the discussion of the plausibility of minimalist or more ambitious accounts of human rights, see Beitz (2001) and Cohen (2004).

211. The discussion in Section 11.2 is, however, quite relevant to the issue of identifying duties to address human rights underfulfilment.

212. I assume that it makes sense to distinguish between legally valid and ethically valid claims, even though determinations of legal validity may arguably partly depend on some ethical considerations, and the fact that one having a legally valid claim may be seen as an important consideration in determining whether one has an ethically valid claim. Conflicts between legally valid and ethically valid claims and obligations will be most pronounced when legal systems are unjust or when they contain many 'gaps', but it is unlikely that such conflicts can ever be completely removed.

recession by taking out medium-term loans, which they repay in the next boom period. Governments can also borrow for investment in longer-term projects, such as improvements in infrastructure, education, and health care, without imposing the burden of financing them solely on present taxpayers. Since improvements in a country's highways or ports, schools, and hospital care, for example, benefit future taxpayers, long-term borrowing allows the government to share the present costs of such projects with future taxpayers through interest and principal repayments (see Herman 2007). It is hard to imagine, in the modern world at least, how most countries – poor or rich – could govern themselves well or reliably fulfil the human rights of their populations without their national government enjoying *some* rights (though not necessarily rights of unlimited scope) to borrow in the name of their present and future citizens.

Sovereign debt raises serious human rights concerns, however, when very high levels of debt significantly limit the ability of countries to manage their affairs effectively, especially (but not only) when this leads its residents to suffer significantly in their health, civic status, or standard of living. The negative social consequences, such as plummeting employment and impoverishment of the population, of financial crises in indebted middle-income countries such as Argentina and Turkey provide recent examples of this phenomenon. High debt levels can limit the capacities of countries' governments to provide the social services necessary to ensure even a minimally adequate standard of living for their people, and divert resources and energy from the pursuit of short- and long-term strategies that further their people's well-being. This effect is particularly acute in the poorest countries. For example, in 2000 the United Republic of Tanzania spent nine times more on debt service than on health, while 1.6 million of its citizens lived with AIDS.[213] In 1991, while President Fujimori of Peru more than doubled the country's monthly debt repayment to $150 million, Peru became the epicentre of the cholera epidemic that spread throughout Latin America in the early 1990s. To generate part of the revenue for the debt repayment, the government instituted policies that raised the costs of basic sanitary products, putting them out of reach of the poorest people, and did not have an emergency health care budget to tackle the epidemic when it broke out. So-called middle-income countries are also significantly affected by their external debts. In Argentina, where life expectancy at birth is 75 years and approximately 97 per cent of the population is literate, almost *half* the population was pushed below the national poverty line by the severe economic crisis in 2002,[214] the year following the debt default and collapse of its fixed exchange rate system.[215] Moreover, even the populations of poor and

213. See, for the ratio, Jubilee 2000 Coalition, 'AIDS and Debt: Africa's Deadly Combination', (n.d.) at www.jubileeresearch.org/jubilee2000/features/aids.html; and for the AIDS figure, Global AIDS Alliance, 'Denver-Based Newmont Mining Blocking Debt Relief', Press Release, at www.globalaidsalliance.org/newsroom/press_releases/press060605.
214. For one account, see Hertz 2004.
215. See Economic Commission on Latin America and the Caribbean, *Statistical Yearbook for Latin America And the Caribbean, 2005*, Table 1.6.1, UN Sales No. E/S.06.II.G.1 (2005), as cited in Barry et al. (2007). More precisely, 45.4 per cent of the urban population fell below the poverty

middle-income countries that are deemed not to be in 'crisis' often suffer very significant social costs as a result of the extent to which their countries' budgets are devoted to servicing their debts. Brazil, for example, typically commits above 20 per cent of its fiscal revenue to debt interest payments alone.[216]

In the late 1980s, economists began to caution against 'debt overhang' – the build-up of large debts, which creates a climate of permanent financial fragility in a country, leaving that country in a financial and economic slump, without domestic revenue to pay for current expenditures. Because of its financial instability, the country is deemed to be high-risk from an investment perspective. Creditors demand a higher interest rate on investment finance – if willing to lend at all – since many of them may have substantial outstanding debt claims on the country (see Palley 2003). Financial crises and the debts that often engender them can also lead the crisis countries to increased dependence on international institutions, which arguably limits the capabilities of their citizens to exercise meaningful control over their policies and institutions.

11.2. HUMAN RIGHTS OBLIGATIONS AND THE CLAIMS OF CREDITORS

Suppose that some country becomes heavily indebted, and that its government can service its debt obligations (as contractually defined) only by severely cutting back on expenditures on education, health, and security. Suppose further that these cutbacks will predictably lead to human rights underfulfilment in its population. We would then be faced with the question of whether the government (and ultimately, the population) of this country ought to bear the costs of the country's earlier decision to borrow, or whether these costs ought to be pushed onto others, such as creditors or other agents.[217] The answer to this question has seemed plainly obvious to some advocates of human rights. How, after all, can we reasonably demand that a country repay its debts when this will predictably lead to human rights underfulfilment in its population, especially since others (such

line in 2002, roughly double what it was in 1990, and 18.6 per cent of the population of the major metropolitan areas was classified as 'indigent', compared to 5.2 per cent in 1990; the poverty line is in this case defined as an income level less than twice the cost of a basic food basket and 'indigent' entails income less than the cost of the food basket.

216. As the Economist Intelligence Unit notes: 'The share of fiscal revenue absorbed by debt interest payments in Brazil is particularly striking considering that the country's tax burden, at more than 35 per cent of GDP, is one of the highest among emerging markets and close to the levels typical of more developed countries.' Economist Intelligence Unit, 'Brazil Finance: Is It Investment Grade?' 23 May 2007, at www.viewswire.com/index.asp?layout=VWArticleVW3&article_id=1542214339&rf=0. This radically understates the burdens imposed by debt upon Brazil's population, since its high external debts have helped engender even larger internal debts that have had significant negative consequences for the majority of its people.

217. One could imagine a general compensation scheme, into which all countries pay in proportion to the size of their economy, that provides resources to heavily indebted countries to meet their debt obligations without sacrificing the provision of goods and services to their people.

as wealthy countries or financial institutions) could arguably bear the financial costs of non-repayment of these debts in a way that would not lead to comparably regrettable outcomes? The distinguished Austrian economist Raffer has argued, for example, that 'one must not be forced to fulfill contracts if that leads to inhumane distress, endangers one's life or health, or violates human dignity. Civilized laws give unconditional preference to human rights and human dignity' (Raffer 2007). This view is also endorsed by many, including advocates of the Fair and Transparent Arbitration Process (FTAP), modelled on Chapter 9 of the US Bankruptcy Code, which governs the bankruptcy of municipalities. The FTAP would ensure that the basic human rights (somehow understood) of citizens of debtor countries are given higher priority than creditors' rights in the management of debt crises (see, for example, Erlassjahr 2001).

It might plausibly be argued, however, that which claims ought to take precedence ought to depend not only on how heavily burdened the population of the debtor country would be in absolute and relative terms were the country to pay its debts, and how costly it would be for others to offset the costs that it would otherwise face, but also on *how the country became* heavily indebted in the first place. Miller, for example, has argued that '[i]f people have poor or otherwise inadequate lives because of decisions or actions for which they are responsible, then outsiders have no obligation of justice to intervene' (Miller 1999). The notion of responsibility Miller invokes here is of what legal philosopher Tony Honoré has called 'outcome responsibility'.[218] An agent is outcome responsible for some cost of their conduct so long as their conduct is connected with this cost in a way that makes it appropriate for them to be held liable for bearing it (see, especially, Honoré 1999).

11.2.1. The Irresponsible Conduct Principle

To determine whether or not some agent should be liable for bearing some cost, one must provide a plausible account of the distinction between those outcomes (or particular features of outcomes) that are attributable to agents for the purpose of allocating the costs of harms resulting from their behaviour, and those that are not.[219] One leading account, embodied in the modern law of torts, is based

218. Miller (2001) points out, however, that the mere fact that an agent is outcome responsible for some cost does not mean that it is right, all things considered, for him/her to bear it. There may be some costs that are so great that we feel that others ought to alleviate them, especially when the agent who is outcome responsible for them is unable to do so.

219. Miller contrasts outcome responsibility with causal, moral, and remedial responsibility, distinguishing them via examples in which an agent is responsible in one or two of these senses, but not in another or others. Miller does not seem to appreciate the fact that while it is true that these notions are *conceptually* distinct, they may not be substantively distinct. One can hold a conception of outcome responsibility according to which only agents who are morally responsible (and thus can plausibly be blamed) for some harm should bear the costs of it, or that agents should be outcome responsible for all harms that they cause. The latter view is defended, for example, by Epstein (1980). Others, such as Waldron (1995), have

on what might be called *the irresponsible conduct principle.* It is worth pausing to explore this principle and to examine its possible application to different agents involved in sovereign borrowing and lending. Standards of tort liability generally demand that an agent bear the costs of his/her harmful conduct when it can be shown that:

1. he/she has causally contributed to them;
2. the harmful outcome was his/her *fault*; and
3. the faulty aspect of his/her conduct (and not merely his/her conduct as a whole) was causally relevant to the outcome (e.g. to show that some driver is liable for the injuries of another person, it must not merely be shown that the driver was negligent and was the cause of the accident, but that the injuries resulted from the driver's negligence).[220]

Theorists of the law of torts differ over how these conditions should be understood, but there are some elements that are common to nearly all accounts of them. First, the notion of fault operates with some notion of a 'standard of care'. That is, agents are at fault for some harmful outcome, and thus can be held liable for bearing its cost, when they have not lived up to an objectively defined normative standard (see Honoré 1995; Ripstein 1999). When an agent fails to live up to this standard, he/she is deemed to be 'negligent', and thus at fault for any harmful outcome of his/her conduct. Second, the normative standard that is invoked for the purpose of determining negligence depends on some conception of what a 'reasonable person' could be expected to have done in the situation given what was foreseeable in the context in which the agent acted (see Ripstein 1999). If the agent acted in the way a reasonable person could have been expected to act in the circumstances, then that agent did not act negligently and is thus not at fault for the costs engendered by his/her conduct. Consequently, such an agent should not be made to bear these costs, even if his/her conduct was causally relevant to bringing them about. If, when driving at normal speed and obeying all traffic signals, I swerve my car to avoid hitting a child dashing across the street and smash into a parked car, I am not at fault for the damage done to the parked car, and thus not liable in tort for bearing the costs of its repairs.[221]

The irresponsible conduct principle might also be thought to apply to countries.[222] If a country has acted negligently, either through severe imprudence or recklessness, it might therefore be argued that the costs resulting from this

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vigorously defended accounts that would make outcome responsibility depend almost entirely on blameworthiness.

220. Wright (2003) calls this the 'tortious-aspect causation requirement'. There are exceptions, such as those few areas of the law in which strict liability is employed. With respect to strict liability, an agent can be held responsible for some cost if his/her conduct was a cause of it, even if his/her conduct showed reasonable care (and thus does not meet the tortious-aspect causation requirement). The question of whether a strict liability standard would be more plausible with respect to sovereign debt is discussed briefly below.

221. The question of whether the owner of the car should bear these costs fully, or whether they should be pushed on to others is a separate matter.

222. For Miller's own view on how such an idea might be extended to *nations*, see Miller (2004).

cannot fairly be pushed onto others, no matter how severe they may be, even if the country can *now* shoulder these costs with great difficulty and at significant sacrifice.[223] In short, in such cases it may be the case that creditors lack altogether human rights obligations to the populations of the debtor countries *with respect to these debts*, and are within their ethical (and not merely legal) rights to demand full repayment of the loans in question.

To be plausible, this type of argument would require a compelling account of how a 'standard of care' can be defined to apply to collective agents like countries. And this in turn will depend on a convincing account of what a 'reasonable country' would do under various sets of circumstances.

However challenging it may be to develop a plausible conception of the irresponsible conduct principle for countries, some principle of this kind is likely to hold quite significant intuitive appeal. Further, it is difficult to deny that some sovereign debt has resulted from countries' failures to exercise reasonable care in the management of their financial affairs.

On any plausible conception of the irresponsible conduct principle, however, it seems extremely unlikely that such a principle would provide grounds for concluding that the burdens resulting from sovereign indebtedness should be borne *solely* or even *mostly* by the populations of the indebted countries. This is so for several reasons. First, there is a great deal of sovereign debt that cannot plausibly be characterized as resulting from the imprudence or recklessness of borrowing countries. The *unstable* global environment in which sovereign debtors and creditors operate produces many changes to the circumstances of debtor countries; these changes are not only impossible for debtors to *control*, but also quite difficult or impossible to *foresee*.[224] Natural disasters or regional financial crises arguably provide vivid examples of such instability.

In response to this, it may be argued that these simply are *the* risks of borrowing money. That is, while *specific* circumstances are impossible to foresee, any borrower is aware (or at least should be aware) that there are *general* risks that accompany borrowing money, which include the risks of financial crises and natural disasters.[225] It is of course a common feature of contracts that those who engage in them are usually supposed to assume the risk that fulfilling the conduct that is required of them by the contract will turn out to be more difficult, and perhaps much more difficult, than anticipated (see Atiyah 1995: especially 212–15 for discussion). However, the law also acknowledges that there are contexts in which this supposition no longer holds. For example, if an unanticipated tsunami of unprecedented ferocity, or a contagious financial crisis that no reasonable observers either predicted or anticipated, wreak havoc on some country's economy, these events may not be viewed as part of the 'normal' background risks that agents ought to have considered when entering into contracts or in making

223. The intuition here factors prominently in Rawls (2001: 117–18).
224. I understand foreseeable risks here as those risks that a 'reasonable' agent would take into account.
225. I am grateful to Mike Ravvin for pushing this point.

other financial decisions. Indeed, contract law and the law of torts have made legally relevant the distinction between ordinary and extraordinary events that lead to the non-performance of contracts or damages. When extraordinary events – including so-called 'acts of god' – lead to non-performance of contracts, the duty to perform them is excused in many legal systems, and the contract is viewed as 'impracticable'.[226] When the performance of a contract becomes impossible for reasons other than the negligence of the contracting parties, it is typically treated as void under the so-called doctrine of frustration (see Atiyah 1995 for discussion).

In addition, even if a country takes out loans knowing that it will be very difficult to repay fully, it may not be acting irresponsibly. In practice, debtor countries are often in so vulnerable a condition that refraining from entering into debt contracts with creditors (even particular creditors) is not a reasonable option for them. Faced with the choice of making a loan that it knows will be difficult to repay and forgoing funds needed to maintain basic services and governmental functions, it seems not implausible that any reasonable government would borrow. In domestic legal contexts of this kind, contracts are often viewed as non-binding, either because they were entered into under severe duress, or because enforcing them would be unconscionable.[227] And even if we do say that the debtor country is obliged to repay what it has borrowed regardless of the social costs to its people, this will not be on the ground that it has borrowed negligently.[228]

It may be argued, however, that our willingness to let the borrowing country bear the social costs – including, especially, human rights underfulfilment – of decisions made when it was very vulnerable may depend not only on whether it acted as a 'reasonable country' would, but also on how it has ended up in such a vulnerable condition that it would borrow funds that it knew it would be unlikely to be able to repay. If it has acted negligently in the past, and if its past conduct is causally relevant to its ending up in such a vulnerable state, then one could argue, on the basis of the irresponsible conduct principle, that it should be made to bear the social costs of its borrowing decisions too, even if *these* decisions were not themselves negligent. Surely many countries that are in vulnerable situations have acted negligently, and sometimes grossly so. It may still be implausible to hold countries of this type solely, or even mainly, responsible for the social costs of their decisions on the basis of the irresponsible conduct principle, however. This is because it does not follow from the fact that a country has acted negligently (as all countries have) and has ended up in a vulnerable position that it can

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226. The United States *Uniform Commercial Code*, §2-615, for example, excuses a party from delivering goods specified in a contract when the reason for their failure to do so results from events, such as 'acts of god' whose absence was a 'basic assumption' of the contract, whether or not such exclusion is specifically stated in the contract. For detailed discussion of the jurisprudence and justification of these measures, see Sykes (1990); and Posner and Rosenfield (1977).
227. It is worth noting that the domestic law of many countries has traditionally regarded with great suspicion loans to poor persons in distress, such as by payday lenders or cheque cashers (see, for discussion, Cartwright 1991).
228. I discuss other possible grounds below.

plausibly be held responsible for ending up in this position. It may be faulted for its negligence, but this negligence may have played no causal role in its ending up in this position. This is so regardless of whether causation is interpreted as 'strong necessity' or 'weak necessity/strong sufficiency,' the most widely advocated philosophical accounts of causation. It may not be the case that 'but for' the fact that the country acted negligently, it would not have ended up in a comparably vulnerable position. And it may not be the case that the country's negligence was a *necessary element of a set of actual antecedent conditions that was sufficient for the occurrence of the consequence – a full causal explanation of why the country ended up in such a position may not necessarily include mention of its negligence.*[229] In still other cases, a country's negligence may indeed be a cause (in the sense of 'weak necessity') of its vulnerability, but there may be other grounds on which to conclude that the irresponsible conduct principle would not demand that it alone bear the costs of its non-negligent borrowing decisions. One example of this might be a case where the country's negligence pre-empted some other cause that would have led to its falling into a comparably vulnerable position. Wright points out, for example, that agents are not liable in tort law if the harm caused by the negligent aspect of their conduct 'almost certainly would have occurred anyway in the absence of their or anyone else's tortious conduct' (Wright 2003: 1434).

Second, even in those cases where countries have clearly conducted themselves irresponsibly, it often does not seem plausible that the vast majority of their present and future people should bear the full cost of this conduct. There are several reasons for this. First, on any plausible reading of the irresponsible conduct principle, it will not follow from the mere fact that some agent's negligence or misconduct has been a cause of some harm that he/she should bear the *full* cost of that harm, so long as the negligence or misconduct of other agents were also causes of it. If a pedestrian crosses a busy street on a red light, without paying attention to the passing cars, and is hit by a driver who was momentarily distracted as a result of talking on the cell phone, most modern law will allocate the liability for the pedestrian's injuries between the driver and the pedestrian to the extent of their fault. And this seems reasonable – why, after all, should the cost that results from the negligence of one actor be borne entirely by someone else, even when this second person also acted negligently? This consideration may be particularly relevant when there is a clear connection between the negligence of one actor and another, such that the negligence of one agent can plausibly be viewed as encouraging (and thus significantly raising the risk of) negligent conduct by the other. If I lend a car to my teenage niece and she drives it into a tree after drinking several cocktails, then she has clearly acted negligently and can reasonably be expected to bear at least some of the cost of the harms her conduct creates. The extent to which she should bear the cost of harms, however, will also depend on other factors, such as whether her acquiring the alcohol involved the negligence

229. For a discussion of the weak necessity/strong sufficiency view, see Mackie (1975); and Honoré (2005).

of other actors. If a liquor store clerk served her without requesting proper identification, then this clerk (and perhaps also his employer) can be held partially liable for the costs of the accident. And if *I* have acted negligently by buying liquor for her, it can reasonably be questioned whether I retain any claim whatsoever to compensation for the damages to my car that ensue from her conduct, or indeed whether I should escape from full liability for the harms her conduct inflicts on others.

These considerations are quite relevant in the context of assessing outcome responsibility for the costs that are the result of excessive sovereign indebtedness, since, while the negligence of borrowing countries has certainly played a role in creating these costs, the negligent conduct of many others has often also contributed causally to them. Creditors have often lent even when they knew (or should have known) that the money would be diverted away from national expenditure to private pockets. The World Bank continued lending to Suharto's Indonesia, for example, even though it was well aware of the corruptness of the government and it was widely alleged that a third of all loans would be embezzled (Winters 2004).[230] In 1983, the IMF famously extended to Zaire the *largest* loan that had ever been made to an African government, even as the IMF had been warned in writing by Erwin Blumenthal, the German expert seconded by the international financial institutions to Zaire's central bank, that Zaire should not be lent any more due to widespread corruption. The IMF was negligent by lending to someone it had reason to suspect would not repay, and is thus co-responsible for the loan going into default. And the IMF was complicit in burdening a population with obligations for loans whose benefits it knew (or at the very least should have known) would be withheld from it.

Further, creditors seem also to have acted negligently by (perhaps unwittingly) taking double advantage of developing countries. That is, they have sometimes encouraged them to borrow large amounts, encouraged them further to borrow still more money at higher cost to repay the earlier debts that they could not feasibly repay, and simultaneously encouraged (or demanded as conditions for debt relief and assistance) further policy changes (such as rapid 'capital account liberalization'), which arguably made their economies still more vulnerable and thus less able to service their debts and meet the needs of their people.[231]

Creditors have also arguably encouraged vulnerable developing countries to enter into debt contracts that the creditors knew, or at least should have known, to be imprudent (Raffer and Singer 1996). Indeed, the World Bank and IMF have themselves acknowledged that their projections of growth and exports, which are used to determine debt sustainability, were over-optimistic and failed to take into proper account the probability of external shocks that can affect export earnings

230. For discussion of this and the following examples, see Raffer (2004).
231. Perhaps the most prominent examples in this respect are the international financial institutions' structural adjustment programmes in the 1980s and 1990s, which have been widely criticized as having not been only ineffective but detrimental to the economic and financial positions of client countries (see, for example, Cornia et al. 1987).

and exchange rates.[232] Most legal systems hold that those whose false statements induce entry into 'manifestly disadvantageous' contracts should be held liable for damages to the disadvantaged party, at least when the false statements should have been known to be false (Atiyah 1995). Such liabilities are typically even greater when the agents providing the false information hold positions of trust and confidence (Atiyah 1995: 275–7).

Third, even when it seems appropriate to attribute debt crises entirely or mainly to the negligent conduct of a *country*, it may be implausible to hold the vast majority of the country's present and future people solely, mainly, and in some cases even partially outcome responsible for shouldering the costs that such crises engender, especially with respect to significant human rights underfulfilment. One main reason for this relates to the fact that those agents who take out a loan and those who are obliged to repay it are different. It is the finance ministers and other public officials of a country's government who make the decision to borrow money in the name of the country, while it is present and future citizens and other subjects taxable by the government who are asked to repay it. Of course, this is not in itself necessarily problematic. Indeed, when a creditor's claims on individual agents result from decisions or policies that have been adopted by the agent's political community, and where the creditor either played some role in choosing the policy *or* at least had his/her interests given adequate weight by those making the decision, there is at least a prima facie case for taking him/her to be obliged to honour them. (See Miller 2004 for a defence of this view.) The present and/or past governments of many excessively indebted countries, however, are not even *minimally* representative of the interests of those they rule.

To be minimally representative of the interests of the people it rules, a government must give due consideration to the interests of its people, in both making decisions and in the decisions themselves. Failing to give such consideration is, as Cohen (2004) has put it, 'tantamount to treating them as outsiders, persons whose good can simply be dismissed in making laws and politics: no-counts, with no part to play in the political society'.

There can of course be reasonable debate both about what giving due consideration to people's interests demands, and whether particular governments have met this standard, but it would seem that many governments that acquired debts that have subsequently become highly burdensome to their populations did not meet this standard on *any* plausible interpretation of it. For example, the apartheid government in South Africa was lent money in the 1980s while it was well known that the government was funding the repression of non-whites. Zaire accumulated $12 billion in foreign debt under the dictator Mobutu Sese

232. International Development Association and International Monetary Fund. 2001. The Challenges of Maintaining Long-Term External Debt Sustainability, 20 April 2001, at www.imf.org/external/np/hipc/2001/lt/042001.pdf; and International Monetary Fund and International Development Association, 'Debt Sustainability in Low-Income Countries—Proposal for an Operational Framework and Policy Implications', 3 February 2004, at www.imf.org/external/np/pdr/sustain/2004/020304.pdf.

Seko (Kremer and Jayachandran 2002). Between 1995 and 2005, the Japanese Government disbursed about $33.2 million in loans to Burma, which is ruled by one of the most repressive military dictatorships at present, despite the lack of 'positive trends' in that country that would justify Japan in making the new loan under its policy of stimulating political change through cooperation with the Burmese Government (Strefford 2006).

To see why such debts raise serious human rights concerns, consider that when a state borrows, it is effectively selling a resource to the creditor, namely, the future revenues necessary to cover interest and repayment of principal. The revenues will in turn be raised by the government, in large measure from those subject to its taxation.[233] It is thus selling a right to part of the future taxable income of those subject to its tax authority. As with any other resource, owners retain the right to decide whether or not to sell it unless they have transferred such right to some other agent. That an agent other than the owner of some resource can have the right to sell it, or undertake binding financial decisions in the name of the owner, is commonplace. But it is normally required that agents, such as stockbrokers or trustees, who have such rights must either have been granted that right voluntarily by the owner and/or are bound by a fiduciary duty to act in the best interest of the owner. Insofar as the owner has not voluntarily granted a right to sell its resources or undertake other financial transactions in his/her name, then under normal circumstances *no other agent* is deemed to have acquired such rights. And if agents who have been granted such a right fail to exercise it responsibly (act in breach of duty), they can be held liable (personally and/or through their employers) for damages to the owner. It is hard to see how a government that is not minimally representative of the interests of the people it rules could have acquired a right to sell part of the future incomes of all persons subject to its tax authority. First, the vast majority of these persons cannot plausibly be viewed as having voluntarily conferred this right to them.[234] Second, the government has (by definition) acted in negligence of its fiduciary duties to its people.

Now, one might claim that, as a matter of international law, any government that controls the means of coercion within the territory of a country and is recognized by others as the government of the country *simply has* the right to sell part of the future taxable income of those subject to its tax authority. It is current practice to recognize that *any* ruling government enjoys unique and nearly complete power to alter the claims of others on their present and future citizens and residents, and thus the privileges of these citizens and residents with respect to them. This claim is entirely true, but merely pointing to this *legal* fact about the existing rules governing relations between sovereign debtors and their creditors does not settle the matter, since granting such power to governments regardless of

233. Alternatively, governments may repay debts from revenue streams that might otherwise be allocated toward public spending.

234. I am indebted to Leif Wenar for discussion of these points. For an interesting related discussion of the considerations relevant to determining whether a government should have the right to sell natural resources, see Wenar (forthcoming).

their other characteristics seems highly questionable. Why should oppressive elites be entitled to run up debts in the names of those whom they impoverish (or worse) and bind present and future citizens of their country (along with others subject to their tax authority) to repay them? (See Pogge 2005; Khalfan et al. 2003; Shafter 2007; and Barry and Tomitova 2006 for discussion.) And why should creditors be permitted to provide resources to a government when there is a great deal of evidence that they will be used in ways that will lessen the likelihood that the human rights of its people will be fulfilled? Indeed, it seems quite wrong that such creditors could in such cases *escape* responsibility for compensating for human rights underfulfilment when they have contributed to it and benefited from it by entering into debt contracts with such governments.

These considerations also suggest that present populations of indebted countries should not be held outcome responsible for excess debt that was accumulated as a result of prior governments that cannot plausibly be viewed as minimally representative of the interests of their people falling back on their payments. For example, Nigeria's $35 billion debt ballooned as a result of penalties and late fees imposed by creditors on the outstanding stock during the dictatorship of Sani Abacha.[235] All G7 countries and other creditors hold rights to repayment of debts that appear to have been *acquired* by (and often pushed on) non-minimally representative governments (see Eurodad 2007). The sovereign debts of Argentina, for example, increased under the military dictatorship from approximately $8 billion in 1975 to $45 billion in 1984 (Cibils 2006). Simply focusing on the amount of debt actively acquired by non-minimally representative governments, however, may radically understate the costs – and human rights underfulfilment in particular – to the populations of countries of debts acquired by such governments, since many loans taken out by subsequent governments are themselves often the result of such debt. The reason for this is that poor countries typically 'roll over' their debt, taking out fresh loans to meet prior obligations. Many debts acquired by governments that are (at least) minimally representative of the interests of their people will be taken out to pay debt service on obligations acquired by predecessor governments that were not minimally representative. This seems unacceptable. Suppose that, as a result of fraud in which someone borrows illegitimately in my name, I become saddled with a debt that I can service only by taking out new loans. In such a case it may not be fair that the creditors that extended these new loans be saddled entirely with these losses (unless, perhaps, they were culpably involved in extending the initial loan resulting from fraud), but it also seems quite unfair that *I* alone bear these costs. It may be even more problematic when the costs of borrowing faced by successors to non-minimally representative governments are very high.

These considerations not only provide reason not to hold the populations of many debtor countries fully (and in some cases even partly) outcome responsible

235. Indeed, the fees were imposed notwithstanding the fact that Western banks accepted and kept deposits of money stolen by the Abacha regime (see Eurodad 2005).

for the severe social costs of their excessive indebtedness, especially when these involve human rights underfulfilment, but also a reason in many instances to hold the creditors and beneficiaries of these loans outcome responsible for some or all of them. It also provides reason to hold creditors and beneficiaries of these loans liable to compensate for whatever *further* costs may have been initially imposed on the citizens of the country as a result of the loan.

Even when human rights underfulfilment linked to high indebtedness results from the negligence of a debtor country, and when its present and future citizens can plausibly be viewed as collectively responsible for the country's negligent conduct, it may nevertheless still not seem plausible to hold them outcome responsible for these costs on the basis of the irresponsible conduct principle if lending practices and customs *encourage* high indebtedness, and also tend to unfairly favour creditors (and in particular official and multilateral creditors) over debtors. The preceding discussion indicates some of the ways that current practices have such features, and one further feature is worth noting.[236] The official practice of guaranteeing the 'political risk' faced by lenders – the promise to the lender by its government that the latter will bail out the former and take over its claim in case the debtor government declines regardless of the reason to honour an obligation – creates a double moral hazard in the international lending system. On the one hand, more capital will flow to reckless governments who will tend to be willing to borrow more than would be prudent from the standpoint of their population; on the other hand, since creditors will have incentive to lend more, the greater their exposure, the greater the likelihood their government will need to bail them out in order to prevent losses to domestic stockholders. This practice shifts a great deal of the risk to the population of the borrower government, which will have to repay or otherwise make other concessions to the government of the lender. For example, in the 1970s US private banks lent to Indonesia's national oil company Pertamina, even as the US Senate Committee on Foreign Relations declared that the company's debt was uncontrollable and the IMF had put a cap on the loans that should be made available to the country. Nevertheless banks lent above the IMF ceiling and, when the crisis broke out, the US Government stepped in to bail them out and assumed Indonesia's obligations.[237]

11.2.2. Strict Liability for Sovereign Debts?

It might be argued that countries should be held outcome responsible whenever it can be shown that their governments have entered into a contract with their creditors that is legally valid. That is, they could be held strictly liable to honour the terms of such contracts. This, indeed, is the account of responsibility that is

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236. For a more extended discussion of the various ways that the international lending system encourages problematic borrowing and lending, see Barry and Tomitova (2006).

237. For a discussion of this example and the (in)operation of risk in international lending, see Raffer (2007).

quite explicitly endorsed in current practices governing sovereign borrowing and lending to sovereigns. *Pacta sunt servanda*, or 'pacts must be respected', is the basic norm that underlies the present treatment of sovereign debt contracts, so that when a sovereign borrower defaults it is treated as being in breach of contract and under obligation to repay the full amount of the loan, along with any interest that the contract stipulates must be added to the principal under such conditions. Unless a creditor decides to 'forgive' a debt, the creditor retains full rights to claim it, and there is no forum in which a debtor can bring a claim that its obligations under the contract should be considered invalid, or that it may permissibly act in contravention of its contractual obligations, except in case the creditor has failed to disburse the resources as stipulated in the contract. While there is no denying this fact about the present international *legal* order, holding the general populations of excessively indebted countries strictly liable for repaying their debts is problematic for reasons already discussed above. On what ground can it be justified that populations that have been impoverished and oppressed by governments that have contracted debts, or whose governments became severely indebted due to unforeseeable changes in the global economic environment or the negligent conduct of other agents, for example, should be held liable to repay them?[238]

In this section I have presented a range of reasons for doubting that creditors may or ought usually to claim full repayment of many of the loans that they have made to developing countries, especially when doing so will lead to widespread human rights underfulfilment. Even in cases in which it seems appropriate that the creditors should be paid the full value of the debt they are legally owed, it seems implausible that the population of the indebted country *alone* should bear the burdens of repaying them.

11.3. DEBT RELIEF AND CONDITIONALITY

11.3.1. Debt Relief

Let us assume that creditors and other agents typically have human rights-based obligations to take action to promote the human rights of the populations of severely indebted countries, and at the very least not contribute further to their underfulfilment. How might they best do this? One obvious suggestion is that they offer direct and immediate debt relief to the debtor countries, thereby freeing up resources that the governments of these countries could devote towards fulfilling the human rights of their populations.

Debts are *relieved* when creditors reduce the amount of debt that they own without receiving debt service (direct payment on the debt) in return. Debt relief can occur either when the creditor simply reduces the contractual value

238. For a more extensive discussion of the implausibility of holding the general populations of severely indebted countries strictly liable for servicing the debts acquired by their governments, see Barry and Tomitova (2006); and Kremer and Jayachandran (2006).

of the debt, or when it reduces the value of the contracted debt in exchange for something other than direct payment on that debt, such as equity (in the form of rights to future resource extraction, or a stake in a government-owned company or other property). The granting of debt relief, however, may not only fail to promote the fulfilment of human rights within the debtor country, but may even be counterproductive to this goal. For example, if a government *could* use the money that it does not pay in debt services to better fulfil the human rights of its population, this does not mean that it *would* use this money to these ends. Indeed it may even use it in a way that further aggravates human rights problems. This may be because the government is corrupt or otherwise inefficient in managing the provision of public resources. There is certainly reason to believe that many governments of severely indebted countries suffer from problems of these kinds, and that resources made available through relief have sometimes been wasted (or much worse) for these reasons.[239] As Director of the Uganda Debt Network, Patrick Tumwebaze expressed this concern, 'If there are no strings attached I'm afraid the money will not be useful for Uganda … . It could benefit a few, those at the political helm, but not the poorest of the poor' (cited in England 2006).

Countries that receive debt relief may lack the infrastructure to use the resources effectively, and indeed may even lack the capacity to determine how such resources are being spent.[240] It may also be that the resources made available through debt relief may be of insufficient scale to make a significant impact on the burdens born by the debtor country's population. Indeed, in some cases, reducing a country's debt may lead to an increase in human rights underfulfilment within the country. This would be likely to occur if the additional resources made available to a government through debt relief are used to more effectively repress minority groups, or to strengthen politically a government that might otherwise be replaced by one that would adopt much sounder economic policies.

If governments use additional resources made available through debt relief to restore public services and infrastructure, for example in health and transportation and the provision of vaccinations or school supplies, then debt relief may contribute significantly to human rights fulfilment.

In sum, there is no necessary connection between reduction in the contractual value of debt (debt relief) and promotion of human rights fulfilment within the populations of the indebted countries. Prima facie, at least, it seems wrong to relieve debt service obligations when doing so will further aggravate human rights problems and perhaps also when it will do nothing or very little to improve the human rights situation within a country. An important consideration in determining whether or not debt relief programmes are justified at all, then, would seem to be whether and to what extent such programmes reduce the human

239. Given the fungibility of resources, speaking of what is done with 'the' resources made available through debt relief is problematic, but I will ignore this complexity for the purposes of this argument.

240. For arguments to the effect that many indebted countries lack such capacity, see Easterly (2001).

rights underfulfilment and other significant social costs that would otherwise be imposed unacceptably on the populations of highly indebted countries. We can refer to such relief as *human rights-promoting debt relief.*

11.3.2. The Prima Facie Case for Human Rights Conditionality in Debt Relief

A conditionality arrangement is an arrangement by which some agent (or set of agents) makes the conferral of some benefit to another agent (or set of agents) contingent on the latter's satisfaction of a set of conditions. A conditionality arrangement in debt relief involving two agents (creditor and debtor) obtains when:

The debt relief conferred to a debtor is made to depend on whether the debtor satisfies some set of condition(s).

Particular conditionality arrangements in debt relief can be identified by:

1. The *agents* (creditors and debtors) involved.
2. The *amount* of the relief to be provided.
3. The *condition(s)* specified in the arrangement.

Any condition – even those relating to states of affairs over which the debtor has no influence whatsoever, such as the weather – could conceivably figure in a debt relief conditionality arrangement. Typically, however, conditions in such arrangements concern different aspects of the debtor's conduct. In some cases, they refer to specific actions that the debtor may undertake, such as cutting its defence budget, adopting some particular macroeconomic policy, or engaging in a consultative process prior to taking some political decision. In other cases they refer to some outcome that the debtor might hope to achieve through its conduct, such as reducing unemployment to some specified level, or increasing the enrolment ratio of girls in primary education by a certain increment.

Human rights conditionality in debt relief would make the conferral of debt relief depend upon the debtor having some specified human rights *status*. This status can be understood as some function of the debtor's human rights *achievements* (for example, the extent to which the human rights of those living within its territory are fulfilled) and what might be called its human rights *efforts* (for example, the extent to which it implements, or shows evidence that it will implement in the future, a plan oriented towards fulfilling the human rights of those living in its territory).[241] In some cases, the arrangement may require that the benefits provided be used specifically ('earmarked') for policies oriented towards human rights fulfilment. The status demanded by any particular conditionality

241. Governments may of course be required to make efforts to fulfil the human rights of those outside of their territory, for example by ceasing unjustified military aggression, advocating fairer international institutions, or providing assistance to countries unable to provide their people with an adequate standard of living.

arrangement may be an admixture of achievement and effort, or may involve only one of these elements.

Prima facie, it seems plausible that human rights conditionality arrangements could contribute to human rights-promoting debt relief. As noted above, there is no guarantee that reducing the contractual value of debt will lead to the reduction of human rights underfulfilment, and it may instead aggravate it. Human rights conditionality arrangements can potentially help agents act on these reasons by making the provision of additional resources through debt relief available to the governments of countries *only if* these governments commit to conducting themselves in a way that is likely to promote the fulfilment of human rights. Under the rules of such arrangements, resources that would otherwise have been provided through debt relief could be withdrawn if debtor governments fail to follow through on their commitments to reducing (or at least taking steps to reduce) these costs.

11.4. OBJECTIONS TO CONDITIONALITY IN DEBT RELIEF

Even if human rights conditionality seems promising, there might still be compelling reasons not to institute conditionality arrangements for debt relief. This may be because such arrangements are, all things considered, relatively ineffective in achieving (or are counterproductive to) ethically valuable debt relief, or inferior to a strategy of collecting the debt service payments and then spending them oneself to fulfil the human rights of its population. Determining whether or not this is the case is impossible without detailed empirical investigation, and doing so in a comprehensive fashion is beyond the scope of this chapter. I will focus here instead on several other types of arguments that might be used to criticize conditionality arrangements. If any of these arguments apply to the case of human rights conditionality in debt relief, then even if such arrangements were indeed effective in bringing about human rights-promoting debt relief, and were more cost-effective in this dimension than alternative arrangements, such as a strategy of collecting the debt service payments and then spending them oneself for the benefit of the population, we might have strong reasons to reject them. If such conditionality is clearly objectionable in any of these ways, it would not even warrant further intellectual and practical exploration. There seem to be at least five such arguments.[242]

242. I draw here on C. Barry, *Evaluating Human Rights Conditionality* (unpublished).

11.4.1. Obligations to Provide Debt Relief Without Conditions

One reason why a conditionality arrangement may be deemed inappropriate is that the creditor may have very weighty ethical reasons to provide the debtor with the benefit of the proposed arrangement *unconditionally*. This idea can be illustrated through a simple example from another domain. Suppose that agent A has acquired resources from agent B to which agent B has a rightful claim, either by forcefully taking them or acquiring them from others who lacked the power to confer a valid title to them. It would, in this case, seem quite inappropriate indeed for agent A to condition the transfer of these resources to agent B on B's having satisfied some criteria. Agent A lacks any claim to these resources whatsoever, while agent B has a valid claim to them, and thus agent A should arguably simply transfer the resources to agent B. It seems plausible to say that if I have stolen your watch or bought it from someone who has stolen it, I must simply return it to you. And I must do this pretty much regardless of what you plan to do with your watch once you get it back – including selling it to a pawn shop to buy cigarettes, alcohol, or worse. Many activists have claimed that *any* conditionality in debt relief is inappropriate for precisely this reason. They argue that, because of the considerations described in Section 11.2 of this chapter to the effect that creditors very often lack ethical claims to developing country debt to which they have a legal claim, the resources that would be transferred to creditors in connection with such debts properly belong to the countries. Once these facts are recognized, it seems an easy route to the conclusion that the appropriate policy response is immediate and unconditional cancellation of such debts. In its Soria Moria Declaration, for example, the Government of Norway urged that 'The UN must establish criteria for what can be characterized as illegitimate debt, and such debt must simply be cancelled.'[243]

With respect to debts to which creditors would seem obviously to lack ethical claims, it is certainly true that the creditors lack an ethical right to the resources represented by payments on the debt. For this reason, it is surely not just *up to them* which conditions may be attached to the conferral of these benefits. It does not follow from this, however, that such debts should be cancelled immediately and unconditionally. There are several reasons for this. Consider first even the simple case described very schematically above, in which X and Y are both individual persons. If Y has a rightful claim to something in X's possession, this will make many conditions that might otherwise be legitimately placed on its return seem inappropriate. It would be inappropriate, for example, if in such a case X were to require that Y provide some special favours, or to offer Y equity in some enterprise before she returned her property. Nevertheless, there are still some conditions that would not seem inappropriate in this case. If X has strong evidence that Z will

243. Government of Norway, 'The Soria Moria Declaration on International Policy', at www.dna.no/index.gan?id=47619&subid=0.

use the returned resources to purchase a gun to hold up a storeowner, a returned cudgel to harm his/her children, or a returned shotgun to shoot X, or perhaps to commit suicide, he/she may (and indeed *must*) withhold the good until there are assurances that these harmful outcomes will not occur. The conditions might be justified in such a case if it provided the only or most reliable means of protecting X, Y, or a third party from seriously harmful behaviour.

A second reason relates to the fact, stressed above, that debt relief (like most aid) is typically granted to a country's government, and not directly to its people. For reasons noted above, making additional resources available to a country's government may not lead its people to acquire access to these resources in any meaningful sense. Government officials and others may use these resources for their own purposes, including purposes that are contrary to the interests of the vast majority of the country's citizens. Now, if it were the *government* rather than the people of a country that had a rightful claim to these resources, this might not seem quite so problematic. It is generally maintained, however, that insofar as 'countries' have claims to the additional resources represented by aid or debt relief, these resources properly belong to its people, and not to its government. Indeed, one of the main bases for the strong intuition that some sovereign debts cannot rightfully be claimed by creditors is that these debts represent resources that the government of a country has taken unfairly from the country's people. And it is very often on this basis that it is argued that these resources should be returned to them through debt relief. If it is the people of a country who have a claim to the resources made available through debt relief, then placing conditions on when a country's government can receive these resources cannot so easily be rejected as inappropriate. And when the conditions – such as the human rights conditions under examination here – are oriented effectively towards ensuring that the rightful owners of these resources (e.g. the people of the country) acquire access to them, it may on the contrary seem seriously inappropriate if they are *not* instituted.

Human rights conditions are of course oriented to ensuring that resources made available to governments will indeed be used to the benefit of their people, in particular the poor and vulnerable. For this reason, it might seem hard to reject such conditions as inappropriate for the reasons examined above, even in those cases where a creditor lacks an ethical claim to the resources conferred as debt relief.

There are some human rights conditions, however, that might indeed seem inappropriate with respect to the relief of debts of these kinds. Suppose, for example, that debt relief is offered to some poor democratic country only on condition that it uses the conferred relief to improve the living standards of its very poorest people. The debtor could plausibly argue that since the resources represented by the debt relief belong properly to its people as a whole, it would be inappropriate that such distributional constraints be imposed upon it. This argument would not necessarily be decisive, of course, particularly if it could be shown that the costs resulting from the debt have fallen particularly heavily on the less advantaged persons within the country. Still, it does seem reasonable that there should be a very strong presumption against attaching conditions to the

cancellation of such debts of countries that attain a human rights status that can be considered minimally adequate. That is, once a government reaches a minimum absolute level of human rights compliance, it becomes less justifiable to pressure it through conditionality to distribute its resources in particular ways.

There may also be benefits that we feel ought to be provided to agent Z independent of any conditions, even if Z does not have a claim to them. If Z is dying of thirst and the only source of water available belongs to me, he/she may not have a legal claim to my water, but arguably I ought to give him/her some of it independent of his/her meeting any (or very nearly any) conditions. And it might similarly be argued that if the debtor country has, or is at risk of having, a public health crisis as a result of a high prevalence of HIV but is unable to purchase antiretroviral drugs because it spends its resources on debt repayment, its creditors ought to relieve some of these burdens by reducing the contractual value of its debt. Here again, however, the fact that debt relief is granted to a country's government and not directly to its people seems quite important, since the creditors would, in this case, seem only to have a reason to confer benefits unconditionally to the *people* who are put at risk by the current situation, and not to their government. And because of this it may be quite inappropriate not to attach conditions to the country's government receiving debt relief when this seems the most effective way of ensuring that it reach its people. If a country is granted debt relief because the resources freed up through such relief are needed to address pressing public health concerns, but its government fails to use the resources conferred to it in this way, it may in the future seem inappropriate for creditors to fail to make relief conditional on some demonstration of the government's commitment to using the relief to achieve this or other important ends.

11.4.2. Ethically Dubious Benefits

A conditionality arrangement involving the transfer of some benefit might be deemed inappropriate because there are very weighty ethical reasons against providing the benefit *whether or not* those receiving it fulfil the conditions stipulated in it. In some cases this may be because there are *always* very weighty ethical reasons against providing the benefit in question to another agent.[244] This type of reason for deeming a conditionality arrangement to be inappropriate would not seem to apply to debt relief, since surely we do not *generally* have weighty ethical reasons against granting to persons who presently have a legal duty to provide us with some resource the privilege of not doing so.

With respect to other benefits – such as perhaps ivory acquired through the killing of elephants – the benefits provided may involve conduct that there are weighty moral reasons against only in specific circumstances, e.g. insofar as elephants are an endangered species, or can be killed only in a cruel manner.

244. Absent some special justification, it is ethically prohibited to conduct oneself in this way.

In still other instances, the provision of the benefit may be ethically dubious not because of intrinsic features of the benefit provided, but from the specific characteristics of those providing or receiving it: there may be nothing wrong in itself about transferring firearms, but there may always be very weighty ethical reasons against transferring them to young children. This type of case can also arise in cases involving collective agents. There may always be very weighty ethical reasons not to provide small arms or high-tech surveillance equipment to murderous dictatorial governments or even to decent governments that lack the capacity to control the illicit acquisition and transfer of such equipment within the territory they govern.

There may be potential recipients of debt relief to whom it would be inappropriate to grant such relief because their increased command over resources could reasonably be expected to lead to significant and unjustified harm. Insofar as there are governments of this type, however, this would suggest not that human rights conditionality arrangements involving them would be inappropriate, but that there are weighty reasons against granting any debt relief whatsoever to regimes on some types of human rights grounds.

It is of course true that human rights conditionality arrangements for debt relief could be inappropriate either because the human rights status that is demanded as a condition of debt relief is *unduly* minimalist or because it is poorly conceived and thus unlikely to make any real positive difference to a country's people. For example, such arrangements might allow debt relief to a government that was making very small and half-hearted steps towards implementing protections against various forms of mistreatment and enacting social policies that would alleviate malnutrition and other severe deprivations, while at the same time also acting in ways that substantially undermined these reforms.

These considerations show not that human rights conditionality in debt relief is necessarily inappropriate, but that such arrangements must ensure that the human rights status demanded of potential debtors be such that it does not have these characteristics.

At the very minimum, human rights conditionality in debt relief ought to incorporate conditions that are sufficiently demanding (and be rigorous enough in holding debtors accountable for meeting them) that the likely effect of granting the debt relief to such debtors will not be such that human rights would have been better fulfilled had they not been granted such relief. It may of course turn out that no feasible conditionality arrangement could have these features, but there is no reason to assume this to be so prior to practical exploration.

11.4.3. Demanding Ethically Dubious Conduct by the Debtor

Conditionality arrangements can also be inappropriate because the conditions they incorporate require that debtors do something that there are very weighty ethical reasons against doing. It may be that the conduct required would be such that there are *always* very weighty ethical reasons against it.

It is not difficult to imagine conditionality arrangements for debt relief that could be inappropriate for this reason. An arrangement in which the creditor would confer debt relief to the debtor on the condition that the debtor invade or take steps to undermine the legitimate governments of peaceful neighbouring countries, or that it implement social and economic policies that would impose significant additional hardships on its people or the people of other countries, for example, would seem clearly to be inappropriate for this reason.

Could human rights conditionality arrangements in debt relief be deemed inappropriate on these grounds? This seems very unlikely, at least if the human rights standards incorporated into the arrangement are understood in the way described in Section 11.1. After all, such arrangements would demand only that governments secure (or take steps towards securing) for their people the social and natural resources that are ordinarily required for them to achieve a civic status and standard of living that is minimally adequate. Few (if any) plausible conceptions of ethics would maintain that there are weighty ethical reasons against a government's conducting itself in this way, and most affirm on the contrary that they have weighty ethical reasons to do precisely this. In another type of case, the conduct demanded of the debtor may not be ethically objectionable in itself, but might be so under the circumstances that obtain when the arrangement is in operation. There may be nothing wrong *as such,* for example, with making cuts in government spending on education and health, or adopting contractionary economic policies. Indeed, such policies may be important means for some countries to balance their budgets and ensure their long-term economic stability. But there may be weighty ethical reasons against undertaking such policies in some circumstances, such as when these policies seem very likely to lead avoidably to public health crises or aggravate seriously the hardships of the poor for the foreseeable future.

Could human rights conditionality arrangements be inappropriate for this reason? Some have claimed that they can, on the ground that the urgency of improving the living standards of people in poor countries requires that priority be given to rapid economic development, even though this may lead to the underfulfilment of human rights, particularly those relating to what are sometimes called 'basic' or 'core' labour standards — specified levels of attainment of wages and working conditions that are deemed minimally adequate — or civil and political rights. The reason that is typically offered for prioritizing development overfulfilment of such human rights is that promoting their fulfilment can act as an obstacle to the development process. It is sometimes even argued that development can only take place *through* the underfulfilment of such human rights.[245]

If this charge were to be true, then it might plausibly be argued that policies requiring greater fulfilment of some human rights of a country as a condition for providing benefits to it might require that its government act against weighty

245. For an extensive discussion of this kind of charge with respect to labour standards, see Barry and Reddy (2008).

ethical reasons that apply to it.[246] This is of course an empirical claim and, as such, it may be questioned on empirical grounds. It is far from obvious that development requires (or even permits) that any (let alone all) human rights go unfulfilled. First, the fulfilment of some human rights can plausibly be understood as constitutive of development; promoting the fulfilment of these rights is a form of promoting development itself. In addition, fulfilling human rights may be instrumentally valuable because they facilitate other aspects of development. For example, the elimination of child labour may help to bring about universal basic education, which may in turn help to foster economic growth, or higher wages may foster increased productivity (see, e.g., Dasgupta and Ray 1987; Levine and Renelt 1992; Leibenstein 1957). Indeed, countries often further human rights standards, including rights to political participation and rights to certain wages and working conditions, without any apparent impediment to their development (see, e.g., Rodrik 1999).[247]

There is a valid concern implicit in this type of charge, however, which is that the human rights conditions incorporated in a conditionality arrangement must recognize explicitly the economic and social constraints facing potential debtors of debt relief or other benefits. The human rights standards incorporated into such arrangements ought therefore to be defined in a way that makes it very unlikely that efforts towards their fulfilment would be likely to thwart significantly other valuable objectives. In addition, such arrangements should give explicit allowance to countries that demonstrate good faith efforts toward fulfilling human rights to an extent and in a manner appropriate to their level of development, even when this falls short of fulfilling them completely. Unless human rights conditionality arrangements operate in a context-sensitive manner, they may indeed be inappropriate.

11.4.4. Imposing Impermissible Conditions

A conditionality arrangement may be inappropriate because it contains conditions that are ethically problematic, even though there is nothing intrinsically wrong about the conduct that they require. There are a number of reasons why this might be so.

246. Assuming, of course, that the prerogatives of development justify overriding the goal of promoting human rights fulfilment.

247. It has been argued that government enforcement of labour standards has created incentives for technological and organizational innovation and thereby enhanced economic growth in Europe and the United States. See, for example, Piore (1994) (studying the nineteenth-century US textile industry).

(a) Undue Meddling

It might be argued that requiring countries to adopt certain policies would be inappropriate since they would involve 'undue meddling' in that country's affairs. There may be nothing wrong with the policies demanded in the conditions themselves, and it may indeed even be *very* good for the prospective beneficiary of debt relief to implement them. It may nevertheless be inappropriate for others to strongly encourage them to do so by providing them with incentives through conditionality arrangements. Such incentives might be alleged to undermine self-determination and local autonomy. This concern might seem particularly important when the prospective debtor in need of debt relief needs it very badly, and has few (or no) viable alternatives to entering into the agreement to obtain them. Collingwood has argued that in such contexts some conditions (such as those comprising the World Bank's conception of 'good governance') may plausibly be viewed as constituting a 'form of cultural hegemony, an attempt to impose contested values on states that have not previously embraced them' (Collingwood 2004). If Collingwood is correct, then such conditionality arrangements could plausibly be viewed as inappropriate because they involve morally problematic forms of coercion.

Surely some conditionality arrangements for debt relief (including many existing conditions placed on debt relief) could plausibly be rejected because they are inappropriate for this reason. Suppose, for example, that the debtor is a poor country that is in desperate need of development finance. Assume further that that debtor's government is at least minimally representative of the interests of its people. Is it appropriate for the creditor to offer to make additional finances available to the debtor only on condition that the debtor adopt a series of policies that would offer significant benefits to the creditor, but which would not be very likely to benefit and may even involve some risk of harm to the debtor's population? Is it permissible even for the creditor to demand unwanted policy changes that are highly controversial amongst economists and social scientists, as very often occurs at present? In such a case, the creditor may be ethically free not to offer debt relief or some other benefit to the debtor at all, and it may be perfectly appropriate for the debtor to adopt the policies specified in the conditions given the situation in which it finds itself. It may nevertheless be inappropriate for the creditor to make the adoption of such policies a condition for the provision of debt relief.

Even some human rights conditionality arrangements for debt relief could potentially be regarded as inappropriate in this way. In particular, those arrangements that employ human rights conditions that depend on highly controversial interpretations of human rights or on conceptions of human rights that seem closely tied to some particular cultural or political tradition might in some cases be viewed as imposing a form of cultural hegemony. This does not show, however that all such human rights conditionality in debt relief would be inappropriate. To avoid being potentially inappropriate in this way, the human rights conditions incorporated in arrangements for the conferral of debt relief would need to be

specified abstractly enough that they permit appropriate context-specific variation in their interpretation and application.

It is hard to see how insisting that countries attain certain human rights statuses (when human rights are understood in the way stipulated in Section 11.1) could be plausibly viewed as a form of cultural hegemony. Indeed some of these protections would seem to be *necessary* for ensuring national self-determination and local autonomy. A society in which many persons are not afforded a meaningful role in shaping the policies and social institutions of the society in which they live is arguably not self-determining or autonomous, or at least not so in ways that are worth protecting at the expense of permitting widespread human rights underfulfilment and other significant social costs to its population. Prohibitions against various forms of mistreatment and demands that people be granted a meaningful role in shaping the affairs of their society, and that they have access to resources normally sufficient to avoid severe ill health or other deprivations, are not unique to any political tradition.

Even if the explicit conditions themselves do not depend on controversial interpretations of human rights, however, they may be applied in a manner that reflects a commitment to such interpretations. To avoid being potentially inappropriate for this reason, the procedures that would determine whether the conditions are met ought to be rule-based and impartial. In addition, it would be highly desirable that any agency charged with determining whether or not human rights conditions are met be widely *viewed as* distinct from creditor countries or countries whose governments are influenced substantially by private creditors.

Any human rights conditionality in which creditors or countries in which they are influential both with determining whether there has been compliance with these standards, and with deciding whether it is justified to withhold relief, would clearly lend itself to opportunistic misuse. Such opportunistic use would not be as readily possible in conditionality arrangements that prevented individual countries from making unilateral determinations of this kind. A transparently constituted and functioning representative body could be charged with interpreting the human rights conditions stipulated in the arrangements, as well as determining how they apply in particular cases. The findings and reasoning of the body could also be presented for public scrutiny.

(b) Non-Germane Conditions

Another possible reason for deeming conditionality in debt relief to be inappropriate has recently been interestingly explored in different contexts by Goodin.[248] If conditionality arrangements are appropriate, it must be appropriate to confer upon agents the power to enact such arrangements. Now, as Goodin suggests, powers are typically conferred for specific purposes that have an ethical

248. I draw in this section on a related discussion in Barry and Reddy, 'Reply to Robert E. Goodin', in *International Trade and Labor Standards*.

justification – and it may be inappropriate (and indeed impermissible) for agents to whom such powers are conferred to use them for other purposes (see Goodin 2004). If this test of permissible application of powers is satisfied when these powers are applied to a specific purpose, then the application of these powers to the purpose in question can be referred to as *germane*. In general, it is suggested that an agent's power should be deemed germane to some policy issue area only if one of the reasons why the agent should be granted the power would be to promote the desired effects within that very policy issue area.

Goodin illustrates this idea with the example of the US ban on Cuban exports (see Goodin 2008). Whatever one thinks of the potential efficacy of the US ban on trade with Cuba in promoting ethically valuable outcomes, one might question whether it is legitimate to use the extension or withdrawal of rights to trade as a means of bringing about regime change (a stated aim of the trade embargo at least since the passage of the Helms–Burton act in 1996). Altering the form of government of one's trading partners simply does not, it might plausibly be argued, further the purposes that are served by granting governments the power to permit or prohibit trade. Since regime change is an objective that is arguably not germane to the purpose of granting governments powers over trade policies, rights to trade may not in Goodin's view be restricted in order to achieve this objective.

It might similarly be argued (though Goodin himself does not) that the reasons for which one might wish to confer powers to governments to place conditions on the provision of benefits to other countries do not include the altering of the domestic policy decisions of the countries to whom such benefits might be conferred. It might be concluded that debt relief is therefore not a germane instrument to apply in attempting to influence domestic policies, and this makes them inappropriate. I call this the 'non-germaneness' ground for deeming certain conditionality arrangements in debt relief to be inappropriate.

It is not difficult to think of conditionality arrangements in debt relief that might indeed be regarded as inappropriate because they are non-germane. Imagine, for example, some country offering debt relief to another only on condition that the president of the debtor country (him/herself guilty of no great misdeeds) be removed from power.

Could human rights conditionality also plausibly be deemed inappropriate on this ground? To answer this question requires reflection on the reasons why two distinct powers should be conferred on governments. The first is the power to confer debt relief in the first place. The second power is to place conditions on the debt relief that one grants. One reason why the power to grant debt relief should arguably be conferred to governments and other agents is that those powers enable such actors to promote improved living standards. They may improve living standards in various ways. First, by granting debt relief, they may help to restore an indebted country's economy, and to create the conditions for it to undertake needed reforms and to improve the living standards of its people, including the alleviation of human rights underfulfilment and other harms. Second, by granting debt relief they may increase the debt service that the indebted country can be expected to pay in the medium and long term (for all the reasons mentioned in Section

11.1 above), thus also leading to improved living standards of those (including themselves) who stand to gain from the payment of the debt. Our reason to confer to agents the power to grant privileges of non-repayment to indebted countries is also a reason to confer upon them the power to make such relief contingent on the prospective beneficiary of this relief satisfying certain conditions. As discussed above, there is no guarantee that debt relief will lead to improved living standards, and may instead decrease them. Allowing agents to place conditions on such relief can enable them to better serve the purpose that justifies the conferral of the power to grant such relief in the first place, *so long as* the conditions are oriented towards improving living standards or other purposes relevant for the justification of this power, and are realized in institutional arrangements that protect against their opportunistic misuse. Second, these powers are arguably granted to governments and other agents to help ensure that the people on whose behalf they act observe ethical obligations that apply to them. Insofar as some firm, country, or other collective agent is in a position to cancel the legal obligations to repay debts to which they have no rightful claim, they have fairly compelling reasons to do so since acting otherwise could implicate their members or those they represent in unfairly harming those who are servicing these debts.

People who know (or should have known) that they are receiving resources transferred as a result of a debtor country's having serviced such debt can plausibly be viewed as having violated their ethical duties by *contributing to* or by becoming *complicit in* practices that unfairly harm others. Since governments and other collective agents can, to some extent at least, help ensure that their members do not engage in such conduct by adopting appropriate policies with respect to debt contracts, this provides a good reason to confer to them the power to set such policies. There are similar reasons to grant some power to place conditions on the terms under which debt relief might be offered. Due to considerations discussed in detail above, simply transferring benefits to the government of a country that is paying such debts unconditionally may aggravate instead of alleviate the human rights underfulfilment and other significant social costs borne by the country's population. Conferring the power to governments and other collective agents to place human rights conditions on debt relief can help these agents to ensure that they do not contribute to or are not complicit in practices that lead avoidably to the underfulfilment of human rights. The conferral of such powers also provides governments seeking debt relief with incentives not to engage in activities that are corrosive of human rights.

11.4.5. Unfair Procedures

A conditionality arrangement may also be deemed inappropriate because its procedures are ethically problematic in various respects. There are a number of plausible reasons why this might be so.

(a) Design Flaws

The procedures of a conditionality arrangement may be poorly designed in a way that makes them prone to opportunistic misuse by the creditor or the debtor. For example, the procedures may enable the creditor to delay relief that ought to be provided to the debtor by arbitrarily making it harder for the debtor to show that the conditions incorporated in the arrangement have been met. The procedures may also enable the debtor to cheat the creditor easily by withholding information that is relevant to determining whether the conditions have been met. This latter possibility may be of particular concern when the conditions are relevant to ensuring that the benefits provided to the debtor benefit its people and that they do not instead aggravate their hardships.

It is easy to see how conditionality arrangements in debt relief, including those involving human rights conditions, could be inappropriate for this reason. It does not follow, however, that they need be. To avoid the risk of being inappropriate in this way, the procedures that would determine whether the conditions are met would also need to be not only rule-based and impartial, but also to have the effectively resourced capacity to ensure that abuses of these rules do not occur.[249] It may of course turn out that establishing arrangements of this type will be politically infeasible, but it does not follow that human rights conditionality arrangements are inappropriate *as such*.

(b) Improper Allocation of Authority

In all conditionality arrangements some agent or set of agents will be allocated authority to determine whether or not the conditions have been met. A conditionality arrangement may involve unfair procedures if such authority is improperly allocated. Imagine, for example, a case in which a creditor lacks an ethically valid claim to repayment of some part of a country's debt. It may of course be questioned whether conditionality is appropriate at all in such a case. But let us suppose (for reasons canvassed in the previous section) that at least conditions oriented towards ensuring that the population of the debtor country received the benefits of such relief were appropriate. It could nevertheless plausibly be deemed improper that the creditor itself be granted authority to determine whether the conditions for debt relief were met, at least insofar as there are other reasonably reliable agents in whom such authority could be entrusted. There are several reasons for this. First, in the case imagined, the resources do not belong to the creditor, and indeed it may seem inappropriate that it continues formally to claim title to them. Entrusting the resources and responsibility for setting and tracking the conditions for their conferral to the debtor country to an independent agent or institution would not only eliminate incentives to opportunistic use of the arrangement by the creditor or other agents, but would

249. For a related discussion in the context of basic labour standards, see Barry and Reddy (2008).

also make clear the nature of the entitlements to these resources. What is more, others (notably including debtor countries themselves) will have much more confidence in a conditionality arrangement if authority for implementing it lies with an independent agent rather than with creditors, particularly if the claims these creditors have to the resources are generally thought to be ethically invalid. Under existing programmes for debt cancellation for the poorest countries, such as the HIPC Initiative and Multilateral Debt Relief Initiative (which resulted from the G8's June 2005 decision on multilateral debt cancellation), qualifying countries must have complied with IMF-designed and monitored conditionalities in order to benefit from them. While IMF conditionalities may be motivated by legitimate reasons to ensure that the resources made available by the cancelled debts are used for defensible purposes, they are seen as highly controversial by developing countries. Instead, peer-run trust accounts that provide a check on the policies of the countries receiving the benefits but are *not* controlled by creditors could provide an alternative.[250] As part of the condition for allowing a cancellation or reduction to go forward, a country might be required to deposit an amount equal to its monthly debt payments into this trust account, from which the money will be transparently allocated to social expenditures on poverty alleviation, health care, and education or other means of addressing human rights underfulfilment in the population of the debtor country. Since payments into the fund could be made in regular instalments, potential abuses could be halted in time with in-progress audits. A further check on the fund's spending could be provided by an independent international arbitral body. Requirements of various kinds, such as that the findings and reasoning of the arbitral body charged with making determinations be presented for public scrutiny, can help to ensure that it functions in the desired manner. Approaches to fact-finding and adjudication of this kind are familiar, even if sometimes difficult to implement fully in practice. They may be found in both domestic and international settings.

11.5. CONCLUSION

To show that some particular human rights conditionality arrangement for debt relief is desirable would clearly require developing in much greater detail than I have provided here the characterization of the human rights standards, the composition of the arbitral body making determinations about whether such conditions are met, and the rules according to which such a body would make its assessments. It would also involve detailed empirical assessment of the likely effects of such a scheme, and regarding whether it would be feasible to bring about and maintain. Even if some such arrangement could be shown to be desirable, it would not follow from this that it should be made a priority for action. Still, given the

250. This proposal is outlined by Hertz (2004) and Kapoor (2005). The idea of peer trusts goes back to Streeten, who proposed an emulation of the Marshall Plan model of self-monitoring by recipients in the mid-1990s (see Raffer and Singer 1996).

severity of human rights concerns engendered by debt crises, and the real risk that granting debt relief may aggravate rather than mitigate such problems, exploring further such arrangements would be a very worthwhile practical task.[251]

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251. I am presently attempting to develop in more detail a feasible and potentially desirable proposal for human rights conditionality in debt relief.

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12

Subsistence Wars[252]

Cécile Fabre

12.1. INTRODUCTION

In the past thirty years or so, a number of theorists of justice have given various philosophical justifications for President F. D. Roosevelt's resounding claim that all human beings, wherever they reside, have a right to be free from want – free, that is, from being subjected to the kind of severe poverty that makes it impossible for them to lead minimally flourishing lives. Those theorists have mounted arguments in defence of that right, tried to identify the bearers of its corresponding duties, and offered accounts of its content. Very few, however, have sought to provide an account of the ways in which the very poor are entitled to act in response to repeated breaches of those duties.[253]

In this chapter, I argue that, under certain conditions, the very poor have the right to wage war against the (foreign) affluent if the latter breach their duty to avoid causing severe poverty abroad. The chapter thus unfolds within a two-pronged conceptual and normative framework – to wit, a conception of distributive justice on the one hand, and the just war tradition on the other hand. Regarding the former, I take it for granted that all human beings, wherever they reside, have a human right not to be subjected to severe poverty (henceforth, HRP). The important questions, for my purpose here, are (a) who is under the corresponding duties (the question of the *scope* of those duties), and (b) what those duties are (the

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252. Earlier versions of this chapter were presented at a conference organized by *The British Journal of Political Science* at the British Academy in June 2006, at the Oxford Political Thought Conference in January 2007, and at seminars organized by the University of Edinburgh, the London School of Economics, Roehampton University (in the latter case under the auspices of the Royal Institute for Philosophy), and the University of St Andrews. I am grateful to audiences at those events for their useful remarks, to L. Wenar for stimulating discussions on the issues raised here, and, for written comments, to G. A. Cohen, G. K. Eddy, Pablo Gilabert, T. Pogge, M. Ravvin, Dominik Zahrnt, and an anonymous referee for Oxford University Press.
253. Luban's well-known article 'Just War and Human Rights' is a notable exception, although he only devotes a couple of paragraphs to the issue (Luban 1980: 160–81). Whether or not it is permissible, in war, to cause severe deprivation on one's enemy, by imposing blockades and embargos, is an important topic in just war theory (see, e.g. Walzer 2006). In this chapter, however, I am mostly concerned with the question of whether those who suffer severe poverty are entitled to start a war against the affluent in the first instance.

question of their *content*). With respect to the scope of the duties, some theorists argue that HRP imposes on anyone in a position to help, wherever they are in the world, a duty to do so. With respect to the content of the duties, some argue that duty-bearers are not merely under a negative duty not to cause severe poverty (which they discharge by not conducting harmful policies such as protecting their own markets from Third World food exports), but also under a positive duty to eradicate it (which they discharge by, for example, transferring material resources to the poor). How radical the conceptions of HRP are, then, depends on the breadth of its scope and the burdensomeness of its content. Thus, a very radical conception would hold that individuals in their private capacity are guilty of injustice whenever they fail to give their own surplus resources to the very poor, whether or not the latter are their compatriots; it would also deem multinational corporations guilty of injustice when they impose employment practices and wages that contribute to causing poverty, whether at home or abroad.

Although that conception of HRP is very burdensome on each and every one of us, I confess to finding it appealing. Not many do. Instead, those who endorse HRP tend to advocate a less demanding set of duties, with respect to both scope and content. In their view, affluent individuals in their private capacity do not owe duties of justice to the very poor (whether or not the latter are their compatriots), and thus are not guilty of injustice if they buy a coffee from Starbucks instead of giving money to Oxfam or buying the *Big Issue*. Rather, they are under a negative duty, as *citizens and public officials*, not to support policies and institutions that contribute to causing poverty. That duty is one that they owe not merely to their compatriots, but also to distant strangers. In addition, as citizens and officials, they owe to the former, but not to the latter, a positive duty to help by way of resource transfers. The key feature of this account, then, is that the affluent are not under a positive duty to help distant strangers: they only owe the latter a negative duty, in their capacity as citizens and officials, not to impose on them policies and institutions that contribute to subjecting them to severe poverty.[254] For example, assuming for now that closing Western markets to Third World food products is a cause of severe poverty in exporting countries, the affluent are under a duty not to carry out or support that policy; but they are not under a duty to send aid to affected food producers and their families.[255]

In this chapter, I shall adopt that less demanding (at least normatively speaking) conception of the affluent's duties towards non-compatriots. My aim is to show that a relatively uncontroversial stand on what the affluent owe to distant

254. Accordingly, when I talk of the violation of HRP by the affluent towards the very poor, I shall assume unless otherwise stated, that the affluent and the very poor are not members of the same political community; likewise, when I talk of such violation as a just cause for going to war against the affluent, I shall mean the affluent's failure to discharge their negative duty not to cause severe poverty.

255. For a defence of the radical view, see, e.g. Singer (1972); Ashford (2007). For the claim that the duty imposed by HRP is a negative duty not to support such institutions, see, e.g., Pogge (2002). For the claim that HRP imposes a positive duty to alleviate poverty whatever its causes, see, e.g., Shue (1996); Caney (2005); Jones (2001).

strangers yields rather controversial conclusions as to what the latter are entitled to do when seeking redress for the injustice which they suffer. Whether or not subsistence wars are a legitimate response to the breach of positive duties must await another occasion.[256]

So much, then, for the conception of distributive justice that underpins this chapter. Let me now make a few preliminary remarks on the just war tradition. The tradition is a set of moral principles which regulate the conditions under which resorting to war is just (*jus ad bellum*), and govern belligerents' conduct in war (*jus in bello*). It is a rich and multifaceted body of thought, spanning centuries and straddling cultures. In its modern (post-sixteenth-century) Western incarnation, as it were, and with qualifications that need not detain us here, the tradition holds that a war is just if it meets the following conditions: [257]

Ad bellum

1. It has a just cause.
2. It is fought by a legitimate authority.
3. It is fought with the right intentions.
4. It must have a reasonable chance of success.
5. It is the option of last resort.[258]
6. The harms that it causes (such as the destruction of life and property) must not be out of proportion to the good it achieves.

In bello

1. Civilians are not targeted intentionally (principle of non-combatant immunity).
2. The collateral killing of civilians is necessary to further one's military ends.
3. The collateral killing of civilians is allowed if, and only if, it is not out of proportion to the good one will thereby achieve.

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256. One might think that subsistence wars that are fought in redress of this kind of violation need not be addressed separately. It seems to me that they do, if only because they could not be properly regarded as wars of *self-defence* (since omitting to help someone is not tantamount to threatening them). Reconstructing just war theory so as to accommodate wars that are neither self-defensive nor humanitarian is beyond the scope of this chapter.

257. For a good overview of the just war tradition, see Rodin and Sorajbi (2006) and Bellamy (2006). Note that throughout this chapter, when I refer to the just war tradition, I mean (to repeat) its post-sixteenth-century Western strand. I lack the space, in this chapter, to assess subsistence wars against the entire tradition, and focus instead on the latter's current, and standard, interpretation.

258. The requirement that the war should be the option of last resort cannot be interpreted strictly. For as has often been said, there is always one further step to take (yet another phone call to make, yet another attempt at diplomatic resolution, etc.) before embarking on a war. Moreover, it may be that resorting to war would be less costly in lives and resources in the longer term than pursuing other options (as repeated attempts to pacify Nazi Germany in the 1930s seem to suggest). The requirement of last resort is best read as a requirement that alternatives to war be given careful consideration, and that weighty reasons be provided for rejecting them.

The claim that the very poor are entitled to wage war against the affluent mostly falls within the remit of *jus ad bellum*, whose central tenets I have just set out. At first sight, there is no reason to believe that the requirements of right intentions and proportionality should apply less, or more, stringently to wars fought on the grounds that HRP has been violated, than to wars fought on the grounds that a state's political sovereignty is under direct threat from another state's decision to invade it. By contrast, the thesis that the very poor are entitled to wage war on the affluent implies that they have a just cause for resorting to war as a means to redress the injustice done to them, and that they have the authority to do so. In implying that the violation of HRP is a just cause, however, that thesis seems to depart from standard accounts of the just cause requirement: for on those accounts, aggression on a state's political sovereignty and territorial integrity, or serious violations of individuals' human rights by their own government, are the only just causes for waging war (a war which, in the latter case, would be a war of humanitarian intervention). Moreover, in arguing that the very poor themselves, and not merely their state, have the authority to wage war against the affluent, my thesis departs from the standard interpretation of the legitimate authority requirement, whereby states, political communities and national liberation movements alone have the right to wage war. I shall justify those revisions to orthodox just war theory in Sections 12.2 and 12.3, and address three objections to my thesis in Section 12.4.

Two *caveats* before I begin. First, by 'the affluent', I shall mean citizens and officials of affluent countries (typically, developed economies). By 'the very poor', I shall mean, unless otherwise stated, those individuals in developing countries who are subject to severe poverty, as well as those states themselves: as we shall see in Section 12.3, it will sometimes be necessary to distinguish the latter from the former.

Second, in this chapter, I do not address civil wars brought about by severe economic deprivation and/or disputes over access to vital natural resources. Moreover, I set aside the hugely complicated question of the affluent's responsibility, through the economic policies that they conduct, for those civil wars. I also ignore the equally difficult question of the extent to which severe poverty caused by war can itself provide a further just cause for war.[259] A full account of subsistence wars would have to deal with all those issues. For now, I content myself with attempting to provide a normative framework for the (marginally) less thorny problem of transnational conflicts between the affluent and the very poor.

259. For the view that the very poor are entitled to go to war against their own state if the latter is derelict in its duty to ensure their access to the resources they need, see Gargarella (2007). For a review of arguments on the causes – some of them economic – of internal conflicts, see, e.g., Brown (1996), especially his introduction and his chapter contribution (ch. 17). For a sceptical take on the claim that severe poverty causes civil conflict, see Sen (2002). Sen stresses that more often than not, famines and severe poverty are caused by war – a claim that is highlighted in the *Human Development Report 2005*.

12.2. SEVERE POVERTY AS A JUST CAUSE FOR GOING TO WAR

12.2.1. Severe Poverty and Self-Defence

In the just war tradition, armed aggression (be it ongoing or imminent) on a state's or political community's territorial integrity and/or political sovereignty by another state or such community is regarded as the only just cause for waging a war of self-defence. In other words, a just cause for a self-defensive war is (a) an armed attack on (b) the collective goods of political sovereignty and territorial integrity. At first sight, it seems that subsistence wars between poor and affluent countries fail the just cause test, since they are not a response to armed attacks, and since poverty affects individuals as such, and not communities (or so one might insist). I shall argue here that subsistence wars meet criterion (b) and that even if they did not, the very poor still would have a just cause for waging a self-defensive war against the affluent. I shall also concede that subsistence wars fail criterion (a), but that this does not deprive the very poor of a just cause for waging them, in self-defence. In other words, neither (a) nor (b) is a necessary condition for a just self-defensive war. Note, incidentally, that my claim is not merely that the very poor sometimes have a just cause for going to war against the affluent. My claim is that they sometimes have a just cause for a *self-defensive* war. The reason I emphasize self-defence is this. Traditionally, self-defence against a lethal threat is regarded as a paradigmatic just cause for permissible killing and, by implication, for a just war. Whilst I have doubts about the cogency of the view that war is about self-defence, I take it for granted in this chapter, and aim to show that it can accommodate the controversial claim that subsistence wars can be just wars.[260]

Let us start with (b). The just cause requirement so defined has sometimes been criticized for illicitly attributing collective interests to states themselves – illicitly because (the objection goes) states cannot have rights independently of the rights of their individual members. In fact, the criticism is misguided. The violation of collective rights to territorial integrity and political sovereignty can coherently be regarded as a just cause for resorting to war, on the grounds that those rights, which are held by individuals qua members of a political community, are instrumentally valuable to those individuals' prospects for a minimally flourishing life. Still, on that reading of the just cause requirement, it seems that just war theory cannot accommodate subsistence wars, since the violation of individuals' right not to be subjected to severe poverty does not (or so one might think) constitute an instance of aggression against their *collective* rights, as a people, to political sovereignty and territorial integrity.

260. Although most war theorists argue that war can be regarded as the exercise, by states or peoples, of a collective right to self-defence, some disagree (see, e.g., Rodin 2002; Zohar 1993).

Upon further scrutiny, however, subsistence wars can be conceived of as a means to redress the wrong of aggression on the political sovereignty of a political community, both externally (in that the community in question is subjected to the domination of another such community) and internally (in that its citizens themselves no longer have meaningful control over their community's destiny). HRP, you recall, imposes on the affluent a duty not to cause distant strangers to suffer severe poverty. Quite straightforwardly, to the extent that violations of that duty consist in seizing or damaging natural resources to which the target community has a (independently defended) valid claim, they are tantamount to attacking the territorial integrity of that community, and, thereby, its political sovereignty.[261]

Moreover, to the extent that they also consist in depriving the members of that community of access to vital resources or in setting up global institutions the rules of which contribute to reducing them to severe poverty, they are tantamount to attacking the political sovereignty of that community, in at least two ways. First, those of its citizens who are living in severe poverty are unlikely to exercise their political rights of citizenship, most notably voting, if and when called upon to do so. It is doubtful, therefore, that the outcomes of those political processes are genuinely democratic, and constitute the expression of political sovereignty. Second, a community that has to devote most of its resources to helping its members meet their basic needs is unlikely to be able to engage in whatever collective projects it would have wanted to pursue otherwise. As a result, its political sovereignty is likely to be severely impaired. Third, in so far as national security is a precondition for effective self-determination, and as severe poverty undermines national security, it follows that severe poverty undermines self-determination. Framing the issues raised by failures to respect HRP in terms of national security might seem odd. However, it has become a commonplace in the literature on security that the latter ought not to be couched solely in narrow military terms (whereby a threat to national security is, paradigmatically and most importantly, a military aggression on the target state's territory). Rather, the literature goes, security is threatened by severe inequalities, environmental degradation, mass migrations of refugees caused by famine, etc. (Buzan 1991; Hurrell 2007, esp. 7; Tuchman Matthews 1989; Ullman 1983). Seen in that light, *if* the affluent's policies can be seen as a threat to the security, more widely defined, of poor states, they can in

261. What if, as Mike Ravvin pointed out to me, the government of a poor country enters into agreements with A, such as to contribute to cause severe poverty amongst its people? To what extent, in that case, can we say that severe poverty vitiates its sovereignty? One cannot reach a firm conclusion on such a case without filling out the details. Is the government democratically elected and representative of the very poor? Does it enter this agreement because it is the least bad of a number of bad options, or as a way for its leaders to line up their bank accounts with corruption money? And so on. There are cases where such a government could not be regarded as legitimate – and where such a political community could not be regarded as sovereign. It would lack internal sovereignty, both in so far as its government takes decisions without the consent of its members, and in so far as the persistence of severe poverty within its borders (a consequence, ex hypothesi, of those decisions) makes it extremely unlikely that it will become able to direct its own future.

turn be seen as a threat to their ability to shape their own future. Within the just war paradigm, these policies would provide the very poor with a just cause for going to war.

Although, as we have seen, violations of HRP can undermine a political community's territorial integrity and political sovereignty, it would be a mistake to insist that they are a just cause for going to war *only* in those cases. For the justification for the duty to avoid causing severe poverty is not merely, indeed not even mainly, that individuals who are severely poor cannot, at the individual level, properly exercise their political rights and, at the collective level, make the decisions they want regarding their future as a people. Rather, the main justification for that specific duty is that we generally ought not to impose severe harm on others. To insist, then, that the violation of HRP is a just cause for waging war only when HRP is understood as a right the realization of which is instrumental to the value of political sovereignty is to miss the point.

Yet, the just war tradition tends to regard the violations of collective rights as the only just cause for waging interstate wars, with the exception of wars of humanitarian interventions. I do not see why that should be so. In fact, narrowing the range of just causes for waging war down to violations of collective rights, to the exclusion of violations of individual basic rights, is at best arbitrary and at worst absurd. For it has the following two-pronged implication: that, in 1982, the United Kingdom had a just cause for waging war against Argentina on the grounds that the latter, by invading the Falklands archipelago – 6,000 miles away from the UK, with a population of under 3,000 people – had violated its sovereignty rights over it; *but*, *by contrast*, that sub-Saharan African states lack a just cause for waging a war against rich nations even if the latter's policies are contributing to causing routine starvation on the continent. However, as we saw above, the violation of collective rights to territorial integrity and political sovereignty is thought to constitute a just cause for resorting to war on the grounds that those rights are instrumentally valuable to individuals' prospects for a minimally flourishing life. If so, HRP violations per se, irrespective of the fact that they in turn constitute a violation of the collective rights to political sovereignty and territorial integrity, provide the very poor with a just cause. To put the point differently, if the impact of a rights violation on such prospects is what renders it a just cause for waging war, then whether the rights are collective or individual is irrelevant.

My argument, note, does not dispute that most orthodox of claims, in just war theory, that war is appropriately regarded as a self-defensive action: rather, it interprets that claim more broadly than the theory would generally allow. And yet, just as the fact that one's life or limbs are at risk from a lethal harm provides one with a reason to kill the agent of that harm in self-defence, the fact that the lives and limbs of the very poor are at risk from the affluent's current deeds provides them with a just cause for exercising lethal force against the latter in self-defence. To be sure, the harm that duty-bearers thus inflict on the life and limbs of the very poor is not as direct as, e.g., the harm inflicted by a serial killer on the life of his/her captive victim. However, to the extent that the violations of that duty are current, ongoing and clearly causally related to the very poor's untimely deaths

and debilitating diseases, any measure that the very poor would take against those who violate the duty to stop the threat can appropriately be regarded as a self-defensive step.

12.2.2. HRP Violations and Military Aggression

As I noted at the outset of this section, a war of self-defence is, typically, a war waged as a response to an armed attack (criterion (a) above.) Subsistence wars do not meet that criterion, at least when they are not a response to the seizure by force of a country's natural resources by another country but, rather, a response to policies that contribute to causing severe poverty. If the existence of an armed attack is a necessary condition for a war to count as self-defensive, then subsistence wars are not self-defensive. Moreover, if one takes the view that war is just if, and only if, it is waged in self- – or other – defence against a threat, then it follows that subsistence wars cannot be just.

For the sake of argument, I shall concede that only *defensive* wars are just. The question, then, is whether a war must be a response to an armed attack in order to qualify as defensive (and therefore just). Most people would argue that it must: paradigmatically, a war of self-defence is a war waged against infantry divisions that have crossed our borders, or jetfighters that have invaded our airspace. Less straightforwardly (but, I suspect, increasingly likely) it is a war waged against an enemy that hacks into our computers and destroys our air defence system. A war of self-defence, in other words, is usually thought of as a response to a kinetic attack of some sort.

It seems to me, however, that the foregoing view relies on an overly narrow notion of self-defence. That narrow notion yields the following odd conclusion, namely: (1) Imagine a country, A, whose troops mount regular incursions two miles into country B's territory, and destroy B's one and only nuclear reactor. If A's attack is unjustified, it provides B with a just cause for waging a self-defensive (limited) war against A, even if it has suffered minimal casualties in that attack. (2) By contrast, imagine country C, whose standard of living is considerably higher than B's. C does not provide B with a just cause for waging such a war if it imposes highly protectionist tariffs on B's products, even though B's farmers are then unable to sell their crops (let us assume) and on the brink of starvation. The difficulty with this view, though, is that, as the effects of A's armed attack on B's sovereignty seem far lesser than the effects of C's policies, it does not seem coherent to insist that B is legitimately *defending itself* by military means in the former case only, and not in the latter. On a broader and, in my view, more plausible understanding of self-defence, a self-defensive war is a war waged as a protective step against a threat to vital individual and collective interests; that threat may take the form of a kinetic action, but may also take the form of seriously harmful economic policies.

12.3. SUBSISTENCE WAR AND LEGITIMATE AUTHORITY: WHO CAN GO TO WAR AGAINST THE AFFLUENT?

To recapitulate, I have argued that the very poor have a just cause for going to war against the affluent if the latter are in breach of their duty not to set up and support national and global institutions whose rules operate in such a way as to cause human beings to suffer severe poverty. However, the just cause requirement is only one of several conditions that a war must meet in order to be just. In addition, the war must be fought by a legitimate authority, standardly defined as a sovereign, independent state with legal and political jurisdiction over a bounded territory, a coalition of such states, or national liberation movements. On that view, only states or quasi-states have the right to wage war. Accordingly, the claim that the very poor have the right to wage war against the affluent raises two questions: (1) Under what conditions, if any, can a state, P, in which a large section of the population is very poor, hold that right? (2) Under what conditions, if any, can the very poor themselves have that right, independently of what their government may do?[262]

The first question – that of state P's right to wage war against affluent state A – is particularly salient in the context of wars of subsistence. For as we saw in Section 12.1, HRP imposes the following duties on the following actors:

1. a negative duty, on A's officials and citizens, not to act in such a way as to contribute to causing severe poverty within P;
2. a negative duty, on P's officials and (affluent) citizens, not to act in such a way as to contribute to causing severe poverty within P's borders; and
3. a positive duty, on P's officials and (affluent) citizens, to transfer resources to P's very poor, by way of coercive taxation.

Accordingly, in order to assess whether or not P can hold the right to wage war against A, we must distinguish cases where P is not derelict in its duties to its very poor from cases where it is. Consider the following examples:

> ***Case 1:*** P does not forcibly withhold from its very poor members access to basic necessities. In fact, it has set up a welfare system that somewhat alleviates poverty within its population. However, A's own policies are such that, notwithstanding P's fulfilment of its duties, there still is persistent and severe poverty within P's borders. P, moreover, simply cannot do more than it currently does without jeopardizing its future as a minimally functioning state.

262. Two points of terminology. First, in this section, by A and P I mean *states* (or regimes) A and P, as distinct from their peoples (there are grounds often for distinguishing a state from its regime but the distinction is not relevant here). Second, when I say that P can hold the right to wage war against the affluent, I mean that P has the authority to do so, not that it *has* the right to wage that war all things considered. Thus, if, in waging such a war, P would violate the requirement of proportionality, then we would conclude that P does not have the right to go to war against A, even though it has the authority to do so.

> ***Case 2:*** A supports global institutions, the policies of which harm P's very poor; moreover, P's own policies are such as to have that effect as well.

In *Case 1*, A's defaulting makes it impossible for P to eradicate severe poverty within its borders. In so far as, ex hypothesi, state P is not guilty of the relevant moral wrongdoing towards its very poor, it can hold the right to wage war against A. It is worth noting, incidentally, that this claim, if true, does not imply that P can hold that right only if it is a morally legitimate state – a state, that is, which respects all the fundamental human rights of its members as well as foreigners, and in which decisions are made through democratic procedures. Indeed, it would be tempting to think that only a legitimate state can ever hold the right to wage war, on the grounds that only a legitimate state has the right to defend its sovereignty and territory against aggressors. However, even if the latter claim is correct, it does not entail that only a legitimate state so defined can hold the right to wage a *subsistence war* on behalf of its very poor. Consider a domestic analogy. A Mafia don who is guilty of extortion and blackmail against some of the members of his family (in the Mafia sense) is not thereby disqualified from having the right to defend them against attackers whom they have not unjustly aggressed, even though he thereby helps ensure that his family remains powerful. Similarly, the fact that an illegitimate state lacks the right to defend itself as a sovereign body does not disqualify it from having the right to defend the lives of its individual members against foreign unjust threats, at least in those cases where it is not itself guilty of the kind of injustice committed by its attackers, and even though it thereby ensures its viability as an illegitimate state.[263]

Note, though, that in this scenario, P's decision to go to war against A would in all likelihood fall foul of the criterion of reasonable chance of success. Suppose that P decides to go to war against A on the grounds that A is derelict in its duty to P's very poor, and that the latter therefore cannot but live in severe poverty. In so far as a successful war requires the deployment of considerable material and human resources, it is likely that P also lacks the wherewithal to win that war since, ex hypothesi, it lacks the wherewithal to pick up the costs attendant on A's dereliction. To be sure, waging a war against the affluent might perhaps be less costly than fulfilling the duty to avoid causing severe poverty. Thus, a poor country

263. The worry, of course, is that illegitimate states could then invoke A's dereliction of duty towards their very poor as a pretext for waging a subsistence war which, if successful, would shore them up. However, if one subscribes to the requirement that the recourse to war is just only if undertaken with the right intentions, then such wars would be unjust. If one does not subscribe to the right intention requirement of *jus ad bellum*, then such wars would be just (and we would say of those states that they are doing the right thing for the wrong reason). This may not convince the sceptic, who might press that subsistence wars cannot be just if they enable illegitimate states to survive. This reply supposes, though, that from a consequentialist point of view, it is preferable that the very poor should continue to be subjected to life-threatening, debilitating poverty. I am not convinced that this is right – on consequentialist grounds. I am grateful to Mike Ravvin for pressing me on this point. For a fuller account of state legitimacy and the *ad bellum* requirement of legitimate authority, see my *States, Legitimacy, and the Just War*, unpub. ts.

might be able to build enough bombs to strike at the heart of affluent institutions. Or it might be able to finance a guerrilla war that would impose considerable losses to the affluent, at a lesser financial cost than doing A's share would require.[264] It is likely, though, that many such acts would violate some other requirements of just war theory, such as the *in bello* requirement of proportionality. In other words, even if a subsistence war does respect the *jus ad bellum* requirement of reasonable chance of success, in many cases (I submit) it will do so only at the cost of some other requirements of a just war. By implication, though, *if* it turned out that such a war would not violate those other requirements, then P would have the right to wage it.[265]

In *Case 2*, the question is whether the fact that regime P defaults on its duties to its very poor disqualifies it from holding the right to wage war against A. Clearly, it does not seem right to deem it permissible for P to inflict widespread damage and destruction on the lives and limbs of members of A – and this, precisely because P itself is guilty of exactly the *same* kind of wrongdoing. Put generally, it is unclear how someone who is also guilty of threatening an attacker's victim – in other words, someone who is also an attacker – could ever be at liberty to exercise lethal force in defence of that victim.[266] By implication, in so far as P is also derelict in its duties to its very poor, it is not at liberty to go to war against the affluent.

However, the foregoing point is wholly compatible with the thesis that P's very poor themselves can have the right to go to war against A. According to orthodox just war theory, they cannot, since a war, if it is to be a just war, cannot be fought by individuals or, indeed, by groups of individuals, unless they do so as a state, a coalition of states, or a national liberation movement. It is unclear to me, however, why that should be so. Ex hypothesi, individuals have a human right not to be subjected to severe poverty. They also have a number of other human rights, for example human rights to fundamental freedoms. If those assumptions are correct, individuals also have the right – the meta-right, as it were – to protect those very rights themselves. It would be incoherent, on the one hand, to claim that individuals' fundamental interests in life-saving resources and basic freedoms are important enough to be protected by rights, and, on the other hand, to deny that individuals' interest in the protection of those rights is important enough to be protected by a right to defend those rights themselves. This is not to say, of course, that individuals have the right to take matters in their own hands whenever the protection of their human rights is at issue. In fact, to the extent that they would

264. I am grateful to G. A. Cohen for this suggestion.

265. One way to allow for the conclusion that P could hold the right to wage a subsistence war, and that such a war would be just even if P were to violate the requirement of reasonable chance of success, would be to relax the requirement. Whether or not P is in breach of the latter depends on one's interpretation as to what counts as 'reasonable.' I am not sure how to go about deciding what counts as 'reasonable' in this particular context. But I do not think that we should do away with the requirement altogether: inflicting widespread, and lethal, damage on other human beings is too portentous an act for agents to do it pointlessly.

266. This case differs from the example I gave earlier, of a Mafia don who, although guilty of the wrongdoing of blackmail against one of his family members, nevertheless has the right (or so I claimed) to defend him from a morally culpable attacker.

be better off by transferring the meta-right to protect their human rights to an organization like the state, it is in their interest that they should do so. Thus, to reiterate a point made earlier, a state has moral legitimacy if, and to the extent that, it respects the human rights of its members. In addition, it must do a better job at protecting those rights than individuals themselves would. Should it fail to do so, however, I submit that the meta-right to protect fundamental human rights reverts back to individuals.[267]

Now, war is one of many steps that individuals may be tempted to take in defence of their fundamental human rights. Whether or not individuals can hold the right to do so is precisely the point at issue. If the foregoing account of state legitimacy is correct, they do. On that account, the state's right to wage war is one that it has precisely in so far as it does a better job than individuals at protecting the latter's fundamental human rights through the use of lethal force. If it is derelict in its duty to respect its members' human right not to be subjected to severe poverty, and, as a result (and as we saw above), has forfeited its right to wage a subsistence war on their behalf, the right reverts to the very poor. For a war to be just, then, it is not necessary that it should be fought by a legitimate authority such as a state. It may be fought by those for whose sake states are normally given the right to wage war, at least in those cases where states are disallowed from exercising it. Moreover, it may be fought by those individuals acting singly, or by them acting together without the attributes of state sovereignty.

Those points raise a difficult issue. If my arguments so far are correct, then the more impoverished you are by the affluent, the greater your case against the affluent, and the less likely you are to have the wherewithal to go to war. We encountered that difficulty above when dealing with the requirement that the war stand a reasonable chance of success, in connection with poor states' ability to wage war. If anything, the difficulty is more acute when poor *individuals* are at stake. Put starkly, what hope do the scores of desperately poor individuals throughout the world, many of them children and women with burdensome family responsibilities, have to arm themselves and act in defence of their rights? None whatsoever. Ex hypothesi, their government lacks the authority to do so on their behalf. The question, then, is whether other individuals or groups who have the ability to fight on their behalf can do so, and if so under what conditions.

It is worth noting, moreover, that cases such as these, where P lacks the legitimate authority to wage war on behalf of its very poor, also raise the issue of the means for fighting such a war. Suppose we were to conclude that some individual(s) or (non-state) group can fight on behalf of the very poor. In so far as those fighters would, in all likelihood, lack the means to fight a conventional war, they would have to resort to non-conventional means such as terrorism. If it turns out that terrorism (however one defines it) is morally wrong, and if it is

267. For a similar account of state legitimacy, see, e.g., Buchanan (2004); Caney (2005); Gargarella (2007).

nevertheless the only way to prosecute a subsistence war in such a case, then such a war is unjust.

I lack the space in this chapter to assess both whether some individual(s) or non-state group can be granted the right to wage war for the very poor, and whether they would be entitled to fight that war through non-conventional means. Let me simply note that although those questions are particularly salient in the context of subsistence wars, they are not specific to them, and arise whenever powerless individuals, whether singly or as a group, suffer from the violation of their most fundamental rights, be they civil, political, or social rights.[268]

12.4. THREE OBJECTIONS

To recapitulate, I have argued that breaches of the duty imposed by HRP provide the very poor with a just cause for waging a war of self-defence against the affluent, and that the very poor themselves have the authority to wage subsistence wars should their own state be derelict in its own duty towards them. In this section, I address three objections to my thesis. The first one claims that there is such a loose connection between the affluent's policies and the predicament of the very poor that the former are not morally liable to being killed by the latter. The second objection claims that subsistence wars will impermissibly target individuals who cannot be held responsible for those policies. The third objection holds that even if the affluent are violating HRP, they do not do so intentionally, and therefore ought not to be the target of a subsistence war for so acting.[269]

268. I am grateful to Pablo Gilabert for pressing me on the issue of third-party intervention. On a separate but germane note, and as George Grech pointed out to me, one might think that, in Case 2, where both P and A are derelict in their duties towards P's very poor, the latter should wage war against their own government before they target A, on the grounds that their own government, as such, has primary responsibility for the persistence of severe poverty within P's borders. By way of a tentative reply: first, it is not clear to me that the government of P has primary moral responsibility relative to A for its very poor (on the grounds that political membership is irrelevant to individuals' basic entitlements [particularly negative entitlements, which are at issue in this chapter]). Second, even if P's government does indeed have primary responsibility for its very poor, it is by no means clear that the latter ought to target it before they target A: suppose that they would be much more successful by waging war against A than by going after their state (e.g. they would be able to get A to stop supporting their poverty-causing government, as a result of which the latter would go under). Would one still want to say, in that case, that the government of P should be the first target?

269. Those objections were put to me at various seminars, most notably the Oxford Political Thought Conference in January 2007, and the Government Department Staff Seminar at the London School of Economics, November 2006. I record them here in what I take to be their strongest form. The first objection expresses scepticism about the extent to which the global order harms the very poor. For a good argument to that effect, see Risse 2005.

12.4.1. Objection 1: Which Policies?

My arguments so far rest on the factual premise that the affluent are causally responsible for the poor's predicament, *and* the normative claim that they are, thereby, liable to lethal violence at their hands. The first objection queries the factual premise, along the following lines. True, seizing crops by force, or barring access to water by military means, would indeed constitute a clear act of aggression.[270] But these cases are few and far between. Instead, criticisms of affluent countries target policies such as loan conditionality, patents-related restrictions on access to drugs, protectionist measures, etc. And yet, the objection goes, there is little evidence that any such policy significantly contributes to causing severe poverty. In fact, some would argue, there is evidence to suggest either that the affluent's policies do not cause severe poverty, or that their effects pale into insignificance when compared with the consequences for the very poor of their own government's policies, uncontrollable environmental factors, etc. In either case (no causal link, or only a tenuous one), subsistence wars are unjust for the following reason: in order for some group or agent to be liable to being killed in self-defence, it must be the case that there is a significant connection between its actions and the harm incurred by the other party. Absent such connection, the objection avers, killing, and thus war, is unjust.

There are two problems with this objection. First, although it is true that there have been few acts of aggression such as described above, one should not underestimate the huge potential for violent conflicts over access to basic natural resources such as water: in fact, access to water already is, or is likely to be, an exacerbating cause for tensions in the Middle East (not least as evidenced by the Israel-Palestine conflict) and the Niger River Region (comprising, amongst others, Cameroon, Benin, Mali, Nigeria). Unfortunately, we may have to gauge, sooner rather than later, the legitimacy of the recourse to military force by comparatively water-rich communities that do not want to share access to water with their comparatively water-poor neighbours. Water is not the only vital natural resource over which conflicts are, or might be, occurring: so is oil, which is said by many to have been an important, not to say crucial, factor in both Gulf Wars.[271]

Second, above and beyond the forcible taking of life-saving resources, the extent to which the policies conducted by the affluent contribute to causing severe poverty in Third World countries is a fiercely debated issue. I will not enter the fray here. Instead, let me venture the following, not implausible, suggestions. Absent protectionist measures designed by the affluent to protect their own markets from

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270. Of a kind which prompts Luban to confer on the very poor, in that particular case, a right to go to war. See his *Just War and Human Rights* (1980), in which he does not address other triggers, as it were, for subsistence wars.
271. Water scarcity is thought by some to play an important role in the Darfur crisis. While this is a civil conflict, there is no reason to assume that transnational conflicts over water will never occur – particularly if one bears in mind the number of international river basins (c. 200 according to some estimates). See, e.g., Brown, et al. (2007); Amery (2002); Selby (2005); Fawcett (2002).

Third World countries' exports, producers in the latter might have better life prospects. Absent patenting restrictions on vital medical treatments, particularly for AIDS (which, let us not forget, has a crippling effect on the society and economy of many sub-Saharan countries), individuals in Third World countries might also have better prospects. Had affluent countries paid greater attention to the necessity of combining rapid and widespread privatization (a precondition for loans to developing countries) with infrastructural investments, the very poor might have stood a better chance against withstanding the devastating impact of the former. Were many Third World countries not burdened by cripplingly heavy debt repayments for bad loans pushed on them by the affluent for geostrategic reasons, their members might have better access to health care and education. Were affluent countries not supporting dictators who plunder their own country's natural wealth and divert aid payments to military programmes or, worse, their personal bank accounts, dictators' fellow citizens might also stand a better chance of living a minimally decent existence. And so on.[272]

The point really is this, namely that it is rather hard to believe that the aforementioned policies have *no* impact whatsoever on the plight of the very poor. More plausible (I submit) is the view that they, together with domestic political, environmental and cultural factors, have considerable impact. But let us grant, for the sake of argument, that they are only *tenuously* related to the persistence of severe poverty. Even then, this does not suffice to show that subsistence wars are unjust. For we need to distinguish between two cases: (a) affluent countries' policies are tenuously related to poverty in Third World countries but not a sine qua non condition for its persistence and severity; (b) they are a sine qua non condition for the latter.[273] In the former case, a subsistence war whose aim is to

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272. The policy literature on Third World poverty is on the voluminous side. As a first cut, see, e.g., Sachs (2005); Easterly (2006); Stiglitz (2002). For scepticism on the connection between trade barriers and the persistence of severe poverty in developing countries, see, e.g., Panagariya (2005). For scepticism about the extent to which patents deprive the very poor of access to drugs, see, e.g., Attaran (2004). For a powerful argument to the effect that the IMF and the World Bank, and their backers, failed in Africa partly because of an unduly narrow and ideological commitment to marketization and liberalization, see, e.g., Woods (2006: esp. ch. 6). My point on debt repayment here is drawn from her discussion of Zaire (pp. 153 and 195). For a penetrating discussion of the 'resource curse' (whereby the populations of resource-rich countries are the worse off for it), see Wenar (2008: 2–32). For a withering critique of the affluent's policies vis-à-vis Third World countries, see Pogge (2002).

273. Two related points. First, the but-for and the significance requirements are different. Suppose we want to purchase, jointly, a machine gun which costs £1,001. You only have £1,000 at your disposal, whereas I only have £1. Each of our contributions is a sine qua non condition for each of us becoming a rightful (joint) owner of this machine gun. However, your contribution is significant whereas mine is tenuous. Second, one might think that Objection 1 denies, by implication, that which I assume at the outset, namely that the affluent are under negative duties not to cause, or contribute to causing, severe poverty abroad. For if there is a tenuous connection between their policies and severe poverty, does this not suggest that they do no wrong by conducting such policies? Not necessarily: if their contribution is a sine qua non condition for the persistence and severity of poverty outside their borders, then, however tenuous it is, they nevertheless are under a moral duty to desist. If I know that, thanks to my small but necessary £1 contribution towards buying the machine gun, you will carry out your plan wrongfully to kill your partner, then I am under a duty not to contribute.

eradicate poverty would have (ex hypothesi) no chance of success and would therefore be unjust (since, as we saw in Section 12.1, a war is just if, and only if, it stands such a chance). To be sure, the regime of a very poor country might be tempted to have recourse to such a war in the hope of getting the affluent to discontinue their policies and thus to help alleviate (if not eradicate) poverty. The problem, however, is that not only would the war, in order to be just, have to stand a reasonable chance of success; in addition, it would have to meet the requirement of proportionality, whereby the harms occasioned by the war must not outweigh the good it brings about. In so far as, in that case, the good in question is the 'mere' alleviation of poverty, it is doubtful that a subsistence war would satisfy the requirement – although that, of course, would have to be established. In case (b), a subsistence war which would succeed in getting the affluent to change course would meet the requirement of a reasonable chance of success, since, ex hypothesi, the affluent's policies are a necessary cause for the persistence of severe poverty. It is more likely that such a war would meet the requirement of proportionality, precisely because it would bring about the eradication, as opposed to merely the alleviation, of poverty. In other words, the claim that the affluent's actions are only tenuously related to the very poor's predicament does not suffice to show that subsistence wars would be unjust. One would have to show, in addition, that such a war would be unjust because the tenuous character of the affluent's contribution is such as to cause the war to fail some requirement(s) of *jus ad bellum*.

The foregoing considerations highlight an interesting difference between subsistence wars and wars against military aggression. In 'standard' cases of self-defence against unjust aggression, for example an invasion, the aggressed country has won the war once it has rolled its enemy's armies back across its borders, and has weakened it to such an extent as to forestall future similar threats. Winning the war is signalled, typically, by the enemy's surrender. Subsistence wars differ from the standard case. In failing to fulfil their duty to the very poor not to subject them to severe poverty, the affluent pose an ongoing lethal threat to them – and one which, I have argued, is serious enough to provide them with a just cause for waging war. The very poor, in waging that war, will stop the threat altogether and get what they want, in either of two cases: either their military victory over affluent states is so comprehensive as to destroy them, or they manage to get affluent states to accept a negotiated peace, the terms of which would include the cessation of harmful economic policies. In the latter case, the success of such a war should be defined as the extent to which winning the war puts the very poor in a position to get the affluent to reverse their harmful economic policy. (The affluent's surrender to the very poor might indeed mean that the latter have won the war in a narrow military sense, but it might not be enough to rectify the injustice that provided them with a just cause for starting the war in the first place.) The very poor, in fact, might need to get the affluent to surrender to such an extent that they would no longer be able to cause severe poverty – a goal that they simply would not be able to achieve. Accordingly, if conducting that war as dictated by the requirement that it stand a reasonable chance of success proves so costly on the very poor that they simply are not in a position to get the affluent

to reverse harmful economic policies once the war is over, then the war would be unjust. It would be just, however, at least at the bar of *jus ad bellum* (provided all other *ad bellum* conditions obtain), if the very poor could get the affluent to reverse their policies. To conclude, the claim that the affluent's contribution to the predicament of the very poor is not significant does not suffice to show that subsistence wars are unjust.

12.4.2. Objection 2: Whose Responsibility?

As we have seen, the first objection adverts to the (alleged) tenuousness of the contribution made by the affluent's policies to severe poverty abroad. The second objection takes a rather different tack. It can accept, in fact, that there is a strong causal link between the former and the latter. Its concern is with who, exactly, is likely to be targeted in a subsistence war. According to the theory of distributive justice that underpins my argument, the human right not to be subject to severe poverty imposes on officials of affluent countries negative duties not to design or implement policies that contribute to causing severe poverty abroad; it also imposes on those countries' citizens a duty not to support political institutions, global and national, whose rules and policies have those consequences. According to the objection under study, my defence of subsistence wars is worrisome in two respects in the light of such a theory.

First, my examples so far have pitted affluent political communities against poor political communities. However, duties to the very poor are often discharged through transnational institutions such as the World Bank or the International Monetary Fund. My defence of subsistence wars thus seems to imply that those institutions are liable to being attacked if their policies result in the persistence of severe poverty in some countries. Yet (the objection goes), officials in either institution are highly constrained by the resources available to them and the political imperatives of the institutions' most powerful member states. Even if they share causal responsibility for the plight of the very poor, they are not morally culpable for it, and therefore ought not to be attacked.

I shall argue in response to Objection 3 that lack of moral responsibility for someone else's predicament is not sufficient to exonerate one from the burden of having to remedy it. Meanwhile, let me make the following two points. For a start, it is not altogether clear that international financial institutions can escape blame for the consequences of their policies on the populations of Third World countries. For while they unquestionably operate under the aforementioned constraints, various studies suggest that they have more room for manoeuvre than the objection implies. Thus, it is a recurrent criticism that the overwhelming majority of their staff is trained in North American economics departments, with great emphasis on neo-classical economics and rather little on development economics. It is a no less recurrent criticism that they tend to make the same recommendations for a whole region, without paying enough attention either to the effects of such widespread policies on individual actors in the area, or to local differences between countries

(Woods 2006: ch. 2). To claim, as the objection suggests, that they have no choice but so to act seems to let them off the hook somewhat lightly.

Furthermore, the fact that an international or, for that matter, inter-governmental, organization operates under externally imposed political and financial constraints does suffice to exempt it from moral evaluation for the policies that it carries out. Consider, very tentatively, the case of NATO. Although meant as a tool for the collective security, through military cooperation, of all of its members, disagreements over burden-sharing, force commitments and security objectives have been rife since its inception in 1949. Those disagreements have been shaped, in part, by member states' domestic political and financial imperatives, and have constrained the choices made by the organization's military commanders on the ground. If the objection under scrutiny is correct, those commanders cannot be held in any way responsible for those choices – even if the latter result, foreseeably, in breaches of the laws of war. Surely, though, while constrains of that kind may operate as mitigating circumstances, they cannot be wholly exculpatory, on pain of rendering the very notion of individual and collective responsibility nugatory.[274]

The second strand of the objection focuses, not on transnational and government officials but, rather, on individual citizens in affluent countries. True, the objection might concede, there might be a strong causal connection between, on the one hand, policies conducted by governments and international organizations and, on the other hand, severe poverty in Third World countries. However, there is a very tenuous connection between citizens' support for their government and the plight of the very poor. Accordingly, whilst the governments of affluent countries and the relevant international organizations might plausibly be deemed to pose a lethal threat to the very poor, individual citizens of those countries cannot. On that view, severe poverty at best provides the very poor with a justification for political assassination but not for war, since war, by definition, is likely to wreak death and destruction on the lives and property of individual citizens.

This particular objection to the claim that subsistence wars can sometimes be just at the bar of *jus ad bellum* invokes the *in bello* principle of non-combatant immunity, whereby the intentional killing of innocent non-combatants is

274. On the role of NATO and the burden-sharing controversies, see, e.g., Duffield (1996). For a fascinating history of NATO, see Kaplan (2004: in particular pp. 124 ff.), where he relates NATO's 1999 aerial campaign against Serbian forces in Kosovo. Kaplan argues that the choices made by NATO's military forces during that campaign, and particularly the organization's Supreme Allied Commander for Europe, General W. Clark, were heavily constrained both by the US Department of Defense and by the organization's member states. Both the Clinton administration and NATO's Secretary General Javier Solana insisted that the campaign should be conducted by air only, partly to minimize casualties amongst NATO forces, and notwithstanding misgivings expressed by, amongst others, then-CIA Director G. Tenet and then-Chairman of the JCSs General Shelton (see Harris 1999*a* and 1999*b*). The example is particularly apposite here, in so far as there is a good case for holding that aerial bombing of that kind breaches some of the requirements of *jus in bello*, notably the requirements of proportionality and necessity. For an insightful analysis of NATO's 1999 bombing campaign in Kosovo, see Wheeler (2000: ch. 8); Roberts (1999); Economides (2004).

impermissible. The objection works best, of course, to the extent that subsistence wars necessarily involve the intentional killing of innocent individuals. Whether that is so is unclear to me – just as it is unclear that other wars, such as wars of self-defence against military aggression, also must involve such killings. In any event, the objection derives much of its strength from the factual claim that individual citizens have very little say over their government's economic policy, particularly so in a globalized world where a government's decisions in this particular area are shaped by similar decisions taken, without prior consultation, by other governments. However, even if there is a tenuous connection between citizens' support for their government and that government's policies, this does not exonerate them from *all* responsibility for what their government does, at least in those cases where they are citizens of a democratic state. For in so far as they are, to some degree, responsible for their government's actions, they are liable to bearing the costs of redressing the wrongs caused by it. Accordingly, the view that citizens of affluent states may be liable to being killed by the very poor in a subsistence war does not contradict the principle of non-combatant immunity, since the latter protects *morally innocent* individuals – individuals of whom we can in no way say that they share any kind of responsibility for what their government does (see McMahan 1994).[275]

I do not wish to assert, of course, that the principle of non-combatant immunity has no relevance in war. In fact, it might well be impossible to wage a subsistence war without targeting a vast number of those innocent individuals. If so, then I believe that the very poor ought to treat all civilians as if they could not be held liable for their officials' actions, in order to ensure that they do not kill the innocent. My claim, though, is that, were they to choose the opposite course of action, they would not be guilty of wrongdoing towards morally guilty citizens.

12.4.3. Objection 3: Negligence, Severe Poverty, and Liability to Being Killed

In the light of my reply, some might be tempted to press that liability to being killed requires, not merely that one contributes, however tenuously, to causing harm to someone else, but also that one should *intend* to cause it. If so, then, for sure, the deliberate contamination of water sources and/or poisoning of crops do constitute acts of aggression on the very poor, and provide them with a casus belli. However, my opponent might maintain, such acts are extremely rare: poverty is mainly due, rather, to the affluent's support for national and global institutions, the rules of which contribute to causing severe poverty. Those actors do not intend to cause poverty abroad: thus, they do not protect their markets from Third World products in the intention that millions of people should die, every

275. For an interesting account of the extent to which nations can be held collectively responsible for deeds committed in their name, see Miller (2004). Although he focuses on nations, much of his argument also applies to the collective responsibility of states.

year, of avoidable, poverty-related causes. Nor do they impose highly restrictive patenting rights on medical drugs with the intention of depriving the very poor in Third World countries of access to those drugs. Rather, their intention is to protect their farmers' interests, and those of their pharmaceutical companies. Whilst morally condemnable, their actions are not such as to provide the very poor with a justification for war.

Note that this particular objection to my view need not deny that the affluent, both as governments and citizens, are causally responsible for severe poverty abroad. Nor need it deny that the affluent are guilty of moral wrongdoing. Its central claim, rather, is that severe poverty, resulting as it does from the affluent's indifference to the plight of the very poor, does not provide the latter with a sufficiently strong reason to go to war against the former.

However, the objection claims, too quickly, that intentions matter when it comes to establishing liability to being killed.[276] Consider the following example. V's lab assistant, who unlike V is wearing protective clothing, is about to open a jar of mosquitoes which he knows to be lethal and which will almost certainly sting V. The lab assistant does not intend to kill V. He may simply be indifferent to his predicament. All he intends to do is conduct an experiment with those mosquitoes. V lacks the time to warn him and can save her life only by shooting him. If the objection under study here is correct, V's assistant is not liable to being killed and V, by implication, is not permitted to kill him, since he does not intend to cause V's death. It seems to me, however, that V is permitted to kill her assistant in self-defence, simply because the latter is posing an ongoing and lethal threat to her life and limbs.[277]

Consider now a military analogy. Suppose that a nuclear power, N, decides to conduct tests a few hundred miles off the coast of some other, non-nuclear and considerably less powerful country, O. Suppose further that it does so in the knowledge that there is a correlation between the conduct of such tests and a rising incidence of cancers amongst foreign populations living within a certain radius of the test zone. Its intention (as far as we can judge) is to strengthen its nuclear capability – not to increase cancer rates in the area.[278] Suppose, finally, that O does not have the wherewithal to offer cancer treatments to its members, that N has consistently refused to compensate O for the harm thus caused, but that O can somehow stop the testing by, for example, destroying the testing facilities. If O's decision respects the requirements of proportionality and necessity, it does not

276. Interestingly, the objection so construed assumes, then, that intentions are irrelevant to the permissibility or impermissibility of actions, but are relevant to agents' liability to, or immunity from, incurring the costs of their wrongdoings. I lack the space here to examine this account of the role of intentions in our moral reasoning.

277. I borrow and adapt this example from Ryan (1983: 518-519). For the view that we are entitled to kill lethal threats in self-defence, whether active or not, whether innocent or guilty, see Thomson (1994).

278. There is some evidence that French nuclear testing in the South Pacific may have had similar effects on parts of the (French) South Polynesian population. At the time of writing, France is no longer conducting such tests. http://www.independent.co.uk/news/europe/frances-nuclear-tests-in-pacific-gave-islanders-cancer-410474.html

seem implausible, in the face of the suffering caused by N and of its utter disregard for O-lives, to claim that O has a prima facie right so to act (even if it would thereby kill the facilities' staff). If so, the fact that N does not intend to destroy those lives is irrelevant to the strength of O's case for attacking N's facilities. And if that is correct, then, by implication, the fact that the affluent do not intend to cause severe and life-threatening poverty in foreign countries is irrelevant to the strength of the case of the very poor. To be clear, my point (at this juncture) is not that the very poor may kill the affluent in a subsistence war all things considered. My point, rather, is that one cannot object to the claim that they may do so on the grounds that the affluent do not intend to subject them to severe poverty.

12.5. CONCLUSION

To conclude, I have sought to show that the very poor – be it via or independently of their state – have the right to wage war against the affluent if the latter are derelict in their duty not to cause severe poverty. I have also suggested that in many cases, subsistence wars will not meet the *jus ad bellum* requirement of reasonable chance of success. Rather than summarize my arguments, let me highlight ways in which they should lead us to revise the just war tradition and deal with some worries about the thesis defended here.

I claimed that severe poverty constitutes a just cause for going to war not merely because it undermines states' political sovereignty and territorial integrity, but also because it harms the very poor in their individual interests in not incurring harm to their life and limbs. By implication, then, I have argued that the just cause requirement ought not to apply solely to collective goods but can also apply to individual goods. Moreover, in claiming that the very poor have a right to go to war independently of their state, I have argued, by implication, that we ought to broaden the scope of the requirement of legitimate authority.

Let me end with two worries. The first worry is that in practice subsistence wars could never meet some of the other requirements of *jus ad bellum* – in particular the requirement that the war stand a reasonable chance of success. If so, then whether or not subsistence wars are just remains a purely academic question. Perhaps so. But the fact that a particular act or decision, if it were committed or taken in practice, could not be just is no reason from desisting from the task of assessing when it *might* be just. (By analogy, that there are very good pragmatic reasons for not implementing luck egalitarian principles of justice is no reason for not defending and articulating those principles.)

The second worry is that my thesis is one which, if acted upon, would encourage still more wars – wars that will affect primarily those for whom they are fought and who are already the chief victims of wars, namely the very poor themselves. Is more war not the very last thing they need? Would it not be better for them to seek redress by some other means? Clearly so, *if* those alternative means are effective. It goes without saying that the world would be a better place if the affluent could be persuaded to set up just and democratic

international institutions, in which the governments of very poor countries could have a decisive say on matters that affect them the most, from trade agreements to conflicts over natural resources. It also goes without saying that, *if* there turned out to be *serious* prospects for improvement on those fronts, then subsistence wars would be unjust, since they would breach the requirement of last resort. Whether or not we are moving towards such a world is, in my view at least, an open question. Accordingly, this chapter does not claim that subsistence wars, here and now, would be permitted. Rather, it makes the more modest (but nevertheless important) point that subsistence wars can be deemed just at the bar of at least two of the standard requirements of *jus ad bellum*, and that they need not always breach the *in bello* principle of non-combatant immunity.

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13

Poverty Discourse in Sub-Saharan Africa: Human Rights Issues at Stake

Edward Wamala

13.1. INTRODUCTION

It is quite intriguing that poverty – which, as the cause of disease, premature death, internecine warfare, domestic violence, all manner of social discord and abuse of human rights, so visibly affects people's lives – has not been the subject of serious intellectual discourse, whether in classical philosophy or classical economics.[279] It is further intriguing that the human rights discourse itself, which has been at the forefront of championing the cause of human dignity, has similarly not taken the issue of poverty very seriously, until recently. Yet poverty has been, and continues to be, one of the most serious human wrongs that stand in the way of realizing a human rights culture.

There are several problems with discussing poverty within a human rights framework. Both at the international and national levels we find extreme polarity between the rich and the poor; the very poor and deprived, wherever they may be, have always remained outside the public view, their voices unheard. Yet close scrutiny of the evolution of our awareness of human rights reveals that behind each human right that is now recognized, there were some individuals who felt very strongly about a particular cause and championed the fight for a specific right. This is true whether we are looking at civil and political rights, economic, social and cultural rights, women's rights, etc. In all these cases, there were individuals around whom public or intellectual opinion coalesced.

If we take the evolution of human rights in England, the *Magna Carta* (1215), considered the cornerstone of English liberty, forced King John to grant certain rights to his subjects. Championing that cause were individuals with wealth, power and influence – the barons. Other major landmarks, such as the British Bill of Rights (1690–91), the American Declaration of Independence (1776), the French Declaration of the Rights of Man and of the Citizen (1789), were all advanced by

279. Proudhon (1988) attempted a philosophical analysis of poverty. That work, which bears reference to poverty, actually went on to discuss ideological issues, inviting in turn sharp criticisms from Karl Marx (Marx 1955).

respectable personalities, whose voices were listened to. Mill's discussion of the subjugation of women is another example where a notable intellectual successfully highlighted a subject that later became a human rights issue. In all these cases, the people behind the push for the rights in question were of such stature that they could mobilize public opinion for a cause.

Poverty by its very nature stands out as a problem in which the victims are unable and unwilling to present their plight and mobilize international action. It is even questionable whether the poor understand the nature of the problem and think of possible remedies. Sen has very insightfully captured the frame of mind of the poor in his 'small mercies' discussion. He has noted that these people will very often 'adjust their aspirations and desires to the little that is feasible' (Sen 1984: 309). He sees them as seriously compromised, lacking as they do the skills of hard bargaining because of their accustomed failure that predisposes them to making defeatist compromises with harsh reality. Sen emphasizes that point thus:

> A chronic underdog may become so used to her deprivation and so hopeless about it, that she may have an illusion of normality about her state of deprivation and she may also respond by cutting down her desires and by learning to take some small pleasures in very small mercies (which would have the effect of making the deprivations look less awful in the scale of utilities). (Sen 2006: 87)

His conclusion is that the result of this false consciousness is that acute inequalities often survive precisely by making allies out of the deprived. The underdog comes to accept the legitimacy of an unequal order and becomes an implicit accomplice. Sen's characterization of poverty helps us to appreciate more clearly why the poor can hardly take on the role of fighting for their right to be free from poverty. Poor people's low self-esteem and their defeatist attitudes are clearly not the kind of qualities that can lead to an aggressive championing of a human right.

True, the poor, the marginalized or the underdog can protest or attempt to resist. We remember all too well the case of Spartacus, the slave leader who refused to accept his fate. Poor people in sub-Saharan Africa, however, do not only suffer from defeatist attitudes, they also have to contend with the brutal force that is often meted out on them by the powers that be whenever they attempt any resistance. It can be argued that the poor and marginalized, rather than spontaneously developing defeatist attitudes on their own, actually develop these attitudes as a result of constant harassment and frustration by the powers that be, who remove them from their peasant holdings and push them to live on the peripheries of densely-populated cities. Often these poor people will resort to courts of law, but they have come to accept the harsh reality that the poor rarely win court cases.

The negative self-image and defeatist attitudes of the poor are but a couple of the myriad problems that confront them. Equally important are the negative public attitudes towards poverty and the poor. Galbraith has made a very useful distinction between what he has called *case* and *insular* poverty. He has characterized case poverty as, 'the poor farm family with the junk filled yard and

the dirty children playing in the bare dirt. Or it is the gray-black hovel beside the railroad tracks. Or it is the basement dwelling in the alley' (Galbraith 1958: 253). He elaborates case poverty further by noting that:

> It is commonly and properly related to some characteristic of the individuals so afflicted. Nearly everyone else has mastered his environment; this proves that it is not intractable. But some quality peculiar to the individual or family involved – mental deficiency, bad health, inability to adapt to the discipline of industrial life, excessive procreation, alcohol, insufficient education, or perhaps a combination of several of these handicaps – has kept these individuals from participating in the general well-being. (Galbraith 1958: 254)

But contrasted to case poverty, which clearly depends on individual characteristics and failures, insular poverty manifests itself as an 'island' of poverty. Galbraith notes that,

> In the Island everyone or nearly everyone is poor. Here, evidently, it is not easy to explain matters by individual inadequacy. We may mark individuals down as intrinsically deficient; it is not proper or even wise so to characterize an entire community. For some reason the people of the island have been frustrated by their environment. (Galbraith 1958: 254)

Galbraith's insights are very handy for our analysis of why poverty has been inadequately addressed at the intellectual level. I hypothesize that failure to put poverty at the forefront of this discourse has largely been because it has been viewed as *case* and not *insular*. That is to say, thinkers have been more inclined to look at poverty as a result of individual weaknesses of the poor, and not as a result of structural problems that face cross-sections of society. Beginning with classical Greek thought, through classical economic thought, to the dominant paradigm (characterized by the thinking that developing countries could speed up their own development if they followed in the footsteps of the now developed countries), the thinking seems to be that poverty is a matter of particular cases, that is, it is deserved and blamable on individual cases. We may put forward the cause for the disabled, because they clearly do not deserve their condition. But the poor, in classical, and even in some contemporary thought, tend to be seen as poor because of personal weaknesses and, accordingly, it has been difficult to see how to champion their cause.

In the section below, I attempt to do a quick survey of classical sources to show their understanding of poverty. However, I acknowledge that this survey may not be comprehensive enough (due to space) to cover all that classical theorists had to say on poverty. Secondly, there is a danger of seeing this survey as divorced or detached from the wider concerns raised in this chapter. Nevertheless, we note that a familiarity with what classical thinkers like Plato, Aristotle, Adam Smith, John Stuart Mill, and others said or did not say about poverty is very important;

after all, it was these same theorists who provided the foundation on which the human rights discourse as we understand it today was built. They provided us with the foundation for the appreciation of civil and political rights: the rule of law, autonomy, freedom of expression, principles of subsidiarity and all manner of civil liberties. This survey intends to show that the human rights discourse was bound to be ineffective in tackling the poverty challenge right from its foundation due to the defects in the discussion of poverty by the classical thinkers. That is why a discussion of the right to be free from poverty in a local setting such as sub-Saharan Africa should not be divorced from the roots of the human rights discourse going back to classical thought.

13.2. THE INTELLECTUAL SILENCE ON POVERTY: FROM CLASSICAL MORAL PHILOSOPHERS TO CLASSICAL ECONOMISTS

13.2.1. Classical Philosophers

A survey of classical ethical and economic theories reveals that although theorists have been aware of problems posed by poverty, they have not explored the subject deeply enough. In his discussion of justice in *The Republic*, Plato discusses, among other things, the virtues of wealth. Cephalus, the protagonist who argues the case for wealth, observes that,

> [t]he possession of money contributes a great deal to not having to cheat or lie to any man against one's will, and, moreover, to not having to depart for that other place frightened because one owes some sacrifices to a god or money to a human being. It also has many other uses. (Bloom 1968: 7)

Of importance to our discussion here is not so much Cephalus' views about wealth, as Socrates' reaction to them. Instead of following up on Cephalus' views to know what happens to the poor, those who do not have the wherewithal to meet their obligations to the divine and their fellow men, those who find themselves in dependency relationships, Socrates decides to direct the discussion to the important but very general subject of justice. My point is that Cephalus' original thought was on the threshold of deepening the discussion of poverty to new levels: what happens to moral virtue in the event of poverty? If Cephalus' moral status had been elevated by his wealth, what happens to the moral status of those without resources like Cephalus? A deeper discussion of poverty in this case would have enhanced further our appreciation of justice and injustice.

Plato returns to the subject of wealth in Book 4 of *The Republic* where there is a discussion of the happiness of the different social groups who make up the city. Among these groups are craftsmen, and a question arises: 'Does wealth or poverty

make these people good or bad?' (Bloom 1968: 99). In the exchange that follows, it is made clear that both wealth and poverty are injurious to the craftsmen. First, when they become wealthy, they become idler and more careless, while if they become poor they do not acquire tools necessary for their trades and they end up producing shoddier works. So, both wealth and poverty are not good for craftsmen. The exchange concludes as follow: 'So, as it seems, we've found other things for the guardians to guard against in every way so that these things never slip into the city without their awareness … wealth and poverty' (Bloom 1968: 99).

Even here Plato is raising an issue, which is not fully explored, of what will happen should either wealth or poverty slip into the city. Plato stops at that well-known Greek point: that moral virtue is to be sought in moderation. Both wealth and poverty are conceived to be excesses and, in classical Greek thought, obstacles to justice and moral virtue. If *The Republic*, which stands out as a classical piece of work on justice, had further discussed the limitations that stand in the way of justice, then the discussion of poverty would have received more serious attention.

Aristotle is another classical thinker who missed the opportunity to discuss poverty as a moral issue. In his *Nicomachean Ethics*, Book I, Aristotle seeks to answer the question of what happiness is. In his deliberations, he says: 'The life of money-making is one undertaken under compulsion, and wealth is evidently not the good we are seeking; for it is merely useful for the sake of something else' (Aristotle 1998: 7). The point is well made: wealth is good because it enables us to do other things deemed to be good in themselves. Aristotle repeats this point when he says:

> Yet evidently, as we said, it needs the external goods as well; for it is impossible, or not easy, to do noble acts without the proper equipment. In many actions we use friends and riches and political power as instruments; and there are some things the lack of which takes the lustre from happiness … (Aristotle 1998: 17)

The critical issue is that, if happiness and noble actions required such resources (like riches) for their realization, what happens to those who lack those resources? This question is not answered.

The question of poverty resurfaces in Book 2 of his *Politics*. Here, Aristotle attempts to critique Phaleas of Chalcedon, who had opined that criminal behaviour was motivated by want or destitution. Aristotle reflects on this and notes that:

> … want is not the only cause of crimes. Men also commit them simply for the pleasure it gives them, and just to get rid of an unsatisfied desire. Vexed by a desire which goes beyond the simple necessities of life, they will turn criminals to cure their vexation. (Aristotle 1998: 65)

In Aristotle's handling of Phaleas' concern, we see the tendency to downplay the unpleasant reality of poverty. What Aristotle says is true in that other motivations

like a desire for superfluities could account for crimes. However, Phaleas' concern is also legitimate and deserves serious scrutiny. The phenomenon of crime among street children in ghettos of large metropolises all give credence to Phaleas' observation. But Aristotle's concerns were not with 'petty crime', as he called Phaleas' concerns.

> The greatest crimes are committed not for the sake of necessities, but for the sake of superfluities. Men do not become tyrants in order to avoid exposure to cold. This is the reason why the crime of a tyrant being great, honours are paid to the man who assassinates a tyrant and not a mere thief. We thus see that the general scheme of the constitution proposed by Phaleas avails only against the lesser crimes. (Aristotle 1998: 66)

Clearly, Aristotle and Phaleas have different theoretical frameworks, hence while Aristotle is interested in the larger picture – the tyrant or political heavyweight who may affect or control the fates of so many isolated individuals – Phaleas for his part focuses on the isolated individual who is often the victim of omissions or commissions of the tyrants. Whereas Aristotle looks at the authors of policies that may create highwaymen or thieves, Phaleas focuses on the victims of wrong policies. Our view here is that while Phaleas' concerns may be 'petty' from Aristotle's perspective, they are very close to the mark from a human rights framework, concerned, as they are, with the well-being or lack of it of individual human agents.

13.2.2. Classical Economists on Poverty

Whereas classical philosophers could skirt serious intellectual engagement on poverty because poverty was considered more of an economic and less of a philosophical or moral issue, economists would hardly have any excuse. Economics is the scientific study of how wealth is produced and used, and in such a study concern with poverty would certainly loom very large. How well have economists analysed the problem of poverty?

For my treatment of this matter, I will start by examining mercantilist economists, who after all were among the very first thinkers to systematize and work out ideas that were later to form the discipline of economics as we know it today. I will start by examining their wage policies that were premised on what they called the utility of poverty. Robert Ekelund has synthesized mercantilist views from a wide array of sources thus:

> The argument that labour should be kept at the margin of subsistence may be found throughout the mercantile age. In the extreme it is premised upon a belief that 'suffering is therapeutic' and that, given the opportunity, a 'menial' would be lazy and slothful. Because of the generally low moral

> condition of the lower classes, high wages would lead to all sorts of excesses, e.g. drunkenness and debauchery. (Ekelund et al. 1983: 40)

Further, mercantilists recommended a wage structure that would support an optimum level of frustration: a wage that would be 'large enough to provide incentive for luxuries but low enough so that they could never be attained' (Ekelund et al. 1983: 40). The thinking underlying these ideas was that poverty was useful for the lower classes because it helped them live better! 'If wages were beyond subsistence, the quest for physical gratification would simply lead to vice and moral ruin. Poverty (high prices of subsistence or low wages), on the other hand, made workers industrious, which meant that they lived better' (Ekelund et al. 1983: 40). Ekelund, quoting Young in his work *Eastern Tour* (1771), points out that '[e]veryone but an idiot knows that the lower classes must be kept poor or they will never be industrious' (Ekelund et al. 1983: 40). De Mandeville is quoted in this same source as having discouraged the idea of children of the poor and orphans getting education on the grounds that education was injurious to the deserving poor: 'Reading, Writing and Arithmetick are very necessary to those whose business requires such qualifications, but where people's livelihood has no dependence on these arts, they are very pernicious to the poor …' (Ekelund et al. 1983: 40).

But mercantilist literature did not only look unfavourably towards the poor, it equally looked unfavourably towards foreign countries. The nine-point mercantilist manifesto published in 1684 by Austrian lawyer von Hornick was particularly telling. It was thoroughly exploitative of other countries, and in a way still informs contemporary international trading relations.

Because mercantilist ideas were quite oppressive and outrageous, almost unbelievable, it was inevitable that they invited forceful criticisms, first from the Physiocrates, and later and more elaborately from Smith. How well did Smith, a forceful critic of mercantilism, handle questions of poverty himself?

First, Smith handles the problem of poverty in his *Wealth of Nations*, especially in the section on the expense of justice, where he discusses the emergence of civil government. Smith traces the emergence of civil government to the second stage of social evolution, the age of the shepherd. He says:

> It is in the age of the Shepherds, in the second period of society, that the inequality of fortune first begins to take place, and introduces among men a degree of authority and subordination which could not possibly exist before. It thereby introduces some degree of that civil government which is indispensably necessary for its own preservation …. Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all. (Smith 1958: 203)

Smith's views are unambiguous. Poverty is related to property relations. Before there was property, there was no inequality in fortune. Smith makes this point

very emphatically: 'wherever there is great property there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many' (Smith 1958: 199).

Civil government, where and when it emerges, has as its objective the protection of the rich against the poor. The poor are by implication outside civil society, and they are a danger to it. In this regard Smith says:

> The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. (Smith 1958: 199)

Our interest in Smith is particularly motivated by the fact that he was an arch-critic of the mercantilists, who had among other things a very denigrating attitude towards the poor. What attitude did he himself have concerning these people? The quotation above alludes to their envy and injustice. Elsewhere he alludes to the 'avarice and ambition in the rich, in the poor the hatred of labour and the love of present ease and enjoyment …' (Smith 1958: 199). Smith here continues the mercantilist tradition of blaming the victim, seeing the poor as a danger to society, and their poverty as a result of their hatred for labour and love for 'present ease'.

But Smith's views on poverty and the nature of civil government raise suspicions about his theory of the invisible hand, where individual selfishness is rationalized as ultimately promoting the common good. How will the common good be achieved in a situation of blatant inequality of fortunes that Smith himself so eloquently catalogues?

Another economist worth studying in our survey is Mill. Mill is interesting because he was able to see the two sides of poverty, i.e. *insular* and *case* poverty. First, he noted that non-economic factors played an important role in human affairs which involved economic progress. Among these factors he included beliefs, habits of thought, customs and institutions. The backwardness of some cultures in Mill's view was closely associated with the despotic and anti-progressive characters of their institutions, especially where and when these were reinforced with religious beliefs that made for uniformity of ideas and opinions (Mill 1992: 68–69). In all these observations, Mill was expressing the view that there were structural factors that accounted for the backwardness of societies and, by implication, individual poverty.

At the same time, Mill was of the view that the qualities of individuals were also important, hence the remark: 'successful production … depends more on the qualities of the human agents than on the circumstances in which they work' (Mill 1920: 104). Our reading of this statement is that the personal qualities

of individuals could be as important as the structural factors that could hinder personal achievements.

Mill's works are replete with proposals for social programmes that would see the enhancement of individuals and communities. To that end, he noted that: '[t]ere is hardly any source from which a more indefinite amount of improvement may be looked for in productive power, than by endowing with brains those who now have only hands' (Mill 1920: 138). Elsewhere he states, '[o]f the two tests of the merits of any set of political institutions, one was the degree in which they promote the general advancement of the community' (Mill 1940: 195). We can argue that Mill saw poverty as a structural problem, and his social reform efforts, such as his emphasis on education, were steps towards addressing that matter.

In Mill, we see nascent attempts (among classical economists) to see poverty as a structural reality and not merely as personal weakness of individuals. His work takes us beyond the practice of blaming poverty on the victims (the poor) and emphasizes a shift to social structures that often keep people in poverty.

13.3. POVERTY DISCOURSE IN THE HUMAN RIGHTS FRAMEWORK

The emphasis on social structures as a key element in backwardness and poverty was picked up by dependency theorists, who highlighted these structural causes of poverty concerning African economic backwardness. Walter, a dependency theorist himself, has observed that:

> The fact of the matter is that the most profound reasons for the economic backwardness of a given African nation are not to be found inside that nation. All that we can find inside are the symptoms of underdevelopment, and the secondary factors that make for poverty. (Rodney 1994: 30)

Frank (and several other dependency theorists) saw underdevelopment not so much as a result of the survival of archaic institutions and capital shortage, but as the outcome of the very same historical processes that also generated capitalism.

The contribution of Marxist dependency theorists, and others, to our understanding of poverty is quite substantial. First, there was an attempt to catapult the poverty discourse into the development/underdevelopment paradigm. Within that paradigm, poverty was seen as a secondary, if symptomatic, indicator of more serious problems. Secondly, these theorists raised the discourse to the ideological plane. In the realm of ideology, the focus was placed on issues such as who owned what, the colonial versus the colonized divide, terms and relations of trade between the core and periphery states, exploitation in and of the colonial state, the subtle dependency syndrome that colonialism had unleashed to the colonial states, and the like. All of these, if properly articulated, were different approaches that could help us appreciate the phenomenon of poverty.

But the discourse went astray when what started off as critical economic analysis got lost in ideological confrontation between East and West. Discourses on substantive issues like poverty, unfair trading practices, marginalization of peripheral states, and others were derailed. Peripheral sub-Saharan states became allies or adversaries in the communist/capitalist ideological confrontation instead of focusing on their specific problems of underdevelopment and poverty. That was how states like Angola, Mozambique, Ethiopia and several others got sucked up in ideological confrontations and, eventually, war.

Most recently, the poverty discourse has taken place within a human rights framework. Discussing poverty within a human rights framework means, first of all, looking at poverty as a human rights issue or looking at aspects of human rights that have bearings on poverty. The human rights framework has clear advantages over earlier approaches for those in the developing world for several reasons. First, we look at poverty as a composite phenomenon, where so many different rights are often involved and violated. The human rights framework helps us to identify what is right or wrong with specific rights, who the duty holders are, and what they are doing about specific rights. Specifically, we are able to analyse what violations of human rights the poor suffer and what can be done about them, what roles national and international human rights institutions and other organizations have to play, and what specific institutions are assigned responsibilities for specific rights or poverty issues. With hindsight we can see that, although Marxist and dependency theorists raised the red flag of danger with regard to poverty, the human rights approach is more focused, specific, and directional in that it gives us a sense of who should do what, where and when. It also provides institutional mechanisms to enforce compliance when these duties are not met.

Additionally, this new approach helps us to carefully work out a theory that explains poverty. The importance of identifying a proper theory to explain poverty cannot be overemphasized, because this will determine when human rights interventions are necessary and what form they should take. Attempting to deal with poverty challenges using a human rights framework without knowing the exact nature of poverty is problematic.

In the sections below I will look at the various types of poverty in sub-Saharan Africa and the relevant human rights issues that emerge.

13.4. THE MANY FACES OF POVERTY

Poverty in sub-Saharan Africa is a multi-faceted phenomenon attributable to a plethora of factors. There are cases of poverty attributable to physical or natural occurrences like droughts, floods, pests and disease pandemics, which may destroy crops and entire animal herds – all leading to poverty. But poverty can also be attributed to human factors like internecine warfare, rebel insurgencies and ethnic or tribal conflicts, where affected communities end up suffering extreme poverty.

Government policies can also cause poverty. For example, when a government decides to undertake land reforms such as land consolidation, many desperate

farmers may be dispossessed from their land. But the reverse process can also lead to poverty. Witness what has happened in Zimbabwe, where formerly large pieces of highly productive land are being parcelled out to individual small farmers with resulting declines in productivity. The famine in Zimbabwe has been attributed to that policy. Wrong advice to farmers on what to grow, lack of agricultural extension staff, lack of markets, and inadequate physical infrastructure (roads, water, energy, etc.) are all policy-related matters that can lead to poverty.

Unfair international trading practices, falling commodity prices, lack of competitiveness on the part of individuals and states on the international scene, and shifting entitlement bases (which means that people get stuck doing what they have always done, little knowing that it is no longer marketable on the international scene) are other causes of poverty. Perhaps the biggest problem with poverty is that politicians politicize it, often engaging in populist agendas that never touch the heart of the problem.

When it comes to international trade, the recent collapse of the Doha round of WTO trade discussions is indicative of a trade regime that is imbalanced. The poor nations are gaining much less compared to what they lose in the present trade arrangement. Due to arrangements such as TRIPS, poor countries are increasingly incapable of building competitiveness and balancing out their trade.

The multifaceted nature of poverty and its causes will mean, from the perspective of my discussion, that different causes of poverty will raise different human rights concerns, and will invite different human rights interventions. In the sections below, I look at these many aspects of poverty and the related human rights issues.

13.4.1 The Case of Insecurity-Related Poverty in Uganda

Policy Briefing Paper No. 4, *Conflict, Insecurity and Poverty: Learning from the Poor*, in its preambular statement, refers to peace and security as 'the basic precondition to sustainable development and their lack during the last thirty years [and] one of the main factors responsible for the stagnation of development and … deepening poverty' (Republic of Uganda 2000: 5). In its summary of key findings, the same point is reiterated: 'conflict and insecurity are both a cause and a consequence of poverty' (Republic of Uganda 2000: 6).

Illustrative suffering from insecurity- or conflict-related poverty and human rights violations include the districts of Kotido, Kumi and Kapchworwa. The specific cause of insecurity here is the problem of cattle rustling or raiding. Cattle raiding, the report points out is, 'an age-old form of wealth redistribution among the Karimajong. It is a traditional and central form of restocking. Young warriors are compelled to accumulate cows in order for them to gain status… . To some degree, one's respect depends on the number of successful raids he has performed' (Republic of Uganda 2000: 13). The report further points out that although this is an age-old tradition, it has become much more violent in the recent past. 'Karimajong warriors used to come in small bands to select and steal the best

cattle in the kraal. Now, they come in large numbers, use guns, take almost all the cattle, destroy crops, loot household property and burn whatever remains' (Republic of Uganda 2000: 13).

The complex mesh of violence, brutality, human rights violation and abuse, cultural shame and embarrassment, all leading to destitution, poverty, and painfully slow but sure death, has been perceptively captured by researchers as follows:

> When robbers, raiders or rebels attack, women are singled out for special indignities, including genital mutilations and rape or abduction and a future of sexual/reproductive slavery. Even when left behind after rape, many women suffer from social isolation while slowly dying of STDs such as HIV/AIDS.... When men choose to fight their attackers and die or flee and drown subsequent feelings of shame and self-reproach in alcoholism, it is women who must shoulder the burden of ensuring their families' survival. Indeed they often take on menial jobs men refuse to do for fear of losing what remains of their self respect. The weight of this burden sometimes kills a woman's spirit long before it kills her body. (Republic of Uganda 2000: 20)

In this quoted scenario, we have a perfect illustration of how poverty leads to crime and human rights abuse and violation, and how this ultimately translates into more poverty – a vicious circle, so to speak. But to call this a vicious circle is not exactly accurate, because what we experience here is a spiral of distrust and numbness, and a failure to access a whole range of other rights.

So, although initially we have institutionally or structurally induced poverty leading to human rights violations, which in turn leads to further poverty, the victims of violence and those whose rights have been violated and abused will live in the shadow of their nightmares for years, long after the spate of overt violence is over. Researchers on conflict, insecurity, and poverty have perceptively captured that reality as follows:

> Raiders and rebels frequently target children as well as women. Thus more than 14,000 children have been abducted by the Lord's Resistance Army (LRA) in Apac, Gulu, Kitgum and Lira districts since 1986. Approximately 500 children escape each year, and some manage to return home. Their lives, however, will never be the same; for each child soldier carries painful physical and psychological scars that will never disappear and may yet kill them. (Republic of Uganda 2000: 20)

The point is that abuses and violations of human rights will be accompanied by future violations of other rights; hence those child soldiers may not take advantage of universal primary education or universal secondary education, and their right to education will be denied, leading to the subsequent denial of their right to employment, enjoyment of culture, and participation in civil and other community activities. Similarly, women who have been traumatized and have

become sickly and weak may never take advantage of available rights, like the right to medical care or to the enjoyment of culture and education, even if these were readily available.

Another cause of insecurity- and conflict-related poverty and human rights violations is rebel insurgence. Here, the deadly mix of broken promises, poverty, violence, human rights violations and abuse is evident. Demobilized soldiers who were promised retirement packages but never received them or received partial payments, as well as the jobless and desperate youth, are all candidates for rebel armies. The Uganda poverty and conflict report has observed that, 'joining insurgent groups on one side of Uganda's borders or another continues to be treated as a livelihood alternative of last recourse. As such, many rebel forces are formed as a result of economic conditions faced by new recruits not on the basis of principles or political goals' (Republic of Uganda 2000: 15). The point above makes the economic undercurrents of rebel insurgencies unmistakable.

People on the margin, or those with no forms of economic entitlements whatsoever, those who have reached the end of the road economically, will often constitute readily available reservoirs of potential rebel recruits. They will often masquerade as 'freedom fighters' for this or that cause, but the underlying motive will most likely be economic.

I indicated earlier that meaningful human rights interventions will hinge on a clear analysis of what caused or causes a particular kind of poverty. In many situations of conflict and violence there has been a paucity of hard-nosed analysis of the genesis and genre of problems. Rebel insurgencies have been variously referred to as rampaging misguided youth, while Akarimajong cattle rustlers are regarded merely as tribal warriors. Those who characterize these problems that way are, in my view, unwittingly perpetuating the tendency to look at poverty as deserved or blamable on individuals, a tendency that we have noted is common in classical literary sources. There is clearly a failure to look at poverty as a structural problem, one that will require structural analysis and intervention. In fact, because of this, even those interventions that do take place tend to be programmatic and piecemeal. Experts have cautioned against this lackadaisical manner of analysing issues, as Wordofa has noted:

> If we say the Karimajong fight because they are backwards, our attitude is questionable. I would say it is prejudiced…. Indeed, given the complex relationship that exists between trafficking guns and cattle across the borders of Uganda, Kenya, Sudan and Ethiopia, it is naïve and false to label raids as a bad tradition by a backward people. To the contrary, it is a wholly modern manipulation of violence for economic gain by self-styled war lords, which has little to do with the traditions of ethnic Karimajong, Pokot, or Turkana. (Republic of Uganda 2000: 14)

What is said about the cattle rustlers can be said with regard to the rebel insurgencies. Serious scholarly analysis of the political economy of rebel insurgencies is needed. As can be understood from Wordofa's comments, Uganda's efforts to disarm

Karimajong cattle rustlers may never solve the complex mesh of problems we have identified if we do not address the larger issue of gun trafficking in the region. But gun trafficking is a reflection of a larger problem of weak states, non-existence of strong civil society, a culture of lawlessness astride borders, a paucity of meaningful economic activities and failure to provide meaningful employment to jobless youth. We can see here a failure to ensure both political and civil rights, on the one hand, and social and economic rights on the other. Gun trafficking astride borders may be one of the overt manifestations of more serious problems of failing states, of multinational arms dealers defying international laws and peddling trade in illicit arms. We do well to note further that senior leaders in governments are often complicit in the arms trade and war economies, generally through bribes and kick-backs, as recent wars in Liberia and Sierra Leone amply demonstrate.

Multinational arms dealers are able to get away with it because the policies employed in dealing with the issues of poverty and conflict in the region are essentially based on the conceptualization of poverty as case poverty. However, a better tackling of the problem would require conceiving of poverty as a structural problem.

With hindsight, we can see efforts like disarmament programmes as a merely pragmatic affair, which will leave the deep-seated problems intact. Similarly, military options to fight off insurgents may, with hindsight, be seen to be expedient military attempts to deal with non-military issues. In order to have a lasting effect on rebel insurgencies and cattle rustling, and the resulting human rights violations, it will be necessary to address the structural poverty that is their cause. This will require strengthening the economies of the countries in the region, empowering communities, and bolstering labour laws. More importantly, there is a need for more equitable access to scarce resources if the growing gap between the rich and poor is to be resolved.

13.4.2. Agro-Related Policies and Poverty

Since time immemorial subsistence-based peasant farmers in sub-Saharan Africa, who constitute about 80 per cent of the population, have cultivated crops and raised animals for their own domestic consumption, to exchange as gifts, or to sell to itinerant traders. These activities were all carried out on their communal tribal lands (*obutaka*), which were always passed on from generation to generation. As long as peasant cultivators and pastoralists were left to themselves, wrestling with nature, they faced certain problems, which they had over the years learnt to deal with, using their own proven technologies and pharmacology.

Agriculture, whatever form it may take, will be useful to the extent that it meets people's right to food. It will further be useful if the sale of agricultural surplus can be used to meet health, housing, and other needs. Rudimentary forms of agriculture and animal husbandry, such as those described above, certainly did not meet many of these demands, and so subsistence agriculturists and pastoralists have always lived on the very margins of existence. Whatever human rights we

care to look at, whether the right to food, health, housing or education, have been largely compromised in the case of subsistence farmers.

Governments have often tried to intervene in different agricultural practices, ostensibly to improve living conditions and enable an increasing number of people to access many more rights than they have traditionally enjoyed. In Uganda, for example, we have had a very comprehensive programme, the Programme for the Modernization of Agriculture (PMA). This programme, which is 'a central element of Uganda's poverty eradication strategy, is key to enabling the rural population to improve their livelihood and ensure food security through changing subsistence agriculture to doing farming as a business' (Wougnet 2005).

Although PMA is only one programme among many undertaken to improve the lives of the people, the human rights issues it raises are typical of human rights problems other similar programmes raise. First, there is the problem of ownership and participation of the poor. Individual peasant cultivators and pastoralists have not seen themselves as architects and participants in the formulation of the policy. Yet, people's participation in matters concerning them is very emphatically raised by *General Comment No. 12 on the Right to Adequate Food* – Article 23, which states that: 'The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all' (UN Economic and Social Council 2008).

Not only has the PMA policy remained unknown to most people, despite its being translated into local languages, it has raised many more questions than it has answered. A peasant farmer has wondered concerning the programme: 'Is it a government policy that encourages the formation of extensive farms that will engulf all small farmers?'(Nakanjako 2002: 8).

Agricultural modernization will clearly require, among other things, land, but one of the problems peasant farmers face is lack of clear land policy. Experts have pointed out that Uganda has developed a land act without developing a land policy. Issues of developing a land policy will hinge on such questions, like exactly how tenants are to relate to the rich landlords who threaten them with eviction. Although the land act pretends to address that issue, the reality is that subsistence cultivators are always under threat of eviction. Then too, there is the question of government acquisition of land in the interest of the state. Here experts wonder when the government should ever take over land in the interest of the state, and when and how it should offer compensation. Now, whether it is government or some powerful individual evicting people, the practice of evicting people from their land is a very serious human rights issue. *General Comment No. 7* (on Article 11.1 of the ICESCR), which deals with *the Right to Adequate Housing and Forced Evictions,* tersely states in its opening article: '… all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats' (UN Office of the High Commissioner for Human Rights 1997). The Ugandan Government seems to be

nominally committed to protecting people in this respect, but the reality on the ground seems to be different.

Since the supply of land is limited, yet the population grows very fast (at a rate of 3.4 per cent per annum), and continues to rely very heavily on agriculture, how can the land needs and land rights (property rights) of all be respected while at the same time ensuring that basic human rights are protected? Property rights need to be securely protected if producers are to continue producing. But how can the property rights of the poor be protected against the interests of the strong and powerful?

Property disagreements between landlords and tenants are just part of the bigger problem of land in Uganda. In the district of Kibaale, there are land conflicts related to ethnicity. Ethnic Kiga agriculturalists (the Bafuruki), are locked in bitter land wrangles with the indigenous Banyoro, who feel the Bakiiga should not till their land. The magnitude of tension is aptly summarized in the question, 'How do you invest your energies on land which you are not sure of retaining when the wrangles calm down?' (Muwanga 2002: 6). The issues here go beyond merely property rights; they have now become civil rights and the right to life. The right to property has become secondary.

Yet, ironically, while land-related conflicts are escalating, economic returns from agriculture are declining. Commodity prices for coffee, cotton, and tobacco have been declining over the years; peasant agriculture as an economic activity seems to have entered a zone of diminishing returns. When masses of people scramble for land, knowing that returns from land have become marginal, this is a reflection of desperation and has dire consequences for the respect of human rights. The Universal Declaration talks about 'all human beings being born free and equal in dignity and rights'.[280] Now, in situations where a sizable portion of the population is desperate, people's dignity, for all practical purposes, has gone to the wind.

The problem of poverty with regard to agriculture can be summarized as a problem of a fast-growing population, archaic means of production, unclear property rights, lack of involvement of locals in matters affecting them, inability of women to secure full property rights in their own name, lack of adequate marketing infrastructures and lack of access to international markets.

13.4.3. Shifting Entitlement Bases: New Aspects to the Spectre of Poverty

Peasant cultivators increasingly find themselves entangled in land-related conflicts, even when agriculture is experiencing diminishing returns. Part of the problem is that peasant cultivators continue to rely on traditional forms of production, despite their inefficiency. A rigid commitment to traditional practices and

280. The Universal Declaration of Human Rights, Article No. 1

modes of thinking is unfortunate because it leaves traditional peoples at a great disadvantage in a new, globalizing world order, where virtually the only constant is change itself.

Globalization itself is a mixed blessing for the poor in sub-Saharan Africa in terms of human rights observance. First, for the first time in history, cases of human rights abuses and violations in any one area of the world, however remote, can now be a matter of international concern. This is true whether we are looking at a disaster in some remote area of the Himalayas, abuses of tribal peoples in the Darfur region of Sudan, lack of education for the Batwa children in the border regions of Uganda and the Democratic Republic of Congo, the forceful disarmament of Akarimajong kraal leaders, or the scourge of HIV/AIDS in Uganda. In all these cases, what would once have passed off as a small local problem is now a matter of global concern. The myriad human rights organizations that have proliferated around the world, armed with the latest communication technologies, will now bring these violations and abuses to the doorstep of the international community. And this is not a matter of only creating awareness, nay, we now have concrete interventions by way of disaster relief, peace keeping, food aid, humanitarian and technical assistance, which are all ways of securing the human rights of individuals and groups worldwide.

But the internationalization of human rights matters is not all there is about globalization. Equally important is the fact that hitherto peasant economies are now enmeshed into the international trading system – thanks to the array of trade agreements to that effect. For better or for worse, peasant subsistence economies are now bound by trading relationships with the highly industrialized nations of the world. For the record, small subsistence peasants from sub-Saharan Africa have, since colonial times, been in some kind of relationship with the industrialized world. They have, as in the case of Uganda, always sold their coffee following a quota system. What is new about the evolving globalized relationships that tie peasant economies and highly industrialized countries together is that this relationship is consummated within a capitalist framework. A coffee farmer of the 1960s, who expected to sell to the world market following a negotiated quota, and who moreover had a domestic stabilization fund to fall back on (in the event of bad international coffee prices), no longer has that luxury. The commodity producer now operates within the framework of supply and demand, and if his commodities fetch lower money internationally, he will experience declining standards of living.

Yet, although this sub-Saharan producer is getting less and less for what he sells, his need for manufactured goods – electronics, automobiles, pharmaceuticals, textiles etc. – is increasing. Globalized communication technologies have also created demand for such unconventional cultural goods as clothing with the logos of 'Arsenal', 'Manchester United', 'Liverpool' etc., which in turn has created 'imagined identities' for the peasant youths. 'I am Manchester United', peasant youth will often be heard saying, innocently expressing their imagined identification with the Manchester United Football Club, oblivious of the complex web of ideological, cultural and trade currents flowing underneath. In short,

sub-Saharan societies continue to be consumers and peripheral contributors to what is internationally produced and consumed. I want to trace this impasse to the structure of entitlement bases.

The structure of entitlement bases in the early colonial period was built around a colonial economy in which individuals grew commercial crops like coffee and tobacco, and mined gold, tin, coal, copper and others, all of which were in demand in industrial Europe. In those circumstances, individual commodity producers, like coffee growers, enjoyed, in Sen's entitlement lexicography, what we would call labour-based entitlements for coffee farmers and casual labourers in coffee factories, and production-based entitlements for factory owners. There were also the coffee traders with their relevant trade-based entitlements.

Commodity trade (in agricultural or mineral produce) marked a vigorous interaction between the developing South and the developed North – the early phases of globalization. For as long as the South's commodities were in demand in industrial Europe and fetched good prices, the South's entitlement bases were secure, and many people were able to live decent lives.

When, however, Africa's commodity prices started to decline, the stage was set for a shift in sub-Saharan Africa's entitlement bases. One of the major issues I want to observe about sub-Saharan poverty in the globalizing world is that contemporary poverty has a causal relationship with sub-Saharan Africa's failure to shift its entitlement bases to reflect the changed values of this globalizing world. Sub-Saharan economies have continued to heavily rely on coffee, cotton, and copper, even as those products are no longer enough to sustain them. A people whose entitlements were assured in one kind of market often find themselves out of place in a new market, where their former entitlement forms and bases are no longer adequately assured. I want to look at contemporary poverty as partly emanating from an obstinate clinging to entitlement forms and bases that are no longer useful or relevant for contemporary society.

Several Asian states were very much at the same economic level as sub-Saharan Africa in about the mid-1990s. At the beginning of the twenty-first century, these Asian states have radically improved economies, precisely because they have successfully shifted their entitlement forms and bases to take into account contemporary world demands. Hence India, which was once a source of spices, is now more known for its computer chips, thanks to burgeoning human resources adequately trained for the purpose.

So far, we have linked declining productivity in the sub-Saharan region to lack of competitiveness, which in turn we have related to the obstinate clinging to entitlement forms and bases that are no longer relevant. Sticking to entitlement forms and bases can be problematic not only internationally but even domestically. A people that sticks to its proven ways of doing things risks losing out in a very fast-paced world. The net effect of this will be poverty.

The specific human rights issue at stake here is the right to education (specifically higher scientific and technical education) that can equip people with the relevant scientific knowledge and skills necessary for the enjoyment of the benefits of scientific culture. Failure of governments to heavily invest in higher and

technical education has deprived people of the benefits of a globalizing scientific culture that Article 15 of the ICESCR talks about. That article observes that states parties recognize the right of everyone (a) to take part in cultural life and (b) to enjoy the benefits of scientific progress and its application – among other things. If people in sub-Saharan Africa have been locked up in traditional entitlement forms and bases, part of the problem is the failure to take advantage of scientific and technical knowledge. That kind of knowledge widens people's entitlement bases and forms, and in turn greatly alleviates poverty.

I now want to broaden the discussion and show that the entitlement argument is only part of a wider problem. Equally problematic are unfair trading agreements, often negotiated with little or no input from sub-Saharan stakeholders. What I have in mind are the unfair trading practices in which powerful members of the international community nominally subscribe to the free flow of trade, but create specific conditions for sub-Saharan African countries to sell textiles to the USA or fish to the European Union, which make the concept of the free flow of goods ridiculous. Article 1(2) of the ICESCR states, 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'[281] I want to note that contemporary trading arrangements in several ways contravene that principle – and indeed, many people's means of subsistence have been seriously compromised.

This then raises a fundamental human rights question: where will smaller states run to for recourse in situations where their rights are compromised? States are duty-bound to advocate for the human rights claims of their individual citizens; where will these states run to ensure they are protected? What impartial organization can be put in place to ensure that weaker states have their economic rights fully ensured and protected? I am raising these questions because, traditionally, states are duty holders, but now it is the state whose rights – i.e. the free international flow of its goods – are at stake. Who will ensure the rights of states in situations of unfair trading practices? International trading relations strongly steeped in neo-classical economic or, to be more exact, mercantilist ideology, may not be the kind that will foster respect for the economic rights of poor states. But at the same time, I recognize the emergence of new thinking, such as the concept of fair trading practices and fair trade goods. Could such concepts be the foundation upon which the economic rights of poor states will be erected? Do such nations stand a chance in the face of exploitative multinational interests?

281. International Covenant on Economic, Social and Cultural Rights, Article No. 1(2).

13.4.4. Populism and Poverty: the Political Angle to Poverty and its Implication for Human Rights

Although developing nations may face huge hurdles in the area of international trade, in the area of democratization the situation is somewhat different. Developing countries are, very much like Western countries, embracing political pluralism. However, with the rise of political pluralism and elective politics, there has emerged a new phenomenon: populist politics, which is likely to have far-reaching consequences in our attempt to deal with the problem of poverty. Because the poor constitute the majority of voters in the sub-Saharan Africa region, politicians attempt to come up with campaign programmes that are often seemingly favourable to them. A good illustration of how poverty has succumbed to populist politics is the suspension of the graduated tax in Uganda. The graduated tax is an old form of tax, whose origins can be traced as far back as 1900. Some form of land taxation is even said to have been in existence in the Buganda Kingdom before the British took over effective administration in 1900.

The earliest taxes were in the form of rent collected from all land-holding subjects of the Buganda Kingdom. In around 1901, a hut tax was proposed as the only practical way of raising revenue from the rural population. That tax was levied specifically upon the owner of the hut – which meant the male household head. A poll tax was later introduced for all those who were not liable to pay the hut tax. Since then, tax payment has evolved, and has spread to all parts of Uganda. By the time the tax was suspended, it had become a graduated tax that was paid by all household leaders who were not sick or disabled. It was a social and psychological sign of maturity and social responsibility, and in some cases the tax ticket could be used as an identity card. In peasant agricultural communities, that kind of tax is virtually the only way that a local community can contribute to the running of its affairs. It is the only viable kind of tax that can be meaningfully levied.

The rationale given for suspending the tax was that people were already very poor, and therefore needed no further burdens. It was also claimed that the costs of collecting the tax were higher than the tax collected, so it simply did not make economic sense. Besides this, the mechanisms of tax collecting were deemed brutal and violated the rights of the tax payers. Although there might have been some grain of truth in some of these claims, nevertheless they were far from convincing, not least because they were made in the heat of a political campaign, when the tax had been in existence for several decades!

Whatever the reasons for suspending the tax, my analysis shows that behind the veneer of respecting taxpayers' rights, there were some very subtle abuses of people's rights. First, although the central government had promised to compensate local governments for the revenue lost when the tax was suspended, it never adequately did so. The net effect of the suspension was that social delivery systems that benefited the poor and that had been supported by the tax were suspended. Rural hospitals, road networks, and agricultural extension work increasingly suffered, thereby compromising the right to medical care, the right to easy movement, and the right to food respectively.

What I consider the biggest loss of the suspension of the graduated tax from a human rights perspective was the poor person's loss of power. The graduated tax was more than merely a graduated tax ticket; it was an empowerment certificate. Armed with it, the 'invisible' poor villager could call government agents to account for the absence of drugs in the local clinic, the prevalence of potholes in the village road networks, the uncleared rubbish on the roadside or unrepaired broken sewerage. One who could reprimand government bureaucrats for shoddy services no longer had the moral grounds to do so once the tax was suspended, and government bureaucrats knew that. Today, when complaints are brought to government officials, they have the audacity to ask whether the complainant contributes to the running of public services. So, although tax payment was suspended because poor people's rights were purportedly being violated, these people's rights end up being violated in increasingly more subtle ways when they do not pay taxes. In the event of undelivered or poorly delivered social services, a simple explanation of 'we don't have the money' will often suffice. What all this means is that the duty holder has vanished.

What I am noting here extends to the larger question of governance. People who have been 'relieved' of the 'burden of tax' will only feel too grateful to the government of the day and may never have the courage to raise critical and fundamental questions about how they are governed. If the government's reason for suspending the tax is that poor people should not be further burdened, the more fundamental questions would be: why is there that kind of poverty in the first place? What institutional framework or policies led to that poverty? Who is responsible, and what institutional or political frameworks should be put in place to rectify that problem? Clearly suspending the tax does not solve the problem of poverty, as it leaves the poor people still poor! The issue here is that we must not be placated with palliatives; we must demand real solutions. So, we see in the suspension of the tax a subtle kind of manipulation intended to silence the population from raising fundamental questions about why they are poor. What initially appeared to be an act of benevolence or consideration for the poor may actually end up creating yet more poverty. Where and when poor people cannot question or criticize government programmes or policies, unproductive and injurious policies or programmes will go unchecked, and poverty is sure to increase rather than decline. People's standards of living do not improve simply because the government has been sympathetic to them.

What I have said regarding the suspension of the graduated tax can also be extended to the scrapping of school fees payment in primary school. The Government of Uganda did a very laudable thing when it moved to implement Article 26 of the Universal Declaration of Human Rights, which states that, '[e]ducation shall be free at least in the elementary and fundamental stages.'[282] The Covention on the Rights of the Child makes much the same point in Article 28(i), where it states: 'States parties recognize the right of the child to education,

282. Universal Declaration of Human Rights, Article No. 26.

and with a view to achieving this right progressively, they shall, in particular: (a) Make primary education compulsory and available free to all.'[283]

The government's attempt to achieve this objective has gone astray in my view, due to the decision to ignore the proviso that universal free education be achieved progressively. That Economic Social and Cultural Rights can only be progressively achieved has been very well stated in Article 2(1) of the ICESCR as follows: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'[284] What started off as a laudable effort in providing free Universal Primary Education went astray when government failed to realize that its objective of free Universal Primary Education could only be achieved progressively.

In Uganda, of all the children who enter Primary One, only 30 per cent will ever complete year 7, and of all those who enter secondary school only 48 per cent will ever reach year 4. Clearly there is much at stake, and government resources need to be pooled together with individual parents' resources to make the programme more feasible. The decision to absolve parents of contributing to Universal Primary Education when government cannot fully equip schools or pay reasonable salaries to teachers or properly house them is simply a political stunt.

It should also be remembered that, '[t]he human person is the central subject of development and should be the active participant and beneficiary to the right to development.'[285] The point I am raising here is that parents and their children, as active participants, should do something to supplement government efforts to provide quality education, as government progressively marshals resources to provide quality education which will, among other things, lead to the 'development of the child's personality, talents and mental and physical abilities to their fullest potential.'[286]

13.5. CONCLUSION

In this chapter, I have tried to go beyond the *case* view of poverty, which has tended to look at poverty as blamable on individual failures and weaknesses, a view that has largely characterized intellectual thought both in the classical and modern periods, and I have taken a structural view of the problem.

I have examined the structural nature of causes of poverty, and I have highlighted both the national and international dimensions of the problem. While

283. Convention on the Rights of the Child, Article No. 28 1(a).
284. International Covenant on Economic, Social and Cultural Rights, Article No. 2(1).
285. Declaration on the Right to Development, Article No. 2(i).
286. Convention on the Rights of the Child, Article No. 29(a).

the national dimension raises concerns like populist government policies and progammes, the phenomenon of rebel insurgencies and ethnic rivalries, these are all national problems that can be dealt with within national human rights frameworks, taking individual states as duty holders.

We get into complications, however, when we consider the international dimension of poverty, looking at such matters as unfair trading practices that limit the free flow of goods from developing countries to the developed world, when goods from the developed world freely move into the less developed world. With this international dimension, we do not have clearly defined duty holders. This, in my view, raises a new question to the human rights discourse, namely, how can we make international organizations, agencies, companies and all the large multinational entities whose actions and policies impact different people from different parts of the world, duty holders for these very different people affected by their actions and policies? How do we go beyond the state as duty holder, to include other large entities in the globalizing world? How can we sensitize the larger international community to the rights of poor people to be free from poverty? What kind of institutional frameworks can we put in place to ensure that the marginalized in the less developed world also benefit from scientific and cultural developments enjoyed by members of the developed North? All these questions point to the need to think more concretely about third-generation solidarity rights that focus on the kinds of issues we are raising here.

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14

Poverty: A Human Rights Violation in Post-Apartheid South Africa[287]

John J. Williams

14.1. THE 'NEW' SOUTH AFRICA AND THE BIRTH OF HUMAN RIGHTS FOR THE MAJORITY OF SOUTH AFRICANS

At a very basic level, 'post-apartheid' spells the acknowledgement of the human rights of the majority of South Africans who were denied such rights for almost four centuries. However, as this chapter argues on the basis of two case studies, the existence of poverty continues to undermine the fulfilment of such human rights, even though since 1993 the post-apartheid state has made several efforts to introduce a range of policies and planning programmes that are geared towards the amelioration of the plight of the poor in the new democratic order (Pillay et al. 2006). As this chapter highlights, an exemplary constitution and sound policies are not sufficient, especially when their human rights provisions are not implemented consistently and systematically in the planning frameworks and monitoring mechanisms of local authorities.

Conventionally, human rights are viewed as a set of claims and entitlements to human dignity, and it is assumed that the state must both provide and secure them. These norms are codified in various international agreements such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination

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of Discrimination against Women (1979) and the United Nations Convention on the Rights of the Child (1989) (Leckie 1998).

There are three 'generations' of human rights: first, security rights, which encompass life, bodily integrity, liberty, and sometimes the associated rights of political participation and democratic governance; second, social and economic rights with regard to food, health care, education, and free labour; and third, collective rights, which may include rights such as membership in a cultural community and access to a healthy environment (Hamm 2001). This chapter focuses on the second generation of rights, i.e. social and economic rights, as they directly relate to the reality of poverty in specific societies.

Many of the second-generation socioeconomic rights, including the right to housing, were included in South Africa's 1996 post-apartheid Constitution. However, the persistence of extreme poverty and apartheid-era social norms have frustrated the fulfilment of these constitutionally guaranteed rights. Thus, in the post-apartheid South Africa, it is especially important to ask why the poor have remained subject to levels of poverty far below the promise of the South African Constitution. It would seem that the answer to this pertinent question relates at least in part to the historical processes behind the conditions that profoundly impact the poorest members of South African society. The new struggle in post-apartheid South Africa is for fundamental social change, especially in relation to the basic needs of ordinary people, in order to resolve the glaring disjuncture between the actual lived experiences of poor people and their constitutionally guaranteed rights (Wiseman 2006).

This chapter specifically highlights the case of the Wallacedene community in Cape Town, which took the planning authorities to court to have its members' constitutional rights to adequate housing and related services enforced (Williams 2003). The implications of this court case are considered and apposite recommendations are proffered to ensure that poor people are accorded their rights as entrenched in what is arguably the world's most 'progressive' Constitution. The case of the Wallacedene community, also known as the Grootboom case, illustrates that citizenship rights in South Africa are not a given (Atkins 2007; McKinley 2006). On the contrary, they are being created, contested and affirmed in the daily-lived experiences of ordinary people through a range of interpretive voices of affirmation or jostling noises of confusion and nullification (Hemson and Owusu-Ampomah 2005).

Even so, as emphasized by the Constitutional Court, the Grootboom case illustrates that the South African state has a direct responsibility to uphold the constitutional rights of ordinary citizens within the jurisdiction of a particular local authority. This means that the state has a direct role to play in making citizenship meaningful for especially poor people at the grassroots level. According to the Constitutional Court's decision, the government is required by the Constitution to implement 'reasonable' legislative and other programmes to 'progressively realize' social and economic rights, including the right to access to water. Emphasizing the urgency of this Constitutional Court judgment, this chapter also briefly looks at the 2006/2007 conflicts around the plight of the poor people in Hout Bay, Cape

Town, to illustrate how the everyday lived experiences of homeless people are still largely ignored by the local government, despite the Grootboom decision. The brief consideration of the experiences of poor people in Hout Bay indicates that the Wallacedene community is not the only one in Cape Town (and by extension, in the rest of South Africa) whose constitutional rights are not honoured by the local state. Before turning to these particular cases, a few prefatory comments on the South African Constitutional Court are in order.

14.2. THE SOUTH AFRICAN CONSTITUTION, CONSTITUTIONAL COURT AND HUMAN RIGHTS

The South African Constitutional Court was established in 1994 according to the terms of South Africa's first democratic Constitution – the interim Constitution of 1993. According to the final 1996 Constitution, the Court established in 1994 continues to hold office. The Court began its first sessions in February 1995. It consists of eleven judges – nine men and two women. They may serve for a non-renewable term of twelve years, and must retire at the age of seventy. They are all independent of political parties. Their duty is to uphold the law and the Constitution, which they must apply impartially and without fear or favour.

The Bill of Rights, Chapter 2 of the South African Constitution, is the cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The state is expected to respect, protect, promote and uphold the Bill of Rights.[288] The South African Constitution also enshrines second-generation human rights. These are rights that are related to equality and are fundamentally social, economic, and cultural in nature. They specifically ensure that citizens enjoy relatively equal social conditions and treatment. They also grant people the right to work and to be employed, thus securing the ability of the individual to support a household.

The judgments of the Constitutional Court are based on the Constitution, which is the supreme law of the land. The Court is charged to guarantee the basic rights and freedoms of all persons. Its decisions are binding on all organs of government, including Parliament, the Presidency, the police force, the army, the public service and the lower courts. This means that the Constitutional Court has the power to declare an Act of Parliament null and void if it conflicts with the Constitution, and to control executive action in the same way. When interpreting the Constitution, the Court is required to consider international human rights

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288. The rights in the Bill of Rights are subject to reasonable limitations as contained in section 36 of the South African Constitution with specific reference to the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose of the limitation (RSA 1996).

law and may consider the laws of other democratic countries. The Constitutional Court is the highest court in the land for all constitutional matters.

Anyone wishing to bring a case before the Constitutional Court must usually start in the High Court. The Constitution makes it possible for a wide range of individuals and public and private bodies to raise constitutional questions in litigation before the High Court. In certain circumstances legal aid will be provided. Such assistance usually depends on the financial ability of the litigant to pay his or her own legal costs, the complexity of the case, the financial resources available, whether charitable work is done by lawyers, the availability of free legal services or legal aid-funded private lawyers, access to legal aid-funded law clinics and legal aid partnerships with paralegal advice offices.[289]

Constitutional questions are initially dealt with by the High Court, which has the power to award relief, including the invalidation of provincial or parliamentary legislation. Should the High Court invalidate provincial or parliamentary legislation, the order of invalidity must be confirmed by the Constitutional Court before it has any effect. Should the High Court decide not to award the relief sought, the Constitutional Court may be approached on appeal. Appeals can be lodged with the Constitutional Court. The judges of the Court will decide if an important question of principle relating to the interpretation of the Constitution has been raised in the application for appeal and will consider whether there is a reasonable prospect that the appeal may succeed. There is no automatic right of appeal against a refusal by a High Court to award constitutional relief. The Grootboom case, discussed below, illustrates the juristic principles invoked by the Constitutional Court to consider the justiciability of socioeconomic rights in post-apartheid South Africa.

14.3. THE GROOTBOOM CASE[290]

Often, whilst authorities talk rather glibly of *a better life for all*, ordinary people know what it means to live in squalor and overall misery without access to basic services.[291] Sometimes, however, the graphic nature of their suffering draws the attention of human rights activists, lawyers and planning advocates. Then, at long last, their voices as citizens are heard even in the highest courts of the country. This is precisely what happened in the Grootboom case, which took place in Wallacedene, Cape Town, in 2000. The Grootboom case raises the issue of the state's obligations under Section 26 of the South African Constitution, which gives

289. In *Nkuzi Development Association v. Legal Aid Board* (2001), the Land Claims Court of South Africa declared that the guarantee to a 'fair hearing' in the South African Constitution requires the government to provide indigents free counsel in proceedings under the Extension of Security of Tenure Act (1997) and the Land Reform (Labour Tenants) Act (1996) (see McQuoid-Mason 2002).

290. A version of this case study appears in Williams (2005).

291. The phrase 'a better life for all' and the term 'integrated development planning' are central to the development discourse in post-apartheid South Africa (African National Congress 1994).

everyone the right of access to adequate housing, and Section 28(1)(c), which affords children the right to shelter. It concerns questions about the justiciability and enforceability of social and economic rights.[292]

Grootboom was one of a group of 510 children and 390 adults living in appalling conditions in the Wallacedene informal settlement in Cape Town. They then illegally occupied nearby land earmarked for low-cost housing, but were forcibly evicted: their shacks were bulldozed and burnt and their possessions destroyed. They could not return to their original informal settlement as their former homes had been occupied by other people. In desperation they settled in the Wallacedene sports field and in an adjacent community hall. The Legal Resources Centre (an NGO) together with other legal activists decided to take up their case in an attempt to enforce their constitutional rights to housing.

Julian Apollos, a pro bono attorney at law for the Grootboom community and a former high school student of the present author, explains his overall involvement in the Wallacedene case as follows: 'One morning a magistrate had to roll out an attorney for a community that was unrepresented. He required me to represent a community that was evicted in Wallacedene; I had to establish their plight, as it was clear to him that it was an inequitable situation to leave the affected community on their own devices. Factually, their plight was not wholly due to circumstances of their own making but rather the failure on the part of the local authority to address the acute shortage of housing in the area. Closer scrutiny revealed that, in terms of the basic rights ensconced in the South African Constitution, Act 108 of 1996, not only the local authority but also provincial and national governments failed in their obligations to the people of Wallacedene' (Apollos 2004).

The Cape of Good Hope High Court found that the children and, through them, their parents were entitled to shelter under Section 28(1)(c) of the Constitution, and ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality to immediately provide them with tents, portable latrines and a regular supply of water as minimal shelter, which they did (*Grootboom* v. *Oostenberg Municipality*, 1999). However, the government challenged this decision before the Constitutional Court, arguing that the Constitution did not require the government actually to provide shelter (*Republic of South Africa* v. *Grootboom*, 2000 [hereafter, Grootboom]). The case was heard in May 2000.

In a unanimous decision, written by Justice Zakeria Yacoob, the Constitutional Court noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health care, sufficient food and water, and social security to those unable to support themselves and their dependents. The Court stressed that all the rights in the Bill of Rights are interrelated and mutually supporting. Realizing socioeconomic rights enables

292. This narrative is based on Williams (2003).

people to enjoy the other rights guaranteed in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. Human dignity, freedom and equality are denied to those without food, clothing or shelter. The right of access to adequate housing can thus not be seen in isolation from other basic rights.

However, the Court recognized that the fulfilment of the obligations that it set out is an extremely difficult task in the prevailing socioeconomic conditions in South Africa. Thus, the Court did not oblige the state to go beyond its available resources or to realize these rights immediately. Rather, the Constitution requires the state to implement 'reasonable legislative and other programmes' to 'progressively realize' social and economic rights. The question is always whether the measures taken by the state to realize the rights afforded by Section 26 are *reasonable*. To be reasonable, measures must reflect the degree and extent of the denial of the right they endeavour to realize. Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored. If certain measures fail to respond to the needs of the most desperate, they may not pass the test of reasonableness. In this case, the municipality's housing policy failed the reasonableness test because, even though the overall housing programme implemented by the state since 1994 had resulted in the construction of a significant number of homes, it failed to provide any form of temporary relief to those who remained in desperate need, with no roof over their heads, or living in crisis conditions. The Court ordered the state to devise and implement a programme that included measures to provide relief to those facing homelessness and desperation.

14.4. THE GROOTBOOM CASE AS AN EXAMPLE OF HOW POOR BLACKS EXPERIENCE POST-APARTHEID SOUTH AFRICA

The Grootboom case is an example of how black South Africans have been dehumanized, marginalized and excluded through apartheid-era planning policies that continue to frustrate efforts to fulfil human rights in South Africa (Williams 1989; Williams 1998). The stark contrast between white affluence and black poverty is perhaps best captured by the Eurythmics singer, Dave Stewart, who during an AIDS Charity Concert in Cape Town initiated by Nelson Mandela observed that 'People ask me if I've been to Cape Town … it's really beautiful. But there are poor communities that have hardly anything. The extremes [of inequality] are really scary … it's like a vision of hell' (Smetherham 2003).

In the Grootboom case, poor, black, homeless people were settled in an area that is geographically unsafe, as the water table for the area is very high, leading to frequent flooding of the settlement, especially in winter. Up to 95 per cent of the dwellings in Wallacedene are informal structures, which house 8,500 families. Wallacedene has an estimated total population of 27,000–30,000 people. This

means the area is highly overcrowded, with a population density of 20,000 people per square kilometre. It is also a major fire and health hazard as the wooden structures are very close to one another and without any sanitation services.

In Wallacedene virtually no services exist. The few toilets are no longer functional and are unfit for human use. There are only a few communal water taps, no health services are provided, and refuse removal is almost non-existent. There is no electricity. Wood fires and paraffin (kerosene) use result in very hazardous circumstances and destruction of possessions. In these circumstances of squalor and bureaucratic neglect, children are the worst victims of diseases, which include tuberculosis and skin disorders. The squalor is such that a community woman stated: 'I've been living here for eight years with my two kids. I can't live like this' (Fata 2002).

Such palpable planning failures are extremely demoralizing, especially to young people, who seem to have a more nuanced understanding of their social conditions. In the words of one such young person: 'Because of the filth here people are constantly sick … tuberculosis, scabies, for example. And the Government thinks it is all just AIDS, but it is also due to our living conditions … all the stench and squalor that is here … and there is no medicine that can cure this' (Mayi 2002). Facing such harrowing circumstances on a daily basis is not only a hellish experience for young people; adults are equally frustrated by their existential neglect, especially in a democratic South Africa. Hence the anger in the voice of the local medicine woman in the community who remarked: 'I don't quite understand what is the difficulty for our government, because we hear that in other places there are developments taking place. We haven't seen any developments here. We are surprised this is not happening because it is long that we have been struggling …. Since Tata Mandela was released. We want our forefathers' land back. We find it difficult to comprehend this lack of progress' (Fatayela 2002).

In this regard, the voice of an elderly man in the community makes it quite clear that they do not want to be completely dependent on the government, but they surely need assistance, as relayed in his own words:

> We want to work together. We want suitable houses to be built for us like it is happening elsewhere. Then after building the houses, they will have to say: 'Here is the metre box … here is electricity and taps and it all works like this and this.' Then the people who don't want to pay can be directly approached by us … I am a member of the community structure that attends meetings. I was at a meeting where we were asked to call a residents meeting regarding water payment. We pointed out our dissatisfaction … for example, what are we paying for? Where are the taps, the garbage collection? This place is filthy. Look at the toilets. People don't have any privacy. (Mabengeza 2002)

The absence of such basic services is very demoralizing, especially to young people. It breaks down their self-respect and dignity. One young woman lamented: 'I am crying because no one cares … especially the municipality. We don't know where else to go. We wrote a letter. We sent it; they never came back to us, except telling

us they received it; but nothing tangible with regard to a meeting to address our problems' (Qamngwana 2002).

Indeed, available statistics suggest that Wallacedene residents simply do not have the material and financial wherewithal to meet their daily needs. For example, most of the inhabitants earn far below the household subsistence level of R1,000 (US$140) per month. Two-thirds of the community earn less than R500 (US$70) per month, with only 3 per cent of the residents receiving some state pension or grant. A lack of basic services in the area is causing rapid deterioration of the overall living conditions. This situation was further exacerbated by the reluctance of the Local Authority (the former Western Cape Regional Services Council, followed by Oostenberg Municipality and now the City of Cape Town) and the Provincial Administration Western Cape to take responsibility for the provision of adequate services in Wallacedene. In an attempt to formally draw the attention of the local municipality to their dire circumstances, the community wrote numerous letters to the planning authorities to address their plight, but to no avail. It was in these desperate conditions that 900 adults and children, including Grootboom, moved out of the crowded conditions in Wallacedene and occupied land owned by a private person, setting the Grootboom case in motion. The owner of the land had the hapless transferees evicted. Consequently, in 2000, what became known as the Grootboom community, one of the informal areas in Wallacedene, took the local authorities to court for the violation of their constitutional rights.

It is within the preceding context of material neglect and suffering that the case study of Wallacedene should be considered as an example of how the past, present and future are linked in the expression of citizenship in post-apartheid South Africa. And it is the above socioeconomic conditions that inform the Grootboom case and which the Court sought to address through its landmark judgment.

14.5. THE SIGNIFICANCE OF THE GROOTBOOM CASE FOR CITIZENSHIP RIGHTS IN POST-APARTHEID SOUTH AFRICA

Julian Apollos, the pro bono attorney at law for the Wallacedene community, indicates that this case is considered a watershed in the context of international jurisprudence. In his view, the Court went further than most courts: it gave effect to second-generation rights (i.e. socioeconomic rights) and recognized the transformation of society as a necessary component for the efficacy of political rights (Apollos 2004).

More specifically, perhaps, the Grootboom case also illustrates that citizenship rights in South Africa are not a given. On the contrary, they are being created, contested and affirmed in the daily-lived experiences of ordinary people through a range of interpretive voices of affirmation or jostling noises of confusion and nullification. Even so, as emphasized by the Court, the Grootboom case illustrates that the South African state has a direct responsibility to uphold the

constitutional rights of ordinary citizens within the jurisdiction of a particular local authority. In this respect, the most significant outcome of the Grootboom case is the Constitutional Court's decision that the government is required by the Constitution to implement 'reasonable' legislative and other programmes to 'progressively realize' social and economic rights, including the right to access to housing and water. Section 9 of the Constitution also requires that all people be extended 'equal protection and benefit of the law' and be extended full and equal enjoyment of all rights and freedoms.

In Grootboom, the Constitutional Court held that the national housing programme failed the test of reasonableness, read in the context of the equality clause, because it did not sufficiently address the plight of the poorest, 'most desperate' people (Grootboom, para. 1) and people in 'crisis' situations (due to fire, flood, eviction, etc) (para. 2). The Constitutional Court stated that a 'reasonable' national programme to implement social and economic rights must:

(a) not exclude the most resource-poor people from its service provision. In the Court's judgment, a reasonable programme will 'create conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society' (para. 35);

(b) expressly provide for temporary forms of relief for people in crisis situations of emergency need and severe deprivation. Accordingly, the programme must 'make appropriate provision for attention to housing crises and to short, medium and long term needs' (para. 43). Ameliorative programmes must be 'sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements' (para. 56).

And, based on the aforementioned notion of reasonable measures, the Court stipulated that the national government must:

(c) monitor constitutional obligations and allocate adequate portions of the national budget to meet the need. In this regard it must 'ensure that appropriate financial and human resources are available' for the task (para. 39). Thus, '[i]t is essential that a reasonable part of the national housing budget be devoted to [meeting constitutional obligations in respect of the poorest and most desperate]' (para. 66).

The Constitutional Court's ruling in the Grootboom case suggests that there is a structural relationship between citizenship and the nature of planning at the local level. Many communities in South Africa face challenges similar to those of the Wallacedene community, and these cases cannot all be resolved through the courts. If basic human rights guarantees are to be met in South Africa, it will require a substantial shift in planning processes, in order to take into consideration the needs of society's most vulnerable members. However, despite the Constitutional Court's decision in the Grootboom case, these changes have not taken place. The enforcement of basic rights at the local level remains quite problematic, as

illustrated by the voices of different officials, politicians and civil society activists who were involved in the Grootboom case.

There are some commentators who argue that the Grootboom case did not take the context of development planning sufficiently into consideration. For example, Smit, a researcher at the NGO Development Action Group, argues that the Grootboom case was 'a little bit of a disappointment in that it did not focus on an integrated approach to development' (2001). For the former Minister of Housing, Sankie Mthembi-Mahanyile, however, the Wallacedene case raises a number of pertinent questions such as: 'What do we do with people who are informally settled? How do we utilize the budget and the related resources to impact [positively] on the lives of [the squatters]?' (2001). In her view, the specific issue of housing, highlighted by the Grootboom case, is in itself organically linked to other development issues such as access to land and resource allocation.

Resource allocation at the local level also appears to feature prominently in comments by other planning officials such as Seymour Bedderson, Chief Director of the Department of Housing, Provincial Administration, Western Cape. He blames the lack of development funding in the Western Cape on the rural bias of development strategies in South Africa (Bedderson 2001). This view is shared by Bazil Davidson, Head of Planning, Cape Metropolitan Council, who points out that Metropolitan Cape Town receives only about one third of its 14,000 individual, distinct, government subsidies; two-thirds of their subsidies have been redirected by the post-apartheid government to rural development programmes (Davidson 2001). Whilst development programmes are important as a state tool, other observers, like Anthea Houston, Director of the NGO Development Action Group, draw attention to the ideological underpinnings of current urban development practices. As an example, she points out that despite the inclusive nature of the South African Constitution, urban development planning still does not take into consideration gender issues. On the contrary, urban development planning still occurs within the restrictive parameters of apartheid town planning regulations (Houston 2001).

Indeed, apartheid-era ideological parameters still seem to have great purchase in largely ethnic communities in the segregated townships of Cape Town. Cecil Africa, Director of Housing for the Oostenberg Municipality, points out that there is a 'not-in-my-backyard' factor that often profoundly impacts housing delivery. This is presumably what happened in the case of the Wallacedene community. In Africa's view, 'there is often very little a municipality can do about this because they would have endless problems from adjoining communities' (Africa 2001). The reason for this apparent paralysing state of affairs is provided by Kobus Scott, Planning Consultant for Oostenberg Municipality, who states that 'you see there is a stigma attached to low-cost housing or subsidized housing. And if you identify land that is suitable for that purpose then you are confronted by surrounding owners not wanting to accept a low-cost subsidy development on their doorstep. This was our first approach even before we [carried out our plans]. We first met with high-income owners and over and over their fear was: What about our property? We had to give them assurances that when we came to that

stage we would look into that. And in the end they also had to approve the final plan.' According to Scott, for this reason, the Oostenberg Municipality split the so-called coloured community and African communities 'to safeguard that people would have more or less equal neighbours in [property] value. Here I must tell you that there is some political unhappiness between the two culture groups [so-called coloureds and black Africans]. Your original residents ['coloured'] was [sic] of the opinion that this area had to stay in the hands of the coloured community' (Scott 2001).

This racist form of planning in Wallacedene elicited strong condemnation from the former Minister of Housing, Sankie Mathembi-Sayanhile. In her view, 'according to the Constitution, no one, absolutely no one has the right to divide people on the basis of race; no one has the right to allocate resources and services on the basis of race. There is no way in which people can bring back apartheid through the back-door and perpetuate racism, because those policies have been refuted by our Housing Act [of 1997]. We are proceeding from the basis that housing will be provided on a non-racial basis and proceeding towards a basis of deracializing society' (Mathembi-Sayanhile 2001). The African National Congress Councillor for Wallacedene, Lucky Gwaza, challenged the very nature of planning in the municipality by observing: 'When you construct housing for high-income earners and then on the other side you build low-income housing for the very poor, isolated from the former, it is obvious that you are separating the haves from the have-nots. This means that the question of integration, often spoken about, is not encouraged or practised. That's not what we want, because that is the old apartheid approach whereby you don't integrate people' (Gwaza 2001).

The Minister of Housing and Councillor's condemnation of apartheid-style planning notwithstanding, it would seem that the so-called white and coloured residents of abutting properties were determined to live in their ethnic enclaves, separate from the largely African community of Wallacedene. For example, these communities had been vitriolic in their opposition to the proposed development plans for Wallacedene as required by the decision in the Grootboom case.

Faced with these challenges, the City of Cape Town and the Provincial Administration of the Western Cape agreed in May 2001 to joint responsibility for the area and committed themselves to a joint effort called the Wallacedene Housing Regeneration Project (Williams 2003). This project had to be fast-tracked due to major flooding caused by winter rains. After the declaration of an emergency situation that included a section in Wallacedene, the national government also committed further funding to the Flooding Relief Project, which enabled the City of Cape Town to provide temporary relief actions for the Wallacedene residents.

The Wallacedene community members were put on the city's housing waiting list. The City of Cape Town has proposed and approved a Spatial Development Framework for the future development of Wallacedene, Plan 12/06/03, after numerous meetings were held with various relevant stakeholders. Predictably, these plans elicited the wrath of surrounding 'white' and 'coloured' communities such as the Ratepayers' Association of Kleinbegin, Kraaifontein, where 109 residents signed a petition that reads:

> Dear Mr Johan Keuler,
> We, as residents of Kraaifontein, wish to register our strongest objection to the further development of Wallacedene. We shall never ever approve of it. The crime in the area is already rife. This development of Wallacedene will merely increase the crime in the area … . Do you at all care about the interests of Kleinbegin or do you simply ignore us because we are not an ANC [African National Congress] ward? Should you continue with the development of Wallacedene, we, the rate payers in the area will withhold our taxes and service charges from the Municipality! We are no longer prepared to be shunted around! Look for another place to solve your problem.
> Yours truly
> Owners and Residents of Kleinbegin. (City of Cape Town 2001*a*)

In a follow-up petition, a Committee of Ten, elected by 48 residents of Kleinbegin on 13 October 2001, forwarded the following objections to the Municipality of Cape Town:

> The City of Cape Town and especially the Executive Committee has a misconception of the problems and trauma caused by squatter settlements in our area …The value of our properties has declined by at least 50% since the establishment of Wallacedene and Bloekombos in 1989. Who would like to live next to squatters? Thus we are demanding compensation from Council as it is directly responsible for the squatter problem in our area. (City of Cape Town 2001*b*)

Such are the contradictions, tensions, fissures and threats of the struggles that inform the nature of citizenship in post-apartheid South Africa. In the battle for meaningful citizenship amongst historically marginalized and excluded people, such as those in Wallacedene, there are voices of clarity that have been heard in South Africa's highest courts. However, there seem to be voices amongst some planning bureaucrats and residents, especially those who hail from the apartheid order or benefited from the inequality that it established, that find the constitutional judgment of equal access to basic rights problematic. It is apparently in this regard that advocate Wallace Mgoqi, the former Chief Commissioner of Land Claims, is at pains to point out that 'the tragedy [is that], even with the arrival of the new democratic dispensation throughout the country, not much has changed in the Western Cape. The powers that be were there previously. The attitudes of your political authorities, local government authorities [show] some kind of apathy towards African people' (Mgoqi 2001).

And yet, despite the racist leanings of local communities and political parties in the Western Cape, there were victories for the Grootboom community. Geoff Budlender, a Legal Resource Centre lawyer who played a pivotal role in the case, observes: 'I don't think it's quite right that nothing has changed on the ground for the Grootboom community. When they started the case, they had literally nowhere to live. They had been evicted from the land where they had been living,

and were truly homeless. They are now living securely on land made available by the local municipality' (Budlender 2004). Perhaps one should reserve the last words on the Grootboom case for the attorney who represented the Wallacedene residents pro bono, Julian Apollos, who said:

> I still have contact with the community leaders of Wallacedene. Unfortunately the Grootboom case has been overtaken by other issues [in the Department of National Housing]. Thus Grootboom has become a sideshow. Recently, the new Minister of Housing, Hangana, has a new project, called Vision 20 … it is the same story, with a different cover. The Courts are going to be consistent in their ruling: they are going to refer to Grootboom as a landmark case in judging similar cases. To the local authorities they will consistently put the question, if necessary: You have breached your obligation, what are you going to do about it? (Apollos 2004)

The significance of the ruling in the Wallacedene case for citizenship rights is clear, but it must be incorporated into the planning process in post-apartheid South Africa if its goals are to be achieved. Tragically, though, Ms Grootboom died on 8 August 2008, without her constitutional right to adequate housing being honoured by the post-apartheid government (Makhanya 2008).

14.6. CITY PLANNING AND THE PERSISTENCE OF RACISM IN POST-APARTHEID SOUTH AFRICA

Thus far this chapter has explored the meaning of citizenship rights in a country in transition from apartheid to democracy. It used the Grootboom case, and the challenges of its implementation, as a means to test the extent to which the basic rights enshrined in the South African Constitution are enforceable by the courts. It drew attention to the landmark judgment in the Grootboom case, in which the Court ruled in favour of the homeless people of Wallacedene. However, it would appear that the implementation of the Court's ruling in favour of the progressive realization of the basic rights of the Wallacedene residents is problematic for several reasons. The challenges involved in the implementation of the basic rights guaranteed in the Constitution are often related to planning procedures, as will be demonstrated by an examination of the ongoing case of the Hout Bay community in Cape Town.

There are a number of significant problems in planning procedures that stifle the implementation of the rights guaranteed by the Constitution, and these rules are often only a thin cover for the sort of racial discrimination that characterized the apartheid era. First, there appears to be a lack of planning mechanisms in local authorities that deal explicitly with Court rulings such as the Grootboom case. Second, it would seem that some bureaucrats and citizens are causing significant noises of confusion, using all manner of red-tape to negate the basic rights guaranteed by the post-apartheid Constitution. It is the second reason that

is elaborated upon in the ensuing section to highlight the subliminal, if not actual, racism underpinning planning practices and community views on 'controversial' planning issues in Cape Town. In this regard, it has to be borne in mind that the everyday relations of citizens to the rest of society do not exist outside of the larger web of power relations, and thus play an important role in structuring the very nature of basic rights.

In the case of South Africa, these relations of power have been profoundly shaped by the colonial-cum-apartheid planning structures of apartheid-era South Africa, which in turn were based on the British 'efficiency' approach to planning that emphasized technical solutions to extant societal problems, as defined by architects and engineers (McCarthy and Swilling, 1984; Smith, 1992). In South Africa, 'efficiency concerns' were largely expressed through a racist lens, which led to the establishment of black townships on the outskirts of white cities. Consider the following planning principles of apartheid South Africa. On 30 May 1952 in a speech in Parliament, Minister of Native Affairs, Dr. Hendrick F. Verwoerd, declared:

1. Everybody wants his servants and his labourers, but nobody wants to have a native location near his own suburb. Therefore:
2. Every town or city, especially industrial cities, must have a single corresponding black township;
3. Townships must be large, and must be situated to allow for expansion without spilling over into another racial group area;
4. Townships must be located an adequate distance from white areas;
5. Black townships should be separated from white areas by an area of industrial sites where industries exist or are being planned;
6. Townships should be within easy transport distance of the city, preferably by rail and not by road transport;
7. All race group areas should be situated so as to allow access to the common industrial areas and the Central Business District (CBD) without necessitating travel through the group area of another race;
8. Townships should be a considerable distance from main, and more particularly national roads, the use of which as local transportation routes should be discouraged; and
9. Existing wrongly situated areas should be moved (Smit 1989).

Unfortunately, this Verwoerdian planning *diktat* still seems to frame planning in Cape Town. Exclusionary planning practices did not end with the birth of democratic South Africa in 1994. Following Henri Lefebvre's triad of spaces, in the 'new' South Africa, geographical space operates simultaneously as *l'espace perçu* (perceived space), *l'espace conçu* (conceived space), *l'espace vécu* (experiential space in the lives of people) (Shields, 2001). Cape Town illustrates this triad of spaces most graphically, as borne out by the Grootboom case, especially the 'perceived space' of exclusive identities and rights. Hence the persistence of the notion that Cape Town (and the Western Cape at large) is the abode of so-called 'coloureds' and 'whites', and where African black people are mere sojourners. In terms of their

lived experiences, African blacks apparently still occupy this 'conceived space' as provided for by apartheid planning practices of exclusion and alienation.

It is in this crucial aspect that the post-apartheid Constitution seeks to make a fundamental difference in the lives of ordinary people by centring the human being as the provenance and recipient of development planning, thus placing the experiential space of people at the centre of the planning process.[293] As illustrated by the attempts to implement the Constitutional Court's decision in the Grootboom case, the affluent members of society, still mostly so-called 'white', often invoke the provisions made for public participation in the affairs of local government to maintain their privileges. However, if the constitutional rights of South Africa's poorest citizens are to be ensured, genuine community involvement that includes the poor must play a central role in planning. Accordingly, the engagement of the majority of people, especially those who were historically denied political rights, and who quite clearly have a collective stake in the outcomes of development planning at local level, is an essential part of democratic practice in all spheres of governance. Community involvement in planning decisions, which must include the poorest people, will assume critical importance in transforming the unequal relations of power in the institutional planning bureaucracies in the new South Africa. This transformation is essential in order to secure the basic rights promised by the South African Constitution.

To demonstrate this idea, one only has to look at the 2006/2007 conflicts around the plight of poor people in Hout Bay, Cape Town, to understand how the everyday lived experiences of homelessness of ordinary people are still largely ignored by the local authority (De Villiers 2007). Currently, Hout Bay consists of an unusual mix of residents living side by side in a little bay surrounded by mountains. On one side there are those who live comfortably, and on the other those who live in Imizamo Yethu township, home to almost 16,000 residents, mostly black African and poor. The Congress of the South African Trade Unions (COSATU) has been at the forefront of the struggle to improve the everyday lived experiences of poor people in Hout Bay by, amongst other steps, calling for a redistribution of land. In their view:

> Unused land must be expropriated from the wealthy in Hout Bay to serve the desperate land needs of the poorer community there, and the present land occupiers should even be compensated a nominal amount. This expropriation will not be the first of its kind in South Africa; as we speak, land is being expropriated from communities in Gauteng to make way for the Gautrain, which will transport the wealthy to and from Pretoria. There is also an expropriation of sorts by Anglo Platinum of land for its mining operations, effectively displacing many households. The only difference here

293. See, for example, subsections 152 (1)a-e of the South African Constitution, Act 108 of 1996. These subsections explicitly refer to the need for community involvement in planning at the grassroots level.

> is that in Hout Bay the intention is to take land from the wealthy to use for poor communities. (Ehenreich 2007*a*)

Accordingly, in 2006, the African National Congress Executive Mayor of Cape Town decided to rezone an adjacent 16 hectares of state land to build houses for the poor black people of Hout Bay. The Hout Bay Ratepayers' Association, in a move similar to the objections of the wealthy communities surrounding Wallacedene, objected to this decision and applied for a court interdict to prevent the rezoning of this particular area. They were granted an interdict preventing the government from using the designated 16ha of government-owned land to provide housing for the poor people of Imizamo Yethu. The basis of this interdict derived from a 1991 apartheid law, called the Less Formal Township Act, which provided justification for reserving the 16ha for amenities according to the apartheid-era Separate Amenities Act. In the democratic South Africa, the notion of separate amenities is illegal, yet the court – in the case of Hout Bay – still used the Act to prevent poor people from exercising their democratic right to adequate housing.

In COSATU's view, this court interdict is 'a declaration of war by the mainly wealthy, white community in the area, on the poor, mainly black community, and it has led to deep divisions' (Ehenreich 2007*a*). This glaring contradiction in terms of the everyday dream (promised by the Constitution of the new South Africa) and the application of racist apartheid laws (the court interdict) is an instantiation of what Henri Lefebvre calls the mythologization of the everyday, as it would seem to be quite illusionary to claim that oppression is absent from the actual lived realities of the poor in Hout Bay (Lefebvre 2003: 82).

Indeed, accenting the everyday lived experiences of ordinary people in Hout Bay, COSATU furthermore points out that:

> This attack denies the Imizamo Yethu community the prospect of raising their children with the same services and opportunity that the wealthy community has. The sad reality in Hout Bay is that the children have to play in the streets of Imizamo Yethu filled with sewage due to the shortage of services, while their counterparts on the wealthy side swim in crystal-clear pools. When these children inevitably get sick, due to these circumstances, the medical services are insufficient and often illnesses that are curable become fatal. The focus of the medical services in this area is inevitably private, and more focused on the wealthy woman who is depressed because the plastic surgery has not quite delivered. (Ehenreich 2007*a*)

Furthermore, in the judgment of Tony Ehrenreich, Regional Secretary of COSATU:

> The courts are not accessible to the poorer communities due to the prohibitive cost involved in litigation, and will soon lose their credibility as an arbitrator of competing interests or rights. Their legitimacy is further eroded if government uses the courts as something to hide behind,

> restricting the realization of legitimate expectations, when what is needed is the introduction of new laws to achieve new objectives. The wealthy can use the courts to delay the developments in Hout Bay for more than 12 years through appeal procedures and effectively deny an entire generation the right to decent housing and services. The sole purpose of this interdict is to keep poor, mainly black, communities out of Hout Bay, and in this way keep the property prices up. (Ehenreich 2007*a*)

In the meantime, a crisis meeting was convened by the Institute for Justice and Reconciliation of the University of Cape Town. However, the Hout Bay Ratepayers' Association and the Hout Bay Residents' Association failed to be present. In COSATU's view:

> [T]he absence of these associations has further polarised the white and black communities, as these associations present themselves as the legitimate representatives of the people in the valley. Their refusal to participate in finding solutions shows a disregard for the legitimate interest of the black communities. (Ehenreich 2007*b*)

As partially borne out by the Hout Bay case, planning issues in Cape Town are quite clearly still read through a racial lens, as privileged groups seem to use a range of tools at their disposal to thwart any remedial action.

It is precisely in this regard where the political leadership, the Executive Councils in the national, provincial and local spheres of government would have to exercise a deliberate and principled choice: what type of citizenship are they going to afford ordinary people? Are they going to pander to the apparently racist stereotypes of historically privileged groups or are they going to enforce, by design and in a systematic manner, the constitutional mandate of equal rights as guaranteed by the South African Constitution and reinforced by the Court's judgment in the Grootboom case? Charles Villa-Vicencio, Executive Director of the Institute for Justice and Reconciliation at the University of Cape Town, observed in this regard: 'Socioeconomic rights are more than an irritant to political reconciliation. They are the heart of the formula that makes for lasting peace' (Villa-Vicencio 2007). Yet lasting peace cannot be achieved as long as poverty violates the laudable basic rights in the South African Constitution.

Thus far this chapter has considered the significance of the Grootboom case for citizenship rights, with special reference to the Constitutional Court's interpretation of such rights, viz. the state's obligation to ensure that basic rights are progressively and reasonably enforced. Attention, however, was drawn to the contradictions and tensions obtaining in local, ethnic communities abutting the Wallacedene area and Hout Bay that prevent the implementation of the Court's decision. The implicit if not explicit presence of racist attitudes among residents in so-called coloured and white communities, and the readiness of local planning authorities to countenance such xenophobia, are highlighted as significant

stumbling blocks to the fulfilment of basic rights for all people in post-apartheid Cape Town.

Recent trends in real estate valuations in Cape Town and its environs, especially since 1994, corroborate the view that racism underlies the problems faced by Cape Town's poorest citizens, who are predominantly black Africans. This very sharp increase in property prices in Cape Town would seem to be a form of market manipulation to keep black Africans out, especially from the formerly white-only suburbs. The South African Treasury commented in this regard:

> Despite the delivery of 1.97 million new subsidised houses since 1994, the housing backlog has grown. This is because of the increased demand and the pace of urbanization, with urban populations growing at 2.7 per cent per year. …The repeal of the Group Areas Act in 1991 led to increasing demand for houses in well-serviced and well-located neighbourhoods. This has led to an increase in prices, sales and investment in this sector, while investment in large parts of the middle to lower end of the property market has declined. While property values in the upper 30 per cent of the market have soared, the stagnation in township and inner city areas has been made worse by 'red lining' by financial institutions. This means the institutions are unwilling to lend money for housing in areas where the property market is perceived to be unviable [i.e. in the black townships]. (Republic of South Africa 2007: 77)

The 'redlining' of low-value property allows wealthy, predominantly white neighbourhoods to prevent black Africans from moving to adjacent areas, helping to ensure that the city remains the last bastion of 'European-cum-Western civilization' on the subcontinent, as envisioned by the Verwoerdian diktat quoted earlier in this chapter. This might appear to be a polemical view, but the 2006 election slogan of the governing Democratic Alliance party in Cape Town, 'Taking Your City Back', demonstrates the validity of this claim (McKinley 2006; May 2006; May and Roberts 2005). In this regard, ponder for a moment the reflections of a 'white' resident of Constantia, one of the most affluent suburbs in Cape Town, when she writes:

> What we have today, a democratic South Africa, [cannot] yet be run and inhabited by unembittered, well-educated, employed, responsible citizens at every level of society. The hugest crime of apartheid is its intensely complicated legacy, with which we are living. It [will take] decades to put into place functioning schools staffed by qualified teachers. To create jobs for an unemployed and untrained population. To condition people with hope to think that the way out of poverty is hard work, not crime. The massive economic disparity between the poor majority in South Africa, who are black, and the minority who are mostly white, as well as black, coloured, and the rest of our wonderful mix, makes crime inevitable. Most of us are ordinary human beings. We bear grudges and we complain. We live in fear and keep our doors locked. We want ordinary lives free from pain. In our

> search for answers and solutions, let us not take the easy way out, and blame the problems we are facing on the colour of people's skin. (Viljoen 2007)

The insights of this affluent resident surely illustrate that in a tension-ridden context, citizenship rights are not given, but interpreted and vigorously contested in the public arena. The extent to which the courts, together with all the organs of the state, commit themselves to the progressive enforcement of such rights, often under difficult circumstances, will determine both the form and the substance of citizenship rights in a future South Africa. The Grootboom case, quite clearly, has set the stage and a remarkable precedent. The question remains, however: Will the South African state be a willing and reliable partner in realizing the rights promised in its Constitution? Only the future will tell.

Thus far this chapter has suggested that there is a structural relationship between constitutionally guaranteed citizenship rights and the nature of the everyday life experiences of ordinary people, especially the poor, as borne out by the challenges of planning in Wallacedene and Hout Bay. These cases demonstrate the disparity between the formal assertion of basic rights and the attainment of those rights by society's poorest and most disadvantaged members. They further demonstrate the need for pro-active remedial planning and, in the case of the Wallacedene community and others like it, state-driven, community-oriented planning.

14.7. PLANNING FOR HUMAN RIGHTS: THE GROOTBOOM CASE AND BEYOND

If South Africa is to successfully achieve the level of basic rights guaranteed by its Constitution, local, provincial and national authorities must radically alter the planning process. In the section below I identify some problems in the planning protocols that governed the Wallacedene community, and discuss a number of suggested reforms that will allow for genuine community involvement in the planning process and ensure the protection of the basic rights of all South Africans.

14.7.1. Planning Shortcomings in Wallacedene

The planning protocols of the Wallacedene community were characterized by significant shortcomings that allowed the community to reach crisis conditions. The first significant problem with the planning protocols as they relate to the Wallacedene community was the lack of an emergency fund. An important step planning authorities must take is to develop a policy to cover relief to severely depressed areas in situations of emergency or potential disaster. In terms of treasury regulations it is acceptable to have a 'disaster fund', and the situation faced by the Wallacedene community would qualify as a disaster area, as the disaster

does not always have to be linked to devastation caused by elements of nature. A certain percentage of the budget could be allocated to such an emergency fund in order to allow for the provision of immediate, basic needs of communities in dire circumstances.

Second, in the case of Wallacedene, the planning bureaucracy demonstrated a lack of sensitivity and humanity toward the needs of this vulnerable community. It is tragic to hear the council planner saying that he did not know why the Grootboom residents 'illegally' occupied land. Anyone would want to escape from such hellish circumstances as those of Wallacedene. It is expected that a planner should know his/her area sufficiently well to allow for pro-active management of emerging problems. Yet, this does not seem to have been so in the case of Wallacedene.

Finally, the lack of an adequate database of the Wallacedene community prevented the development and execution of appropriate relief efforts. Development planning presupposes that proper information about the exact extent of the problems should have been in the hands of planners and the Municipal Council. This information would include levels of poverty, unemployment, services needed, population size and a breakdown of this, number of children and their ages for purposes of immunization and education, crime levels, rape and child abuse statistics, number of people per household, means of heating/cooking, HIV/AIDS incidence, and means of income generation. Gathering this information would only have confirmed what a single visit to Wallacedene would have shown. Additional information is needed to evaluate possible responses, including detailed information on available land, subsidies for housing, and health services. Proper information would determine which areas of intervention are most critical, what it would cost and what is possible.

14.7.2. What is to be Done in Wallacedene

Consonant with the provisions of the South African Local Government Municipal Systems Act (2000), there are various critical elements that inform Development Planning, including, among others, factors of production, land, labour, capital and technology (Harvey 2001). The successful implementation of the following elements of planning protocols will allow for the more effective achievement of basic rights for the Wallacedene community, as well as other communities in similar circumstances.

14.7.3. Short-Term Response

Immediate emergency response is required based on emergency meetings between a Municipal Council and a specific community in order to arrive at agreements and solicit commitment to proposed interventions, both short- and long-term.

For this purpose there has to be a re-prioritization of the budget if no specific fund exists that can be utilized. Some emergency necessities are:

- an immunization campaign to reduce disease amongst children;
- a mobile clinic twice weekly for a specified period to treat current problems;
- a clean-up operation involving as many members of the community as possible, paying the unemployed to do the work, which will provide equipment and support mobile toilets and the fixing of broken ones;
- intensive education programmes on health, hygiene, and fire prevention;
- weekly interaction with the community to report, motivate, explain, and encourage cooperation. These measures could have an immediate impact by reducing health risks and partially affirming the dignity and rights of these people.

14.7.4. Medium-Term to Long-Term Responses

Land: There is huge overcrowding in the area of Wallacedene. Although the Chief Director of Housing for the Oostenberg Municipality has said that land adjacent to Wallacedene belongs to farmers and is not suitable for housing, he did not indicate why the land is unsuitable and therefore this appears to be an excuse for doing nothing. If the Oostenberg Municipality, which is responsible for planning in Wallacedene, has to purchase land, it has to negotiate with the surrounding farmers and ask for assistance from the Land Affairs Department. Some community members have indicated that they want their ancestral land back, although it is not indicated where this is.

Labour: It is necessary to mobilize the key officials and politicians in the Oostenberg Council to change their attitude of apathy towards the plight of the poor. It is further necessary to empower staff and motivate them to interact with the community. Community development officers should be employed to ensure interaction and consultation with, as well as empowerment of, the community. Councillors in the ward must interact with the community. Members of the community should be encouraged to volunteer their own time and labour where possible. The community should be trained to render and protect some services and 'contract' them in when necessary. This will at least generate some short-term income and create commitment to the programmes.

Health services: More educational programmes on safe methods of cooking are required, as is increased training of community health workers, continued support from mobile clinics, condom provision and HIV/AIDS education, and improved basic service provision. More infrastructure is needed to provide increased access to water and sanitation. Grants like the Consolidated Municipal Investment Programme, Equitable Share, Mvula Trust, and Public Works should be accessed in order to subsidize the improvement of infrastructure. State-supported public-private partnerships (PPPs) with businesses such as engineering companies should be explored with the goal of meeting basic Reconstruction and Development

Programme[294] standards (water within 200 metres of dwellings) by increasing the number of standpipes and taps. There are no ideal solutions for sanitation, as each comes with disadvantages. The ventilated pit latrine system is the cheapest method, but it is problematic in the Wallacedene area, which has a high water table, unless meticulous de-sludging arrangements can be made. Users will have to be educated on whichever option is chosen, and on the general usage of sanitary services. Planning authorities must establish regular refuse removal services. The possibility exists for creating a waste removal and recycling project, which could even create jobs for the community.

Capital: The Planning Department of the Oostenberg Municipality indicated that they spent about R6.5 million on Wallacedene without getting a cent back in revenue from services. This is clearly because this extremely poor community is not able to pay for these services. The municipality has not indicated whether it has communicated statistics about its indigent population and whether it has received its equitable share from the national government treasury. The municipality needs to form PPPs and try to access all the possible funds for improving the Wallacedene area. The Municipal Council may consider increasing tax rates (after thorough investigation) in more affluent areas for the purpose of cross-subsidization. Interaction is needed with the welfare department in order to assist the application of those who may qualify for various types of social grants and the establishment of poverty alleviation projects in the area. The possibility exists that more capital would probably have to be reallocated from the Oostenberg Municipality budget and other sources to at least begin to correct the situation. Once the land question has been sorted out, the municipality must assist the community to access Reconstruction and Development Programme housing grants. Alternatives for new housing models need to be explored.

Technology: A proper database, for example in the form of a Geographical Information System, is needed to compile a community profile and to store information about indigents, nutrition levels, health indicators, labour, social indicators, etc. This will assist the council to monitor interventions in order to assess their impact. Technology should also be explored specifically with regard to the provision of the most appropriate sanitation services for the area. User education programmes need urgent attention in relation to the prevailing health hazards. In this regard, the circumstances in which people are living, specifically the levels of dirt and disease, indicate that there is a great deal that needs to be done to empower, motivate and educate the residents. If planning authorities are able to create a 'clean slate' for the community to start on, it would be the duty of the community to take responsibility for their environment by starting to use it differently.

294. The Reconstruction and Development Programme was the official programme of reconstruction of the South African Government that was launched in 1994 to address the legacy of uneven development as a result of successive colonial and apartheid governments in South Africa since 1652, a programme that was subsequently ditched in favour of the neo-liberal Growth, Employment and Redistribution Programme in 1996 (Bond 2000).

Local economic development: Because there is virtually no economic activity in this community, it presents a lot of opportunities if the council can access economic development funding – maybe in partnership with local business and other donors. If the land question is sorted out, there is the possibility of training the community to build their own homes, or to have a brick-making project. The basic idea would be to make them self-sufficient through a number of projects and enable them to be contracted for services needed in the community. This approach will be an incremental approach where gains are made at a slow but steady pace. Hopefully this will generate a sense of dignity and pride in this community of the historically neglected and excluded, transforming ordinary people at the grassroots level into active citizens, directing and shaping their everyday lived experiences, congruent with the principles and ethos of the post-apartheid Constitution of creating a caring and sharing society.

14.8. CREATING A NEW PLANNING PROCEDURE FOR A DEMOCRATIC SOUTH AFRICA

Beyond these recommendations for the Wallacedene community, the Grootboom case suggests that the process of transformation in South Africa from an apartheid society to a democratic society, in which human rights are both recognized and fulfilled, will be facilitated by the following measures, which must become an integral part of planning procedures:

- the effective coordination, on a territorial basis, of all civil services, planning authorities and institutions intervening in the various aspects of change, including that of the physical environment;
- the construction of integrated policies for particular spatial units by overcoming the simplistic practice of preparing projects according to immediate, ad hoc concerns which lack long-term vision of sustainable development;
- the departure from a linear approach of space determinism, i.e. not assigning people to specific residential areas without a concomitant concern for their basic rights as citizens within specific places, such as Wallacedene;
- the inclusion of historically-neglected groups: hence the need for an effective information gathering and managing system;
- the means by which policies are exercised have to become more attuned to existing problems, by adding new measures to the traditional ones;
- planning has to acquire and strengthen a cyclical character so that there is continuity, evaluation, and eventually a redirection of policies to more appropriate objectives. (Williams 1999)

Reforms in the planning and social policy machinery have to put as one of their primary targets the task of creating an efficient bureaucracy that can deal with these issues. Consequently, with the view to deepen and sustain the process of

transforming South African society, it also has to be realized that management is not merely the managing of people, but most importantly, the management of time, skills, abilities, potential, aspirations in relation to specific tasks, exercises, projects and programmes. The accomplishment of these reforms will require inter-sectoral/ multi-disciplinary networking, liaison and communication in defining the form and substance of the development planning. Thus with a view to expediting the transformation of planning as a regulatory framework of official intervention in the 'public domain' (Williams 2000), as recognized by the Municipal Systems Act (2000), it is therefore necessary to investigate the following:

- the particular governing strategies and structural features that shape decision-making at local level;
- the different public, private, non-local agencies and interest groups which participate in development coalitions or regimes and the means by which they are brought together;
- intergovernmental relations and the effects they have on local institutional structures;
- the way institutional structures affect, but do not determine, the behaviour of public officials and citizenry;
- the way in which wider economic forces, including locational criteria, set the context for strategic decision-making at the local level;
- policy agendas, occupational and employment structures, and local patterns of interest mobilization;
- place-boundedness and place-consciousness of public-private relations;
- the interrelation between and effects of economic and administrative restructuring at the local level within a citizen-driven development planning framework.

These suggested reforms to planning procedure, practice, and evaluation in South Africa will help ensure that many of the obstacles facing the implementation of the Constitutional Court's decision in the Grootboom case can be overcome. However, they also make clear that the basic rights guaranteed by the South African Constitution cannot be ensured without attending to the severe poverty that lies at their root.

14.9. POVERTY AS A HUMAN RIGHTS VIOLATION

The challenges facing the implementation of the basic rights guarantees of the South African Constitution, and the proposals for the reform of planning procedures suggested here, emphasize that it is important for the achievement of socioeconomic rights not only to have a rights-based constitution, but also to understand the significance of reducing or eliminating poverty as an existential experience.

Poverty as a human rights violation means the absence of basic justice for a specific person or group of persons as a result of a condition of severe material

deprivation. Hence the import of the notion of justice (Balikrishnan and Narayan 1996), which here refers to the formal, impartial and consistent application of specific rules in relation to rights such as equality, human dignity, life, freedom and security of person, absence of slavery, servitude and forced labour, the right to citizenship, fair labour practice, healthy environment, property, housing, health care, food, water, social security, education, language and culture, access to information, just administrative action and access to courts. These rights are also encapsulated by the thirty articles of the Universal Declaration of Human Rights. The protection and enforcement of these rights would constitute *substantive justice*, i.e. they are rights that individuals can legitimately demand from their governments. This is precisely what the Grootboom case illustrates, as it affirmed that citizens in a post-apartheid South Africa are entitled to such rights as adequate housing, health care and education, as stipulated by subsections 26, 27 and 29 of the South African Constitution. Should the government fail to provide these rights, citizens have a right to take it to court to enforce them.

More importantly, perhaps, the Grootboom case also illustrates that poverty undermines four basic rights that are essential for human survival, namely: (a) the right to adequate food; (b) the right to drinking water; (c) the right to shelter; and (d) the right to health. Poverty that undermines the very physical survival of a person or household must be recognized as a direct threat and impediment to the fulfilment of all other rights. Indeed, if we recognize these basic socioeconomic rights, as the South African Constitution does quite explicitly, then a person or group of persons who, as a result of their extreme poverty, lack sufficient food for subsistence, who have no access to drinking water, who have no place to live and whose health is at risk, must be regarded as suffering an intolerable violation of their basic human rights (Bengoa 2002).

14.10. CONCLUSIONS

This chapter has documented how a poor community in Cape Town, known as the Wallacedene community, took the South African Government to court in 1998 to have their constitutional rights honoured. This case, known as the Grootboom case, has been hailed as an international precedent in which the South African Constitutional Court made a landmark decision to require the South African state to meet the basic socioeconomic rights guaranteed by its Constitution. The Constitutional Court held that the national housing programme failed the test of reasonableness, read in the context of the equality clause, because it did not sufficiently address the plight of the poorest, 'most desperate' people, and people in 'crisis' situations. However, the implementation of this decision has been problematic at the local level for at least two reasons. First, there appears to be a lack of planning mechanisms in local authorities that are capable of implementing the Court's decision. Second, it would seem that some citizens and bureaucrats are using all manner of red-tape to negate the rights guaranteed by the post-apartheid Constitution.

This chapter then suggested that this tactic seems to be related to some form of racism, as borne out by the experiences of poor people in both the Wallacedene community and the Hout Bay community in Cape Town. In this regard, it must be remembered that the everyday relations connecting citizens to the rest of society do not exist outside of the larger web of power relations and that, in fact, exclusionary planning practices did not end with the birth of a democratic South Africa in 1994. On the contrary, it would appear that the affluent members of society, still mostly so-called 'whites', are willing to use their social position to attempt to maintain their privileges. A number of reforms to the planning process have been suggested that, if implemented, will go a long way towards remedying the challenges facing the implementation of the Constitutional Court's decision in the Grootboom case, and others like it.

The strategy outlined here involves the daily struggles of poor people for basic rights, and recognizes that in light of the challenges facing South Africa's poorest citizens, poverty itself must be understood as a violation of basic human rights. The configuration of power relations continues to significantly influence the extent to which poor people are able to gain access to basic rights, and this will not change unless poverty itself is regarded as a violation of those basic rights and remedied accordingly. This chapter illustrates that constitutional rights are important, but cannot be implemented without taking a broad approach to resolving the challenges of poverty through reformed planning procedures and the recognition that poverty itself lies at the root of the violation of basic rights – even in democratic, post-apartheid South Africa.

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Socioeconomic rights are a central element of human rights, and yet these basic rights remain unmet for billions of people living in severe poverty. The essays collected here explore the theoretical foundations for socioeconomic human rights and their practical application. Focusing on the urgency of addressing severe poverty, and the challenges of implementing socioeconomic rights, these essays will be useful to theorists and practitioners alike.

The authors offer a diverse range of ways to achieve the goal of reducing poverty, examining reforms to domestic institutions in developing countries as well as changes that should be made to the structure of the global economy. Coming from diverse backgrounds and perspectives, these leading academics explore the ways in which socioeconomic rights can be conceived, how they can be pursued in different cultural and political contexts, and who is responsible for taking action.

This volume springs from a UNESCO philosophy programme organized in response to the first of the Millennium Development Goals (MDGs) adopted by the United Nations General Assembly in 2000: 'to eradicate extreme poverty and hunger'. It will be of great interest to academics and students in philosophy, political science, law and international relations, as well as to lay readers. It will particularly challenge and inspire policy-makers in governmental, inter-governmental, and non-governmental organizations who think of their work in human rights terms.

Thomas Pogge is Leitner Professor of Philosophy and International Affairs at Yale University, Professorial Fellow at the ANU Centre for Applied Philosophy and Public Ethics, and Research Director at the University of Oslo Centre for the Study of Mind in Nature.

Pierre Sané is Assistant Director-General for Social and Human Sciences at UNESCO and former Secretary-General of Amnesty International.

CONTRIBUTORS:
Charles Beitz • Jeremy Waldron • Sebastiano Maffettone • Jennifer Rubenstein
Jiwei Ci • Neera Chandhoke • Paulette Dieterlen • Frank Michelman
Varun Gauri • Daniel Brinks • Oscar Vilhena Vieira • Christian Barry • Cécile Fabre
Edward Wamala • John Williams

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