GIVING MEANING TO ECONOMIC SOCIAL AND CULTURAL RIGHTS

EDITED BY
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Giving Meaning to Economic, Social, and Cultural Rights

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Introduction

A shift in the conceptualization of international human rights has begun: the international community appears to be more open today to advancing a holistic rights framework than it has ever been in the past. While the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations in 1948,[1] encompasses economic, social, and cultural rights as well as civil and political rights within its text, the subsequently drafted 1966 International Covenants[2] divided rights into two distinct categories—civil and political rights, and economic, social, and cultural rights—with distinct levels of justiciability and requirements for realization. However, more recent international human rights treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, have rejected a division or hierarchy of rights, giving equal importance to economic, social, and cultural rights, and civil and political rights. Regional treaties, such as the European Social Charter and the African Charter on Human and Peoples' Rights, and treaty bodies, such as the Committee on the Rights of the Child, have been at the forefront of integrating economic, social, and cultural rights within their realm of protection. Nongovernmental organizations (NGOs) working in the field of protecting and advancing economic, social, and cultural rights are also being taken more seriously, and being provided with more support, within the treaty monitoring system and by regional organizations or domestic governments. Moreover, some of the human rights treaty bodies have begun to look at rights in an integrated manner, defining and expanding the content and scope of certain rights in order to deal with them in a logical context. For example, the Committee on the Elimination of Discrimination Against Women's General Recommendation on women and health links women's rights to nondiscrimination and health care, thereby linking a social right to a cross-cutting human right.[3]

Despite these positive developments, a lack of political will to devote needed resources and implement infrastructural change in order to protect and advance economic, social and cultural rights remains apparent today. Within the international system, and at domestic levels, the eloquent statement made by the UN General Assembly in 1948, that economic, social, cultural, civil, and political rights are indivisible and interrelated, has not yet translated into reality. There is therefore still a need to look beyond the bare words of the UDHR and the International Covenant on Economic, Social, and Cultural Rights to give true meaning to these rights. Words on paper alone do little justice to the aspirations inherent in these documents; the

rights they contain must be humanized, no mean feat in the face of rampant rhetoric. This means recognizing that, without progress in the realization of economic, social, and cultural rights, an ancient language is lost, families struggle in slums, communities go hungry, women's bodies are exploited, children wait days at clinic doorsteps. Both bodies and spirits die.

It is thus our intention in this book to go beyond the rhetoric. To do so, we envision three steps. The first is to explore conceptualizations of human rights that assist in dissolving the traditional, category-bound approach to economic, social, and cultural rights. The second step is to examine how an integrated approach to rights produces a more meaningful analysis of individual economic, social, and political rights. Craig Scott refers to this as looking "between" rights.[4] The third step is to demonstrate that these rights are justiciable and therefore tangible, whether through domestic, regional, or international fora.

Until recently, the conceptualization of economic, social, and cultural rights was wanting in both clarity and dynamism. The authors in Part I of this volume make concrete suggestions for approaching these rights with a fresh eye. Craig Scott argues that a meaningful understanding of economic, social, and cultural rights will not occur until there is a conscious and radical breaking down of normative boundaries among the categories framed by each of the human rights treaties. As a part of this process, Scott proposes a simple yet fundamental change in the current practice of the six existing UN treaty bodies—he calls for substantive interaction, in order to harness the benefits of integrating diverse perspectives in the juridical construction of economic, social and cultural rights.

Chisanga Puta-Chekwe and Nora Flood make a similar plea for breaking down categories, but frame it in the context of how certain NGOs have recharacterized economic, social, and cultural rights as integral and important "basic human rights." Dianne Otto expands on Scott's proposal to undo human rights categories, reminding us of the cross-cutting nature of women's economic, social and cultural rights, and demonstrates the urgent need for "interactive reformation" in the conceptualization of rights by the UN and by states at the domestic level. Thus, these first three authors outline a conceptual approach to economic, social, and cultural rights whereby these rights are considered to be informed by, and indivisible from, all other human rights, so that they are considered not only justiciable, but also fundamental to our understanding of what rights are.

The essays in Part II approach the practical application of Scott's "breakdown of normative boundaries" through a variety of current themes, including equality rights for women and children; the right to health, and the human rights responsibilities of corporations. Like Scott, these authors propose a "governance responsibility"—as opposed to state responsibility—on the part of all individuals, organizations, governments, and other bodies that can affect the implementation of economic, social and cultural rights.

For instance, both Craig Forcese and Kerry Rittich argue that the neglect of market responsibility has led to detrimental effects on workers. Forcese argues that governments must address the moral implications of globalism, including the link between trade and economic rights. He states: "an assumption that economic development abroad will automatically induce improvements in human rights is not supported by the empirical record. Concrete policies on human rights are required." Rittich describes the rise of the market and the eclipse of the state, linking these developments to the persistent devaluation of women's work. In addition, she identifies the "direct collision between the demands for ever more efficient markets and equity for women" and proposes elements of a solution to this pressing issue, such as specific forms of protection and regulatory interventions.

Rebecca Cook explores the challenge of, and state obligations to, effectively guaranteeing health rights and reducing the tragic rates of maternal mortality around the globe. According to Cook, the key to advancing the right to safe motherhood is through the recognition of legally enforceable duties—an objective that health activists and human rights activists must work toward together. Martha Shaffer approaches the issue of children's poverty through an analysis of the relationship between Canada's international human rights obligations to children and its recent child support guidelines and cuts to social programs. She concludes that these guidelines, which were meant to standardize the amount of child support awarded and reduce child poverty attributable to economic upheaval caused by marriage breakdown, cannot be seen as measures that fulfill Canada's legal obligations under the Convention on the Rights of the Child.

The promises made by the international community to protect and promote economic, social and cultural rights remain only words on paper without, first, a progressive vision of these rights and, second, giving effect to these rights. While advancing economic, social, and cultural rights has traditionally been thought of as the role of domestic courts and legislature, Barbara von Tigerstrom in Part III explores the positive role that national nonjudicial human rights institutions, including ombudsman and human rights commissions, can play in implementing these rights. Leilani Farha explores the roles that NGOs can play in the fast-developing area of international housing rights and demonstrates that housing rights implicate almost all categories of rights. Finally, James Anaya illustrates a dynamic approach to using regional human rights judicial bodies in light of domestic intransigence in order to advance claims for indigenous peoples' rights to cultural integrity, property, and a healthy environment.

While the realization of economic, social, and cultural rights is greatly assisted by a legal framework that defines the content of such rights and provides an enforcement mechanism to protect against their violation, the focus cannot be exclusively legal if progress is to be made. A shift in ideological perspective to one that is more communitarian and egalitarian, both

domestically and internationally, is imperative if we are to tackle the fundamental obstacles to realizing these rights. Indeed, progress will be achieved where there is community and political will for substantive equality, social redistribution, and commitment to the dignity of the human being. It is hoped that this book provides thoughtful reflection on this expanded vision of economic, social and cultural rights.

Part I. Conceptualizing Economic, Social, and Cultural Rights: Dissolving Categories

1

Toward the Institutional Integration of the Core Human Rights Treaties

CRAIG SCOTT

By its nature as a pronouncement of high normative principles, the Universal Declaration of Human Rights (UDHR) did not address the hard questions related to the creation of institutions to begin the process of bridging the gap between statement of ideals and practical realization. However, starting with the grand bifurcation that produced the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) as the two institutionally separated offspring of the UDHR, the UN human rights treaty order has evolved in such a way that the UDHR's inclusion of the entire range of then-recognized human rights in one authoritative instrument has become fragmented. We now have six core conventions each with its own treaty body charged with interpreting and monitoring compliance with its own instrument.[1] This chapter builds on works that seek to make a case for a much less category-bound approach to thinking about human rights.[2] The theme which unites these works with the present chapter is the need for a conscious and radical breaking down of the normative boundaries among the categories framed by each of the human rights treaties and for a complementary "interactive reformation" of the treaties' institutional orders in order to harness the benefits achievable through dialogue across diverse perspectives in the juridical construction of human rights knowledge.

The argument in the first work, "Reaching Beyond," was that we must strive to make the original promise of the UDHR—that its human rights represent an integrated bundle of fundamental interests—the overarching premise of the current six-treaty order. An analytical shift is required to enable us to search out ways to approach received categories (economic, social, and cultural rights, women's rights, and so on) with a certain wariness of the aptness of those categories and with an associated willingness to cross to and fro among categories. We must further be prepared to engage in category crossing–and category combining—to the point that we begin to defy the categories themselves by developing our shared sense of when it is awkward, usually unhelpful, and often even harmful to understand a given rights claim or context in terms of existing categories. Harm is exacerbated when we approach a right's content as involving only a single category of rights as contained in the one treaty that is subject to interpretation or application.[3]

In the second work, "Bodies of Knowledge," the context was set by recent recommendations that consolidation of the six treaty bodies into one or two bodies should be on the UN reform agenda. It was argued that harnessing of diversity must be central to any consolidation reforms and that diversity-enhancing initiatives must start immediately with respect to the current six-committee order, in part because practical experimentation with promoting diversity will provide valuable lessons at the institutional design stages of any eventual consolidation project. But the central thrust of the argument was that such an approach was independently desirable quite apart from whether treaty-body consolidation is in the cards. Two premises were — and remain — central. The first is that superior collective judgment is exercised when multiple perspectives are encouraged to interact with each other in coming to grips with any given normative issue or decision. The second is that, in order for diverse perspectives and actors to interact, there must first be a commitment to ensuring diversity within the composition of the membership of collective decision-making bodies. Diversity multiplies perspectives, while the need for decision making necessitates that those perspectives engage each other. Diversity helps oust monological reasoning in favor of dialogical reasoning, making it less likely that reasoning will take place within the four corners of a single person's limited knowledge and more likely that it will take place in the context of the necessity to test one's assumptions and intuitions against those of others. The operative good of a "dialogical universalism" is *knowledge* and the perspectives that adhere to knowledge. In somewhat oversimplified terms, we can think of "social experience" and "disciplinary expertise" as the two main forms of knowledge relevant to the juridical construction of normative knowledge.[4]

"Bodies of Knowledge" noted but bracketed a third form of diversity of knowledge in the human rights treaty context which fuses diversities of expertise and experience, namely, diversity of "normative focus." This term was meant to capture the epistemological perspectives that tend to coalesce around a category of human rights as it gets constructed over time as its own distinct field of knowledge. In this way, we can speak metaphorically, but meaningfully, about the potential of treaty texts to enter into dialogues with one another, dialogues that profit from the interaction of the diverse knowledge(s) each treaty regime has constructed for itself. The present chapter was signaled by the following passage at the end of the introduction in "Bodies of Knowledge":

> [A] second proposal . . . could complement [the discussion in "Bodies of Knowledge"]. This is for the human rights committees, through pragmatic acts of institutional co-operation, to consider their six treaties as interconnected parts of a single human rights "constitution" and thereby to consider themselves as partner chambers within a *consolidating* supervisory institution. Through such acts of pragmatic imagination, each committee would be encouraged to place itself within a network of dialogue with the other committees; all would seek to expand their horizons

through harnessing the pool of diverse knowledge represented by their large collective membership and the diversity of normative mandates of the six treaties.[5]

The operative assumption of this passage is that, if diversity is seen as an institutional good because of its role in bringing to bear multiple angles of vision on the exercise of judgment, then it makes sense to look at the treaty body order as a whole and ask whether knowledge-enhancing effects can be achieved by reforming the relations of the committees among themselves. It becomes important to think in terms of the normative focus of each committee's constitutive treaty as having only a partial perspective on human rights which would be enhanced by dialogical engagement with the other committees.[6] Such dialogical congress can be organized in terms of at least two broad patterns of interaction.

If, for some purposes or in some contexts, the committees began to interact as a kind of quasi-consolidated committee of the whole, then this would have the effect not only of increasing the overall membership pool (to 97) but also of deepening the pool of knowledge. An analysis that is fuller and normatively richer can — or, can potentially — be achieved than is possible from within a single committee with its more limited membership and its more narrowly categorized normative focus. Here, the treaty bodies (or cross-cutting working groups made up of several members from each treaty body) would interact as some kind of organic or seamless whole, consolidated around a common purpose to the point that the boundaries between the institutions functionally dissolve, even if only temporarily and for limited purposes. So, for example, if the six human rights committees were to meet for two days in a joint plenary session to discuss the draft text of a common general comment on the relationship of social vulnerability to human rights violations, we would speak of the committees (and their members) as consolidated for this purpose.[7]

In other contexts there may not be any actual convening of the members of the committees into some kind of committee of the whole, but rather a more notional or virtual dialogue in which each committee takes note of procedural and substantive developments (some routine and some more experimental) that have taken place in other committees and then makes an independent choice as to whether to emulate what is going on in the other committee(s). On this approach, we would think less in terms of (the members of) the committees interacting as a single consolidated collectivity and more in terms of the committees interacting as autonomous bodies with their own institutional perspectives. Such inter-treaty interaction would be premised on institutional sovereignty (both of jurisdiction and of normative focus) remaining intact in a strong sense. The interaction that takes place is in the form of dialogue across palpable boundaries in which each institution seeks either to persuade or to learn from another institution. Each institution has its separate perspective generated by its normative focus and by its

practical experience which it may wish to commend to the other institution(s) or to have enriched by listening to the other institution's perspectives and experience. Jurisdictionally separate institutions are engaging in dialogue (as an *inter-institutional* order), not the membership of the institutions as an amalgamated whole (a *pan-institutional* order).

The first two sections of this chapter discuss various basic possibilities as to *how* such institutional integration could evolve in the near future. The final section then offers some thoughts on what spin-off benefits might be produced by such integration for resituating "economic, social, and cultural rights" in the process of responding to the next generation of monitoring challenges in the rapidly evolving context of economic globalization and transnational reconfigurations in governance structures.

The Role of the Annual Meeting of the Chairpersons in Fostering Evolution of the Human Rights Treaties' Integrated Jurisdictional Order

Picturing the Six-Treaty System

A stylized (bordering on caricatured) depiction of the contrast between the state of the current UN human rights treaty order and the as-yet-unrealized potential of institutional integration can be found in Figures 1 and 2. In both diagrams the six treaties are depicted as circles (A–F). Each circle overlaps with the other circles to varying degrees so as to represent the unity of purpose and the shared norms of the treaties as well as the potential for integrated normative analysis to defy the definitional categories of the rights in each treaty. The combined treaty order is shown as embedded in a larger UN human rights system that surrounds the treaties in a cocoon of moral, political, and legal norms. The United Nations Charter and the Universal Declaration of Human Rights are the energy sources for this field. Each treaty has provisions establishing and setting out the authority of its monitoring institution. These provisions are represented as smaller circles located so as to portray each of the six human rights treaty bodies incorporated within its own treaty's normative world. It is with respect to the location of each committee and associated relations with the other committees that Figures 1 and 2 differ.

In Figure 1 (the current treaty order), each committee is shown as lying outside the field of normative overlap. This is suggestive, to an exaggerated extent, of the way each committee has tended to treat its treaty as a self-contained regime relatively unconnected to the other five treaties. Each committee's location on the far edge of each treaty is also suggestive of both its distance from the area of greatest normative overlap (the normative core of the treaty order) and its isolation from the other committees. Six