



# THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS

## A Global Overview

Edited by Lanse Minkler

CAMBRIDGE

# The State of Economic and Social Human Rights

A GLOBAL OVERVIEW

Edited by

**Lanse Minkler**

University of Connecticut



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## Introduction: Why Economic and Social Human Rights?

*Lanse Minkler*

To begin to appreciate the magnitude of suffering endured by those living in poverty, consider this: measured head to toe, a traveler condemned to walk on the backs of Earth's population subsisting on \$2 per day or less would cover the same distance as four roundtrip voyages to the moon.<sup>1</sup> Such a journey would take fifty-four years of nonstop walking.<sup>2</sup> That option, however, would be better than being forced to say the names of each so afflicted, which would take 195 years of nonstop talking.<sup>3</sup> Moreover, income poverty representations understate the true magnitude of human suffering. Even those with higher incomes may suffer hardships associated with poor health, housing, and education. Their sources of income may be precarious; they may lack clean water and sanitation or otherwise live in a spoiled environment. As always, these maladies disproportionately affect women, children, minorities, and the persecuted and dispossessed.

Although good development and growth policies are necessary, they have not been remotely sufficient to reach those most in need. For instance, researchers have concluded that neither current nor conceivable economic growth rates would be sufficient to achieve the Millennium Development Goal (MDG) of halving even the lower global poverty rate of \$1 per day or less from 1990 by 2015 (Besley and Burgess 2003;

<sup>1</sup> The World Bank estimates that there were 2.564 billion people living in extreme poverty in 2005, virtually unchanged from the 1981 number (World Bank 2008, table 3). For a comprehensive criticism of how the World Bank calculates its poverty headcount figures and its political and moral implications, see Pogge (2010).

<sup>2</sup> The distance arrived at assumes an average height of 4 feet, and an average distance to the moon of 238,900 miles. The walking speed was assumed to be a brisk 4 miles an hour.

<sup>3</sup> Assuming 2.4 seconds per name.

Kimenyi 2007).<sup>4</sup> Furthermore, policy goals such as those embodied in the MDGs are just that, goals, or desirable objectives. Contrast that approach with the human rights approach. Specifically, economic and social (ES) human rights – the rights to the goods, services, and means to an adequate standard of living – are universal moral entitlements whose power is (or should be) legally ensured. ES rights enable each and every individual to claim sufficient resources to live a dignified life no matter what a country's average income or income distribution might be.

ES rights are becoming increasingly recognized in the law. For example, South Africa's 1996 postapartheid constitution innovatively includes rights of access to housing, food, water, and social security. In 2005, India's parliament adopted the National Rural Employment Guarantee Act, which gives rural head of households the statutory right to paid employment for 100 days per year.<sup>5</sup> More comprehensively, researchers associated with the Toronto Initiative for Economic and Social Rights have surprisingly identified at least one ES right provision in 95% of the world's developing country constitutions.<sup>6</sup>

Of course, even if laws are on the books (*de jure* protections), it does not mean they are implemented in practice (*de facto* implementation). We need to carefully examine the obstacles to *de facto* implementation. To do that we must be very clear about what ES rights are; when they are relevant; the extent of obligations; what laws, legal strategies, and policies are most suited for the realization of ES rights, and in what contexts.

The interdisciplinary analysis offered in this volume attempts to help scholars and policy makers find the best ways to instantiate ES rights. The authors in this volume provide a detailed, up-to-date discussion of ES rights. They also examine the role of the associated obligations, especially the obstacles to respecting, protecting, and fulfilling those obligations. For instance, we will see that not only can globalization, discrimination, and states' failures to recognize their extraterritorial obligations to other

<sup>4</sup> The notable exception is China, which has seen the numbers of its population subsisting on \$2/day or less drop from 972 million in 1981 to 474 million in 2005, despite its population growing by 311 million during that time (World Bank 2008, table 3).

<sup>5</sup> Also, in the summer of 2010, the United Nations (UN) General Assembly officially confirmed the rights to clean water and sanitation as human rights. Even states in the United States have recently passed ES rights legislation. New York became the first state to pass legislation giving domestic workers modest protections against exploitative conditions, and Vermont enacted a single-payer health insurance system.

<sup>6</sup> Access <http://www.tiesr.org/data.html>. As we will see, contributors to this volume further detail the widespread legalization of social security and environmental human rights.

states hamper ES rights fulfillment, but also, more subtly, that things like growing meat consumption and even Keynesian economics are obstacles as well.

## 1. WHAT ARE ECONOMIC AND SOCIAL HUMAN RIGHTS?

Most fundamentally, human rights are based on and meant to assure the realization of human dignity.<sup>7</sup> ES rights, like all human rights, are moral entitlements everyone has just because they are human. ES rights are therefore not contingent on one's virtue, behavior, attributes, or failings; nor, as moral entitlements, are they contingent on external circumstances such as political and economic systems or a society's wealth.

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, famously enshrines the full catalog of human rights – that is, moral entitlements.<sup>8</sup> Of its thirty articles, Articles 22–26 have come to be identified with ES rights. Those articles cover entitlements to work, social security, education, and an adequate standard of living, which includes food, clothing, housing, and medical care. Although often ignored, we also include Article 28 because it reads, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Human rights are consistent with many different policies and institutions, but this Article imposes additional constraints on the rules of the game. Among other things, Article 28 obligates foreign governments from also violating the ES rights of domestic citizens.

Although moral entitlements are nice, they may be of little comfort to those who experience real-life violations. That recognition led to two additional covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which were adopted by the UN General Assembly in 1976. Together, the UDHR, ICCPR, and ICESCR are referred to as the International Bill of Human Rights.<sup>9</sup> While separating the rights into two covenants contributes to the perception that the nature

<sup>7</sup> I will further touch upon foundational arguments; Michael Freeman will take up possible objections in his concluding chapter.

<sup>8</sup> For a good account of the history of the Declaration, see Lauren (1998). He argues that the Declaration is a Western articulation of universal principles that can be found in the best of the world's cultural and social values.

<sup>9</sup> Other international covenants that include some ES rights include the Convention on the Elimination of All Forms of Discrimination (see especially part II) and the Convention on the Rights of the Child. ES rights are also included in The African Charter of Human and

and value of human rights differ by category, the intent was to provide legal protections and support for the moral entitlements embodied in the UDHR. By signing and, more importantly, ratifying these covenants, countries are expected to align their laws and policies with the principles articulated in the UDHR and then detailed in the covenants. The covenants convert moral rights into ostensibly enforceable legal rights. However, enforceability further requires an enforcement agency and sufficient political and legal institutions in countries.

Once a country has ratified the ICESCR, often with reservations or exclusions, the Committee on Economic, Social and Cultural Rights (CESCR) is tasked with monitoring the implementation of the covenant. State parties are required to submit reports about their implementation efforts to the committee within two years of adopting the ICESCR, and then every five years thereafter. The committee uses the reports to assess and comment on a country's progress. To further clarify its interpretation of the ICESCR's provisions, the CESCR issues general comments; to date, it has published twenty-one.

However, the CESCR has very limited tools to compel countries to respect their ES rights obligations. The committee lacks the power to levy fines or to imprison violators, but it can try to work constructively with noncompliant governments. What it does have is the bully pulpit; it can reveal egregious violators to the international community, the so-called name-and-shame game. Often, of course, that is not enough.<sup>10</sup>

I now close this section with a brief discussion of what ES rights are not. Human rights are not entitlements to all things good or important.

Peoples' Rights, The Cairo Declaration on Human Rights in Islam, and the American Declaration of the Rights and Duties of Man.

<sup>10</sup> Even if it had better enforcement mechanisms, the CESCR still requires reliable, accurate information on which to base its analyses. Government policy makers themselves need accurate information about their own ES rights performance as well as alternative policy options. For some time now, human rights nongovernment organizations (NGOs), policy makers, and scholars have used cross-national databases to assess civil and political human rights performance, such as the Political Terror Scale, the CIRI Human Rights Data Project, Polity IV Project, and the World Bank's Worldwide Governance Indicators. Similarly scholars have recently been using data sources such as the Physical Quality of Life Indicator, Human Development Indicator, and Human Poverty Index in order to assess ES rights performance. Myriad theoretical and empirical issues remain, perhaps the most important of which is the continuing need for comprehensive disaggregated data, but early pioneering efforts attempted to assess and rank country ES rights performance. These works include the "residual" approaches of Kimenyi (2007), Cingranelli and Richards (2007), and Richards and Clay (2009) and the "frontier" approach of Fukuda-Parr, Lawson-Remer, and Randolph (2009) and Randolph, Fukuda-Parr, and Lawson-Remer (2010).

As Jack Donnelly notes, we do not have human rights to love, charity, or compassion (Donnelly 2003). ES rights do not entitle us to things that are often the objectives of economic and social justice. In particular, we are not entitled to any income equality beyond what is necessary to assure an adequate standard of living for human dignity. ES rights fulfillment is consistent with wealth, consumption, and social status disparities, perhaps significant ones. The extent of permitted disparities remains an interesting and somewhat contentious issue.<sup>11</sup>

Finally, ES rights doctrine does not constitute a comprehensive social, political, or economic theory. For instance, neoclassical economics theorizes about individual behavior, exchange, institutions (firms, markets, government, social), and macroeconomic processes and outcomes. Marxism has a systematic analysis of economic systems and individual behavior (from material conditions) that focuses on class (property relationships), alienation, and the process of social change (historical materialism). Human rights doctrine is far less comprehensive than either of the aforementioned, and is fairly agnostic on individual behavior and institutions beyond what is necessary to assure respect for human rights. The advantage of this lack of grand theorizing is that human rights doctrine is consistent with a wide variety of theories, and it is likely that the best of existing cultural, social, and economic institutions could be made to conform with human rights doctrine. The disadvantage is that there is no internal map in human rights doctrine that explicates necessary institutional reform, nor does it provide the expansive social justice that many seem to desire.

<sup>11</sup> The CESCR employs the core obligation approach, which sets the minimal essential levels of food, education, shelter, water, sanitation, and health facilities a state is obligated to guarantee its citizens. The minimal essential levels are meant to assure universal human dignity, but the exact requirements could vary in time and place depending on local circumstances (e.g., the minimal shelter needs of one living in Bangkok differ significantly from one living in the Yukon Territory). The primary virtue of this approach is that it bounds human rights claims and state obligations, which in turn can enhance political feasibility. In contrast, proponents for a more expansive approach argue that the requirements for human dignity entail more than the minimal basket of the core obligations approach (Bilchitz 2007; MacNaughton in this volume). If the moral rights included in the UDHR only require minimal essential levels of goods and services for human dignity, why didn't the framers refer to a minimum standard of living instead of an adequate standard of living? This approach calls for more equality of income, wealth, consumption, and social status than the core obligation approach. The primary counter might ask how this upper bound is determined; how exactly are state obligations bounded in a human flourishing approach?

## 2. SOME CONTEMPORARY ISSUES

The purpose of this book is to shed light on the status of ES rights. Necessarily, many important issues are only partly addressed or are left unaddressed altogether. Those issues include the foundations of ES rights, their costs, and the relevance of the notion of the interdependence and indivisibility of all human rights. This section touches on each of those issues.

### *a. Foundations*

As expressed in human rights doctrine and the International Bill of Human Rights, the central foundation for all human rights is human dignity. Human dignity in turn is perhaps best defined as *intrinsic worth* – that is, a noncontingent worth each human possesses simply by virtue of our humanity (Gewirth 1992).<sup>12</sup> Everyone matters, but why do humans – as opposed to, say, frogs – uniquely possess this kind of worth, and do the explanations differ for different kinds of human rights?

Many foundational arguments insist that humans are unique in some important way. For instance, Alan Gewirth argues that each person has a justified sense of worth by virtue of his or her purposeful actions, and that each of us must also rationally attribute that same worth to other persons (Gewirth 1992, 1996). While differing in some important details, arguments pointing to human agency and autonomy are related. David Copp (1992) argues that for human autonomy and rationality to be realized, certain needs have to be fulfilled. That need fulfillment in turn provides the rationale for certain human rights, particularly the right to an adequate standard of living. Amartya Sen (1999, 2004) and James Griffin (2001) focus on *human agency*, the ability of humans to choose our own goals or life plans, and then the ability to pursue them. Humans can only realize their agency if they enjoy substantial freedoms, freedoms necessarily guaranteed by the entire catalog of human rights. Sen in particular is sensitive to the possible objection that justice accounts should include personal responsibility, not just entitlements. Based on agency, however, he argues that personal responsibility requires social responsibility because people cannot be truly responsible unless they have the kinds of choices that health, nutrition, literacy, and participation provide (Sen 1999).

<sup>12</sup> For an argument that the concept of dignity is too elastic to provide a proper foundation for human rights, see Bagaric and Allan (2006).

There are other kinds of justifications for human rights. For instance, Henry Shue (1996) argues that if everyone has a right to something, then basic subsistence and security are both required for the enjoyment of that right, and therefore everyone also has basic rights to subsistence and security. That argument justifies a minimal basket of both civil and political rights on the one hand and economic and social rights on the other. Finally, Jack Donnelly (2003), a skeptic of foundational justifications, argues that human rights exist because the international community has agreed that they are fundamentally important, and that governments can only enjoy legitimacy if they fulfill their human rights obligations. Similar to all of the preceding arguments, Donnelly's analysis applies to all human rights. Furthermore, Donnelly has gone to great lengths to try to dispel the "myth" that Western governments were ever hostile to economic and social rights (Donnelly 2007).

The brevity of this description is not meant to imply that any disputes over either the origins of human rights or their purported differences have been decisively settled.<sup>13</sup> Such a standard would be impossible; certainly there is no universal agreement about any one moral or political philosophy. However, I do mean to suggest that as a body of rights, ES rights are on similar footing to all other human rights because they share the same foundations and justifications, however strong those may be. ES rights may possess special features that imply implementation difficulties, which in turn could weaken their initial justifications, but those kinds of objections require close scrutiny. I address one such objection next; Michael Freeman will provide a more detailed analysis in his concluding chapter.

### *b. Costs*

A central objection to ES rights aims at costs. Simple intuition suggests that many, perhaps all, countries do not have the resources to provide the goods and services required by ES rights. Maurice Cranston famously discusses the issue when questioning the very validity of ES rights with the

<sup>13</sup> Osiatynski (2007) offers a most interesting difference between ES rights and civil and political rights. He suggests that governments typically provide the services underlying civil and political rights, whereas individuals usually provide the goods and services underlying ES rights for themselves. Therefore, he suggests that ES rights should only be legally binding for those unable to provide for themselves or for wards of the state. Perhaps not anticipated by Osiatynski, I think his argument provides further justification for the central ES right of employment, and when coupled with a conditional income guarantee for those unable to engage in paid work (young, old, severely disabled), goes a long way to assure the right to an adequate standard of living.

test of practicality: if something is impossible to do, it cannot constitute a right (or duty) (Cranston 1967). Even the drafters of the ICESCR gave special attention to the anticipated cost considerations by including the infamous “progressive realization” clause.<sup>14</sup> Are overwhelming costs the obstacle that simple intuition suggests?

First, it is important to note that all human rights impose costly obligations. Eide (1989) argues that human rights impose three different kinds of obligations on governments: the obligation to (1) respect through noninterference, (2) protect from interference by others, and (3) fulfill the right for those otherwise unable.<sup>15</sup> That refinement of obligations implies, for instance, that it is quite costly for governments to protect us from harm by others (i.e., protect our civil rights) or to organize electoral processes (i.e., fulfill our political rights).

Second, some evidence suggests that economic rights, conceived of as conditional social security support plus guaranteed government employment for all of those unable to find jobs, may not be as costly as often assumed, at least for higher-income countries. Phil Harvey has estimated the financial costs of a guaranteed employment program in the United States from 1977 to 1986, a period in which the official unemployment rate ranged from a low of 5.8% to a high of 9.7% (Harvey 1989). After netting out the additional taxes paid by program workers and subtracting redundant social security expenditures (that would have been paid to the unemployed), Harvey estimates that the government employment program would have added, on average, 3.2% to the federal budget over the time period. That average includes a low figure of a .36% surplus in 1979 and a high of a 7.4% increase in the federal budget in 1982. With significantly different assumptions, I found similar results (Minkler 2011). In 2006, when the official unemployment rate was 4.7%, I estimate that a government employment program that generated 3.7 million new jobs would have cost \$123 billion, an increase of 4.6% to the federal budget. For 2009, when official unemployment stood at 9.7%, the program would have cost \$308 billion, added 10.7% to the federal budget,

<sup>14</sup> The clause basically obligates governments to fulfill economic and social rights only to their (resource) ability. That ability should increase over time as resources grow, and those richer countries that are in a position to do so are obligated to provide aid. Unfortunately, some governments have hidden behind the clause in an attempt to excuse their poor performance, and richer countries largely fail to meet their (imperfect) obligations.

<sup>15</sup> Shue provided an earlier, similar three-part delineation with his avoid/protect/aid framework in the 1980 first edition of his book (Shue 1996), but Eide’s framework has become the standard in human rights doctrine.

and generated 9.3 million new jobs.<sup>16</sup> Although these kinds of estimates beg for scrutiny from economists, they do cast doubt about commonly held assumptions on the feasibility of ES rights.

What about poorer countries? It is certainly true that respecting, protecting, and fulfilling ES rights obligations will be more burdensome for governments in poorer countries, just as it is for civil and political human rights, but even that differential burden may not be as insurmountable as it appears. First, as Sen reminds us, the relative cost of labor is lower in poorer countries (Sen 1999). That means the labor services provided by teachers and medical technicians, to name just a few ES rights providers, cost relatively less than highly skilled or capital-intensive goods and services (which are relatively scarce). It also means that jobs programs of the type discussed previously will be relatively cheap. Moreover, and as also pointed out by Sen, it is not only how rich a country is that matters, it is also how it spends its resources. Throughout his seminal book, Sen documents how well the relatively poor Indian state of Kerala does in meeting literacy and longevity goals precisely because it spends an unusual share of its scarce resources on education and medical services. None of this suggests that the quantity of available resources or economic growth is not important, indeed – and obviously – they are, but it does suggest that even poorer governments can go a significant way toward meeting their ES rights obligations right now.

Additionally, these poorer countries should receive assistance from richer ones. Thomas Pogge provides perhaps the strongest moral argument for why rich countries are obligated to transfer resources to poorer ones. He argues that the current international world order (e.g., trade regime, power relationships based on colonial heritage) privileges rich countries while actively harming poorer ones. Because there are feasible alternative economic arrangements, rich countries are violating the negative rights of interference of the poorer ones by inflicting harm (Pogge 2005). Even if one is not persuaded by that philosophical argument, one needs to look no further than the International Bill of Human Rights for justification. Article 2 of the International Covenant on Economic, Social, and Cultural Rights states that governments are obligated to realize ES rights “through international assistance and cooperation, especially

<sup>16</sup> Similarly, Harvey (2011) estimates that a federal government program that generated 8.2 million jobs in 2010 would have had a net cost of \$235 billion. Harvey argues there, as he does in his chapter in this volume, that a federal employment program would be a lot cheaper than standard macroeconomic stimulus policies to create new jobs for the unemployed.