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The journal is specially destined to academics and activists dedicated to the study and defense of human rights. Our main purpose is to divulge the viewpoints of the Global South countries, stressing its specificity and facilitating contacts among them – without setting aside the important contributions of the more developed countries.

The journal is published by **Sur – Human Rights University Network**, an organization that seeks to strengthen the voice of the universities – specially of the Southern Hemisphere (Africa, Asia and Latin America) – and the cooperation among civil society organizations and the United Nations, in the debates related to human rights.

The issues of the journal are not thematic, allowing the publication of articles dealing with human rights matters from multiple perspectives. Within this wide and complex field of interests, we prioritize articles which preferentially – but not exclusively – deal with the following topics:

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SALIL SHETTY

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ABSTRACT

This essay deals with the intrinsic relationship between the Millennium Goals and Human Rights. It analyzes how countries – specifically those where hunger and poverty are rapidly increasing –, should adopt the human rights discourse in order to demand the monitoring and the implementation of the Millennium Goals by 2015. It shows that, despite its alleged flaws, the Millennium Goals can greatly contribute to the advancement of the Human Rights agenda. And it calls upon citizens to hold both their governments and international institutions accountable for pursuing these Goals, in order to eradicate hunger and enhance development. [Original article in English.]

MILLENNIUM DECLARATION AND DEVELOPMENT GOALS: OPPORTUNITIES FOR HUMAN RIGHTS*

Salil Shetty



The relationship between the Millennium Development Goals (MDG) on the one hand and human rights on the other has generated a certain deal of confusion within civil society. I will here approach this issue from a human rights practitioner's point of view, which might therefore not meet the standards of those who have a much better grasp of the theoretical and legal bases of human rights.

As we start discussing the Millennium Goals, we have to remember the broader reality. There is no greater crisis in the world today than that of grinding poverty and its related manifestations. Unfortunately, we have all become insensitive to the scale of the problem. At the present time, nearly one of out six people in the world, which is almost a billion people, go hungry every day. It is estimated that 30,000 people, many of them children, die every day because of poverty. Half a million mothers, no less, died last year alone for no justifiable reason – from child birth, from malnutrition.

The so-called international community has an appalling record of acting too late. We prefer to deal with the consequences than act when we see the early warnings. The case of the current locust attacks in West Africa are a very graphic case in point, not to mention the crisis in Darfur.

* Text based on lecture delivered at the IV International Human Rights Colloquium: "UN Millennium Declaration and Development Goals: Challenges for Human Rights". São Paulo, 11 October 2004.

Almost 3 million people died from HIV/AIDS last year. 120 million children are denied the right to primary education and are out of school, not to mention the much larger numbers who go to completely ineffective schools, notionally enrolled. 1 billion people have no access to sanitation. Most of these are women and girls.

Staring nakedly in our face is the greatest weapon of mass destruction – poverty. The paradox is that at the same time the world has never seen so much prosperity before. The 1000 richest people in the world are said to have a personal wealth greater than the 500 million people or so living in the so-called “least developed countries”.

Shamed by the sheer magnitude of this violation of basic human rights and troubled by the potential backlash on global security of the effect of such extreme deprivation faced by the majority of the world’s population, in the largest gathering of Heads of State in the history of humankind in September 2000, world leaders committed themselves to the Millennium Declaration. In this sobering document, they vowed to free their fellow citizens from the indignity and suffering that goes with abject poverty. And at the turn of the century and the millennium, they recapitulated the outcomes of the different UN Summits of the nineties and gave themselves 15 years, up to 2015, to meet a set of very minimal but concrete goals and targets, later christened The 8 Millennium Development Goals.

The title of this colloquium points to the challenges that the Millennium Declaration and Goals present to human rights. I am absolutely convinced that, on the contrary, the Declaration and Goals, if interpreted and used properly, offer an incredibly powerful opportunity in converting human rights from aspirations to reality. Equally, ensuring that the discourse on the Goals is continuously anchored within a human rights framework is the only way to ensure that the Goals are achieved in an inclusive and sustainable manner. It is my submission that the Millennium Goals and human rights are inter-dependent and mutually reinforcing.

In the following, I will try to explain why I believe this is the case.

The Millennium Goals in the human rights context

It is amazing how often, even very well-informed people, do not remember that the Goals were derived at a later date from the original document i.e. the Millennium Declaration. I would therefore like to give the Declaration some careful attention. The Millennium Declaration presents the normative and contextual basis for the Millennium Goals.

In fact, the Millennium Declaration has 8 sections that have been placed on an equal footing including. The first section is called “Values and Principles” all of which are entirely based on the human rights discourse. Allow me to quote some parts of it that are directly relevant to our discussion:

We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed.

... We consider certain fundamental values to be essential to international relations in the twenty-first century. These include:

***Freedom.** Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.*

***Equality.** No individual and nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured ...*

The other sections of the Millennium Declaration are “Peace, security and disarmament”; “Development and poverty eradication” (from which the Goals have been primarily extracted); “Protecting our common environment”; “Human rights, democracy and good governance”; “Protecting the vulnerable”; “Meeting the special needs of Africa”; and “Strengthening the United Nations”.

Let me quote relevant parts of the section on “Human rights, democracy and good governance”:

We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.

We resolve therefore:

- *To respect fully and uphold the Universal Declaration of Human Rights.*
- *To strive for the full protection and promotion in all our countries of civil, political, economic and social and cultural rights for all.*
- *To strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights.*
- *To combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women.*
- *To take measures to ensure respect for and protection of the human rights of migrant workers ... to eliminate the increasing acts of racism and xenophobia and to promote greater harmony and tolerance in all societies.*
- *To work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.*
- *To ensure the freedom of the media to perform their essential role and the right of the public to have access to information.*

The Declaration leaves no room for doubt or negotiation. The Millennium Goals are about realizing the Right to Development within a broader human rights framework. Development is seen as imperative based on justice and not a charitable option. The foundational values for the achievement of the Goals are of shared responsibility, indivisibility, non-discrimination, equality and accountability – all straight out of a human rights dictionary. The Millennium Goals are powered by the legitimacy and value base of human rights, without which they are an empty set of targets.

Linking the Goals to human rights standards

There have been several contributions on the specific human rights provisions, standards and instruments that the Millennium Goals can align themselves to. But the common thread is that the linkages are extensive and obvious. As the Millennium Declaration clearly views development from a human rights perspective, one might claim relevance for all measures set out in international covenants and treaties, e.g.: the Universal Declaration on Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC) are all directly relevant. This is detailed in the recent Report to the General Assembly of the Special Rapporteur for Health of the Commission on Human Rights (27 September 2004):

Millennium Development Goals and human rights standards

Millennium Development Goals	Key Related Human Rights Standards
1. Eradicate extreme poverty and hunger	UDHR Article 25(1); ICESCR Article 11
2. Achieve universal primary education	UDHR Article 25(1); ICESCR Articles 13 and 14; CRC Article 28(1)(a); CEDAW Article 10; CERD Article 5(e)(v)
3. Promote gender equality and empower women	UDHR Article 2; CEDAW; ICESCR Article 3; CRC Article 2
4. Reduce child mortality	UDHR 25; CRC Articles 6, 24(2)(a); ICESCR Article 12(2)(a)
5. Improve maternal health	UDHR Article 25; CEDAW Articles 10(h), 11(f), 12, 14(b); ICESCR Article 12; CRC Article 24(2)(d); CERD Article 5(e)(iv)
6. Combat HIV/AIDS, malaria and other diseases	UDHR Article 25; ICESCR Article 12; CRC Article 24; CERD Article 5(e)(iv)
7. Ensure environmental sustainability	UDHR Article 25(1); ICESCR Article 11(1) and 12; CEDAW Article 14(2)(h); CRC Article 24; CERD Article 5(e)(iii)
8. Develop a Global Partnership for Development	Charter Articles 1(3), 55 and 56; UDHR Article 22 and 28; ICESCR Articles 2(1), 11(1), 15(4), 22 and 23; CRC Articles 4, 24(4) and 28(3)

The Millennium Campaign will be publishing a short paper soon jointly with the Office of the High Commissioner on Human Rights to clarify the relationships between Human Rights and the Millennium Goals and identify synergies.

But leaving aside the world of the Millennium Declaration and human rights standards, in the real world, it is the absence of dignity, respect and choice that poverty is all about. Injustice and discrimination of one kind or another are increasingly seen as the key determinants of poverty and it is no coincidence that the very same determinants account for most human rights abuses. For no other group of people does the existence and fair application of rule of law and human rights matter more than for poor and excluded people, the same people for whom the achievement of the Millennium Goals matter the most. It is the poor, particularly women, who have to live on land without legal titles, who face constant violence and insecurity. Going to any favela in Sao Paulo will tell that story like it is. So, poverty is fundamentally a denial of human rights.

Best chance for a breakthrough on poverty

There are several reasons why the Millennium Goals, in the current context, offer the best chance for a breakthrough on poverty:

- They do represent, at the level of governments, a **compact** not only between rich and poor countries and the UN system based on shared responsibility, but also with the key institutions that determine the economic fate of the developing world: the World Bank, the IMF, the regional development banks and increasingly the WTO. For the first time, the IFIs and rich country governments have made explicit what they can be held accountable for: not just in process terms but in outcomes.
- The world has never seen so much **prosperity** before. The hundreds of billions that are being spent in Iraq have put things in perspective. Last year alone, the

world spent US\$ 900 billion on arms. Not to talk of the money that is siphoned off on tied aid, agricultural subsidies and straight corruption. And we might not need more than about US\$ 100 billion of additional aid per year to meet the Goals. Financially, we are talking of small change.

- Performance against the goals will be **monitored**. These goals are not just lofty statements of intent, they are quite precise. Monitoring mechanisms have been put in place in terms of national MDG reports and the Secretary General's reports to the General Assembly. Many civil society actors are starting to look at independent tracking processes. Over 60 national reports have already been produced at the national level.
- The Goals are clearly **achievable**. In fact, the criticism from civil society actors is they are not millennium but minimum development goals. Some ask if even these are achievable. We believe that to set the bar any lower than this is morally unacceptable.

But it is equally true that at current trajectory, if we carry on in a "business as usual" mode, the goals will not be achieved even by 2015, which many of us thought was too far away. It is commonly understood that these Goals will not be achieved mainly in Sub-Saharan Africa, where Goal 1 (on poverty and hunger) for example, at today's pace will be achieved in 2147.

The reality, however, is that the Goals don't mean that much at the global level or even at the national level. Poverty, morbidity and mortality, and illiteracy as we know, are statistical facts at the aggregate level. But at the level of individuals and households, men and women, girls and boys, they are the dividing line between dignity and indignity and in many cases between literally life and death. When you look at it at this level, the Goals are not about Africa or LDCs alone, they are equally about Latin America and the so-called Middle Income and transition countries as well.

In fact, most of the poor people in the world live in

India, China and Brazil, none of which are LDCs. Child mortality levels for the bottom 20 percent in Bolivia are known to be as bad as Sub-Saharan Africa. The Goals are about people, not about national or global level statistics.

The Goals have to be defined at the national level, the main implementation unit, through a process of full and informed participation of all citizens. Many countries like Vietnam have decided to set their national Millennium Goals much higher than the global ones. Latin American countries have set themselves the goal of universal secondary education, rather than the global Goal 2 of universal primary education. Heterodox development models and policies have to be generated nationally to achieve these defined Goals.

What is wrong with the Goals?

The Goals have been criticized by some as being too ambitious and by others as being Minimum Development Goals that have diluted previous commitments (refer Table from Katarina Tomaševski, next pages). The Goals have been criticized as being over simplistic and too quantitative. In most cases, it is the targets and indicators that are much weaker and less comprehensive. Goal 3 has been particularly criticized as gender clearly is a cross-cutting issue. Goal 8 is the other Goal that is problematic. It is the one Goal without any precise commitments and time-lines. Many are critical of the aggregate and global nature of the Goals and the fallacies that this can create. Another criticism has been that the Goals are apolitical in nature and donor-driven.

But even these minimal and flawed goals mean a lot to the people who are far from realizing them. They offer the best hope in the current scenario as they have the commitment of the world leaders at the highest level, in the South and North. We cannot allow the best to be the enemy of the good.

Finally, and this is the issue that I want to focus the rest of my presentation on, is the issue of accountability or enforceability. One of the major criticisms, particularly from the human rights community, is that the Millennium Goals, unlike human rights conventions and treaties, are not legally binding.

Differences between the CEDAW and MDGs

	Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Millennium Development Goals (MDG)
What?	<p><i>International obligations of the state</i></p> <p>International human rights obligations pertain to the state and are not affected by changes of government. These obligations are undertaken through parliamentary process, whereby they are made into the law of the land. Through the process of ratification, these obligations also become international law and apply in relations between individual states.</p>	<p><i>Political commitments</i></p> <p>Changes of government through elections often result in altered political commitments, quite a few governments which committed themselves to MDGs in 2000 are no longer in power. Electoral changes (in the USA or in Denmark) have illustrated how much development cooperation policies change. The attainment of MDGs depends on peer pressure amongst governments, while goals and targets can be changed by an agreement of the governments who are in power at the time.</p>
When?	<p><i>Immediate and permanent obligations</i></p> <p>International human rights treaties lay down minimum global standards, which can and should be attained in all countries. These can be claimed as individual rights by the affected populations as well as international obligations by other governments. The obligation of all states parties to CEDAW is to constantly move towards gender equality, which is a goal that no country has achieved as yet. Thus, they are a yardstick that applies to all countries, all the time.</p>	<p><i>Long-term goals</i></p> <p>Specific benchmarks have been set at the lowest level so as to make them “technically feasible in even the poorest countries.” (UN Doc. A/59/282, August 2004, paragraph 77) The postponement of the MDGs to the year 2015 takes away the immediacy characterizing human rights, as well as the necessity of improvement in countries which have already achieved the minimum quantitative targets. Being long-term goals, they do not create individual entitlements nor do they create a legal basis for demanding accountability in relations between states.</p>

	Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Millennium Development Goals (MDG)
How?	<p><i>Governmental obligations entail individual rights</i></p> <p>International human rights complaints procedures bestow upon individuals the right to hold governments legally accountable for failure to implement human rights obligations, both domestically and internationally.</p>	<p><i>No remedy for the lack of performance</i></p> <p>MDGs anticipate only a process of monitoring the attainment of specific quantitative targets, and possibilities of increasing aid so as to improve performance.</p>
How much?	<p><i>All human rights for all women</i></p> <p>The CEDAW Convention stipulates gender equality as the goal to be attained, which requires full recognition of all human rights to all girls and women, and the elimination of all forms of discrimination.</p>	<p><i>Specified quantitative targets</i></p> <p>The indicators chosen for monitoring reflect only the data which already exist, leaving outside many key areas for which there is no internationally comparable statistics (such as the prevalence of child marriage or polygamy, or violence against women), and those areas where qualitative data are used (such as the absence of women's internationally – but not domestically – recognized rights or the elimination of stereotypes).</p>

How can human rights help achieve the Millennium Goals?

One of the key ways in which we can increase accountability of governments and non-state actors is to use the existing human rights processes and instruments to help achieve the Goals. Already Special Rapporteurs are starting to do this in their own reports. As national MDG Reports are published, there is a case to link this closely with national International Covenant on Economic, Social and Cultural Rights

(ICESCR) reports. Similarly Treaty Bodies could start building in MDG monitoring into their functions.

Country mandates and missions could use their reports and media briefings to highlight performance on MDG. Thematic procedures could also use this framework in their own assessments and reports.

Locally defined Goals and targets can provide relevant benchmarks for the progressive realization of human rights e.g. the target of reducing by two thirds, the under five mortality rate before 2015 can be translated into intermediate benchmarks that are locally appropriate. The MDGs can ensure that progressive realization is not a process that can go on *ad infinitum*.

At the national level, there is a lot of room for legal provisioning of many of these Goals. In many developed countries, laws are being created for international cooperation. The ICESCR General Comment on International technical assistance measures is an important pointer at the international level.

But let us move back into the real world in which we know that claiming and realizing rights is a political process, mediated by the practice of power. It is the result of intense contestation and struggle by myriad of social and political actors. This is true at the local, national and international levels. Human rights have to be seen well beyond legal rights. If it were merely declaring these basic needs as basic rights that would help us achieve them, the world would have been a much better place by now.

So what is stopping the world from achieving even these minimal Goals? In the past we could say that we did not have the technology or resources to address these issues of meeting even the basic needs of all human beings. That is simply not the case any more. We know what needs to be done.

A key factor keeping the world from achieving the Goals is the lack of political will and accountability. We have the way but not the will. To the extent that we are dealing with democratic countries, governments are primarily accountable to their own citizens or voters. Political will shifts only if there is public mobilization at the local and national level, building up to international processes, as we have seen in

many major recent campaigns whether it be the Jubilee Action, anti-landmines or anti-Large Dam campaigns.

Let me share two examples of the Basic Education campaign in Kenya and the Food Rights campaign in India – both of which show the power of civil society campaigning using a human rights framework. In Kenya, key civil society organizations ran a successful campaign to make primary education free calling for Basic Education as a Basic Right. In the first week of taking over power in December 2003, the new Government made education free bringing in hundreds of thousands more children into primary schools.

In April 2001, the Right to Food Campaign in India filed a Public Interest Litigation that food grain stocks lying in Government warehouses should be made available through the public distribution system. Following a strong civil society campaign with grassroots participation in 14 states and widespread media coverage of people's hearings etc., the Supreme Court directed all state governments in November 2001 to introduce cooked mid-day meals in primary schools.

So, national level campaigning on the Millennium Declaration and Goals, within a human rights framework, has to form the backbone of any international campaigning that could force political leaders to act.

The key to the Millennium Compact is that rich countries have to meet their obligations to helping poverty eradication as spelled out rather imprecisely in Goal 8 of the Millennium Goals. This means meeting their commitments to the 0.7 percent of GNI to ODA, improvement in the quality of aid including untying and simplifying procedures and putting an end to conditionalities, much deeper and quicker reduction of debt – Africa continues to pay out in debt every year, more than it receives. Debt sustainability has to be now redefined in terms of the achievement of the Millennium Goals.

And we need a much more level playing field in the trade arena. This includes time-bound elimination of agricultural subsidies that make the poor poorer, policy space for developing countries, reviewing all intellectual property agreements that simply benefit TNCs and hinder food security and the health needs of the poor; indeed, concluding the Doha Round in favor of poor countries is

essential for the achievement of the Millennium Goals.

Much as rich country commitment to their side of the bargain is critical, there is no doubt that poor countries can do a great deal more to achieve these basic human rights on their own steam. Having the right policies and plans in place, raising and allocating domestic and external resources for fulfilling the needs of the majority of the population on an inclusive basis, being accountable to our own citizens and stopping corruption don't need too much external help.

But as we speak today, there is too much rhetoric and too little action. Lip-service is paid to the Millennium Goals and often they are becoming a new label under which we continue old ineffective practices. But the only way in which governments will actually act is when there is pressure from citizens to hold them to account for their promises.

That is really what we at the Millennium Campaign are focusing on. To support citizen's action to hold their own governments and international institutions to account for achieving the Millennium Goals, as translated into the national and local context. And indeed these campaigns, which are now starting to gain momentum in about 30 countries of the North and South, each look different, as they should. So the campaign in the Philippines is focused on tracking government budgets towards the Millennium Goals. While the campaign in El Salvador is focused on local authorities delivering services that really reaches the people in terms of education, water and health. The Ghana campaign wants to change the Poverty Reduction Strategy to make it focused on the rights of poor people. The Italian campaign is intent on getting the Government to commit itself to the 0.7 percent target. The Irish campaign is called "Keep Our Word". The Indian campaign is tentatively called *Vaada na Todo* (Don't break your promise).

What binds them together is that they see the Millennium Goals within a human rights and justice framework as described in the Millennium Declaration, not as a superficial set of targets but looking at the underlying and structural causes of poverty. The Spanish *Sin Excusas 2015* campaign is off to a good start.

The interesting thing is that the MDGs are becoming a unifying force bringing CSOs working on different sectoral

and thematic priorities together. It is bringing the service-delivery program/operational NGOs together with the advocacy and human rights-oriented ones. And more importantly it is bringing new constituencies beyond the development NGOs into the process. Youth, parliamentarians, local authorities are all joining forces for a combined fight against poverty.

The good news is that already things are beginning to change. For a start many of the poorest countries in the world are already showing that these Goals can be achieved if there is political commitment, even in most adverse circumstances, as faced by Sub-Saharan Africa. Malawi, Eritrea and The Gambia are some examples on primary education and Bangladesh, Ghana and Mozambique are all picking up on the health front, not to speak of Thailand, Uganda and Senegal on HIV/AIDS.

Many rich countries are starting to face up to their responsibilities. Half the EU countries now have a clear deadline to get to 0.7 percent on aid, including some large economies like Spain and UK. Overall aid levels have gone up in 2003 after a very long gap. There is some glimmer of hope on the trade negotiations through the July announcements on agricultural subsidies. Cancun was a wake-up call and the subsequent victories by Brazil on their complaints on unfair trade practices in the WTO are also positive signs. And discussions on debt have been reopened in the last G8 and will continue into the next one. But none of this is anywhere close to what we need to achieve the Goals.

Civil society at the national and global levels is getting stronger through initiatives such as the World Social Forum. And many excluded groups are beginning to exercise their rights. We have avowedly progressive and pro-poor Governments and parties in power now in many strategically important countries in the world and elections on the cards in a several others.

2005 is a particularly important year and we need a big push. The world needs to bring development back on the agenda, away from the obsession with the so-called war on terror which has resulted in significant reduction in human rights space and diverted scarce development resources. The

Heads of State meeting in September 2005 to review progress against the Millennium Declaration is very important. This is preceded by the G8 in the UK which will focus on Africa and the MDGs. At the end of the year, there is likely to be the Ministerial meeting of the WTO in Hong Kong. Recognizing this, a very important coalition of all major NGOs, trade unions, churches etc. has come together initially in the UK and now globally. Under the name of the Global Call to Action against Poverty,¹ this coalition is planning a series of mass mobilizations on bringing world attention to these issues. Major media houses like the BBC are also starting to highlight these efforts.

At the political level, President Lula supported by a large number of Heads of State has taken the initiative to push hard to create the enabling conditions for the achievement of the Millennium Development Goals. This includes new and innovative financing mechanisms and serious reform to many of the key international institutions, particularly the international financial institutions and the World Trade Organization.

We are the first generation that can actually end poverty and we are running out of excuses. You can organize your own campaign or join existing national campaigns.² You could analyze progress on the Millennium Goals in your country using a human rights framework or make sure that the next national MDG Report of the Government looks at the human rights implications. Or you could take a personal action of signing the “No Excuse” petition and writing to your local newspaper or political representative.

1. Global Call to Action against Poverty: <<http://www.whiteband.org>>. Last access on 17 January 2005.

2. See <<http://www.millenniumcampaign.org>>. Last access on 17 January 2005.

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ABSTRACT

This article discusses the implementation of the Millennium Development Goals, characterizing the gap between human rights and development approaches. It offers a new interpretation for public interest law litigation and budget analysis, requiring closer cooperation between human rights lawyers and development organizations. It urges the adoption of a strategy that articulate a participatory collaboration between government and civil society organizations, including national plans geared to specific aspects of the Millennium Goals – e.g. reduction of poverty – in which a leading role is ascribed to “national councils”. Finally, an appeal is made for the inclusion of refugees and other forced migrants as some of the most marginalized populations that are often excluded from these concerns. [Original article in English.]

REFLECTIONS ON HUMAN RIGHTS APPROACHES TO IMPLEMENTING THE MILLENNIUM DEVELOPMENT GOALS*

Fateh Azzam



The theme for the IV Human Rights Colloquium was whether or not the human rights paradigm as a legal construct can indeed have a role to play in the achievement of the UN Millennium Declaration and Development Goals (MDG),¹ especially as the mid-way evaluation point draws near. As the organizers of this Colloquium have correctly stated, the Millennium Development Goals document makes only passing references to human rights and the rule of law, but does not contain mechanisms for justiciability that citizens can use, nor does it use rights-based language in general. Rather, it is framed as a “compact among nations”, a broadly-framed document that uses demographic and economic data indicators as measures of progress for achievement; a needs-based exercise in number-crunching if you will, and a wish-list of what needs to be done. The assumption is that this is rightly the function of governments who are responsible for the welfare of their citizens.

However, in its Overview of the MDG, the United Nations Development Program perceives a joint responsibility of states, citizens and the international community as a whole in its implementation. It promotes a role for social movements and a civil society mobilized to pressure governments to act, yet it offers little by way of mechanisms.²

* This text is based on a lecture presented by the author at the IV International Human Rights Colloquium. São Paulo, Brazil, on 12 October 2004.

1. See UNGA Resolution, A/RES/55/2, 18 September 2000.

2. “Millennium Development Goals: A Compact among Nations to End Human Poverty”, UNDP, Human Development Report 2003. Available at <http://www.undp.org/hdr2003/pdf/hdr03_overview.pdf>. Last access on 31 January 2005.

It has been demonstrated time and again that pressure from civil society and active claims for entitlements can indeed achieve much despite reluctant governments; after all, the development of the human rights regime itself owes much of its growth and development to non-governmental organizations. In this arena as well, human rights activists, lawyers and NGOs, do indeed have a role to play in the effort to make progress on the MDG, but it is a role that they have to actively carve out for themselves. To play such a role requires a broader vision that must take them beyond the narrow confines of established patterns of activism. They must test their creativity and review some of their strategies, including litigation, to make them more relevant to the task at hand, and seek new strategies that are appropriate and effective. The MDG provides an opportunity and a specific set of somewhat concrete goals that can challenge human rights activism to broaden into new areas of work.

3. UNGA Resolution, A/CONF.157/23, 12 July 1999.

4. For a comprehensive discussion of strategies adopted in several parts of the world, see: International Human Rights Internship Program, "Ripple in Still Water: Reflections by Activists on Local and National-Level Work on Economic, Social and Cultural Rights". Washington: IIE-IHRIP, 1997. For suggestions and proposals on strategies, see also "Circle of Rights". Washington: IIE-IHRIP, 2000.

5. See Willem Van Genugten & Camilo Perez-Bustillo, *The Poverty of Rights: Human Rights and the Eradication of Poverty*. London/New York: Zed Books, 2001.

Characterizing the gaps

That there is a debate on or a perceived disconnect between human rights language and the MDG language is symptomatic of a larger gap between rights-based approaches and needs-based development approaches. Despite the commitment to the universality and indivisibility of human rights, first articulated formally in the Vienna Declaration and Program of Action of 1993,³ the fact is that few human rights organizations have actually articulated effective strategies in the defense and promotion of economic, social and cultural rights beyond presenting shadow reports to the Committee on Economic, Social and Cultural Rights. There are of course some notable exceptions of successful legal advocacy, and strategies and efforts to develop legal work on economic, social and cultural rights are slowly growing.⁴ Indeed a number of interesting programs have been articulated in different parts of the world, especially in the Philippines, Nigeria, Bangladesh and several countries in Latin America.⁵ As a whole, however, the commitment to the indivisibility of rights has remained mostly verbal. Firmly wedded to direct litigation strategies in working on civil and political rights,

human rights lawyers have found it difficult to deal effectively with the softer, and perhaps less clear standards of rights articulated in the International Covenant on Economic, Social and Cultural Rights.

Certainly it is unfair to characterize the divide between the rights and development approaches as one of lack of interest or narrow visions of lawyers. Just as rights are inter-dependent and indivisible, so are the mammoth problems in the developing world which are inter-connected to the degree that we stand almost befuddled before the question: where do we start? Are the problems of failed development simply due to failed leadership, corruption and the lack of political access for the citizenry in isolation from the global context? Would democratization at the national level bring solutions, or would democratization at the international level bring a more equitable distribution of global wealth? Is it an unjust and inequitable world economic system that keeps the South down or simply poor national utilization of available resources in each country and the preponderance of armed conflicts? Will civil and political rights bring sustainable development or will improved economic conditions and the enjoyment of economic, social and cultural rights bring democratization? What comes first, the chicken or the egg?

A case in point is my region, the Middle East and North Africa, where most countries are plagued by authoritarian regimes and the near-total political and economic disenfranchisement of their citizenry because of the lack of democratic participation in decision – making on policies that affect day-to-day life. Authoritarian regimes also mean relatively weak legal systems and the lack of judicial independence, resulting for the most part in a “Law of Rules” rather than the “Rule of Law”. Throw in some corruption in various degrees and it becomes extremely difficult for the state and its institutions to deal effectively with the problems of poverty, even if they want to. This has led most rights activists to prioritize civil and political rights over economic, social and cultural rights in the belief that without democracy and respect for political human rights – broadly defined – none of the other rights can be achievable. Thus we have recently seen a proliferation of

calls for political, economic, legal and other reform, for increased participation in decision-making and policy-setting by ordinary citizens, and, to a lesser extent, decentralization. In our part of the world, most of these calls for reform are made by (and for the most part remain in) the elite political sphere, human rights organizations included. They repeat the same logic of the *statu quo* in their assumption that once change occurs at the top, everything else should trickle down in due time.

The search for creative strategies

So how do we move forward on articulating human rights strategies that may be relevant to the MDG? Are our usual tried-and-true methods, such as documentation and reporting, public shaming and legal aid and litigation on individual cases effective and relevant here? Are there new approaches that we must seek to develop that speak more directly to the needs-based approach of the MDG and add a rights-based approach as well? The following are just reflections on some opportunities that may be available to human rights lawyers and activists, each of which would certainly require much more strategic thinking and planning before they become viable strategies.

Public interest law litigation

The Millennium Development Goals are neither legally binding nor individuated and have no implementation mechanisms, save for a briefly stated requirement that the General Assembly review progress, and for the UN Secretary General “to issue periodic reports for consideration by the General Assembly and as a basis for further action”.⁶ Rather, they are of a comprehensive nature, presented more as appeals and challenges to the international community than as a set of rights. However, it may be possible and even advantageous to consider using public interest law litigation in moving forward on implementing the MDG.

This sort of litigation usually takes the form of class action suits and suits against the state, its organs or against private citizens and companies, “in the public interest”.

6. “Millennium Development Goals ...”, paragraph 31 [op. cit., note 2].

However, class action suits are not an available mechanism in many countries, and public interest law is usually not individuated, i.e., based on a specific person's claims against the state, although individuated law suits may be used as "test cases" to challenge or confirm certain public interest principles or requirements. Public interest litigation is always a risky proposition since one cannot anticipate courts' decisions or expect them always to come out in favor of one's own perceptions of the "public interest".⁷

With these caveats in mind, we can still consider public interest law litigation as a viable strategy for making progress on the MDG. One point of interest here would be the use of indicators, since the MDG can offer a somewhat clear measure of a state's performance and in particular its political will to implement at least some of its obligations in the economic and social rights spheres. The difficulty, however, is in defining the nature of the state's obligations towards its citizens beyond the generally understood framework of progressive achievement within the "maximum available resources". Can human rights lawyers pursue a clearer and more specific legal obligation devolving upon the state that can form the basis for public interest law litigation?

A possible approach may be to utilize the International Law Commission's Draft Articles on State Responsibility, which, while concerned primarily with the relations between states, nevertheless provide interesting and useful analysis that can be adapted to our needs. The ILC presented in the Draft Articles an analysis of the nature of state legal obligations under treaty law. Depending on the obligation in question, the Commission defined two overarching types: obligations of "result", (entailing a duty to ensure that a particular result is achieved) and obligations of "means" or "conduct" (the legal duty to keep working towards achieving a result, whether or not that result is definitively achieved).⁸ Based on this analysis, it can be said that the nature of states' obligation to implement most of the rights guaranteed under the International Covenant on Economic, Social and Cultural Rights is that of an obligation of conduct. The state and its executive, ministries, and other institutions and organs would need to show that indeed all means at

7. For a thorough overview of various public interest law strategies, see Mary M. McClymont & Stephen Golub (eds.), *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World*. New York: The Ford Foundation, 2000.

8. Articles 20 and 21 of the Draft Articles on State Responsibility: *Yearbook of the International Law Commission*. Vol. 11, Part 1, 1977.

their disposal are being employed within “maximum available resources” until it can be shown that progress is being achieved in the implementation of the rights under the Covenant, if the state is party.

Here the MDG offers intermediate and longer-range benchmarks to help measure such progress. Using for example, a comparative analysis of the number of children in primary school (Goal 2) or the number of girls in primary and secondary schools (Goal 3) in 2000 compared against enrollments in 2005 or 2010 will offer an indicator of whether or not consistent efforts are being made by the state to at least partially meet the MDG, and whether these efforts are succeeding or at least netting some results. Using the concept of a “state obligation of conduct” may strengthen legal arguments towards the progressive realization of economic and social rights, relying on the benchmarks defined by the Millennium Development Goals to which a state is committed by virtue of membership in the UN.

Budget analysis

Another strategy raised in some quarters is the use of budget analysis as a tool to measure states’ commitment to economic, social and cultural rights in general and it can certainly be used in implementing the MDG in particular.⁹ Annual budget allocations by states provide excellent indicators of states’ commitments to achieving progress in the various fields, particularly when compared against military spending. A striking example is provided by Oxfam which estimated in 2000 that it would cost only about US\$ 8 billion more than current annual spending to achieve universal primary education; a figure which is equivalent to approximately four days only of global military spending.¹⁰

Again, using the MDG benchmarks, an analysis of state allocations to health, education, and economic revitalization would provide indicators of attempts by the state to meet the goals. It is admittedly difficult to definitively judge the success or failure of particular state strategies simply by analyzing the amounts of money allocated to each program; throwing money at a problem does not necessarily solve it

9. See Maria Socorro Diokno, *A Rights-Based Approach to Budget Analysis*. Washington: Institute for International Education/International Human Rights Internship Program, 2000.

10. “Education-Africa: Calls for Global Campaign to Abolish Primary School Fees”. Inter Press Service, 6 December 2000. Available at <<http://www.aegis.com/news/ips/2000/ip001209.html>>. Last access on 31 January 2005. See also relevant chart in *Duties sans Frontières: Human Rights and Global Social Justice*. Geneva: International Council on Human Rights Policy, 2003, p. 5. Available at <<http://www.ichrp.org/ac/excerpts/137.pdf>>. Last access on 31 January 2005

and if the state budget for education or health has been doubled it may not follow that the child infant mortality rate would automatically be halved. However, the combination of reviewing strategies and their intermediate effects together with tracking budgets may help assess efforts and give an idea whether or not progress is being made in these fields within the framework of the MDG.

We should note here that budget analysis processes vary greatly and range from the very basic to the extremely complex; the more complex the process is the higher level of skills needed to implement it. Needless to say, such skills are not normally taught in human rights advocacy training, and are rather the purview of economists, demographers and statisticians. Where budget analysis is needed in specific fields like health or education, experts in those fields are much better qualified to consider the data. This is where it becomes crucial for human rights activists concerned with implementing the MDG to build alliances with development and service organizations and experts.

Building bridges with development organizations

The fact that human rights activists and organizations are not expert in all of those fields may explain to some extent why there has been so little human rights work in general around economic, social and cultural rights beyond legal studies on their analysis and scope. Educators, development organizations, health services providers, and more generalist social scientists do have the skills needed for data analysis in their respective fields and this is why we must seek to build bridges and alliances between them and human rights lawyers. Legal activists and activists outside of the specifically-defined field of human rights need to support each other's work by the mutual exchange of a rights-based approach with the data and knowledge necessary to assess progress, strengthen legal arguments and carry out human rights advocacy on the basis of clear and expert knowledge of the real situation on the ground.

I hasten to add that there have been attempts to bring the human rights and development paradigms together. Some development and social service organizations have already

bridged that divide in their increasing use of rights language. For example, organizations concerned with the advancement of women took on new life with the coming into force of the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). This convention provided them with a clear set of minimum standards and benchmarks that they immediately began using in all of their work, from income-generation activities for women, to education, to the battle against domestic violence and political participation. Similarly, it took almost no time for social service NGOs to seize upon the adoption of the Convention on the Rights of the Child and use it in the same way, and we saw the proliferation of educational programs on children's rights and new claims made for resources to enhance the education and care of children.

Bridges can also be built in the context of the strategy of public interest and impact litigation. Human rights activists can take on the social service organizations as clients in pursuit of one or more of the MDGs, or collaborate with them more generally in joint legal and other strategies to achieve effective change. Moreover, staff of these social service organizations can be trained as paralegals in order to be more directly involved in legal strategies and the provision of legal service and advice to their constituencies, through which test cases may be identified and out of which may come new ideas and approaches to public interest law work.

In short, human rights advocacy would gain from closer working relationships between their lawyers and the experts in the particular fields of health, education, development, etc. Expertise in the social sciences can combine with expertise in human rights, and using the MDG as yardsticks and criteria, can press the state from within the legal system for change and for implementation of the Goals.

It's important to note here that implementing the MDG can add significant strength and argument for ongoing work under the International Covenant on Economic, Social and Cultural Rights. Human Rights organizations have been preparing shadow reports for the Committee on Economic, Social and Cultural Rights, and these reports are stronger where there is cooperation with development and relevant organizations in the field. We have

already seen a clear impact for the Human Development Index reports, and how they already provide significant data and information that has aided the rights activists in their public and legal petitions for change.

National plans of action

Many countries around the globe are adopting “national plans of action” around various themes: for children, for women, for human rights, etc. This strategy commits the state and its citizens to a series of steps at the national level to improve performance and make the necessary enhancements to quality of life for the targets of such plans. It is an especially viable and legitimated strategy where the national plan has been put together as a result of a broad consultative process that includes government, civil society, activist NGOs, academics and sometimes international bodies such as the inter-governmental agencies of the UN. The Millennium Development Goals are by definition long-term and require a sustained multi-year and multi-party effort subject to constant assessment and review. As the UNDP in its Overview reiterates: “National ownership – by governments and communities – is key to achieving the Millennium Development Goals. Indeed, the Goals can foster democratic debate, and leaders are more likely to take the actions required for the Goals when there is pressure from engaged populations”.¹¹

Thus, a national plan of action may be just the mechanism by which implementation of the MDG may be actively pursued. Working with development and social service organizations and other civil society organizations at large but also with governmental agencies, human rights organizations can play a leading advocacy role for articulating a “National Plan for the Millennium Goals” designed to promote the steady implementation of these goals.

There is growing work on what are called “poverty reduction strategies and plans” (PRSP), which aim at developing coherent national plans for reduction of poverty, and by consequence, the implementation of the MDG. PSRPs are now increasingly being demanded of governments and

11. See “Millennium Development Goals ...”, p. 1 [op. cit., note 2].

states as a pre-condition for development aid by donor countries and international financial institutions. However, acrimonious debates have arisen around international trade and market protectionism practiced by the developed countries, the policies of international financial institutions, privatization and structural adjustment requirements as well as tariff policies, all of which have a direct and often deleterious effect on global poverty. The policies of the developed countries in this regard have been highlighted by the UNDP as exacerbating poverty, if not directly causing it, clarifying the need for cooperation on a global level if the MDG were to be implemented.¹²

12. *Id.*, pp. 11-13 for UNDP's view on the role of debt, aid and other international policies that affect implementation of the MDG.

Like the PRSPs, an important element in the potential effectiveness and legitimacy of a national action plan is the manner in which such a plan is developed. A clear consensus has emerged that such plans are most successful when hammered together in a participatory fashion as a result of a collaborative nation-wide effort involving all sectors of society. A coherent and unified national effort in this regard would bridge a number of gaps. It would broaden cooperation between human rights and development organizations, and between them and government. Such an effort would also go a long way towards softening the lines of confrontation between authoritarian states and human rights activists, engendered usually by sharp clashes over civil and political rights. Human Rights activists can find common cause with their governments, assisting, through the national plan, in strengthening governmental efforts to have a voice and negotiate a space in the international economic order.

Yet it is also important for human rights activists to ensure that national plans (be they PRSPs or plans for implementing the MDG) are cognizant of and indeed based on guarantees of the minimum standards in international human rights law on the civil, political, economic, social and all other fronts. Some important work has already been done in this vein that can be useful. For example, clarification can be had from the Office of the High Commissioner for Human Rights, which sponsored in 2002 a comprehensive and detailed discussion in a set of draft guidelines for a human rights approach to poverty reduction.

These draft guidelines include, *inter alia*, definitions, requirements and criteria for human rights action in the field of economic, social and cultural rights as well as discussions of the scope of each of those rights, and finally, the important questions of monitoring and accountability mechanisms.¹³ Another good resource is the excellent and thorough work being undertaken on housing rights and more broadly on economic, social and cultural rights by Habitat International Coalition.¹⁴

National councils

With or without national plans of action, some states have adopted alternate modes to promote work in particular areas or themes. Egypt, for example, has a National Council for Childhood and Motherhood, a semi-official body which has taken on the primary responsibility for promoting family and child welfare. The NCCM has recently cooperated very well with child rights organizations who have added the human rights dimension to its work, as well as with other civil society organizations and intergovernmental agencies like UNDP, UNICEF and UNHCR. The National Council for Women is also active, with women's rights as articulated by CEDAW being quite high on their agenda, including the receipt of complaints and provision of legal assistance and redress.

Such bodies, including national councils for human rights, where they exist, can take a leading role as organized focal points for broad societal efforts towards improving the quality of life for their target groups. In Egypt, these bodies may very well take on the MDG goals related to education, girls and women, for example. As semi-official bodies, they are well placed to encourage and promote cooperation between government and civil society in the articulation and implementation of national plans of action, and to track progress made even without national plans. However, they must be actively pressured to do, especially given that the effectiveness of these national councils has not yet be thoroughly evaluated or assessed. Human activists have an important role here as catalysts and instigators, acting as watchdogs over the work of those national councils generally.

13. See "Poverty Reduction Strategies", Office of the High Commissioner for Human Rights, Draft Guidelines. Geneva, 2002. Available at <<http://www.unhchr.ch/development/povertyfinal.html>>. Last access on 31 January 2005.

14. See especially the draft document: "Holding Donors Accountable: An interactive training program for southern NGOs and grassroots organizations" and other tools and methodologies on housing and other economic and social rights. Available from *Habitat International Coalition, Housing and Land Rights Network – Middle East and North Africa*, at <<http://www.hic-mena.org>>. Last access on 31 January 2005.

A note on refugees and other forced migrants

Refugees and other forced migrants are often a neglected category in our human rights conceptions and we often relegate them to the refugee law regime and exclude them from the broader and more inclusive human rights law arena. According to UNHCR, there were 17.1 million refugees and internally displaced persons at the end of 2003.¹⁵ More than 66 percent of the world's refugees are in developing countries, and half of those are in the 49 Least Developed Countries.¹⁶ These percentages go much higher if we were to include the internally displaced, labor migrants, domestic workers, and the vastly increasing numbers of so-called "irregular movers" and victims of smuggling and trafficking.

Efforts to implement the Millennium Development Goals, which are aimed primarily at the poorest of the poor worldwide, need to include these marginalized populations given the particular difficulty they are in, especially the lack of access to certain privileges that accrue primarily to citizens. Human rights activists in particular need to ensure the inclusion of refugees and other forced migrants, especially when they are reminded that economic, social and cultural rights are universal, and most of them accrue not only to citizens but to everyone within a state party's jurisdiction. Allowing forced migrants to fall outside of the statistics or of national and global advocacy efforts to promote and implement the Millennium Development Goals would be tantamount to creating merely the illusion of progress. Moreover, their inclusion may very well contribute to ameliorating the conditions and root causes of their dispossession and enforced movement on the political, economic or policy levels.

Conclusion

The various strategies and modalities for action suggested above are initial reflections on the role of human rights in implementing the MDG. In these implementation efforts, human rights activists, lawyers and organizations potentially have the important role of catalyst, to galvanize work using the MDG as benchmarks and criteria, bringing the various

15. "Global Refugee Trends".

Geneva, UNHCR,

June 2004, p. 1.

16. Core Group on Durable

Solutions, "Framework for

Durable Solutions for Refugees

and Persons of Concern".

Geneva, UNHCR,

May 2003, p. 9.

actors in society together on a basis of human rights. With human rights as the centerpiece of “the public interest”, activists can analyze budget policies and undertake litigation to monitor states’ obligation to use all means within available resources to implement the MDG and economic and social rights more generally. The clear inter-dependence of rights is an extremely important asset to these activists, and their active participation in giving life to the Millennium Development Goals would be of benefit in further developing their strategies for promoting economic, social and cultural rights, and feed back into their work on civil and political rights as well.

The Millennium Development Goals also provide an opportunity for human rights activists to find common cause with their governments in confronting powerful global economic and political forces. But even where governments are less willing to adopt collaborative strategies, the cooperative efforts of activists with other actors in civil society locally, regionally and globally can articulate strategies and bring quite significant pressure to bear at the local and national level for the amelioration of conditions of poverty.

To undertake all of the above, a broadly comprehensive view and inclusive strategies need to be employed, with a view to integrating rights and integrating actors in all spheres.

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ABSTRACT

The article recapitulates the Universal Declaration of Human Rights framers debates regarding the right to education, centering on its primary purposes, followed by contemporary examples of programs, both in formal and informal (popular) education, designed to achieve each of these specified purposes. [Original article in English.]

THE RIGHT TO EDUCATION AND HUMAN RIGHTS EDUCATION

Richard Pierre Claude



Education is intrinsically valuable as humankind's most effective tool for personal empowerment. Education takes on the status of a human right because it is integral to and enhances human dignity through its fruits of knowledge, wisdom and understanding. Moreover, for instrumental reasons education has the status of a multi-faceted social, economic and cultural human right. It is a social right because in the context of the community it promotes the full development of the human personality. It is an economic right because it facilitates economic self-sufficiency through employment or self-employment. It is a cultural right because the international community has directed education toward the building of a universal culture of human rights. In short, education is the very prerequisite for the individual to function fully as a human being in modern society.

In positing a human right to education, the framers of the Universal Declaration of Human Rights (UDHR) axiomatically relied on the notion that education is not value-neutral. In this spirit, Article 26 lays out a set of educational goals analyzed in this essay along with discussion focusing on education about human rights in the light of Article 26.

Human Rights Education (HRE) is a long-term strategy with sights set on the needs of coming generations. Such education for our future will not likely draw support from the

impatient and the parochial, but it is essential to construct innovative education programs to advance human development, peace, democracy and respect for rule of law. Reflecting these aspirations, the UN General Assembly proclaimed a United Nations Decade of Human Rights Education (1995-2004) (Res. 49/184). In so doing, the international community referred to human rights education as a unique strategy for the “building of a universal culture of human rights”.

The right to education in the Universal Declaration of Human Rights

In the wake of World War II, the globe lay in shambles, torn by international violence from Poland to the Philippines, from the tundra to the tropics. Discussion about the importance of education as indispensable for post-World War II reconstruction emerged in the earliest work of the United Nations Human Rights Commission. That body was set up in 1946 by the Economic Social and Cultural Council of the UN, to make recommendations for promoting respect and observance of human rights on the untested theory that human rights-respecting regimes do not make war on other such regimes.

Thereby to bring peace to the world, members began their work in 1947, and Mrs. Eleanor Roosevelt was elected to chair the Commission. The Commission’s Rapporteur, Dr. Charles Malik (Lebanon) said that from the beginning all the Commission members knew that their task of composing a declaration of human rights was in itself an educational undertaking. He said: “We must elaborate a general declaration of human rights defining in succinct terms the fundamental rights and freedoms of [everyone] which, according to the Charter, the United Nations must promote. ... This responsible setting forth of fundamental rights will exert a potent doctrinal and moral and educational influence on the minds and behavior of people everywhere”.¹

Malik’s statement echoed the Preamble to the Universal Declaration proclaiming the instrument as a common standard of achievement for all peoples and all nations who should “strive by teaching and education to promote respect for these rights and freedoms...”. This entirely new global “bottom up” program of educating people regarding their human rights marked a

1. Charles Malik, *These Rights and Freedoms*. UN Department of Public Information, 1950, pp.4-5.

challenge to the “top down” strategies of diplomatic state-craft, balance of power manipulations, and *Realpolitik* that were insufficient to forestall the calamity of two world wars.

Formulating the right to education

The Universal Declaration shows its framers realized that education is not value-neutral, and in drafting the document, the Soviets, being most ideologically sensitive, were the first to speak on this point. Mr. Alexandr Pavlov for the USSR argued that one of the fundamental factors in the development of Fascism and Nazism was “the education of young people in a spirit of hatred and intolerance”.² As it finally turned out, Article 26 took up Pavlov’s point that education inescapably has political objectives, but ignored his ideologically rigid ideas substituting several goals in positive terms. Thus Article 26, in its most contentiously debated section says that the right to education should be linked to three specific educational goals: (1) the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms; (2) the promotion of understanding, tolerance and friendship among all nations, racial or religious groups; and, (3) the furthering of the activities of the United Nations for the maintenance of peace.

2. E/CN.4/SR.67, Commission on Human Rights, Third Session. Summary Record of the 69th Meeting (Lake Success), 11 June 1948, p. 13.

■ The first goal

This arresting notion of the development of the human being’s full personality, while abstract, is important as a thematic thread running through the UDHR. Its significance in framing a holistic concept of human nature as essentially free, social, potentially educated, and entitled to participation in critical decision-making is bolstered by repetition at several points:

- Article 22 says everyone’s rights to social, economic and cultural rights are “indispensable” ... for the “free development of his personality”.
- Article 26 posits a right to education, and states: “Education shall be directed to the full development of the human personality”.
- Article 29 repeats the holistic vision of human rights, saying: “Everyone has duties to the community in which alone the free and full development of his personality is possible”.

The language linking these provisions in “full development” terms illustrates the organic nature of the Declaration whereby diverse rights flow from a belief in the equality of all human beings and the fundamental unity of all human rights. The often reiterated right to “the full development of the human personality” was seen by most framers as a right reinforced by community and social interaction. It linked and summarized all the social, economic and cultural rights in the Declaration. Given the goal of the full development of the human personality in the context of society – the only context in which this can occur – it follows that the right to education is a social right, a social good, and a responsibility of society as a whole.

Latin Americans took a leading role in framing the right to education. Belarmino Austregésilo de Athayde for Brazil provided a keynote statement on the importance of value-based education and was the first to argue that education provides the individual with the wherewithal “to develop his personality, which is the aim of human life and the most solid foundation of society”.³ An Argentine proposal put substance on these abstractions mimicking Article 12 of the American Declaration of the Rights and Duties of Man. “The one-year old Declaration of Bogotá said: “Every person has the right to an education that will prepare him to lead a decent life, to raise his standard of living, and to be a useful member of society”.⁴ Calling for greater conciseness, Mrs. Roosevelt cautioned against language that would overload the right to education. In this spirit, the framers settled on alternative simpler language – “Education shall be directed to the full development of the human personality”.⁵

The “full development” goal was intended to capture the enabling qualities of the right to education, and of education about human rights to capacitate people to their potential faculties so as to ensure human dignity. This view follows from a close reading of the key phrase – “full development of the human personality” – which is immediately followed without so much as a comma by the phrase: “and to the strengthening of human rights and fundamental freedoms”. Using a standard approach to statutory construction, one might fairly conclude that the joining of the two elements was deliberate and meaningful, especially in view of Mrs. Roosevelt’s injunction to seek conciseness.

The logic of the two ideas in combination tells us that

3. Official Record of the Third Session of the General Assembly, Part I, “Social Humanitarian and Cultural Questions”, 3^d Committee, Summary Records of Meeting, 21 September–8 December 1948, reporting the 147th Meeting of the Commission, held at the Palais de Chaillot, Paris, 19 November 1948, p. 597.

4. Argentine Amendment (A/C.3/251).

5. Cuban Amendment (A/C.3/261).

education promoting the full development of the human personality and the dignity it entails also promote human rights. And for such full development, education for dignity should take into account the total menu of human rights, personal rights like privacy, political rights like participation and the right to seek and disseminate information; civil rights like equality and non-discrimination; economic rights like a decent standard of living; and the right to participate in the community's cultural life. This analysis pre-figures the Brazilian Paulo Freire's views advocated in his book, *The Pedagogy of the Oppressed*.⁶ Freire emphasizes the connections between popular empowerment and self-realization as the consequence of people learning and exercising their human rights.

6. P. Freire, *Pedagogy of the Oppressed*. New York: Seabury Press, 1973.

■ The second goal

Article 26 calls for education to “promote understanding, tolerance and friendship among all nations, racial or religious groups ...”. This idea started out under the guise of different language. Professor René Cassin, the influential French delegate and Vice President of the Human Rights Commission, drew support for asserting that one goal of education should involve “combating the spirit of intolerance and hatred against other nations and against racial and religious groups everywhere”.⁷ But again, the Latin American delegations had the last word, showing their voting strength in supporting the view of Mr. Campos Ortiz of Mexico that educational goals should be framed in positive terms instead of negative goals such as “combating hatred”. He convincingly said that Article 26 should link the right to education with the positive goal of “the promotion of understanding, tolerance and friendship among all nations and racial and religious groups ...”.⁸

7. Official Record, op. cit., p. 587.

8. Id., p. 584.

■ The third goal

Article 26 says education should “further the activities of the United Nations for the maintenance of peace”. In the final consideration of the Declaration before the General Assembly, the Mexican delegate said that the right to education should be connected to the peaceful objectives of United Nations activities. Mr. Watt from Australia promptly objected and urged support

9. *Id.*, p. 594.

10. *Id.*, *ibid.*

11. *Id.*, p. 589.

for a broader reference to all the “purposes and principles of the United Nations”.⁹ Again, Mrs. Roosevelt expressed distaste for any formulation lacking conciseness and specificity, and said for that reason she associated herself with the simpler Mexican proposition. She thought that for educational purposes, United Nations activities for the maintenance of peace should be recognized as “the chief goal of the United Nations”.¹⁰ True to pattern, other Latin American voices chimed in, supporting the Mexican initiative. Mr. Carrera Andrade of Ecuador lyrically concluded that when the world’s youth became imbued with “the guiding principles of the United Nations, then the future [would promise] ... greater hope for all nations living in peace”.¹¹

Finally, the reference to UN peace activities was adopted and all dissent was swept away with the final version of Article 26 winning a unanimous 36 votes with 2 abstentions. As a result, Article 26, with three separate sections, now reads:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

On 10 December 1948, the General Assembly solemnly adopted and proclaimed the Universal Declaration of Human Rights. That body showed it realized such a document could have little effect unless people everywhere knew about it and appreciated its significance for every human being. Therefore, the Assembly also passed Resolution Number 217 urging that the widest possible publicity be given to the Declaration and inviting the Secretary General and UN specialized agencies and non-

governmental organizations to do their utmost to bring the Declaration to the attention of their members. One present-day result is that the Universal Declaration can be obtained from the United Nations in any of 300 languages: <<http://www.unhchr.ch/udhr/index.htm>>.

As noted, the educational directives of Article 26 point to three distinguishable goals. Using this tripartite framework affords a glimpse at present day examples of human rights education directed to each of the three goals.

Human rights education today

Education involves more people than any other institutionalized activity worldwide, according to the United Nations Special Rapporteur on the Right to Education. In her 2002 report to the UN Commission on Human Rights, Katarina Tomaševski said that while a commitment to institutionalized education is globally ubiquitous, the commitment everywhere is “to ‘hardware’ at the expense of ‘software’”.¹² In these terms, she “lamented a ... disequilibrium between the formal institutional structure and contents of schooling on the one hand and the value-oriented substance of teaching and learning on the other. ... the disequilibrium [is manifested in] fierce disputes about the orientation and content of schooling [which] are thus endless”.

While the obligation for states, schools, and all of us to promote human rights through education is a 50-year-old internationally defined duty, it has only recently become more actively and widely accepted. Among the several reasons for this, perhaps none is more important than the end of the Cold War which made more realistic than heretofore the announcement of the UN Decade for Human Rights Education whereby the United Nations intervened in the “fierce disputes” referenced by Tomaševski by calling for the insertion of human rights content into the orientation and material dealt with in the classroom.

In 1993, the World Conference on Human Rights held in Vienna asked the UN for action to accelerate the promotion of human rights. One important result was that the United Nations General Assembly proclaimed the years 1995-2004 as the World Decade for Human Rights Education. The UN proclamation says the decade has as its aim “the full development of the human

12. Annual Report of the Special Rapporteur on the Right to Education, Katarina Tomaševski, submitted pursuant to Commission on Human Rights Resolution 2001/29, paragraph 46, E/CN.4/2002/60.

13. UN General Assembly,
Res. 49/184.

personality in a spirit of peace, mutual understanding and respect for democracy and the rule of law". The resolution says that such education should be introduced at all levels of formal education (the conventional school system) and should be adopted in non-formal education (called "popular education" as promoted by NGOs). The resolution also speaks to issues of methodology, favoring interactive, participatory and culturally relevant learning methods.¹³

There are many examples of programs entailing these goals and methods. Having tracked the Article 26 human rights education goals of (1) full personal development, (2) the promotion of tolerance, and (3) advancement of UN peace goals, it is instructive to link recent HRE programs with each of the Declaration's goals. The thumbnail profiles that follow will draw from both formal education and non-formal education where various activist groups target specialized constituencies.

Examples were chosen to illustrate how wide-ranging the human rights education project has become since its recent inception. The "software" is very diverse. For example, some of these projects are short-term and others reflect long-term educational commitments. Some are addressed to values clarification and cognitive development. Another set focus on analytical skills and problem-solving, and others on changing attitudes and behavior. Some are embedded in formal educational programs and others in programs of popular education. All manifest one or more of the educational goals specified in Article 26 of the Universal Declaration.

Full personal development and respect for human rights

■ Popular education on the rights of the child in Nepal

The United Nations Convention on the Rights of the Child was adopted by the General Assembly in 1989 and rapidly came into force as an international treaty. States parties are obliged to make its principles and provisions widely known to both adults and children and to file a report on such

activities with the UN Committee on the Rights of the Child, a ten-person group of experts. Nepal is one of 192 countries (as of 2004) which have ratified the treaty. Despite episodes of civil strife, NGOs in the Himalayan kingdom have shown ingenuity in propagating its provisions and in seizing the state's reporting duties as an opportunity to launch a nationwide educational program on the rights of the child.

In 1992, many Nepali NGOs along with United Nations Children's Fund (UNICEF) organized a workshop on the Children's Convention in the capital of Katmandu. The workshop supplied educational opportunities to inform policy makers, to prompt questions from members of the media, and to raise the consciousness of the general public regarding children's issues and Nepal's duties under the Convention. The workshop was replicated in five administrative regions of the country and finally in all 75 provincial districts. Drawn from many localities, children also participated in a National Seminar of NGOs, after which, they went back to their communities to share their learning and then return to the capital with friends.

The resulting Children's Seminar discussed the status of children and their responsibilities as well as the related duties of parents, the community, local government bodies, and political parties. As an outcome of this process, the government's National Planning Commission – with responsibility to prepare Nepal's treaty report required by the Convention on the Rights of the Child, did so by forming a joint committee with NGOs representation. Thus the National NGOs Workshop and the Children's Seminar, as well as various declarations and plans of action developed in their wake, became the basis for NGOs input in the national report to the United Nations. The resulting report was important, but no more so than the nationwide NGOs-led process of education on the subject of the rights of the child.

The NGO's objective of values enhancement and clarification took place at many levels as Nepal prepared to take up its responsibility under the International Convention on the Rights of the Child, including the incorporation of human rights and the rights of the child into the formal school curricula. The Convention says such education shall be directed to: "... the development of the child's personality,

talents and mental and physical ability to their fullest potential; [as well as] the development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations”.

■ Women’s rights in Ethiopia

A project in Ethiopia initiated by a group called Action Professionals Association for the People stresses the importance of education for full personal development with particular attention to respect for the human rights of women. In 1995, the Action Professionals were looking for a teaching program to promote women’s rights, taking into account that Ethiopia had ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This author documented their work, observing them setting up community-based programs of human rights including one called “Bringing CEDAW Home”. Their curriculum planning was meticulous, and the resulting training manual, *The Bells of Freedom*, is accessible on-line.¹⁴

14. Action Professionals Association for the People (APAP), *The Bells of Freedom*. Adis-Abeba, 1996. Available at <<http://www.umn.edu/humanrts/education/belfry.pdf>>. Last access on 9 January 2004.

The CEDAW exercise begins with the announced objective of promoting behavioral change and women’s empowerment through community-based non-formal education to break the old curse of domination by one gender over the other and to take action to eliminate discrimination. They designed simple ways and simple language to introduce CEDAW – article by article, explaining that the Government has promised to abide by its provisions. Then, people were asked to speak from experience about any specific provision of CEDAW such as Article 5 saying customary practices based on the idea of the inferiority of the sexes should be eliminated.

Most important, using a problem-solving approach, participants designed programs of action and selected the one action-plan, among several they designed, that they all actually would be willing to put into effect, including one specifically addressed to removing barriers to the full development of the woman’s personality. In one significant outcome, for example, women agreed to stop using coercion and even force to back up arranged marriages for their pre-teenage daughters, so as to abide by Article 16 of the Universal Declaration saying everyone has a right freely to choose a spouse.

*Promoting tolerance among groups
and international friendship*

■ **Cambodian exercise
on prejudice and discrimination**

Cambodian NGOs, like those in many developing countries, have tried to avoid duplicating efforts and have found ways to undertake their work sorting out a division of labor among themselves. Some specialize on the problems of the disabled, some with war-widows, and others with issues relating to domestic violence. In 1999, under the sponsorship of the Asia Foundation, this author worked with a creative Cambodian NGO specializing in grassroots educational programs for ethnic minorities: the Khmer Kampuchea Krom Human Rights Association (KKKHRA). The group conducts needs assessments among poor minority groups and organizes educational sessions for citizens, including those prone to prejudice and discrimination. Between 1993 and 1999, the NGO had reached 23,716 Cambodians with its popular education programs.

In the example below which reflects the work of KKKHRA, the entire lesson plan is laid out to illustrate the organized mode of presentation. Followers of Paulo Freire will recognize the Brazilian methodology at work. The lesson includes five standardized key parts: (1) an **overview statement** explaining in historical and social terms why the exercise is important; (2) the **objectives of the exercise** from the point of view of the participants and of the desired learning competencies expected of them; (3) **procedures**, giving some pointers to the facilitator, for example about using some visual reference points for non-literate audiences, such as “stick figure” drawings; (4) **materials**, including specific relevant provisions of the Constitution of the Kingdom of Cambodia as well as international human rights standards applicable to the country; and (5) **sequence**, in which step-by-step advice is given to the facilitator.

1. **Overview.** First, the facilitator must become familiar with basic information important to the historical and demographic context of the exercise as well helpful in analyzing related problems. In this case, the facilitator is told that an understanding of prejudice, discrimination,

racism, sexism and ethnocentrism is an important part of human rights education. These forms of moral exclusion are fundamentally manifestations of the central problem of the denial of human dignity that makes possible various types of discrimination, especially against minorities. Groups suffering from discrimination include ethnic and language minorities, refugees and displaced persons, religious and other minorities. Ethnic minorities suffered badly during the early 1970s in Cambodia, called “Pol Pot times”. Before 1975, the nation had a population of about 7.2 million; within four years this had dropped to around 6 million (some were the victims of genocide, others became refugees). By the end of the 1990s, the population rebounded to 10 million. Ethnically, the Khmers are the dominate group and there are significant Chinese and Vietnamese minorities as well as a small percentage of tribal groups. It is prejudice and ignorance that promote the dehumanization of ethnic minorities and which in turn foster and support many forms of discrimination.

2. Objectives: Participants should:

- reflect on the meaning and nature of prejudice;
- reflect on the process and characteristics of discrimination and its origins in prejudice;
- be able to identify minority group problems of prejudice and discrimination;
- recommend a course of action for a problem of discrimination faced by members of an ethnic minority and base their plan on national and international human rights standards.

3. Procedures. The facilitator must use creativity to explain the distinction between prejudice and discrimination and to ensure the participants understand the connections involved. As this can be a very sensitive topic for many, it will be important to allow adequate time for diverse views to be expressed. The facilitator should not try to “correct” views that sound prejudiced, but allow others to comment on them. Steps 5 and 8 are rather complex, so the facilitator should plan to “float” among various groups to ensure that they understand their tasks.

4. **Materials.** International Covenant on Civil and Political Rights (ICCPR), articles 26 and 27; Cambodian Constitutional provisions on discrimination, articles 31 and 45.

5. Sequence

Step 1. Ask the participants to name different ethnic minorities in Cambodia. Tell them that they should identify a group with which they are familiar and explain whether that group suffers from prejudice.

Step 2. Facilitator input: Explain that prejudice and discrimination are closely related, and that prejudice leads to discrimination. Undertake some brief lecturing along the following lines:

Prejudice involves beliefs, feelings and attitudes [add emphasis]. Feelings of prejudice stem from the belief and attitude that certain people are inferior and should be treated in an undignified way or even with contempt. Prejudice is the fertile ground in which custom, habit and attitudes take root and grow into systematic oppression. Prejudice and ill-feeling are often directed at women, as well as other groups in society: refugees and displaced persons, members of various religions, ethnic and language groups, etc. Prejudice tends to be strongest in persons and societies where reasoned judgment is weak and where ignorance explains prejudicial processes of moral exclusion of others and the process of denial of the right to equal and fair treatment. It is ignorance that says that exclusion and denial are “natural”. Prejudice is often hidden, but becomes evident when people (1) use bad names to refer to a minority, such as “*juan*” a pejorative and mean-spirited reference to Cambodians of Vietnamese origin, and (2) use stereotypes – “oh, the X group, they are all lazy and stupid”.

Discrimination involves action [emphasis], often based on unfair rules. Acts of discrimination are based on the prejudice that one group, considering itself better than others, deserves to deny the other group basic human rights and access to the benefits of society. Thus discrimination is a denial of human dignity and equal rights for those discriminated against. The actions involved deny human equality and impose a life of problems and struggles upon some, while endowing others

with privileges and benefits. Just as prejudice gives birth to discrimination, so discrimination gives birth to exploitation and oppression, and when exploitation and oppression are reinforced by custom and tradition, they are difficult but not impossible to uproot and change. In the Khmer context, ethnic minorities suffer from prejudice and discrimination, and the subservience of women involves both exploitation and oppression.

Ask the participants if they understand these distinctions and ideas and urge them to ask questions.

Step 3. Show the participants a picture of four “stick figures” with a cloud above their respective heads looking at another such figure identified as a member of an ethnic minority. Name that person’s ethnic minority status, e.g., ethnic Vietnamese. Ask the participants to discuss in small groups how to fill in the cloud space, with a bad name designed to reinforce the notion that the minority member is inferior or less than human, and other idea-clouds with a stereotypes (they are all greedy, cruel, etc.). Encourage discussion of how these names and stereotypes reflect ignorance and lack of understanding. Explain that these are all indications of prejudice which, like poison, leads to a socially unhealthy result in terms of discrimination.

Step 4. Draw an arrow from each stick figure to the minority member saying the arrow shows action involving discrimination, e.g., acts of denial and exclusion including those deciding that an ethnic Vietnamese child should be excluded from a community social event or from a local school.

Step 5. Divide the participants into small groups, each one to deal with a different ethnic minority. Each group should have (1) a reporter who reports on problems of prejudice and attitudes that people have about the category of people discussed, including bad names and stereotypes; and (2) a reporter to report on problems of discrimination or acts of exclusion, exploitation and oppression, directed against the category of people being discussed. The two reporters present the discussion and conclusions of the group to the plenary

sessions. Urge the participants to ask the “prejudice reporter” to explain how prejudice leads to discrimination. Urge the participants to ask the “discrimination reporter” to tell them how prejudice is the basis for discrimination and why it is hurtful to the community.

Step 6. Facilitator input: Tell all participants that when minorities are victimized by discrimination, considered inferior or treated with little or no tolerance, a grave human rights violation is committed. Human rights require that minorities are to be treated with respect and dignity. Any form of discrimination or intolerance violates their respect and dignity. Therefore any form of discrimination should be taken seriously. Ask them if they understand.

Step 7. Tell them that the following are methods in seeking justice when minority rights are violated:

- filing a complaint with a court that can take action;
- informing the police and asking them to take action;
- informing a defender organization that can supply legal assistance;
- telling a human rights NGO that is able to investigate and report on the incident;
- informing the media: newspaper, radio, television;
- informing a representative of the National Assembly from the province;
- telling the commune leader to investigate and act upon the allegation;
- conducting an NGO-sponsored human rights education class for the community.

Step 8. Ask the participants to reconvene in groups imagining they are minority members and as such to decide which remedial step they would recommend selected from the previous instructions but adding to their recommendation those provisions of the ICCPR and the Constitution of the Kingdom of Cambodia which apply. Finally, the groups should report back with their action recommendation.

The exercise described above is used by NGOs in the context of a full program of many human rights popular education lessons.¹⁵

15. A variation on this “prejudice exercise” can be found in a more generalized format as Activity 15 in Richard Pierre Claude, *Educación popular en derechos humanos: 24 guías de actividades participativas para maestros y facilitadores*. San José de Costa Rica: Instituto Interamericano de Derechos Humanos, 2003.

■ Arab-Israeli education planning

In 2003, the Council of Europe brought together educators from Northern Ireland, Palestine and Israel to compare educational techniques for advancing the cause of toleration.

Palestinian and Israeli participants involved in preparing school textbooks learned how education authorities in Northern Ireland try to overcome the problems of teaching in a divided society. The Council's Rapporteur on the Situation in the Middle East, Mikhail Margelov (Russia), hailed the "spirit of tolerance" that prevailed during the meetings on suppressing inflammatory language and incitements to hatred in school textbooks. Participants heard examples of provocative language used in current Palestinian and Israeli schoolbooks, but agreed on making changes to promote the values of tolerance. Taking into account the fact that the majority of hostile interactions, acts of violence and destruction in Israel and Palestine are conducted by and victimize the young, too often prompted by adults, the Rapporteur said: "What makes me optimistic is the level of self-criticism and cooperation we have heard".

For their part, Arab and Israeli educators were able to share a positive example of educational planning directed at the promotion of inter-group understanding among youth at the secondary school level in Israel. "The Rules of the Game" is called by its designers a "bottom-up" curriculum. This term draws attention to the fact that, from its inception, the project was developed with the full participation of an equal number of Arab and Jewish high school teachers.

The objective of the group of 20 educators was to cooperate in developing a curriculum to foster the understanding of human rights and democratic principles including both majority rule and minority rights. The teachers' planning phase encompassed a year of debate and discussion with intensive workshops drawing materials from Al-Haq and B'Tselem, respectively Arab and Jewish human rights NGOs.

The teachers' participatory learning project is supposed to build and reinforce attitudes of tolerance, mutual respect and individual freedom. To these ends, the curriculum primarily emphasizes a cognitive approach aimed at helping students distinguish empirical findings from value judgments, eye-witness evidence from hearsay, and a logical argument from an emotional

one. The teacher-planners of the project expressed the hope that "... a 'grass roots' curriculum, introduced by the very same teachers by whom it was developed, might secure good will and cooperation that are so direly needed in order to overcome negative attitudes and resistance to change" (Felsenthal & Israelit, p. 95).¹⁶

In the Israeli example, teachers from both sides of the divisive conflict came together cooperatively to plan a program promoting the values inherent in their collaborative process: conflict resolution, tolerance of diverse perspectives and mutual respect for the human rights of others.

Furthering activities of the UN for the maintenance of peace

■ The peace-building handbook

In 2003, scholars at the Columbia University Center for the Study of Human Rights (CSHR), published a ground-breaking and highly specialized planning and evaluation handbook sponsored by the United States Institute of Peace. *Human Rights Education for Peace Building* is a multi-authored research project reflecting several years of analytical brainstorming and fieldwork by J. Paul Martin, Tania Bernath, Tracey Holland, and Loren Miller. They gathered educational materials and conducted interviews in post-conflict areas such as El Salvador, Guatemala, Mexico, Liberia, and Sierra Leone, where the international community sought to restore peace. The resulting manual is replete with lessons drawn from these zones of conflict and presented to help future planners, administrators and teachers in implementing HRE in violence-ridden areas where peace-building programs are targeted.

Martin and colleagues give human rights practitioners a detailed *vade mecum* on how, under challenging conditions, to conceive, plan and manage HRE programs in their cognitive, attitudinal, behavioral and skill-building components. The peace-building handbook presents a rich mix of theoretical wisdom, anecdotal and practical prescriptions for advancing reconstruction and transitions to peace with educational components. The contribution of human rights in such environments lies in the vision of living without violence it offers to those beset by powerlessness. *Human Rights Education*

16. Ilana Felsenthal & Israelit Rubinstein, "Democracy, School, and Curriculum Reform: The 'Rules of the Game' in Israel". In: Roberta S. Sigel & Marilyn Hoskin (eds.), *Education for Democratic Citizenship: A Challenge for Multi-Ethnic Societies*, pp. 87-102. Hillsdale, NJ: Lawrence Erlbaum Associates, 1991.

for Peace Building argues for long term educational projects that offer a conceptual alternative to violence as a means of social action.

With strong analytical guidance, the book shows that HRE objectives may be appropriate at one level of peace-building but not at another. HRE planners are guided by a “stage approach” model along the continuum from conflict to peace and suggesting variations in HRE objectives suitable, among others, for the pre-peace and settlement stage, the negotiation stage, and the reconstructive stage. For example, educational objectives for the pre-peace stage are reactive and emphasize monitoring skills and the need for meticulous accuracy in recording violations for possible legal process. As reconstruction activities develop, HRE programs become pro-active and forward looking, focusing on expanded notions of human rights beyond legal claims and to norms for everyday living, including non-discrimination, empathy and respect for everyone’s human dignity.

In answer to the question: “How does HRE differ from other peace-building activities?”, the CSHR co-authors write:

In the eye of the storm, where everything seems negotiable and thus subject to the fiat of the most powerful, HRE can provide both structure and standards. HRE introduces an alternative, namely a set of laws or codes as defined by the international community away from the heat of the crisis as a way towards preventing human right abuses. This was precisely the motivations of the world’s states after the horrors of the World War when in 1948 they approved the UN Declaration on Human Rights.

■ Philippine HRE for military and police

Despite the origins of the Freire pedagogy in Brazil, in some respects Asia shares credit as a cradle of human rights education because such programs were first commenced on a national basis in the Philippines as required by their Constitution of 1987. It is a charter composed by people who themselves had suffered under the previous tyrannical rule of Ferdinand Marcos, so the resulting new Constitution is strongly reactive to that historical record. Through human rights education, the framers explicitly sought to change the political environment and prevailing values,

attitudes and behavior of citizens and law enforcement officials. They reasoned that human rights education and training have both preventive and curative impacts – they can empower people to prevent problems from arising by nurturing respect for other people’s rights, and, as well put officials on notice that people are informed of the possibilities of redress.

Philippine NGOs use the constitutional mandate to build their own programs of community development and practical self-help networks for women and children, farmers, the handicapped, slum dwellers, etc. Such programs carry less risk of provoking elite-based opposition when linked with human rights education because of the well-known constitutional stamp of approval. Moreover, NGOs in the Philippines found their programs had higher prospects for success in shaping values as they linked human rights with concrete community improvements that respond to peoples’ needs as they define them.

Since 1987 when the new Constitution mandated the teaching of human rights, police, military and teacher-training in the island nation has been implemented with varying degrees of success. For lack of well-planned models, efforts to implement HRE for security services were initially shaky and notably uncertain.¹⁷ For example, the military made seven *coup d’état* attempts against the new government within three years until a Philippine Senate Committee focused sharply on the need for stronger discipline supplemented by education “with teeth”. They concluded (apud Claude, p. 73):

A more effective education program is needed for the military and government personnel in order for them to have a better understanding of their duties and responsibilities in the protection and promotion of human rights in accordance with the Constitution, laws and internationally accepted human rights norms and standards.

The demand for the restoration of domestic peace served as a rebuke to the National Human Rights Commission because it is constitutionally responsible for human rights education for the military and police.

After several failed attempts at implementing HRE, and in response to the Senate’s criticism, fresh efforts to gain military

17. R.P. Claude, “Civil-Military/Police Relations”. In: *Educating for Human Rights: The Philippines and Beyond*, pp. 71-101. Manila/Honolulu: University of the Philippines – University of Hawaii, 1996.

18. Galtung & Wirak, "Human Needs and Human Rights – A Theoretical Approach". *Bulletin of Peace Proposals* 8, pp. 251-258, 1977.

acceptance of effective human rights education were launched under the leadership of the Human Rights Commission's education officer, Amâncio S. Donato. A PhD in philosophy, in interviews in Manila he told this author that his ideas about how to approach HRE for the police and military were partially influenced by Johan Galtung and Anders Helge Wirak's "Human Needs and Human Rights".¹⁸ Under the new program Donato planned with the help of social scientists and law professors, thousands of police and military officers began undergoing periodic eight-day "conscientization programs" on human rights, constitutional law and humanitarian law. The "teeth in the programs" derived from Presidential orders specifying that promotions and pay increases should be withheld for officers failing to pass the required course on human rights and international humanitarian law.

The Human Rights Commission was faced with the challenge of how to ensure acceptance of the program within the military ranks among whom were many who held elected officials in contempt. With such attitudes prevailing, the educational challenge was to design a model adding attitude and behavior change to cognitive skills development. As a related matter, the Commission had to deal with the sensitive issue of the program's "legitimacy". Acceptance by the officer corps remained problematic so long as they had no hand in its design and little basis to relate to its provisions. The Commission responded by proposing several ways to increase endorsement of human rights education by military and police. For this author, Dr. Donato summarized his methods for military HRE, reducing the planning directives colloquially to a set of maxims:

Make it folksy: instructors should use common vernacular and "avoid legalese", emphasizing the Filipino culture and community context so as to ensure sympathetic understanding.

Make it their's: encourage the development of their own drafting of a professional code of ethics after a thorough understanding emerges in discussion of human rights and humanitarian law norms.

Make it personal: trainers should creatively underscore the

point that respecting human rights is consistent with the trainee's own human needs (e.g., family interests, the education of their own children, etc.) tied to respecting the human needs of others.

Make it pay: Success in the program should be shown to be in each officer's best interests evidenced by reliance on incentives (promotions and pay increases) rather than sanctions (threats of investigations, punishment and humiliation).

In 1995, recognizing the importance of HRE program evaluation where military and police training are concerned, the University-based Development Academy of the Philippines designed an assessment program focusing on security services training at two levels. First, at the individual level, an attitude and skills survey instrument helped to evaluate trainees' changes in psychological attitude and behavior norms. Second, a community-level impact assessment canvassed the incidence of increases and decreases in human rights violations among those who have gone through the program of human rights education and training. Professionals conducting such programs recognize that critical evaluation is always important to ensure that long-term programs adjust to changing circumstances and meet their stated objectives.

Global resources and support for Human Rights Education

By many standards, the original UN Decade for Human Rights Education (1995-2004) was a success. By its completion, HRE programs could be found in the majority of countries worldwide. They were strengthened and facilitated with various reinforcements. Many were:

- facilitated by UN and regional support and technical assistance;
- funded by international agencies;
- converted into long-term programs with the aid of university certificates and teacher training; and
- supplemented by creative popular education projects of NGOs targeting specialized groups such as women and children, the disabled, the rural poor, and those unreached by the formal school systems.

The supporting structures at the international level include UNESCO's Division of Human Rights, Democracy, Peace and Tolerance which provides strategies for teaching human rights on an international and regional level. Also from the United Nations, the "UN Cyber School Bus" – <<http://www.un.org/Pubs/CyberSchoolBus/humanrights>> – is an attractive website to facilitate infusing classroom activities with human rights information and materials. The site includes an interactive Universal Declaration of Human Rights, a plain language version of the Universal Declaration, questions and answers, definitions of human rights terms appropriate for primary and secondary school classes, and an ingenious *Global Atlas of Student Activities*.

Regional support for human rights education are evident in the work of the European Union, the Asian Regional Resource Center, the All African Annual Workshop on Human Rights Education, and the publications and instructional programs of the Interamerican Human Rights Institute. International and national funding agencies have favored the use of HRE. The chief sources of financial support have included the European Human Rights Foundation, the Canadian Human Rights Foundation, United States Agency for International Development, and many private foundations including the Ford Foundation, Redd Barna (Norway), the Fredrick Neuman Foundation (Germany), the Dutch Foreign Ministry, the Asia Foundation and many others.¹⁹

A new step was taken at the level of international financial institutions when the Asia Development Bank, not traditionally known for progressive initiatives, nevertheless assessed the region's legal systems at the beginning of the twenty-first century as "plagued by corruption and interests vested in maintaining the *statu quo*". The Bank concluded that their funded development projects would benefit by including programs of "legal literacy training" a term less controversial to Asian governments than "popular human rights education". Linked to development projects, "legal literacy" training, according to the Bank, should promote improved governance based on "citizen knowledge of rights, demands for accountability, and participation in decision-making" to foster a "legal system's responsiveness to the needs of the disadvantaged".²⁰

There are many Internet sites established to support HRE programs, and they are especially useful to classroom teachers

19. Funding agencies supporting human rights education are listed in Frank Elbert (ed.), *Human Rights Education Resources Book*. Cambridge/Amsterdam: Human Rights Education Associates, 2000.

20. Asian Development Bank, "Legal Literacy for Supporting Governance". Manila: Regional Technical Assistance Study RETA 5856, 1999.

and NGOs undertaking educational projects for the first time. A few examples suggest the range and diversity of such resources. “All Different, All Equal” is a project of the Council of Europe which includes curriculum to promote inter-cultural education. Amnesty International USA supports a Human Rights Education site offering a monthly e-mail newsletter for human rights educators. BBC World Service: “I Have a Right to ...” supplies case studies used to teach students about the Universal Declaration of Human Rights. Other sites with substantial HRE materials are hosted by the “Human Rights Internet”, “Human Rights Education Associates”, “The People’s Movement for Human Rights Education”, “Partners in Human Rights Education”, etc.

Conclusion

Many observers, activists and educators now perceive the beginnings of an international movement in support of human rights education. It is more viable for having globally available UN resources in combination with a burgeoning international network of cooperating public and private groups. The vision shared by those involved is directed to constructing a “universal culture of human rights”, no longer a utopian fancy but now a challenge for a globalizing world in need of shared positive values. We are faced with the obligation at the international, national, local and personal levels to implement effective programs of human rights education and to employ methodologies that will ensure that the task is well done, consistent with the goals of world peace and respect for human rights everywhere.

To reinforce our responsibilities to support human rights education, consider this poignant comment by Eleanor Roosevelt. As if talking to us today, she said in 1948:

It will be a long time before history will make its judgment on the value of the Universal Declaration of Human Rights, and the judgment will depend, I think, on what the people of different nations do to make this document familiar to everyone. If they know it well enough, they will strive to attain some of the rights and freedoms set forth in it, and that effort on their part is what will make it of value in clarifying what was meant in the Charter in the references to human rights and fundamental freedoms.

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ABSTRACT

Taking the statements of two Brazilian jurists as a starting point, this article reveals what makes even educated people qualified in law reject granting of equal rights to homosexuals. It also reflects on the absence of moral and legal discussion on this social stigma in Brazil, both generally and, more specifically, among jurists, who tend to develop an irrational or traditionalist (another form of irrationalism) understanding of the fundamentals of moral life and who present arguments that are misinformed and erroneous from a contemporary philosophical and scientific point of view. By adopting this stand, they hinder physical and psychological damage inflicted on homosexual children and youngsters from being considered a form of violence, encouraged by a legal framework that harbors specific religious prejudice. From these two pivotal points, the article attempts to show how the law can be applied so as to end social discrimination of gays and lesbians. [Original article in Portuguese.]

THE RIGHT TO RECOGNITION FOR GAYS AND LESBIANS

José Reinaldo de Lima Lopes

*Homosexuals are a race accursed, persecuted like Israel.
And finally, like Israel, under the ignominy of an undeserved
hatred by the masses, they have acquired
mass characteristics, the physiognomy of a nation
... They are in each country a foreign colony.*
Marcel Proust



“Brazil is not prepared for adopting the civil union concept. It is unnecessary and goes against the cultural and religious foundations of the country.” This is what judge Marcos Augusto Barbosa dos Reis had to say, in an interview with *Trip* magazine (n. 95, Nov. 2001), about the union between people of the same sex. “Neither natural law, nor Brazil’s constitutional or infraconstitutional legislation provides for homosexual union. ... These isolated decisions will never mean that two men, or two women, can find happiness and the protection of law for a behavior that is a deviation from the nature of things.” This is the essence of a statement made by the lawyer Jaques de Camargo Penteado, in the *Tribuna do Direito* (n. 82, Feb. 2002). Such contemporary statements illustrate to what degree Brazilian legal discussion is contaminated by inaccuracies and misunderstandings about what law, democracy and morality are. Both these statements confuse dimensions that in liberal, democratic and modern (or at least post-traditional) societies ought never to be confused.

Firstly, they confuse the legal order with the order acceptable by the majority, overlooking the fundamental aspect of democracy: the protection of the rights of minorities.

The references of the sources quoted in this text are found on page 90.

Secondly, they confuse law with a traditional moral order: to say that something is unacceptable because it goes against the traditional fabric of a group is to ignore the prescriptive and counterfactual character of any normative order. Thirdly, they confuse religion and the state: the legal order of a democratic state is not founded on the religious grounds of any of the groups that make up its citizenry. Fourthly, they draw on concepts of natural law and nature that, at best, are inaccurate. As jurists should well know, natural law is not a series of commands or orders, but, rather, a condition enabling the social organization of life. And what, for that matter, is nature? A collection of cosmic necessities and regularities? Indeed, if that were the case, traveling by air and having blood transfusions also go against nature. Is it a set group of functions and purposes? If so, we are led to “subjectivizing” nature, as when we state that it “wants” something, which, strictly speaking, nobody would admit, except in a metaphorical sense. But the metaphoric use of words rarely produces convincing arguments.

Yet the fact that jurists should express themselves so spontaneously and publicly, indicates how much there still is to be discussed and how statements, in all seriousness, are made that simply reproduce generalizations and uncritical morality. It comes as a disappointing surprise to hear a jurist shield himself behind the claim that “society is not prepared”. There are many things society is not prepared for: it is not prepared to abolish torture or share wealth. But we do at least expect it to be prepared to condemn torture and create taxes and social contributions. It is also disappointing to hear people say that nature is prescriptive: surgical operations, marriages between people who cannot reproduce and other similar events would enable us to say that they are things proscribed by “natural law”.

Two arguments in favor of a critical morality in law

In the early 60s, when the United Kingdom was discussing an end to the criminalization of homosexual intercourse between consenting adults, an important debate erupted that should be a model for all law students. The debate was waged between Lord Devlin, a member of the United Kingdom’s highest judicature (the House of Lords– the *Law Lords*) and one of

the eminent jurists of the last century, Herbert L. Hart. Later, the same topic was addressed by Ronald Dworkin, another first rate jurist, still living. The debate illustrates the need, given that it deals with human dignity and fundamental rights, for a minimum moral grounding. The need, in short, to move away from relativist skepticism, which considers moral questions as if they were questions of taste; and to move away from pure and simple traditionalism, which addresses moral questions merely as a problem of customs that ought to be recognized and preserved.

At the time, the Wolfenden Commission, created in the United Kingdom, concluded that homosexual intercourse between consenting adults should be decriminalized. Part of British public opinion felt outraged, as this meant making a choice of moral character, removing from such acts the character of something subject to punishment, detaching them from the idea of sin. Lord Devlin joined the debate, saying that it is indeed the function of law, particularly the criminal law of a country, to determine what is moral, and that this is or should be the morality of the majority. He said (Devlin, 1991, p. 74): “For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart.”

Lord Devlin went on to say that religion and morality cannot be separated completely, and that the moral standards generally accepted in Western civilization are those belonging to Christianity (p. 69). Therefore, while someone living in a Christian society cannot be forced to convert to Christianity, he or she is obliged to adhere to Christian morals, which are the prevailing morals in his or her environment. And a common morality is as necessary as a government: accordingly, if it is legitimate for the government to punish subversive acts – such as forms of treason – then it is also legitimate for the state to punish immorality (sic, p. 77). He recognizes that it is natural for legal penalties not to be merely an extension of religious or moral punishment: therefore, the state may punish given behaviors not because they are sins, in themselves, but because they go against the order – the generally accepted morality. Finally, Lord Devlin adds that this is not a case of shaping the standard of moral judgment only from the opinion of the

majority. After all, he comes from the land of John Stuart Mill, a land that witnessed an intense debate on individual liberty.

J.S. Mill, nearly 200 years ago, drew attention to the danger of democracy dissolving individual liberties (the moral liberty of individuals) in the name of the process of representing the majority. He said: “the tyranny of the majority is now generally included among the evils against which society requires to be on its guard”. And he continues: “the majority may desire to oppress a part of their number”. This is why, Mill concluded, the only liberty that deserves the name of liberty is the liberty to pursue our own happiness, in our own way, provided it does not prevent others from doing the same (Mill, 1974, p. 138). Devlin, on the contrary, argues for the criteria of the man on the street, or what he calls the “right-minded” person: immorality then, is what every right-minded person considers immoral. Accordingly, it is not the morality of the majority, but the morality of the man on the street that should inspire legislators. In the case of homosexuals, the matter is resolved with simplicity: both the majority and the supposed “man on the street” condemn homosexual persons and practices.

As we can see, Devlin’s argument is based on the idea that society is fragile and that individuals are not capable of developing themselves autonomously. Autonomous development creates a risk of social corruption. On the other hand, Devlin does not believe in a critical or rational morality. Like many of our contemporaries, he thinks that morality is a matter of tradition, custom, regularity and convenience. Therefore, one may not, in a moral debate, take a critical perspective – which is always universal – but only a convenient and practical perspective, the perspective of the man on the street.

One of the first to counter these arguments was Herbert Hart. Under the title “Immorality and Treason”, a first and brief controversial text, he argues that Devlin tries to show immorality as the result of an intellectual activity that combines disgust, intolerance and indignation: if certain acts or attitudes awaken these feelings in the man on the street, then we are certainly facing something immoral, which should be punished by law. In these terms, concludes Hart, the morality proposed by Devlin is uncritical, is not based

on any rational discussion of the fundamentals of moral choice, but on impressions and feelings. He also emphasizes the erroneous comparison made by Devlin with the case of treason: not all actions against the government are treason, as they may not be attempting to destroy it, but merely modify it. The risk of wrong decisions being taken by majorities – and their representatives –, says Hart, is a risk inherent in representative democratic government. But it should not be broadened, elevating the “man on the street” to such a position that all he needs do is to express repulsion or disgust for us to accommodate our laws to his feeling, without making a critical assessment of his demands.

In a more comprehensive essay (1963), Hart developed his response concluding that the central (critical) principle of the moral discussion is that misery, human suffering and the restriction of liberty are evils. As such, the law of a free and democratic society is founded on the reduction of misery, of suffering and of restrictions against liberty. The preservation of order and of society, in addition to the maintenance of a common morality, cannot be evaluated in themselves, but only when submitted to the principle of a critical morality.

Following the same line of reasoning is an essay by Ronald Dworkin (1977, pp. 240-258). For him too, what is at play in this debate is a controversy between a conventional morality (according to which moral rules are grounded in conventions) and a critical morality (in which the moral rules should be submitted to a kind of rational screening). Of course, Dworkin does not deny that historical moralities can result in the *de facto* acceptance of certain practices. But what he does deny is that this *de facto* existence is grounds for its justification or validation. We do many things without asking why, although if the question is posed, the moral response cannot be “because it’s always been done like this” or “because everyone does it like this”. Dworkin therefore proposes a screening system for moral opinions:

- prejudice is not a valid reason (a belief that homosexuals are inferior because they do not hold heterosexual intercourse is not justified as a moral judgment of superiority or inferiority);
- personal feelings of disgust or repulsion do not provide sufficient grounds for a moral judgment;

- moral judgment based on *de facto* reasons that are either false or implausible are not acceptable (for example, it is factually incorrect to say that homosexual acts are debilitating, or that no homosexual practices occur in nature – that is, in other species of sexual animals);
- moral judgment based on other people’s beliefs (“everybody knows that homosexuality is a sin”) is also not sufficiently justified.

In short, the law of a democratic society, contrary to what those less prepared imagine, is not a law without morality, but a law that is founded on a morality of a critical character. The constitutional system – that establishes equal treatment, respect for people’s dignity and the moral liberty of citizens – is a legal system with an agenda of critical morality. This distinguishes it from the tragic authoritarian regimes of the last two centuries. Social practices may be authoritarian, but the law is – or should be – an antidote to such practices.

There are two errors in contemporary discussions on the topic of the rights of homosexuals when the issue is dealt with in moral terms, as some would have it. The first consists of identifying the morality of a democratic society with a morality that is traditional, or of the majority. The second lies in the claim that modern law does not include a certain morality. The arguments summarized above help to correct these two errors. The morality of a democratic society is critical, not simply traditional, or backed by the majority. A parliamentary majority cannot do everything, and should it maintain discriminatory forms of treatment, it would perpetrate an unconstitutional act, as defined under Article 5 of the Brazilian Constitution, which expressly prevents discriminatory treatment from being perpetuated. If the question is shifted to the Judiciary, we will find ourselves under the venue of an institution which, by definition, is “antimajoritorial”, i.e., is the guardian of the interests of the minority.

But democratic society does have a morality, one that consists of establishing the equal and universal dignity of all persons as its principle, and this principle includes the freedom to do anything that causes no harm to others. As Dworkin notes, the “harm” that is caused to others cannot

be an uneasiness or an indisposition based only on tradition and prejudice. Therefore, the morality of a democratic society must be critical, although there obviously are fundamental moral principles underlying the legal order.

The claim for recognition and the stigma as a legal offense

The gay movement presented the public – in new terms and new circumstances – with the old issue of justice. Just like many other social groups, gays also started to demand, in the name of the law, respect for their identity and their liberty, as well as a nondiscriminatory treatment. This struggle has had a unique history, just like any other movements, but it is also part of a broader process that one might describe as the expansion of democracy and the assertion of universal rights.

This expansion of democracy includes the right to civil and political freedoms, whose most salient features are freedom of expression (the end of crimes of opinion), freedom of association (the end of crimes of sedition) and the extension of suffrage (to all adult individuals). It also includes social rights – labor, welfare and social protection – whose extension is due exclusively to the bitter and often bloody struggles of the working class. For the universal assertion of rights, we need to be able to count on the nature of a universal human subject, in whom is embodied a value that cannot be exchanged, and so by definition has no price, which is dignity. These two currents – democratic expansion from an institutional point of view and the assertion of the subjects from a moral point of view – converge in the gay movement in an exemplary way. And they become more important the less universalistic the social context is in which they are asserted.

The assertion of the rights of homosexuals is not a straightforward process, but, rather, occurs in a manner marked by problems and, at times, contradictions. These rights are not always or necessarily acknowledged or supported by those who consider themselves convinced of moral goodness, whether of democracy as such or of the universal human rights. In fact, it is not only against traditionalist visions of the world that homosexuals have had to struggle. Often they have had to fight groups apparently inclined towards liberty. This is

particularly evident in Brazil, where neo-liberalism often means nothing more than the defense of free trade or free business initiative. Not all liberals extend their liberalism to individual liberties, or to the defense of self-determination of human subjects. The left, largely responsible in the last century for the democratization of Brazil and the extension of rights to all people regardless of their social class, often opposed recognition for homosexuals, when it wasn't ostensibly persecuting homosexuals living under the so-called "real socialism".

In the field of Law proper, in what concerns the legal framework and the kaleidoscope of duties and rights that are distributed among the people, the assertion of the right to recognition also faces difficulties. To clarify the status of homosexuals in law, I shall take as a starting point a key distinction made by Nancy Fraser (1997) between **rights of distribution** and **rights of recognition**. Gays and lesbians, just like national and cultural minorities, claim their right to recognition.

Rights of distribution are traditionally called social rights and they have a special function: their purpose is to redress the structural and inevitable injustices of the class system inherent in capitalism. For social rights or rights of redistribution to exist, we need to accept certain things: (a) that social classes exist; (b) that social classes are not a cosmic phenomenon, but instead the product of institutional frameworks and historical processes; (c) that social classes generate situations of injustice; (d) that the social production of wealth is a common social undertaking; (e) that the injustice of classes consists in the unequal appropriation of the social results of the production of wealth; (f) that even those less capable and less productive, if they are nonetheless recognized as members of society, have the right to be provided for within that society by mechanisms of wealth distribution.

The **rights of recognition**, likewise, also need a starting point, and we can say they emanate from the following: (a) that there are in society groups that are stigmatized;¹ (b) that stigmas are institutional and historical products, not cosmic; (c) that stigmas do not necessarily have any scientific, rational or functional grounding for society; (d) that people belonging to stigmatized groups suffer from the "usurpation" or denial of an asset that is immaterial (non-

1. This topic was addressed extensively in the work of Erving Goffman (1975). For him, a stigma is a social phenomenon, a demeaning attribute that enables the pre-establishment of certain relations. The stigmatized may be divided initially into two groups: those whose stigma is evident, who are known as the discredited people, and those whose stigma is not immediately noticeable, who are the discreditable people.

commercial, non-marketable) and basic: respect and self-respect; (e) that the social perpetuation of stigmas is, therefore, an injustice, causing unnecessary pain, suffering, violence and disrespect; (f) that members of a society, in order to remain members, have the right to have their demeaning stigmas removed.

Nevertheless, if the stigmas are produced socially, one could claim that the law is impotent against such “prejudices” of a social and cultural nature. And, often, the most one can do is to punish the behaviors that generate violence against people belonging to a stigmatized group. But this is a claim that finds not backing either in legal or historical terms.

Let us begin with historical examples. Various forms of stigmatism have already been effectively tackled by law. To cite some examples, one could say that identity groups that have emerged over the past centuries and managed to overcome the social stigmas by legal means are women and, to some degree, blacks, foreigners and the physically handicapped. From the point of view of the cultural majority, the means used to degrade these groups were sanctioned by law. Women could not vote, they could only receive salaries lower than those of men, they did not act on their own judgment without the authorization of their husbands, and so on and so forth. It was the emancipationist and feminist movements that gradually projected a more positive and assertive image of women that “denaturalized” the discriminatory legal treatment, and introduced into law the equality of men and women, which previously would have been considered impossible, given the gender difference. Difference is, therefore, a historical barrier; and the law does not play a neutral role in its construction: on the contrary, the law – the rules in place – helps naturalize the differences and the inequalities common in the culture. A change in the law not only follows cultural changes, it helps to promote them.

Therefore, the law can promote changes and remove historically consolidated injustices, requiring only that certain legal institutions be mobilized. The first of them is the class action, or “civil public action”, which offers an effective means for some members of a group to achieve recognition of the rights that will be extended to all members. Accordingly, isolated members or groups of stigmatized people with greater

2. It is worth recalling the typology of discriminatory treatment elaborated by Kenji Yoshino (1999). Discrimination disrespects identities, forcing different groups to convert or hide. "Converting" is an explicitly antidemocratic requirement in various circumstances and affects those underlying identities that are changed when freely accepting affiliation to a group (religious, for example). "Passing" is another requirement that presumes to be compatible with a degree of tolerance: the individual may continue with his or her own underlying identity, but not expose it publicly (the freedom of conscience, but without the freedom to hold public services, for example). Therefore, by "passing", the individual may continue to be who he or she is, although publicly he or she must be who he or she is not (the identity trait is not visible). Finally, "covering" occurs when the individual is not required to disguise his or her underlying identity, but to cover it: this permits the individual to retain his or her identity and even make it public, but not take pride in it, exhibit it or flaunt it. According to Yoshino, this is the case with blacks forced to have a conventional haircut among white people, and not flaunt a black power style.

resources – particularly psychological – can play the indispensable role of hero or trailblazer, without each individual member having to bear the extremely high costs of exposure and combat.

A second important element is the unmasking of the prevailing generalizations. The statements cited at the opening of this paper demonstrate that offensive and injurious words can be used against a given group of citizens without fear of serious consequences. However, if these types of public statements resulted in charges for their discriminatory and unconstitutional nature, there is little doubt that the law would contribute to reducing the stigma in its own arena, in public life. In strictly private life, nobody is obliged to have social contact with gays: flee from them, if you can, as they are everywhere, even in heterosexual families. They are even born into and live with families, although all too often they are submitted to physical and psychological tortures. One of the slogans of the international gay movement is: "we're queer, we're here, get used to it".

Third, the law can unveil discriminatory treatment in the most varied ways: pseudoscientific criteria infiltrate into evaluations for adoption, the custody for children, the distribution of health benefits (social rights, incidentally) and the holding of posts in the public service. To expose this discriminatory treatment helps to break the mold, to lay publicly bare the many forms of violence that a group of citizens has suffered, still suffers and will continue to suffer for some time.²

Let us consider but a few examples of the suffering imposed on a particular group of citizens to have an idea of the how much the law contributes to cloak violent and blatantly unconstitutional practices.

Herrero Brasas (2001, p. 323) paints a portrait of the violence that many homosexuals, both male and female, are submitted to from a very early age, in both their childhood and adolescence. He says there is an active violence, which we all see, and a passive violence, which I would call disguised or psychological. This violence is comprised of "public insults, mocking and ridiculing gestures, such as manifestations to torment a social group". Closely associated, and also a form of social and silent violence, is "the lack of legal protection against these symbolic acts", which generally exist in the rhetoric, the

symbols and in the culture as a whole. The lack of legal action is akin to a warrant, a complicity in this daylight violence – evidence of the “denial of absolute equality”. We also need to take a look at what Herrero Brasas (p. 324) calls

... abandonment and terror that adolescents suffer when they discover their gay or lesbian orientation, which submits them without any alternative to the degrading emotional blackmail of their family ... The younger and more vulnerable person is condemned to silence and to psychological and emotional torture while the authorities conduct no awareness-raising campaigns about the reality of being gay or lesbian, nor do they develop any informative programs for their families. All this causes real suffering ... experienced as an expression of hatred against them.

Such passivity on the part of governments and of the Law illustrates just how much violence against this particular group of citizens has been naturalized: we talk in defense of children and adolescents, but how much has been done for a group of people who suffer the most violence and degradation when they are children and adolescents? Is there not a role here for the law?

Following the same trend of these observations, one may add the typology developed by Axel Honneth (1996, pp. 129-134), according to which the denial of recognition generates physical violence (physical abuse), which is the prevention of someone being physically secure in the world, and also a non-physical violence. The non-physical violence, in turn, unfolds into two typical forms. The first is a person's exclusion from the possession of certain rights, denying the person social autonomy and the possibility of interaction. Honneth calls this social ostracism. “The kind of recognition that this type of disrespect deprives one of is the cognitive regard for the status of moral responsibility that had to be so painstakingly acquired in the interactive process of socialization” (p. 134).

The second form of non-physical violence is the denial of the value of a way of being or living, and it is this form of violence that underlies the degrading and insulting treatment of certain people and groups, as it promotes disrespect for individual or collective forms of living. Honneth goes on to say (p. 134):

For individuals, therefore, the experience of this social devaluation typically brings with it a loss of personal self-esteem, of the opportunity to regard themselves as beings whose traits and abilities are esteemed. Thus, the kind of recognition that this type of disrespect deprives a person of is the social approval of a form of self-realization that he or she had to discover, despite all hindrances, with the encouragement of group solidarity. Of course, one can only relate these kinds of cultural degradation to oneself as an individual person once the institutionally anchored patterns of social esteem have been historically individualized, that is, once these patterns refer evaluatively to individual abilities instead of collective traits. Hence, this experience of disrespect, like that of the denial of rights, is bound up with a process of historical change.

This is the same form of violence denounced by Didier Eribon (2000):

What the insult tells me is that I am an abnormal or inferior person, over whom someone else has power and, above all, the power to offend me. The insult is, therefore, the means by which the asymmetry between individuals is expressed. ... The insult also has the force of a constituent power. Because personality, personal identity, the most intimate awareness, are manufactured from the very existence of this hierarchy and by the place we occupy in it, and, therefore, by the glance of the other, the “dominant one”, and the capacity he has to degrade me by insulting me, letting me know that he can insult me, that I am an insultable person and insultable ad infinitum. (p. 57)

The homophobic insult is part of a continuum ranging from the word spoken on the street that every gay and lesbian can hear (bloody queer, bloody dyke) to the words that are implicitly written on marriage registry office doors: “no homosexuals allowed” and, consequently, also the professional practices of jurists who include this ban in the law, and also the rhetoric of all those men and women that justify these discriminations in articles that they present as intellectual elaborations (philosophical, sociological, anthropological, psychoanalytical, etc.) and that are no more than pseudoscientific lectures designed to perpetuate the unequal

order, to reinstitute it, either by invoking nature or culture, divine law or the laws of a symbolic order immemorial. All these lectures are acts, and acts of violence. (p. 62)

Nevertheless, it is this very insult and violence that certain provisions of the legal framework silence on or, depending on the rhetoric of some jurists, actually permit. And it is this silence or omission that the demand for rights of recognition aims to abolish. In fact, there is an unquestionable contradiction between preaching tolerance and being shocked by the cruel and gratuitous violence of which homosexuals are victims, and, at the same time, upholding as an official and well-controlled rhetoric the generalized violence of offense and, within families, the “blackmail” referred to by Herrero Brasas. To talk about the right to recognition is to talk about abolishing such social practices, or at least removing them from the silence that may serve to keep them alive.

Eribon and Honneth say that insults are forms of offense and violence. One could even say that insults consistent with the denial of rights can propagate the negative image of homosexuals. The denial of rights, the rhetoric that publicly affirms that homosexuals should not be condemned, but neither should they be encouraged, has precisely the opposite effect, that is, to encourage physical and moral violence against them. Since they cannot have equal rights, the message sent by the jurists who deliver them is to reinforce the prejudice and pseudoscientific ideas that are endorsed here and there. It is a message of inequality.

The description of the insults and violence of which homosexuals are victims reveals a violation of their fundamental rights. It is not hard to see that the social treatment given to homosexuals – at times by the state services themselves or by public service agencies, such as hospitals and schools – constitutes a degrading treatment, which is prohibited by Article 5 (III) of the Brazilian Constitution. Many other pretensions of social groups would also consist of violations of the rights of conscience and belief of this portion of the citizenry (same Article, item VI). In addition, the honor and privacy of the individual is treated constitutionally as an inviolable right (item X), so the various forms of public communication and social expression of contempt directed at

gays and lesbians must surely be violations of their honor and their privacy. Not to mention that fact that the Constitution itself requires legislators (and also all public bodies with semi-legislative powers) to punish “all acts of discrimination against fundamental rights and liberties” (item XLI). These individual rights, deemed the fundamental rights of any member of Brazilian society, are enough to reveal to what degree the institutionalized continuity of antigay stigmas is illicit.

But it is unquestionably on the principle of dignity of the person that the vindications against unequal and discriminatory treatment and the reaction to public statements are grounded. The Brazilian state – the institution of the public and common life of Brazilian society – is founded on the “dignity of the human person” and on “political pluralism” (Brazilian Constitution, Article 1, items III and V). A person’s dignity can be best expressed by the Kantian formula: the worth of each human being, which is exchangeable for nothing, may be bought for nothing and may be the instrument of nothing. No human being may be used by another or by the collectivity and may not be used even as an example, or as a scapegoat. Pluralism, meanwhile, states that the cornerstone of political coexistence in Brazil is reciprocal tolerance. These are the basic, not to say elementary indications that Brazilian democracy, or rather, the public legal system of Brazil, adopts the necessary precautions not to permit intolerance and social oppression among social groups. Brazil’s legal system guarantees and values the plurality of forms of life and thought, and does not license the state to sponsor uniformity, conformism and submission.

The denial of rights, coupled with the traditionalism of the *statu quo*, is what maintains and fuels the most evident forms of physical violence, and that in itself is an offense against the democratic regime of equal liberties. There is no pride to be taken in the fact that intolerance is cultivated under the silence of the legal system – as it could be understood by its most common non-democratic forms of expression. In a democracy, this kind of sexual discrimination is a legal offense. In a democratic state, the defense of the social order is restricted to the defense of institutions that can pass the test of universalization and criticism; this would sustain the different treatments that are justified by the need to maintain the conditions of social harmony with equal

liberty for all. However, today's preconceived ideas about the emotional and erotic relations between people of the same sex would not pass this test.

To claim that such relations should not be recognized, on the grounds that they go against the religious fabric and universal morality, comes up against the constitutional ban on the state compelling all citizens to have a determined set of religious convictions. Arguments about religious conviction cannot be legitimately used in a democracy when they are purely religion-based, as no religion determines precepts, duties and rights for all citizens, since not all are followers of the religion that claims to be or is, in fact, dominant. Freedom of belief, one of the cornerstones of democracy, prevents the obligations required of all followers of a given belief from being imposed on all citizens. Drawing on Christian, Jewish or Islamic ideologies is not sufficient – I purposefully cite these denominations as homosexual relations are not the object of the same taboo in many other religions and cultures.³

Freedom of religious belief is, therefore, a democratic and constitutional barrier to arguments of this type, when talking about state legislation. Article 5 (VI) of the Brazilian Constitution is explicit: “Freedom of conscience and of belief is inviolable, the free exercise of religious worship being ensured and, under the terms of the law, the protection of places of worship and their rites is guaranteed”. Nevertheless, if freedom of conscience is inviolable, those who do not share the same religious convictions of others (even though the others may be the majority) cannot yield to laws whose *raison d'être* is justified purely on religious belief.

The Brazilian Constitution also adds another extremely important ingredient to the debate: “No one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he invokes it to exempt himself from a legal obligation required of all and refuses to perform an alternative obligation established by law” (Article 5, item VIII).

The religious conviction of others, therefore, may not deprive of rights a social group that does not refuse to observe the general obligations of citizenship. Besides being free to believe, Brazilian citizens are free not to be deprived of rights by religious groups that have enacted laws founded on their

3. This is not the proper place to cast doubt on the very religious grounding of taboo. As many a theologian has said, it is a clear sign of bad faith that religions selectively choose which of their traditions survive and impose this selection on everyone. As such, the groups are not few that, inspired in Judaism or Christianity, ignore the obligations of animal sacrifice, rituals of cleaning and segregating the sick and women, alimentary taboos, and so on. For what reason do they continue to consider an abomination relations between two people of the same sex, but not alimentary taboos?

religious convictions. To say, therefore, that the rights of others due to the “religious fabric” of the majority or the “natural law” of a manifest or pseudoscientific character (and if it is not scientific, it is therefore a belief, a question of conscience) does not extend to certain groups (such as gays and lesbians) is in stark contrast to constitutional law.

The same goes for a claim such as “nobody could be happy like that”. It so happens that modern and democratic law does not presume to make people happy. People can be happy the way they like, provided they do not cause any harm or prevent others from also searching for happiness. This is the meaning of civil liberty and tolerance between citizens of a democratic state. It is not the responsibility of the state to make its citizens happy in their private lives, and the happiness of others should be the problem of others. In a particularly pertinent passage, J.R. Lucas (1989, p. 262) says that the expression “take care of your life” is a good summary of the principle of justice and tolerance. “‘Take care of your life’. Although this is an inadequate definition of justice, even so, it is an important remedy for an exaggerated solicitude to others. There is ... a conceptual bond between justice and freedom, to the degree that it is part of the requirements of justice that each individual must be able to conduct his/her own life”.

Social solidarity in mass societies that are bureaucratic, democratic, tolerant and, in a word, just, is not the same as public control of individual happiness. Nor is it the same as social control: freedom from the interference of others is one of the key benefits of democracy, and is an element that makes it desirable.

Another line of argument for the legal system to ignore the rights of homosexuals and not to “encourage” them attempts to base itself on scientific grounds in two ways. The first claims that natural is what exists empirically, and unnatural is what is not found in other species of animals. The second combines the functions and regularities of nature with the purpose of human action and transforms natural functions into moral maxims (deriving the **ought** from the **is**, as Hume puts it).

The first claim argues that cohabitation of two people of the same sex is unnatural and that such relationships do not exist in nature. In this sense, the alleged grounding for

legislation is simply incorrect: to say that erotic-affective unions between human beings of the same sex is “unnatural” because it does not occur in nature demonstrates plain ignorance of the facts. And cases do exist in “nature”, rendering the argument groundless, as proven by empirical evidence: the establishment of relations between individuals of the same sex has been discovered in several mammals.

According to the second line of reasoning, unnatural means against the purposes of nature, and, as such, the argument contains two flaws. The first concerns the purpose of nature, which cannot be determined by science. To do so would be to presuppose the existence of a subject, or a conscience, behind the regularities of nature; this is equivalent to personifying nature. This is why, in modern science the functionality of events should not be confused with their purpose. Transforming natural functions into purposes is an error in the order of categories and precludes logic. Although sexual contact may be functional for the reproduction of the species, one cannot derive from this that the purpose of this contact between human beings is, or ought to be, the reproduction of the species.

Morality and ethics are the fields in which we shape and interpret human behaviors that are independent of natural determinisms. Human beings are valued as people precisely because they are capable of undertaking purposes (this we call autonomy), as opposed to the determining regularities of nature. We are people because we are subjects and not objects. Purpose is not compliance with a natural determination. Nobody has the purpose of dying: the fact that we all die eventually is a determining regularity of nature. In moral arguments, it is not simple to invoke nature as a determiner of prescriptions: nature is not prescriptive, it is determining, altogether a very different thing.

In the last century, even Christian theology rejected such a simplistic assertion. Dealing specifically with Roman Catholic tradition, the constitution *Gaudium et Spes*, of 1965, states: “Marriage to be sure is not instituted solely for procreation” (GS, 50). It emphasizes that marriage consists of the expression of love: “This love is uniquely expressed and perfected through the appropriate enterprise of matrimony. The actions within marriage by which the couple are united intimately and chastely

are notable and worthy ones” (GS, 49). Along the same lines, now that the years of the great debate of the mid 20th century have passed, the official *Catechism* (of 1992) stipulates that, in addition to the transmission of life, an equally important purpose of marriage is the “good of the spouses” (Part III, Section II, Chapter II, Article 6).

If this were not the case, all infertile humans, for example, would have to be banned from having sexual (and affective) relations and from marrying. But simple infertility, or *impotentia generandi*, has never been cause for annulling marriage. The *Code of Canon Law*, in force since 1983 for the Roman Catholic Church, consolidates the long tradition on this subject: canon 1084, paragraph 1, states that impotence, or *impotentia coeundi*, can invalidate marriage, but it is explicitly stated in paragraph 3: “... sterility neither forbids nor invalidates a marriage”.⁴

4. In the *Code of Canon Law* from 1917, the same rules were contained in canon 1068, paragraphs 1 and 3.

Grounded on this valuation of the reciprocal good of the spouses, Michael Sandel (1996, p. 104) criticizes the defense of the rights of homoerotic individuals based only in the negative liberty (negative tolerance). As far as he is concerned, a positive argument is also available, stating that loving relationships between individuals of the same sex are good, just like all loving relationships are good. Therefore, in respect not only of the issue of freedom, but all the idea of goodness, it should not be difficult for courts to positively value these relationships.

Finally, the alleged scientific argument against the “impulse” of erotic and affective relations between people of the same sex appears to be caught up in a strong contradiction. While it is asserted that homoerotic orientation goes against nature because there is no homoeroticism in nature (a claim that has already been proven wrong), the argument also suggests that the choice is influenced by cohabitation and education. It also presumes that “nature” determines things for all beings except humans (for whom sexual orientation depends on impulses rather than natural determinisms); and that the law should, if nature fails, step in to substitute it. The problem is considered a behavioral “disease” and, worst of all, a contagious disease.

The coherence of the assertion is at best doubtful. As we well know, the vast majority of gays and lesbians are born into

heterosexual families and they spend most of their lives with heterosexuals (the majority of the population) – environments, incidentally, in which they are submitted to all kinds of moral and physical violence. How, why and because of who do they feel the impulse to belong to this vulnerable group that has been subject to so many limitations, to so much violence and humiliation throughout history? The argument appears to suppose that public recognition of such relations would encourage heterosexuals to convert and become gays and lesbians. What kind of contagion is this that can transform somebody in a gay person but cannot transform a gay into a hetero? So it concludes, as such, that sexual orientation is cultural and social – it is, therefore, not natural. If it were determined by nature, it could not be changed. But if it is not natural, the argument that draws on nature to ban a behavior is impaired.

Therefore, the ban on equal rights for gays and lesbians needs to be based exclusively on moral grounds and, as the intention is to maintain a free and democratic society, arguments of a critical morality, and not a traditional morality, need to be employed. Of course, none of this has any value if the conception of public space, law and politics is intolerant, traditionalist and assimilationist. If what is at play is genuinely the imposition of homogeneity (ethnic, religious, political or sexual), then a difference in sexual orientation is just as malignant as any other, and it is no coincidence that during the Nazi regime homosexuals were also sent to the concentration camps.

Secular and critical arguments, therefore, should be fundamental. And among these secular and critical arguments there are none that invalidate the principle that, among free adults, certain interferences by the state are unacceptable.

The right to recognition: how will it come about?

Recognition consists of an assertion and a positive valuation of a given identity. The right to recognition, therefore, must be asserted as a right first and foremost, and it will need to be translated into public efforts – state and non-state – to remove from a stigmatized group the legal consequences of a social stigma.

5. Iris M. Young (1996) would disagree with this analysis. As far as she is concerned, distribution occurs with items that can be individualized (income, opportunities, etc.), which is not the case with respect, and the politics of identities does not imply the distribution of anything, only the dismantling of systems of oppression (could distribution dismantle exploitation?). Even so, I believe that we can talk about distribution if we imagine that the image of social groups constitutes a social product, something common (indivisible) and that can be changed. In the *Nicomachean Ethic*, Aristotle presents honor as an example of an object that is distributed proportionally. Obviously, honor in a non-egalitarian society is different from respect in a democratic society; but the respect exists precisely to the degree that it is universally and equally distributed. To address the topic as distributive justice also seems to me to be important, as it is legally relevant: the commutative relations enable legal solutions of simple and bilateral adjudication, while distributive relations call for solutions of plurilateral or administrative adjudication.

How would it be possible to convert this right to recognition into duties, and who should it benefit? I shall turn briefly to the topic of subjective rights. Since the 16th century, the most evident example of subjective rights has been that of *dominium*, which over time was broken down to property – as we imagine it today – but previously involved a series of other powers, such as jurisdiction itself. Princes and male parents had not only commercial and economic *dominium* over things, but also powers of lordship over their subjects and kindred.

In any case, the important thing is that subjective rights ended up being handled in an exemplary manner in the field of property, on two fronts. Firstly, and concerning its concept: property owners were those who could use, enjoy and dispose it. Second, the forms of transfer of power came to constitute the chief field of duties. Therefore, defining powers and determining how they circulate among the people appropriately summarizes the reflection on subjective rights. However, the discussion of subjective rights takes place within the framework of the rules of commutation or exchange. It presupposes that the important thing is to define how things change hands and how they end up in the hands of their owners.

A different sphere is the reflection on distribution. In this field, the problem does not consist of defending existing rights, but in assigning rights out from the assumption that they have not yet been distributed. This is not a historical reflection, but a critical reflection on who should have what. There is a specific difficulty with the rules of distribution: they do not presume that there are already owners of subjective rights, they only presume that everyone should have access to a certain item. Rules of distribution differ from rules of commutation because they do not assign rights to some against others (to the other, as a personal right; to all the others, as a real right), but rights to all against all. The most evident examples of distribution are company laws. There are rights belonging to all partners before being rights of one partner against another partner, or against the company.⁵

To begin with, it is my understanding that rights to recognition need to be placed within this sphere. The struggle for rights to recognition is a struggle for distribution, the distribution of an item that only exists and is only produced socially: respect. We are not dealing here with a commutative

respect, but a distributive respect that is, consequently, universal. When a society organizes itself in a hierarchical and unequal manner, respect cannot be distributed equally and universally. In the political language of old, honor consisted precisely of unequal respect: some had it, others did not; some had more (greater honor) and others less (lesser honor); in these terms, it was treated as a scarce item, which could not be distributed equally to all citizens. Respect, for its part, is the counterpart of universal dignity.

Respect itself, the equal valuation or esteem of all human beings, is conditioned to the social production of a positive or negative image, of a trait that identifies a group – skin color, education level, ethnic background, gender or sexual orientation. And the production of this respect sometimes depends on the social perception of the characteristic responsible for the socially created image: is it visible or invisible, mutable or immutable? I am also referring to distributive respect, taking into account that “respect” is an indivisible and socially produced item.. Therefore, if the image of a given group is negative, this distinction is a social production.

The new legal problem is the dispute over public image. Reparation of injustice, in this case, is not of a purely individual character, but social. The struggle for recognition is a dispute for two different things: for recognition of the dignity of the person demeaned or offended by the majority; and also a struggle against the injustice that consists of demeaning an entire group. Accordingly, it is not a struggle to convince the majority of the value of a minority, but a struggle for pluralism.

Naturally, pluralism and tolerance have limits: the intolerant, for example, can at times be restrained. For gays and lesbians to be recognized and tolerated on these terms, they must not be confused as being intolerant themselves, or as being a group that wants to dominate the social landscape. This is one of the underlying themes of various arguments against recognition for gays and lesbians (who are perceived as being “corruptors”, traitors to social life). It is not about giving each human being belonging to that stigmatized group the opportunity to simply shake off the stigma. It is about destigmatizing the entire group, demonstrating that the stigma is founded on prejudice and discrimination, which are unacceptable in a democratic society.

Traditional subjective rights were assimilated to property: the property of oneself and one's possessions made up the core of the idea of subjective rights. Having rights meant being the master of oneself and of one's possessions. Consequently, having rights meant having legal protection against acts that violated one's person or property. Generally, this was done by the criminalization or civil penalization of behaviors, giving the victims the possibility to claim the item, or its equivalent in money, by way of compensation. The guarantee of a subjective right was given by the instruments of commutative justice (corrective or retributive): return to someone what belongs to them, repair the damage caused, apply a punishment proportional to the injury caused the other person.

It is natural that the legal defense of the right of property or freedom takes place when someone is either a proprietor or free. The non-proprietor and the slave have nothing to defend. For them to have something, they need to assert a right to distribution of things and to freedom. Under these terms, distribution is a logical precursor of all rights.

This distribution was the object of the struggle for social rights in the 19th and 20th centuries. Social rights were, therefore, conceived as rights of distribution or redistribution. In distribution, one does not conceive of each person as having the right to something; rather, each person has the right to a part of something, which is common. The rights of shareholders to dividends operate exactly in this manner. Nobody would assert, before dividends are distributed, that shareholders do not have a right to such dividends. Until the division is made, they do not have the right to a specified part of the dividends, but they do retain the right to the dividends. This is why there are certain things a Board of Directors cannot do, under pain of infringing on the shareholder rights (of a yet undetermined content). Shareholders, therefore, enjoy remedies that could be described as "collective" or "diffuse", since they have the right to something that remains undivided: while the profit is not "distributed", each shareholder has a right to a part of the common fund (the profits of the business activity).

When speaking of the right to recognition, we speak of something which extends beyond the respect due each individual under the universal democratic rules of tolerance and freedom.

There is no doubt that the ultimate grounding of the right to recognition, the right to be different, as some call it, is the universal subjective right of freedom. Sérgio Paulo Rouanet is right when he says that the defense of certain groups is grounded in the defense of the right of the individuals of that group to lead their lives, to be treated as human beings regardless of the fact that they belong to that group. Women want to be respected as human beings just as complete and worthy as men, and this is the ultimate objective in the defense of women's rights. If, in order to grant them full and equal respect, it is necessary to recognize the differences, then so be it.

Along this line of reasoning, one might say that legal difference is purely instrumental for moral equality, and that the specific difference of who is gay or lesbian enables us to distinguish them apart, denying them some right. This is why the right to recognition calls for an identification, from a social and legal point of view, of the historically negative valuations about a given identity. To belong to an identity group is not the same as belonging to a voluntary association. This is because the tolerance shown to identity groups is different from the tolerance shown to opinion groups. Opinion groups are accepted because they do not force anybody to think one way or another, and contact with the opinions can be illuminating and prompt better decisions. But with identity groups, it is not always possible to come and go freely: one does not change one's ethnicity or sexual orientation like one changes one's opinion.

To talk about "dissidents" is one thing; to talk about those who are "different" is another thing altogether: is the tolerance extended to dissidents the same as that shown to those who are different? Essentially, there are many similarities: tolerance of dissidents stems from the understanding that mere difference of opinion does not make someone a traitor or a murderer. Accordingly, mere difference of opinion does not justify the elimination of the dissident, or the denial of their civil or political rights. But certain attitudes indicate that the rhetoric in support of the rejection of the rights of those who are different is the same as the rhetoric that preaches the elimination of those who are different. Foreigners or homosexuals should only be accepted as equals if they renounce their respective identities. So, they have two options: either

assimilate (convert) or hide (disguise or conceal themselves). The right to recognition is a right to maintaining one's identity, provided this does not prevent the simultaneous existence of other identities. It is an outcome or a specialization of tolerance – tolerance of those who are different.

Perhaps this is more problematic than it appears, as the difference may be precisely what one wants to preserve, not abolish. It is in these terms that the discussion occurs on the right to be different, the right to recognition, with two distinct meanings.

In the first place, the right to be different can mean exactly the same as the implications of fundamental rights in a democratic program: that no individual characteristic may be taken into account by legislators or courts to restrict a person's rights, as long as this characteristic is not justified as a sufficient differentiator. Differences of birth, ethnicity, gender and so on are proscribed from the legal framework. To treat someone differently on these terms means not recognizing that person individually for who he or she is. The legal remedy for the lack of individual recognition is the banning of such acts by the rule of isonomy. And it is worth emphasizing that this isonomy is always created socially – as we well know, to equate men and women in all respects is a fairly recent construction. Respect for difference means here only the purposeful irrelevance of the difference, an intentional disregard of empiric difference.

Secondly, recognition can mean the removal of the negative valuation of a given identity, whether to assert it positively or, more importantly, to assert that the identity, when it comes to social and political-legal life, is irrelevant. On these terms, the individual not only has the right to be treated like all others, needing to prove – through valiant efforts – that he or she is exactly the same as others. In this second perspective, it becomes his or her right to see his or her specific difference not disrespected publicly. The right to recognition, at this point, acquires the distributive aspect I mentioned previously, since the identity is not specific to one individual, but belongs to a group. It is this common item (an identity) that deserves public respect, which means neither admiration nor sympathy. Nobody is obliged to convert to Afro-Brazilian cults, to Islam or Christianity in order to be publicly respected. Just as the law does not enforce love, respect for social pluralism is not to

be confused with the right to change the conviction of others.

Kant says that universal love does not mean universal affection, but that it can and does mean universal respect. The right to recognition means, therefore, respect for a given collective identity. Martha Minow chose a very fitting title for her book on the rights of minorities (1997): *Not only for Myself*. The rights, which are claimed under this form of recognition, are not exclusively individual, they are “not only for myself”. The recognition that is sought, in the form of a right, is for “anyone”, it is universal.

Nevertheless, this positive construction of difference – or the deconstruction of the negative difference – establishes a conflict in two senses: in the sense that the distribution of the value of the identities needs to be questioned, and in the sense that the identity of each group is something that is distributed universally among all its members.

In the first sense, redress for discrimination, past and present, should be embodied in practices intended to alter, for the future, inherited historical conditions: the dissemination of information and the teaching of tolerance become the rights of all and benefit the groups traditionally submitted to physical and moral violence and traditionally treated, as United States constitutional law puts it, as a “suspect class” (Gerstmann, 1999, *passim*). Redress for passed discrimination is not a privilege, or a special right of a group, but instead redress for a special injustice against a group. Without this redress, historical situations of injustice would tend to be perpetuated.

In the second sense, the violence directed at someone for being a member of the group may be considered an act of violence or an offense against all members of group. That is, if the physical or moral integrity of a member of a group is at risk because he/she belongs to that group, the security and respect the person is entitled to is converted into a common (indivisible) item, which belongs to all members. Intolerance, once it is accepted in social life, knows no limits, creating a vicious circle of exclusions. This is why class actions have proven to be important in this case, since by definition they benefit all members of a class or a group. Distribution is achieved in the very outcome of the process: all members of the group benefit from a positive outcome, reducing the risk of exposure of its more vulnerable members.⁶

6. Class actions also face some specific legal and political problems, of which I will point out just two: (1) they may be used in a paternalist manner, as they possess some clearly paternalistic groundings, such as the idea that the groups the class action is defending are weak and defenseless, or “hyposufficient”, and need a representative, because they are incapable of defending themselves; and (2) they may be demobilizing, by encouraging the free-rider effect, or predatory behavior, enabling one of the action’s beneficiaries to not pay their share of the costs. These two “defects” of a class action should be remembered by those employ them, although distributive problems undeniably need specific legal redress such as class actions.

The Supreme Court of Justice and the recognition of homosexuals

Various rulings handed down by the Supreme Court of Justice (STJ) illustrate what the right to recognition is in the first sense: tolerance, negative freedom and non-discrimination. The decision on Special Appeal 154857/DF, published on 26 October 1998, is perhaps the most exemplary (rapporteur Minister Luiz Vicente Cernicchiaro). The capacity of a homosexual to testify had been opposed, alleging among other things the person's "moral deviation" [sic]. The STJ accepted the appeal to reestablish the witness' capacity. The argument of the STJ is typically one of tolerance and non-discrimination: a person's sexual orientation does not interfere with his/her capacity to testify, and so it cannot be used as a justification not to hear such person. "Thus the principle of equality, enshrined in the Constitution of the Republic [of Brazil] and in the Pact of San José, Costa Rica, is upheld".

What is important about the decision is that discrimination based on sexual orientation is considered incompatible with the Brazilian Constitution (for violating fundamental rights) and with the Inter-American Convention on Human Rights (for violating human rights on an international level). It means that a constitutional norm prevents sexual orientation from being considered as a criteria for differentiating citizens.⁷ Note, particularly, the fact that lower-level local court had actually been capable of invoking the sexual orientation of a witness as a "moral deviation", and it was only at a higher court level that this "deviation" was declared irrelevant.

Other cases have addressed the recognition of the right to division or moiety, in short, the recognition of *de facto* partnerships between people of the same sex. In this case, the question is slightly different. We can say that a form of recognition exists for same-sex unions, as it uses the exact same groundings (the existence of a common effort to accumulate possessions) adopted decades ago, when the bond of marriage was considered indissoluble and the law prevented more than one marriage. At that time, marriage-like cohabitation (*more uxorio*) between heterosexuals could not be formally accepted, although courts gave partners reciprocal estate rights. It was a

7. The central argument in the work of Roger R. Rios (2000) follows exactly along these lines: despite not being expressly stated in the Constitution, discrimination based on sexual orientation is unconstitutional and a violation of fundamental rights and of human rights.

half-way acceptance of the conjugal partnership. By resorting to an equivalent argument, the STJ opens up towards a recognition of the union. But there is a limiting factor: it is the recognition limited to matters of estate, and not a positive recognition, as Sandel says (1996), which includes the affective relations established between the partners.

This recognition is implicit, however, in Special Appeal 148897/MG. In its award, the court recognized that the partner has a right to his or her share in an common asset obtained during the cohabitation, although it denies the survivor compensation – claimed against the father of the deceased – for moral damages caused by having shouldered alone all the responsibilities resulting from the deceased's illness. In adopting this approach, the court applied the same logic that it would apply in the case of a heterosexual couple: the husband or the wife that survives, under the Brazilian legal system, is not compensated by the families for having suffered as a result of the illness of the deceased spouse. What's more, this cohabitation, "in sickness and in health", is part of the marriage contract, according to the terms accepted today. This is why, by dividing the possessions but denying compensation, the STJ took yet another step towards narrowing the gap between gay and lesbian cohabitation and the cohabitation of different-sex partners.

Conclusion – what, after all, is due to gays and lesbians as a fundamental right?

Matters of rights need to be resolved in such a way that we can say what "each one's own" is. When one speaks of social rights, for there to be an "each one's own", we need to define, first of all, what is the common part, of which each one shall have their "own". In capitalist societies common property has been dissolved and everything transformed into an object for individual appropriation. Under these circumstances, the need arose to channel everyone's contributions – proportionally – to the formation of common funds: by levying taxes and social contributions. From these funds come, or should come, the provisions for social rights – health, education, pensions, and so on. We are experiencing today a period of criticism of this model of constituting common funds, criticism aimed at both

the inefficiency of their management (in the name of privatization) and the very possibility of their existence (in the name of competition between economic agents).

I feel altogether sure that, for a legal point of view, social rights were met as a result of the following two processes: the creation of funds and the distribution of common funds. These funds have enabled us to “commodify” (reify, convert into a commodity or credit) the expectations for accessing the social results of economic production. Meanwhile, they also allowed us to measure (albeit imperfectly) the accesses permitted to these funds. By “commodifying” the access, the legal system created very specific tensions. It introduced a fund manager – the state – that appears in reality to be the “owner” of the fund. This was decisive in permitting a universalization of the funds, preventing them from being merely sectorial or corporative. At the same time it disassociated, in the eyes of the jurists, the two extremes of the system: contribution and distribution. It appears that these funds can exist without the contribution of anyone, and legal conflicts concerning contribution are debated in one sphere, while the conflicts of distribution are debated in another. Tax jurisdiction regulates only the relations of the state with the taxpayers and adopts, in this sphere, an approach that is clearly restrictive and protective of the contributor.⁸ The conflicts over distribution are processed independently, and permit attitudes that are generous towards the beneficiary. In the long run, the accounts tend not to balance.

8. The research of Marcus Faro de Castro (1997) reveals that in 75.57% of the conflicts between public authorities and private individuals, the decisions of the Supreme Court (STF) were in favor of the private individuals, which prompts him to say that “the STF, even in its routine activities, has ruled against the prevalence of the initiatives of the state, which includes the implementation of public policies” (p. 153).

Claus Offe (1991) observes that there is here evidence of distinctive rules being applied: one is the rule of solidarity, and the other the rule of interest. Concerning social rights, a “commodification” exists, resulting in a separation of solidarity from interest. Interest appears as if it had no counterpart, and is asserted, therefore, as an individual civil right. The individual civil right, rather like Dworkin’s absolute rights, is irresponsible, says Offe (p. 84), it can be claimed by a person without any counterpart by such person. The classic social right, however, presupposes that there is solidarity and that the counterpart of a social solidarity fund exists: its concession depends on whether the fund exists and the respective rules of access.

The right to recognition is distinguished from a social

right in an important sphere. It can be difficult to “commodify”. Recognition, as Fraser says (1997), does not aim to redress an injustice related to material goods, but to an immaterial good (moral, if you like), which is respect, the public image of a person or a group. This right to recognition is unlikely to be established with the creation of a compensation fund, pure and simple.

This is why, as she says in a previous paragraph, the right to recognition refers to a good – reciprocal and universal respect – which is the common (social) product of life in society. The social image of a group, like a common good, cannot be distributed in a commercial manner. It is distributed universally and equally and, therefore, it is similar to the Dworkin’s absolute rights and Offe’s irresponsible rights.

Whoever claims the right to recognition requests that the distribution of social identity should not establish hierarchies based on a specific identity trait. The claim is made that all identities should be treated legally and politically as equivalents. It is about asserting the right to be different and for this difference to become irrelevant. It is a combination of modern and Illuministic universalism, with pluralism: a simultaneous claim for universalism and social perception of the “queer theory”. The dissolution of sexual identities, the assertion of all sexuality, is done in the name of what is universal. Rouanet (2001, p. 89) recalls that universalism is critical precisely because it prevents the parochial forms of thinking and judgment from aspiring to a universality that they cannot have. Therefore, he says, those who defend universalism “condemn sexism, not because they specifically identify with the feminist statute, but because they reject the validity of all specific statutes and because they consider that these statutes are almost always imaginary creations, destined to deprive empiric individuals of their prerogatives as possessors of universal rights”.

This pretension can be protected by the law, as, for instance, when it is shown, in specific cases, how gay and lesbian people are degraded in the treatment they receive from the legal system: simply because of the sex of their erotic and affective partners they see themselves deprived of the benefits extended to other citizens, such as the simple right to testify,

the right to contribute to the public pension system, to be eligible for income tax deductions, and so on. In addition, it can be said that homosexuals have the right to be treated with respect in the public demonstrations of all, and since rhetoric from social groups that incite hatred are not tolerated, the law also serves to repress unlawful public demonstrations. This type of crime victimizes the collectivity, since it breaches democratic coexistence.

In short, much can be said and done by the law; but, given the still oppressive nature for individuals who are publicly degraded, it is legally necessary, on many occasions, for actions to be taken by procedural substitutes. And also because the degradation we are referring to is of a “diffuse” (it can affect anyone) and antidemocratic nature.

REFERENCES

- CASTRO, Marcus Faro. “O Supremo Tribunal Federal e a judicialização da política”. *Revista Brasileira de Ciências Sociais*. São Paulo, v. 12, n. 34, 1997.
- DEVLIN, Patrick. “Morals and the Criminal Law”. In: R. DWORKIN (ed.), *The Philosophy of Law*. Oxford: Oxford University Press, 1991.
- DWORKIN, Ronald. “Liberty and Moralism”. In: *Taking Rights Seriously*. Cambridge, Mass.: Harvard University Press, 1977.
- ERIBON, Didier. *Papiers d'identité*. Paris: Fayard, 2000.
- FRASER, Nancy. “De la redistribución al reconocimiento? Dilemas en torno a la justicia en una época ‘postsocialista’”. In: *Iustitia Interrupta*. Bogota: Universidad de los Andes – Siglo del Hombre Editores, 1997.
- GERSTMANN, Evan. *The Constitutional Under-Class*. Chicago: University of Chicago Press, 1999.
- GOFFMAN, Erving. *Estigma: notas sobre a manipulação da identidade deteriorada*. Rio de Janeiro: Zahar, 1975.

- HART, Herbert. "Immorality and Treason". In: R. DWORKIN (ed.), *The Philosophy of Law*. Oxford: Oxford University Press, 1991.
- _____. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963.
- HERRERO BRASAS, Juan A. *La sociedad gay: una invisible minoría*. Madrid: Foca, 2001.
- HONNETH, Axel. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge, Mass.: The MIT Press, 1996.
- LUCAS, J.R. *On Justice*. Oxford: Clarendon Press, 1989.
- MILL, John Stuart. *On Liberty*. New York: Meridian, 1974.
- MINOW, Martha. *Not only for Myself*. New York: The New Press, 1997.
- OFFE, Claus. "El concepto de los derechos y el Estado del bienestar". In: Enrique OLIVAS (org.), *Problemas de legitimación en el Estado social*. Madrid: Trotta, 1991.
- RIOS, Roger Raupp. *O princípio da igualdade e a discriminação por orientação sexual: a homossexualidade no direito brasileiro e norte-americano*. [Masters Dissertation]. Rio Grande do Sul: Law School, UFRS, 2000.
- ROUANET, Sérgio Paulo. "A coruja e o sambódromo". In: *Mal-estar da modernidade*. São Paulo: Cia. das Letras, 2001.
- SANDEL, Michael. *Democracy's Discontent*. Cambridge, Mass.: Harvard University Press, 1996.
- YOSHINO, Kenji. *Covering*. Paper presented at the Latin American Seminar on Constitutional Law, La Serena, Chile, 1999.
- YOUNG, Iris Marion. *Justice and the Politics of Difference*. Princeton: Princeton University Press, 1990.
- WINTEMUTE, Robert. *Sexual Orientation and Human Rights*. Oxford: Clarendon Press, 1996.

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ABSTRACT

The 1986 UN Declaration on the Right to Development rather than resolve the question of whether there is a Right to Development further polarized the membership of the United Nations. The southern governments contend for a right to development while the rich countries of the North oppose the existence of such a right. In order to resolve this impasse and implement the Declaration, the UN appointed an Independent Expert on the Right to Development, Professor Arjun Sengupta, called for the establishment of a development compact between developed and developing countries. A development cooperation relationship already exists in the form of the Cotonou Partnership Agreement between the European Union and Africa Caribbean and Pacific Countries. This paper will conduct a comparative analysis of Sengupta's development compact and the Cotonou agreement and will argue that while both share common features such as equality, non-discrimination and participation, their convergence ends with regard to the principle of accountability. [Original article in English.]

IMPLEMENTING THE RIGHT TO DEVELOPMENT

E.S. Nwauche and J.C. Nwobike



The Declaration on the Right to Development has been trailed with controversy since its adoption by the United Nations in 1986.¹ While the developing nations in the South argued for resource transfer as the basis of the right to development, the developed countries representing the North denied the existence of such a right. However, the reaffirmation of the right to development at the 1993 Vienna World Conference on Human Rights² provided an opportunity for the debate to move from rhetoric towards actual implementation. The Open Ended Working Group was established and the Independent Expert on the Right to Development, Professor Arjun Sengupta, was mandated to find a way of operationalising the right to development.³ The Independent Expert has recommended a Development Compact⁴ between a specific developing country and the international community and international financial institutions as a mechanism for implementing the right to development.

The purpose of this paper is to examine the practical application of the Development Compact through a comparative analysis of Sengupta's Development Compact and the Cotonou Partnership Agreement,⁵ which is a trade, aid and development agreement between the European

See the notes to this text as from page 107.

Union⁶ and 78 Africa, Caribbean and Pacific states (the ACP group).⁷ The Agreement's main objectives are the reduction and eventual eradication of poverty and the gradual integration of ACP states into the global economy, whilst adhering to the aims of sustainable development.⁸

The significance of this inquiry should be seen in the light of the fact that the controversy surrounding the right to development is one that has deeply divided and continues to divide the northern and southern governments.⁹ In furtherance of our objective we ask, what is the Development Compact Mechanism? Thereafter we examine the conceptual basis for Sengupta's Development Compact, which will provide us with the necessary background information for our comparative analysis.

The Development Compact mechanism

According to Sengupta, a Development Compact would be a country specific-arrangement establishing reciprocal obligations between developing countries and the United Nations system, international financial institutions and bilateral donors. Developing countries would be under the obligation to realize the right to development and the international community under an obligation to cooperate to enable the implementation of the program. If the developing country fulfils its part of the bargain, the international community would need to take the corresponding measure, and provide resource transfers and technical assistance as previously agreed.¹⁰

How can this Development Compact be implemented? The Independent Expert says that any developing nation interested in a development compact must accept to design and implement their national development programs in a rights-based manner, including participation by civil society, national incorporation of human rights instruments and a monitoring role for national human rights institutions.¹¹ The compact could focus on a few core rights, or on the achievement of poverty reduction objectives.¹² Sengupta suggests that the Development Assistance Committee of the Organization for Economic Co-operation and Development (OECD) could organize a "support group" that would

scrutinize, review and approve the national development policies of the developing country; identify financial burden sharing and specific responsibilities and duties of the parties to the compact; and monitor the implementation of the compact. “Callable commitments” to a new financing facility, “the Fund for Financing Development Compacts”, would ensure that resources were available, and might increase total international development assistance.¹³ The financing requirement of a particular compact would be a residual, after implementing other measure of international cooperation, such as bilateral programs.¹⁴

The rationale for the Independent Expert’s Development Compact is that existing programs to implement the right to development set conditionalities on developing countries which are not matched by reciprocal obligations of the international community. According to Sengupta “a successful program is thus as much dependent upon the appropriate design of the program, the detailed specification of responsibilities and a fixing of the accountabilities, as on recognizing the mutuality of the obligations and the reciprocity of the conditionalities”.¹⁵

It is this “mutuality of obligations” and “reciprocity of the conditionalities” that has made the concept of a Development Compact very controversial.¹⁶ Developed countries are uncomfortable with the Development Compact as it seeks to impose some form of conditionality on them. Consequently, the proposal to establish development compacts has neither being fully endorsed or clearly rejected despite it having been discussed at the meetings of the Open Ended Working group on the Right to Development, of the Commission on Human Rights, the General Assembly.¹⁷

The controversy surrounding the Development Compact emanates from the how the rights-based approach to development should be understood. The Independent Expert’s view is that the rights-based approach to development is an empowerment approach as well as requiring the objectives of development to be realized as human rights. In other words, the goals of human and social development are to be regarded as entitlements or as rights that can be legitimately claimed by individuals as right holders against corresponding duty holders, such as the state and the international community. This

position is in sharp contrast with the rights-based approaches held by most development agencies, International Financial Institutions and bilateral donors. They hold that what may be described as an instrumentalist view of human rights. Poverty reduction is held to be the principal objective of development with human rights seen as a means to realize those goals, or principles which should be followed, but not in themselves the objective of development. Simply put, the objective of development assistance is to eradicate poverty, not principally to respect and promote human rights.

It is clear from the above that the dividing line between the contending parties on the rights-based approach is what is the role of human rights in development. In other words should the promotion and realization of human rights be the primary objective of development or should it be seen as a means to achieving development?¹⁸ To better appreciate the positions of the parties above, it would be necessary to examine further the conceptual basis of the Development Compact. This turns on the meaning of the right to development, but specifically on whether there is an obligation of international assistance and cooperation in the light of Articles 55 and 56 of the UN Charter, Article 28 of the Universal Declaration of Human Rights and Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The conceptual basis of development compacts¹⁹

The Development Compact evolved from Sengupta's interpretation of the right to development as a right to a particular process of development which facilitates and enables all fundamental freedoms and rights to be realized, and which expands basic capabilities and the abilities of individuals to enjoy their rights. It cannot be equated with a right to the outcomes of development nor with the sum of existing human rights. It refers not to just the realization of individual rights but also to the way in which these rights are realized and development facilitated.²⁰

Sengupta further argues that poverty reduction could be seen as the target of the right to development, and that national poverty reduction strategies when implemented in a rights-based manner will lead to economic growth with equity and

justice. He defines rights-based approach as “a manner that follows the procedures and norms of human rights laws, and which is transparent, accountable, participatory, non-discriminatory with equity in decision making and sharing of the fruits or outcomes of the process”.²¹

In short, a rights-based development program will regard the goals of human and social development as entitlements or as rights that can be claimed by individuals as right holders against corresponding duty holders, such as the nation-state and the international community.

Sengupta’s interpretation of the rights-based approach to development is based on his desire to draw a distinction between “recognizing the right to development as a human right ... and the creating of legally binding obligations relating to the right”.²² In his view recognizing the right to development would be meaningless without the corresponding obligation relating to that right.²³ Consequently, the right to development creates a legal obligation on the developed countries to provide resource and technical assistance to developing countries when they lack the capacity to do so themselves. This interpretation turns on who are the right and duty holders of the right to development. On Sengupta’s interpretation, the holder of the right to development is the individual while the duty holders are the nation-state at national level and the developed countries at the international level.²⁴

Developed countries deny that there is a legal duty to provide international assistance and cooperation. Rather they are only willing to own up to a moral and political obligation to provide assistance to poor countries. In their view the holder of the right to development is the individual but the holder of the duty is primarily the nation-state with voluntary contribution coming from the international community.²⁵

The developed countries’ view is predicated on their concern that should they accept an obligation to provide international assistance to developing countries, that acceptance may be regarded as *fait accompli* by the developing countries to neglect their primary responsibility for development. Against this background, one is sympathetic towards their resistance. But the duty to provide assistance could be seen differently. As Sengupta points out in his analysis of the duty holders of the right to development the

responsibility for development should be seen to lie at two levels, one national and the other international. This distinction was also emphasized upon by the Committee on Economic Social and Cultural Rights (CESCR) in its General Comment on the nature of states parties' obligation under article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶

If there is a consensus that nation-states have the primary responsibility for development at the national level and the international donor community at the international level then efforts could be devoted to working out criteria, such as human rights indicators and bench marks, for determining when the nation-state has accomplished its primary duty, consequently imposing a duty on the international community to provide necessary assistance.²⁷ Until these human rights bench marks and indicators are established there will continue to be controversy and suspicion on the obligation of international cooperation and assistance.

To conclude this issue, we note that the Development Compact is controversial in that it is based on the premise that duty-holders can be monitored, their culpability for not facilitating a process of development identified, and their commitments enforced. This point was aptly made by Sengupta when he says that the difference in approach between the IMF/World Bank's Poverty Reduction Strategy and the Comprehensive Development Framework as well as approaches of the major bilateral donors, and the implementation of the right to Development as a human right, is the explicit recognition of the obligations of the stakeholders, including those of the international community.²⁸

In the light of the above observations we turn to the comparative Analysis of the Cotonou Agreement to see if it meets the rights-based approach of the Development Compact.

Comparative analysis of the Development Compact and the Cotonou Agreement

The Development Compact and the Cotonou Partnership Agreement share some fundamental similarities. One, they are both development agreements between the North and the South, second, they are contractual in nature and third, their

objectives include poverty reduction and eradication. However, to determine whether the Cotonou Agreement meets the rights-based approach of the Development Compact we need to emphasize on the salient features of the right to development approach. A development approach policy that is rights-based implies a process that is equitable, non-discriminatory, participatory, transparent and accountable. Accordingly, our analysis of the Cotonou Agreement will utilize these rights-based norms.

Equity

The concept of equity derives from the principle of equality of all human beings. The principle of equality is essential to any program aimed at implementing the right to development. Accordingly, a rights based approach in the Development Compact seeks to address the need for equality in the level or amount of benefits accruing from the exercise of the rights. As a result, microeconomic policies and programs must be based on a development framework that reduces income disparities or, at least, does not allow these disparities to increase.²⁹ This involves putting the human person at the centre of the development framework as well as making her the beneficiary of development. This point is recognized in the Cotonou Agreement. It provides that “cooperation shall be directed towards sustainable development centered on the human person, who is the main protagonist and beneficiary of development”.³⁰ But whether the microeconomic policies and programs to be implemented under the Cotonou Agreement will meet the requirement of equality for all remains to be seen. This is because the agreement places emphasis on economic growth through microeconomic structural reforms, privatization and trade liberalization. These are economic policies that have been criticized in the past for having increased poverty and disparities among populations in the third world.³¹

While these economic policies may be helpful in promoting efficiency and high economic growth they often compromise the ability of a country to meet the basic needs and rights of its people. This point has been emphasized in the Human Development Report 2003. The Report suggests that Goals 1-7 of the Millennium Development Goals dealing

with poverty eradication and environmental stability cannot be achieved without policy changes from rich countries as reflected in Goal 8.³² The policies in question are rich country tariffs and subsidies that restrict market access for developing country exports, patents that restrict access to technology that can save lives and unsustainable debt owed to rich country governments and multilateral institutions. Unless there is some movement by the developed nations in this front, the imbalance that currently pervades the world economic system will remain.

Non-discrimination

The principle of non-discrimination is also a fundamental element in the rights-based Development Compact. It requires that in the designing and implementing of all policies and practices there should not be any discrimination on the grounds of race, color, sex, language, political or other opinion, religion, national or social origin, property, birth or other status, not only between the beneficiaries but also between stakeholders and beneficiaries.³³

The principle of non-discrimination is captured in the Cotonou Agreement. Article 9(2) recognizes the equality between men and women. In Article 13(1) the parties reaffirm their existing obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on origin, sex, race, language and religion. Does this commitment to non-discrimination in the Cotonou Agreement meet the threshold of the rights-based Development Compact? We shall consider two examples in this regard: the rights of women and migrant workers.

On gender, the Cotonou Agreement states that systematic account shall be taken of the situation of women and gender issues in all areas – political, economic and social.³⁴ The agreement falls short of specifying how gender mainstreaming can be achieved in practice and does not address the issue of capacity building. A wide study on the gender aspects of the Cotonou Agreement found that “overall the Cotonou Agreement itself is unclear and apparently inconsistent on the role of gender and the implications of integrating gender aspects. The sections on economic and trade co-operation,

structural adjustment and debt, tourism, other 'hard' economic issues, and on instruments and management of the ACP-EU co-operation do not pay any attention to gender let alone show gender sensitivity".³⁵

With respect to the rights of migrants, the agreement seeks to protect the only rights of migrant workers and their family who are legally resident within the territory of the contracting parties.³⁶ It refuses such protection to illegal migrants and their families. The only protection that illegal migrants get is in the course of the procedure initiated for their return to their country of origin. This is discrimination on ground of legal status. Indeed it is arguable that the principle of non-discrimination in the Cotonou Agreement does not meet the threshold of a rights-based approach in the Development Compact.

Participation

According to the principle of participation, all beneficiaries and agents involved in the implementation of the right to development are entitled to participate in, contribute to and enjoy the results of the process of development.³⁷ In practice this means access to information and decision making and the exercise of power in the execution of projects which lead up to the program for development. The Cotonou Agreement contains provisions to promote participatory approach³⁸ and to ensure the involvement of civil society and economic and social players by providing them with information on the ACP-EU Partnership Agreement in particular within the ACP countries. It also ensures the consultation of civil society on the economic social and institutional reforms and policies to be supported by the EU, the facilitation of non-state actors in the implementation of programs and projects as well as providing non-state actors with adequate support for capacity building.³⁹

The practical application of the participatory approach may prove problematic. The reason is that the effectiveness of participation within both the Development Compact and the Cotonou Agreement will ultimately depend on the relative power and status of the parties involved. In the light of the resource and technological gap between the developed and

developing countries, effective participation may be compromised.

This has been a major draw back on Sengupta's Development Compact. It requires the Development Assistance Committee of the OECD to organize a "support group" that would scrutinize, review and approve the national development policies of the developing country seeking the compact. This model according to Piron (2003) does not clearly articulate the participation of non state actors and may weaken country ownership of the development program.⁴⁰ The Cotonou Agreement suffers the same fate. While ACP states were given the responsibility for choosing, preparing the dossier, implementing and managing the various projects and programs to be funded under the Cotonou Agreement the EU retained the sole right for taking financing decisions on the said projects and programs.⁴¹

Transparency and accountability

Accountability and transparency are two other principles associated with the rights-based Development Compact. It involves the specification of obligations for the different duty-holders who will be accountable for carrying out their obligations. In order to make that possible, the programs must be designed in a transparent manner, bringing out openly all the interrelations and linkages between different actions and actors.⁴² The principles of transparency and accountability in this context seek to introduce "reciprocity of the conditionalities" into the development cooperation framework. As noted earlier, the rationale for this approach was the desire of the Independent Expert to move away from the one-sided conditionality imposed on a party (usually the developing country) that has characterized the experience of international cooperation. The Cotonou Agreement is also framed in this one-sided conditionality.

Respect for human rights, democratic principles and the rule of law, by the ACP states, are made essential elements of the Agreement, along with as good governance.⁴³ Subject to an agreed procedure the agreement may be terminated or suspended when any of these essential or fundamental elements are violated.⁴⁴ There is no corresponding obligation under the

Cotonou Agreement on the EU to fulfill its commitment to support the economic and social development of ACP.⁴⁵ This point was noted by Maxwell and Riddell (1998), when they doubted whether the concept of partnership under the Cotonou Agreement could be relied upon to sanction the European Union “for slow delivery” of its commitments to ACP states.⁴⁶

The lack of “mutuality of obligations” and “reciprocity of the conditionalities” in the Cotonou Agreement was no doubt influenced by the position of the international financial institutions and donor countries on the right to development discourse. In the view of the developed countries under international law there is only a general duty to cooperate for development and any assistance offered is based on moral or humanitarian grounds.⁴⁷ This entails certain general duties to provide financial and other appropriate assistance to the South, but there is no specific duty of any particular state to assist another particular state, nor to make available a fixed amount of assistance.⁴⁸ Karin Arts makes this point clearly when she argues that within the Lome Context developing countries do not have a right to development assistance from a particular developed country but as yet can only refer to a general, essentially non-enforceable, notion of the right to development.⁴⁹

The North’s position on the right to development had a far reaching consequence for the Cotonou Agreement. The preamble of the Agreement had urged all parties to have regard to the principles enshrined in the UN Charter, the International Bill of Rights as well as the various regional human rights instruments such as the European Convention on Human Rights, the African Charter on Human and Peoples’ Rights and the Inter American Convention. The 1986 Declaration on the Right to Development was left out entirely from the text of the Cotonou Agreement. The rationale no doubt was to exclude from the Cotonou regime the divisive debate on the right to development.⁵⁰

In the light of the foregoing, it is arguable that the Cotonou Agreement, while it shares some common features with Sengupta’s Development Compact, it is not an example of the Compact. What then are the practical limitations of the Development Compact?

Practical limitations of the Development Compact

The first limitation of Sengupta's Development Compact is how to achieve sufficient participation by all stakeholders, including civil society in the development process. If the compact is to be funded through "support groups" made up of DAC countries, it is likely that the national development programs will only be approved if they meet with donor objectives and international policy prescriptions. This will weaken the country ownership of the programs. This is exactly the finding of Sengupta in his fifth report, where he compares the development compact model to existing partnership approach to development such as the Poverty Reduction Strategy Papers, the World Bank's Comprehensive Development Frameworks and the UN's Common Country Assessments and Development Assistance Frameworks.⁵¹

Secondly, the developed countries' instrumental view of human rights will be another hurdle that the Development Compact will have to scale. The rights-based compact requires that development programs be established with the realization of human rights as their main objective. According to Piron (2003) the practicality of this approach is in doubt in view of the fact that developed countries regard the eradication of poverty as the principal objective of assistance and respect/promotion of human rights as incidental to the objective of poverty reduction.⁵² Moreover, the developing countries are also likely to oppose the Compact because they "are still suspicious of linking international human rights obligations to national development process, and see it as a form of conditionality".⁵³

The third difficulty is the issue of accountability. How can individuals in a developing country claim a right or make an entitlement against a donor country especially in the light of the unavailability of an accountability mechanism at the international level? This question is even more pertinent because in the view of most donor governments, they are only accountable to their home country parliaments. It is to these parliaments that they are expected to account for development policies and not to the citizens of the aid receiving nations.

However, the Committee on Economic Social and Cultural Rights has adopted a different approach. In considering country reports of developed countries, for instance Italy and Japan, it has started questioning delegations on the efforts they have made in the fulfillment of their obligations under Article 2(1) of ICESCR concerning international assistance and cooperation.⁵⁴ Moreover, as stated earlier, the Human Development Report 2003 makes it clear that policy changes by rich countries for aid, debt relief, trade and transfers of technology (Goal 8 of the Millennium Development Goals) are essential to achieving all the other seven Goals.⁵⁵

The fourth limitation deals with the inability of the Development Compact to recognize the current realities in international relations. Most donor countries deploy development aid as a tool in their foreign policy. They use aid as a leverage to attain their foreign policy objectives. For instance during the debate at the UN Security Council for a second resolution authorizing the use of force against Iraq, it was said that the United States was offering aid to third world countries, such as Guinea, on the Security Council in exchange for their votes supporting the resolution for war. Also during the mid-term review of the Lome IV Convention, officials of the European Commission and member states revealed in interviews that they saw increases in aid as the European Union's bargaining chip in getting the ACP states to agree to the wide-ranging changes to Lome that were proposed.⁵⁶ Given this scenario, major players in world affairs, who are incidentally the donor countries, are unlikely to support the Development Compact not only because it imposes sanctionable obligations on them but it also reduces their ability to influence international affairs or negotiations through the instrument of aid.⁵⁷

The Development Compact is based on the Independent Expert's conceptual interpretation of the Right to Development in the 1986 Declaration which the Committee on Economic, Social and Cultural Rights has said was not designed to be operational but a statement of broad principles.⁵⁸ Against this background one could appreciate the practical difficulties the Development Compact will encounter.

Conclusion

The Cotonou Agreement is an operational document between the ACP states and the European Union, while the Development Compact is still on the drawing board as a proposal by the Independent Expert to implement the Right to Development. Their common features include such principles as equality, non-discrimination, and participation. Their convergence however ends with regard to the principle of accountability. Like most development cooperation agreements before it, the Cotonou Agreement imposes the conditionality of respect for the human rights, democratic principles, rule of law and principle of good governance on ACP states without a corresponding obligation on the EU to fulfill its commitment to provide resources for economic and social development.⁵⁹

The lack of reciprocity in obligations is the major difference between the Cotonou and the Development Compact. The compact was designed to assure developing countries that if they fulfill their part of the bargain and carried out their obligations, the program will not be derailed because of the lack of international cooperation. This is achieved by ensuring that the obligation of the right holders and duty holders are clearly identified, their culpability identified and their commitments enforced.

The conceptual basis for the Development Compact is the Independent Expert's view that a rights-based approach to development is one that makes the realization of human rights as its main objective in addition to empowerment. This is radically different from the view of major donors, to wit: the objective of development is to eradicate poverty, not principally to respect and promote human rights. Both sides agree to a right-based approach but part company as to its interpretation, particularly with respect to the issue of accountability. This is the same "conceptual gridlock" that surrounded the adoption of the 1986 Declaration on the Right to Development. Until it is resolved no progress can be made and Sengupta's Development Compact will remain on the drawing board.

NOTES

1. Adopted by General Assembly Resolution 41/128 on December 4, 1986, by a vote of 146 to one against (United States), with eight abstentions, including Germany, Japan, and the United Kingdom.
2. See The Vienna Declaration and Program of Action, June 1993, items 10, 11, 72 and 73.
3. Commission on Human Rights Resolution 1998/72, adopted without a vote on April 22, 1998. To date the Independent Expert has submitted six reports to the Open Ended Working Group.
4. The idea of a "compact" was first floated by the Norwegian Foreign Minister, T. Stoltenberg in the late 1980s and was elaborated upon by other development economists and in the Human Development Reports. See A. Sengupta, "On the Theory and Practice of the Right to Development", 24 *Human Rights Quarterly*, November 2002.
5. The Cotonou Partnership Agreement was signed on 23 June 2000. The full text of the Cotonou Agreement is available at http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm. Last access on 24 January 2005.
6. The EU Countries that were signatories to the Cotonou Partnership Agreement were: Austria, Belgium, Denmark, Germany, France, Spain, Ireland, Greece, Italy, Luxembourg, Netherlands, Portugal, Sweden, Finland and United Kingdom. From 1st May 2004, the European Union comprises 10 new member states: Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia and Slovenia.
7. The ACP group was founded in 1975 with the signing of the Georgetown Agreement. The ACP group is made of the following Countries: Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cook Islands, Democratic Republic of Congo, Djibouti, Dominican Republic, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guinea Bissau, Guyana, Haiti, Ivory Coast, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, St Kitts and Namo, St Lucia, St Vincent and the Grenadines, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, Sudan,

Suriname, Swaziland, Tanzania, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Zimbabwe. It is worthy of note that Cuba is a member of the ACP Group but is not a signatory to the Cotonou Agreement.

8. Article 1 of the Cotonou Partnership Agreement.

9. See Stephen Marks, "Obstacles to the Right to Development", pp. 2-6. (Where he recounts the political posturing that goes on between the Northern and Southern governments at the United Nations in respect of the Right to Development.) Available at <http://www.hsph.harvard.edu/fxbcenter/FXBC_WP17—Marks.pdf>. Last access on 15 March, 2005.

10. See Arjun Sengupta, "Fourth Report of the Independent Expert on the Right to Development E/CN.4/2002/WG.18/2 20. December 2001, paragraph 54.

11. *Id.*, paragraphs 59-61.

12. *Id.*, paragraph 57. See also A. Sengupta, "Second Report of the Independent Expert on the Right to Development", E/CN.4/2000/WG.18/CRP.1 (11 September 2000), wherein the Independent Expert argues that poverty reduction could be seen as the target of the right to development, and that national poverty reduction plans, when implemented in a rights-based manner, can be a way in which to realize the right.

13. See Sengupta, 2001, *op. cit.* (note 10), paragraphs 68-74.

14. *Id.*, paragraph 63.

15. *Id.*, paragraph 54.

16. For a critique of the Development Compact, see Laure-Hélène Piron, "Are Development Compacts Required to Realize the Right to Development?". In: Franciscans International (ed.), *Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development*, pp. 46-61. Geneva, 2003.

17. *Id.*, p. 46.

18. For an extensive discussion on the constitutive and instrumental role of human rights in development, see Amartya Sen, *Development as Freedom*. Oxford: Oxford University Press, 1999, Chapter 2.

19. For an overview of the Development Compact, see Sengupta, 2002, *op. cit.* (note 4), pp. 838-889.

20. *Id.*, pp. 848-852.

21. Id., *ibid.*
22. Id., at p. 842.
23. Sengupta, 2001, *op. cit.* (note 10), paragraph 53.
24. Sengupta, November 2002, *op. cit.* (note 4) pp. 876-880.
25. See L.-H. Piron, *The Right to Development: A Review of the Current State of the Debate for the Department of International Development*, April, 2002. Available at <http://www.odi.org.uk/pppg/publications/papers_reports/dfid/issues/rights01/right_to_dev.pdf>. Last access on 25 January 2005.
26. See General Comment 3, paragraphs 11-14. See also the "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights". 9 *Human Rights Quarterly*, 1987, pp. 122-135, paragraphs 25-29. Available at <<http://www2.law.uu.nl/english/sim/instr/limburg.asp>>. Last access on 24 January 2005.
27. See Paul Hunt, "Using Rights as a Shield". *Human Rights Law and Practice*, v. 6, n. 2, June 2002. (Where he states that the CESCR is working on human rights indicators and bench marks.)
28. Sengupta, 2001, *op. cit.* (note 10), paragraph 52. This point was also made in Sengupta, "Fifth Report on the Independent Expert on the Right to Development". E/CN.4/2002/WG.18/6. 18 September 2002, pp. 12-15.
29. Sengupta, 2001, *op. cit.* (note 10), paragraphs 26-28.
30. Article 9, paragraph 1 of Cotonou Agreement.
31. In its 1989 Annual Report the World Bank admitted that concerns about the effects of its adjustment policies has been raised: "Little is known about the overall effect of adjustment programs on poverty" (p. 81).
32. See the Human Development Report 2003, p. 11. Available at <<http://www.undp.org/hdr2003/>>. Last access on 25 January, 2005.
33. Sengupta, 2001, *op. cit.* (note 10), paragraph 29.
34. Article 31 of the Agreement.
35. Karin Arts & WIDE, "Gender Aspects of the Cotonou Agreement", WIDE, January 2001, pp. 11-12. Available at <<http://www.genderandtrade.net/Cotonou/WIDE%20Gender%20and%20Cotonou.pdf>>. Last access on 25 January 2005.

36. Article 13 of the Cotonou Agreement.
37. Sengupta, 2001, op. cit. (note 10), paragraph 30.
38. See Articles 2 and 9 of the Cotonou Agreement.
39. See Articles 4 and 5 of the Cotonou Agreement.
40. Piron, 2003, op. cit. (note 16), pp. 56-57.
41. Article 57 of the Cotonou Agreement.
42. Sengupta, 2001, op. cit. (note 10), paragraph 31.
43. See Article 9 of the Cotonou Agreement.
44. See Articles 96 and 97 of the Cotonou Agreement.
45. See generally Articles 25, 26 and 27 of the Cotonou Agreement.
46. See Simon Maxwell & Roger Riddell, "Conditionality or Contract: Perspectives on Partnership for Development". *Journal of International Development*, v. 10, pp. 256-261, 1998.
47. See for instance the United Kingdom's view in DFID, "Eliminating World Poverty: Making Globalization Work for the Poor". White Paper on International Development, December 2000, p. 14 [WP11].
48. See Philip Alston & Gerard Quinn, "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic Social and Cultural Rights". 9 *Human Rights Quarterly*, 156, 1987. See also Mathew Craven, "The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development". Oxford: Clarendon Press, 1995. p. 49. Cf. Paul Hunt, Manfred Nowak and Saddiq Osmani, "Human Rights and Poverty Reduction Strategies", a discussion paper prepared for the UN office of the High Commissioner for Human Rights; February 2002, p. 18.
49. Karin Arts, "Integrating Human Rights into Development Cooperation: The Case of the Lome Convention". Kluwer Law International, 2000, p. 44.
50. The EU position on the Right to Development appears to be changing. In this regard, Ambassador Mary Whelan of Ireland recently declared: "On behalf of the European Union, I wish to reiterate our commitment to the Right to Development, as set out in the Vienna Declaration and Program of Action. It is also a commitment that is manifested in the development co-operation partnerships and agreements that we have with countries throughout the

world". See Address delivered by Ambassador Mary Whelan, Ambassador of Ireland to the United Nations, on the Right to Development at the 60th Session of the United Nations Commission on Human Rights on 23 March 2004.

51. See Sengupta, "Fifth Report on the Independent Expert on the Right to Development", E/CN.4/2002/WG.18/6. 18 September 2002.

52. See Piron, 2003, op. cit. (note 16), p. 56.

53. Id.

54. See Hunt, 2002, op. cit. (note 27) pp. 113-114.

55. Sengupta, 2002, op. cit. (note 28).

56. Interviews: Brussels, 26 and 27 May 1993, cited in William Brown, *The European Union and Africa*. London: I.B. Tauris, 2002, p. 134.

57. For the role human rights play in the foreign policy of developed countries see Peter Baehr, *The Role of Human Rights in Foreign Policy*. 2.ed. Macmillan Press Limited, 1996.

58. See "The Incorporation of Economic, Social and Cultural Rights into the United Nations Development Assistance Framework (UNDAF) Process". Comments adopted by the Committee on Economic Social and Cultural Rights, 15 May 1998, paragraph 5; cited in Anne Orford, "Globalization and the Right to Development". In: P. Alston (ed.), *Peoples' Rights*, pp. 127-172. Oxford: Oxford University Press, 2001.

59. This has been described as conditionality in its purest form. See Peter Hilpold, "EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance". 7 *European Foreign Affairs Review*, n. 1, pp. 53-72, 2002.

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ABSTRACT

Actions taken during the course of armed conflict have, through the ages, led to significant environmental destruction. Until recently this was regarded as an unfortunate but unavoidable consequence of conflict, despite its sometimes disastrous impact on human populations. However, as the nature and extent of environmental rights have come to be more widely recognized, it is no longer the case that the deliberate destruction of the environment to achieve military and strategic goals can be accepted, particularly given the development of weapons capable of widespread and significant damage. This article argues that the deliberate destruction of the environment during wartime should, in appropriate circumstances, be regarded as a 'Crime against the Environment' and should attract international criminal responsibility. It examines the existing international rules that apply to the protection of the environment during armed conflict and explores whether, and to what extent, the International Criminal Court may have competence to deal with acts that significantly damage the environmental rights of targeted populations. [Original article in English.]

HUMAN RIGHTS, THE ENVIRONMENT AND CONFLICT: ADDRESSING CRIMES AGAINST THE ENVIRONMENT*

Steven Freeland

*The environment is not an abstraction but represents the living space,
the quality of life and the very health of human beings,
including generations unborn.¹*



It is well recognized that environmental issues constitute an important element of the fundamental rights of human beings. The 1972 Stockholm Declaration provides for the “fundamental right to ... an environment of a quality that permits a life of dignity and well-being”.² Sixteen years later the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights affirmed the “right to live in a healthy environment”. This right has also been built into the national constitutions of a number of countries. While there remains some debate as to the precise legal scope of current and emerging notions of “environmental rights”, there is no doubting the strong relationship between human rights and the environment.

Similarly, it is clear that the deliberate despoliation of the environment can have catastrophic effects, not only in ecological terms but also on human populations. Actions that have been strategically planned to destroy an important part of the environment represent a breach of the basic human rights of the targeted individuals. The relationship between human security and a safe and habitable environment is fundamental, particularly in relation to access to natural resources. If this intricate inter-relationship is significantly affected by the deliberate actions of others, the lives and/or livelihoods of those

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See the notes to this text as from page 133.

The references of the sources quoted in this text are found on page 137.

reliant on the natural environment may be jeopardized or even destroyed.

Yet, we have been witness to many deliberate acts aimed at destroying the natural environment in order to achieve strategic goals, particularly in the context of armed conflict. The deliberate destruction of the environment as a method of threatening human security has, increasingly, been a tactic employed in conflict,³ giving rise to terms such as “ecocide” or “geocide”. One of the tragic consequences of conflict is that the natural environment is almost always vulnerable to the aims or weapons of warfare. Few can forget the haunting images of the 736 burning Kuwaiti oil well heads, which had been deliberately ignited by retreating Iraqi forces towards the end of the first Iraq conflict, or the systematic draining of the al-Hawizeh and al-Hammar marshes in southern Iraq by the Saddam regime, which effectively destroyed the livelihood of the 500,000 Marsh Arabs who had inhabited the area of this unique ecosystem.

More recently, it has been estimated by Human Rights Watch that, during the course of the 2003 invasion of Iraq, United States and British forces used almost 13,000 cluster bombs – containing almost 2 million munitions – causing very significant human and environmental damage. There are ongoing reports of the use of depleted uranium shells by coalition forces in Iraq, some of which have a “half-life” of many millions of years. At the time of writing this article, the world is witnessing a humanitarian and environmental catastrophe unfolding in the western region of Darfur in Sudan, which has seen the poisoning of vital water wells and drinking water installations as part of a deliberate Government-supported strategy by the Arab Janjaweed militia to eliminate or displace the ethnic black Africans living in that region.⁴

Moreover, there is another equally significant, but perhaps not yet fully understood, link to be drawn between the environment and human conflict. Access to natural resources – or the lack of such access – can itself be the trigger for conflict. One of the underlying tensions between Israel and Syria is the issue of access to water. In both the Democratic Republic of Congo and Haiti, the United Nations Environment Programme (UNEP) has reported that environmental damage has been a

major cause of political unrest and conflict. While there is work to be done to more accurately determine the nature and extent of the link between environmental degradation, poverty and political and social conflict, the logic of some form of connection appears to be undeniable. This was recognized by the United Nations Security Council, which in January 1992 concluded that:⁵ “The absence of war and military conflicts amongst states does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters” (emphasis added).

Deliberate actions intended to cause significant environmental destruction and which significantly effect particular groups of people represent not only a feature of conflict strategy but also a root cause for the escalation of the conflict itself. It is therefore important that there are appropriate enforcement measures in place to respond to deliberate environmental destruction during armed conflict.

In an era in which morality, ethics and international law now recognize the rights of individuals, and notions of environmental rights and ecological rights are becoming increasingly accepted, it is only natural that the deliberate destruction of the environment during armed conflict should be regulated by strict international legal rules. Moreover, such destruction should, in appropriate circumstances, also give rise to **individual criminal responsibility** at the international level. If the environmental destruction is carried out in such a manner as to cause severe destruction and consequent human suffering, then such actions should be regarded as constituting a crime that offends the international community as a whole and thus be seen as an international crime – properly labeled as a “Crime against the Environment”.

In addition, a legal regime that allows for individual criminal responsibility at the international level in cases of significant and deliberate destruction of the environment would cause military and political decision-makers to consider more closely the consequences of their actions. It would elevate the importance of protecting the environment and of environmental rights, even in situations of wartime, by publicly

stigmatizing actions that disregard those rights. In this way, the destruction of the environment could no longer be regarded as collateral consequence of conflict.

In this context, this article has two purposes. Firstly to examine the major existing international law rules that apply to the protection of the environment during wartime and ascertain the extent to which such actions attract criminal responsibility. It will be seen that in this regard, existing international law largely avoids imputing individual criminal responsibility for any large-scale destruction deliberately occasioned. This article will then explore whether, and in what circumstances, actions designed to deliberately destroy the environment may fall within the jurisdiction of the International Criminal Court (ICC) under the terms of the 1998 Rome Statute of the International Criminal Court (Rome Statute). The conclusion reached is that, although there is only minimal reference to the environment within the Rome Statute, there are a number of potential options to “pigeon hole” environmental crimes within the definition of those crimes set out in that instrument.

Individual criminal responsibility or state responsibility?

Before examining whether and how the commission of a crime against the environment may possibly attract individual criminal responsibility, there is a preliminary, but important, question to resolve: who should be held responsible for environmental crimes in circumstances where there is significant state involvement in the destruction – just the appropriate individuals or, in addition, the relevant state?

In relation to the commission of international crimes, the judgment of the Nuremberg International Military Tribunal represents the traditional view. The Tribunal stated that “international law imposes duties and liabilities upon individuals as well as upon states has long been recognized ... Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ...”.

This is reflected in the jurisdictional mandates of all

subsequently established international criminal tribunals, including the ICC. These courts are generally not designed to investigate and prosecute actions taken by non-natural entities, particularly states. The ICC is empowered to exercise jurisdiction over “natural persons” but not states. There is currently no possibility that an international criminal prosecution of a state may be instigated in the ICC for any international crime, including actions that are intended to produce significant environmental degradation. Instead states might have some degree of legal responsibility for the commission of international crimes under the principles of state responsibility, or blame might be imputed to a state as a result of the commission of an international crime by one of its officials.

However, this is quite a different level of culpability from accepting the possibility that a state itself may be **criminally responsible**. This distinction is more than a question of semantics – it carries with it the message that, irrespective of the degree of involvement by the machinery of a state, its culpability for actions that precipitate very serious consequences for humans and the environment is something less than the standards by which we judge individuals.

Yet, it was not long ago that the notion of an international crime committed by a state was contemplated by the International Law Commission (ILC). Having been given the task in 1949 of formulating draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC introduced draft Article 19 during the early 1970s. When specifying the form that an internationally wrongful act by a state may take, this draft Article drew a distinction between international delicts and international crimes.

Within the definition of an international crime,⁶ the draft Article included actions from which such a crime may result, including:⁷ “(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas”.

Draft Articles 52 and 53 then provided for the consequences of the commission by a state of an international crime, including the possibility of collective sanctions.⁸

Draft Article 19 gained partial support at the time of its introduction, mainly from developing and eastern European

states. In its commentary on the draft Article, the ILC commented that:⁹ “Contemporary international law has reached the point of condemning outright the practice of certain states in ... acting ... gravely to endanger the preservation and conservation of the human environment. ... these acts genuinely constitute ‘international crimes’, that is to say international wrongs which are more serious than others and which as such, should entail more severe legal consequences”.

Despite these views, draft Article 19 gave rise to much controversy among other states as well as commentators and various members of the ILC itself, some of whom argued that it suggested an acceptance of the idea of collective responsibility of the entire population of a state for the actions of their leaders, as well as the notion of collective punishment.¹⁰ In the end, draft Article 19 (and its associated draft Articles 52 and 53) was not included in the version of the Articles that was adopted by the ILC in 2001 and noted by the General Assembly later that year.¹¹ Indeed, it is unlikely that the notion of international criminal responsibility of a state currently represents the general view and practice of states (and hence customary international law), though the sentiments enunciated in draft Article 19 may reflect an emerging trend in relation to the law on environmental damage resulting from deliberate state policy.

In this regard, there have been various enforcement mechanisms instituted at the international level against a state to deal with some aspects of deliberate destruction of the environment. Following the environmental damage occasioned in both Kuwait and Saudi Arabia by the Iraqi regime in the period during and immediately following the invasion of Kuwait, the United Nations Security Council passed Resolution 687 which, in part, provided that Iraq was “... liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait”.¹² A compensation fund was established to be administered by a United Nations Compensation Commission (UNCC),¹³ which also deals with claims currently totaling US\$ 350 billion for damage caused by Iraq’s invasion and subsequent occupation of Kuwait.

While the award of damages in such a case is an important enforcement mechanism designed to remediate the damage caused to the environment, it may not be an adequate measure to reflect the serious human consequences of the action. Many lives may have been lost or severely affected by those actions. Given that international law is not yet in the position to find the state criminally responsible, it is appropriate to consider how those individuals who orchestrated the environmental damage to suit certain specific purposes can themselves be prosecuted in an international forum.

It is therefore necessary to examine the existing international law rules that apply to the regulation of armed conflict.

The existing law for the protection of the environment during conflict

It is an unfortunate fact that warfare and armed conflict appear to be unavoidable elements of human society. Moreover, it is inevitable that warfare will result in environmental damage, particularly given the rapid advances in weapons technology. There are two main types of international treaties that are relevant in this regard – Multilateral Environmental Agreements (MEAs) and those treaties that form the core of international humanitarian law (*jus in bello*), which regulate the overall conduct of warfare. Within this latter class, there are a small number of treaties that are specifically directed towards the protection of the environment.

Events such as the first Gulf War in 1991 have highlighted the inadequacy of these existing principles, at least in relation to the imposition of criminal responsibility. It is clear that individuals do bear a responsibility towards the environment; however the concept of international environmental crimes has not, until quite recently, been the subject of specific focus in international humanitarian law or in the otherwise rapid expansion of international criminal law, and has largely been ignored by international environmental law.

Various international environmental instruments do specify the general need for all persons to “protect and preserve the environment”.¹⁴ This duty also extends to states, particularly in the context of conflict. For example, Principle

24 of the 1992 Declaration of the United Nations Conference on Environment and Development (Rio Declaration) states:¹⁵ “Warfare is inherently destructive of sustainable development. states shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary”.

However, the international environmental legal regime that is in place does not adequately take account of the increased danger of massive destruction to the environment occasioned by individuals and states with access to new and potentially devastating weapons or technology. Multilateral efforts to address the issue of environmental damage generally focus instead on the elaboration of legal regimes specifying liability arising from a breach of an international obligation, giving rise to traditional principles of state responsibility. Even then, important but unresolved questions relating to state responsibility for the environment are often not fully addressed.

In addition, states are bound by their obligations under customary international law as they relate to the environment, as well as any MEAs to which they are party. A breach of these principles will also invoke the principles of state responsibility.¹⁶ While issues of deliberate environmental damage are subject to the various “non-criminal” legal processes applicable under the terms of the principal MEAs, this may not be sufficient given the magnitude of the destruction that may result from such actions.

To the extent that MEAs do make reference to criminal responsibility and enforcement, they generally prescribe that this is to be undertaken at the **domestic** level, based on traditional national jurisdiction principles. For example, Articles 213-222 of the 1982 United Nations Convention on the Law of the Sea specifies that the appropriate jurisdictional state (which will depend on the precise circumstances) shall enforce its domestic laws and regulations with respect to pollution of the marine environment. This is also the approach recently proposed by the Council of Europe and the European Commission, which have both drafted instruments that propose the protection of the environment through national criminal law.¹⁷

Reliance on this domestic law approach may not reflect adequately the extent of the potential environmental

consequences of conflict. In addition, the various criminal sanctions expressly relating to the environment in national jurisdictions are neither consistent nor universal. Political will on the part of states is necessary to introduce and enforce adequate national laws, and this may not always be present. Indeed the United Nations General Assembly has expressed the concern that the existing international law prohibitions of damage and depletion of natural resources “may not be widely disseminated and applied”.¹⁸ The importance of the environment therefore demands that protection is enhanced at the international level with sufficient and effective deterrent and enforcement mechanisms, including criminal sanctions, to be imposed on those who are responsible for such actions.

The fundamental principles of international humanitarian law largely stem from the body of law set out in the 1899 and 1907 Hague Conventions and the four 1949 Geneva Conventions. These instruments impose rules that *inter alia* limit the method and means of conducting warfare and also provide for classes of protected persons and protected objects. As an example, the Hague Conventions applied the laws of war to restrict the use of poison or poisoned weapons and asphyxiating gases, which were further extended by the 1925 Geneva Protocol. These instruments, although crucial in the development of rules that regulate the conduct of warfare, did not expressly address the protection of the environment.

A number of other instruments were also relevant to the issue of environmental degradation during conflict. For example, the 1963 Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water, the 1996 Comprehensive Nuclear Test-Ban Treaty and the 1972 Convention on Bacteriological and Toxic Weapons each specify limits as to the proliferation, testing and usage of particular weapons of mass destruction, whose use during conflict would quite obviously cause significant environmental damage. However, instruments such as these were not so much implemented for the purposes of environmental protection but rather more as part of the evolution of the laws of armed conflict, particularly as developments in technology gave rise to the introduction of further weapons capable of causing significant and indiscriminate destruction.

There are a small number of treaties that specifically refer

to the protection of the environment in the context of conflict. The 1977 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) was the first instrument that dealt with deliberate destruction of the environment during warfare, although it also applies in time of peace. It prohibits “environmental modification techniques having widespread, long-lasting or severe effects”, the breach of which allows for a complaint to be made to the United Nations Security Council for action. It does not, however, create a regime for civil or criminal liability in the case of breach.

The most directly relevant instrument for the protection of the environment within those rules regulating the conduct of warfare is Additional Protocol I of the 1949 Geneva Conventions. Article 35(3) prohibits as a “basic rule” conduct intended or expected to cause “widespread, long-term and severe damage to the natural environment”. This is a significantly higher threshold than appears in ENMOD, requiring not only that the damage be long-term (meaning a period of years or even decades) but that it be widespread **and** severe.

Additional Protocol I makes express reference to the need to protect the environment and repeats the prohibition in Article 55(1), linking it to “the health or survival of the population”. Further, the instrument proceeds to create criminal sanctions in relation to “grave breaches” to the four Geneva Conventions or Additional Protocol I, declaring that such conduct is to be regarded as a war crime.¹⁹ This is a significant step forward in protecting the environment in times of warfare but in practical terms it may be almost impossible to demonstrate the necessary threshold of damage in order to sustain a conviction for a grave breach of these prohibitions.

The high threshold under existing international rules

The scope of Articles 33(3) and 55(1) of Additional Protocol I have been considered both directly and indirectly in a number of forums. In its Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* Case, the International Court of Justice confirmed the customary international law obligation of states to “ensure that activities within their jurisdiction and

control respect the environment of other states or of areas beyond national control ...”²⁰

However, the Court did not prescribe any criminal responsibility for a breach of this obligation, which instead would attract the principles of state responsibility.

The Court considered the provisions of Additional Protocol I and affirmed a general obligation to protect the natural environment against widespread, long-term and severe environmental damage – without providing any guidance as to the meaning of these threshold requirements – and that attacks against the environment by way of reprisals were prohibited.²¹ However, it did not regard environmental concerns as representing “obligations of total restraint” during armed conflict. Instead, environmental concerns were to be regarded as an element to be taken into account when assessing what is “necessary and proportionate in the pursuit of legitimate military objectives”.²²

In essence, the International Court of Justice declined to promote the protection of the environment above questions of military necessity. It accepted the inevitability of environmental destruction during warfare and repeated the same high threshold requirement for damage specified in Additional Protocol I before such damage constituted a breach of international law.

It is possible that the Court may have the opportunity to revisit this issue. Following the bombing of Serbia and Kosovo by NATO forces during “Operation Allied Force” (March – June 1999), the Government of Yugoslavia (now Serbia and Montenegro) initiated proceedings in the International Court of Justice against ten NATO member states. The applicant sought an order for provisional measures, pleading that the NATO states had violated their obligation “to protect the environment” and not to cause considerable environmental damage. For example, Yugoslavia claimed: “The bombing of oil refineries and oil storage tanks as well as chemical plants is bound to produce massive pollution of the environment, posing a threat to human life, plants and animals. The use of weapons containing depleted uranium warheads is having far-reaching consequences for human health”.²³

The International Court of Justice declined to grant provisional measures and the cases have thus far proceeded

largely on preliminary questions of jurisdiction. The NATO states are all claiming that the Court does not have, and should not exercise jurisdiction to hear the matter. Already the actions against Spain and the United States have been dismissed on this basis. It is unclear whether the Court will find that it has jurisdiction in relation to the cases brought against the other eight NATO countries. In the event that the Court finds the jurisdictional questions in the applicant's favor, it is then that it will in all likelihood be required to address the obligations of a state to protect the environment in times of conflict.

The actions of NATO during Operation Allied Force have been considered elsewhere. In *Bankovic and Others v. Belgium and 16 Other Contracting States*,²⁴ the European Court of Human Rights Grand Chamber ruled that an application brought against all European NATO countries that were a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms by the relatives of individuals killed in the bombing of the Serbian Television and Radio Station was inadmissible due to jurisdictional grounds.

In addition, the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the former Yugoslavia (ICTY) commissioned a committee of experts (the Committee) to determine whether there was evidence justifying an investigation by the OTP into the actions of NATO personnel during that period. In the end, the Report of the Committee concluded that there was insufficient evidence to warrant such an investigation, a recommendation that was accepted in its entirety by the OTP.²⁵

During the course of preparing the Report, the Committee considered possible environmental damage caused by the actions of NATO personnel. In this respect, it looked at the requirements of Articles 35(3) and 55 of the Additional Protocol I and confirmed the customary international law obligation to avoid **excessive** long-term damage to the environment, even during the bombing of a legitimate military target.²⁶ The Report concluded, however that this represented a "very high threshold of application". However, the Committee could not, in the end, clearly define the meaning of "excessive" in the context of long-term damage

to the environment and could not therefore conclude that the actions of NATO personnel breached the standard. Moreover, it reached this conclusion even though it recognized that the actual impact of the NATO bombing campaign was “unknown and difficult to measure” at the time.

Notwithstanding the failure of the Committee to recommend the initiation of a formal investigation into these matters, such an investigation was quite within the powers of the OTP and would have been justified. It was clear that the specific actions considered by the Committee fell within the jurisdiction of the ICTY. It is equally the case that similar actions may, in certain circumstances, also fall within the mandate of the ICC, assuming that the jurisdiction *ratione temporis* and other preconditions to the exercise of jurisdiction specified in the Rome Statute are satisfied.

The applicability of the Rome Statute

The ICC was established to address “the most serious crimes of concern to the international community as a whole”.²⁷ The Rome Statute came into force on 1 July 2002, following the 60th ratification of the treaty, and at the time of writing there are 97 parties to the treaty. The ICC has jurisdiction with respect to the following crimes committed after 1 July 2002:²⁸

- a. *The Crime of Genocide.*
- b. *Crimes against Humanity.*
- c. *War Crimes.*
- d. *The (as yet undefined) Crime of Aggression.*

In 2001, a study prepared by the United States Army Environmental Policy Institute²⁹ concluded that the ICC was unlikely to be called upon to determine responsibility for environmental crimes arising from military actions, at least in relation to international peacekeeping operations. The study focused only on the definition of War Crimes in the Rome Statute, and then only on Article 8(2)(b)(iv), the only provision in the instrument that expressly refers to the environment.

In view of the need to ensure that actions constituting environmental crimes are prosecuted, it is appropriate to consider not only the scope of that one provision, but also

other provisions of the Rome Statute in order to determine whether they could, in certain circumstances, be applied to actions designed to render significant damage to the environment. The following three sections will therefore consider in turn each of the (defined) crimes within the jurisdiction of the ICC.

Environmental crimes as genocide?

The Crime of Genocide is defined in Article 6 of the Rome Statute. It mirrors the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), as well as the Statutes for both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Genocide has been referred to as the “crime of crimes” and requires a very high threshold of intent before a conviction can be upheld – an “intent to destroy, in whole or in part” a particular group based on “national, ethnical, racial or religious” criteria.³⁰

Despite the significance of the Genocide Convention, the meaning of this definition was not judicially considered for many years. Whilst there were a small number of domestic cases that looked at its scope,³¹ widespread political will in relation to the enforcement of the crime was lacking at the national level.³² In addition, no “international penal tribunal” was established by the parties to the Genocide Convention under Article VI. Indeed, it was not until 1998 – exactly fifty years after the adoption of the Genocide Convention – that an international criminal tribunal (the ICTR) first looked at the meaning of the definition in any detail and we have only recently seen the first convictions for the crime.³³

The definition of genocide does not include actions intended to destroy (in part or whole) a group based on their **culture** – there is no concept at international criminal law of cultural genocide, despite the fact that many regard it as necessary. Indeed the notion of cultural genocide was deliberately excluded from the primary deliberations and negotiations leading to the finalization of the definition of genocide in the Genocide Convention. The precise scope of the crime was crafted on the basis that it would be necessary

to categorize the victimized group within one of the four headings referred to above before it could be found to have been committed.

Putting this aside for one moment, however, one could certainly envisage acts of deliberate degradation of the environment that are intended to destroy a group (or part) by damaging its ability to carry on with its way of life and its culture. Indeed, the Rome Statute specifies that “... deliberately inflicting on the group conditions of life calculated to bring about its physical destruction ...” would fall within the type of acts that constitute genocide, assuming that the other elements of the crime are also present.³⁴

The draining of the marshes in southern Iraq or the destruction of forests upon which local indigenous groups depend, may fall within this description. Even so, it may be that the targeted group does not constitute one of the established groupings within the definition. It appears at first sight that this would defeat the possibility of classifying the actions as constituting genocide (even assuming that all other elements of the crime are present) within the jurisdiction of the ICC.

The categorization into (one of) the four specified groups in the definition of the crime is not, however, as clear-cut as first appears. In a recent case before Trial Chamber I of the ICTR, *Prosecutor v. Akayesu*,³⁵ the Court was faced with the prosecution of a burgomaster of a local commune who had been charged with genocide. The accused was shown to have the requisite intention to “destroy” the Tutsis. However, the Trial Chamber felt that it was unable to “label” the Tutsis as falling within any of the established groupings within the definition of the crime. Instead, the Court extended the meaning of Article 2 of the ICTR Statute to apply to a “stable” and “permanent” group³⁶ and, as a result, found the accused guilty of the Crime of Genocide. Whilst this may have been a laudable result in the circumstances of that case, the Court clearly read the express terms of the definition beyond their ordinary meaning.³⁷

Indeed, this approach was not followed in *Prosecutor v. Sikirica and Others*,³⁸ which affirmed that, unlike some national jurisdictions, the ICTY has consistently not regarded cultural genocide as falling within the definition of the treaty

Crime of Genocide. Furthermore, case law in the ICTY also confirms that “destroy” in the treaty-based definition of genocide means the **physical** destruction of the relevant group.³⁹

Nevertheless, the expansive approach taken by the ICTR in Akayesu highlights a number of aspects that may be relevant to the issue of environmental crimes. If an extension of the relevant groupings was eventually to be accepted, it could quite feasibly be applied to cultural genocide perpetrated through the destruction of the natural habitat or resources upon which indigenous or minority populations are dependent. Moreover, it also demonstrates the inadequacies of the current definition of genocide in relation to the complex nature of actions perpetrated in an attempt to eliminate particular groups. It is clear that a definition coined almost 50 years ago to apply to the most horrendous of human acts should be updated to apply to contemporary events.

In the absence of this, however, it is unlikely that the destruction of the natural environment would *per se* be prosecuted as an act of genocide. This is more so given the need for the Prosecutor and the ICC not to be seen as “creating” crimes, which may inhibit future acceptance of the Court among a broader spectrum of the international community.

Environmental crimes as Crimes against Humanity?

Although the term had been used earlier, “Crimes against Humanity” was not formally classified as a separate category of crime until after the Second World War. It was included in the Nuremberg Charter and the Tokyo Charter, and its scope has evolved over time in the various Statutes of the *ad hoc* international tribunals. The definition of Crimes against Humanity in the Rome Statute is broader than previous formulations and is largely based on existing customary international law, although it differs in a number of respects.⁴⁰

Despite the expansion of its reach, there is no specific mention of the environment in the definition of the crime, although some jurisprudence in the *ad hoc* Tribunals has made reference to environmental damage when discussing the broader aspects of the crime. However, it appears that the definition of the crime in the Rome Statute allows for the

possibility that environmental crimes do fall within its ambit. The most probable options in this regard would be acts falling within Articles 7(1)(h) and 7(1)(k) of the Rome Statute. Article 7(1)(h) identifies “... persecution against any identifiable group or community on political, racial, ethnic, cultural, religious, gender ... or other grounds ... recognized as impermissible under international law ...” (emphasis added). In Article 7(2)(g) the characterization of the targeted groups is wider than for the Crime of Genocide. “Persecution” is defined as “the intentional and severe deprivation of fundamental rights contrary to international law ...”.

The deliberate destruction of habitat or of access to clean and safe water or food on a significant scale could represent a breach of the fundamental human rights of the individuals within the targeted group, as would some other acts of environmental destruction. The various instruments that collectively constitute the “International Bill of Rights”⁴¹ and customary international law confirm these as representing fundamental rights of an individual.

Another aspect of Crimes against Humanity that may be relevant is the “catch all” Article 7(1)(k), which refers to “... other inhumane acts ... intentionally causing great suffering or serious injury to body or to mental or physical health”. Once again, one could envisage the possibility of acts that constitute environmental crimes falling within this definition.

Consequently, the concept of Crimes against Humanity, even as presently defined in the Rome Statute, represents a possible tool for the prosecution of environmental crimes before the ICC. Of course it will be necessary for the other elements of the crime, including the need for a “widespread or systematic attack directed against any civilian population, with knowledge of the attack” to be proven before a conviction can stand. Certainly there is a greater possibility that this crime, rather than genocide, would be used to bring such a prosecution, particularly given the broader scope of the crime. Indeed, it may well be strategically advantageous and symbolically important for the ICC Prosecutor to indict an act of environmental crime under the heading of Crimes against Humanity in addition (or as an alternative) to War Crimes, given that the former is generally thought of as the more heinous crime of the two.⁴²

War Crimes and the environment

As mentioned above, the environment is expressly referred to in one provision of the definition of War Crimes in the Rome Statute. Article 8(2)(b)(iv) specifies that, within the scope of an international armed conflict, the following actions could constitute a war crime: “Intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

This provision requires a balancing of damage as against military advantage, but sets a very high threshold of injury to the environment before the action falls within the scope of the crime. Indeed, a comparison of this provision to Article 55(1) of the Additional Protocol I indicates how the level of culpable action necessary to amount to a crime has been increased. Acts that would contravene Article 55(1) would not necessarily constitute a war crime under this provision, since Article 8(2)(b)(iv) includes the need for damage that is “clearly excessive”. The difficulties relating to the requirement of “excessive” damage (let alone “clearly” excessive) have already been canvassed above.

Moreover, the requirement that the anticipated military advantage must be taken into account when looking at the damage to the environment – also not included in Article 55(1) of Additional Protocol I – adds a further element of uncertainty and subjectivity to a consideration of a specific action. In addition, the Committee looking at the NATO actions during Operation Allied Force concluded that, under Article 8(2)(b)(iv), it was also necessary to find actual or constructive knowledge as to the grave environmental effects of a military attack before a crime under that provision could be proven.

It seems therefore that there is a real risk that the conditions applying Article 8(2)(b)(iv) would be almost impossible to satisfy. Although there is clear reference to the environment, it may be very difficult to secure a conviction based on this provision where there is an act constituting an environmental crime, given the extent of damage required to meet the threshold specified. In this regard, other

provisions that fall within the definition of War Crimes in the Rome Statute may be helpful in addressing the issue of environmental crimes. In the “grave breaches” provisions, Articles 8(2)(a)(iii)⁴³ and 8(2)(a)(iv)⁴⁴ of the Rome Statute may be applicable.

Again within the context of international armed conflict, Articles 8(2)(b)(v),⁴⁵ 8(2)(b)(xvii)⁴⁶ and 8(2)(b)(xviii)⁴⁷ of the Rome Statute also appear to be applicable in appropriate circumstances. Unfortunately, there do not appear to be similar possibilities for prosecution of environmental crimes within the context of a non-international armed conflict in the relevant provisions of Article 8 of the Rome Statute, with the possible exception of Article 8(2)(e)(xii).⁴⁸ As we have witnessed in the Darfur tragedy, deliberate environmental destruction may well be perpetrated in the context of an internal conflict, particularly in those areas where certain (targeted) groups tend to live. There is no logical reason why the provisions in the Rome Statute dealing with this type of conflict should not also have been drafted so as to more readily include the possibility of covering environmental crimes.

While there are various legal thresholds to satisfy in order to justify a conviction of War Crimes, this crime appears nevertheless to be a potentially fertile area for the prosecution of environmental crimes, at least in the context of international armed conflicts. However, as mentioned above, it is not the only crime that may be applicable. There may be good legal and other reasons why Crimes against Humanity and even (though less likely) Genocide should also be carefully considered in this regard. The important point to note is that the potential for prosecution is not limited only to the one provision in the Rome Statute that makes express reference to the environment.

Concluding remarks

Environmental rights represent an important part of fundamental human rights. Without access to a safe environment, human populations may not be able to exist at even a basic level. The right to live in a safe environment requires protection through proper and enforceable legal

mechanisms. The significance of these rights has meant that the deliberate destruction of the environment, even during the course of conflict, is restricted under environmental law principles and may attract state responsibility and liability. However, the basic requirement for environmental security means that acts intended to severely compromise environmental rights in the course of conflict should also attract criminal responsibility. We must judge very harshly those individuals who initiate strategies intended to render significant environmental damage in order to promote military goals.

Enforcement of this environmental security must fall to the international institutions established according to diplomatic, legal and political processes. The integrity of environmental rights means that their protection must be led by bodies that have been created with the general (ideally universal) acceptance of the international community. The ICC is the first and only **permanent** international criminal court (at least at this stage) and, as such, represents the appropriate judicial “forum” through which to prosecute such acts, despite the resistance that it still faces from the United States and others.

One of the principal goals behind the establishment of the ICC has been the deterrence and punishment of the most serious international crimes, which also “threaten the peace, security and well-being of the world”.⁴⁹ The deliberate destruction of the environment for strategic and military purposes, with its disastrous consequences for human populations, clearly falls within this description.

However, the jurisdiction of the ICC is limited to specific crimes, as defined in the Rome Statute. It is important that the Court and the ICC Prosecutor proceed in such a way as to avoid any claims that they are overreaching the boundaries of their respective powers, particularly given the highly political nature of the opposition to the Court. This means that as we are faced with further examples of unacceptable action taken by human beings against others, we cannot expect the Court to play a part unless and until those actions can quite readily be classified into the existing crimes within the Court’s jurisdiction.

Nevertheless, where the circumstances so warrant, the

prosecution of environmental crimes within the terms of the existing jurisdiction of the Court is possible and appropriate under the provisions of the Rome Statute. There is no legal reason why this should not be the case. To the extent that others have dismissed outright the possibility that the ICC may play a part in relation to environmental crimes, they are not correct. Of course, the environmental damage would, in reality, have to be very serious and the suffering of the targeted group severe to attract the attention of the Prosecutor.

As this brief analysis indicates, however, military personnel and others engaged in armed conflict cannot act without regard to the impact of their actions on the environment. To do so, particularly in circumstances where the environment itself is the subject of the action (either directly or indirectly), could result in prosecution under the Rome Statute.

Whether this will actually happen remains to be seen and will, at least in the short-medium term, probably be dictated as much by political as legal considerations. However, the enforcement of these crimes would be another important step towards an end to impunity for those who commit the most serious violations of human rights in complete disregard for human security.

NOTES

1. "Legality of the Threat or Use of Nuclear Weapons Case", 1996. ICJ Rep. 242, paragraph 29.
2. Principle 1 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration). UN Doc A/CONF/48/14/REV.1.
3. See United Nations Commission on Human Security, "Human Security Now". New York 2003, pp. 16-18.
4. See Report of the High Commissioner for Human Rights, "Situation of human rights in Darfur region of the Sudan". 7 May 2004, UN Doc. E/CN.4/2005/3, paragraphs 50 and 73.

5. Note by the President of the Security Council, UN SCOR, 3046th mtg. at 3, UN Doc S/23500 (1992).
 6. "An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole ..." Former draft Article 19(2).
 7. Former draft Article 19(3)(c) and (d) respectively.
 8. Draft Article 52 provided:

Where an internationally wrongful act of a state is an international crime:

 - a. *an injured state's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of Article 43;*
 - b. *an injured state's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of Article 45.*
- Draft Article 53 provided:
- An international crime committed by a state entails an obligation for every other state:*
- a. *not to recognize as lawful the situation created by the crime;*
 - b. *not to render aid or assistance to the state which has committed the crime in maintaining the situation so created;*
 - c. *to cooperate with other states in carrying out the obligations under subparagraphs (a) and (b); and*
 - d. *to cooperate with other states in the application of measure designed to eliminate the consequences of the crime.*
9. *Yearbook of the International Law Commission*, 2, 1976, pp. 109-119.
 10. See D.J. Harris, 1998, p. 489, referring to the comments of Mr. Rosenstock, the United States member of the ILC, in *American Journal of International Law*, n. 89, 1995, pp. 390-393.
 11. General Assembly Resolution 56/83 "Responsibility of States for Internationally Wrongful Acts". 12 December 2001, UN Doc A/Res/56/83.
 12. United Nations Security Council Resolution 687 (1991) 3 April 1991, paragraph 16.
 13. *Id.*, paragraph 18.
 14. See, for example, paragraph 21 of "The 1994 Draft Declaration of Principles on Human Rights and the Environment". Available at <<http://www1.umn.edu/humanrts/instreet/1994-dec.htm>>. Last access on 3 February 2005.

15. UN Doc. A/CONF.151/26/Rev 1, (1992) 31 ILM 874.
16. There may also, of course, be relevant municipal legislation that will regulate the activities of the particular state in relation to the environment.
17. The Council of Europe prepared a framework-decision on this issue in January 2003 in response to the adoption of a Directive on the same question (but in different terms) by the European Commission in 2001. This institutional conflict between the two bodies has not been resolved. See Europa website <<http://europa.eu.int/comm/environment/crime/>>. Last access on 12 September 2004.
18. United Nations General Assembly Resolution 47/37, UN Doc A/RES/47/37, 25 November 1992.
19. Additional Protocol I, Article 85(5).
20. International Court of Justice, Report 242, 1996, paragraph 29.
21. *Id.*, paragraph 31.
22. *Id.*, paragraph 30.
23. "Legality of the Use of Force" (Serbia and Montenegro v. Belgium). Request for Indication of Provisional Measures, paragraph 3.
24. Application 52207/99, Grand Chamber, 12 December 2001.
25. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 13 June 2000: (2000) 39 ILM 1257.
26. *Id.*, paragraph 23.
27. Rome Statute Preamble, paragraph 4.
28. Rome Statute, Article 5(1).
29. J. Sills et al. "Environmental Crimes in Military Actions and the International Criminal Court". Available at <<http://www.acunu.org/millennium/es-icc.html>>. Last access on 7 February 2005.
30. Genocide Convention Article II; ICTY Statute Article 4(2); ICTR Statute Article 2(2); Rome Statute Article 6.
31. The most significant of these was Attorney General of the Government of Israel v. Eichmann (1961) 36 ILR 5.
32. Australia, for example, failed to adequately implement the Genocide Convention into its domestic law, with the result that there was no domestic legislation providing for prosecution of genocide claims in Australian courts.

See *Nulyarimma v. Thompson* (1999) FCA 1192. The position has changed, at least partially, following the enactment of the International Criminal Court (Consequential Amendments) Act 2002 (Cth), which was part of the process of implementation of the Rome Statute into Australian domestic law.

33. See ICTR, Judgement Prosecutor v. Akayesu, Case n. ICTR-96-4-T, 2 September 1998.

34. Rome Statute Article 6(c).

35. Trial Chamber I of the ICTR, Prosecutor v. Akayesu, Case n. ICTR-96-4-T, 2 September 1998.

36. *Id.*, paragraph 511.

37. See 1969 Vienna Convention on the Law of Treaties. 1155 UNTS 331, Article 31(1).

38. ICTY, Judgement on Defence Motions to Acquit, Prosecutor v. Sikirica, Dosen and Kolundzija, Case n. IT-95-8, 3 September 2001.

39. ICTY, Judgement, Prosecutor v. Jelesiaë, Case n. IT-95-10-I, 14 December 1999 at paragraphs 78-83; and ICTY, Judgement (Appeals Chamber) Prosecutor v. Krstic, Case n. IT-98-33-A, 19 April 2004.

40. For example, the ICC includes a much broader range of actions involving sexual violence within the terms of crimes against humanity than either the ICTY Statute or the ICTR Statute. Article 7(g) of the Rome Statute includes “... sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” within the range of acts that may constitute crimes against humanity in addition to “rape”, which is the term used in both the ICTY Statute and the ICTR Statute. See A. Cassese, 2003, pp. 91-94.

41. These are the 1948 Universal Declaration of Human Rights (UDHR) UNGA Res 217(A); the 1966 International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 999 UNTS 3. Article 11(1) of the ICESCR, for example, recognizes the right of individuals to “an adequate standard of living ... including adequate food ...”.

42. This is evidenced by the fact that the Rome Statute (Article 124) allows for a seven-year “transition” period, during which Parties to the treaty can “opt out” of the War Crimes provisions; but no such provision applies to the Crimes of Genocide or Crimes against Humanity.

43. “... wilfully causing great suffering, or serious injury to body or health”.

44. "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" – for example dams.
45. "Attacking or bombarding ... towns, villages, dwellings or buildings which are undefended and which are not military objectives" – for example chemical factories.
46. "Employing poison or poisoned weapons."
47. "Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."
48. "Destroying ... the property of an adversary unless such destruction ... be imperatively demanded by the necessities of the conflict."
49. Rome Statute Preamble, paragraph 3.

REFERENCES

- AMBOS, Kai. "Current Issues in International Criminal Law". 14 *Criminal Law Forum* 225, 2003.
- BASSIOUNI, M. Cherif. *Crimes against Humanity in International Criminal Law*. 2.ed. The Hague: Kluwer Law, 1999.
- BERAT, Lynn. "Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law". 11 *Boston University International Law Journal* 327, 1993.
- BIRNIE, Patricia & BOYLE, Alan. *International Law & the Environment*. 2.ed. Oxford: Oxford University Press, 2002.
- CASSESE, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003.
- CHO, Byung-Sun. "Emergence of an International Environmental Criminal Law?". 19:1 *UCLA Journal of Environmental Law & Policy* 11, 2001.
- COTTIER, Michael. "Did NATO Forces Commit War Crimes

- during the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000". In: F. HORST et al. (eds.). *International and National Prosecution of Crimes under International Law*. Berlin: Arno Spitz, 2001.
- FAUTEX, Paul & GÜNDLING, Lothar. "The Role of War". 22:3 *IUCN Bulletin* 25, 1991.
- FREELAND, Steven. "The Bombing of Kosovo and the Milosevic Trial: Reflections on some Legal Issues". *Australian International Law Journal* 150, 2002.
- _____. "Human Security and the Environment – Prosecuting Environmental Crimes in the International Criminal Court". Paper presented at the 12th Annual Conference of the Australian and New Zealand Society of International Law. *International Law and Security in the Post-Iraq Era: Where to for International Law?* Canberra, Australia, 18-20 June 2004.
- GALLANT, Kenneth S. "Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts". 48:3 *Villanova Law Review* 764, 2003.
- GLICKMAN, Rachel et al. "Environmental Crimes". 40:2 *American Criminal Law Review*, 413, 2003.
- HARRIS, David J. *Cases and Materials on International Law*. 5.ed. London: Sweet & Maxwell, 1998.
- HUNTER, David et al. *International Environmental Law and Policy*. 2.ed. New York: Foundation Press, 2002.
- KITTICHAISAREE, Kriangsak. *International Criminal Law*. Oxford: Oxford University Press, 2001.
- MCCAFFERY, Stephen C. "Crimes against the Environment". 1 *International Criminal Law* 541, 1986.
- NORDQUIST, Myron N. "Panel Discussion on International Environmental Crimes: Problems of Enforceable Norms and Accountability". 3 *ILSA Journal of International and Comparative Law* 697, 1997.
- ORREGO VICUÑA, Francisco. (Rapporteur on the Subject of Environmental Responsibility and Liability.) Final Report Prepared for the Eighth Committee of the Institut de Droit International. "Responsibility and Liability for Environmental Damage under International Law: Issues and Trends". 10 *The Georgetown International Environmental Law Review* 279, 1998.

- SCOVAZZI, Tullio. "State Responsibility for Environmental Harm". 12 *Yearbook of International Environmental Law* 43, 2001.
- SHAW, Malcolm. *International Law*. 5.ed. Cambridge: Cambridge University Press, 2003.
- SILLS, Joe; GLENN, Jerome C.; FLORESCU, Elizabeth; & GORDON, Theodore J. "Environmental Crimes in Military Actions and the International Criminal Court". Available at <<http://www.acunu.org/millennium/es-icc.html>>. Last access on 7 February 2005.
- STEINER, Henry J. & ALSTON, Philip. *International Human Rights in Context: Law, Politics, Morals*. 2.ed. Oxford: Oxford University Press, 2000.
- SYMONIDES, Janusz (ed.). *Human Rights: International Protection, Monitoring, Enforcement*. Great-Britain: Ashgate – UNESCO Publishing, 2003.
- TECLAFF, Ludwik A. "Beyond Restoration – the Case of Ecocide (The International Law of Ecological Restoration)". 34:49 *Natural Resources Journal* 33, 1994.
- TINKER, Catherine. "Environmental Security in the United Nations: Not a Matter for the Security Council". 59 *Tennessee Law Review* 787, 1992.
- UNCHS (United Nations Commission on Human Security). *Human Security Now*. New York, 2003.
- UNHCHR (United Nations High Commissioner for Human Rights). "Situation of Human Rights in Darfur Region of the Sudan". UN Doc. E/CN.4/2005/3, 7 May 2004.

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ABSTRACT

This article examines the different modes of engagement between civil society and the state in the area of citizen security in Brazil. It begins by considering both the progress made in opening up new spaces for civil society interventions (in the role of advisor, watchdog and even service deliverer) across a number of policy areas, and the specific difficulties posed by the criminal justice system. It continues by analyzing the activities of non-state organizations in two fields: policing and the prison system. It concludes that the danger of producer capture is much greater in the former, because police are suspicious of civil society monitoring of their role, and the culture of community policing has not yet taken hold. However, the prison system has been more open to change, with some very creative partnerships between the state and local NGOs transforming the management and ethos of some small prisons. [Original article in English.]

CIVIL SOCIETY-STATE PARTNERSHIPS FOR THE PROMOTION OF CITIZEN SECURITY IN BRAZIL

Fiona Macaulay



Introduction

The involvement of civil society in social policy delivery has become, in recent years, one of the dominant tropes of the New Policy Agenda.¹ Of course, there are many points at which ordinary citizens may become included in social policy – in designing policies, allocating resources, giving advice to government bodies, delivering services on the ground, monitoring implementation and giving feedback to state agencies. Citizens, both as individuals and in groups, may be called upon as lay experts, clients, and end-users of services, and as more generic stakeholders in the social fabric. In some cases civil society participation is mere window-dressing, with policy-makers proceeded unhindered down familiar paths. There have, however, been some very significant attempts in some policy areas, or in particular geographical locations in Latin America, to make participation meaningful, a tool as much for citizen empowerment as for improvement of public services. Insofar as citizens can exercise a tangible influence on policy outcomes, and have sufficient resources and institutional stability to resist co-option and maintain autonomy, this engagement will be termed **civil society-state partnership** for the purposes of this paper.

See the notes to this text as from page 160.

The references of the sources quoted in this text are found on page 163.

In recent years criminal justice reformers have been attempting to extend to the criminal justice institutions the principles of civil society participation already well established in other, “softer”, policy areas. This reflects in large part the evolution of the human rights community from reactive, *ad hoc* protests against institutional violence, to a proactive stance aimed at analyzing and restructuring the system. This paper examines the fruits of such attempts in the areas of policing and citizen security, and of penal policy (prisons and sentencing). It finds remarkable progress and innovation in some areas, yet few advances and entrenched institutional resistance in others. I distinguish between two principal modes of civil society engagement: (1) monitoring and oversight; and (2) of constructive engagement and partnership. The first mode is inevitably antagonistic to some degree, with the community performing a watchdog role, and the authorities reacting, generally, with secrecy and hostility. The second mode is more creative, but requires not only that civil society is moved to engage in the areas of rule of law and justice, but also that the state agencies relinquish some of their power and prerogatives, and provide the institutional infrastructure necessary for this interface.

Civil society and the state in Brazil

This paper focuses on the case of Brazil, and specifically on the policy area of crime and justice. On the one hand, Brazilian civil society is acknowledged to be relatively dense (if patchily so), which in itself is a function of the many institutional tools for enabling participation that have been made available since the transition to democracy. The 1988 Constitution was key in this respect: the drafting process was one of the most participatory in Latin America with 122 grassroots amendments presented by social movements, totaling over 12 million signatures, many of which succeeded in altering the final text.² In particular, the new Constitution institutionalized various forms of popular input into governance and policy-making: plebiscites and referenda, public hearings, people’s tribunals and, most relevantly for our purposes, the creation of a plethora of state-civil society councils, at all three levels of government, to advise on a

range of social policy areas (Draibe, 1998; Tatagiba, 2002).³

These mechanisms may be broadly categorized into three main groups: (1) the public policy management councils (known as *conselhos gestores*), which are statutory in character and are charged with overseeing particular ongoing social policies (health, education, social services, children's welfare). They have legal powers to define priorities, set out budgets and monitor policy implementation; (2) more *ad hoc* councils set up to deliver special government policies (for example school meals, employment, housing, food distribution and rural development); and (3) thematic councils, which tackle issues such as race, disability or women's rights. The latter have no statutory character and may be set up on local initiative.

All three types occupy an institutional space that is enshrined in legislation of some description, federal or subnational, making these spaces of "invited participation" (Cornwall, 2002). This guarantees them some level of resourcing and continuity, although political clientelism and co-optation are a constant threat. All three tend to have a mixed composition, generally half representatives of civil society and half representatives of relevant government agencies. The "council" model of civil society-state relations has undoubtedly deepened the level of civic association in Brazil: it is estimated that by 1999 there were approximately 45,000 members of health councils alone up and down the country (Tatagiba, p. 48).

In particular, the Brazilian Workers' Party (*Partido dos Trabalhadores* – PT) has been a key player in promoting and consolidating these institutional spaces and a pioneer in its municipal and state administrations in opening up the political and policy process to forms of social participation such as the famed Participatory Budget.⁴ These participation spaces and processes have the potential not only to increase the capacity of both civil society and the state to operate in their separate spheres, but also to bring them together as joint stakeholders in the effective solution of social problems. The party has both used the advisory council model as it currently exists, and also sought to modify it in several policy areas in order to make it less prone to co-optation and more responsive to the opinions and needs of organized, as well as unorganized, civil society.⁵

Civil society and the criminal justice system

All bureaucracies tend to be insular and self-serving but their degree of resistance to external influence varies, and not all policy areas are equally open to civil society engagement. The criminal justice system has traditionally been the most closed as it is composed of institutions that constitute part of the state's monopoly (in theory at least) of coercive power. Operators of the criminal justice system tend to possess a marked *esprit de corps*, based on their professional training and on the social control responsibilities that they exercise. In consequence they tend to be extremely resistant to outside scrutiny or interference in the operation of their institutions.⁶

In Brazil the professional associations of judges, public prosecutors, and police officers have been able to flex their collective muscle in a number of ways, with the police blocking long-awaited constitutional reforms,⁷ and the judges fending off measures that they regard as an attack on their autonomy.⁸ Surveys conducted with judges and public prosecutors in the mid 1990s revealed that 86.5 percent of judges were completely opposed to any form of external control over the judiciary, whilst prosecutors showed a slightly more democratic face, with only 35 percent totally opposed to outside monitoring of their own institutions. Nonetheless, they still felt that any such body should be composed primarily from their own ranks (Sadek, 1995; 1997). However, a sequence of subsequent court-related scandals eroded that position and judges now grudgingly accept the necessity of a mixed judiciary-civil society oversight board as a means of recuperating lost legitimacy. This measure was finally approved in December 2004 in a long-awaited judicial reform bill. Similar surveys of the civil (investigative) police station chiefs revealed that any form of inspection of their activities was consistently ranked lowest in terms of contribution to better policing, although the creation of community policing councils was cautiously welcomed (Sadek, 2003).

This problem of producer capture and corporate mentalities is by no means specific to Brazil. Indeed it is the product of the very way in which modern states handle social conflict, crime and deviancy. As many critical penologists have pointed out, in the retributive model of justice, crime is viewed as a violation of the state. The justice system therefore

determines blame and administers pain in a contest between the offender and the state, in which the victim or the wider community are largely absent or silent (Zehr, 1990). Conflicts have become the “property” of the state (Christie, 1977), on which logic state agents build their edifice of professional expertise. This expertise is used both against fellow legal system operators and lay people, as a means of defending their monopoly over different aspects of the law and order apparatus.

The Brazilian justice system institutions are marked by atomization and hyper-autonomy at both an institutional level and individual operator level, with rivalry and competition between the different institutions of the criminal justice system – the two branches of the police (civil and military), prosecutor’s office, courts and prisons – as well as between the different branches of state government which control them. For example, the civil police in Brazil are not merely an investigative force, as in other countries, but also have a quasi-judicial function. The police investigation mirrors that conducted by the courts, thus making the police chief – who must have a law degree – a *de facto* investigating magistrate, and the police station a “registry” office staffed by a legal “clerk”. Such “lawyerization” of the police (Cerqueira, 1998) puts the police in competition with the judiciary and Prosecution Service for control of criminal investigation. It is this context that shapes the degree and mode of civil society input into the justice system.

All the above has made it very difficult for groups in civil society to redefine the terms of the debate about law and order. Neild (1999) points out that the terminology employed is crucial to how ideas of “security”, and the relationship between the state and citizen are framed. The concept of “national security” establishes the idea of *force majeure* and effectively allows the security forces a free hand in pursuing, by all means necessary, some notion of a national interest. The militarized character of the major police force in Brazil, created in its current form under the authoritarian regime of 1964-1985, continues to reflect the national security logic of that period.

The term currently most used in Latin America and in Brazil is that of “public security”. Here the good being protected is still the interest of the state and of the public authorities, albeit often at a very local level. Those who are powerful enough to capture the public sphere and its resources are also able to access its law

and order agencies. However, those who are excluded by virtue of their social class are left, by definition, unprotected. According to Article 144 of the Brazilian Constitution, the police's mission is the "preservation of public order", as defined under the section dedicated to "The defense of the state and of its democratic institutions", in which "public order" and "social peace" are paramount concerns. The figure of the citizen is absent, even in a document that articulates the fullest statement of civil liberties. On a rhetorical level, at least, the needs of the state continue to override those of the individual.

The most recent coining, that of "citizen security", removes the power to define fear, crime and security from the state and the socio-political elite and delegates it to members of the public. In this formulation, the state authorities are at the service of the population, not vice versa. Citizen security and safety are, in ideal terms, based on policing by consent, not by repression, on punishment for rehabilitation, not retribution, and founded on the principles (and constraints) of universal human rights and civil liberties. All three of these conceptualizations of security have been in currency in Brazil, and are employed at different moments by the state authorities, by the mass media, and by civil society. For example, even whilst the current PT government is clearly an proponent of citizen security, as laid out in its own policy guidelines,⁹ it is still under pressure in some quarters to acknowledge the drugs trade and narco-violence as an issue of national security (the so-called "colombianization" of Brazilian inner cities). Periodic calls for "hard line" policing methods and a visible oscillation at state government level between tough and more "community-oriented" policing strategies illustrate the dynamism of this continuing debate over the very terms of reference, and the importance of civil society engagement with the state in this arena.

Policing

In the area of policing, civil society organizations have been created to achieve two ends: (1) to monitor the activities of the police, particularly in relation to accusations of human rights abuses; (2) to work together with the local police in community-police liaison councils in order to allocate policing resources according to local needs and priorities.

Oversight

Following the transition to democracy in Brazil, there has been a steady increase in crime and violence, matched by a similar rise in police abuses – excessive use of force, summary executions and use of torture on criminal suspects. This is not the place to rehearse the various analysis of police dysfunction in Brazil (Chevigny, 1995; Human Rights Watch, 1998; Pereira, 2000); suffice to say that police inefficiency and systemic abuse of human rights are overdetermined by underresourcing, corruption, lack of training, procedures and discipline, impunity inherent in the bias of the military courts (which try offenses by military police) and the internal affairs units, long run institutional practices, and a public security mindset that reflects and reinforces social stratification and inequalities.

It was clear by the mid-1990s that the police needed to be brought under civilian oversight of some kind. The state government of São Paulo under PSDB founder Mário Covas pioneered a new institution, that of the *Ouvidoria da polícia*, set up in 1995. More followed, initially in states governed by the left or centre-left.¹⁰

The *ouvidorias* are generally housed in the offices of the state secretariat for law and order, or equivalent, and are therefore part of the executive.¹¹ Their brief is, literally, “to hear” (from the verb “*ouvir*”) complaints about police misconduct, corruption or omission from the public,¹² prepare an initial case summary, pass on the complaints to the police internal affairs units, and track the progress of the investigation. The *ouvidoria* may also refer cases to the Prosecution Service. Although generally translated as “ombudsman’s offices”, they do not possess the independence and wide powers that such entities have elsewhere. Police internal affairs units continue to monopolize the resources and remit to carry out investigations into alleged police misconduct, and often obstruct or refuse to open an inquiry. Therefore the *ouvidorias* constitute in institutional terms a form of semi-independent internal control.

Nonetheless, they have achieved the highest degree of transparency of all the police oversight mechanisms.¹³ They broke new ground in publishing the first reliable figures on

police shootings of civilians, as well as on police fatalities on and off duty. The *ouvidorias* have also contributed significantly to breaking the culture of police impunity in Brazil. Members of the public are guaranteed anonymity, crucial in overcoming the population's real and justified fear of police reprisals. Complainants are now increasingly emboldened to report abuses openly, a shift that must reflect greater confidence in the state authorities. In 2000 most complaints to the Rio de Janeiro *ouvidoria* were made anonymously: from January to July 2001, some 150 complaints were made in person. Rio, in common with around half the states in Brazil, now has a witness protection program for use in such cases.¹⁴ When the *ouvidorias* encounter bureaucratic inertia, obstruction or hostility, they can have recourse to the media, using a "name and shame" strategy,¹⁵ and the number of complaints against police tends to rise noticeably when incidents receive widespread media coverage

Strong links to civil society have been crucial for the *ouvidorias* to maintain their legitimacy and stance of independence from the administration. The São Paulo ombudsman is appointed from a list of three candidates put forward by the state Human Rights Council, and is backed by a board of leading lawyers and human rights activists. The Pará office is governed directly by the state police advisory committee (CONSEP) and the most successful ombudspersons to date have come from a background of human rights activism and hence have high credibility.

As the police force has traditionally been a closed institution and public consultation on policing virtually unknown, the *ouvidoria* is the first government institution to solicit the views of members of the public and performs an invaluable feedback function. The notion that the public should have a right to oversee, control and determine the actions and priorities of the police represents a significant cultural shift in Brazil of which the *ouvidorias* are both a reflection and a constitutive element.

Due to the inherently conflictual nature of oversight mechanisms, which are obliged to criticize the institutions they are supervising, "partnership" may seem an odd term to use for the *ouvidorias*. Certainly the police regard them more as sparring partners than as collaborators. However, it would be

wrong to assume that the police are simply the instrument of the state authorities, or under their heel. Often the elected authorities are challenged by autonomous enclaves within the security apparatus, which they can only undermine with the active support of civil society.

Community-police liaison committees

One of the primary means of moving towards a model of policing based on consent and cooperation is to institute spaces in which the police and local community are able to come together to debate local needs and priorities. Police-community liaison committees (*Conselhos de Segurança* – CONSEG) were pioneered in Maringá, Paraná state, in 1974.¹⁶ São Paulo state followed suit under the progressive, democratic government of Franco Montoro, regulating these new bodies in 1985 and 1986. By 2002 the state claimed to have over 800 CONSEG operating in more than 520 municipalities.

Ideally, these bodies exist to encourage cooperation with the local police force and a “community policing” operational style, to overcome traditional mistrust and suspicion, and to effectively “municipalize” policing, that is, make it responsive to neighborhood needs rather than to priorities set at the level of the state government. The CONSEG could serve, in principle, as part of an attempt to modernize the police, rendering it an accountable and responsive public service rather than a repressive state bureaucracy driven by its own agenda. It is also claimed that the reorientation of the police combined with the local community’s involvement in monitoring and reporting crime and undertaking preventive action can reduce crime levels significantly. For instance, the city of Lajes in Santa Catarina reported a 47.7 percent drop in theft and robbery following the installation of ten CONSEG.¹⁷

However, as with so many aspects of the criminal justice system in Brazil, no empirical studies have been carried out on these councils, despite their impressive numbers. What seems clear from a reading of the extremely bureaucratic regulation of these bodies is that they still fall firmly under the control of the police and public security apparatus of the state. The legislation for Paraná states that “The Community Security Council must give all necessary support to the Public

Security bodies, given that its job is to cooperate, represent, check up and make demands on the Public Security authorities and other organized elements of society, but without interfering in the running of the former". In São Paulo state the local civil police chief and military police commander are automatically co-opted members of any council and take the initiative in seeking out the organized elements of the local community ("*forças vivas da comunidade*") which are earlier defined as "representatives of the municipality, of local associations and other bodies providing relevant services to the community".¹⁸ Much of the regulation is taking up with procedures for elections and the proper use of logos, coats of arms and even an official CONSEG song. Membership of the CONSEG is numerically small and closed, due to the conduct of internal elections.

Anecdotal evidence suggests that they are also not all "representative" of the local community, being mainly composed of local businesspeople. Much of their activity seems to centre on raising money to buy police equipment (as basic as new tires for police vehicles) for which generosity they may expect preferential attention in return. Indeed, the CONSEG seem to present a good case of "mutual capture", whereby the police play a guiding role in setting up, running and finding members for the Council, whilst the members enjoy privileged access to a public good. This is a problem of which the state authorities are not unaware, identifying as a common obstacle the "coming forward of leaders not equipped for community work: people who want to extract some personal, financial or electoral advantage from the CONSEG", and thus undermine their legitimacy. Indeed, there is a very thin line between this type of capture and the kind of alliance that elements of "uncivil" society have made with local police, assisting death squad activity aimed at eliminating those classed as social undesirables.¹⁹

An alternative model was instituted in São Paulo City under the administration of PT mayor Marta Suplicy (2001-2004). The municipal police force was revamped as an "ideal model" of preventive policing, and new civil society-police structures set up. The federal constitution allows municipalities to set up municipal police forces for the purposes of protecting city property. Whilst this is a limited remit, there have been

recent moves in Brazil to “municipalize” policing, in part to circumvent the enormous structural obstacles to a complete reform of the state-level policing apparatus.

Benedito Mariano (who had been the first police ombudsman in Brazil, during Mário Covas state administration), was brought in to head the city’s new secretariat for public security, and doubled the numbers of municipal guard from 4,000 to 8,000 (including a 30 percent quota for women officers). The Guard’s contact with the local community is intended to be a cornerstone of their preventive strategy – indeed, their work is probably closer to what might be termed “community” policing than most other experiments that go under the name in Brazil. The community is consulted on a regular basis through Community Committees set up in six regions of the city. In this case, every meeting of the Committee is open to all comers, although a standing committee is elected. The co-opted members include the Regional Inspector of the Municipal Guard and a representative of the sub-prefecture, but otherwise the balance is tipped much more heavily towards civil society than is the case in the CONSEG.²⁰ The Secretariat claims that 2,870 people participated in 56 meetings between October 2002 and December 2003, an average of 50 per meeting, of which two-thirds were civil society representatives. It seems that the participatory, democratic ethos employed by the PT in its consultation exercises in other areas of municipal governance has influenced its conduct of the civil society-state partnership in this newer field of citizen security (Baiocchi, 2003).

Community policing

Analysis of policing in Brazil since the return to democracy have tended to emphasize its authoritarian characteristics, its ineffectiveness, and the degree to which the police actually contribute to criminal activity through corruption and organized crime, and routinely commit gross human rights violations such as torture and summary executions of criminal suspects. In particular, attention has focused on the militarized police, a uniformed state-level force responsible for carrying out preventive policing, with its military structure, hierarchy, code of conduct, training and corporate ethos.

Various studies of extrajudicial executions demonstrate the belligerent attitude that the military police adopt in relation to the community (Cano, 1997) and suggest that this is a residue of the National Security Doctrine of the military period by which the civilian population was viewed with suspicion, as the potential “enemy”, to be controlled and contained. This antagonistic stance of the police *vis-à-vis* the citizens whose security they are supposed to be safeguarding came to be viewed by critics and reformers as counter-productive, and in violation of Brazil’s commitments to human rights and civil liberties. It was within this environment that tentative experiments with community policing have been undertaken.

Community policing theory presupposes a quite different relationship between police and public. It is based on principles of trust and collaboration, ongoing interactions with civil society, attentiveness to the expressed needs and priorities of the population, information sharing leading to intelligence-led policing, conflict mediation and resolution, and crime prevention rather *post hoc* repression. It was pioneered in Rio de Janeiro in the early 1990s by the then Commander of the Military Police, Carlos Magno Nazareth Cerqueira, backed by a local human rights NGO, *Viva Rio*, under the leftwing administration of Leonel Brizola (1991-1994). The first projects were implemented in a piecemeal manner in a number of neighborhoods in Rio de Janeiro city. The first major scheme was set up in Copacabana but lasted a mere ten months, dismantled by the incoming administration of Marcello Alencar, who adopted a “tough on crime” stance, giving the new Secretary of Public Security *carte blanche* with a shoot-to-kill policy (Musumeci et al., 1996).

In 2001 Rio de Janeiro tried another community policing project, this time in the small central favella of Cantagalo, run by a military police major connected with a group of justice system reformers who fell out with the Garotinho state government. This initiative attempted to counter the mainstream policing practices in Rio’s favella which in the past have consisted of large-scale armed “blitzes”, firefights with the drug traffickers, followed by withdrawal. The police began by taking over a vast community centre and abandoned hotel at the top of the hill and running cultural, educational and training activities for the local youths, taking the place

of local NGOs who are too scared yet to operate in the favela.

Similarly, in violent low-income areas in São Paulo, police have ended up calling in their own institution's social services: military police doctors, dentists, and physical education teachers. As police are often the only agency of the state physically present in the more marginalized neighborhoods, it is evident that community policing projects require the collaboration not just of the local population, but also of other parts of the state apparatus in a multi-service approach in improving, simultaneously, quality of life, social capital and citizenship trust in and access to justice and rule of law services.

The core question about community policing in Brazil concerns its still marginal status. The Cantagalo project was isolated from the mainstream of policing activity in Rio de Janeiro, and boycotted by the municipal government, for reasons of territorial possessiveness and electoral competition (a long-standing rivalry between successive governors and mayors), and thus denied many vital social services that would have bolstered its legitimacy and effectiveness.²¹ Although initially the project started well, with 50 police officers purged on charges of corruption and violence, old habits died hard and police abuses gradually escalated again (*Global Justice*, 2004, p. 38).

Some community policing schemes are in name alone.²² In some 100 neighborhoods in the state of São Paulo mobile police cabins have been set up. However, as police only leave their post – reluctantly – when approached by a member of the public requesting assistance, they can scarcely establish the indispensable, durable and organic links with the local population.²³ A comparison of public attitudes to conventional and community police in Brazil shows that public trust in the latter can only be generated by increased visibility and outreach (Kahn, 2004). In short, without political backing and an upheaval in institutional cultures, the “community” will remain the enemy of the police force, not a partner.

Prisons and the penal system

Although successful crime prevention and resolution requires cooperation from the local population, this is less evident in the case of sentencing and imprisonment, for the punishment

of offenders has generally been abrogated by the state as its exclusive prerogative. Nonetheless, this is now being challenged in Brazil, initially in response to a crisis of state capacity – the rising concern about prison conditions and the collateral effects of rioting, break-outs and hostage taking episodes that characterized the late 1990s, and then inspired by global penal reform movements and radical new ideas such as restorative justice, that put the victim, offender and community, not the state, centre-stage.

Oversight

It was not until the latter half of the 1990s that public attention shifted to the fate of those held in police custody or in the prison system. The pioneers in raising public consciousness were undoubtedly the members of the Catholic Church's "Prison Ministry" (*Pastoral Carcerária*)²⁴ which had some 3,000 lay and religious volunteers around the country regularly visiting prisons, offering practical and spiritual support and bearing witness to the daily abuses suffered by prisoners. In 1997 the plight of detainees was taken up by the National Council of Bishops (CNBB) as the theme of their Lenten campaign. They also began increasingly to seek allies in the Bar Association, in young and enthusiastic prosecutors, and in the judiciary.²⁵ Lobbying of international organizations resulted in visits and reports by the Inter-American Human Rights Commission, Human Rights Watch, Amnesty International, the United National High Commissioner for Human Rights and the UN Special Rapporteur on Torture, as well as by the Human Rights Committees of a number of state legislatures.

In fact, civil society oversight of the prison system had already been established in the 1984 Law on Sentence Serving (LEP), which required the judge of every circuit with a prison to appoint a Community Council (*Conselho da Comunidade*), composed of representatives of the local community, to visit the prison at regular intervals, inspect conditions, and assist prisoners.

Despite the support of both the Cardoso and Lula governments for this scheme, relatively few have been set up. The Ministry of Justice holds no information²⁶ as to how many

exist and those that do operate generally do so in a vacuum without institutional support and connections.²⁷ For example, the one in Rio, which is relatively active, lost its offices in the local Justice Secretariat. It also stopped reporting to the local judge due to his hostility to their work.

This case illustrates well a common problem of state-civil society interaction. One part of the state apparatus (the executive, and the national law) supports these groups, in principle. However, they can only be brought into existence by the local judiciary, which either is ignorant or resistant to having others intrude on “their patch”. Without training, guidelines for their activity, an established feedback mechanism into the local state and sufficient autonomy and backup to resist pressure from those officials they may criticize, these *Conselhos* have been doomed to be a dead-letter.²⁸ It is perhaps understandable why some have decided to substitute the state altogether inside some prisons rather than engage with it as an outsider.

Given the weakness of the *Conselho* structure and the relative strength of the *Pastoral*, local prison administrators were tempted to simply “hand over” inspection responsibility to the Catholic Church, thus absolving the state from a degree of responsibility either to set up effective internal monitoring procedures, or to strengthen the institutional apparatus by which civil society could properly exercise its prerogative of oversight. Despite all the activism in this area in the late 1990s, very little progress has been made on either fronts.²⁹

Community-run prisons

Periodically the capacity of the Brazilian state to run the prison system – notorious for its overcrowding, endemic violence, appalling conditions of detention, poor management and inability to alter offending behavior (Amnesty International 1999; Human Rights Watch 1998) – has been called into question. The private security industry is, after all, booming in Brazil³⁰ in response to the deficiencies of the police, yet privatization of the prison system has been periodically debated since the 1980s but always rejected.³¹

One of the most surprising features of Brazil’s prison system is the existence of an innovative partnership between

state and civil society in the area of prison administration. Whilst prisons are generally managed either by the public sector, or via contracts with the private sector, a third paradigm is possible.

The first experiment in community participation in running prisons occurred in the 1970s, in São José dos Campos, São Paulo state, where a Catholic group took over completely the running of a decrepit and overcrowded local jail. Dr. Nagashi Furukawa, then a local district justice in Bragança Paulista, visited the institution in the 90's, and thereafter established contact with a group in his town that defended similar concepts. His initiative resulted in the first cooperation agreement between the state and a NGO.

The Bragança Paulista jail was completely refurbished, applying a model that came to draw the both domestic and international attention. Shortly afterwards, upon being appointed Secretary of Prison Affairs of the state of São Paulo, Dr. Furukawa, he began to replicate this successful experience. So far, 20 Resocialization Centers (*Centros de Ressocialização* – CR) have been set up, each holding approximately 210 inmates,³² administered in an innovative partnership between the state prison authorities and a dedicated local NGO, on the basis of formal co-operation agreements.*

The non-profit organization deals with the day-to-day running of the prison and rehabilitation of prisoners whilst discipline and security remain under state control. Most of the CR have been purpose-built to a new architectural design, but a number, such as the two original public jails in São José dos Campos and Bragança Paulista, have been upgraded and converted.

On the basis of field research carried out in four CR in October 2004,³³ they appear to be outstanding in relation to protection of the human rights of prisoners and staff, elimination of violence and drug abuse in prison, decent conditions of detention, potential for significantly reduced levels of re-offending, excellent social, education, occupational and psychological support given to offenders and their families, value-for-money in terms of quality and costs,³⁴ increased transparency and checks-and-balances for both treatment of detainees and use of public resources and

* See <<http://www.sap.sp.gov.br/common/cidadania.html>>. Last access on 14 March 2005. [E.N.]

improved community relations with the justice system.³⁵ Recidivism is claimed to be a third of national levels.³⁶ This is in fact a fairly modest performance, as compared to other successful measures, within the framework of a model conceived so as to avoid family breakdown, unemployment, institutionalization, drug consumption and poor self-esteem that conventional prisons invariably produce.

Another form of cooperation between the civil society and the state with a view to face the problems of the prison system are the APACs (*Associação de Proteção e Assistência Carcerária* – Associations for Carcerary Protection and Assistance).

Although the original APAC model is essentially faith-based, reliant on “saturating the prison environment with religious programming and instruction” (Johnson, 2000), the CR rely principally on two factors for rehabilitation: work (in some CR 100 percent of prisoners work) and rebuilding family relations (the CR only take offenders whose families live in the vicinity).³⁷ Visiting hours are generous and most families spend several hours each Sunday on the visit, and the money earned in prison is often of assistance to the low income families, which the NGO’s social work staff go to great lengths to support whilst their relative is in prison. The families form a bridge to the local community, helping it overcome hostility and demonization of the prison and its inmates.

Equally, both the CR and APAC units deliberately subvert the construction of a “prison culture”. Local business also benefits materially, as the NGOs have much greater flexibility than the state to purchase goods and services locally. The APAC founders from São José dos Campos have now sought out new partnerships in Minas Gerais, mainly via the judiciary, not prison authorities, and currently run a number of units with prison guards within the perimeters (the CR allow prisoners to unlock internal doors, but prison guards monitor all activity).

The NGO and the state authorities also provide an excellent system of checks and balances for one another as the contract makes very careful stipulations in relation to accounting and transparency. This is perhaps the truest partnership, or “co-production” (Joshi & Moore, 2004;

Masud, 2002) of all the cases analyzed, and the one in which the balance is tipped most heavily toward civil society. As in the case of the community police councils set up in São Paulo, two factors were crucial: the presence of a committed change agents, and the political-institutional space and backing in which to trial a new model. It also highlights how spaces within a rather fragmented justice system may be partially appropriated by civil society. This may be due to fragility and neglect of the state but may also constitute a case of the state “inviting participation” on grounds that are much more equal and collaborative.

Nonetheless, they remain invisible within the prison system as a whole. There is no mention of them in the planning and policy documents and statements that issue from the Ministry of Justice, nor any empirical evaluation studies. It seems perverse that the state would not actively claim ownership of successful facilities under its aegis.

Conclusions

The unevenness of the fabric of local civil society affects the capacity for all these partnerships in public policy to succeed. Even the police are conscious of the degree to which it is actually creating social capital. The São Paulo state founding policy document on the CONSEG cites Putnam’s seminal work³⁸ on the relationship between social capital and social development and notes “the police will tend to be more effective when they help communities to help themselves”.³⁹

The regulation of the CONSEG in Santa Catarina lists as one of the core objectives “to develop civil and community spirit in the area”.⁴⁰ Thus any state entity that wants to build in community consultation as part of its practice inevitably ends up attempting to foment and build the civic groups it wants as its partners. How to do this without co-optation has been the perennial challenge facing all the areas of public policy in Brazil in which the “council” model is employed for civil society input.

Alongside the capacity of civil society to articulate its needs and interests, the other major problem lies with the receptivity of the state agencies. For example, at present the CONSEG and prison community councils will only be as

successful as the local police commanders and judges allow them to be. The resistance of state agencies to change may be cast in many ways – as path dependency, as bureaucratic cultures, as territorial defensiveness – and I have argued that the very nature of the policy area of crime and violence exacerbates these tendencies. Nonetheless, change agents, both individual and collective, have proven adept at finding spaces and places within the state apparatus where the state authorities are indifferent and exhausted (the APAC prisons), have escaped the dominant institutional vices (the municipal guards), or are looking for radical new policy approaches (CR). Where there is local political support, these spaces offer valuable arenas for forging new forms of state-civil society partnership.

In the cases I have examined, partnership takes different forms depending on the role of civil society (critical watchdog, advice and support, or co-production), and this in turn affects the power asymmetries at play.

The example of the CONSEG is the clearest case of state actors capturing civil society – but this turns out to be a mutually beneficial arrangement due to the exclusionary design of the councils. The failure of the prison councils to make any progress must be attributed to inertia on the part of the judiciary. The local judges most likely see no benefit to themselves in setting up the councils (whereas the police get quite tangible goods from setting up the CONSEG) and thus have been boycotted this provision in the law, despite all exhortations from their superiors.

While it is to be expected that the state, with its superior resources, might always have the upper hand, this is not the case in the APAC and CR prisons, where the local community has managed to mobilize human capital resources that have made significant improvements both to the human rights and treatment of the detainees, and their prospects for rejoining their families and not reoffending. Where these partnerships work, they can make considerable contributions to improvement of citizen security in Brazil.

NOTES

1. For a critical discussion of the idea of "participation" in development policy circles see A. Cornwall, 2002.
2. For example, women's organizations estimated that around 80 percent of the amendments they put forward had been retained in the final version.
3. The first two national advisory councils, in health and education, were set up in 1937 with the overhaul of the state under Vargas. There are now 25, most set up in the 1990s. The 1988 Constitution also provided for municipal and state-level councils.
4. There is by now a huge literature on the participatory budget process, but for a good critical overview see Baiocchi, 2003.
5. For an analysis of the PT's modification of the women's council model see Macaulay, 2003a.
6. For details of other civil society initiatives for transparency in the justice sector see documents on the website of the Due Process of Law Foundation <<http://www.dplf.org>>. Last access on 15 March 2005.
7. The state-level Military Police, which constitute some 80 percent of the force in Brazil, used their lobbying influence among senators to block proposals put forward under the Cardoso government to "deconstitutionalize" them, that is, to remove all mention of the military police in the constitutional text, thus allowing state governments to retain, abolish, or merge them with the Civil Police.
8. On the debates about accountability and the judiciary see Macaulay, 2003b.
9. In 2002, the PT-linked think-tank Instituto da Cidadania produced a 120 page set of recommendations for reform of the justice system, drawn up by leading policy experts. This became the basis for the Lula government's Integrated Public Security Plan.
10. Rio de Janeiro, in March 1999 under Anthony Garotinho (PDT); Minas Gerais in 1997 (Eduardo Azeredo, PSDB); Pará in 1997 (Almir Gabriel, PSDB); Rio Grande do Sul in August 1999 (Olívio Dutra, PT); and others in Pernambuco, Espírito Santo, Rio Grande do Norte, Mato Grosso, Bahia and Ceará.
11. Exceptions are those in Pará, subordinated to the state council on law and order (CONSEP), and Minas Gerais, linked to the governor's office.
12. They receive all manner of communications from the public in relation to the police. Priority is given, however, to serious allegations regarding the right to life, and police corruption.

13. See Lemgruber et al. (2003) for an in-depth study of the *ouvidorias*; and Macaulay (2002) for a comparison with other forms of police oversight.
14. However, individuals with a criminal record are excluded from the program, thus depriving a good number of police torture victims of this protection.
15. It is noticeable that the successors to the first *ouvidor* in Rio de Janeiro and São Paulo, Julita Lemgruber and Benedito Mariano, use the media a lot less. In 2001 the then Rio *ouvidor* rejected what he dismissed as work “just to get newspaper coverage”. On the other hand, media coverage gives a degree of visibility and protection to the ombudsman – he was forced to resign shortly afterwards due to lack of political backing.
16. In 2004 the state of Paraná had 280 CONSEG with 46 in Curitiba and 74 in the metropolitan region.
17. *A Notícia*, 16 May 2002. As of May 2002 Santa Catarina had 31, but planned to install one in every municipality. The law authorizing them was only passed in March 2001. Similar levels of crime reduction are cited for Embu in São Paulo state.
18. Regulamentação dos CONSEG, Resolução SSP n. 47, 18 March 1999; and Decree n. 25366, 11 June 1986.
19. Similar problems are reported for Chile by Frühling (2003, p. 38).
20. “Projeto do Programa das Comissões Cíveis Comunitárias”, unpublished internal document, Prefeitura do Município de São Paulo.
21. Interview with Major Antonio Carballo, Cantagalo, July 2001.
22. For details of other projects see Mesquita & Loche, 2003, pp. 193-199.
23. Information from Guaracy Mingardi, July 2001.
24. Much of the Pastoral’s effectiveness must be attributed to the inspired leadership and political savvy of its longtime leader, Father Francisco “Chico” Reardon, an Irish-American priest and naturalized Brazilian who, sadly, died in 1999.
25. Other human rights groups did visit places of detention intermittently, generally following some violent episode. None, however, had the consistent presence of the Pastoral.
26. I have data only for São Paulo state where there are 54 court districts with a functional Council, 23 with a dormant Council, and 62 with no Council. No qualitative data are available.
27. Interview with Tania Kolker, vice-chair of the Rio de Janeiro Conselho da Comunidade, July 2001.
28. There is also minimal interaction with the state authorities responsible, on

paper, for prison inspection: the local prison judge, the internal affairs department of the state prison administration, local Penitentiary Council (essentially a parole board) and public prosecution service.

29. That said, there is currently a UK government funded project aimed at setting up a prisons inspectorate in Brazil, at state level initially, and discussions are ongoing concerning capacity building for the *Conselhos*.

30. According to data from the Private Security Companies Union in 1985 the ratio of police to private guards was 3:1. By 2000 this had reversed. Some 1,200 private companies were employing 400,000 registered guards plus 600,000 unregistered guards, making the industry worth U\$ 4.5 billion in 2000.

31. Brazil has six semi-privatized prisons in Paraná state.

32. The United Nations recommended that prisons have no more than 500 inmates, as authorities tend to lose control of large units.

33. Funded by a grant from the UK Socio-Legal Studies Association.

34. The NGO receives a per capita allowance for each inmate for food, building maintenance and so forth. As the purchase of goods and services is being done by a private, not public body, the NGO is not tied into government supply contracts, and can sack staff for poor performance. The cost per prisoner in a CR is half that in a state-run prison, and one third of that in the few semi-privatized units.

35. The warden of Bragança, a civil police officer, admitted in a conversation in 1999 that he had staffing problems "two are drunkards, two are nuts and the other two are ok and have to keep an eye on the others". Clearly local civil society input here far outweighs that of the conventional prison staff, who must adapt the CR's unusual ethos.

36. There is no systematic measurement of recidivism, either by facility, by state or nationally. The national databases required to track repeat offenders have not yet been put in place.

37. The APAC prison in Caruaru, Pernambuco, organized father-child art workshops and escorted day trips to the zoo.

38. David Putnam, *Comunidade e democracia: uma experiência da Itália*. Rio de Janeiro: FGV, 1996.

39. See "Informativo Institucional" at <<http://www.conseg.sp.gov.br/conseg/downloads.aspx>>. Last access on 15 March 2005.

40. "Regulamento dos Conselhos Comunitários de Segurança". Secretaria de Estado de Segurança Pública de Santa Catarina, Conselho Superior de Segurança Pública, May 2001.

REFERENCES

- AMNESTY INTERNATIONAL. *No One Sleeps here Safely: Human Rights Violations against Detainees*. London: Amnesty International, 1999.
- BAIOCCHI, Gianpaolo (ed.). *Radicals in Power: The Workers' Party (PT) and Experiments with Urban Democracy in Brazil*. London: Zed Press, 2003.
- CANO, Ignacio. *Letalidade da ação policial no Rio de Janeiro*. Rio de Janeiro: ISER, 1997.
- CERQUEIRA, C.M.N. "Questões preliminares para a discussão de uma proposta de diretrizes constitucionais sobre a segurança pública". *Revista Brasileira de Ciências Criminais*, 6(2), 1998.
- CHEVIGNY, Paul. *Edge of the Knife: Police Violence and Accountability in Six Cities of the Americas*. New York: New Press, 1995.
- CHRISTIE, Nils. "Conflicts as Property". *British Journal of Criminology*, 17(1), 1977.
- CORNWALL, Andrea. "Making Spaces, Changing Places: Situating Participation in Development". IDS Working Paper 170, 2002.
- DRAIBE, Sônia Miriam. "A nova institucionalidade do sistema brasileiro de políticas sociais: os conselhos nacionais de políticas setoriais". *Caderno de Pesquisa 35*, UNICAMP, 1998.
- FRÜHLING, Hugo. "Police Reform and Democratization". In: H. FRÜHLING et al. (eds.), *Crime and Violence in Latin America: Citizen Security, Democracy and the State*. Washington, DC/ Baltimore: Woodrow Wilson Center Press – Johns Hopkins University Press, 2003.
- GLOBAL JUSTICE. *Rio Report: Police Violence and Public Insecurity*. Rio de Janeiro: Global Justice, 2004.
- HUMAN RIGHTS WATCH. *Police Abuse in Brazil: Summary Executions in Rio de Janeiro*. New York: Human Rights Watch, 1997.
- _____. *Behind Bars in Brazil*. New York: Human Rights Watch, 1998.

- JOHNSON, B.R. "Assessing the Impact of Religious Programs and Prison Industry on Recidivism: An Exploratory Study". (Unpublished paper.) Washington, DC: Prison Fellowship International, 2000.
- JOSHI, Anuradha & MOORE, Mick. "Institutionalized Co-production: Unorthodox Public Service Delivery in Challenging Environments". *Journal of Development Studies* 40(4), pp. 31-49, 2004.
- KAHN, Tulio. "Segurança pública e trabalho policial no Brasil". Working Paper CBS 51-2004. Oxford: Centre for Brazilian Studies, 2004. Available at <<http://www.brazil.ox.ac.uk>>. Last access on 2 March 2005.
- LEMGRUBER, Julita; MUSUMECI, Leonarda & CANO, Ignacio. *Quem vigia os vigias: Um estudo sobre controle externo da polícia no Brasil*. Rio de Janeiro: Record, 2003.
- MACAULAY, Fiona. "Problems of Police Oversight in Brazil". Working Paper CBS 33-2002. Oxford: Centre for Brazilian Studies, 2002. Available at <<http://www.brazil.ox.ac.uk>>. Last access on 2 March 2005.
- _____. "Sexual Politics, Party Politics: The PT Government's Policies on Gender Equity and Equality in Brazil". Working Paper CBS 46-2003. Oxford: Centre for Brazilian Studies, 2003a. Available at <<http://www.brazil.ox.ac.uk>>. Last access on 2 March 2005.
- _____. "Democratization and the Judiciary: Competing Reform Agendas". In: M. D. KINZO & J. DUNKERLEY (eds.), *Brazil since 1985: Economy, Polity and Society*. London: Institute of Latin American Studies, 2003b.
- MASUD, Mohammad O. "Co-producing Citizen Security: The Citizen-Police Liaison Committee in Karachi". IDS Working Paper 172. Brighton (RU): Institute of Development Studies, University of Sussex, 2002. Available at <<http://www.ids.ac.uk/ids/bookshop/wp/wp172.pdf>>. Last access on 2 March 2005.
- MESQUITA NETO, Paulo de & LOCHE, Adriana. "Police-Community Partnerships in Brazil". In: H. FRÜHLING et al. (eds.). *Crime and Violence in Latin America: Citizen Security, Democracy and the State*. Washington, DC/Baltimore: Woodrow Wilson Center Press – Johns Hopkins University Press, 2003.

- MUSUMECI, L. et al. "Segurança pública e cidadania: A experiência de policiamento comunitário em Copacabana (1995-1996). Relatório final do monitoramento qualitativo". Rio de Janeiro: ISER, 1996.
- NEILD, R. "From National Security to Citizen Security: Civil Society and the Evolution of Public Order Debates", 1999. Available at <<http://www.ichrdd.ca>>. Last access on 2 March 2005.
- _____. *Themes and Debates in Public Security Reform: External Controls*. Washington, DC: Washington Office on Latin America, 2000.
- PEREIRA, Anthony. "An Ugly Democracy? State Violence and the Rule of Law in Post-Authoritarian Brazil". In: P. KINGSTONE & T. POWERS (eds.). *Democratic Brazil*. Pittsburgh: University of Pittsburgh Press, 2000.
- SADEK, Maria Tereza. *O Judiciário em debate*. São Paulo: IDESP, 1995.
- _____. *O Ministério Público e a Justiça no Brasil*. São Paulo: IDESP, 1997.
- _____. *Delegados de policia*. São Paulo: IDESP, 2003.
- TATAGIBA, Luciana. "Os conselhos gestores e a democratização das políticas públicas no Brasil". In: E. DAGNINO (ed.). *Sociedade civil e espaços públicos no Brasil*. São Paulo: Paz e Terra, 2002.
- ZEHR, Howard. *Changing Lenses: A New Focus for Crime and Justice*. Scottsdale, Pa: Herald Press, 1990.

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ABSTRACT

This article analyzes public interest law in the context of Central and Eastern Europe from two perspectives: its conceptual foundation and the practical implications for strategies to protect human rights and promote democracy. The article ultimately concludes that the meaning of public interest is less important than the question of who gets to participate in the process of defining it and through what means.

The article generalizes beyond the American case and differentiates three overlapping conceptions of public interest law: social, substantive and process-based. A number of strategic objectives derive from that analysis: developing greater use of legal instruments by civil society organizations in order to strengthen discourse in the public sphere; bringing together theory and practice in higher legal education; and fostering cooperation among different stakeholders, such as bar associations, courts, state bodies and NGOs, in order to strengthen the provision of free legal assistance in the interest of equal access to justice for all. [Original article in English.]

WHO DEFINES THE PUBLIC INTEREST?

Public Interest Law Strategies in Central and Eastern Europe*

Edwin Rekosh



In Central and Eastern Europe – as in continental Europe more generally – the term “public interest law” is not commonly used. But it is starting to be used by some, and more importantly, an increasing number of legal professionals and activists are starting to adopt public interest law strategies, regardless of whether they actually call them public interest law strategies.

In sorting out how public interest law relates to Central and Eastern Europe, I would like to address two particular aspects of the term: First, it’s conceptual foundation – which is admittedly problematic; and second – and more importantly – the practical implications concerning strategies for protecting human rights and promoting democracy and the rule of law.

It has become commonplace among those who have studied the public interest law phenomenon in the United States and elsewhere to throw up their hands when it comes to providing a definition of the term that is at all generalizable or carries any intellectual precision whatsoever. Many like to follow the lead of what US Supreme Court Justice Stevens famously said about pornography: “I know it when I see it”.

Instead of trying to strive for a universal definition, I believe it is more useful to examine the multiple layers of

* This article is a revised and slightly expanded version of a public lecture delivered at Central European University in Budapest on 22 November 2000. © 2005 Public Interest Law Initiative/ Columbia University Kht.

meaning implied by the term. There are at least three different conceptions of “public interest” and “public interest law” worth exploring. The term public interest law comes originally from the United States, so that is a good place to start. One of the first persons to articulate the conceptual underpinning of public interest law in the US was Louis Brandeis, who was a pioneering public interest lawyer – many years before such a notion was widely adopted – and later became a Supreme Court Justice. In a celebrated address to the Harvard Ethical Society in 1905, Justice Brandeis said: “Instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either, able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people” He further stated: “The great opportunity of the American bar is, and will be, to stand again as it did in the past, ready to protect also the interests of the people”.¹

1. L. Brandeis, “The Opportunity in the Law”. *American Law Review*, vol. 39, 1905, pp. 55-63.

Justice Brandeis’ reading of history may be open to question, and he provides scant theoretical justification, but these two sentences nonetheless capture the essence of how American public interest lawyers would begin to define themselves decades later.

It took about sixty years, but the social turmoil of the 1960s did finally create the conditions for widespread adoption of Justice Brandeis’ dictum. In the late 1960s and 1970s, large numbers of American law graduates began to define themselves as public interest lawyers in order to distinguish themselves from the “corporate adjuncts” referred to by Justice Brandeis. They conceived their role as representing the poor and other underrepresented interests in society, partly as a corrective to the disproportionate influence of economically powerful interests.

But if some American lawyers can be said to practice public interest law, then where can one find this body of public interest law they are applying? Where is public interest law codified? This question – which would probably sound silly to a lot of American public interest lawyers – is not an invented one. More than one Eastern European lawyer has listened to me explain some of the key concerns of the public

interest law community in the United States and elsewhere only to ask, at the end of the discussion, for a model public interest law, so that they could promote the adoption of such a law in their own country.

How can one define the concept of “public interest”?

So if public interest law does not refer to a body of law, then what is it? The answer to that question in the United States lies in the origins of the term. It was not adopted to describe a particular field of law; rather, it was adopted to describe **who** the public interest lawyers were representing. Instead of representing powerful economic interests, they chose to be advocates for – in Justice Brandeis’ words – the “people”. This is not to say that all public interest lawyers in the United States see themselves as advocates for the poor. The American public interest law field has come to be understood as encompassing a multitude of objectives: civil rights, civil liberties, consumer rights, environmental protection and so on. But the origin of the term comes most directly from the notion of counter-balancing the influence of powerful economic interests in the legal system, and regardless of their objective, public interest lawyers in the United States continue to be infused with the ethic of “fighting for the little guy”. I will call this the **social** conception of public interest law.

A second conception of public interest law can be thought of as the **substantive** one. This approach starts with the question: “What exactly is the ‘public interest’ that public interest lawyers are presumably protecting, and what are the substantive, doctrinal implications?”. Well, even if there is no code of public interest law in the United States, there are numerous references to the “public interest” in the legislation and jurisprudence of the US and other countries. In fact, a quick database search of US federal law turned up more than 300 statutes that employ the term “public interest”.

On a whim, I decided to look up “public interest” in a couple of law dictionaries, and I was almost surprised to find that the dictionary editors had dared to define it. This is certainly an indicator that the term “public interest” has doctrinal implications. When I went to law school (in the

United States), every student owned a copy of Black's law dictionary. Here is how that esteemed dictionary defines public interest: "(1) The general welfare of the public that warrants recognition and protection; and (2) Something in which the public as a whole has a stake; especially an interest that justifies government regulation".²

2. Bryan A. Garner (ed.),
Black's Law Dictionary. 7th ed.,
St. Paul, Minn.: West
Publishing Co., 1979.

It is hard to imagine a definition that is more tautological. This means little more than saying that a public interest is a legal interest of the public. Does any of this really get us anywhere?

Another legal dictionary – Barron's – provides a definition which yields a bit more meaning. Like the previous definition, it claims that the public interest is "that which is best for society as a whole", but then adds it is "a subjective determination by an individual such as a judge or governor, or a group such as a ... legislature of what is for the general good of all people" (emphasis added).³

3. Steven H. Gifis, *Law Dictionary*. 4th ed. New York:
Barron's Educational Services,
1996.

While this is not a very rigorous definition either, at least it acknowledges an important practical truth. When a legislative body adopts a law that includes the term "in the public interest", it is essentially code for judicial or executive discretion. It signals that an executive or judicial authority should take into account, in their decision on a particular issue, a necessarily subjective determination of what is in the best interests of the public generally. A commonly applied example in the United States is the provision in our Freedom of Information Act which requires administrative officials to waive or reduce fees charged to cover the cost of duplicating requested documents if "disclosure ... is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester".⁴

4. Freedom of Information
Act, 5 USC, paragraph 552
(a)(4)(A)(iii).

It would of course lead to many arbitrary and inconsistent results if government bureaucrats were unconstrained in their interpretation of such broadly defined criteria. But their decisions are subject to judicial review, which shifts a good deal of the discretionary authority ultimately to the courts. And the courts have their own ways of limiting arbitrary and inconsistent decision-making.

Public interest in Central and Eastern Europe

So what does all this have to do with Central and Eastern Europe? The way in which the term “public interest” is applied as a matter of substance in the US provides a counter-example to one of the general shortcomings in how the rule of law is developing in many countries in Central and Eastern Europe. I don’t know how many times the term “public interest” appears in the legislation of the countries of Central and Eastern Europe, but there are certainly parallel terms that have substantive significance there. For example, many criminal procedure codes in the region contain a provision stipulating that courts should ensure that defendants are represented by a lawyer without charge if “the interest of justice” so require. What does the term “interests of justice” refer to if it is not also code for discretion in the same way in which “public interest” is used in the United States?

A public interest law approach, in this sense of the term, would imply the exercise of discretion by executive authorities – as well as by judges – in pursuing abstract notions of general welfare, such as justice. But this raises a serious institutional blind spot that has developed during the last decade or so of reform. While the state administration arguably has less rule-making authority than under the socialist regime, with the legislative process firmly within the competence of the parliament, legislative changes have increasingly provided governmental agencies with discretionary latitude in making decisions. Yet, there has been little attention focused on relevant standards and practice to guide individual public officials in exercising their discretion. The result has been uneven implementation of the law and a lack of effectiveness in mechanisms intended to keep government accountable to the public.⁵

The situation is similar with respect to the judiciary because the exercise of discretion on the part of judges is also extremely underdeveloped in Central and Eastern Europe. Ewa Letowska, the first ombudswoman of Poland and now a judge on the Supreme Administrative Court of Poland, has tersely explained how this is rooted in the socialist legacy: “The courts [under socialist law] were not only bound

5. See E. Rekosh (ed.), *The Vicious Circle: Weak State Institutions, Unremedied Abuse and Distrust*. Budapest: Open Society Institute, 2005.

6. Ewa Letowska, Response to Questionnaire for: *Guidance for Promoting Judicial Independence and Impartiality*. Washington, DC: USAID 2001 (on file with author).

7. Jan Hrubala, Response to Questionnaire, id.

8. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. (Trans. William Rehg) Cambridge: MIT Press 1989, p. 27.

by the statute but also by every normative act ... The system of law was not a system of statutes only, but one of acts created by the administration, too. The courts asserted they were not allowed to [exercise] control over the executive even if it issued unconstitutional law”.⁶

As a result of this background, judicial reasoning in post-socialist countries, compared with other civil law countries, tends to be even more reliant on strict interpretation of positive law and even less willing to address inconsistent, illogical or unconstitutional outcomes produced by literal application of the law. This broad statement of course applies to varying extents in different countries, depending on their current legal culture and other factors. But Slovakia is a good example of a country where this point can be easily demonstrated. Jan Hrubala, former judge and now head of the Slovak Government’s Anti-Corruption Department, describes the situation in his country this way: “In spite of the democratic changes in the society, certain representatives of the judicial profession continue to behave as if the judges were no more than civil servants whose obligation is to fulfill the will of the current power holders and to accept without reservation the decisions of state administration officials”.⁷

This brings us to the third conception of public interest law – the one that is perhaps the most relevant for Central and Eastern Europe – which is best articulated in the process-based notion of the public sphere, a concept closely associated with Jürgen Habermas, who stated:

*Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses of general interest inside the framework of organized public spheres. [Emphasis added.]*⁸

For Habermas, an open forum for discourse – which he labels the public sphere – is the critical element of democracy. What does this have to do with public interest law? For Central and Eastern Europe, I would argue: quite a lot. For those

who participated in creating a public interest law movement in the United States in the late 1960s and 1970s, the notion of the public sphere, and civil society's role within it, was **not** the key problem they were addressing. Their concerns lied elsewhere: primarily – as I mentioned earlier – with rectifying imbalances in how the work of lawyers favored the powerful economic interests in society.

They were not so interested in addressing the nature of the public sphere because that aspect of American political life was alive and well despite – or perhaps even because of – the social turmoil of the 1960s.

The contrast to European society was first explored by Tocqueville, but a more relevant observer for our purposes was Hannah Arendt. Shortly after she moved to New York, in 1946, in a letter to one of her mentors, Karl Jaspers, Hannah Arendt wrote:⁹ “people here feel themselves responsible for public life to an extent I have never seen in any European country”. As an example to demonstrate her generalization, Arendt cited the storm of protest that followed the detention in concentration camps of Americans of Japanese descent during World War II. In the letter, she recounts her own exposure to this issue. She writes:

I was visiting with an American family in New England at the time. They were thoroughly average people – what would have been called “petty bourgeoisie” in Germany – and they had, I’m sure, never laid eyes on a Japanese in their lives. As I later learned, they and many of their friends wrote immediately and spontaneously to their congressman, insisted on the constitutional rights of all Americans regardless of national background, and declared that if something like that could happen, they no longer felt safe themselves (these people were of Anglo-Saxon background, and their families had been in this country for generations, etc.).

Human rights advocates in Central and Eastern Europe would be pleased but astonished to encounter analogous behavior. In Hungary, for example, the government has adopted an impressive, rights-based educational policy to diminish discrimination against the Roma, a marginalized ethnic minority, by reversing extensive *de facto* segregation of Roma

9. See Lotte Kohler & Han Saner (eds.), *Hannah Arendt/Karl Jaspers: Correspondence*. New York: Harcourt Brace & Company, 1992, p. 30.

10. See Viktoria Mohacsi, "Government Initiatives: Hungary's School Integration Program". In: E. Rekosh & M. Sleeper (eds.), *Separate and Unequal: Combating Discrimination Against Roma in Education*. Public Interest Law Initiative/Columbia University, 2004.

in the school system.¹⁰ The policy is driven primarily by international and European standards, political pressure from the Roma minority itself and the good intentions of a dedicated but small circle of technocrats, educational experts and NGOs. There is a notable absence, however, of proactive support from the majority population.

Until recently, the public sphere in Central and Eastern Europe was dormant for decades or longer. Yet, the "public interest" as a concept was by no means absent from socialist legal theory. Theoretically, the *Prokuratura's* chief function was to protect the public interest, armed with both criminal and civil sanctions. But the principal distinction with the liberal concepts that inform public interest law turns on this notion of the public sphere. Socialist legal theory had no place for alternative voices competing to be heard in the discursive process imagined by Habermas. To the extent general public interests were taken into account, they were determined at the top in a non-democratic process, implemented in a strongly hierarchical manner by executive authorities, and enforced in the courts by the all-powerful procuracy.

This state of affairs has implications for the importance of judicial reasoning alluded to earlier as well. The legacy of the socialist legal system erodes our confidence in the discretion of executive authorities, and further justifies the need to encourage and develop the discretionary functions of the judiciary. Furthermore, the legacy of this approach continues to be evident in the limitations of the language itself – in formerly socialist countries – to distinguish between the state and the public. State interest equals public interest, and the vocabulary (in the relevant national languages) for distinguishing public interests from state interests literally does not exist.

Despite the contrastingly healthy state of the public sphere in the United States, this aspect was also present when the field of public interest law was first defining itself in the 60s, and 70s. One exemplar is Thurgood Marshall, who continued the tradition of Louis Brandeis in that he served as the director and chief litigator of the NAACP (National Association for the Advancement of Colored People) Legal Defense Fund, the premiere civil rights litigation organization

in the United States – before becoming a Supreme Court Justice. In a speech to the American Bar Association in 1975, Justice Marshall said: “Public interest law seeks to fill some of the gaps in our legal system”.¹¹ As one might expect, he was emphasizing the law reform aspects of public interest law. He and his predecessors had been taking this approach on behalf of NGOs like the NAACP Legal Defense Fund and the American Civil Liberties Union (ACLU) for many decades preceding the expansion and consolidation of the public interest law field in America in the 1970s. Justice Marshall went on to acknowledge the important contributions that public interest lawyers had achieved for their clients, the underrepresented individuals in society, but he went further to say:

More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decision makers. They have made it possible for administrators, legislators and judges to assess the impact of their decisions in terms of all affected interests and minorities. And, by helping to open doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.

So at least in Justice Marshall’s understanding of public interest law, enlarging and strengthening the public sphere is an important public interest law objective in the United States as well. The distinction to be drawn in Central and Eastern Europe may be the much more dramatic degree to which the public sphere needs to be created from scratch or revived after decades of dormancy.

Now we’re back to the question of “Who defines the public interest?”. In a liberal society, maybe the answer is: you and me. We all participate in defining what is – and what is not – in the public interest. And the public interest is worked out in the resulting contest of values and opinions. The point is: we don’t need to concern ourselves as much with **what** the public interest is, so much as **who** gets to participate in defining it and through what means.

Here we come to the strategic implications of this conceptual analysis. I have described three different approaches to conceptualizing public interest law: the social,

11. T. Marshall, “Financing the Public Interest Law Practice: The Role of the Organized Bar”. *American Bar Association Journal*, v. 61, 1975, pp. 1487-1491.

the substantive and the process-based conceptions. Taking them in reverse order, let's start with the process-based concept of the public sphere.

Process-based conception. The notion of the public sphere has tremendously important strategic implications for lawyers and activists working on human rights and other public interest issues in Central and Eastern Europe. If we accept that a critical element of democratic development is the further expansion of the public sphere, that implies an approach to the law that is radically different from – at least historically – the dominant trend in the region. Law is one of the main pillars of governance. But if we accept that law should be a product of public sphere discourse rather than a monolithic entity received from some higher authority, then we must provide opportunities to contest the law. Law, then, becomes instrumental, not just for state authorities, but for everyone. It is no longer merely an instrument of state control; it is a forum for resolving conflicts and working out competing notions of what is in the public interest.

What does this mean in practice? It means NGOs pursuing broad social goals, such as human rights, can and should add law to their arsenal. And we can see clearly that this is taking place. Law is being used strategically and instrumentally by NGOs most obviously through the mechanism of the European Court of Human Rights.

But over-reliance on the European Court of Human Rights as the key forum for reconciling the public interest through application of international norms creates its own set of problems. The Court covers a huge and still increasing jurisdiction. It is simply not practical for it to be the sole battleground for working out the public interest. We need to strengthen the ability of national legal systems to cope with competing public interest claims in the same way that the European Court does; if it were otherwise, the legal component of the public sphere would not be a public sphere at all, but rather a public outpost all the way in Strasbourg.

This means that NGOs must be creative in finding ways to, paraphrasing Marshall, open the doors to their own legal systems. This means putting pressure on the ordinary courts to consider constitutional analysis and international law in

applying national laws, making better use of constitutional courts and forums for judicial review, broadening public participation in administrative proceedings, and securing greater access to information that rests under state control.

Some would argue that these legal strategies are more appropriate to the common law system than to the civil law tradition. But I would argue first of all that this distinction is usually overplayed since common law and civil law approaches have been converging for decades, and more importantly, I believe that such measures are a necessary corrective to decades-old habits formed within a weakened public sphere.

Substantive conception. Another component of the strategic agenda of putative public interest lawyers and activists in Central and Eastern Europe has to do with what I have labeled the substantive conception of public interest law. Incorporating explicit areas of discretion into the law becomes a key complement to the strategic objectives just mentioned. That, in turn, depends upon administrators and judges reconceiving their role and adopting new, less familiar modes of reasoning. In short, in many of the countries of Central and Eastern Europe, this requires a major cultural shift.

How might this come about? Many claim that a chief obstacle is the so-called mentality of judges. In other words, the legal culture is not conducive. Well, if we agree that judicial reasoning is tied up in the legal culture, then it would make sense to target the law faculties. Law faculties are also legal culture “factories”. It is where future lawyers, prosecutors and judges learn how to think like future lawyers, prosecutors and judges.

It follows that the key strategic goals within the law faculties ought to be improving the critical thinking skills of law graduates, as well as injecting the practical aspects of law as applied, in order to challenge the myth that law is best conceived as a monolithic and positivistic realm of pure theory. Fortunately for public interest lawyers, there is a tremendous hunger within law faculties for bringing theory and practice closer together. Students and teachers alike see a growing disconnect between how law is perceived within the placid environment of the law faculty and the way it

actually exists in the turbulent world outside. The rapid growth of clinical legal education, in which students learn about the law by providing legal assistance to actual clients, is but one indicator of this trend.

Similar strategies are warranted for schools of public administration and other programs designed to train and increase the professional competence of public servants. A particular challenge in this area is that administrative law and practice has not received the kind of attention that has been focused on the judiciary during the last decade or so of reform in Central and Eastern Europe. As a result, there is a preliminary need to study and understand the way in which administrative decision-making is actually operating and to determine what sorts of training would be most effective.

Social conception. Finally, the social conception of public interest law is starting to have strategic relevance in Central and Eastern Europe as well. One need look no further than the musing of the staunch free marketeer, George Soros, to find evidence of this. First in a controversial article he entitled “The Capitalist Threat”,¹² and then in subsequent books including *Open Society: Reforming Global Capitalism*, Soros is starting to sound a bit like Justice Brandeis. In the introduction to *Open Society*, he writes: “Market fundamentalists hold that the public interest is best served when people are allowed to pursue their own interests. This is an appealing idea, but it is only half true. Markets are eminently suitable for the pursuit of private interests, but they are not designed to take care of the common interest”.¹³

The gap that George Soros and others have identified in Central and Eastern Europe is the same gap that Justice Brandeis was calling attention to in the United States at the turn of the last century. Law and lawyers in the service of what Soros calls “market fundamentalism” are at risk of becoming nothing more than the corporate adjuncts that Brandeis decried. Of course, few would disagree with George Soros’ opinion that the public interest is in part served by individuals pursuing their own private interests. But as Soros has pointedly argued, the market alone will never address many important aspects of the public interest.

One example of this kind of market failure relates to

12. G. Soros, “The Capitalist Threat”. *The Atlantic Monthly*, February 1997, v. 279, n. 2, pp. 45-58.

13. G. Soros, *Open Society: Reforming Global Capitalism*. New York: Public Affairs 2000, p. xii.

access to the services of lawyers. In Central and Eastern Europe, where lawyers' services are becoming increasingly subject to the rules of the free market, an increasing number of individuals are getting second-rate treatment by the legal system. In other words, we are drifting further from the ideal of equal access to justice for all.

The strategic implication for public interest lawyers and activists is that more attention needs to be focused on mechanisms – from both state and private sources – that provide greater opportunities for legal aid to those who are priced out of the market.

In conclusion, we can identify a number of strategies that are critical for supporting the web of values and ideals present in the concept of public interest law. First, NGOs can and should make more effective use of the law as an instrument for achieving social purposes, and this will contribute to the development of a more vibrant public sphere. In addition, legal educators – who are based at the legal culture factories – must continue to bring theory and practice closer together in an effort to improve the critical reasoning of future judges and other legal professionals. In conjunction with that effort, there is a need to understand the operation of administrative processes better and to develop tools to improve the exercise of discretion by public servants as well. And finally, bar associations, courts, state bodies and NGOs must explore new ways of collaborating to ensure adequate legal aid, bringing us closer to the ideal of equal access to justice for all.

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ABSTRACT

The objective of this paper is to analyze the different courses of action developed by human rights organizations that work in the field of economic, social and cultural rights. In this vein, from the definition of the principle characteristics of these rights and their structure, we shall first analyze the possibility of claiming them through judicial channels, together with the problems and limitations of judicial protection strategies. Second, we shall address the debate on the role of the courts on matters related to social policies, and examine, from the perspective of human rights organizations, the apparent impasse between strategies of a judicial nature and those of a political nature, and the possible cooperation between the two. [Original article in Spanish.]

COURSES OF ACTION IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INSTRUMENTS AND ALLIES*

Víctor Abramovich



The structure of economic, social and cultural rights and possible judicial strategies**

Those who subscribe to the thesis that economic, social and cultural rights as demandable rights contain a “defect of origin” believe that the impossibility of claiming them lies in their very nature. The arguments put forward by opponents of the judicial enforcement of economic, social and cultural rights are based on a distinction between the nature of these rights and the nature of civil and political rights.

One of the arguments most often used to support this purported distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other, is the presumed character of negative obligations implied by the former class of rights, while economic, social and cultural rights suggest positive obligations that, in the majority of cases, may only be fulfilled by resorting to funds provided by the public treasury.¹ According to this viewpoint, in performing its negative obligations the state merely adopts a “do not” approach: not arbitrarily detaining persons, not administering punishments without prior justice, not restricting freedom of expression, not violating the privacy of correspondence nor of private papers, not interfering with private property, etc. In

* This article was prepared with the collaboration of Julieta Rossi.

** This part of the text expresses the conclusions of a broader research paper prepared together with Christian Courtis (2002).

See the notes to this text as from page 206.

The references of the sources quoted in this text are found on page 214

contrast, the structure of economic, social and cultural rights is characterized by obliging the state “to do”, that is to say, to provide positive services: supply health services, ensure education, preserve the cultural and artistic heritage of the community.

In the former case, it would be sufficient to limit the activity of the state, prohibiting it from involvement in certain areas. In the latter, the state must necessarily allocate resources in order to provide the claimed services, in a positive form.² These distinctions are based on a distorted and “naturalistic” view of the role and the functioning of the state apparatus, which coincides with the position of a minimalist state, one that guarantees only justice, security and defense.³ Nevertheless, even the most traditional theorists of classical political economy, such as Adam Smith and David Ricardo, saw that the very obvious interrelation between the supposed “negative obligations” of the state – especially the guarantee of the freedom of commerce – and the long list of positive obligations related to the maintenance of political, judicial, security and defense institutions, was a necessary condition for the exercise of individual liberty.

Smith, for example, assigns the state an active role in the creation of institutional and legal conditions for the expansion of the market.⁴ The same could be said for many other “civil and political” rights – such as due process of law, access to justice, the formation of associations and the right to elect and be elected – that imply the creation of the corresponding institutional conditions by the state (the existence and maintenance of courts, the establishment of rules and regulations that lend legal relevance to collective action of a group of people, the calling of elections, the organization of a system of political parties, etc.).⁵

Even certain rights that appear to be more easily classified as “negative obligations”, that is to say, those that require a limitation of the state’s activities so as not to impinge upon the liberty of its citizens – for example, the prohibition of arbitrary detention, of prior censorship of the press, or of violation of correspondence and of private papers – also require intense state activity to prevent either agents from the state itself or private citizens from infringing on this liberty, so much so that the precondition for exercising these rights is the

fulfillment by the state of the functions of police, security, defense and justice. Evidently, the fulfillment of these functions implies positive obligations, characterized by the allocation of resources, and not merely the state refraining from acting.⁶

In short, the structure of civil and political rights may be described as a series of negative and positive state obligations: the obligation to refrain from acting in certain spheres and to carry out a series of functions to guarantee the enjoyment of individual autonomy and to prevent this autonomy from being violated by other citizens. Given the historical concurrency of this series of positive functions with the definition of the modern liberal state, the characterization of civil and political rights has tended to “naturalize” this state activity and emphasize the limits of its action.

From this perspective, civil and political rights differ from economic, social and cultural rights more in matter of degree than in any substantial way.⁷ We can recognize that the most visible features of economic, social and cultural rights are the obligations “to do”, and it is because of this that they are sometimes called “service rights”.⁸ Nevertheless, it is not hard to discover, when observing the structure of these rights, the concomitant existence of obligations “to do not”: the right to health implies a state obligation to not damage health; the right to education presupposes the obligation not to worsen education; the right to preservation of the cultural heritage entails an obligation not to destroy this heritage.

This is why many of the legal actions aimed at the judicial enforcement of economic, social and cultural rights are designed to correct state activity when the state fails to fulfill obligations “to do not”. Similarly, therefore, economic, social and cultural rights may also be described as a series of positive and negative state obligations, although in this case the positive obligations acquire a greater symbolic importance for identifying them. Thus, for example, Contreras Peláez, realizing the impossibility of a clear distinction between the two types of rights, states that “for social rights ... the state service truly represents the substance, the nucleus, the essential content of the right; in cases such as the right to healthcare or education, state intervention occurs every time the right is exercised; the non-provision of this service by the state automatically presupposes the denial of the right”.⁹

It is also possible to illustrate another type of conceptual problem making it difficult to distinguish radically between civil and political rights on the one hand and economic, social and cultural rights on the other, underscoring the limitations of these differentiations and reaffirming the need for a common theoretical and practical treatment in relation to everything that is substantial. The theoretical concept – including the specific legal regulations of the various rights that are traditionally considered “rights of autonomy” and that generate negative obligations for the state – has changed so much that some of the rights classically considered “civil and political” have acquired an unquestionable social aspect. The loss of the absolute character of the right to property based on public interest is the most fitting example, although it is not the only one.¹⁰ The current trends in the right to civil liability damages has made the social distribution of risks and benefits a key criteria in determining the obligation to compensate.

The rather sudden emergence of a right to consume has substantially transformed contractual relations in which there are consumers and users participating in the relationship.¹¹ The traditional interpretation of freedom of expression and of the press has taken on social dimensions that have grown in importance through the formulation of freedom of information as a right for each member of society – which comprises, in certain circumstances, the positive obligation to produce public information. Corporate and commercial freedoms are restricted when their objective or their development has an impact on health or on the environment.¹² In short, many rights that are traditionally classified as civil and political have been reinterpreted from a social point of view, so that absolute distinctions also lose meaning in such cases.¹³ In this respect, the jurisprudence of international human rights organizations and, in particular, the European Court of Human Rights (ECHR), has established as positive obligation of states: to remove the social obstacles that preclude access to jurisdiction; to take appropriate steps to prevent environmental changes from constituting a violation of the right to private and family life;¹⁴ and to develop positive steps to prevent foreseeable and avoidable risks from affecting the right to life.¹⁵

Given the interdependence of civil and political rights with economic, social and cultural rights, in many cases

violations of the former also affect the latter, and vice versa. The apparently incontrovertible distinction between the two categories has a tendency to dissipate when one seeks to identify the violation of rights in specific cases. Often the interest protected by a civil right also covers the interest protected by the definition of a social right. The dividing line between one category and the other is at the very least tenuous. Whenever there are no direct mechanisms for judicially protecting economic, social and cultural rights in the domestic law of states or in the international system of human rights protection, an indirect strategy consists of reformulating the obligations subject to the justice of the state into matters of civil and political rights, so as to address the violation through this channel. Such procedure is of utmost importance in countries like Spain and Chile, where judicial protection, by means of such legal actions as *amparo* [appeal for protection of constitutional rights], is restricted to a limited list of rights labeled as “fundamental”, which in general correspond with those on the classic list of civil rights. Accordingly, it is impossible to gain access to judicial protection in situations when there is a blatant violation of a social right. In this respect, it is particularly useful to consult the mechanism for judicially protecting social rights in connection with fundamental rights in the jurisprudence of the Colombian Constitutional Court, as an example of a means of indirect protection of social rights resulting from their close relationship with a civil or political right.¹⁶

To refer to the right to life so as to protect interests safeguarded by social rights is another strategy for indirectly protecting economic, social and cultural rights resorted to on a domestic level, but which may also be applied to the mechanisms of international human rights protection. In the European system, right to life has been used as a means of protecting interests associated with the right to health and to claim from the state positive protection obligations. In the case of *L.C.B. v. the United Kingdom*, the ECHR declared that the first paragraph of Article 2 of the Convention obliges states not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard life. The case in question addressed the scope of the duty of the state to supply adequate information to the applicant on

the circumstances that could have minimized or prevented the disease she was suffering from.

Also explored as a strategy for indirectly claiming social rights, is the close relationship between the choice of an individual way of life and the exploitation of the cultural heritage that identifies, for example, a given minority, or an indigenous people. In this vein, the right to autonomy – or the right to establish one’s own life project in an autonomous way – draws closer to the social right to participate in certain cultural practices or groups. One can argue, therefore, that the life project of each member of this group depends greatly on the enjoyment of the cultural heritage – language, religion, ancestral lands and traditional economic customs – of indigenous peoples.¹⁷

One could say, therefore, that the assignment of a right to the category of civil and political rights or economic, social and cultural rights has a heuristic, ordering and classifying purpose; nevertheless, a stricter conceptualization would produce a *continuum* of rights, in which the place of each right would be determined by the symbolic weight of the positive or negative obligations components outlined in it. According to this reasoning, some rights clearly liable to be classified as negative state obligations fall into the province of civil and political rights – the case, for example, of freedom of thought or freedom of expression without prior censorship. On the other hand, some rights which in essence are classified as positive state obligations may be found in the catalogue of economic, social and cultural rights – for example, the right to housing.¹⁸ In the space between these two extremes lies a range of rights consisting of a combination of positive and negative obligations in differing degrees: to determine whether one of these falls into the category of civil and political rights or the group of economic, social and cultural rights is a conventional, more or less arbitrary decision.

Along the same lines, authors such as van Hoof and Asbjorn Eide propose an interpretive system that consists of establishing “levels” of state obligations that would characterize the identification of each right independently of its assignment to the group of civil and political rights or economic, social and cultural rights. According to van Hoof’s proposal,¹⁹ for example, one could discern four “levels” of obligations: to

respect, to **protect**, to **fulfill** and to **promote** the right in question. Obligations to **respect** are defined as the duty of the state not to interfere nor hinder or bar access to the enjoyment of resources that constitute the object of the right. Obligations to **protect** consist of preventing others from interfering, hindering or impeding access to these resources. Obligations to **fulfill** entail ensuring access to the resource when holders of the right cannot do so themselves. Obligations to **promote** are characterized as the duty to create the conditions so that holders of the right can have access to the resource.

As we can see, the concept of “levels” of obligations can be applied perfectly to the entire spectrum of rights, regardless of whether they are classified as civil and political rights or economic, social and cultural rights. Much of the work performed by human rights organizations and by international bodies that enforce international human rights regulations concerning the right to life and the right to physical and psychological integrity (and the corresponding prohibitions of death and torture) – rights generally classified as civil and political – consists of reinforcing the aspects associated with the obligations to protect and satisfy these rights. Various methods are used to do this, such as: investigation of violational state practices; trial and establishment of civil or criminal liabilities for their perpetrators; compensation for the victims; modification of legislation to establish special forums for trying cases of death, disappearance and torture; modification of programs to form the military and security forces; and the inclusion of human rights education in school curricula.

Positive obligations and negative obligations

It is important to repeat here that objections to the judicial enforcement of economic, social and cultural rights stem from the simplistic view that these rights establish exclusively positive obligations – an idea that, as we have seen, is far from being correct.²⁰ Civil and political rights, as well as economic, social and cultural rights, all constitute a series of positive and negative obligations. It is appropriate, therefore, to investigate this concept in greater detail, since its clarification will improve the extension and scope for claiming both types of right.

When referring to negative obligations, we mean the

obligations of the state to refrain from certain activities; for instance: not impeding the expression or the dissemination of ideas; not violating correspondence; not detaining people arbitrarily; not impeding a person's affiliation with a union; not interfering in strikes; not worsening the state of health of the population; not impeding a person's access to education.

As for positive obligations, it is appropriate to establish some distinctions that give us an idea of the type of measures that can be claimed from the state. It is somewhat automatic to link positive state obligations directly with the obligation to dispense funds. There is no doubt that this is one of the most characteristic ways of fulfilling the obligations to do or to give, particularly when the issue at stake concerns health, education and access to housing. However, positive obligations extend beyond the actions that require the dispensation of budget reserves for the provision of services. Obligations to provide services may be characterized by the establishment of a direct relationship between the state and the recipient of the service. But the state can also ensure the enjoyment of a right in other ways, in which other obligated individuals can take an active part.

1. Some rights can be characterized by the obligation of the state to establish some type of regulation, without which the exercise of a right has no meaning.²¹ In these cases, the state's obligation is not always associated with the transfer of funds to the recipient of the service, but rather with the establishment of precepts that ascribe relevance to a given situation or with the organization of a structure that implements a given activity. To give an operational example, the right to free association implies an obligation by the state to give legal relevance or recognition to the association resulting from the exercise of this right. Similarly, the right to form a union or to affiliate oneself with a union implies the right to ascribe the relevant legal consequences to their activities.

The political right to elect presupposes the possibility of choosing from among different candidates, which in turn implies the existence of a regulation to ensure the possibility of various candidates representing political parties and running for election. The right to information

implies at the very least the establishment of a state legislation intended to ensure access to information from various origins and the plurality of voices and opinions. The right to marry implies the existence of a legal regulation that confers some validity to the act of getting married. The right to the protection of the family presupposes that there are legal precepts that assign to the existence of a family group some form of differential consideration that its non-existence would not have.

The enjoyment of these rights implies a series of precepts establishing relevant legal consequences, resulting from the original permission. Once again, these may be new permissive precepts (the possibility of an association entering into contracts, or a married couple registering their home as a family asset, to protect it from potential foreclosures, etc.); prohibitions against the state (making it impossible to impose arbitrary or discriminatory restrictions against the exercise of the aforementioned rights, or prohibiting discrimination against children born out of wedlock); or even obligations of the state (to recognize candidates submitted by political parties, or union delegates).

2. In other cases, obligations require the regulation established by the state to limit or restrict the powers of citizens or to impose some form of obligations upon them. Legislation associated with labor and union rights in general share this characteristic, as do the relatively recent precepts governing consumer defense and environmental protection. Consequently: the establishment of a minimum wage; the principle of equal salaries, which establishes equal remuneration for equal work; obligatory breaks; the limited workday and annual paid vacations; protection against arbitrary dismissal; guarantees enabling union delegates to perform their work, etc, would make little sense if they could only be claimed when the state is the employer. In market economies, the state has an obligation to establish a regulation that extends to private employers. The same applies for the precepts governing consumer relations and environmental obligations.

There are also cases in which state regulation may establish limits or restrictions on the free interplay of market forces, in order to promote or assist access by low income groups to rights such as the right to housing. State regulation of interest rates for mortgages and of leasing for family housing are examples of this type of measure. Moreover, such restrictions are not limited to the economic field. The right to retraction and the right to reply are a good example: the state places restrictions on private journalistic media for the benefit of citizens who feel negatively affected by false or offensive information.

3. Finally, the state can fulfill its obligation of providing services to the population, either exclusively or through forms of mixed coverage that include not only state contribution, but regulations that contemplate the citizens affected by restrictions, limitations or obligations. State measures to fulfill its positive obligations can take on multiple forms: the organization of a public service (for example, courts that ensure the right to jurisdiction; provisions for the position of public defender, ensuring the right to counsel for those who cannot afford a private lawyer; or the organization of a public education system); the provision of development and training programs; the establishment of scaled public/private forms of coverage (for example, through the organization of private forms of contribution for the maintenance of social services that cover the right to health of employed people and their families, and the establishment of a public health system for people not covered through the employment structure); the public administration of different forms of credit (for example, mortgage loans for housing); the creation of subsidies; the implementation of public works; the provision of tax benefits or exemptions.

As we can see, the series of obligations a single right can encompass is extremely varied. Economic, social and cultural rights are characterized precisely because they involve a vast spectrum of state obligations. Consequently, it is false to assert that there are scant possibilities of judicially enforcing these

rights: each type of obligation offers a range of possible actions, which vary from denouncing the non-fulfillment of the negative obligation, the various forms of controlling the fulfillment, to demanding the fulfillment of the non-fulfilled positive obligation.

Judicial strategies

From what has been said thus far, we can draw conclusions that clearly call into question the idea that only civil and political rights fall into the sphere of the Judiciary.²² Nevertheless, if we understand that all rights generate for the state a series of negative and positive obligations, we need to analyze what types of obligations offer the possibility of being claimed through judicial action. The problem leads us to the classical discussions on the definition of rights: the relationship between a right and the judicial action that exists to claim it. Some conceptual issues raised by this discussion – a source of constant circular responses – refer to the strict bond between the classical idea of the subjective right, the idea of property and the model of the liberal state.²³ The essential ideas and procedures that shape the traditional continental legal system have emerged largely from the conceptual framework determined by this bond; this is why many of the almost automatic responses about the possible judicial enforcement of economic, social and cultural rights draw on the lack of actions and specific legal guarantees that protect these rights.

Some of the facets these responses highlight refer to the collective nature of many of the claims dealing with economic, social and cultural rights. They also refer to the inadequacy of the structure and the position of the Courts to impose obligations that, to be fulfilled, require that the political authorities provide the appropriate funding, or to the inequalities that would arise from the success of some individual cases in which a given right of a given person becomes claimable, whilst the rights of other identical situations that have not been questioned judicially would remain non-fulfilled. In this vein, some authors note that the limited cognitive framework of a judicial case is an obstacle to judicial protection: the decision framework of judicial litigation is not always the most suitable place for discussing and deciding

on matters of public policies that could imply prioritizing objectives, distributing resources, balancing opposing interests, etc.²⁴ Others refer to the professional training of magistrates: certain matters submitted to the consideration of the judicature require specific technical knowledge and large amounts of information on the facts, making a specialized administrative agency better qualified for the job than a judge or a Court of Law.²⁵

Although we must admit theoretical difficulty – which evidently places limits on the judicial protection of certain obligations resulting from economic, social and cultural rights – we need to conduct a more precise analysis to clarify the distinct types of situations in which violations of economic, social and cultural rights are correctable through judicial action. Moreover, we need to add that the inexistence of specific legal instruments to remedy the violation of certain obligations arising from economic, social and cultural rights does not mean it is technically impossible to create and develop them. The argument that draws on the inexistence of appropriate actions merely exposes a state of affairs²⁶ susceptible to be modified. We could say that the traditional legal instruments – emerging from the context of disputes aimed at individual interests, the right to property and the concept of an abstentionist state – appear limited when it comes to judicially claiming such rights.²⁷

On the one hand, as we have seen, violations of economic, social and cultural rights often result from the non-fulfillment of negative obligations by the state. In addition to the many examples given, it is useful to remember that one of the underlying principles established for economic, social and cultural rights is the obligation for the state not to adopt a biased approach in the exercise of these rights (see Article 2.2 of the International Covenant on Economic, Social and Cultural Rights – ICESCR), which in fact establishes important negative obligations of the state. Violations of this type open up an enormous field for claiming judicial protection of economic, social and cultural rights, whose recognition therefore constitutes a limit and, consequently, a standard for contesting state activity that does not respect these rights.

Consider, for instance, state violation of the right to health as a result of the contamination of the environment by its

agents; or the violation of the right to housing as a result of forced eviction of residents from a given area without the provision of alternative dwelling; or the violation of the right to education as a result of restrictions on the access to education based on sex, nationality, economic conditions or other discriminatory factors; or the violation of any other right of this type when the legislation that establishes the conditions of access and enjoyment are discriminatory. In these cases, many of the traditional legal avenues are perfectly viable, whether they are cases of unconstitutionality, cases to contest or revoke regulatory acts of general or private scope, declaratory actions, *amparo* proceedings, or even suits for damages. The positive action of the state, which ends up violating the negative limits imposed by a given economic, social or cultural right, is judicially contestable and, if this vulnerability is proven, the judge may decide to strip the illicit manifestation of the state's will of any legitimacy, compelling it to make the necessary corrections so as to respect the affected right.

On the other hand, we also come across cases in which the state fails to fulfill positive obligations, that is, when the state neglects its obligations to carry out actions or measures to protect and satisfy the rights in question. This is where the greatest number of doubts and questions concerning the judicial protection of economic, social and cultural rights come into play. However, the issue involves a multiplicity of aspects that need to be reviewed. One could say that in an extreme case, that is, when the state completely and absolutely fails to fulfill all of its positive obligations, it would be extremely difficult to compel direct fulfillment through judicial action. There is some sense to the traditional objections concerning this: the Judiciary is not suited to conduct planning in public policy; judicial cases are not very appropriate for discussing measures of general scope; judicial discussion raises problems of inequality for those persons affected by the same failure to fulfill an obligation but who have not participated in the case; the Judiciary lacks the compulsory means of enforcing a verdict that compels the state to provide a service that had been neglected for all the cases involved, or to edit the neglected regulation; the substitution of general measures for *ad hoc* decisions made by the judge in a private case could also prompt undesirable inequalities, etc.

Despite the evident difficulties, it is worth pointing out some of the nuances of these objections. In principle, it is difficult to imagine a situation in which the state utterly and absolutely fails to fulfill every positive obligation associated with economic, social and cultural rights. As we have already seen, the state partly fulfills its obligation concerning rights to health, to housing or to education through legislation that extend these obligations to citizens, interfering in the market with regulations and the exercise of police power, performed *a priori* (through authorizations, accreditations and licenses) or *a posteriori* (through inspections). So much so that, given that the obligations to take appropriate steps to guarantee these rights are partly fulfilled, even when the steps do not imply the full provision of services by the state, there is always the possibility of judicially contesting the violation of state obligations, by alleging discriminatory provision of the right.

The possibilities are more evident when the state provides a partial service, discriminating against entire portions of the population. Of course, judicial and operational obstacles may hamper the formulation of similar cases, but it is hard to argue that the partial or discriminatory fulfillment of a positive obligation is not a viable case for demanding judicial protection. Accordingly, appeals that draw on equality of treatment for claiming social rights have been an avenue traditionally pursued by human rights movements in their litigation strategies. From the women's rights movement, which pushed for equal salaries in the workplace, to the civil rights movement in the United States, in claiming equality in access to jobs, equal salaries and identical education and public health conditions, equality of treatment and prohibition of discrimination are avenues that have been successfully pursued for indirectly claiming economic, social and cultural rights for groups and sectors of society that enjoy less protection from the state. Also in this respect, it is very useful to consult the development of the criteria and standards of equality and non-discrimination established by the Constitutional Court of Colombia, and their application concerning social rights.²⁸

Secondly, beyond the multiple theoretical and practical difficulties besetting the organization of collective actions, non-fulfillment by the state can often be reformulated, even in a traditional judicial context, into individual and specific

violations, rather than generic. The general violation of the right to health can be redirected, or reformulated, through the organization of an individual case filed by a single plaintiff who alleges a violation caused by the lack of production of a vaccine or by the denial of a medical service on which his or her life or health depends; by the establishment of discriminatory conditions in access to education or housing; or even because of unreasonable or discriminatory rules for access to social welfare benefits (for example, the prohibition of extending to illegal immigrants the benefits of an AIDS treatment medicine program). The ability to argue this will be founded on the intelligent description of the violations of positive and negative obligations, or otherwise on a conclusive demonstration of the consequences of the violation of a positive obligation based on an economic, social and cultural right, on the enjoyment of a civil and political right. If the violation affects a broad group of people, a situation known in contemporary procedural law as “homogenous individual interests or rights”,²⁹ the numerous individual judicial decisions will alert the political authorities to a situation of widespread failure to fulfill obligations of importance to public policy – a particularly valuable consequence for the issue we shall address next.

The response of the Courts to collective and direct social rights cases prompted by the inactivity of the state may assume various profiles. In principle, the role of the Judiciary may consist of declaring that the omission of the state constitutes a violation of the right in question, thereby compelling the state to take the appropriate action. In these cases, it is the role of the Judiciary to advise the public authorities as to the nature of the appropriate action, either by notifying the specific result required, without determining what method to employ (for example, access of a portion of the population to medical services or the relocation of arbitrarily evicted people); or, in cases when there is only one possible means of obtaining the required result, by describing in detail the action that must be taken. In such cases, the public information available and the prior conduct of the state, its “own acts”, acquire enormous importance, as they add to the discussion on matters of “public policy” or of a technical nature – for example, concerning budget priorities or priorities to formulate, develop and

implement specific official measures. It is in this type of case, in which the obstacles to claiming social rights are more evident, that the Judiciary tends to act more reticently.

There is no doubt that the implementation of economic, social and cultural rights depends in part on planning and budget forecasting, which, given their nature, are the job of the public authorities, and only in limited cases may the Judiciary intervene to make up for its inefficiency. Even in these cases, however, there are a variety of opportunities for judicial activity, and courts have found ways of guaranteeing the validity of social rights that have been violated, basing their intervention on legal standards established by constitutions and human rights treaties, and seeking, in each case, the best way of shielding the scope of the action from the other branches of the state. On occasion, they redirect the case after having established its legal framework, in order to define the measure, or public policy, necessary to remedy the violation of the rights in question.

The jurisprudence of domestic courts in Latin America provides examples of some of the avenues successfully explored by them to perform their function of guaranteeing economic, social and cultural rights. Among other important cases, this was the avenue pursued by judges who succeeded in compelling the state to provide drugs to all AIDS patients in the country; to manufacture and administer vaccine to the entire population suffering from an endemic disease; to create maternal/child care centers for a socially discriminated group; to supply drinking water to an indigenous community; to extend the coverage of an educational or welfare benefit to an originally excluded group; to return to private secondary school students who were unfairly expelled.³⁰

The role of the Judiciary and cooperation between legal and political strategies

An analysis of the historical circumstances that led up to a greater judicial activism concerning economic, social and cultural rights in Latin America is directly related to the existence of political factors that assigned the Judiciary a special legitimacy to occupy a place in the decision-making arena that was previously restricted to the other branches of the state.

The weakness of the representative democratic institutions, together with the deterioration of the traditional centers of social and political mediation, have contributed to this transfer to the judicial domain of collective conflicts that were previously settled in other social or public spheres, restoring primarily the topic of social rights – the old controversy over the degree of maneuverability of judicial bodies in relation to administrative bodies. To a certain extent, the recognition of judicially protectable rights limits or restricts the government's maneuverability. But an analysis of this matter does not fall within the conceptual framework of this paper. However, we understand that this is not a question that can be answered in an abstract manner, without back-up from the social and institutional context in which the intervention of justice is sought.³¹

It is clear, therefore, that judicial intervention in these fields should be, in the interest of preserving its legitimacy, firmly based on a legal standard: the “rule of judgment”, in which the intervention of the Judiciary is grounded, may only be used as a criterion for analyzing the measure in question if has its roots in a constitutional or legal precept (for example, the principles of “reasonableness”, “proportionality” or “equality”, or an analysis of minimum content that may be found in the very precepts that establish rights). Therefore, it is not the job of the Judiciary to devise public policies, but rather to examine existing policies with the use of applicable legal standards and, whenever discrepancies are found, forward the matter back to the appropriate authorities so they can adjust their activity.

When, in public policy planning, the constitutional or legal precepts determine agendas on which the validity of economic, social and cultural rights depend, and the appropriate authorities have not adopted the necessary measures, it is the job of the Judiciary to chasten this omission and send the matter back to the authorities so that appropriate measures are taken. This aspect of the judicial action can be regarded as participation in a “dialogue” between the various branches of the state to observe the legal and political program established by the Constitution or by human rights conventions.³² Only under exceptional circumstances, when justified by the magnitude of the violation or by the sheer lack

of cooperation by the political authorities, do judges proceed to define, according to their own criteria, the measures that must be adopted.³³

In this sense, in the following we will attempt to characterize typical situations in which the Judiciary assumes the task of verifying compliance with legal standards in the development and application of public policies.

The first type of situation is the judicial intervention that tends to give legitimacy to public policy measures assumed by the state without judging the public policy itself – transforming measures developed by the state within a framework of arbitrariness into legal obligations that are, consequently, subject to sanctions in cases of non-compliance. In its analysis, the court accepts the measure that has been created by the other branches of the state, transforming its character from a mere arbitrary decision into a constituted obligation. Accordingly, the Judiciary becomes the guarantor that the measure will be properly applied. In many such cases, the measure developed by the state coincides with what is being demanded by claimants, only its adoption now assumes a mandatory character, and its application is not subject only to the government body it was developed by. One example is the *Viceconte* case,³⁴ in which the Argentine state made a political decision to manufacture a vaccine against an epidemic and endemic disease, going so far as to set up a time schedule for its production. All the court did alter the character of this measure, transforming it into a legal obligation; for this reason, it took the word of the state concerning the time schedule, determining sanctions in the event of non-compliance.

There are points of conflict in discussions on the problems of the Judiciary's legitimacy in this type of collective action, or actions which result in a collective impact, in cases when a decision is required concerning exclusively the fulfillment by the state of very clear obligations established by law or by regulations on social matters. Supposing this does occur, it is not up to the court to establish conduct or policy, only to compel the state to observe and apply what is stated in the law. We could take, as an example, a law dealing with AIDS that clearly defines the benefits due to affected persons, or a Ministry of Health regulation that determines the scope of

welfare coverage for AIDS cases in all public hospitals, in compliance with a judicial mandate. There is no discussion here about the existence of an obligation, in the legal sense, to provide a service, only an examination of its non-fulfillment by the state.

Although every act of interpretation of the law results to a certain extent in an act of creating law, judicial action follows the guidelines and the agendas set by Congress, which, in the classic theory of the division of powers, is the expression of the political will of the majority.³⁵ The same occurs when the Courts are summoned to apply regulations or acts emanating from the state, from which derive legal obligations for the state. The possible interference in areas or spheres of activity reserved for the other branches of government is not a question that can be validly posed in these cases. The Judiciary is limited to compelling the state to fulfill the obligations determined by law, or by the state itself, in its regulatory capacity.

The second type of situation arises in cases when a Court of Law examines the compatibility of public policy with the applicable legal principle and, consequently, its aptness to satisfy the right in question. Under these circumstances, if the court considers the policy – or any aspect of it – to be inconsistent with the principle, it sends that matter back to the appropriate authorities for them to reformulate it. The principles employed by the courts to analyze a public policy are reasonableness, proportionality, non-discrimination, progressiveness, non-retroactivity, transparency,³⁶ etc. In this respect, for example, in the *Grootboom* case,³⁷ the Constitutional Court ruled that the housing policy developed by the South African government was not reasonable, as it did not allow for the immediate provision of housing solutions for sectors of the population with urgent housing needs – the court concluded that one aspect of the policy conflicted with the principle of reasonableness, but it did not question the policy as a whole. Generally speaking, courts allow the other branches of government a broad leeway to develop public policies, so as not to substitute them in choosing the guidelines that are in keeping with the applicable legal principles.

As long as the political authorities act in keeping with

the legal principles, the Judiciary will never have to analyze whether some alternative policy could have been adopted. The degree of control also depends on the principle: the analysis of “reasonableness” is less rigorous than the analysis that could be performed based on the notion of “appropriate steps” contained in the International Covenant on Economic, Social and Cultural Rights. It is important to emphasize that, in this type of case, the judicial action in the application stage does not consist of the compulsory imposition of a penalty, understood to be a detailed and self-sufficient ruling, such as the imposition of an obligation to pay a net and exigible sum; instead, continuity is given to a directive established in general terms, and which is shaped throughout the case through “dialogue” between the judge and the state. So much so that the sentence, far from constituting the end of the process, is like a point of inflection that alters the direction of the jurisdictional action: once the award is pronounced, it is up to the state to plan how it will comply with the instructions of the magistrate, while the court limits itself to supervising the adjustment of the concrete measures adopted as a result of the order it delivered.

In the third type of situation, the Judiciary takes responsibility for establishing the measure to be adopted. In this case, the passivity of the other branches of government in the face of the vulnerability of a social right prompts the court to check the existence of a single suitable measure of public policy – that is, the inexistence of alternatives to satisfy the right in question – and order its application. A good example is the *Beviacqua* case,³⁸ in which the preservation of the life and health of a boy with a serious bone marrow disease required treatment with a specific drug that his parents could not afford. In this instance, unlike in previous cases, the Judiciary took upon itself to choose the measure to be adopted and, consequently, the appropriate conduct.

We could consider a fourth type of judicial intervention that is limited to declaring that the omission of the state is illegal, without proposing remedial steps. Even if the judge’s award is not directly applicable, there is value in a judicial action in which the Judiciary declares that the state is delinquent or has failed to fulfill its obligations concerning economic, social and cultural rights. Both in judicial cases that

are enforceable – such as the aforementioned *Beviacqua* case – and in judicial decisions that declare the non-fulfillment of state obligations in a given area, and possibly informing the political authorities thereof, the sentences delivered by the Judiciary can constitute important vehicles for advising the political authorities of the demands of the public agenda, through a grammar of rights and not merely by lobbying or party political demands.

The multiple forms of judicial intervention, which conform to different levels or degrees of activism, determine the potential of the various legal strategies, and also the possibility of establishing fruitful cooperation with other political strategies – supervision of social public policies, lobbying in government bodies or in Parliament, negotiation, social mobilization and public opinion campaigns. This is why it would be wrong to think that legal strategies cannot embrace other political strategies, or to propose, as alternatives, to take action in court or in the field of public policy. In principle, every strategy employed to claim rights, specifically in cases involving collective disputes or situations of homogenous individual interests, has a clear political sense. Moreover, in all the actions for claiming economic, social and cultural rights, the key to success lies in the very cooperation between the different fields, so that the resolution of the legal case can contribute to transforming the institutional deficiencies, state policies or the social situations that are the heart of the dispute. In general, successful legal strategies are usually those that are backed up by the mobilization and by the activism of the protagonists of the actual dispute.

At times, legal avenues preserve or improve the effectiveness of the “victories” obtained on a political level.³⁹ Within the framework of our fragile democracies, the sanction of laws by Congress does not always ensure that the acknowledged rights are upheld and, as we have seen, it is sometimes necessary to litigate to make sure these rules are implemented and observed. Accordingly, in a much-flawed institutional system, not even legal victories concerning social rights or political triumphs are definitive, and they require the use of all the available means of action and means of claim.

One of the reasons for adopting constitutional clauses

or treaties that establish rights for persons and obligations and commitments for states is to make it possible to claim fulfillment of these commitments – not as a gracious concession, but rather as a government program adopted both domestically and internationally. It seems evident that, in this context, it is important to establish mechanisms of communication, debate and dialogue that remind the public authorities of their commitments, compelling them to incorporate into government priorities measures geared towards fulfilling their obligations when it comes to economic, social and cultural rights. In this vein, it is particularly important for the Judiciary itself to “communicate” to the appropriate public authorities any failure to fulfill these obligations.

The logic of this process is similar to that which requires the exhaustion of internal resources as a prior condition for accessing the international human rights protection system: of giving the state the chance to acknowledge and fix the alleged violation before appealing to international circles to denounce the non-compliance. When the Executive does not fulfill its obligations and it is therefore labeled “delinquent” by the Judiciary, in addition to the possible adverse consequences on an international level, it will have to face from its own citizens the political accountability of its delayed action.

We have seen how the range of action of the Judiciary can vary considerably, depending on the direct actions taken to claim economic, social and cultural rights – legitimize a public policy decision already taken by the state; enforce a law or an administrative directive that establishes legal obligations in social matters; establish a standard within which the Executive must plan and implement concrete actions and supervise their application; determine a conduct to be followed; or, under certain circumstances, label the state delinquent concerning an obligation, without imposing any legal remedy or means of enforcement. Cooperation between the legal actions that produce any of the above results and other strategies of a political nature is the key to an effective claim strategy. One may suppose that the greater the moderation with which the Judiciary acts, the more active the political effort must be to ensure that the legal decision translates into the satisfaction of the rights in question. However, there are

no factors in play obliging us to consider that legal strategies exclude political channels.

It is fitting to analyze other situations that enable cooperation between these two channels when it comes to claiming economic, social and cultural rights. It is sometimes possible to employ judicial intervention purely for the purpose of illustrating other available means of making demands of the state's administrative or legislative bodies. These are complementary legal strategies, arising from a "procedural focus" or perspective: no service is claimed, nor is any policy or measure referring to social rights called into question. Their only purpose is to guarantee the conditions that make it possible to adopt deliberative processes for producing legislative directives or administrative acts.

In these situations, the demands do not expect the Judiciary to have a direct knowledge of the collective dispute and guarantee a social right; only that it complements the other actions of a political nature, for instance, claims to the Judiciary for the opening of institutional forums for dialogue, the establishment of their legal frameworks and procedures, or the guarantee that potentially affected persons may participate in these forums, under equal conditions. These cases may also be used to request access to public information that is indispensable for the prior control of policies and decisions to be adopted, and their legitimacy; the production of data, if the case calls for it; as well as the enforcement and observance of settlement agreements achieved by persons or social organizations, in the various formal or informal bodies of interchange and communication with the Executive.

In some Latin American countries, organizations of users and consumers have successfully developed these channels of action. They have claimed, for example, the holding of public hearings prior to tariff rises for public services – electricity, water, gas – or executing contracts with concessionary companies, calling for access to public information that is indispensable to uphold their rights in these areas and protecting (at times with judicial intervention) the results achieved once the deliberative proceedings are over. Environmental organizations have also developed their own legal strategies, for the purpose of claiming forums for participation and access to information before measures or

policies that involve environmental risks are adopted. The same form of legal strategy is also employed in the judicial actions of indigenous peoples seeking to secure mechanisms to consult and participate in decisions concerning their cultural homelands.

The human rights movement has a lot to learn about these strategies. When the state provides space for civil participation to discuss or analyze certain measures or policies (public hearings in Parliament or in administrative bodies, participative preparation of rules, participatory budget, strategic planning councils in cities), the actions may have as a goal to discuss the conditions of admission, as well as mechanisms of debate and dialogue, in order to ensure basic rules of procedure. In these situations, even though the right to civic or civil participation is formally discussed, the social rights in question may define the scope of this participation – for example, by outlining the affected group, the sector deserving priority attention of the state, or by having an institutional space for participation before adopting a social policy decision.

Thus, for example, in the case brought by the Independent Federation of the Shuar People of Ecuador (FIPSE, in Spanish) against the Arco oil company, the use of judicial *amparo* proceedings prevented the company from negotiating its entrance to the indigenous territory to conduct exploration activities without consulting the legitimate political authorities of the indigenous people. This case, not unlike the traditional trade union classification and trade union legalization disputes in collective bargaining processes, intended to protect the rules of the negotiation process, by defining the players legitimately authorized to negotiate.⁴⁰

Occasionally, judicial intervention may be necessary merely to enforce an agreement executed after negotiating with a state: for example, an agreement to relocate a group of people exposed to the risk of compulsory eviction. Even though these cases deal with enforcing decisions already taken by the state, the characteristics of the social rights in question – such as the right to housing – determine the maneuverability of the Judiciary and the interpretation of the very scope of the obligations emanating from these agreements.⁴¹

Among the most important legal actions that could be

expanded within the framework of indirect legal, or “procedural”, strategies are those that seek access to and production of public information.⁴² The right to information constitutes an indispensable instrument for rendering more effective civil control over public policies in the economic and social sectors, while also contributing to the monitoring, by the state itself, of the degree of effectiveness of economic, social and cultural rights. The state should possess the necessary means of guaranteeing access to public information under equal conditions. Concerning economic, social and cultural rights more specifically, the state should produce and place at the disposal of its citizens, at the very least, information on: (a) the conditions of the different affected areas, particularly when their description requires measurement expressed by indicators; and (b) the content of developed or planned public policies, with express mention of their motives, objectives, timescales and the resources involved. The actions employed to access information are usually legal avenues that support the work of supervising social policies and documenting economic, social and cultural rights violations.⁴³

What characterizes these indirect or complementary actions is that the judicial avenues, far from being the center of the strategy for claiming economic, social and cultural rights, serve to back up other political actions employed to advance the demands for rights in a collective dispute: direct complaints to the Executive, development of channels of negotiation, or even lobbying with officials, Congress or private companies. Once again, it is clear that there are no exclusive or isolated options and that legal instruments can help maximize the political strategy.

NOTES

1. See F. Hayek, 1976, vol. 2, chap. 9.
2. Another attempt at differentiation consists of correlating a specific type of state obligation with each category of rights. Thus, for some authors, civil and political rights correspond to obligations in terms of results, while economic, social and cultural rights correspond only to obligations of conduct. For a more thorough look, consult R. Garretón Merino, 1996, p. 59; and P. Nikken, 1994. See also A. Eide, 1993, pp. 187-219. See opposing arguments in G.H.J. van Hoof, 1984, pp. 97-110; and P. Alston, 1991. In fact, despite the possibility of supporting the distinction, it turns out to be of little relevance when differentiating between civil and political rights, and economic, social and cultural rights.
3. C. Nino (1993, p. 17) describes this position as "conservative liberalism", although he does clarify that it is "more conservative than liberal".
4. For more on this, see also A. Smith, 1937; L. Billet, 1975, pp. 430 and followings; B. de Sousa Santos, 1991, pp. 175-178.
5. See van Hoof, 1984, pp. 97 and followings.
6. See also, on the topic, the opinion of C. Nino, pp. 11-17. From an economic point of view, this argument is the central thesis of S. Holmes & C.R. Sunstein, 1999. See also R. Bin, 2000; and R. Plant, 1992.
7. See also F. Contreras Peláez, 1994, p. 21: "Pure 'negative' obligations (or, in other words, rights that bring about exclusively negative obligations), therefore, do not exist, although it does seem possible to assert a difference of degree with respect to the relevance that services have for one type of right or the other".
8. See also Contreras Peláez, op. cit., pp. 17-20. And also B. de Castro, "Los derechos sociales: análisis sistemático", in *Derechos económicos, sociales y culturales*, by various authors. Murcia, 1981, pp. 15-17.
9. Contreras Peláez, op. cit. p. 21.
10. See the American Convention on Human Rights (Pact of São José, Costa Rica), Article 21.1: "Everyone has the right to the use and enjoyment of their own property. The law may subordinate such use and enjoyment to the interest of society" (emphasis added).

11. See *T. Bourgoignie*, 1994.

12. See *S. Felgueras*, 1996.

13. See also *F. Ewald*, 1985, Book IV.2.

14. ECHR, *López Ostra v. Spain*, A 303-C (1994). ECHR, *Guerra and Others v. Italy*, 19 February 1988.

15. See in European jurisprudence the case *Osman v. the United Kingdom*, ruling of 28 October 1998, in which the European Court established that these obligations included the primary duty of guaranteeing life, by implementing an effective criminal legislation to prevent crimes from being committed against people, and by maintaining a legal system to prevent and punish criminal behavior. This includes, under certain circumstances, the positive obligation of adopting operational measures to protect an individual or individuals whose lives are at risk due to the criminal acts of other individuals. The extent of the positive obligations imposed on the state varies considerably. Accordingly, for example, the duty of the state to officially investigate whether the death of an individual was caused by use of force was also considered to be covered by Article 2, read in conjunction with the general duty imposed by Article 1 of the Convention. See ECHR, *McCann and Others v. the United Kingdom*, ruling of 27 September 1995, and *Kaya v. Turkey*, ruling of 19 February 1998. More recently, in *Mahmut Kaya v. Turkey*, ruling of 28 March 2000, positive duties concerning the right to life were established based on the right to an effective remedy established in Article 13 of the Convention.

16. The Constitutional Court established that judicial protection for economic, social and cultural rights will only be accepted in cases in which a fundamental right has been violated, in accordance with the corresponding requirements and criteria of distinction. See *C. Const.*, S. Primera de Rev. Sent T-406, June 5/92. Expte. n. T-778. M.P. *Ciro Angarita Barón*. See also *M.J. Cepeda Espinosa*, "Derecho constitucional jurisprudencial", *Legis*, Bogotá, 2001.

17. This was the argument used in the case of *Loverace v. Canada* (1981), Communication n. 24/1977. The applicant ethnically belonged to the Maliseet indigenous people. According to indigenous law and the community's own rules on usage of the Tobique reservation, where she used to live, women who marry non-Indians lose their right to live on the reservation, even though they might have been born there. The applicant, who was born on the reservation, married a non-Indian but later, after her divorce, wished to return to the reservation and live with the Maliseet people, to which she belonged. The community denied her this right. Basing her case on the International Covenant on Civil and Political

Rights, the author alleged violation of not only her right to participate in the community's culture, guaranteed by Article 27, but also her right to choose her place of residency (Article 12), her right to not suffer interference in her private or family life (Article 17), and her right not to be discriminated against on grounds of gender (Article 26). Her application, which was accepted by the Human Rights Committee (HRC), made clear the deep-seated relation between personal autonomy and the enjoyment of cultural heritage. Her life project was associated with the use of cultural territory, as only possible on that reservation lived the community she belonged to. The HRC understood that, in this case, Article 27 should be read in conjunction with Articles 12, 17 and 26, among others, and judged that Canadian legislation violated Article 27 of the Covenant.

18. Even in this case it is possible to illustrate negative obligations. According to van Hoof, the state would be violating the right to housing if it allowed the modest homes of lower-income people to be demolished and replaced with luxury housing beyond the economic means of the original inhabitants without offering them alternative housing on reasonable terms. See van Hoof, p. 99. More clearly, the state should refrain from carrying out this relocation under these conditions. The example is far from being theoretical: see the observations of the Committee on Economic, Social and Cultural Rights on the report presented by the Dominican Republic (UN Doc. E/C.12/1994/15), points 11, 19 and 20 (cited in H. Steiner & P. Alston, 1996, pp. 321).

19. See van Hoof, p. 99. Henry Shue (1980) originally suggested this distinction. In the field international human rights law, the distinction was assumed – with some corrections that reduces the enumeration to three categories: obligations to respect, obligations to protect and obligations to fulfill, satisfy and comply – in the principle interpretive documents of the ICESCR: Committee on Economic, Social and Cultural Rights: General Comment n. 3 (1990) "The Nature of States Parties' Obligations – Art. 2, paragraph 1 of the Covenant"; General Comment n. 4 (1991) "The Right to Adequate Housing – Art. 11, paragraph 1 of the Covenant"; General Comment n. 5 (1994) "Persons with Disabilities"; General Comment n. 6 (1995) "The Economic, Social and Cultural Rights of Older Persons"; "Limburg Principles" (1986); "Maastricht Guidelines" (1997); CIJ, "Bangalore Declaration and Plan of Action" (1995). Latin American Conference of Economic, Social and Cultural Rights Organizations: "Declaration of Quito" (1998).

20. In this respect, see the opinion of R. Alexy (1993, pp. 419-501), who defends a broad concept of the positive obligations of the state, or, as he calls it, "rights to positive actions of the state". These would include rights to

protection, rights to organization and to legal process and rights to services in a strict sense.

21. Alexy affirms that “an action can become legally impossible only if it is a legal act. Legal acts are actions that would not exist without the legal precepts that constitute them. Accordingly, without the precepts of contractual law, the legal act of entering into a contract would not be possible; without corporate law, the legal act of establishing companies would not be possible ... The constitutive nature of the precepts that make them possible characterizes these actions as institutional actions. Institutional legal actions become impossible when their constitutive precepts are repealed. Consequently, there is a conceptual relationship between the repeal of these precepts and the impossibility of institutional actions” (pp. 189-190). Our argument complements that of Alexy: “institutional legal actions” become impossible not only when their constitutive precepts are repealed, but also when these precepts are not created. If the constitution or human rights convention establishes rights whose exercise depends conceptually on the creation of precepts, this implies a positive obligation by the state to create these precepts. Alexy (pp. 194-195) comes back to this point when he discusses the rights to positive actions, distinguishing between rights to “real positive actions and normative positive actions”. Rights to normative positive actions are “rights to state acts of imposing precepts”.

22. In this respect, see the separate vote of Judge Piza Escalante in OC-4/84, 19 January 1984, “Proposta de modificación a la Constitución Política de Costa Rica relacionada con la naturalización”, of the Inter-American Court on Human Rights, in point 6: “... the distinction between civil and political rights and economic, social and cultural rights follows merely historical reasons, and not the legal differences between them; so much so that, in fact, the important thing is to distinguish, with a technical and legal criterion, between fully claimable subjective rights, i.e., that are ‘directly claimable in themselves’, and progressive rights, which in fact behave rather like reflected rights or legitimate interests, i.e., that are ‘indirectly claimable’, through positive political demands or pressure on the one hand and through legal actions to contest what opposes them or what grants them with discrimination. The specific criteria for determining what kind of right we are dealing with in each case are circumstantial and historically conditioned; but it can be said, in general, that whenever we can determine that a particular fundamental right is not directly claimable in itself, then we are dealing with a right that is at least indirectly claimable and that can be progressively realizable”.

23. See, in this respect, the lucid analysis of J.R. de Lima Lopes, 1994.

24. See also, for example, Lon L. Fuller, "The Forms and Limits of Adjudication", 92 *Harvard Law Review*, p. 353.

25. See also, for example, Cass R. Sunstein, "Response: From Theory to Practice", 29 *Arizona State Law Journal*.

26. A "gap" that indicates a flaw in the system, according to the terminology of Ferrajoli (1999, p. 24). The author states, "it should be noticed that for the vast majority of such rights [social rights], our legal tradition has not elaborated guarantees as effectively as those established for the rights to freedom. But this is primarily the result of the slow development of legal and political sciences, which until now have not theorized or projected a social state of law comparable to the old liberal state; this has allowed the social state to develop, in actual fact, through a simple enlargement of the arbitrary jurisdictions of administrative apparatus, the unregulated game of pressure groups and clientelism, the proliferation of discrimination and privileges, and the growth of the normative chaos that they themselves now denounce and think of as a 'crisis of the regulatory capacity of law'" (p. 30).

27. The lack of adequate judicial mechanisms or guarantees says nothing of the conceptual impossibility of making economic, social and cultural rights the object of judicial protection, but – as we have already seen – it does require suitable legal instruments to be devised and created to advance such claims. Some of the progress in contemporary procedural law has been made with this in mind: the new perspectives for *amparo* proceedings, the possibilities of formulating cases of unconstitutionality, the development of declaratory actions, class actions, public civil actions, Brazil's *mandado de segurança* injunctions, and the legitimacy of the Justice Department or the Office of the Public Defender to represent collective interests, are all examples of this trend. It is worth emphasizing, moreover, that another source of supposed difficulties promoting cases that attempt to prove non-fulfillment of economic, social and cultural rights by the state lies in the privileges the state enjoys when legal action is brought against it, privileges that would not be admissible if similar issues were at stake among citizens.

28. See the research paper: "Análisis jurisprudencial. La igualdad en la jurisprudencia de la Corte Constitucional". In: Various Authors, *Pensamiento Jurídico – Revista de Teoría del Derecho y Análisis Jurídico*. Universidad Nacional de Colombia, n. 15, 2002, pp. 347-369.

29. See, in this respect, the Brazilian Consumer Defense Code, Article 81, sole paragraph (iii).

30. To examine cases of relevance to this topic, one may consult the experiences developed for Argentina, Dominican Republic, Venezuela and Nicaragua in the research paper: *Los derechos económicos, sociales y culturales. Un desafío impostergable* (IIDH, 1999).

31. In "Reyes desnudos. Algunos ejes de caracterización de la actividad política de los tribunales" (unpublished), Christian Courtis illustrates that the question concerning the legitimacy of judicial action cannot be answered in an abstract manner, considering just one or two normative variables, such as the role of the courts in a "pure theory" of democracy, or the non-elective origin of judges. The question of legitimacy requires empiric information on the functioning of the political system and a concrete knowledge of the historical context in which the judges act. In this vein, analysis of the legitimacy of judicial action implies the necessary comparison with the analysis of the legitimacy of the action of the other branches.

32. Concerning the legitimacy of a constitutional court in a social and democratic state, acting to protect the procedural conditions for the democratic genesis of law, which includes the guarantee of fundamental social rights that assure inclusion in the political process, see J. Habermas, 1994, pp. 311 and followings. On the role of judges in a constitutional and social state, see, also, Ferrajoli (pp. 23-28). Other authors justify strong judicial intervention to protect the majority of rights of disadvantaged social groups. See also Owen Fiss, 1999, pp. 137-159.

33. This occurred in the aforementioned structural reform disputes. It is useful to emphasize – in response to the objections posed against the incapacity of the Judiciary to resolve technical matters, or against the limitations of the judicial process to address cases that are complex or have multiple plaintiffs – that many analysts have applauded the role of the courts when they proceed to devise policies and change institutional practices. The lack of predisposition on the part of the Executive or Legislative to recognize and modify their illegal policies and actions determines the strict necessity for the matter to be addressed and resolved by an impartial and independent tribunal. See, for example, William Wayne, "Two Faces of Judicial Activism", 61 *George Washington Law Review* 1 (1992).

34. Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, Sala IV, caso Viceconte, Mariela v. Estado Nacional-Ministerio de Salud y Acción Social s/ amparo, 2 June 1998, *La Ley*, Suplemento de derecho constitucional, 5 November 1998. The case may be consulted in the IIDH research paper: *Los derechos económicos, sociales y culturales*, p. 81.

35. In these cases, the discussion between judicially protectable rights and free conduct of political bodies is limited, as politics acts first through Congress and, in any extent, is limited to determining for itself legal obligations concerning social policy. Concerning the classic discussion over the tension between democracy and rights, with reference to judicially protectable rights, see G. Pisarello, 2001, and also E. Rivera Ramos, 2001. For a broader view of the debate that emerged in the United Kingdom with the incorporation of the human rights statute and the consequent attribution of new powers to the Judiciary to the detriment of Parliament, see M. Loughlin, 2001.

36. The reference is to the cases in which a legal precept imposes the obligation to develop processes to produce information and consultation – for example, for the recipients – during the stage of development and evaluation of a social policy. Therefore, in the case of *Defensoría del Pueblo de la Ciudad v. INSSJP*, the criterion for annulling the privatization process was precisely the lack of access to information for users of the system. Similarly, in other cases, the *contencioso-administrativo* resource (judicial review) in Argentina has annulled tariff hikes for public services due to the absence of public hearings – understood to be the consultation opportunity for users – prior to the adoption of the decision.

37. Constitutional Court of South Africa, case CCT 11/00, *The Government of the Republic of South Africa and Others v. Irene Grootboom and Others*.

38. CSJN, *Campodónico de Beviacqua, Ana Carina v. Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas, s/ recurso de hecho*, 24 October 2000.

39. In the *Asociación Benghalensis* case, a group of organizations that defend the rights of AIDS victims filed a class action that was judged by Argentina's Supreme Court of Justice. The verdict obliged the Executive to observe the law on AIDS referring to the obligatoriness of providing medicines. This law had been passed as a result of an intense political campaign, in part instigated by the same groups and plaintiffs who would later have to take judicial action to make it effective. It is also worth mentioning the cases in which women's organizations went to court to demand the implementation and observance of legislation on reproductive health for which they had fought in Congress.

40. See *Tarimiat, Firmes en nuestro territorio. FIPSE v. Arco*. Quito: CDES, 2001. Available at <http://www.infodesarrollo.org/archivos/6c70ae2fcdc4dc83dcd0aa5b37d87252/TARIMIAT_2DA_EDICION.pdf>. Last access on 7 January 2005.

41. In a case concerning an agreement made between evicted families and the Government of the City of Buenos Aires, the former judicially demanded fulfillment of the state's obligations that had been agreed: construction of housing on public land and a temporary solution to the housing needs of the group while the construction work was under way. In this case, which sought fundamentally to enforce the agreement, constitutional and international standards on the right to housing were used to interpret the scope of the obligation to provide temporary housing with certain characteristics, which was requested through a writ of prevention. The court judged the request and ordered the families to be housed in hotels in the city, under specific conditions of habitableness. Even though the agreement was a consequence of negotiation and political pressure on the government, it was the litigation that made the agreement effective and determined the legal scope of the obligations assumed by the state. See *Agüero Aurelio Eduvigio and Others v. the Government of the City of Buenos Aires on amparo* (Article 14 CCABA), Expte. n. 4437/0. Resolution of 26 February 2002.

42. When adopting the International Covenant on Economic, Social and Cultural Rights, the state undertakes the responsibility to raise information and formulate a plan, as the Committee on Economic, Social and Cultural Rights states. On some topics – such as the right to adequate housing – the obligation of the state to immediately implement an effective monitoring of the housing situation in its jurisdiction is expressly recognized, and for this it needs to conduct a survey of the problem and of the groups that find themselves in vulnerable situations or in difficulties – homeless persons and their families, persons inadequately housed, persons who do not have access to basic amenities, persons who live in illegal settlements, persons subject to forced eviction and low-income groups (General Comment n. 4, point 13). Concerning the right to compulsory primary education, free of charge, those states that did not have this already implemented at the time of ratification assumed the commitment to prepare and adopt, within a period of two years, a detailed plan of action for its progressive implementation (Article 14, ICESCR). These obligations to monitor, gather information and prepare a plan of action for the progressive implementation are extendable, as immediate measures, to the other rights sanctioned in the Covenant (General Comment n. 1, points 3 and 4).

43. See also Abramovich & Courtis, 2000.

REFERENCES

- ABRAMOVICH, Victor & COURTIS, Christian. "El acceso a la información como derecho". In: E.L. DUHALDE (ed.), *Anuario de Derecho a la Información* 1. Buenos Aires/ Madrid, 2000.
- _____. *Los derechos sociales como derechos exigibles*. Madrid: Trotta, 2002.
- ALEXY, Robert. *Teoría de los derechos fundamentales*. Madrid: Centro de Estudios Constitucionales, 1993.
- ALSTON, Philip. "No Right to Complain about Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant". In: A. EIDE & J. HELGESEN (eds.), *The Future of Human Rights Protection in a Changing World*. Oslo: Norwegian University Press, 1991.
- BILLET, L. "Political Order and Economic Development: Reflections on Adam Smith's Wealth of Nations". *Political Studies* 35, p. 430, 1975.
- BIN, R. "Diritti e fraintendimenti". *Ragion Pratica* 14, pp. 14-25, 2000.
- BOURGOIGNIE, Thierry. *Elementos para una teoría del derecho del consumo*. Vitoria (Spain): Basque Government, 1994.
- CONTRERAS PELÁEZ, Faustino. *Derechos sociales: teoría e ideología*. Madrid: Tecnos, 1994.
- EIDE, A. "Future Protection of Economic and Social Rights in Europe". In: A. BLOED et al. (ed.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*. Dordrecht, Boston/London: Martinus Nijhoff, 1993.
- EWALD, François. *L'État Providence*. Book IV.2. Paris: Grasset, 1985.
- FELGUERAS, S. *Derechos humanos y medio ambiente*. Buenos Aires: Editorial Argentina, 1996.
- FERRAJOLI, L. *Derechos y garantías. La ley del más débil*. Madrid: Trotta, 1999.
- FISS, O. "Grupos y cláusula de igual protección".

- In: R. GARGARELLA (org.), *Derecho y grupos desaventajados*, pp. 137-159. Barcelona: Gedisa, 1999.
- GARRETÓN Merino, R., “La sociedad civil como agente de promoción de los derechos económicos, sociales y culturales”. In: *IIDH – Estudios Básicos de Derechos Humanos V*, p. 59. San José de Costa Rica: Instituto Interamericano de Derechos Humanos, 1996.
- HABERMAS, Jürgen. “Justicia y legislación: sobre el papel y legitimidad de la jurisprudencia constitucional”. In: *Facticidad y validez*. Madrid: Trotta, 1994.
- HAYEK, F. *Law, Legislation and Liberty*. Chicago: The University of Chicago Press, 1979.
- HOLMES, Stephen & SUNSTEIN, Cass R. *The Cost of Rights – Why Liberty Depends on Taxes*. New York: W.W. Norton, 1999.
- LIMA LOPES, José Reinaldo de. “Direito subjetivo e direitos sociais: o dilema do Judiciário no Estado social de direito”. In: J. E. FARIA, (org.), *Direitos humanos, direitos sociais e justiça*, pp. 114-38. São Paulo: Malheiros, 1994.
- LOUGHLIN, M. “Rights, Democracy, and Law”. In: T. CAMPBELL et al. (orgs.), *Sceptical Essays on Human Rights*, pp. 41-60. Oxford: Oxford University Press, 2001.
- NIKKEN, Pedro. “El concepto de derechos humanos”. In: *IIDH – Estudios Básicos de Derechos Humanos I*. San José de Costa Rica: Instituto Interamericano de Derechos Humanos, 1994.
- NINO, Carlos. “Los derechos sociales”. In: *Derecho y sociedad*. Buenos Aires, 1993.
- PISARELLO, G. “Los derechos sociales en el constitucionalismo moderno: por una articulación compleja de las relaciones entre política y derecho”. In: M. CARBONELL et al. (orgs.), *Derechos sociales y derechos de las minorías*, pp. 113-138. Mexico: Porrúa/UNAM, 2001.
- PLANT, R. “Citizenship, Rights and Welfare”. In: A. COOTE (ed.), *The Welfare of Citizens. Developing New Social Rights*, pp. 15-29. London: Rives Oram Press, 1992.
- RIVERA RAMOS, E. “Los derechos y la democracia. ¿Conflicto o complementariedad?”. In: Various Authors, *Los derechos fundamentales*, SELA, 2001. Buenos Aires: Editores Del Puerto, 2001.

SANTOS, Boaventura de Sousa. "Sobre los modos de producción del derecho y del poder social". In: *Estado, derecho y luchas sociales*. Bogotá: Instituto Latinoamericano de Servicios Legales Alternativos, 1991.

SHUE, H. *Basic Rights, Subsistence, Affluence and US Foreign Policy*. Princeton: Princeton University Press, 1980.

SMITH, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*. New York, 1937.

STEINER, Henry & ALSTON, Philip. *International Human Rights in Context*. Oxford: Oxford University Press, 1996.

SUNSTEIN, C.R. "Response: From Theory to Practice". *29 Arizona State Law Journal*, 1997.

VAN HOOF, G.H.J. "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of some Traditional Views". In: ALSTON & TOMAŠEVSKI (eds.), *The Right to Food*, pp. 97-110. Dordrecht: Nijhoff, 1984.

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