

9-1-1998

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Recommended Citation

Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 Buff. Hum. Rts. L. Rev. 25 (1998).
Available at: <https://digitalcommons.law.buffalo.edu/bhrlr/vol4/iss1/4>

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SOCIAL RIGHTS AND ECONOMIC DEVELOPMENT: CONVERGING DISCOURSES?

*Henry J. Steiner**

It hardly surprises that argument for the creation and implementation of human rights treaties rests primarily on notions of rights and social justice. Rights-based and fairness-based arguments also dominates the work of the myriad international institutions created over the human rights movement's half century in order to expound, promote, monitor, apply and enforce the treaty rules. On the other hand, the idiom of the international institutions concerned with economic and social development has been primarily consequentialist, means-end instrumentalist, welfare-maximizing, utilitarian—even with respect to matters that have much in common with some human rights.

Neither structure of argument is easily defined or cabined within boundaries that clearly separate the two. Interpretation of rights, for example, proceeds through argument and decisions that go well beyond any mere "application" to given facts of treaty texts or the terse postulates of rights or theories of fairness or justice that underlie them. The process is far more complex. Despite such internal complexities, these two modes of argument are at their core very different discourses, not only in their antecedents, styles, structure and language, but often in their purposes and functions as well. Human rights advocates, scholars and institutions make at best occasional forays into the other domain.

It is unfortunate that this should be the case. Rights-based and consequentialist arguments about matters related to human rights can often be usefully understood not as antagonistic or incompatible but as deeply interrelated, as implicated in each other, and indeed as profitably employed by both rights advocates and by economists concerned with growth to achieve common goals. The two together may have a powerful synergy. In certain fields, their radical separation may deny both rights advocates and development economists a more cogent and persuasive exposition of their views and a better chance to persuade others to their proposals.

My comment means to illustrate why this may be the case in many

* Jeremiah Smith, Jr. Professor of Law and Director of Human Rights Program, Harvard Law School. This comment grows out of my talk on the same topic at the Seminário Internacional de Direitos Humanos, held in São Paulo, Brazil, on November 27-28, 1996. I have profited from discussions about ideas in this comment with Dani Rodrik and Lewis Sargentich.

instances by concentrating on one such instance. I draw on a topic common to rights advocates and development economists: the so-called social rights like education, health care, and housing that form an important part of the human rights corpus, and concerns about these same matters that figure in current thinking about economic, social and human development. Rights advocates and international financial institutions concerned with education, health care, or poverty should realize that each can, to some degree, draw on and profit from types of arguments and information typically associated with the other.

I illustrate my ideas through observations about the International Covenant on Economic, Social and Cultural Rights¹ (the Covenant), an analysis of a recent decision of the South African Constitutional Court on social rights, and a description of the changing approach to similar matters (for example, health and education) in the proposals and policies of two international institutions: the United Nations Development Programme (UNDP), a specialized agency of the UN, and the International Bank for Reconstruction and Development (World Bank).

Some changes of the last two decades in both the understanding of social rights by rights advocates and the strategies toward development of international institutions reveal a fresh perception of how the work and methods of each may contribute fruitfully to the other. Although the points of departure, the impulses, and commitments remain profoundly different, argument about social rights growing out of the human rights movement and argument about the paths toward and nature of development that are now expressed by the UNDP and the World Bank have more in common.

I. SOCIAL RIGHTS

A. *The Covenant*

The Covenant, which entered into force in 1976 and to which over 140 states are now parties, sets forth the many economic and social rights that its states parties recognize. The debates of the period when the Covenant was

¹ G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No.16, at 49, UN Doc. A/6316 (1966), 993 UNTS 3 (entered into force Jan. 3, 1976) [hereinafter the Covenant].

drafted,² and much (though not all) of the work of the body implementing this Covenant (the Committee on Economic, Social and Cultural Rights), stay within this discourse of rights.³ Influential principles on the implementation of the Covenant that were developed by a group of experts hold closely to the text and to notions of rights.⁴ Correspondingly, the rhetoric of rights has been alien to most discussions in the World Bank publications about the nature of development and the policies to achieve it. There the idiom remains dominantly consequentialist and utilitarian.

The rights-oriented character of the Covenant is evident throughout. The preamble declares that economic and social rights are based on the inherent dignity of all human beings, and respond to the ideal that all human beings may be free "from fear and want." To the maximum of their available resources, the states parties commit themselves to take steps to achieve such rights progressively.⁵

No clear divisions can be made among the different rights declared in the Covenant. Most rights evidence both economic and social concerns. In some, the economic and workplace character is dominant—for example, rights to work and to favorable conditions of work such as wages necessary for a "decent living," or rights to form and advocate through trade unions (Articles 6-8).⁶ Articles 11-14 of the Covenant have a different character. They range from rights to "the highest attainable standard of physical and mental health," to rights to education and "an adequate standard of living." Article 11 defines such a standard of living to include "adequate food, clothing and housing."

² See generally Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

³ See, e.g., *General Comment No. 4*, Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 5th Sess., Supp. No. 3, U.N. Doc. E/1992/23, Annex III (1991).

⁴ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, in THE REVIEW: THE INTERNATIONAL COMMISSION OF JURISTS, No. 37, at 43 (1986).

⁵ See The Covenant, *supra* note 1, art. 2.

⁶ Indeed, several rights that play a central role in the Covenant, such as the right to association that underlies trade unionism, figure as well in the companion International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). All such rights have figured importantly in the work of other international institutions, particularly the International Labour Organization whose conventions and processes focus on workers' rights and workplace standards.

For purposes of clarity in this comment, I shall call these rights in Articles 11-14 "social rights," even though they have important economic consequences. They differ markedly among themselves. Some, such as those in Article 11 on adequate housing and food, are often referred to as social welfare rights. They address and primarily affect those parts of a population on the bottom rungs of the socio-economic ladder. By concentrating on the least well off, the most deprived population, they speak more directly than other parts of the Covenant to its purpose of reducing poverty. On the other hand, other social rights like those to health care, education and social security, address needs not only of the economically marginal population but of all citizens.

I shall focus on these social rights. As set forth in the Covenant, they keep a certain distance from each other. Beyond a general reference to the interdependence of all rights--civil and political as well as economic and social--the social rights are related neither to each other nor to the economic rights. The Covenant reveals no scheme or strategy about economic development or about a socio-economic transformation that might, say, overcome structural problems leading to poverty and marginalization, thereby reducing dependence on a social safety net. Its static character, the absence of any suggestions about how to get from here (where countries now are) to there (where they ought to be moving to meet their obligations under the Covenant), probably stems partly from the sharp ideological divisions during the 1950-1966 period when the Covenant was being drafted.

The strategies for realizing rights, as well as the economic and political systems within which they were to be realized, remained for the parties to decide on. The existing liberal and social democracies could readily find in the Covenant a confirmation of existing arrangements in which tax-and-redistribution social welfare programs sought to bring the least well off population up to the level required by the social rights to, say, food or housing.

Nonetheless, in contrast with Articles 22-26 of the constitution-like Universal Declaration of Human Rights, the Covenant goes well beyond the bare articulation of these rights. In several ways, it clarifies the mandate of states for progressive achievement of rights by spelling out a mini program, some elements of a time schedule. For example, Articles 13(2) and (14) provide for the sequential realization of free education in sequences that establish priorities such as free and compulsory primary education.

Such explicit direction is, however, rare in the body of the Covenant. The treaty text germane to the other social rights indicates either the components of the right (provisions in Article 12 to the effect that full realization of the right to health includes matters like prevention of epidemic diseases,

provisions for reduction of infant mortality, and assurance to all of medical service for sickness), or possible strategies toward its realization (provisions in Article 11 to the effect that the right to food requires states to improve methods of production, conservation and distribution by taking measures like reform of agrarian systems to achieve efficient resource use).

In these senses, the Covenant (approved by the General Assembly and submitted to states for ratification in 1966) reflects the approach of an earlier period of the human rights movement. Approved more than a decade later, the Convention on the Elimination of All Forms of Discrimination against Women⁷ (CEDAW) follows a different course. Above all, the treaty text indicates how to get from here to there. It spells out the routes to reach goals that include achieving a number of economic and social rights. Those routes range from the state's duty to modify or transform existing cultural patterns and underlying beliefs (a duty to promote that is absent from the Covenant) to detailed prescription in fields like education, employment, rural life, and family life. Economic, social, civil and political rights are integrated within a program of profound cultural and political change that includes the active and meaningful participation by women at all stages. Other basic human rights documents, such as the Declaration on the Right to Development⁸ go well beyond the Covenant in their dynamism. They sketch a comprehensive economic, social, cultural and political process for change and emphasize vital elements of the process such as "population participation in all spheres."⁹

From the hindsight of later instruments like CEDAW and the Declaration on the Right to Development, it becomes possible to understand the Covenant in similar ways by drawing links among its apparently distinct provisions. To start with, the economic and workplace rights may lead to government employment and development policies that stimulate the economy, provide more jobs and income, and hence reduce dependence on social welfare payments. Achieving certain rights facilitates the satisfaction of others. Similar relationships exist among the social rights. Adequate food and housing reduce the need for health care, adequate health care enables people to undertake work and education, education in turn improves health and spurs the economy.

The web of relationships and hence the potential causal links are

⁷ G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13 (*entered into force* Sept. 3, 1981).

⁸ G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

⁹ *Id.* art. 8(2).

pervasive. By definition, these rights, all rights, are inherent goods, but they also constitute instrumental goods. This dual character informs many parts of the human rights framework, including of course the classical civil and political rights. The right to free speech is understood both as an inherent good, an inalienable and imperative right, and as a means of enriching the marketplace of ideas and hence cultural and political processes.

A similar blend of rights-based and instrumental argument characterizes the translation of the social rights into institutional forms and programs. Unlike, say, the right to be free from torture, many social rights become meaningful only when instituted. Inevitably considerations of the costs and benefits associated with one or another realization of the right, of cost efficiency within a structure of market prices, become relevant. No single way of satisfying the right to housing or education is required by the Covenant. Priorities and sequences must be established. Depending on the path and structure chosen--taxes and subsidies, criteria for eligibility, co-payments, the mix of market regulation and public provision, location, and so on--there will be different gainers and losers and perhaps distinct long-run consequences in comparison with a different substantive and institutional design of the right.

The components of whatever policy is followed arise out of diverse considerations rather than from an exclusive effort to determine the essential nature or necessary implications of the right. Cultural and political constraints and traditions will influence the formulation of the policy, as will arguments about fairness and social justice, and about cost efficiency that will suggest how the greatest benefit can be derived from a given amount of funds. Such types of considerations will influence all the fora in which rights-related policies are being developed or criticized: organs of national governments, treaty bodies such as the Committee on Economic, Social and Cultural Rights, and specialized agencies of the UN such as the World Health Organization.

B. The Soobramoney Case

A 1997 decision of the Constitutional Court of South Africa well illustrates this intertwining of rights-based and cost-benefit or consequentialist argument in the development of social rights.¹⁰ Articles 26 and 27 of the 1996 Constitution declare rights to housing, health care, food, and social security. Clause (1) of Article 27 states that "Everyone has the right to have access to

¹⁰ *Soobramoney v. Minister of Health (Kawzulu-Natal)*, 1997 (12) BCLR 1696 (CC).

health care services....” Clause (2), to the same effect as clause (2) of Article 26, provides that the state “must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right. In their references to available resources and to progressive realisation, these clauses closely resemble Article 2 of the Covenant. Finally, clause (3) of Article 27 reads: “No one may be refused emergency medical treatment.”

The appellant was in the final stages of an irreversible condition of renal failure. Unable to afford private care, he sought dialysis treatment from a state hospital, without which death was imminent. Because of limited equipment and budget, the hospital could provide such treatment only to a limited number of patients. Guidelines for admission to dialysis programs, drawn up by the provincial administration responsible for health services, required that a patient be eligible for a kidney transplant; treatment would continue until an organ donor was found. Because of his poor condition, appellant was not eligible for a transplant. Hence he would have required dialysis treatment for the rest of his life. His application for an order directing the hospital to provide ongoing dialysis treatment was dismissed by the lower court, and the Constitutional Court affirmed.

In an opinion by its President Chaskalson, the Court quoted from the preamble to the Constitution: the aspiration to a society based on “social justice and fundamental human rights,” the aspiration to “improve the quality of life of all citizens.” It observed that obligations imposed on the state with respect to these social rights were dependent on available resources, and that in the circumstances of South Africa, an “unqualified obligation” to meet health care and other needs “would not presently be capable of being fulfilled.”¹¹

The Court rejected the “broad construction” of clause (3) of Article 27 that emergency medical care included ongoing treatment of chronic illness. Such a construction would make it “substantially more difficult” for the state to meet its primary obligation under clauses (1) and (2) to provide health care services to “everyone” within its available resources. It would reduce the resources available to the state for purposes of preventative health care and treatment of curable diseases. Indeed, the Court concluded that appellant’s case did not fall within the “emergency” criterion of clause (3), which the Court termed “a right not to be refused emergency treatment.”¹² Rather, appellant’s case involved an ongoing state of affairs, and was to be decided within the first two clauses of Article 27.

¹¹ *Id.* ¶ 11.

¹² *Id.* ¶ 20.

The Court noted that the budget of the provincial Department of Health was overspent. Resources were stretched in all renal clinics throughout the state. Hence guidelines had to make the "agonizing choices" about who should receive treatment.

By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients. . . . It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally. . . . If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment . . . the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet.¹³

In its argument, the Court blended (i) considerations of benefits and costs and simple cost efficiency within a policy perspective, with (ii) attention to its limited institutional competence to interfere with "rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."¹⁴ The state, it stressed, must "manage its limited resources" in order to address the claims of the many people in need of access to health care, housing, and social security, all aspects of the right to human life.¹⁵

In his concurring opinion, Justice Sachs observed that in open and democratic societies, "the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care."¹⁶ It was necessary to adapt traditional rights analysis to account for these problems governing a right of access to scarce resources.

¹³ *Id.* ¶¶ 25, 28.

¹⁴ *Id.* ¶ 29.

¹⁵ *Id.* ¶ 31.

¹⁶ *Id.* ¶ 52.

When rights by their very nature are shared and interdependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights . . . , but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.¹⁷

As for intervention by courts in these matters, "institutional incapacity and appropriate constitutional modesty require us to be especially cautious."¹⁸

These opinions barely distinguish between the languages of rights and cost-benefit. They underscore both the goal of social justice and the necessity of management to achieve the effective use of resources. These are understood, naturally presented, as complementary and interdependent rather than antagonistic or even alternative discourses. Deciding on the full operational definition of the right requires that "agonizing choices" be made, choices about cost efficiency and vexing trade-offs. These intertwined decisions are vital to the very content and significance of the right: the type of health care system, the funding, the priorities and coverage in terms of both persons and problems.

The problem of choice is seen at two levels: how to allocate funds and arrange priorities within the health care system, and how to allocate funds among the different social rights ranging from health care to housing. Indeed, at the highest level of government the problem reaches more broadly to resource allocation among all items on the government budget, as well as to the related capacity to tax and borrow. The problem is truly systemic. Even when access to health care is conceived of as an individual right rather than a policy goal, its concrete realization cannot be determined independently of the system. When alluding to the range of social rights in the Constitution, the Court highlights this point by emphasizing the need for the state "to manage its limited resources in order to address all these claims," a necessity which will at times require it to "adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."¹⁹

To be sure, rights constitute a singularly powerful starting point, an imperative for governmental consideration and action, a commitment at the highest level to social justice and improvement of the quality of life. The fact that

¹⁷ *Id.* ¶ 54.

¹⁸ *Id.* ¶ 58.

¹⁹ *Id.* ¶ 31.

rights and consequentialist argument may be interwoven does not imply that they merge into each other, that they assume a common identity. To the contrary, social rights serve here all the functions that rights discourse distinctively serves: rights as a mobilizing force that speaks to basic aspects of human dignity, appellant advancing a claim of right rather than asserting a want or interest, the imposition on the state of constitutionally based duties rather than reliance on fluctuating state policies that may be reversed.

The rights are also more than directive principles, for they impose an immediate requirement on government to move toward progressive achievement. The language of *Soobramoney* indeed suggests one way of understanding that requirement: to act rationally and in good faith to make the rights operational. Depending on the precise issue, that requirement will become to one or another degree justiciable, appropriate for judicial review and decision, as indeed it was in *Soobramoney's* decision to sustain the guidelines and their application. But the satisfactory realization of this and many other social rights will not stem from any process of derivation or necessary implication, from any inner logic, from any search for the essential nature of the right or insulation from other forms of reasoning.

The use of a judicial decision to illustrate these thoughts about social rights poses a special problem that is noted in both the opinions described. Institutional competence, the appropriate scope of judicial review of executive or administrative or legislative action, distinguishes the considerations debated in these opinions from the full range of considerations before these other branches of government. In the *Soobramoney* opinion, the Court upheld the provision and its application after concluding that the administrative decisions were "rational" (presumably in terms both of the broad goal or end and its responsiveness to the character of the right, and of the means-end reasoning to achieve the result) and made in good faith. The essential conditions were met.

My remarks do not suggest that all aspects of formulating or applying social rights such as access to health care must involve such diverse considerations and modes of argument. Much depends on the issue presented. In other situations, identification of the content of a social right and judicial review of its formulation or application may involve a "purer," less complex course of argument that could indeed establish some baselines, some absolutes, some non-consequentialist duties of government, some necessary implications of the right that are immune to qualification by argument about resource constraints. Surely this is so in the "easy" cases where governmental definition or application of a right of access to health care violates other constitutional (and international human) rights, such as those to due process in the application of the law, or to

equal protection in the content of the law. In such circumstances, the critical problem does not involve *social rights* as such, but rather a different rights framework.

In other settings, the ongoing processes of expounding social rights have generated authoritative rules or guidelines that establish baselines and place both restraints and affirmative duties on government. The content of the right moves toward the "absolute" side of the spectrum, away from the contingent and variable. Such absolute restraints and duties may, for example, address governmental conduct that worsens an already deprived population's situation--perhaps the destruction of slums without provision of alternative housing--or that establishes unjustified legal barriers to the realization of the right.²⁰ At times such duties may require fresh programs, such as school education about reproductive health care. This ongoing and expanding identification of absolute rights of, say, access to health care--without explicit, ongoing consideration of their costs and benefits and of alternative claims on funds--may rest not only on their fundamental importance for health and social justice but also on an implicit determination that they are now within the economic reach of all states that seek in good faith to institute them.

II. ECONOMIC AND SOCIAL DEVELOPMENT

My remarks emphasize the World Bank, but start with a description of the influential work of the UNDP. They do not reach to other UN instruments (such as the Declaration on the Right to Development), programs and institutions that yield a more complex and richer portrait of these matters.²¹ Nor do they draw on the imaginative writings of economists and philosophers that have exerted an important influence on these fields through innovative concepts such as people's "basic capabilities."²²

²⁰ See *General Comment No. 3*, Committee on Economic, Social and Cultural Rights, ¶ 10, U.N. Doc. E/1991/23, Annex III, (1990); see also *General Comment No. 4*, *supra* note 3, ¶ 10.

²¹ See generally James Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT. L.J. 307 (1995).

²² A prime illustration is the concept of "capability" as a vital goal and measure of development. Growing primarily out of writings of Amartya Sen, that concept has significantly influenced some basic ideas and indices in the annual Human Development Reports of the UNDP, referred to below in the text. See generally Amartya Sen,

The work of the UNDP, particularly the annual Human Development Reports issued by it since 1990, has played an important role in changing perceptions of development. The 1996 Report²³ explores the links between economic growth and human development and, like its predecessor reports, seeks to correct the "mismeasure of human progress by economic growth alone."²⁴ It advances a conception of a development program that must be "people-centred, equitably distributed" and environmentally and socially sustainable. Although economic growth and human development have no automatic link, they can be mutually reinforcing. Far from being a mere appendage to development theory, a humane afterthought, human development must be made explicitly and integrally a part of it.

The Reports have developed a series of indices to measure human development. The basic measure is a "composite index of achievements in basic human capabilities in three fundamental dimensions—a long and healthy life, knowledge and a decent standard of living."²⁵ The three variables representing these dimensions are life expectancy, educational attainment and income.²⁶ The measurements are disaggregated (unlike traditional statistical measures like per capita income) to indicate how significantly human development differs with respect to gender, race, religion, ethnic group, age and so on. What is at issue is not simply the economic indicia of growth as measured by market prices of production or incomes, but the quality of that growth.

Capability and Well-Being, in THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993); see also Amartya Sen, *Development Thinking at the Beginning of the XXI Century*, in ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY 531, 540-42 (Louis Emmerij ed., 1997). For analysis of and suggestions about the relationship between rights-based approaches and capabilities, see generally Martha Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997); see also Alicia Ely Yamin, *Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic and Social Rights under International Law*, IV GEO. J. FIGHT. POV. 273 (1997). For other significant contributions to the policies of UNDP, see generally MAHBUB UL HAQ, REFLECTIONS ON HUMAN DEVELOPMENT (1995).

²³ UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1996 (1996).

²⁴ *Id.* at iii.

²⁵ *Id.* at 28.

²⁶ See *id.* at 28-30.

Human development is conceived in the large as a matter of enlarging choices. The effort of the UNDP economists has been to reach beyond the instrumental vision of people as "human capital" essential to growth, beyond treating people and their improved education or health only as a means to greater production, and in place of that vision to understand people as ends, whose well being is the ultimate purpose of development. Hence the Human Development Reports describe matters like health and education as valued in themselves, as "essential components of human well-being."²⁷

The Reports make frequent claims of causal links between the identified "essential components of human well-being" and growth. Notions of the instrumental and inherent value of such components of human well-being are complexly interrelated. Educating women makes educated children more likely. Indeed, "[t]he input with the greatest power is education," and "[e]ducating girls, worth doing for its own sake, also has important spin-off benefits. Educated women are better able to ensure their children's survival and more likely to have fewer children."²⁸ The Report refers to "[a] basic fact: Healthy, well-educated people make an economy more productive."²⁹ Improving the nutrition, health and education of workers leads to gains in worker productivity; particularly primary education enhances such productivity. But these relationships are not the only justifications for social investment in fields like food, health and education, for "[t]he development of human capabilities is an end in itself."³⁰

In a revealing passage, the 1996 Report describes the right to adequate housing as "[o]ne of the many development-related rights" that are stated in the Universal Declaration of Human Rights and the Covenant. By ratifying the Covenant, states

[H]ave firmly committed themselves to improving housing conditions as part of their commitment to people-centred and equitable development. The key challenge is not for legal experts to interpret legal texts, but for the policy-makers to take the necessary action to honour their commitment to the people If international law can be one way of focusing attention on the need for action, then so much the better.³¹

²⁷ *Id.* at 54.

²⁸ *Id.* at 74.

²⁹ *Id.* at 75.

³⁰ *Id.*

³¹ *Id.* at 25.

In other words, the Covenant and social rights in general can provide additional support for the policy-maker advocating particular strategies toward development. If international law and the discourse of rights can be helpful, then indeed "so much the better." Rights can be understood as "development-related."

Nonetheless, while coming close to notions of right--through a concept of treating people as ends, through a human development index employing the idea of capabilities, through reference to "essential components of human well-being"--the UNDP has not "internalized" the core conception of rights to the point of directly using rights rhetoric in its advocacy. To some extent, it doubtless shares the traditional scepticism of economists about the rhetoric of rights--a scepticism surely traceable to the absolute, insistent, urgent quality of rights, to their resistance to the concept of marginal utility and to trade-offs in a policy framework.

The basic activity of the World Bank, created in 1946 at the Bretton Woods Conference, involves long-term lending for productive investments, with the current objective of raising developing countries' standard of living. The radically different schools of thought generated over several decades in the field of development economics eventually brought the Bank to changed perceptions about the nature of and paths toward development.³² In the process, the gap between the Covenant and other instruments concerned with social rights, and the Bank's programs has to some extent narrowed. An earlier near-exclusive emphasis on macroeconomic phenomena--gross national product as measured in market prices, neoclassical concern with less regulated markets, structural adjustment programs enacting neoliberal theory--has given some ground to and been complemented by more recent concern with the reduction of poverty and conceptions of human development that bear some affinity to notions of rights. Still, the policies described in the Bank's World Development Reports and Annual Reports have moved far more guardedly than the UNDP in the direction of employing rights-related notions.

By the 1980's, the Bank's references to human resource development had become common.³³ Such development, which included notions like

³² See H.W. Singer, *Is Development Economics Still Relevant*, in ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY, *supra* note 22, at 507; see also Emmanuel de Kadr, *How Well do Economists Serve Development Theory and Practice*, in ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY, *supra* note 22, at 512; see also Sen, *Development Thinking at the Beginning of the XXI Century*, *supra* note 22, at 531.

³³ See generally WORLD BANK, WORLD DEVELOPMENT REPORT 1980 (1980).

education and better health, was referred to as "an end as well as a means of economic progress."³⁴ The causal relationships were clear. Human resources benefiting from improved health and education could constitute a more effective labor force producing greater growth. "Educating girls may be one of the best investments a country can make in future economic growth and welfare. . . ."³⁵

The 1996 World Development Report³⁶ expands on these earlier ideas. Again there is stress on the role of social investment in fields like health and education in spurring economic growth. "Education reform is urgent because the erosion of a country's human capital imposes high downstream costs. Ill-educated people make up a large proportion of the unemployed and the poor."³⁷ The argument, however, goes further. "Reform of the health care system is needed to raise life expectancy and to reduce the burden of disease and injury, contributing both to productivity and to the quality of life."³⁸

The 1997 Annual Report³⁹ is more explicit. Reduction of poverty and protection of the most vulnerable part of the population are described as an overarching goal of the Bank through its loan policy.

Evidence continues to mount that investments in health, nutrition, and education contribute to individual productivity and, in the aggregate, to national economic growth. It is the combination of good economics and the reduction of human suffering that makes investments in human development a powerful weapon in the fight against poverty.⁴⁰

The emphasis clearly remains on the instrumental efficacy of these social investments to serve graphic and readily measurable purposes like heightened production, but the Report also makes a strong argument for bringing about the social and political conditions that underlie effective development. It refers to a task force within the Bank recognizing that "fair and equitable development contributes to human welfare and to the social cohesion and social stability that

³⁴ *Id.* at 32.

³⁵ *Id.* at 50.

³⁶ WORLD BANK, WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET (1996).

³⁷ *Id.* at 123.

³⁸ *Id.*

³⁹ WORLD BANK, THE WORLD BANK ANNUAL REPORT 1997.

⁴⁰ *Id.* at 17.

underpin sustainable development."⁴¹

Recent initiatives of the World Bank have made other ideals and norms of the human rights instruments germane to its work. For the past decade, the Bank has given extensive attention to the problem of "governance."⁴² The concept is large and porous, but appears to include at its core notions related to the rule of law (rule generality and reasonable predictability, separation of powers assuring judicial independence), as well as to accountability, transparency, and a minimum assurance of human rights that would tend to foster stability. The discussion and prescription of good governance, while drawing on the human rights corpus, absorbs its ideas into the Bank's own dominant framework. That is, the basic civil and political rights that are drawn on are valued less for their inherent or imperative quality than for their efficacy in creating those circumstances in which economic development is most likely to occur. Other, related work of the World Bank has stressed the importance of heightened popular participation in the process of development.

Relative to the UNDP and its absorption of components of human development like health or education into the core conception of development, the World Bank has been less systematic, more wary of referring to inherent as well as instrumental goods, and more consistently instrumental in its justifications for the social investments discussed.

III. CONCLUDING REMARKS

What this comment proposes is more than an occasional, strategic (some might say unholy) alliance between rights advocates and development economists that could summon greater and more respectful attention to matters like health, housing, and education. The proposal goes beyond a temporary "marriage of convenience" between movements and institutions that in some respects urge the same goals.

The idea is more basic. In a field like social rights (but not in all fields of human rights), rights discourse at a certain point gives out. No program springs full blown from the bare declaration of the right. It becomes essential to locate social rights in the real world, in their historical, cultural and political context, in

⁴¹ *Id.* at 23.

⁴² See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS* (2d ed. 1995).

order to work out the content and forms of a health plan, a housing program, or an educational system. Considerations of cost efficiencies and costs and benefits become vital to designing the most effective way—for the while—to achieve the right. All is up for reconsideration as contexts and possibilities change. There is no one, final, unassailable form and content that the social right must take.

By the same token, the development economists will humanize their undertaking by taking account of the values underlying the rights framework, not only in terms of their advantageous consequences for growth but also because of their inherent importance. Whether the precise language of rights is employed seems less significant. Just as rights advocates may prove more persuasive to many audiences by employing the language of costs and trade-offs in the development of social programs and by stressing the utility of rights for development, development economists could better reach audiences turned off by raw economic calculations that ignore the needs, well-being and quality of life of the very agents of development.

Rights advocates might well fear that by venturing into the world of consequentialism, they will surrender the most powerful attribute of rights discourse: insistence on absolute and urgent rules based on notions of equal human dignity and respect. The world of limitless trade-offs without fixed values is more than uncongenial to a commitment to human rights; it is hostile and threatening.⁴³ In that world of trade-offs, there can be no constants. Indeed, some day development economists might reject the evolving views described in this comment about the significance of social rights for development.

But my argument urges no abandonment of deep beliefs, no retreat from rights' imperative quality. Rights remain the potent, insistent points of departure. At that basic level, no compromise or trade-off can be in the cards, and the two discourses remain profoundly different. Fleshing out social rights in the complex ways that have become characteristic of modern societies is a different issue, a principal theme of this comment. Notions of right and fairness continue to inform that process, but other considerations must as well. Room now appears open for a fruitful use of both discourses to achieve goals that rights

⁴³ Cf. MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (1995). The author notes the reluctance of the Committee on Economic, Social and Cultural Rights to allow problems of economic development to justify lower support for economic and social rights. (Structural adjustment programs offer an apt illustration.) "It seems to be the position of the majority of the Committee that the process of economic growth should be combined with the realization of human rights. The idea that certain 'trade-offs' can be made is implicitly rejected." *Id.* at 139.

advocates and many development economists are coming to hold in common. My suggestion is that each group be supple enough to shed exclusive attachment to a single method of argument and seize the day.