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The Past and Future of the Separation of Human Rights into Categories

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The Past and Future of the Separation of Human Rights into Categories

STEPHEN P. MARKS*

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INTRODUCTION

It is a commonplace to recall that the Universal Declaration of Human Rights (UDHR) integrated civil and political rights (CPR) with economic, social, and cultural rights (ESCR), and that the two International Covenants separated them.

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Reflecting Cold War divisions, stress on one or the other of these two traditional categories tended to reveal preferences for neo-liberal or social democratic understandings of human rights, when it was not more blatantly reflective of competition between the NATO and Warsaw Pact (plus “Non-Aligned”) countries, a sort of North–West vs. East–South ideological split. This article explores how the separation of categories of rights has lost its pertinence in the first decade of the 21st century. My purpose is to show how the separation into two categories is perhaps a convenient taxonomy for some, but subject to serious challenge from the perspectives of political history, the theory of rights, and contemporary policy.

While human rights are accepted as universal because of the resonance of the underlying principles with all major religious and philosophical traditions, many of the assumptions underlying the separation of economic, social, and cultural rights from civil and political rights derive from interpretations of the philosophical ideas and revolutionary practices of 18th century Europe and America.¹ A few reminders of the legacy of that period may dispel the historically inaccurate claim that those rights falling within today’s category of economic, social, and cultural were unknown to the Enlightenment and absent from the French Declarations of the 18th century.

First of all, to the extent that the essence of these rights is distributive justice or the exigencies of equality, they are echoed in the second element of the revolutionary triad (“*liberté, égalité, fraternité*”). Surprising though it may be to anyone who assumes the Enlightenment was exclusively about liberty from state abuse, it should be recalled that, in the mind of many representatives of the Third Estate—the representatives of the commoners and the bourgeoisie in the Estates-General, which became the Constituent Assembly, and promulgated the Declaration on the Rights of Man and the Citizen in August 1789—human rights began with the rights we call today economic, social, and cultural. Abbé Sieyès, representative of the Third Estate from Nemours in the Estates General, presented a theory of human nature based on the fulfillment of human needs: “Man is, by nature, subject to *needs*; but, by nature, has the *means* to satisfy them. . . . Individual means are linked by nature to

1. See Stephen P. Marks, *From the “Single Confused Page” to the “Decalogue for Six Billion Persons”: The Roots of the Universal Declaration of Human Rights in the French Revolution*, 20 HUM. RTS. Q. 459 (1998).

individual needs. Whoever is responsible for needs must therefore freely dispose of the means.”² He further discussed various forms of inequality and explained that a purpose of society is to develop the moral and physical capacities of its members which it augments through the “inestimable collaboration of public works and assistance.”³ His draft declaration of rights of February 1789⁴ refers to “natural and social rights,” including the human right of each citizen “unable to satisfy his needs to the assistance of his fellow citizens.”⁵ In a remarkably progressive analysis, anticipating class analysis of a century later, the introduction attributes the “war between the government and the nation, or more exactly between the government and the people” to ignorance and greed. It seeks to go beyond the cessation of abuse of power and ameliorate “all social relations” and “establish the reign of justice among all the different classes of citizens.”⁶ After a first article stating the right to do freely what does not harm others, the Nemours draft declaration of rights enumerates what we call today welfare rights: the right to assistance from others; free assistance to children, the weak, and disabled; non-interruption during work; adequate salary for work; and the right to keep what one legitimately acquired through work, donation, or inheritance. Only after these rights come protection against violence, expropriation, and violations of liberty, property, security, and rules of criminal due process. Then come provisions on income taxes and finally freedom of expression. The second chapter of the Nemours draft is devoted to public education, which must be “highly favored” by the state.⁷ Thus, although the Declaration of 1789 is limited in its concern with equality to matters of taxation and property, the concerns of equality and social justice were voiced, and might have found expression in the text had more time been spent on it. The *Dictionnaire Critique de la Révolution Française* notes that, while the Declaration of 1793 contains explicit social rights, “almost half of the drafts of 1789 include assistance, even work, among the primordial guaranties that a

2. Abbé Sieyès, *Préliminaire de la Constitution, Reconnaissance et Exposition Raisonnée des Droits de l'Homme et du Citoyen* (July 20–21, 1789), reprinted in STÉPHANE RIALS, *LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN* 591, 593–94 (1989) (translation by author).

3. *Id.* at 595–99 (translation by author).

4. *Id.* at 550–55 (translation by author).

5. *Id.* at 605 (Article XXV) (translation by author).

6. *Id.* at 551 (translation by author).

7. *Id.* at 555 (translation by author).

collectivity owes to its members.”⁸

This heritage, along with the achievements of European socialism and of the Soviet Union, influenced the drafting of the Universal Declaration. Albert Verdoodt wrote:

Mr. Cassin took advantage of his background as an eminent jurist and his special talent for reconciling the liberalism of the French Declaration of 1789 and the socialism of modern constitutions, especially that of the USSR. He succeeded in maintaining, in the declaration, both all the traditional rights and the new socio-economic rights.⁹

According to John Humphrey, the Canadian U.N. staff member who contributed to the drafting of the Universal Declaration, his own draft “attempted to combine humanitarian liberalism with social democracy.”¹⁰ The direct impact of the socialist countries on the text is most noticeable in the provisions on duties to society and on economic, social, and cultural rights.¹¹ It was not exclusively the Soviet bloc delegates that insisted on including these rights in the Universal Declaration. Indeed, several delegates referred to Roosevelt’s Four Freedoms (1941), which included freedom from want on a par with freedom from fear, freedom of religion, and freedom of expression.¹² The United States had even proposed an international bill of human rights in 1942, which states in Article I that the purpose of government was common welfare in an interdependent world, and in Article II that “[a]ll persons . . . have the right to enjoy such

8. Dictionnaire critique de la Révolution Française 121–22 (François Furet & Mona Ozouf eds., 1988) [hereinafter *Dictionnaire Critique*]. The Declaration of 1793 gave explicit reference to the rights to social protection and education. Article 21, for example, refers to public assistance as a “sacred debt” and affirms that society must provide for the subsistence of unfortunate citizens either by finding work for them or by assuring a means of existence for those unable to work.

9. ALBERT VERDOODT, NAISSANCE ET SIGNIFICATION DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L’HOMME 49 (1964) (translation by author). As was pointed out *supra*, Verdoodt is not entirely accurate in considering social and economic rights as “new.”

10. JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 40 (1984).

11. ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 42 (1990). Cassese adds the reference to the role of individuals “as members of society,” for example, in Article 22 on social security, and the exclusion of activities contrary to the purposes and principles of the U.N. (Article 29(3)) or destructive of rights (Article 30).

12. Cassese points out, drawing on leading historians, that Roosevelt meant by freedom from want—an expression he borrowed from a journalist—the elimination of certain cultural and commercial barriers between nations, rather than its current meaning of realization of economic, social, and cultural rights. *Id.* at 30.

minimum standards of economic, social and cultural well-being as the resources of the country, effectively used, are capable of sustaining.”¹³ Eleanor Roosevelt’s motivation for including economic, social, and cultural rights was, of course, the welfare commitments of her husband’s administration and his proclaiming of freedom from want among the Four Freedoms. However, it was also to avoid the Soviet Union taking credit for the inclusion of these rights, for which its delegate argued long and hard. William Korey explains that “she must have been aware that socialist principles were being advanced and implemented in numerous Western societies. To have resisted this trend would have abdicated leadership in the international community to the Soviet bloc, which was already trumpeting its strong advocacy of economic, social and cultural rights.”¹⁴ As Mary Ann Glendon notes, “[c]ontrary to later belief, the countries within the Soviet sphere of influence were neither alone nor the most vigorous in pushing for the inclusion of social and economic rights. . . . [N]o nation opposed them in principle.”¹⁵

While Eleanor Roosevelt maintained that economic, social, and cultural rights could not be regarded as justiciable in the same way as civil and political rights, she agreed to their inclusion in the Universal Declaration. However, Latin American delegates were particularly forceful about the inclusion of these rights, as was René Cassin of France. The views expressed in the debate and the placement of these rights in the overall arrangement of the articles nevertheless reveal a lower ranking than civil and political rights, which is similar

13. It is also worth recalling that President Roosevelt, in his State of the Union Message of 1944, said that:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not free men.” People who are hungry and out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Franklin D. Roosevelt, President of the United States, Message to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 40–42 (Samuel I. Rosenman ed., 1950). See also Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 388 n.99 (1990).

14. William Korey, *Eleanor Roosevelt and the Universal Declaration of Human Rights*, in ELEANOR ROOSEVELT: HER DAY 21 (A. David Gurewitsch ed., 1973).

15. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 185 (2001).

to the French revolutionary declarations. Post-1948 developments in the U.N. have considerably expanded the normative and institutional space for economic, social, and cultural rights.

A combination of Western traditions going back at least to the French Revolution, reflected in numerous national constitutions of the late 19th and early 20th centuries, in the 1919 International Labour Organization (ILO) constitution, in Roosevelt's second bill of rights, and in the draft international bill of rights prepared by a committee of the American Law Institute, on the one hand, and socialist thinking and the legal system of Soviet-bloc countries, on the other, made it possible for the 1948 text to contain both sets of rights. The doctrine of their equal value has been a canon of the United Nations ever since, in spite of practice to the contrary. That canon is reflected in numerous statements of U.N. bodies,¹⁶ General Assembly resolutions,¹⁷ and notably the declaration issued at the close of the World Conference on Human Rights in 1993, which proclaimed: "All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."¹⁸ The significance of this canon for the traditional separation of categories of human rights calls for a rethinking of the rationale behind the decision of the General Assembly in 1951, "largely on ideological grounds,"¹⁹ that the Commission should draft separate covenants for each of the groups of rights. Already in 1950 Mrs. Roosevelt had felt obliged by the "growth of isolationism and

16. For example, a UNDP policy paper has outlined UNDP's strategy for integrating human rights into sustainable human development and called for a "universal and holistic [approach], stressing the indivisibility and interrelatedness of all human rights—economic, social, cultural, civil and political." U.N. Development Programme, *Integrating Human Rights with Sustainable Human Development*, at 16 (Jan. 1998), available at http://www.undp.org/governance/docs/HR_Pub_policy5.htm.

17. As early as December 4, 1950 the General Assembly adopted Resolution 421E (V), U.N.Doc. A/1775, affirming that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent. . . . [W]hen deprived of economic, social and cultural rights man does not represent the human person whom the Universal Declaration regards as the ideal of the free man." In a 1977 resolution, the General Assembly enumerated the concepts which should guide all future work of the U.N. on human rights, including "equal attention and urgent consideration should be given to the implementation, promotion and protection of both" categories of human rights. G.A. Res. 32/130, ¶ 1(a), U.N. Doc. A/RES/32/130 (Dec. 16, 1977).

18. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

19. HUMPHREY, *supra* note 10, at 107.

anticommunism” at home to favor including only civil and political rights in the Covenant.²⁰ The U.K. lost interest and eventually the General Assembly reached its decision to have the Commission draft two covenants, to be treated equally and opened for signature on the same date. As Mary Ann Glendon describes it, “[i]n practical terms the move made sense, but separating the political/civil liberties from the social/economic rights had a heavy cost: it undercut the Declaration’s message that one set of values could not long endure without the other.”²¹

Two decades after the end of the Cold War, the distinctions are disappearing in theory and practice. The traditional distinctions were based on several philosophical and practical considerations, ranging from the concept of negative and positive rights to resource allocations and institutional issues. On closer examination of the rationale for separating categories of human rights, we can identify—at the risk of oversimplifying—four philosophical or conceptual features and four practical or policy-based features

I. CONCEPTUAL DISTINCTIONS BETWEEN CATEGORIES OF HUMAN RIGHTS

The conceptual bases relate to immutability, cultural bias, role of the state with respect to positive and negative rights, and political ideology favoring freedom or equality.

A. Immutability

At the theoretical level, the case is often made that civil and political rights are permanent and immutable, and are not subject to changing circumstances as they relate to the permanent nature of human beings. Those who hold this view stress the priority of civil and political rights for human life and dignity, which are timeless, compared to economic, social, and cultural rights, which are conditional on societal development and programmatic realization over time. This theory is strongly influenced by natural law, which attributes the permanence of human rights to the natural condition of human beings—that is, all humans have the same nature and therefore the same rights. Since human nature does not change, then neither do human rights. A second feature of natural law supportive

20. GLENDON, *supra* note 15, at 196.

21. *Id.* at 202.

of permanence of rights is the derivation of rights from natural justice, from an abstract appeal to Reason, or from a belief that these rights are “God-given” or correspond to the Will of a Divine Presence (for those who adhere to an organized religion), or the Will of an abstract Deity (for those who adhere to the deist position). From all these perspectives, it is inconceivable that the definition of virtue as derived from these forces greater than humans would change over time, although the ability of human to apprehend the higher Will may be perfected.

The strength of the arguments for permanence based on human nature depends on a belief in an abstract and unknowable source of justice accepted as a matter of faith rather than the scrutiny of scientific investigation. The concept of human nature, however, has a place in the study of evolutionary biology and human behavior. The question for evolutionary biology is whether there is a comparative reproductive advantage of propensities such as empathy and altruism, which would explain the emergence of codes of human social behavior such as human rights. There may be genetically determined basic human instincts of survival of the species and manifestations of empathy and altruism that evolutionary biology is only beginning to explain.²² Since human evolution is driven by reproductive selfishness, one could wonder why the human species would develop any ethical system, like that of human rights, according to which individuals manifest feeling for the suffering of others (empathy) and—even more surprising—act in self-sacrificing ways for the benefit of others without achieving any noticeable reproductive advantage. And yet, as Paul Ehrlich notes in *Human Natures*, “empathy and altruism often exist where the chances for any return for the altruist are nil.”²³ Natural selection does not provide the answer to moral behavior as “there aren’t enough genes to code the various required behaviors,” but rather “cultural evolution is the source of ethics”²⁴ and therefore of human rights.

The second scientific approach to understanding human nature holds that moral behavior is a human, social product developed by a process of biological and social evolution (associated with Hume, and also sentimentalist, subjectivist, or naturalistic approaches) or as a

22. See PAUL R. EHRLICH, *HUMAN NATURES: GENES, CULTURES, AND THE HUMAN PROSPECT* 305–31 (2000).

23. *Id.* at 312.

24. *Id.* at 317.

sociological pattern of rule setting (as in the sociological theory of law and the work of Weber). This approach includes the contractarian notion that individuals in a society accept rules from legitimate authority in exchange for security and economic advantage (as in Rawls). In legend, literature, religion, and political thought, justice and eventually the concept of human rights became socially constructed over time into complex webs of social interaction striving toward a social order in which human beings are treated fairly as individuals and collectivities. The best-known histories of the human rights movement²⁵ tend to begin with the ancient religions and societies and trace the evolution of understanding of human rights over time, reinforcing the idea that moral codes evolve with circumstances.

Whether one uses a biological or a sociological lens to discern the origin of human rights in society, it is indisputable that the content of the norms evolves over time. Slavery, torture, and subjugation of women and colonized populations are among the most obvious practices that were regarded as natural and just for long periods of human existence. Clear human rights norms have emerged in recent times to exclude these practices from acceptable human behavior. Thus, this progressive awareness of new understandings of acceptable treatment of humans and exigencies of social arrangements, including legislation and enforcement, explains the changes over time of the catalogue of civil and political as well as economic, social, and cultural rights. Given these explanations of the evolution of human rights norms, there is no basis for considering that one category reflects values more timeless than the other. It is tempting to cite life and bodily integrity as so basic that they have always been protected in human society and that certain social benefits or cultural practices are only recently regarded as deserving of protection, but history teaches us otherwise. The social norm of caring for the needy has a long history while the prohibition of deliberate infliction of pain to obtain information is relatively recent, thus upending the assumption that civil and political rights are constant and economic, social, and cultural are “new.” It is therefore disputable to justify the distinction between categories of rights on the relative permanence of the one compared to the other.

25. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* (2d ed. 2003); HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS*, (1950).

B. Cultural Bias

Another justification for the distinction between categories is based on cultural or civilizational bias, the concept of the autonomous individual being characteristic of Western modernism and requiring that civil and political rights protect that autonomy, in contradistinction to other civilizations that value the group, whether the Asian values of duty to the family and king (state), or the dictatorship of the proletariat in societies that claim to be communist, or communal values in African societies. From this perspective, civil and political rights are Western and made part of constitutional democratic regimes and of the expectations of the citizens, although they may be exported to other societies that are modernizing, either by building new nations out of a colonial legacy, which made them familiar with these rights, or in responding to the pressures of globalizing markets and ideas, as in China, and adapting their legal practices and constitutional norms as a result. According to this view, a priority may have been placed on economic, social and cultural rights in non-Western societies either because it is the duty of the beneficent Asian king (and the successor state) to provide for his subjects, or because the dictates of charity in the religion or belief system of the society, or because the victory of the proletariat in the class struggle so requires.

However, this approach, which has been articulated in the “clash of civilizations” thesis, tends to consider large zones of human habitation as excessively monolithic. Drawing on a classification of civilizations as Western, Latin American, African, Islamic, Sinic, Hindu, Orthodox, Buddhist, and Japanese, Samuel Huntington argues that “individualism remains a distinguishing mark of the West among twentieth-century civilizations.”²⁶ Huntington considers the Western “tradition of individual rights and liberties unique among civilized societies.”²⁷ He agrees with Bilahari Kausikan of Singapore that the West, which “wrote the Universal Declaration of Human Rights,” has lost its leverage, especially over Asian countries.²⁸ Huntington’s thesis is flawed in several respects. First, as Thomas Franck points out, he erroneously assumes that the most radically conservative

26. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 71 (1996).

27. *Id.*

28. *Id.* at 194; see also Surya Prakash Sinha, *The Axiology of the International Bill of Human Rights*, 1 PACE Y.B. INT’L L. 21, 31–52 (1989).

manifestations of non-Western civilizations accurately represent them and that occidental culture is inherently liberal and tolerant.²⁹ The reality is that non-Western civilizations are quite diverse in practices and beliefs and that “autonomy and freedom of conscience are not any more indigenous to the West than to the East.”³⁰ Moreover, many Westerners “probably not only do not oppose, but actually share with non-Western societies a commitment to community-based values and identity.”³¹ In other words, in all societies there is a spectrum of individualistic and communitarian attitudes,³² and conflicts of values occur within as well as across civilizations. Second, Huntington neglects the authenticity of activists in people’s movements in non-Western societies who espouse human rights without rejecting their own culture. Human rights activists from non-Western societies may find it more effective within their culture to seek change at the community level rather than through state institutions, as in the West, but such preferences are a matter of strategy based on cultural realities not on the inappropriateness of the human rights framework for their struggle for social justice. Former human rights activist and later South Korean President Kim Dae Jung rejected the “Asian values” argument of former Singaporean Prime Minister Lee Kuan Yew, which he found “not only unsupportable but self-serving.”³³ For him, the Universal Declaration “reflects basic respect for the dignity of people, and Asian nations should take the lead in implementing it.”³⁴ “The biggest obstacle [to establishing democracy and strengthening human rights in Asia] is not its cultural heritage but the resistance of authoritarian rulers and their apologists.”³⁵

The debate over the cultural bias of human rights has not been laid to rest by these or other voices. A vast amount of official pronouncements and scholarly exegesis can be marshaled on either side of the debate. The question for the purpose of challenging the excessive distinction between categories of rights is whether this

29. Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int’l L. 593, 608 (1997).

30. *Id.*

31. *Id.* at 604.

32. *Id.* at 605.

33. Kim Dae Jung, *Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values*, 73 FOREIGN AFF. 189, 190 (1994).

34. *Id.* at 194.

35. *Id.*

claimed bias is related to civil and political rights as being Western, and economic, social, and cultural rights as being non-Western. The Cold War obfuscated the debate as the West used international fora to criticize the stifling of freedom of expression, religion, movement, assembly, the denial of political rights, and the practice of arbitrary arrest and detention in socialist countries, while the latter denounced the contradictions of Western capitalism as responsible for the lack of economic, social, and cultural rights and the prevalence of racial discrimination in the West. The reality is, of course, more complex. Most significant for present purposes is the long tradition in the West of supporting these rights, including Roosevelt's proposing a second bill of rights to cover them,³⁶ and broad ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (the United States being the only major Western country not to ratify it). In education and the media, it must be said that the United States is behind most countries on developing awareness of human rights, and it is rare to find issues of health, social security, food, and shelter articulated as matters of human rights, except by progressive social movements. However, a survey shows that most of the public "'strongly' believe meeting people's basic needs of food, housing, and healthcare should be considered human rights."³⁷ The fact that the U.S. is behind other countries diplomatically does not justify the conclusion that culturally Americans do not understand access to basic health, education, food, and housing as a matter of human rights. In other Western countries, the problem does not even arise. In sum, it is not accurate to consider that economic, social, and cultural rights are not suitable to the West due to cultural notions of the nature of rights and should therefore be treated differently from civil and political rights.

C. Role of the State in Realizing Positive and Negative Rights

The third set of conceptual bases for the distinction between traditional categories of human rights has to do with the role of the state and the notion of negative vs. positive rights. According to this perspective, civil and political rights are attributes of the human

36. See Roosevelt, *supra* note 13.

37. Belden, Russonello & Stewart Research & Comm'n, *Human Rights in the U.S.: Findings from a National Survey*, (2007) at 4, available at http://opportunityagenda.org/files/field_file/Human%20Rights%20Report%20-%202007%20public%20opinion.pdf (last visited Apr.20, 2009).

person with which the state must not interfere, and thus are best described as “freedoms from state interference” or “droits-attribut,” while economic, social and cultural rights are “claims on the state,” or “droits-créance.” Civil and political rights are “negative” insofar as they enjoin the state from interfering in the individual’s freedom to do whatever is not harmful to others, whereas economic and social rights are correlative to positive duties of the state to enable the individual to do what he or she would like to do.³⁸ The former imply abstention of the state while that latter imply claims against the state for provision of services.

Although intellectually appealing in its neatness, this distinction tends to oversimplify the process of realizing rights in practice. First of all, considerable intervention by the state is necessary to achieve civil and political rights, including action to ensure that private parties do not violate the rights of others, and to give agents of the state the wherewithal to train and equip internal security forces so they can acquire information and confessions without resorting to torture, and to establish and maintain a system of courts and public defenders’ offices necessary for a fair hearing and adequate legal defense. Merely “abstaining” cannot fulfill the state’s duties under the social contract.

The distinction between positive and negative rights is not the same as that between negative and positive liberty. In his famous essay on “Two Concepts of Liberty,” Isaiah Berlin treated the idea of negative liberty as referring to an individual being left to act or be as he or she pleases without interference of other persons, whereas positive liberty involved either the collective self-determination of the space of freedom, as in a democratic system, or control or mastery of someone else who determines the scope of one’s actions.³⁹ Closely related to this distinction was the assumption that positive freedom was associated with authoritarianism and paternalism, and the Cold War perception in the West that the Soviet Union was claiming to realize positive freedom but was in fact totalitarian and

38. This distinction was brilliantly argued by Quincy Wright in his contribution to a collection of philosophical essays produced by UNESCO to assist the drafters of the Universal Declaration. Quincy Wright, *Relationship Between Different Categories of Human Rights*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 143, 147 (UNESCO ed., Greenwood Press 1973) (1949).

39. Isaiah Berlin, *Two Concepts of Liberty*, Inaugural Lecture before the University of Oxford (Oct. 31, 1958), *reprinted in* ISAIAH BERLIN, LIBERTY 166 (Henry Hardy ed., 2002).

repressive, hence non-liberal. The issue today is not whether to choose between positive and negative freedom but whether to attach practical consequences to the distinction between negative and positive human rights.

Negative rights are somewhat akin to negative liberty in the sense that their enjoyment requires inaction on the part of others, whereas positive rights require action on the part of the duty holder. Thus civil and political rights, such as freedom of speech, the right to vote, or the right to physical integrity, require abstention on the part of the state from banning speech, restricting voting rights, or abusing the person of a citizen. Poverty, ignorance, illness, inability to bargain for the price of one's labor under conditions of exploitation, social inequalities, stigma, discrimination and similar factors are as constraining on an individual's liberty to be or act as he or she wishes as banning a publication or speech or assaulting or arbitrarily detaining a person. The realization of human rights requires positive action to lift such constraints, such as providing education, protecting from discrimination, or regulating the labor market. In this sense, economic, social and cultural rights are instrumental to negative freedom.

Similarly, there are negative duties implied in the proper realization of many economic, social and cultural rights. Article 15 of the ICESCR on the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications refers to "the right to freedom indispensable for scientific research and creative activity."⁴⁰ Leaving aside the material conditions necessary for the artists or scientists to be productive, the freedom to which that paragraph refers is a negative freedom.

In the 1980s, Henry Shue provided a fairly systematic refutation of the claim that there are sharp and significant distinctions between positive and negative rights. For him, "neither rights to physical security nor rights to subsistence fit neatly into their assigned sides of the simplistic positive/negative dichotomy," demonstrating "that security rights are more 'positive' than they are often said to be" and "subsistence rights are more 'negative' than they are often said to be," and he concludes that the distinctions, "though not entirely

40. International Covenant on Economic, Social and Cultural Rights art. 15(3), Dec. 16, 1966, 993 U.N.T.S. 3.

illusory, are too fine to support any weighty conclusions.⁴¹

Rather than seek to redress the balance by enumerating negative freedoms in ESCR and positive freedoms in CPR, it is more productive to draw on the practice of the past twenty years of interpreting the normative content of all human rights in terms of three types of obligations or duties, which are less abstract and more grounded in practice, namely, the obligations to respect, protect, and fulfill, the latter sometimes subdivided into the duties to facilitate and provide. While this typology emerged with respect to defining obligations under the ICESCR,⁴² the obligations approach is even more relevant as a framework that applies equally to ESCR and CPR since it underscores that the state has duties that vary from preventing its agents from committing violations (duty to respect), and holding third parties accountable (duty to protect), to extending services (duty to fulfill) through information (duty to facilitate) and furnishing what otherwise cannot be obtained (duty to provide). Such duties cannot be reduced to negative and positive obligations; they lead to a range of policy preferences for any right, regardless of category. The ban on torture calls for (a) state agents not to torture, (b) the state to prevent private torture, (c) the state to train law enforcement officers to collect information without torture, and (d) considerable investment in providing a functioning prosecutorial and penal system adequate to eliminate the temptation to torture. Similarly, health as a human right implies (a) duties on state agents not to discriminate in access to health services, (b) regulation over private health providers to meet various exigencies of this right, as well as (c) prevention and promotion campaigns, and (d) a state duty to provide certain services not met by the private sector or required in circumstances of severe deprivation or epidemic. Clearly, it is far too simplistic to limit the realization of freedom from torture to the negative obligations ((a) above) of state agents and of the right to health to the positive obligation ((d) above) to provide health services. In many specific instances the important developments in civil and political rights might relate to positive obligations and those in economic, social, and cultural rights to negative duties. There is, of course, merit in the distinction between state abstention and state intervention as applied

41. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 37 (2d ed. 1996).

42. See generally M. MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (2003).

to the two categories of human rights; however, there are sufficient crossovers among positive and negative rights for this distinction not to justify the claim that there is a difference in nature between the two groups.

D. Political Ideology Favoring Freedom or Equality

Related to the previous conceptual basis for the distinction is the underlying philosophical basis for rights, expressed in terms of “freedom” or of “equality” and the corresponding ideological underpinnings.

The “revolution of freedom” refers to the historical response to the arbitrary exercise of power by the monarchy in 18th century Europe. It is the powerful idea that underlies both the establishment of the First Republic in France and the independence of the American colonies from the British Crown in the New World. This is the response to the “long train of abuses and usurpations, pursuing invariably the same Object [which] evinces a design to reduce them under absolute Despotism” to which the Declaration of Independence refers. The 1789 French Declaration was based on the belief that “the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments.” Out of this tradition there have emerged both the libertarian and liberal sets of political beliefs and action. Adherents of the former stress that “America was founded on the idea of Liberty; however oppressive the present statist government of America is, America and Liberty are one and the same.”⁴³ The preoccupation with liberty of 18th century France had to do primarily with what the Old Order lacked: tolerance for ideas (thought, conscience, religion, expression, and the press), parliamentary representation, and fair criminal justice. The most articulate and passionate voices in 1789 were those who defended liberty defined as “the freedom to do everything which injures no one else,” according to article 4 of the 1789 Declaration. That text also defined the “natural and imprescriptible rights of man” as “liberty, property, security, and resistance to oppression.” (Article 2.) The 1793 Declaration defined these rights as “equality, liberty, security, and property,” (article 2), and liberty as “the power that belongs to man to do whatever is not injurious to the rights of

43. Nation of Liberty Official Website: Home of the Libertarian Revolution, <http://www.geocities.com/CapitolHill/Congress/3999> (last visited Apr. 17, 2009).

others,” (article 6).⁴⁴

A libertarian analysis of the Universal Declaration by Frank van Dun accepts the understanding of human rights similar to that of the French Declaration of 1789, the American Bill of Rights, and Locke’s *Second Treatise* in UDHR Articles 3, 4, 5, 9, 10, 11, 12, 13, 16, and 17, but has serious problems with the economic, social, and cultural rights in Articles 22 through 28. The Universal Declaration mistakenly presents these “simply as human rights, as if they are of the same nature and on the same level as other rights, with their seemingly respectable ancestry,” according to van Dun.⁴⁵ “Anyone familiar with the classical doctrine of natural rights,” he continues, “will see . . . that the UD’s distinctive ‘rights’ are incompatible with that doctrine.”⁴⁶ The UDHR reads, for him, like “an original manifesto of the philosophy of the welfare state.”⁴⁷ The claims on resources posed by such “rights” are intolerable for the real rights since “a person’s life, liberty, and property are thrown upon the enormous heap of desirable scarce resources to which all people are said to have a right.”⁴⁸ Such “rights to” are incompatible in this view with natural rights and he therefore rejects the idea “that one’s rights are as unlimited as one’s desires, and, thus, are the primary sources of conflict and disorder.”

A more classical liberal approach to human rights, such as that represented by Maurice Cranston, also finds reason to treat CPR as real rights and ESCR as aspirations.⁴⁹ It has been the official position of the government of the United States, alone among Western democracies, to find the whole category of ESCR as so different in nature from CPR as not to be human rights at all. The ideological significance of this position is to reinforce the separation of categories and to resist the redistribution objective of the perceived ideological enemy of equality.

The political ideology favoring the “revolution of equality” also finds its roots in the French Revolution. That momentous event is a

44. 1793 CONST. arts. 2, 6 (Fr.).

45. Frank van Dun, *Human Dignity: Reason Or Desire? Natural Rights Versus Human Rights*, 15 J. LIBERTARIAN STUD. 1, 5 (2001).

46. *Id.*

47. *Id.* at 7.

48. *Id.* at 10.

49. Maurice Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43–53 (D.D. Raphael ed., 1967).

constant reference point for the development of Marxism, whether in *The Jewish Question*, *The Eighteenth Brumaire of Louis Bonaparte*, *The Civil War in France*, or *Critique of the Gotha Program*. Marx referred to the “gigantic broom of the French Revolution of the eighteenth century,” which “swept away all these relics of bygone times,” i.e., “all manner of mediaeval rubbish, seigniorial rights.”⁵⁰ From the grand *Socialist History of the French Revolution* by Jaurès⁵¹ to the socialist and libertarian *Lutte des Classes sous la Première République* by Daniel Guérin⁵² and the writings of Albert Soboul and Georges Lefebvre, the French Revolution has been a preferred subject of scholarship for the left, until the revisionism of the last twenty years, which was in vogue during the bicentenary in 1989. The historiography of the French Revolution is inseparable from the development of socialist thought and its critiques. Socialist and social democratic ideas galvanized the revolutions of 1848, 1871, and 1917. The drafters of the UDHR were aware of those ideas and the provisions on economic, social, and cultural rights in numerous European and Latin American constitutions.

The “revolution of equality” is indeed that part of the revolutionary tradition that challenged the privileges of those who dominate in society through titles and wealth. There is, of course, a strong egalitarian theme in the liberal tradition and an abhorrence of arbitrary abuse of state power among most socialists. Do their differences justify keeping two categories of human rights separate? It is only the extreme views of liberty that would reject equality, and of equality that would suppress freedom; most political philosophies on the right and the left allow for a balancing of both in a broad ideological middle-ground between the libertarian rejection of all welfare as theft, at the one extreme, and the dictatorship of the proletariat at the other. Contemporary human rights continues to provide legitimate aspirations for greater equality in states built on strong liberal traditions and for greater freedom in states that have provided strong support for the material needs of the population. The “social and international order” to which Article 28 of the Universal

50. KARL MARX, *THE CIVIL WAR IN FRANCE*, reprinted in part in *MODERN POLITICAL THOUGHT: READINGS FROM MACHIAVELLI TO NIETZSCHE* 874 (David Wootton ed., 1996).

51. JEAN JAURÈS, *HISTOIRE SOCIALISTE DE LA RÉVOLUTION FRANÇAISE* (Albert Soboul ed., Éditions Socials 1969) (1924).

52. DANIEL GUÉRIN, *LA LUTTE DES CLASSES SOUS LA PREMIÈRE RÉPUBLIQUE 1793–1797* (2d ed. 1968).

Declaration refers is one that presumably would temper the excesses of any regime, whether ideologically to the left or the right; it would call for political prisoners to be released from Cuba, while acknowledging that country's high levels of achievement in education and health and call for universal health coverage and greater equality of access to quality education in the United States, while hailing the protections available to citizens against arbitrary exercise of power. The value of a holistic approach to human rights is to favor both freedom and equality in proportion to the democratically determined preferences of each society. Maintaining separate categories of rights for each ideological preference undermines that approach.

II. POLICY-BASED DISTINCTIONS BETWEEN CATEGORIES OF HUMAN RIGHTS

The practical or policy-based distinctions between the two categories of rights concern implementation, justiciability, violations, and resources. The assumption underlying the separation of rights of the UDHR into two covenants was primarily practical, although philosophical distinctions were voiced. The practical reasoning for treating some rights as categorically different from others began with a consideration of the appropriate means of implementation.

A. Implementation

Thus, civil and political rights were deemed to be immediately enforceable, whereas economic, social, and cultural rights were deemed to be subject to progressive implementation. The core obligations set out in Article 2 of each Covenant reflected this distinction, the International Covenant on Civil and Political Rights (ICCPR) specifying that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant," and that an effective remedy be provided in case of violation; and the ICESCR stipulating that "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." This difference in implementation is, moreover, the principal reason why the Commission on Human Rights decided to draft two Covenants rather than one.

However, at the national level, there is little doubt that states confront practices and imbedded habits that make it difficult to take this distinction too literally. Where prosecutors and law enforcement officials lack training and incentives to abide by human rights rules governing treatment of offenders, the full realization of the rights not to be subjected to torture or arbitrary arrest or detention calls for progressive measures. The same is true for the independence of the judiciary and the process of free and fair elections. These institutions require efforts over generations to be up to the task of full respect for the related civil and political rights. This obvious fact does not mean that acts of torture, mistreatment, and denial of justice or free and fair elections do not violate national and international norms. They do. But they must be seen in the context of progressive measures taken to improve the system.

Similarly, the progressive implementation of ESCR is now understood by the Committee on Economic, Social and Cultural Rights as requiring: (a) that the rights in question be exercised without discrimination;⁵³ (b) that the state comply with a “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights;”⁵⁴ and (c) that they take immediate steps, which “should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”⁵⁵ None of these three requirements is subject to progressive realization.

Thus the distinction between categories of rights on the basis of immediate vs. progressive implementation is only partially accurate. Most scholars and lawyers have accepted the reasoning of the Committee that rights of both categories imply obligations to respect, protect, promote, and provide. Which of these obligations looms large depends on circumstances, not on categorical distinctions.

B. Justiciability

The reference to an “effective remedy” in Article 2(3) of the ICCPR without an equivalent in the ICESCR suggests that judicial

53. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Econ., Soc. & Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations*, ¶ 1, U.N. Doc. E/1991/23/Annex III (Dec. 14, 1990), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument).

54. *Id.* ¶ 10.

55. *Id.* ¶ 2.

remedies apply only to civil and political rights, making economic, social, and cultural rights more “programmatically” and “aspirational.” In practice, the maturity of the judicial system and the way legislation is drafted determine whether and how claims regarding legally protected rights may be litigated, not whether the right protects individual autonomy or ensures a social need. Indeed, the same Article 2(3) refers to the determination of rights “by competent judicial, administrative or legislative authorities, or by any other competent authority” and only requires States Parties “to develop the possibilities of judicial remedy; [and t]o ensure that the competent authorities shall enforce such remedies when granted.” Thus the immediate justiciability of ICCPR rights is not required.

Many ESCR are protected by law, such as access to schools, tenants’ rights in housing, payment of benefits under a pension, unemployment or other safety-net schemes, or access to health care. While it is true that the state may not wish to create a cause of action regarding a service that it is only beginning to put in place or may consider that the market will provide the services through private insurance schemes or supply and demand in labor or real estate, the courts or the legislature may—and usually do—allow citizens and sometimes aliens to sue in order to benefit from an appropriate remedy when the state has failed in its obligation to respect, protect, facilitate, or provide. Typically such litigation concerns the duty to respect when the state has failed to provide a mandated service or has discriminated against the plaintiff, or the duty to protect when the state has failed to prevent a third party, such as a business enterprise, from harming health through pollution or a dangerous product, or failing to respect mandatory conditions of housing, or destroying or damaging an object placed under the protection of national heritage, to name obvious examples. In all these cases, the economic, social, or cultural right in question may be considered to be justiciable. The failure to provide a remedy, for example, in cases of alleged torture or prolonged detention without charge, suggests that the justiciability of civil and political rights is not always respected, even in advanced democracies.

Some confusion might have existed in the first decades following the entry into force of the ICESCR, when little comparative research had been done on actual case law concerning ESCR. In recent decades, a vast amount of case law has been collected so as to make unsustainable the claim that justiciability attaches to CRP but not to

ESCR, or not to the same degree. For example, a recent compilation of essays documents nearly 2,000 judgments and decisions from twenty-nine national and international jurisdictions covering such issues as resettlement following eviction, regulation of private medical plans, and state support to anti-poverty and illiteracy programs, and addresses the extent to which economic, social, and cultural rights are justiciable.⁵⁶ The special rapporteurs on the rights to adequate food, education and health have established or referred to databases of case law in which the rights in question have been adjudicated. In a general comment on domestic application of the Covenant, the Committee on Economic, Social and Cultural Rights considered that the view that judicial remedies were essential for violations of CPR but not for ESCR was “not warranted either by the nature of the rights or by the relevant Covenant provisions.”⁵⁷ The Committee concluded on this point:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁵⁸

A particularly telling example of the judicial examination of ESCR, including allocation of resources, is provided by the Constitutional Court of South Africa, which decided in the *Soobramoney* case in 1997 that “the state has to manage its limited resources” and, in this case of a man suffering kidney failure, would not require the state to provide renal dialysis under the right to health because to do so “the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet.”⁵⁹ Then, in *South Africa v Grootboom* in 2000, the Court interpreted the right to

56. See SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2009); see also THE ROAD TO A REMEDY: CURRENT ISSUES IN THE LITIGATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (John Squires, Malcolm Langford & Bret Thiele eds., 2005).

57. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, ¶ 10, U.N. Doc. E/C.12/1998/24 CESCR (Dec. 3, 1998).

58. *Id.*

59. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) paras. 28, 31 (S. Afr.).

adequate housing as requiring the state to “provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”⁶⁰ For present purposes it is worth highlighting the Court’s dictum: “The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.”⁶¹ In 2002, the Court decided, in the landmark *Treatment Action Campaign* case, that the constitutional guarantee of the right to health required the government to provide to pregnant women a drug known to reduce mother-to-child transmission of HIV, noting that the government “has to find the resources” to comply with a court order and “[w]here a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted.”⁶²

The distinction of categories of human rights thus finds a particularly weak justification on the ground that one category is justiciable while the other is not. Clearly, the courts adjudicate human rights of all types and categories depending on the domestic incorporation of the international standard and the extent to which the legal status of the right in question renders litigation possible and practicable, as opposed to other available remedies.

C. Violations

Related to the justification of the distinction on grounds of justiciability is the assumption that it is only appropriate to speak of “violations” with respect to civil and political rights. The argument here is that it is appropriate to apply a “violations” approach to civil and political rights, whereas a “programmatic” approach is indicated for economic, social, and cultural rights. However, the realization of

60. *South Africa v Grootboom* 2001 (1) SA 46 (CC) para. 99 (S. Afr.).

61. *Id.* para. 20.

62. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para. 99 (S. Afr.). In fact the court went beyond a declaratory order, stating:

We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.

Id. para. 106 (footnote omitted).

civil and political rights cannot be limited to dealing with violations and economic, social, and cultural rights can also be violated. Part of the justification for the claim that a violations approach is not appropriate for economic, social, and cultural rights is the assumption that compliance with these rights is best assessed in terms of the outcome of programs that are more or less effective in delivering the services, whereas accountability for civil and political rights is a matter of identifying and punishing those who violate these rights. Certainly, a country that refuses to hold free and fair elections, a law enforcement department that brutalizes suspects, a security policy that engages in extraordinary rendition, prolonged detention without charge, and torture, is guilty of violations of civil and political rights. But this failure to realize civil and political rights also involves inadequate training, failure to enact appropriate legislation and similar measures for which it may not be easy to identify the duty-holder accountable for the failure to eliminate these abuses from the system of criminal justice or the administration of elections. Along with accountability for violations attributable to individuals is the requirement that effective preventive programs reduce the incentives to commit violations, which is best advanced through a cooperative mode of encouraging, cajoling, assisting, or otherwise cooperating with state officials to seek improvement of human rights performance. The choice between the violations and the cooperation approach is a tactical matter for other governments, international partners, and civil society organizations to assess. A government that is willing to accept international assistance and cooperation to improve the practice of its law enforcement officials may reject accusations of responsibility for violations of the rights of detained or incarcerated persons. Without denying the right to redress of alleged victims of violation, there are advantages to walking through the open door of cooperation, which may be slammed shut for those who focus exclusively on public denunciation of violations. Thus, there are situations in which CPR may be advanced more effectively through the cooperation mode. Similarly, there are situations where the promotion of ESCR, normally pursued in the cooperation mode, may require a violations approach. When policies and practices that are so ill-conceived and rife with corruption that they are the direct cause of famine, epidemics of preventable disease, horrendous working conditions, and similar grave abuses, they cross the line; these acts and omissions are best treated as violations of economic, social, and cultural rights.

This matter was addressed by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, drafted by a group of more than thirty experts who met in Maastricht, the Netherlands, from January 22–26, 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, U.S.A.), and the Centre for Human Rights of the Faculty of Law of Maastricht University. More than a decade ago, the experts agreed that it was “undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.”⁶³ The Guidelines insist on treating violations the same for both categories of rights: “As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty.”⁶⁴ The Guidelines also applied the same concept of obligations to respect, protect, and fulfill that is used for civil and political rights, concluding with respect to economic, social, and cultural rights that “[f]ailure to perform any one of these three obligations constitutes a violation of such rights.”⁶⁵ They further clarified that “a violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result.”⁶⁶

In the same spirit, the Guidelines defined the types of actions and omissions that constitute violations of these rights, responsibilities, and remedies, and recommended that “[t]he optional protocol providing for individual and group complaints in relation to the rights recognized in the Covenant should be adopted and ratified without delay.”⁶⁷ It took nearly twelve more years for that recommendation to be implemented. On Human Rights Day, December 10, 2008, the

63. International Comm’n of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶ 4 (Jan. 26, 1997), available at <http://www.unhcr.org/refworld/docid/48abd5730.html> [hereinafter *Maastricht Guidelines*].

64. *Id.* ¶ 5.

65. *Id.* ¶ 6.

66. *Id.* ¶ 11.

67. *Id.* ¶ 31.

General Assembly finally adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.⁶⁸ This act is a clear signal that there is no longer an expectation that economic, social, and cultural rights need be treated differently from civil and political with respect to violations.

D. Resources

The final—and perhaps most widely cited—basis for separating the two categories is that of allocation of resources, according to which civil and political rights, being negative and implying abstention by the state, do not require resources, whereas economic, social, and cultural rights, being positive, are resource-dependent.

However, the weaknesses already discussed of the distinction between negative and positive rights from a philosophical perspective are particularly evident when it comes to resources. Comparing the costs of programs to protect subsistence rights (ESCR) and security rights (CPR), Henry Shue notes, “Which program was more costly or more complicated would depend upon the relative dimension of the respective problems and would be unaffected by any respect in which security is ‘negative’ and subsistence is ‘positive.’”⁶⁹

Stephen Holmes and Cass Sunstein, in *The Cost of Rights: Why Liberty Depends on Taxes*, demonstrate how all rights require tax payer-funded and government-managed services, whether courts, law enforcement, administrative agencies, or other institutionalized guarantees that the contract, property, liability-based, or other right will be enforced. This argument cuts both ways for international human rights. On the one hand, the principal message of their book that “private liberties have public costs,” and that “all rights are positive”⁷⁰ provides a convincing rebuttal to the argument that CPR and ESCR are fundamentally different from the resource perspective. On the other hand, they examine the costs of rights from the perspective of the legal and economic system of the United States and are somewhat dismissive of international human rights. The “ostensibly legal rights guarantees” of international human rights

68. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

69. SHUE, *supra* note 41, at 39.

70. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 48 (1999).

instruments are not worthy of consideration “unless subscribing national states—capable of taxing and spending—reliably support international tribunals, such as those in Strasbourg or The Hague, where genuine redress can be sought when such rights are violated. “In practice,” they continue:

rights become more than mere declarations only if they confer power on bodies whose decisions are legally binding (as the moral rights announced in the United Nations Declaration of Human Rights of 1948, for example, do not). As a general rule, unfortunate individuals who do not live under a government capable of taxing and delivering an effective remedy have no legal rights.⁷¹

Oddly they refer to redress from The Hague, which, if they have the various criminal tribunals or the ICJ in mind, does not provide “genuine redress” for individuals. They cite Article 13 of the European Convention on Human Rights for the proposition that the rights are “reliably enforced when the subscribing states treat them as part of domestic law.”⁷² The fact is that most of the treaty monitoring, whether by the regional human rights courts and commissions or by the U.N. treaty bodies or by special procedures, has to do with domestic incorporation of international human rights norms, and many states parties, including poor countries, take very seriously the need for legal remedies. On this point, the observations made above on justiciability respond in part to Holmes’ and Sunstein’s dismissal of international human rights regimes that do not meet their standard of “government capable of taxing and delivering an effective remedy.”

Their presumed doubts that many countries can meet that standard might be contrasted with their consideration of how the U.S. Supreme Court interprets the Bill of Rights. They acknowledge that:

some important constitutional rights are plausibly styled as duties of the government to forbear rather than to perform. But even those ‘negative rights’—such as prohibition on

71. *Id.* at 19. One may wonder to what tribunal in The Hague they refer since the ICJ and the ICC or other penal tribunals located in that city do not deal with domestic application of international human rights law. They probably did not have Dutch courts applying the Covenants in mind, although they do constitute a good example of justiciability of ESCR since the Netherlands, like other countries having a monist system, applies the ICESCR directly through its courts.

72. *Id.* at 237 n.5.

double jeopardy and excessive fines—will be protected only if they find a protector, only if there exists a supervisory state body, usually a court of some kind, able to force its will upon the violators or potential violations of the right at issue.⁷³

The issue does not even arise in many other jurisdictions since the courts are expected to deal with allocation of resource issues that affect the implementation of constitutionally protected ESCR derived from international human rights, as the example from the Constitutional Court of South Africa cited above attests.⁷⁴

In sum, the distinction between CPR and ESCR in international human rights law on the grounds that, in general, the former are cost free while the latter require state resources has lost its cogency, along with the seven other bases for that categorical distinction discussed above. To conclude, it may be useful to summarize, in the following table, the main features which have been used to distinguish the two categories and the core arguments which have progressively challenged that distinction:

73. *Id.* at 53–54.

74. *See supra* notes 59–62 and accompanying text. There are undeniable difficulties in enforcing the orders of the South African Constitutional Court but it is by far preferable that human rights be protected under the Constitution and treaty obligations, affirmed by the courts, and to struggle with effective enforcement, than to take as the starting point that human rights involving positive duties have no place in the legal system.

**Features Traditionally Used to Distinguish Civil and Political from
Economic, Social, and Cultural Rights**

Feature	Traditional characteristic of civil and political rights (CPR)	Traditional characteristic of economic, social, and cultural rights (ESCR)	Rationale for challenging the distinction
A. FEATURES MAINLY OF A PHILOSOPHICAL OR CONCEPTUAL NATURE			
Permanence	Absolute, immutable	Relative, responsive to changing conditions	All rights emerge in a historical context and take on priority status when affirmed as human rights.
Cultural bias	Based on Western economic and political liberalism	Based on models of centrally planned socialist system or Eastern enlightened king	All political systems, whether monarchy, democracy, or socialist, provide for constitutionally guaranteed rights of people or citizens.
Role of the state	Negative rights (freedom from state intervention), free markets	Positive rights (claims to benefits from the state), welfare state	Varying degrees of the duties to respect, protect, and fulfill apply to all rights and make the positive/negative distinction of limited value in defining the role of the state.
Underlying philosophical objective	Freedom/autonomy	Equality/solidarity	Freedom requires both CPR and ESCR, and equality must be assured in relation to both, although the degree of redistribution of resources can vary.
B. FEATURES MAINLY OF A PRACTICAL OR POLICY-RELEVANT NATURE			
Approach to implementation	Immediate implementation	Progressive implementation	Elements of immediate and of progressive implementation apply to all rights in varying degrees.
Availability of Judicial remedies	Justiciable	Political or programmatic	All rights require remedies and eventually become justiciable as legal redress is provided.
Relation to violations	Violations can be identified and denounced	Violations are unsuitable to cooperation mode	Both violations and cooperation modes may be appropriate for any given right, depending on circumstances.
Allocation of resources	Cost-free (individual freedom), rights as immunities	Resources required (welfare), rights as entitlements	Resources are needed for the realization of CPR, and most ESCR can be realized with minimum investment.

CONCLUSION

A holistic approach to the relations among CPR and ESCR avoids misleading categorization of human rights, although the two Covenants, each devoted to one of the traditional categories, remain the standard reference documents. The separation of human rights into two categories appears to be discouraged by the Universal Declaration of Human Rights and more recent formal texts that support this holistic approach. The Universal Declaration, in Article 28, refers to the right to “a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” The reference to a “social and international order” suggests a concern for social structures conducive to the realization of rights that cover the civil, cultural, economic, political, and social domains. Such structures imply a holistic framework in which the cumulative effect of realizing all types of human rights is a structural change, that is, an altering of the power relations with the society. The addition of the term “international” means that the change in power relations not only occurs with national societies but also at the level of international relations and the international political economy. That is a reformist and perhaps a revolutionary aspiration in the sense that full realization of both sets of human rights does imply in most societies alteration of power relations. In the last analysis, the transformation of human rights from their legitimate status of morally justified entitlements to rights that are legally enforced and enjoyed in practice, from capability to functioning, is the essential project for human rights realization. The “right” to the social and international order described in Article 28 does not describe the existing order but rather the potential order towards which a holistic approach to human rights aspires.

Various formulations of the holistic approach appear in the Declaration on the Right to Development,⁷⁵ the Vienna Declaration and Programme of Action,⁷⁶ the mandate of the High Commissioner

75. Declaration on the Right to Development, G.A. Res. 41/128, art. 6(2), U.N. Doc. A/RES/41/128/Annex (Dec. 4, 1986) (“All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.”).

76. *Vienna Declaration and Programme of Action*, *supra* note 18, ¶ 5 (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with

for Human Rights,⁷⁷ and in expert formulations such as the the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.⁷⁸ Beyond the reaffirmation that all human rights are interdependent and interrelated, the holistic approach also recognizes that both categories require resources, both can involve violations, both require adaptation and often transformation of institutions and practices, and both are essential for human dignity. The *Human Development Report* of the United Nations Development Programme for the year 2000 (*HDR2000*) dispels four myths about the two categories of rights by clarifying that both categories include positive and negative rights, involve immediate and progressive implementation, require resources, and require quantitative and qualitative indicators.⁷⁹ *HDR2000* gives examples of how, in practice, the exercise of civil and political rights has been instrumental in empowering poor people and advancing economic, social, and cultural rights. In the context of development, the holistic approach means that all human rights, not just the right that appears most relevant to the task at hand, must be considered. In urban planning, for example, it is not enough to consider that the allocation of resources to affordable housing is a contribution to the right to shelter; the planner must ask what the plan will do for the residents' enjoyment of rights to health, food, education, information, work, and effective remedies, to mention only the most obvious ones. The Office of the High Commissioner for Human Rights assumes in its training materials for staff and for national human rights institutions

the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”)

77. G.A. Res. 48/141, ¶ 3, U.N. Doc. A/RES/48/141 (Dec. 20, 1993) (stating that the High Commissioner for Human Rights shall “[b]e guided by the recognition that all human rights—civil, cultural, economic, political and social—are universal, indivisible, interdependent and interrelated and that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”).

78. *Maastricht Guidelines*, *supra* note 62, ¶ 4 (“It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.”).

79. U.N. Development Programme, *Human Development Report 2000*, at 93 box 5.5 (2000), available at http://hdr.undp.org/en/media/HDR_2000_EN.pdf.

that the two main categories of human rights “are not fundamentally different from one another, either in law or in practice.”⁸⁰

Outside of the circles of academics, bureaucrats, and government representatives who adhere to U.N. dogma, there is considerable confusion regarding the separation of human rights into two categories. Numerous economists still hold the view that the end of development is growth and market efficiency, or place an absolute value on the free market. They look with suspicion on any government intervention and find human rights useful only to the extent that they protect the right to property, and they find civil and political liberties necessary because they are conducive to transparency and accountability, which contribute to economic efficiency. They would deem any use of economic, social, and cultural rights for the purpose of redistribution as confusing rights with desires. Similarly some in the human rights field consider that only civil and political rights, encapsulating human freedom, are properly human rights and that the promotion of economic, social, and cultural well-being may be a useful agenda for government policy but not for human rights. In sum, free-enterprise economists and the libertarian or conservative rights theorists stress individual freedom and sanctity of property⁸¹ and reject the concept of economic, social, and cultural rights as undermining human freedom and economic efficiency.

The alternative position is that ESCR are as fundamental to human agency and dignity and as definitional of human existence and fulfillment as CPR. “[W]hen deprived of economic, social and cultural rights,” the General Assembly affirmed in 1950, “man does not represent the human person whom the Universal Declaration regards as the ideal of the free man.”⁸² All governments have formally recognized both sets of human rights in the Universal

80. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS 3 (2005).

81. The argument that pro-growth policies based on economic freedom empower the poor is made by Jean-Pierre Chauffour, in *Pro-Human Rights Growth Policies*, 7 DEVELOPMENT OUTREACH, Oct. 2006, <http://www.devoutreach.com/oct06/SpecialReport/tabid/1513/Default.aspx>. This former senior economist at the IMF and current economic advisor at the World Bank has developed these ideas in a recent book published by the Cato Institute. See JEAN-PIERRE CHAUFFOUR, *THE POWER OF FREEDOM: UNITED DEVELOPMENT AND HUMAN RIGHTS* (2009).

82. G.A. Res. 421E (V), U.N. Doc. A/1775 (Dec. 4, 1950).

Declaration and constantly reaffirmed that all human rights are universal, indivisible, interdependent and interrelated. The separation during the Cold War between categories of rights was fraught with ideological overtones, most of which have dissipated with the end of East–West ideological confrontation. It is true, as David Beetham insightfully put it:

Although in theory the end of the Cold War could have provided an opportunity for ending the sterile opposition between the two sets of human rights, in practice it has reinforced the priorities of the U.S.A., the country which has been most consistently opposed to the idea of economic and social rights.⁸³

He is correct that the United States Government

believes that while the progressive realization of Economic, Social and Cultural rights requires government action, these rights are not an immediate entitlement to a citizen. Sovereign states should determine—through open, participatory debate and democratic processes—the combination of policies and programs they consider will be most effective in progressively realizing the needs of their citizens.⁸⁴

Nevertheless, the U.S. return to multilateralism and membership in the Human Rights Council under the Obama Administration may diminish the impact of U.S. exceptionalism regarding ESCR. Many responses to concerns expressed by the skeptics, including U.S. government lawyers, may be found in the general comments of the Committee on Economic, Social and Cultural Rights,⁸⁵ in debates among the leading scholars and practitioners,⁸⁶ and in the practice of

83. David Beetham, *What Future for Economic and Social Rights*, 43 POL. SYS. 41, 43 (1995).

84. See David Hohman, U.S. Delegate, Statement Before the 61st Commission on Human Rights: Explanation of Vote (Apr. 15, 2005), available at <http://www.us-mission.ch/humanrights/2005/0415Item10L27.htm>. U.S. NGOs and most academics do not accept this interpretation. See, for example, the work of the Center for Economic and Social Rights, <http://www.cesr.org>, and the Poor People's Economic Human Rights Campaign, www.economichumanrights.org (both last visited Apr. 17, 2009).

85. The texts of the nineteen General Comments issued so far are available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

86. See Mary Robinson, *Advancing Economic, Social, and Cultural Rights: The Way Forward*, 26 HUM RTS. Q. 866 (2004); Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM RTS. Q. 63 (2004).

international institutions and bilateral aid programs that have successfully applied a human rights-based approach to their work in the fields of education, health, social security, labor, housing, and other domains of economic, social, and cultural rights. In many parts of the world a willingness to work for ESCR adds legitimacy to efforts to promote CPR.

Twenty-first century human rights thinking has evolved beyond the Cold War divide and “the sterile opposition between the two sets of human rights.” The conceptual distinctions based on permanence, cultural bias, the role of the state, and political philosophy have lost their cogency since rights in both categories build on a shared understanding of core values of freedom, autonomy, equality and solidarity at a particular historical moment and provide a standard of achievement that transcends and builds on the best features of capitalism and socialism, in a world where neither is feasible in its pure form. The practical grounds for treating the two groups differently based on modes of implementation, including the use of the courts, reference to violations, and allocation of resources, have also lost their cogency since both sets of human rights require immediate and progressive measures, both have justiciable and programmatic elements, both are advanced by reference to cooperation and violations, and both involve the use in varying degrees of action by and resources of the state.

The human rights agenda sixty years after the adoption of the UDHR calls for a translation of the rhetorical commitment to a holistic and integrated approach to human rights into the further development of tools of implementation, monitoring, measuring, and thinking common to both sets of human rights. The trends among treaty bodies, U.N. agencies, and NGOs are clearly moving in that direction. The aim of this article has been to suggest the implications of these trends for the restoration of the unity of human rights that has been put into question since 1951. The essence of human rights is to define priorities based on what is most valued by the society. The values represented by one set of human rights are no less valuable than those of the other, including under times of stress when national security or economic prosperity are threatened and under attack. Human rights function to provide a bulwark against the temptation to sacrifice anyone’s freedom or subsistence in response to such stress. Under any given circumstance, the urgency and

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effective means of implementation will vary from one right to the next. The false dichotomy of ESCR and CPR has outlived its usefulness. It is time to move on to a more holistic and integrated understanding and practice of human rights.