

## On the relationships between civil and political rights, and social and economic rights

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In this chapter, I propose to deal, summarily, with the relationships between interests usually classified as civil and political (CP) rights, and those usually classified as social and economic (SE) rights.<sup>2</sup>

On the face of it, the issue of the relationships between groups of claims does not appear to be one of great importance. The need to address it comes from the fact that a bewildering variety of positions on this issue have been advanced. The controversy centres around two related, but distinct, issues: the relationships between the types of concerns involved, and whether they should be recognized as basic human rights. Some argue that both groups of interests are equally important to human welfare, so they should both be considered human rights, equal in importance and status. This is the vision that “won” in the Universal Declaration of Human Rights in 1948.<sup>3</sup> The vision that the groups are and should be kept separate and distinct won when the Declaration was translated into the two 1966 covenants,<sup>4</sup> and is a vision argued for within many theories of political philosophy. The question of which cluster of rights deserves primacy has been answered in a variety of ways: Some seek to give priority – logical, normative, and political, to CP rights. They are either indifferent or hostile to SE rights, while voicing different attitudes towards SE concerns. The legal system of the United States is an example of this attitude. Most importantly, many Western theories of political justice and liberalism make CP rights a necessary component of the liberal, democratic state, but do not include SE benefits in the order

of rights. Moreover, some such theories present the taxation required for efforts of redistribution seeking to address SE concerns as a violation of CP rights, specifically the rights to liberty and property. Others claim that without satisfaction of SE needs, CP concerns are secondary and meaningless and therefore the former have priority over the latter and at times justify non-protection of CP claims by the need to guarantee SE ones. These are the facts that make the discussion of the relationships between these concerns one of both theoretical and practical importance, and they will dictate the structure of this chapter.

The twentieth century is often described as “the age of rights.” Against this background, I do not need to go into the debate whether rights talk is desirable. This decision has been made.<sup>5</sup> In fact, the great success of rights talk explains current tendencies such as the attempt to identify everything one sees as desirable as a “right,” to warn that policies deemed very undesirable are not only bad but also inconsistent with rights, and to deny the status of rights to concerns which one thinks are not legitimate. My main argument in this chapter will be that these tendencies are often misleading and even dangerous. Rights are very important, but they should not be allowed to pre-empt, confuse, or impoverish practical discourse. On the other hand, the practical difficulties should not impede the recognition as rights of the appropriate concerns.

In a nutshell, my argument will be this: rights are special normative entities. Human rights are a sub-class of rights. Rights have moral, political, and legal functions. Basic interests required for human dignity and flourishing should be the subject of rights, and these interests include both CP and SE concerns. In this sense, CP and SE concerns reinforce each other as ingredients for basic human dignity. The satisfaction of both is required by the unifying concept of human dignity. There is no historical, logical, political, or moral reason for thinking that only CP concerns can and should be the subject of rights.

However, this is just the beginning, not the end, of the road. The mere recognition of a right does not say much about the scope and the nature of the duties that may legitimately and wisely be imposed in order to protect it. Since rights conflict among themselves, and since rights do not necessarily defeat all other interests, the specific scope of rights is often a matter that should be decided by the political processes of each society. There is a wide range of such arrangements, which may be compatible with a general commitment to human rights. The choice between these arrangements should be based on moral, political, and empirical considerations, and is not a matter of conceptual or analytical moves. More specifically, recognition of a right to liberty or to property does not inherently support a sweeping rejection of taxation and redistribution for the purpose of guaranteeing some level of SE welfare to all. Similarly, a

right to equality cannot, by itself, require major redistribution. We need first to clarify what we mean by a “right to equality,” and discuss the way such a right may compete with other rights and interests.

Finally, the relationship between the types of rights is complex. CP rights and SE rights can both derive from the unifying notion of human dignity. They complement each other. CP rights may also promote the ability to fight effectively for SE rights, and to minimize SE catastrophes. On the other hand, there may be tensions between rights, both within each of the clusters (e.g. the tension between the right to free speech and the rights to reputation and privacy) and between them.

Before elaborating on some of these themes, two preliminary comments are called for. First, the scope of this chapter is huge, and the literature written on each of the theses mentioned here is immense and constantly growing. My discussion will often have to be extremely skeletal, with major points presented as assertions rather than as conclusions of arguments. All I can say for this choice is that it is inevitable to keep the chapter within reasonable limits, and that I believe all the assertions can indeed be supported more fully, and often have been supported extensively in the relevant literature.

Second, if we accept the claim that human rights are universal, then they are especially befitting to international regimes. Constitutional and legal rights may well be more particularistic, and limited to particular societies.<sup>6</sup> Moreover, they all have strong institutional support, which is related to institutions of the states and the societies within which they operate. I was asked to cover the functioning of rights within municipal systems. Naturally, I concentrate on internal mechanisms of enforcement and elaboration of rights. I will therefore move back and forth between analytical and international discussion of human rights, and their recognition within municipal systems.

### The nature of human rights

Human rights are a sub-class of rights. The debate about the nature of rights is complex and persistent. We will limit ourselves to questions related to rights functioning as human rights.<sup>7</sup> Human rights are rights that “belong” to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right-grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not

granted by people nor can they be taken away by them. They can only be respected or violated by them.

Human rights are often complexes of the types of benefits listed by Hohfeld (claim rights, liberties, immunities, and powers). Whatever their type, their special function is to justify the imposition of duties on others.<sup>8</sup> These duties, in turn, make meaningful the sense in which the right-holder has entitlement. Demanding that a right be protected, or that a duty corresponding to it be performed, is thus not a matter of charity or even of justice. The right-holder is entitled to the performance of the corresponding duty.<sup>9</sup>

Furthermore, rights are strong entitlements. This is an additional, and a distinct, feature of rights. Even if one does not accept Dworkin's position that rights act as trumps,<sup>10</sup> precluding their violation for reasons of prudence or utility, or Nozick's conception of rights as side-constraints, rights do provide more than regular reasons for action. For instance, they confer the right to do wrong, i.e. they protect the right-holder against interference, even if the particular instance of exercising of the right cannot be justified by an all-things-considered judgment.<sup>11</sup>

All rights – natural, moral, constitutional, and legal – enjoy this peremptory nature.<sup>12</sup> Only human or natural rights have the additional feature that they exist irrespective of any social or institutional endorsement, based only on moral justification and the humanity of the right-holder. This distinct combination is the source of both the great appeal of the notion and of its weakness. It also explains the unease often felt when courts play out the institutional implications of this combination, giving priority to claims of human rights, as such, over practical judgments made by legislatures or communities.

Human rights, in themselves, do not come with either an authoritative tribunal for deciding their scope, or with the mechanism to make sure that they are in fact protected. The de facto success of claims of human rights depends on enforcement, and when the decision-making mechanism is not accepted, there may well be a debate about the legitimacy of this invocation of rights. This debate signifies the tension between the pure justificatory element of human rights, and the ingredient seeking to stress its special strength and its effectiveness, the special claim to be respected.<sup>13</sup> The pre-political, pre-legal nature of human rights is what permitted the allies to put Nazi leaders on trial, disregarding their claim that the German law under which they acted either permitted or demanded what they did. NATO invoked the same notion to justify its intervention in Kosovo. In both cases, however, military and political might was needed. In both cases, those who opposed the intervention claimed that it was an unjustified use of force, violating their rights rather than protecting the rights of those under their jurisdiction.<sup>14</sup>

The picture becomes clearer when we move into municipal legal systems. The pre-political nature of human rights suggests that they do not require social endorsement for their recognition. Ideally, all societies should voluntarily abide by these constraints. However, wise societies know that there are forces which systemically seek to undermine the rights of others. They therefore construct institutional mechanisms to protect the rights of inhabitants even against legislatures and executives. These mechanisms often include granting constitutional status to some rights, enforceable by independent (constitutional) courts. Presumably, their nature as pre-legal rights influenced the decision to accord them constitutional status, but in turn their effectiveness within the system depends on that status.<sup>15</sup>

We see here an important implication of the institutional nature of law, and the way it affects “pure” practical reasoning. Human rights justify the imposition of duties, and thus have moral import. Legal rights benefit from the general legitimacy enjoyed (in stable societies) by the state and its decision-making processes. But within the state and the legal structure, different branches derive their legitimacy from different sources. These different sources of legitimacy (in the Weberian sense) affect the primary role of the different branches. The “political” branches owe at least some of their legitimacy to their periodic accountability to the public. Legislatures and executives are allowed to pursue policies that do not enjoy universal acceptance, because they have a political mandate to make decisions about policies for their constituencies. Courts usually derive their legitimacy from their independence within the state structure, which is in turn based on their primary role as exponents of the law, and as those who ensure that in its application to individual cases the rule of law will be maintained. They are primarily appliers of pre-existing laws (including laws conferring rights) to individual situations. The elaboration of the duties derivable from rights is a part of the judicial function, so judicial creativity in these matters is legitimate and even desirable and indispensable. Nonetheless, courts must be no less responsive to social mores than legislatures.

When all the courts do is indeed enforce rights accepted by all – the structure does not raise a problem, and the rights protected are both human and legal. However, when courts defeat the preferences of majorities in the name of human rights, the legitimacy of their action is often contested. The threat to judicial legitimacy does not stem from the mere fact that courts “create” laws as they adjudicate. It stems from the fact that some such decisions are deeply controversial. The groups offended by the decision then claim that the courts transcended their role, which requires – according to the challengers – that they should have deferred to the judgment of the political branches. Courts may then be

accused of acting as philosopher kings, impoverishing political discourse and destabilizing the political order, which, we are then reminded, is ultimately required for the protection of all human rights themselves.<sup>16</sup> In other words, courts are seen as institutions designed to protect those rights that have acquired social and political endorsement. However, they are challenged when they seek to impose duties that they considered mandated by the unmediated recognition of pre-political human rights.<sup>17</sup>

Tensions between the political process (and democracy) and the judicial protection of human rights are thus relevant to all human rights. They owe as much to the nature of the judicial process as to the pre-legal feature of human rights. This can be seen clearly when we remember that debates about the judicial interpretation of rights exist even when there is no serious debate about the legal or constitutional origin of the rights involved. Nonetheless, the vaguer and more abstract the formulation of the right, the more vulnerable any attempt to derive or to invalidate specific arrangements by invoking it becomes.

So here is the dilemma: the appeal of the notion of human rights is precisely its ability to defeat specific arrangements by particular legal systems, and to provide an external criterion of evaluating them.<sup>18</sup> However, the enforcement of human rights requires political force. When the implications of human rights are controversial, the legitimacy of using such force is reduced. And in fact, social institutions may well only enforce those rights that they deem acceptable to their societies. They may invoke the rights, with their evaluative power, only to serve their own conventional morality. If it follows that human rights can be effective only when they are not controversial, their original appeal almost disappears. Human rights are then seen to depend on their enforceability, which seems to contradict the idea that their force is moral and pre-legal. So we want to reject this interpretation and this description of social and practical reality. On the other hand, the effective strength of rights in actual political discourse does depend also on their enforceability. It sounds empty to say that I have a right if there is no effective way in which I can enforce the obligations of others either not to interfere in my exercise of it or to actively assist me to do so.

I cannot treat this issue directly and systematically in this essay. I will simply assert that the tension is real, and that human rights scholars (and activists) should attend to it. The appeal of the ideal of human rights within a generally just society, governed by the rule of law, is important. It can be maintained only if a serious effort is made to minimize the extent to which the protection of rights repeatedly leads to the defeat of the products of its regular political deliberations. This notion has become quite central in discussions of rights and of judicial activism.

One way of going about it is to distinguish between “thin” and “thick”

readings (or conceptions) of rights.<sup>19</sup> “Thin” readings are the ones truly shared by all, or at least rights that can seriously claim universality. Basic rights to human dignity and freedom are obvious candidates. Torturing, killing, or persecution of political dissidents, or of members of a certain race or religion, are unjustified violations of human rights. The courts of a political system should declare such activities illegal, and make the perpetrators accountable. But care should be taken when we move into arrangements, which may be presented as unjustified violations of human rights only under “thicker” readings of such rights. An example is the refusal to adopt a generous welfare policy. The decision may be presented as a violation of rights to life and dignity. But it may also be presented as required by the ethos of liberty and personal responsibility. These issues should be discussed on their merits and decided by the political process, and not given the protection and the institutional implications of “human rights.” The details of these arrangements are a matter to be elaborated by that society, and should not be seen as being determined only by an analysis of the rights concerned. Arrangements within particular societies may become “thicker” in different ways. Once an arrangement gets the required support, it may well become a right within that system. Nonetheless, this is a right within the system, but it is not a human right. Another system may decide not to adopt it, and still not be violating the rights of those subject to it.

Accepting a “thin” reading of human rights suggests that, within particular societies, human rights discourse should focus on persuading the political branches of the need to promote the relevant concerns by defining them as rights within the system. This approach is superior, for both moral and institutional reasons, to trying to “force” them to legislate and implement these policies through international and external pressures, invoking the duty of these countries to protect and promote human rights.<sup>20</sup>

Lest I be misunderstood, I do not claim that all human rights should be reduced to claims which in fact enjoy the support of social forces within one’s society. This position would indeed negate the pre-legal moral force of human rights. Human rights are unique in that they justify the imposition of duties, even if social and political powers reject such duties. However, the protection of rights will be effective only if this moral force is backed by actual acceptance. Since all political authority is based on a claim to legitimate authority, moral arguments inevitably feature in the deliberations of all power holders. A system of checks and balances is designed to make sure that the perception of moral justification of more than one agency will be taken into account in political decisions.

Nor do I argue that courts (or other branches of government) should never make controversial decisions. There are cases in which a basic

human right, under its “thinnest” reading, is blatantly violated. And there are situations in which declaring such action illegal may be extremely controversial. In such cases, we hope the courts will have the courage and the integrity to save society from itself. Clear cases of this sort are when the court is asked to stop a serious violation of rights in a semi-lynching situation.<sup>21</sup> Many feel that the case of the massive detention of Japanese-Americans during World War II is a case in point. Administrative detention is clearly a violation of people’s rights to freedom, due process, and freedom of movement. The reasons advanced to justify the detention were not persuasive. This is precisely the type of case in which we hope the court will protect rights and give them their moral force.<sup>22</sup>

A case exemplifying an invocation of rights to invalidate legislation that does raise an issue of legitimacy is that of the alleged “right to abortion.” We all agree that freedom of movement should not be systematically denied without due process of law. The controversy about the legitimacy of the restrictions imposed on Japanese-Americans during World War II is thus not about the principle, but about its application in that particular case. Abortion, on the other hand, raises very different issues. We all agree that murder is a serious crime, and that it violates the right to life. Some people think abortion is murder. For them, laws permitting it are laws legitimating murder, and consequently patently immoral. Others, myself included, disagree with their classification of abortion as murder. We believe that women should have the liberty to decide whether or not to bear a child even after they got pregnant. I want the laws of my country to give them this liberty. I do not think, however, that such liberty is required by women’s human rights. I would, therefore, hesitate to give unelected judges the power to invalidate the considered preferences of their communities on this issue by invoking human rights.<sup>23</sup>

I hope these two examples may illustrate what I have in mind when I talk about the distinction. Needless to say, the question may arise as to whether a specific alleged implication of a right falls within a “thin” reading, and should thus be considered a human right, or whether it belongs to the “thick” reading, so that the political system has more liberty in regulating it. The mere fact that someone opposes the right does not in fact render it controversial in the sense I refer to. By “controversy” I mean the existence of a serious public debate within society about the principles governing the way the question should be decided. The fact that there would always be borderline cases does not undermine the usefulness of the distinction.

Institutionally, when there is no real controversy about rights, it is not very important who should make the decisions. Presumably, all decision makers will tend to make similar decisions. When a controversy exists,

the identity of the decision maker empowered to make the decision may determine the outcome. In some cases of controversy we want the court to hand down the decision. These are mainly the cases in which interested parties or powerful organs violate norms accepted by society. The independence of the courts is then an essential part of their ability to decide well and correctly. However, when the controversy is about the general conception of the good, about what is required by public interest, about what the norm should be, judges seem less attractive candidates. It seems better for these decisions to be made through the political processes. In our discussion we saw a connection between human rights talk and the identification of the optimal decision maker. Human rights talk suggests the suitability of courts. Therefore, expansive human rights talk tends to enlarge the jurisdiction of courts, and legitimate judicial activism. Insistence on “thin” readings of human rights relegates more of the responsibility for articulating the implications of rights and the duties they generate to the political organs.

I can now reformulate the purposes of this chapter. In all societies, debates about the desirable scope of protection of human rights and the interests protected by them will be central features of political deliberation. These will obviously include debates about both CP and SE concerns. My focus is on the suitability of rights talk to the protection of CP and SE concerns respectively. For each of the groups, I will examine claims that issues relating to them should be fully resolved by analysis of human rights and not through regular political deliberations. I will argue that most of these claims, for both types of concerns, are deeply flawed. The two clusters share the fact that some concerns within them can and should be seen as human rights. Neither of these clusters of rights is logically or normatively prior to the other. Recognition of some concerns in each cluster as rights does not require that the other concerns cannot be seen as rights. The recognition of interests belonging to both concerns as rights does not generally dictate any specific arrangement, or permit the invalidation of such arrangements. The questions are normative and political, and should be decided and challenged as such. Answers do not automatically derive from the nature of rights or even from recognizing them as rights, so the responsibility for their decision does not lie exclusively with a “forum of principle.”

In the second section I examine, and reject, some standard arguments against seeing SE concerns as rights. Here I want to emphasize that seeing CP and SE concerns as equal candidates for the status of rights can be derived directly from my analysis of the nature of human rights and the reasons for recognizing certain claims as human rights. The exposition above about the nature of human rights, the tension between their pre-legal nature and the need to enforce them, and the role of the judi-

ciary and the political branches, applies to all human rights, whether they seek to protect CP concerns or SE ones. A closer look reveals that this unity is not accidental. None of the reasons for recognizing human rights leads to a distinction between these concerns which would justify giving one cluster of rights primacy over the other. We “recognize” rights following from one’s humanity precisely in order to indicate the moral urgency of not letting political powers exhaust the realm of moral claims. The universality of these concerns seeks to highlight the fact that freedom and dignity are basic human needs in all cultures and in all times.<sup>24</sup> A life of struggling to subsist offends the notion of human dignity much more than a life in which one’s freedom to speak is curtailed. We usually care about speech only after our subsistence needs are met. The structural reasons which induce the political powers to ignore rights exist for both CP and SE concerns: rulers may seek to silence their critics in order to perpetuate their power, so they are likely to try and restrict CP rights. Allocation of public resources is often dictated by political powers, and the underclass often has fewer political powers than other groups, so SE rights are also at risk.<sup>25</sup> Some forms of adequate standards of living may be necessary background conditions for exercising civil and political rights. The conclusion is that there are situations in which legal and constitutional entrenchment of rights is needed for both CP and SE concerns.

The legitimacy of imposing particular arrangements on a society in the name of human rights, despite the fact that the society in question did not authorize, or explicitly rejected, that arrangement, is indeed problematic in many ways. But this, too, is as true for CP concerns as it is for SE ones. Suffice it to remind ourselves of the debate about abortion or about religion in the schools. In fact, in many countries, debates over alleged transgressions of the courts on controversial CP rights are more intense than the discussion of their role on SE rights. This may stem from the fact that courts are often more active in their expansive readings of CP rights than they are in their readings of SE ones.<sup>26</sup>

The distinction between “thin” and “thick” readings of rights is also equally applicable to all human (and constitutional) rights, and the distinction between CP rights and SE rights does not affect its applicability. A good example within CP rights is freedom of religion. A law forcing a person to convert is accepted by most to be a blatant violation of this right. A reading of the right that precludes such a law is a “thin” one. But the limits of religious teaching may be drawn in different ways in different societies, or in the same society at different times. Balancing the rights of religious freedom and freedom from religion is usually relegated to the political decision of the societies in question. An example from within SE rights is the human right to free public education. This is a right recognized by the International Convention on Economic and Social

and Cultural Rights (ICESCR). Some countries grant a right to free education up to the level of college, while others grant only elementary education. All these countries meet their obligations under the convention, but the former states recognize a broader right to education than the latter ones.

The analysis of the nature of human rights does not support a principled distinction between CP and SE concerns. To the contrary, it supports their unity, as deriving both from the same ideal of human dignity. I shall return to this unity below. Let us now turn to some arguments seeking to suggest that only CP concerns can and should be seen as human rights.

### SE interests can be protected as human rights

Let me start by clearing the table of a claim that was made in the 1950s, seeking to reject the possibility of recognizing SE interests as rights, on the basis of the logical features of rights.<sup>27</sup> This argument has run out of favour in recent decades,<sup>28</sup> but I want to reject it explicitly since its residues linger.

The argument is based on distinctions between positive and negative rights and duties, and between liberty rights and claim rights. The two distinctions are often treated as interchangeable, but they should not be confused. Liberty rights create areas of freedom in which individuals are under no duty to act or abstain from acting. A claim right enables the individual to demand that others act or refrain from acting with regard to a particular matter. In terms of the legal system – liberty rights are those areas in which the law does not intervene. A negative claim right is characterized by the fact that co-relative to it there are duties on others not to act in ways that infringe upon it. A positive claim right is a right characterized by the presence of duties on others to act in ways that protect or promote it.

Legal rights can be of all these sorts. The scope of my liberty of speech is determined by the details of the duties imposed on me not to defame or incite. If the constitution is interpreted as limiting the power of legislatures to impose such duties, I also have a constitutional negative claim right, and an immunity right, to speak. My right to vote is a positive personal power, which I have the positive liberty to exercise. The government is under a (negative) duty not to deny me the right, but also under a (positive) duty to allocate the money and to arrange the details required to permit me to exercise it.

It is easier to impose duties of abstention (do not kill, rape, or maim) than it is to impose positive duties of care (pay to support others, save the person drowning in the lake, donate blood to the needy). This is es-

pecially true if we speak of duties imposed on everyone, irrespective of special relationships. Some argue that even if we impose a duty to save, this would be an imperfect, unenforceable duty, and that therefore no one can have a right to be saved. The argument then continues upon the assumption that SE rights are positive claim rights that are impossible to enforce. Who has the co-relative duty? What does this duty consist of? Is it possible that these duties should apply universally, without responsiveness to the wealth and abilities of the state and individuals concerned? Children may have a right to support against their parents and guardians (although enforcement is very difficult even in these contexts). But what does it mean to have a human right to adequate conditions of living? Or to an education? They conclude that SE interests may be important ideals, but that they are incoherent as claims of rights, and therefore cannot be identified as human rights.

However, this argument is based on a misconception of the role of human rights in practical reasoning, and on a serious mistake concerning the meaning of the protection given to “classical” CP interests.

First, the logical force of the argument that SE concerns cannot be regarded as rights because of their incoherence rests on a conception of rights very different from the one we have been using. It is a much stronger conception, closer to the one used by adherents of the control theory of rights, whose attractiveness is strongest for legal contexts. Under this conception, a right is not merely the source of justifying the imposition of co-relative duties. It requires, in addition, that the claim is directed at identified individuals or organs, and that the beneficiary can control its enforcement. Clearly, this conception is not applicable to human rights or, more generally, to moral rights. No human right, as such, comes complete with extensive enforcement mechanisms. As we saw, one of its main functions is moral and evaluative. It may well be that some aspects of a human right are not likely to be effectively enforced, or even that it may not be desirable to enforce them against the preferences of other individuals lest their liberty is curtailed without justification. This does not indicate that we should refrain from endorsing and recognizing the interest as a basic human aspiration and ideal, one that in principle may justify the imposition of duties on others. The political debate will then centre on the question of which such duties should indeed be imposed. The right to freedom from hunger, recognized by most, is a good example of just one such right.

Second, the argument is based on the assumption that, by definition, the protection of CP concerns only requires the recognition of liberties or negative claim rights, whereas the protection of SE concerns requires recognition of unenforceable general positive duties, involving great public expenditure and taxation. This, however, is not the case. Not all

CP concerns involve only negative claim rights and not all SE concerns require positive duties of action and financial contribution. The right to vote, for example, is a CP concern requiring action and positive expense, while protecting the privacy of people on welfare requires “only” abstention from monitoring and dissemination of information.<sup>29</sup> A clear case that defeats the claim is the right to non-discrimination, seen as a basic CP right. This right is invoked to justify admitting women and minorities into schools and military units that used to be closed to them. Such integration often requires great expenditure, and clearly goes beyond negative claim rights.

In other words, the protection of CP rights may require the imposition of positive duties and public expenditure no less than that these are required for the protection of SE rights. Another typical example is that of the right to property, seen by some as the paradigmatic CP right. The right to private property is often presented as a liberty right, which requires only the costless abstention of government from acting. However, as a long line of scholars, from M. R. Cohen<sup>30</sup> in the 1930s to Sunstein and Holmes<sup>31</sup> at present show, this is a serious mistake. The protection of private property requires not only abstention but also public decision making about the scope of private property. Property is made “private” by exclusionary rules, which are made and enforced by the public. Like all public enforcement, the protection of property requires public expenditure. We may protect property by using tax money to enforce the right by detecting, indicting, and imprisoning thieves who violate it. We may also think that we can protect private property more effectively by giving youngsters an education, which may give them a way out of thieving to begin with. Private property and a decent education for all are both goods that societies may choose to protect, facilitate, and provide. The decision whether they should be seen as rights, or as interests seeking recognition in the public sphere, is a matter of practical reasoning, not of conceptual analysis. That the problem is not logical is further proven by the willingness of most Western countries to recognize a general right to free public education.<sup>32</sup>

The nature and the extensiveness of the duties that need to be imposed in order to support certain arrangements is an important feature of the discussion of the desirability and feasibility of an arrangement. Admittedly, many SE concerns do require major redistribution, which may be both unfeasible and unjust. This is why the enforcement mechanisms of the ICCPR and the ICESCR are different. However, recognition of this feature of rights talk is very different from the alleged preliminary conclusion that, as a matter of the nature of rights, no SE concerns can or should be recognized as human rights. I return to these differences in enforceability below.

Arguments against seeing SE concerns as rights are sometimes based on different types of claims. One such argument goes thus: CP rights are neutral rules of the game, framework rules within which we can pursue our goals. SE claims are limiting this freedom to pursue our goals through forced collectivization and redistribution. Anyway, SE concerns, like all other debates about the good life, should be discussed within “the game” constructed by CP rights. Consequently, CP rights should be accorded primacy over SE concerns. At times, this feature of the distinction is presented as one of the logical priority of the right to liberty and CP rights in general over SE.<sup>33</sup>

The distinction between the rules of the game and ordinary politics is indeed important. For most practical purposes, debates should be within the rules of the game, and challenges of the rules of the game themselves should be relatively rare. It is also true that drawing this distinction is one of the reasons for constitutional politics. We entrench the rules of the game in the constitution, so that we can have a robust debate within it about desirable arrangements. But basing the priority of CP rights over SE concerns on this reasoning may be circular. It is true that human rights are a strong candidate for inclusion in a constitution, to be seen as a part of the rules of the game. But why should these include just CP rights? Why should some basic SE rights not be included in our “rules of the game”?

A person struggling to subsist does not have any meaningful freedom to pursue any goals. CP rights may well perpetuate a situation in which some people are free to pursue their goals only because others live a life in which this freedom is totally absent. If this is the case, CP rights are far from being neutral. The theory of human rights talks about basic human needs. It does not privilege one social order over another in this way. Social order is indeed necessary to protect all human rights. The content of the social order and the way it defines its basic commitments, however, cannot be privileged through a definitional move under which the present order is protected by “rights,” whereas all other interests are seen as mere interests. This is the basic political issue of any society, and we cannot resolve it by invoking the ideal of human rights, or by defining in a certain way what the “rules of the game” are.

An additional argument for restricting the status of human rights to CP rights comes from a certain reading of history: according to this analysis, rights talk started in Western civilization in the seventeenth century. Its main function was to limit the power of governments and kings. This limitation was achieved by classical CP concerns, and had nothing to do with the welfare of individuals under government. One does not need to go into the validity of this historical account.<sup>34</sup> There is no reason why we should be ruled now by the contingencies of the history of ideas. The answer to the question of which concerns should be seen as rights or as

human rights should be determined by our analysis of the urgency of the needs, their relation to human dignity, and the need to give them the special protection generated by rights.

We must add that the tendency to claim that SE concerns could not be rights, and that classical CP concerns must be, is itself not neutral, but a result of a specific picture, both descriptive and normative, of the relationships between individuals and the groups to which they belong. It is connected to traditions stressing individualism and the pervasiveness of a distinction between public and private, under which markets are deemed private, and allegedly should be left outside the jurisdiction of states and the law. In that tradition, there is a tendency not to give adequate attention to the relationships between the rights and duties of individuals living in society. The Universal Declaration of Human Rights (UDHR) emphasizes the context of human rights in an attempt to prevent or minimize the threat of great atrocities. But the Declaration is based in a context of a social life in which individuals are members with both entitlements and obligations. Nonetheless, one of the main complaints of critics of rights talk is that in many cultures, especially individualistic ones, the connection between rights and responsibilities is severed. The institutional features of the protection of rights strengthen this tendency: courts typically deal with specific claims of individuals, and cannot deal effectively with the background conditions that often determine one's welfare.

Some claim that the interdependence of rights and duties is more important in the SE context than it is in the CP one. Since our institutional mechanisms are better geared to protect independent claims of rights, without the need to attend to their context, CP rights belong more easily to our known legal and constitutional structure. This is superficially true. The recognition of SE rights does presuppose links of solidarity that are stronger than those assumed by the recognition of CP rights of individuals.

This is why the institutional mechanisms required to protect CP rights are often different from those required to protect SE rights. The difference stems in part from the fact that effective protection of SE concerns requires a richer range of human and social interaction than does the protection of many CP rights. It is relatively easy to provide protection to those advocating unpopular views, or to avoid exposure to such expressions. It is very difficult to send one's child to a school where social tensions make learning difficult. Dealing with the social tensions requires a deeper and more extensive involvement than refraining from punishing a person for his expressions. A court can make it very unlikely that a person be convicted for speech. Its ability to make sure that a black child in the US South gets effective and adequate education or medical care is much more limited.

Notwithstanding the validity of this argument, it can also be applied to CP rights. The effective protection of CP rights may also require the imposition of duties on a large, indeterminate group of people. If these duties are not performed, the effectiveness of protecting CP rights may be seriously hindered. Let us take the most paradigmatic of CP rights – freedom from torture. Effective protection against torture requires a combination of circumstances. First is the duty to refrain from torture (a negative claim addressed to all). Then there is the duty of governments to protect individuals from torture, by imposing the first duty and enforcing it. But history shows only too well that freedom from torture also requires a society that is not willing to tolerate the use of torture. There are societies in which people support torturing others, when they are conceived as threats and as enemies. In such societies, effective protection from torture may also require a long-term educational and legal effort to de-legitimize it. One could also add international organizations to the list of duty-bearers, because they can exert influence on governments to refrain from torture or to protect from it.<sup>35</sup> Despite this variety of duties and duty-bearers that may be required for an effective protection from torture, no one would doubt that freedom from torture should be recognized as a human right.

I want to clarify that I am not suggesting that a commitment to CP concerns protects individuals, while a commitment to SE concerns is more responsive to claims of groups. The indignity of a life of struggling to subsist is an affront to the individuals whose fate it is, and freedom of speech and association are not primarily about the interests of individuals to express themselves, but to the society in which we live. Freedom of association, and even freedom of religion in its group aspects, presuppose social networks and their importance. One of the major justifications of freedom of expression and of democracy is the constraints they put on the nature of social processes, and the stability they enhance. Freedom of expression (or religion) for Jehovah Witnesses is not just an individual right. It is the right of the group to which individuals belong to gain access to the public forum of persuasion. The law against incitement is not a limitation of the right of one person to free speech in order to protect the right of another to life. It is a limitation of the right to speech intended to defend social institutions and structures, which are conditions-precendent of all human welfare and security.

For this reason, I do not need to enter another debate which may be casting doubt on the coherence or intelligibility of SE rights: the idea that the subjects of rights are only individuals, and that all “group rights” are in fact reducible to various kinds of individuals’ rights.<sup>36</sup> Human rights are indeed universal and indivisible, and reflect a deep concern with individuals, as they live in societies. Both CP and SE concerns are central

to human welfare. Our picture of human rights should not be a tool that disguises the complexity of the constituents of human welfare.

We can conclude that the answer to the question of which concerns should be seen as rights or as human rights should be determined by our analysis of the urgency of the needs, their relations to human dignity, and the need to give them the special protection generated by rights. There is no reason for concluding, at the outset, that SE concerns cannot be the subject of (human) rights.

### The hierarchy between CP and SE rights

I mentioned above that most contemporary scholars have dropped the arguments seeking to show that SE concerns should not be seen as human rights. However, the same arguments are used, together with other arguments, to claim that CP rights should be seen as prior and primary. This position is reflected by the fact that liberal theories of democracy often insist on constitutional protection for CP rights only, relegating the protection of SE rights to regular laws and policies. In institutional terms, as we saw, this means that, while SE rights are protected only against arbitrariness or discrimination by the government, CP rights are protected against legislative decisions as well.

In part, this preference for CP rights may be connected to the ideal of democracy. It may be argued that CP rights are critical for the functioning of democracy, and once democracy is in place, coupled with such constitutional protection, the products of the political system are bound to be acceptable in terms of social justice as well. However, this justification is of only limited force: many affluent constitutional democracies continue to live with abject poverty and hopelessness in their midst. CP rights may be necessary, but they are not sufficient as guarantees of human dignity for all.

Against the background noted above of the priority of CP rights in many discussions, the debate about the status of SE concerns as rights, and the relationship between the two, may gain practical and political importance. It is therefore important to emphasize some of the ways in which SE concerns are at least as central to human welfare and to the structure of human societies as are CP concerns. This point is merely an elaboration of my primary thesis above: these issues are not matters of conceptual analysis or of the nature of rights. Their analysis requires a closer look at the background conditions and the presuppositions of life in democracies.

Two different routes lead to the same conclusion. One is the frequently quoted idea that all human rights derive from the concern with human

dignity. Among civil rights, the ones most clearly related to dignity are the rights not to be tortured, raped, or defamed. Not allowing a person to express various ideas is a serious limitation of liberty, but its connection to dignity is more remote. Usually, dignity also requires some ability to control one's life and participate in the decisions made in one's political community. As we saw, these are positive rights against the state, which is required to confer the powers and provide the resources needed for the implementation of their exercise. But not being able to survive, or not being able to marry or to have children for lack of ability to support them, or not being able to afford a standard life-saving medicine – these are instances where the threat to human dignity is clear and obvious. In terms of relevance to human welfare and dignity, the need to avoid a life reduced to the struggle for subsistence may often be more primary and central than the need to gain political liberty.

We reach the same conclusion when we look more closely at the ideal of democracy and political participation, which all liberal theories emphasize. The justifying power of democracy stems from its being the regime where individuals are allowed an equal right of participation. However, democratic participation is more than the power and freedom to cast a vote. It is the ability to cast this vote from a position of knowledge and freedom. While no one can be forced to become knowledgeable or free and autonomous, background conditions must be such that people can have effective liberty to gain them. This effective liberty includes freedom from the struggle for subsistence.

In other words: not only can both CP and SE concerns be rights. Not only are some SE needs as central to human welfare as the most important CP interests. It is also that the exercise of CP rights cannot be rich and full without a basic freedom from hunger. The real question is, then, whether societies should use some of their resources to guarantee all their members an adequate level of welfare. Which translates into the question of how the division of resources between state, society, and individual members should be structured, and how much resources a society can and should take from its rich members to enhance public resources and resources used for redistribution.

It should be clear by now that I am not arguing that the recognition of SE rights dictates extensive programmes of redistribution. The resistance to programmes seeking to secure SE concerns is not motivated only by power and self-interest. It is also supported by important moral, social, and political arguments. These need to be seriously addressed when social policies are considered. These real differences between CP and SE rights require creative thoughts about social arrangements, some of which I discuss below. My purpose in this section is to show that these considerations justify neither the exclusion of SE concerns from the realm of rights, nor giving CP rights primacy over SE rights.

## Property, liberty, and social justice

Before I move ahead, I want to complement my arguments so far by addressing the powerful and influential argument, made by Robert Nozick, against recognition of SE rights, by invoking the need to protect CP rights. In *State, Anarchy and Utopia*, Nozick cast the age-old argument on the priority of CP concerns explicitly in terms of rights. According to him, any taxation for purposes other than the night-watchman functions of the minimal state is a violation of the rights of individuals to liberty and dignity, since it is akin to slavery: it forces them to work for the welfare of others. Such policies, he claims, are not merely undesirable and should be opposed in democratic deliberations; they should be ruled out by anyone committed to taking the rights of individuals seriously.

Most scholars and politicians in the West do not accept Nozick's argument and his principled stance against taxation designed to achieve redistribution.<sup>37</sup> To succeed, Nozick's critics have to reject both his premise that taxation is inconsistent with respect for rights of liberty and property, and his general position against welfare arrangements that are not based on one's work. For my purposes, the distinction between the two phases of Nozick's argument is crucial. The right to liberty or to property does indeed not rule out taxation or redistribution. But this conclusion, in itself, does not justify any specific redistributive arrangement. Neither, however, does a general right to adequate living conditions. Specific schemes of taxation and redistribution should be discussed on their moral and political merits. They are neither rejected nor mandated by a commitment to human rights.<sup>38</sup>

Nozick's argument is of special relevance to my concerns, because he seeks to base his rejection of welfare laws on the claim that they inherently violate individuals' rights. He presents a person's right to liberty as a side-constraint on one's actions, not as just an additional consideration to be weighed against others while pursuing one's goals.<sup>39</sup> The nature of liberty rights as side-constraints stems from the Kantian insistence on seeing individuals as ends. This perception of the individual, in turn, precludes using one person to gain advantages (or to avert catastrophes) for another. This picture of rights, again, stresses the preemptory nature of rights. Side-constraints reflect the things we may not do to individuals, because by doing them we would violate and undermine the most basic ground for recognition of the others' worth. People have entitlements, and these entitlements impose limits on what can be done to them and their holdings without their consent. This picture of rights, again, seeks to draw practical lessons from the nature of rights and the presuppositions of recognizing them.

The Kantian image of individuals who should not be violated is indeed attractive and important. However, the key question then becomes: what

are one's entitlements? Nozick's answer in terms of work and voluntary exchange is only persuasive in part. The literature on this subject is huge. Arguments similar to Nozick's are often made by advocates of the free market analysis of political economy, and by "Law and Economics" scholars. However, there are serious philosophical, economic, and legal analyses expounding the difficulties arising from their premises. All I need to say in this context is that there is no knockout victory in this debate, and that one is unlikely. Once we concede this, the question of social justice cannot be presented as one totally controlled and pre-empted by the recognition of individuals' rights to liberty or property.

Some scholars are content to stop at this point. This is a mistake. The questions of how to strike an acceptable balance between liberty and solidarity, between individual autonomy and social mutual responsibility, are the central political questions of our age. The fact that human rights talk, in itself, does not answer these questions should not allow them to be decided only by political power and conflicting self-interest. The questions often reflect internal tensions between the premises of an allegiance to human rights. Furthermore, various forms of institutional rights, constitutional as well as legal, may well be important elements of the solution.

I cannot of course say much about the substance of this debate in a chapter like this, but I do want to add a few reminders. I argued above that liberty, property, or the distinction between CP and SE concerns could not really decide the relevant issues. Instead, we need to base our analysis on moral and normative considerations going beyond the general commitment to these rights. But we must also attend to facts about human nature, the nature of social and political organization, and the limits of political feasibility.

While Nozick's principled argument against taxation for redistribution must be rejected, some of the sentiments he expresses are indeed central to liberty and dignity, and some of the dangers he points out are very real. The fact that so many of the Communist regimes were oppressive, arguably beyond the necessities dictated by their social aims, and that even their ability to take care of the SE welfare of their population was very limited, should give us pause. The kind of administration that is needed to enforce complicated systems of taxation and redistribution is indeed likely to generate problems. In extreme forms, it may even threaten important aspects of personal and political freedom. A system of redistribution that builds only on coercion of the haves cannot be stable. There are serious limits to our ability to control social processes, and interventions do have unanticipated consequences that may sometimes undermine their desired consequences and make the intervention, all things considered, unjustified.

On the other hand, it is very hard to take seriously the claim that all taxation other than that required to support the minimal state will inevitably lead to the denial of freedom, initiative, and an ethic of responsibility. Or to ignore the fact that intelligent public investments in education and empowerment (i.e. responding to SE needs through taxation) may well contribute to growth and to welfare more than increasing the expenses of policing the have-nots so they cannot effectively threaten the well-being of the haves (i.e. responding to CP needs through taxation). In other words, rights to liberty, dignity, or property cannot decide, on their own, how a society should distribute its resources.

It is significant and fortunate, on the other hand, that in contemporary discussions of these issues, there is hardly an argument that they should be decided summarily by the recognition of the centrality of a right to equality in our commitment to human rights. Equality is recognized as a right only in some limited senses – a right not to be discriminated against, a right to be treated equally by public institutions, including the courts. The implications of the commitment to equality in our system of social justice are usually conceded not to be determinative of specific arrangements.<sup>40</sup> Moreover, the SE rights we are talking about are not primarily rights to equal shares or allocations, but rights to adequate standards of living, health, and education.

This is not to say that the right to equal treatment does not impose important constraints on the arrangements of particular societies. Nonetheless, like liberty and property, equality alone cannot decide these issues.

### Grave SE concerns and oppressive regimes

Until now I have examined arguments for the exclusion of SE concerns from the realm of human rights or for seeing SE rights as secondary to CP ones. However, there are also advocates for the superiority of SE rights over CP rights.

Governments and religious leaders in many countries object to international pressures that they should respect the CP rights of their citizens, invoking the primacy of forms of solidarity and control, which are necessary, so they claim, to maintain their culture and to permit life in complicated, poverty-ridden areas. These objections are not usually phrased in terms of the wish to protect SE rights. Rather, they are based on a rejection of the tradition of rights itself, claiming that this tradition is individualistic and Western, and that its claim of universality is mistaken. As mentioned above, I will not deal with this position here.<sup>41</sup>

Other leaders concede the applicability of documents such as the

UDHR to their countries. They argue, nonetheless, that in non-modern countries suffering from systemic poverty, meeting the subsistence needs of the population requires centralist control which is not consistent with respect for the basic CP rights recognized in the industrial West.

If it had been the case that the prevention of famine and starvation require, under some circumstances, the denial of some CP rights – this might have been a serious and tragic dilemma. However, there is absolutely no evidence that this is indeed the case. To the contrary, many argue that democratization and freedom of speech and protest are effective ways of preventing, or at least minimizing, such catastrophes. Sen, for example, points out that India did not have a single major famine since it became a democracy, and that forced silence contributed a lot to the scope and dimensions of the tragedy of the “Great Leap Forward” in China.<sup>42</sup>

I do not want to sound naive, suggesting that SE and CP concerns are two separate realms, each totally autonomous. Clearly they are not. In fact, the complex relationship between them is what I am stressing. In many cases, the rise, or the persistence, of oppressive regimes is facilitated by economic interests, seeking to perpetuate their monopolies and to fight plans of massive redistribution. In such cases, the government does not seek to justify its atrocious violations of CP rights, such as murder, torture, illegal imprisonment and the like, by invoking SE concerns. The argument is that these are necessary to maintain security and order. The denial of CP rights, in these cases, permits the situation of an increasing denial of welfare and subsistence for large parts of the population. Granted, ensuring that the economy is planned and growing and that for people to receive education and acquire skills may require effective government may not always be easy to achieve when one has to struggle against traditional leaders who resist the changes. Nonetheless, these needs do not justify oppression and arbitrary power. In fact, government action that may challenge traditional leadership will be more effective if the population itself is empowered, so that challenges of tradition can come from civil society itself. Protests, dissidence, and trade unions may indeed make moving a society through quick processes of industrialization more difficult. But shortcuts in these processes are likely to be even more dangerous. I repeat my advice concerning thin and thick readings of rights. There may be conditions, which may justify, in one country, less expansive protection of some CP (or SE) rights than in other, more developed and more stable, societies. But this is very different from saying that CP rights are not applicable, or that they are secondary to SE rights.

Rulers of oppressive regimes may not be very interested in the welfare of their population, in either the CP or the SE aspects of it. But an anal-

ysis of developing countries may explain why the right to private property is not usually counted among basic human rights. Torture and oppression are not legitimate (or effective) tools in promoting either law and order or economic growth. Prohibitions against them are justly considered strong side-constraints on the conduct of governments and other individuals. On the other hand, some gradual restructuring of the economy, and some agrarian reform, may well be required to adapt the country to modern conditions. Such restructuring may require a certain measure of coerced interference with private property. It may also require some public interference with freedom of contract as well as various structures of public expenditure. I do not think all such interference is made totally unacceptable by a commitment to human rights. On the other hand, I do not think that such interference is automatically justified by the wish to promote social justice or economic growth. Human history shows that wholesale redistribution of property accumulated by few was usually extremely brutal, and did not make an enduring contribution to social justice. Again, this is a question that needs to be deliberated and decided, responsibly, by the society in question. Today's economies depend to a large extent on private and semi-private investment and on international assistance by bodies such as the IMF and the World Bank. It seems that the incentive structure today is biased, if anything, against the willingness of states' leadership to increase the planned aspects, or even the welfare components, of their economies.<sup>43</sup>

We may conclude that it may well be convenient for rulers to invoke SE needs to justify the denial of CP rights, but that this denial is not in fact required to meet such needs. Whenever a claim is made that violations of CP rights is required to protect pressing SE needs of the population, the arguments should be subjected to a penetrating analysis. The burden is on the state or individuals seeking to justify the violation of CP rights for these reasons. In any event, such justification may be based on the conflict and the need to balance between rights and interests. It does not support a general primacy of SE concerns over CP rights.

### Enforceability of CP and SE rights

For the reasons mentioned above, individuals might well have a human right to adequate living conditions. In other words, they do have rights to such conditions of life that stem from the mere fact of their humanity, and these rights do not depend on effective recognition by their societies. These rights justify the imposition of duties, on states and on individuals, to act in order to protect and promote them. The main questions are what these duties are and how they should be enforced.

It is of great interest and significance to note that the international

community decided to create different enforcement mechanisms for CP and SE rights, primarily in the form of the ICCPR and the ICESCR. While international mechanisms are not very effective even for CP rights, the separation of the two covenants signifies a debate about the status of SE rights. More specifically, there is less willingness to identify and impose the duties, be they on states or other individuals, which are co-relative to the SE rights of individuals. As we mentioned above, there are many practices in human rights discourse that strengthen the prime place of CP rights. In many contexts, only CP rights are discussed under the label “human rights.” The choice of two covenants lends great support to the force of the distinction. Against the background of the UDHR decision to treat the two clusters of rights together and as being of equal status, the decision to distinguish between enforcement mechanisms may seem inconsistent. I do not think it is. While the clusters are interconnected in many ways, there is a justification to emphasizing some structural differences between them as well. These differences should not lead, however, to overlooking the indivisibility of the concerns.

In the CP context, the duties are imposed on states. They need to pass laws and to create background realities and institutions that will minimize violations of the rights mentioned in the covenant. In some cases the duties are specified, and some forms of balancing between these rights and other considerations (such as emergency situations) are explicitly excluded.<sup>44</sup> If suspects are subjected to torture or to humiliating treatment under the jurisdiction of a state, if people disappear or do not have a fair trial before an independent judiciary – this is a failure of duty on the part of the state. These duties are both negative – not to infringe upon the right, and positive – to take steps to promote it. In the SE covenant, on the other hand, the duty is only to make efforts to reach an adequate level of protection. Moreover, the SE covenant explicitly allows developing countries not to grant these rights to individuals who are not their nationals.<sup>45</sup>

There is an additional difference of importance. The international community accepts some responsibility for seeing to it that CP rights are not violated, especially when the violations are crimes against humanity. There is no similar commitment in the SE context other than a commitment to cooperation and coordination. It seems that the duty is not imposed on every individual and every state, but only on one’s own state. The differences between the two covenants become even more apparent with the establishment of the International Criminal Court and in the aftermath of the Pinochet affair.

It is thus important to remind ourselves that these are differences in enforceability, not in the status of the concerns as rights, or in their importance to human dignity. Massive taxation and redistribution does

raise serious moral and political issues. These are best decided by the societies in question. International supervision (and possibly supervision by domestic courts as well) should be careful and delicate. Developing standards, thresholds, and guidelines is a better way to approach these issues than outright decisions and condemnations of failures. A country that is forced to prevent child labour, or is condemned as a human rights violator because it does not, when its economy is still based on this institution – is not likely to become a supporter of human rights. More likely, it will feel that human rights are indeed a form of Western imperialism. However, the same caution is recommended on issues which belong to CP rights, such as the status of women and the role of religion in public life.

The differences between the enforcement mechanisms of CP and SE rights on the international level exist for most domestic legal systems, irrespective of the way these concerns are recognized in the systems. However, a closer look at the details of legal and political decisions suggests that the difference is not in the nature of the rights, but in the differences in the typical co-relative duties that need to be imposed in order to protect and promote them. Courts hesitate to impose heavy budgetary burdens on their governments. Their reluctance is based on considerations of institutional competence, separation of powers, and effectiveness. They also hesitate to make policy decisions on matters that are ordinarily assigned to the political branches. It is important to see that these legitimate and weighty considerations should not lead us to distort the role of SE rights in our thinking and in our political action.

A look at the comparative law of human rights may be useful. The Indian constitution and that of South Africa both include SE rights. However, in India SE concerns are given the status of guiding principles, and in South Africa they are full-fledged rights. In both countries, some parts of the population argue for judicial activism in promoting SE rights, while others warn against it. In both, the courts' performance gets contradictory assessments from parts of the population. Yet in both countries, the courts end up not giving expansive interpretations to SE claims. The reason is that such interpretations would have involved the courts in making policy decisions which might not be enforceable. The UN has decided to reflect this reality in the structure of the covenants. No doubt, the decision was also a result of political negotiations between states.<sup>46</sup> But it reflects more than differences of power within the UN decision-making bodies. A large majority of states did not want a possibility of international determination of their social and economic policies. The choice was between diluting the enforcement of all rights or giving CP rights a stronger enforcement mechanism. I believe the choice to do the latter is amply justified.

## Protection of rights vs. protection as rights

In the US there are hardly any SE rights protected by the Constitution. All welfare arrangements, in principle, are within the power of regular legislatures. Once some scheme is adopted, there is a constitutional right to due process and equality in benefiting from it. But the entitlements themselves are not protected. This fact has been illustrated quite powerfully by the dramatic change in the welfare regime over the last few years. In this narrow sense the US compares badly with other countries whose constitutions contain explicit commitments to SE rights (e.g. India and South Africa). Furthermore, there is a stark difference between the way the US treats CP rights – which are constitutional rights protected by the courts – and the way it treats SE concerns.

Does it follow that the US violates the SE rights of its population? The absence of a constitutional protection for SE rights does not in itself lead to a positive answer to this question. Recognition of SE constitutional rights is neither a sufficient nor a necessary condition for a finding that a given country respects these rights. This feature is not unique to SE concerns. Bills of Rights, in general, are neither sufficient nor necessary for the effective protection of the rights listed in them. Suffice it to remind ourselves of the fact that England still does not have an entrenched Bill of Rights with full judicial review,<sup>47</sup> and that the former USSR had a very advanced Constitution. In the US, the existence of a Bill of Rights in itself, including specific commitments to equality and freedom of expression, was not enough to generate either desegregation, extended freedom of expression, or equality for women. On the other hand, the existence of a Bill of Rights and a tradition of judicial review may facilitate extended recognition of rights through judicial law making that may push the legislative branches in the direction of additional protection.

It is more important that the concerns are addressed effectively than that they are recognized as rights. However, we saw that one of the main reasons for recognizing rights is precisely the wish to make their protection more effective. The institutional features of rights, and the international power of recognizing them as such, do provide some help in making claims of rights more effective. The US Bill of Rights, in itself, did not guarantee full protection of the rights mentioned in it, but it did provide the tools that permitted better protection when the courts felt they were willing and able to undertake it. I have argued above that over-expansive rights talk may be dangerous, and harm the legitimacy of the courts. This danger should be heeded, but it does not serve as a conclusive argument against insisting that both CP and SE concerns, when appropriate, should be protected as rights. The necessary balance between protection and flexibility should be achieved by the institutional checks and balances and by their careful use.

## The implications of globalization

My analysis was based on a world order in which there are sovereign states that bear primary powers and responsibilities in the life of their populations. Within this order, human rights are constructs designed to evaluate municipal arrangements by invoking a universal set of standards. There is a growing tendency to seek international mechanisms of enforcement, but these are still the exception rather than the rule. The protection of the welfare of individuals, in most cases, depends on what their states do and refrain from doing much more than on international pressures or resolutions.

Interestingly, exceptions to the principle of sovereignty have centred to date on attempts to prevent and punish atrocities resulting from the violation of CP rights. While the world seeks to give humanitarian and medical relief to areas of the world stricken by starvation, there has been no attempt to use force to change the system of government that leads to such catastrophes. This is as it should be. But international law has also been very slow to adjust to the fact that in the SE realm, the implications of globalization are immense, seriously affecting the power of states to relieve the SE concerns of their populations. In the confines of this chapter, I cannot do justice to these issues. I do want, however, to point out some structural features, which make globalization upset some “old” connections between CP and SE concerns within municipal systems.<sup>48</sup>

In the past, states had some incentive to deal with social justice and a feeling of social cohesion within their borders, since states enjoyed relative autonomy. While there were always great differences between communities, states, and nations, there was a sense in which the responsibility for the balance between individual liberty and social justice could be placed on the state. While states did not and could not obliterate the differences between families and communities, they did provide a framework within which the resources of the state as a whole could be mobilized to provide for the population. Furthermore, democratization meant that, in principle, this same population had a say in determining the identity of national decision makers. In principle, the have-nots could influence government in such a way that their main SE concerns would be met.<sup>49</sup> I mentioned above that democratization in itself cannot guarantee social justice, but it could be relied upon to express a reasonable balance between individual rights and social solidarity. Bluntly, the rich and the powerful had to give adequate response to the poor of their states and communities, for a variety of moral and prudential reasons. Their own welfare required that most of their population would be satisfied, and that levels of hopelessness would not end up with rioting or even revolution. Finally, democratization meant that at least some protection of welfare and education would gain the respectability of rights, not just

that of political arrangements or of charity. Consequently, within states, rulers and elites alike learned that they cannot ignore the welfare of their population.

Globalization seems to undermine some of the presuppositions of this ideal picture. This is one of the reasons why the hope that protection of CP rights would generate, in itself, acceptable resolution of the SE concerns, did not materialize. On the global level, this relationship between vote and product was never obtained. There seems to be a growing gap between voice, responsibility, and power. Many factors contribute to this gap. One is the interdependence of markets and the mobility of industry, labour, and capital. The other is the great divergence of the cost of labour in different parts of the world. A third is the vulnerability of third world leaders and peoples, who depend on Western technologies and capital they do not have. As a result, there is a serious detachment between markets and centres of life for many industries and industrialists.

This situation creates problems for both the developed and the undeveloped parts of the world. Unskilled labour in the developed world cannot compete with labour from the undeveloped world. It is threatened by the fact that production moves elsewhere and that its own country attracts foreign workers, legal as well as illegal, who are willing to work in conditions no longer acceptable to natives. Furthermore, the decision-making processes by which international economic structures are decided are not accountable to municipal political processes. They are conducted by international fora in which quite often the affluent classes of a number of countries decide on agreements that are good for them but bad for their countries as a whole.<sup>50</sup> These developments contribute to the present predicament of the welfare state in the industrial West. In the undeveloped parts of the world, international pressures and internal corruption make a gradual move towards modernization, combining growth with structures responsive to the education and SE concerns of all, extremely difficult.

Some of these issues are discussed in the chapters by Shue and de Senarclens in this volume. I mention them here because they highlight the growing fragility of processes that until now secured, to some extent, a balance between CP and SE concerns in many societies. Any modern attempt to deal with these rights will have to be sensitive to these facts.<sup>51</sup>

## Notes

1. I thank Paul Safier and the participants in the UNU workshop in Princeton, October 1999, for useful comments on a previous draft. Yael Ronen helped me in preparing the draft for publication.

2. In the first group, I include rights to life and bodily integrity, the right not to be tortured or humiliated, the basic freedoms of conscience, religion, opinion, speech, assembly, association; political rights of participation; freedom of movement and freedom from imprisonment; and the right to non-discrimination and the right to trial and due process. It is interesting and relevant that the right to property is sometimes numbered among CP rights in some documents, but is absent in others. The second group includes the rights to education, accommodation, an adequate standard of living, healthcare, freedom from poverty, work and leisure, in short – welfare rights.
3. Adopted by UNGA Resolution 217, III, 10 December 1948.
4. International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, both adopted by UNGA Resolution 2200A, XXI, 16 December 1966.
5. I take it that this is also the position of most of the literature critical of rights talk, such as Glendon's book. The critique is not a general condemnation of the utility of rights, but an exposition of the dangers of an over-imperialistic rights talk. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, Cambridge, MA, Harvard University Press, 1991.
6. Moral rights may be in an intermediate situation. Some say they are, by definition, universal and timeless. Others invoke notions, which are more contextualized and culture-relative. The latter position is clearly applicable for positive morality.
7. Thus we do not need to get into the interest vs. the will theory of rights, since human rights clearly do not require "control" of the individual for them to exist. Human rights are clearly justificatory, not descriptive, entities. For the interest vs. the control debate see Matthew Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate over Rights*, Oxford, 1998.
8. In this characterization I follow the influential analysis of rights put forward by Joseph Raz.
9. I thus accept Shue's general characterization of human rights, although the normative implications I draw from the existence of such rights are different from his.
10. For a classic exposition see his "Rights as Trumps," in Jeremy Waldron, *Theories of Rights*, Oxford, OUP, 1984, pp. 153–167.
11. For a discussion of this feature of rights see Waldron, "The Right to do Wrong," in *Liberal Rights*, Cambridge, CUP, 1993, p. 63. An obvious example is the right to freedom of speech. In many cases, the right will protect a speaker who injured another's reputation or privacy even though the violation of these rights is not justified in that particular case.
12. It is important to distinguish this peremptory force of rights from the question whether rights are or can be absolute. A right is absolute if it defeats all other possible reasons or considerations. The right not to be tortured is often brought as a paradigmatic, and rare, illustration. But all rights, even those that are conceded not to be absolute, have this peremptory power.
13. This tension is the one captured by the persistent debate between interest and control theories of rights. Interest theories of rights give rights a moral peremptory force, while control theories emphasize the institutional effectiveness.
14. The two cases are similar in general structure, invoking human rights and international standards to justify the use of force. There are, of course, many differences. After World War II, the force used was "Victors' Justice," i.e. an international tribunal, enjoying widespread international support, where alleged war criminals were put on trial. In Kosovo, they were invoked to justify military actions, done without UN approval.
15. Constitutional rights are often as abstract and general as are international formulations of human rights. In such cases, the transition from human rights to constitutional rights does not mean added concreteness and determinacy. In fact, the First Amendment

guaranteeing freedom of speech in the US is even less specific than the guarantees of free speech in the Covenant on CP Rights.

16. These modern critiques, like Glendon's, echo Bentham's earlier statement that natural rights were both incoherent and dangerous.
17. My chapter deals with the relations between moral justificatory force and effectiveness in municipal legal systems. The international human rights regime was developed in order to remedy to some extent the failure of states to protect the human rights of their own citizens. Naturally, they rely more heavily on moral force, as a way of increasing effectiveness. Inevitably, sanctions in international law are usually less effective than in municipal courts. It can be expected that international human rights jurisdiction may therefore be more coherent than that of municipal courts, because it is less limited by political constraints. On the other hand, the international system cannot replace state power in effective protection of rights. States can do much more for the human rights of their inhabitants than international declarations. The interrelations between international and municipal human rights jurisdictions are therefore complex, and it cannot be assumed that international law interpretations are necessarily superior to these made by municipal systems.
18. For a classical formulation of this appeal see MacDonald's essay. Margaret MacDonald, "Natural Rights," *Proceedings of the Aristotelian Society 1947-48*, pp. 35-55, reprinted Waldron, 1984, pp. 21-40.
19. For the distinction see e.g. Michael Walzer, *Thick and Thin, Moral Disagreements at Home and Abroad*, University of Notre Dame Press, 1996, and Mark Tushnet, *Taking the Constitution Away from the Courts*, Princeton, NJ, Princeton University Press, 1999.
20. In the text I draw a distinction between internal political activity within a state and international pressures. But within the state there is also the possibility of seeking to promote human rights by litigating test cases in the courts. Litigation is in an intermediary position here. It invokes a national institution, which is a partner in elaborating the society's social norms. Litigation is therefore a form of internal political persuasion. On the other hand, it invites the court to invalidate laws in the name of universal human rights. This is indeed an example of complex internal dynamics, which seek to strengthen the evaluative power of human rights. We should recall that, while the authoritative decision or interpretation is made by the court - the other branches of government are also partners to this elaboration of internal political norms against the background of external ones.
21. I describe a situation as semi-lynching when the motivation behind the violation is acute anger, frustration or fear that leads to a tendency not to respect inhibitions and laws prohibiting violence or requiring due process.
22. It may well be that this is, on the part of many, wisdom after the event. Some may still argue that courts should not second-guess the decisions of the executive in war-like situations. The structure of the argument is important, this is the type of case in which our judgment is distorted by passion and the wish for revenge. Rights and institutional constraints are designed to help us from succumbing to the temptation to lose our judgment.
23. See my "The Role of Courts in Rifted Democracies," *Isr. L. Rev.*, 1999.
24. I cannot enter here the important and fascinating debate about the cultural relativity of human rights, and the argument that the West is imposing its own system of values on the East. Different forms of social organization may indeed structure relationships between individuals and societies in different ways, allowing different modes of freedom and dignity to individuals. Nonetheless, I do not know of any great human civilization that does not include respect for the dignity and the freedom of individuals, nor do I know of any society in which people did not strive for them. See the powerful discussion

- of Panrikar. Panrikar Raimando, "Is the Notion of Human Rights a Western Concept?" 120 *Diogenes*, 1982, pp. 75–102.
25. It should be noted that the effectiveness of courts as defenders of rights is much higher in CP concerns, because judges inevitably belong to those parts of the population for whom subsistence is not an issue. The insulation of judges from populism may act against the effective protection of the human rights of the weak. This is one of the explanations suggested for the ineffectiveness of courts in redressing racial discrimination in the US.
  26. The US Supreme Court first invoked the constitutional right to liberty to invalidate laws granting rights to workers. This may be a case in which a civil right to liberty was invoked to defeat SE rights. In modern times, however, the liberty clause in the Constitution is invoked in order to expand liberty in issues such as abortion. SE arrangements are left almost free of judicial review.
  27. M. Cranston, *What Are Human Rights?* London, Bodley Head, 1973.
  28. By 1984 Waldron dismisses such arguments in his *Introduction to Theories of Rights*, p. 11, see note 10 above.
  29. See also the right to form trade unions, Article 8 of the SE Covenant. One may respond that the "location" of rights should not affect their classification. The right to form trade unions, under this argument, should be seen as a CP right despite the fact that it is mentioned in the ICSECR. But then it seems that the distinction is reduced to that between negative and positive rights, and not to the context in which these rights arise and are central. The right to form trade unions is an SE right despite the fact that it may well be seen as a private instance of the more general right to free association. The reason is historical; forming trade unions is a central aspects of the process in which workers sought to improve their negotiation position vis-à-vis employers.
  30. M. R. Cohen, *Property and Sovereignty*, 13 *Cornell L.*, 21, 1927.
  31. Stephen Holmes and Cass R. Sunstein, *The Cost of Rights, Why Liberty Depends on Taxes*, W. W. Norton and Co., 1999.
  32. This is the only right in the ICESCR for which states are explicitly required to institute a specific arrangement – compulsory free primary education. If they do not have such education in place, they are required to prepare a plan that will guarantee such a system within a specified short period, Articles 13–14.
  33. This is the impact of Nozick's construction of rights as side-constraints. I discuss his analysis below. A similar move is made by H. L. Hart in an early paper, which he appears to have modified, "Do We have Natural Rights?" And see his comments on Bentham's *On Rights*. H. L. Hart, "Are There Any Natural Rights?" *Essays on Bentham*, Oxford, OUP, 1982. For a claim that logically there is a priority to claim rights see Golding's analysis. Martin Golding, "The Primacy of Welfare Rights," *Social Philosophy and Policy* 1, 1984, p. 119; Robert Nozick, *State, Anarchy and Utopia*, New York, Basic Books, 1974.
  34. The tradition of human rights exemplified by Locke does centre on the question of the limits of government. However, one may counter that the novelty was the rights talk, but that concerns with welfare are much older than those with freedom. See e.g. Golding.
  35. James Nickel, "How Human Rights Generate Duties to Protect and Provide," *Human Rights Quarterly* 15, 1993, p. 77.
  36. On this controversy I agree with the conception endorsed by the international documents – individuals as well as collectivities may be the subjects of rights. The relationships between individuals and the collectives of which they are members are indeed complex, and essentialist interpretations of the collectives are indeed dangerous, but the conclusion that only individuals "exist" does not follow.

37. See e.g. Rawls's *Theory of Justice*, requiring societies to obey the principle of maximin, ensuring that policies will benefit the worst off. See also Dworkin's writings, arguing both for "taking rights seriously" and that equality is a basic tenet of liberalism. For an analysis of Nozick's argument see Scheffler. Samuel Scheffler, "Natural Rights, Equality and the Minimal State," *Canadian J. Phil* VI, 1976.
38. For very sensitive discussions see Wellman and Jacobs. Both are very sympathetic to claims of social justice, and both are rigorous enough to point out the difficulties in establishing rights to welfare or deriving specific conclusions from them. Carl Wellman, *Welfare Rights*, NJ, Rowman and Littlefield, 1982; Lesley A. Jacobs, *Rights and Deprivation*, Oxford, 1993.
39. See Nozick, at pp. 30–35. The structure is similar, though not identical, with Dworkin's trumps and Raz's exclusionary reasons.
40. It is not determinative when equality is seen as a human right. Some may argue that in particular societies, the commitment to equality does require, or prohibit, certain arrangements. Decisions of international courts are quite interesting in this regard, seeking to give "equality" a significance that transcends the arrangements of particular societies. The ambiguity of the implications of liberty or equality create interesting institutional questions in municipal systems. I believe that they would call for a policy of judicial deference, for the reasons clarified by, among others, O. W. Holmes. Such deference may be progressive when the court is asked to invalidate progressive arrangements, such as affirmative action, or conservative when the court is asked to declare that such measures are required by the constitution.
41. For a systematic treatment of such claims see the chapter of Tatsuo Inoue in this volume.
42. See A. Sen, "Freedom and Needs," *New Republic* 31, 1994, and his recent *Democracy and Development*, 1999. I rejected the argument that the protection of CP rights could, in itself, guarantee the satisfaction of SE concerns. Yet it may be true that CP rights can make an effective contribution to an adequate protection of SE rights.
43. On this point see the analysis of Professor Pierre de Senarclens in this volume.
44. While rights of due process may be temporarily suspended during emergencies, the right not to be tortured or the right to life cannot be suspended.
45. ICESCR, Article 2(3).
46. The insistence on including SE rights as rights of equal status in the UDHR was the result of the demand of the USSR and its block of nations. While it was agreed to do that in the declaratory document, there was no willingness to incorporate the same mechanism at the conventions stage.
47. The recent legislation incorporating the European convention into English law is an interesting exercise in constitutional development. But even this Human Rights Act stops short of giving the courts the power to overrule legislation.
48. I do not deal here at all with the urgent normative questions raised by Henry Shue's paper, concerning the nature and scope of the duties that states and individuals in the developed world may owe to the needy of the undeveloped world. My comments are concerned with the impact of globalization on "old" background conditions of social systems. However, my general attitude to rights talk does suggest that its extension in the way suggested by Shue may raise serious problems. I would therefore prefer a direct discussion of moral duties, and their scope, to their derivation from the language of rights and strong entitlements.
49. But see Nozick's explanation, pp. 274–275, suggesting that the majorities usually do not have an interest in supporting the weak.
50. See Eyal Benvenisti, "Exit and Voice in the Age of Globalization," *Michigan Law Review* 98, 1999, p. 167.

51. For example, national solidarity was supported, to some extent, by nation states and cultural ties. And the life of poor people was made richer and meaningful by memberships in religious and cultural communities of support. Globalization, with waves of migrant workers, often disrupts these frameworks. The job markets created in undeveloped countries create great disparities of wealth, while breaking up traditional structures. The predicament of unskilled people in the developed world creates desperation and unrest, and breaks traditional family structure. These processes in turn create a large underclass, which is alienated and dependent on public welfare. The ancient and persistent problems of tensions between rich and poor thus become complicated with ethnic, religious, and social issues. Poor people may have less of a supporting community, which would have helped them cope better with poverty and its implications. Attempts by states and international forces to address these problems, whether as rights or in other ways, should be sensitive to these complexities.

The Civil Rights Act of 1991 invalidates the Supreme Court's holding in *Wards Cove*, in part, by reshifting part of the burden of proof in disparate impact employment discrimination cases from plaintiffs to employers, to prove business necessity for any business practice that is proved (by a plaintiff) to have a disparate impact on a Title VII-protected class. Congress enacted the Civil Rights Act in 1964 to remedy the discrimination and injustices suffered by minorities. The contrast between changes in overall demographic composition and the average exposure to whites provides clear evidence of a decline in segregation, and the dissimilarity index is used to document changes in both school and district segregation.