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The Right to Development or the Development of Rights

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The Right to Development or the Development of Rights *

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Abstract

This survey discusses the inner logic of proliferation of human rights. The earliest declarations focused on civil and political rights, whereas later declarations add economic and social rights. Furthermore, where the first declarations pointed to the (nation) state as the prime duty bearer for the realization of human rights, later ones also address the international community. This is most notable in the Right to Development.

The literature on human rights is, understandably, dominated by legal contributions. Jurists formulate the declarations that political leaders adopt and the subsequent covenants, covenants, agreements and other legal papers. The legalization of human rights is, however, challenged on moral (philosophical), practical, (international) political and sometimes also legal arguments. This is true more of economic and social rights than it is of civil and political rights. Somewhat surprisingly, the inclusion of economic and social rights as human rights did not attract many economic contributions to the discussion. But the further development towards the Right to Development is changing that somewhat. Granting a Right to Development changes the playing field for economic development, which is a large specialization in economics. This survey will discuss the economic arguments that relate to human rights, the Right to Development in particular. It finds that economic development facilitates human rights and concludes that putting economic and social right before economic development may be counterproductive. It slows down economic development and thus narrows the base to build human rights. This very strict economic approach, however, may not do justice to the efforts to develop a working framework to realize human rights. But, to quote Amartya Sen freely, it does point to the importance of open and informed scrutiny of the development of human rights.

JEL-codes: K33, O19, P48

Keywords: human rights; development

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1. Introduction

In 2008, a year long campaign led up to the 60th anniversary of the Universal Declaration of Human Rights (UDHR) on 10 December of that year. A year before, with much less clamor and glamour, the Declaration of the Right to Development (RTD) celebrated its 21st birthday. Much shorter than its elder cousin, the RTD is often considered a third generation human right after the first generation of civil and political rights and the second generation of social, economic and cultural rights respectively, both of which are encapsulated in the UDHR of 1948. It adds 'solidarity' rights to 'liberty' rights and 'equality' rights (Freeman, 2002:47). All human rights are put on an equal footing in the 1993 Vienna Declaration and Programme of Action which explicitly declares that: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." (art. I.5)

If the brevity and clarity of both declarations¹ add to their popular appeal, the ensuing covenants, conventions and protocols certainly make for specialist reading, the specialists mainly being lawyers. It is of course not only the word 'rights' that attract lawyers to human rights. As the declarations are political documents stating intentions more than anything else, there is a need for lawyers to translate these intentions into practical and enforceable rights and to subsequently argue and judge human rights cases that are brought to courts. But there are objections to the dominance of the legal approach to human rights. Pogge (2008:51) for instance argues that a human right primarily is a moral claim which "requires its own juridification only when it is empirically true – as it might be for some civil and political rights – that secure access to its object presupposes the inclusion of a corresponding legal right in the law or constitution." Freeman (2002:10) argues that a legal-positivist approach to human rights would misrepresent their character as "it is a mistake to believe that the legalization of human rights takes the concept out of politics." Often, human rights are (principally) not legally enforceable. Sen (2006a:2916) goes a step further by arguing that the legal route to understanding human rights is mistaken. In his view "human rights are best seen as articulations of social ethics, comparable to – but very different from – utilitarian ethics. Their functional usefulness lies in practical reason. Like other ethical tenets, human rights can, of course, be disputed, but the claim of generality of human rights is that they will survive open and informed scrutiny." The rights may be legalized, or inspire legislation, but "that is a further fact, rather than a defining characteristic of human rights themselves" (Sen: 2006b: 3).

Given the explicit inclusion of economic rights in human rights and the broadening of the human rights to the RTD it is surprising how few economic contributions are concerned with human rights.² Many of the national and international economic decisions indeed do have an effect on the direct or indirect realization of human rights and the growing awareness and importance of human rights necessitate a role in economic discussions. In this paper I will review the literature on human rights with a focus on the economic arguments that are related to human rights, the economic rights and the RTD in particular. I will take a descriptive historical approach by tracking the development of rights from their inceptions in France and the USA towards the importance they have gained in the policies of the United Nations, but a more normative approach when discussing the interaction between economic

¹ The UNDH counts 30 articles, whereas the RTD makes due with a mere 10.

² The work of Amartya Sen is a notable exception. He, in 1998, received the Nobel prize in economics for his contributions to welfare economics. He always had a keen interest in the welfare of the poorest and in the economics of development. His explicit involvement with human rights is of more recent date and builds on the discussions on the RTD.

development and the legalization of economic rights in their many manifestations, but most notably in the RTD.

2. A very brief history

The origins of human rights are often traced back to the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and Citizen of 1789. The Americans hold it "to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government..." In France, the National Assembly "recognizes and declares, in the presence and under the auspices of the Supreme Being, the following rights of man and the citizen: 1. Men are born and remain free and equal in rights. Social distinctions may be based only on common utility. 2. The purpose of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance of oppression. 3. The principle of all sovereignty rests essentially in the nation. No body and no individual may exercise authority which does not emanate expressly from the nation..."³ In total there are 17 articles in the French Declaration. Hunt (2007: 130) remarks that there are no duties in the declarations and that they are a part of a rupture with established authority and an attempt to define new grounds for governmental legitimacy. They challenged the old order. The American Declaration of Independence still asserted that men were endowed with rights by their Creator, but the French deduced rights from secular sources of nature, reason and society only. Even though the declarations were not discriminating, they opened up discussions on the rights of those without property or of religious minorities or on new groups, such as slaves or women, who had no political standing. Hunt continues to argue that human rights have an inner logic.⁴ Groups that were excluded from exercising rights, protestants, servants, Jews, slaves, those without property successively come to fore to claim their rights. The abstract universalism of declaration was "coming home to roost" (Hunt 2007:153) Women's rights were also discussed, even though this did not result in expanding human rights to women.⁵ The 17 articles of the French declaration were a result of extensive discussion. They predominantly reflect what later became commonly referred to as civil and political rights. They describe the relationship between the state and its citizens and stress the accountability of the state, the freedoms of citizens and the legal basis of state activity against citizens and so on. In preparatory drafts, however, the rights of citizens included what later would be indicated as economic and social rights and include adequate salary for work, free assistance to children, the weak, and disabled among others (Marks, 2009:211). For these economic and social rights to become important, the focus had to shift from the individual to the collective, from natural rights to social rights and for sociology to supersede philosophy (Freeman, 2002: 30). This only happened later in time, with the evolvement of capitalism as a dominant social economic system when socialism became an important ideology, stressing the economic dependence of workers on employers and the social consequences of capitalism and for the

³ Translation taken from Hunt (2007).

⁴ Hunt casually introduces the term human rights here. Before, the discussion is on political rights or the rights of man and citizen as quoted from the French Declaration of the rights of man and citizen. In Dutch and German the translation of Rights of Man equals that of Human Rights. (Rechten van den mensch and Rechten des Menschen respectively).

⁵ Hunt (2007:170) cites Condorcet who in 1790 in a newspaper editorial argued that women had the same characteristics as men, i.e. they were feeling beings, capable of acquiring moral ideals and of reasoning about these ideas, and hence they necessarily have equal rights. Both she and Sen (2006b) point to the contributions of Mary Wollstonecraft on the rights on women.

working class to become an effective political force (Donnelly 2003:58). It nevertheless lasted until the UDHR for economic and social rights to receive formal recognition.

Politically, human rights received new standing after World War II when the General Assembly of the newly formed United Nations adopted the UDHR. This document, like the French declaration in 1789, was the outcome of numerous rounds of discussion on drafts, but the final version included both civil and political and economic, social and cultural rights.⁶ The distinction, however, reappeared as the General Assembly, in 1951, as a result of diverging interests between member states asked for two separate covenants to give human rights legal standing (Mandle, 2006:75). The communist countries, in line with their socialist ideology, stressed the importance of economic and social rights, while the western countries emphasized the civil and political rights. Similar to the French declaration, the UDHR had an inner logic and opened up a sequence of legislation to capture different interests. The international covenant on civil and political rights (ICCPR) and the international covenant on economic, social and cultural rights (ICESCR) were followed by five conventions.⁷ Furthermore, in 1986, the General Assembly linked human rights to development, which it describes as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits there from, and adopted the RTD. Freeman (2002:47) links the new emphasis on economic rights into international debate to the admission of a large number of developing countries to the UN. In a sense, they challenge an old order and the RTD attempts to define new grounds for the legitimacy of the international order in similar ways as the 18th century American and French declarations attempted to define new grounds for governmental legitimacy. The development rights are also addressed as third generation human rights, more particular as 'solidarity' rights. The increasing international economic interdependencies, commonly referred to as globalization, leave individual states less sovereign in their economic policies.⁸ The RTD indeed requires effective international cooperation to provide the developing countries with the appropriate means and facilities to foster their comprehensive development.

Finally, the RTD is followed by the Vienna Declaration of 1993 which explicitly considers all human rights and fundamental freedoms as indivisible and interdependent⁹. The collective responsibility for development is strengthened in the United Nations Millennium Declaration (MD) in which the heads of State and Government use strong words – we will spare no effort – to commit making the right to development a reality for everyone. The MD does go further than the RTD and other earlier declarations in that it formulates specific goals, for instance to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day, and it defines includes a measurement for success even though it does not include penalties for failing to comply to this measurement.

⁶ Glendon (2001) extensively describes the process of debate and negotiations that led up to the adoption of the UDHR in 1948.

⁷ The International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the Convention on the Rights of Children of 1989, and the International Convention on the Protection of the Rights of All Migrant Workers and Their Families of 1990.

⁸ Skogly (2006:297) remarks that "the globalizing effects of technology, capital movement, the economic power of transnational corporations, significant international, and a *de facto* unequal position of states themselves, limit the states' domestic policy choices."

⁹ The Vienna Declaration and Programme of Action was adopted in June 1993 at the World Conference on Human Rights. It summarizes and reaffirms all human rights declarations, covenants and conventions and stresses the importance of coordination between all organs, bodies and agencies of the UN.

3. Theory of Human Rights

As is acknowledged in the Vienna Declaration of 1993, the UN works from the premises that all human rights are indivisible and interdependent. Individual member states, however, beg to differ. China, for instance, did not yet ratify the ICCPR, whereas the United States failed to ratify the ICESCR. The United States objects to their status as rights and refers to them as goals or aspirations. The discussion focuses on whether economic rights are constitutional. The constitution is said to provide only for so-called negative rights, i.e. the right to constrain the state from infringing upon liberties, not positive rights entailing affirmative duties (Keller, 2003:600fn). In terms of negative rights, civil and political rights draw upon the state to refrain from action. Economic and social rights, on the other hand, are drawing more on positive rights and require a more activist state that provides rights. The difference between negative and positive rights and the role of the state is a recurring theme in discussions on human rights. In a philosophical discussion, a minimalist approach emphasizes the negative duties to refrain from violating rights and rejects rights that entail positive duties to protect and to help, whereas a maximalist approach acknowledges that all human rights entail negative as well as positive duties (Pogge, 2008:70). Elsewhere, he argues that the distinction between acting and not acting is not as clear cut as it may seem.¹⁰ From a moral point of view, there is an obligation to help if you are in a position to help, and in some cases it can be a violation of human rights not to do so.

The maximalist approach find more followers in practical legal matters. Gavison (2003:37) for instance argues that to secure the right to vote, a clear political right, requires action and positive expenses from the state, as is the case when women and minorities are admitted to schools that used to be closed to them.¹¹ She also points out that civil and political rights and social and economic rights reinforce each other as ingredients of human rights. This point is also made by Keller (2003: 561) who reproaches the United States when it "refuses to recognize that the political rights so cherished by American politicians are meaningless to a child who is hungry, or an adult who is working forty hours a week, but cannot afford to keep a roof over her family." Marks (2009:222) argues that poverty, ignorance, social inequality among others are as constraining on an individuals liberty to be or to act as he wishes as can be banning a publication or speech. A similar point is made by Sen (2000) who argues that poverty is not just a low income, but a deprivation of capabilities, the freedom of people to lead lives that they value and have reasons to value.¹²

Like Sen, Chauffour, another economist, emphasizes the importance of (economic) freedom in a discussion on development and the legalization of economic rights. He argues that the fundamental distinction between negative (refraining from action) and positive (providing) rights is that negative rights can be characterized by general and abstract rules that consistently apply to everyone on an equal basis without exception while positive rights cannot. Positive rights are fundamentally incompatible with a free society, in which individuals determine their position according to their own goals and means and they, therefore, are a threat to human rights. (Chauffour, 2009: 32-35)¹³ Positive rights reflect a subjective set of limited societal objectives that are highly dependent and correlated, and have income as their constituent element. Negative rights are a set of independent and uncorrelated rights, that cannot be reduced to a more fundamental common constitutive element. According to Marks

¹⁰ In Pogge (2007:21) he gives an example where a neighbor does not water the garden in a draught while you are away, even though she had promised to do so. Had she not been there at all your plants would have perished anyway. But had you known she would have been away, you could have taken precautions, by asking another neighbor.

¹¹ An example of a negative duty ensuing from a so-called economic, social and cultural rights is for the state not to intervene in the right to form trade unions (Van Hoof, 1984).

¹² Sen (2000:18-20) describes freedom as a two way relationship in which public policy can enhance capabilities, while the direction of public policy can be influenced by the effective use of participatory capabilities in public. Individual freedom becomes crucial to development.

¹³ Keller (2003:562-563) discusses the American position that economic, social and cultural rights are a Soviet invention.

(2009) the separation between negative and positive rights is unfruitful and better be replaced by interpreting the normative content of human rights in terms of three types of obligations or duties, namely the obligations to respect, protect and fulfill (sometimes divided into duties to facilitate and provide).¹⁴ These are less abstract and more grounded in practice. The elimination of the distinction between negative and positive rights at the same time eliminates a cost based argument for the separation into two separate sets of rights, with civil and political rights implying a small state that provides a limited number of goods and economic and social rights requiring a larger state and a higher budget. Craven (1995) puts it succinctly when he argues that neither in principle, nor in the financial consequences there is a great difference between the separate set of rights. They all cost money.¹⁵ But even if all activities by the state need to be financed and put a tax burden on citizens, there is a difference whether the state spends money for its own production or acts as distributor of money.¹⁶ Building and operating a legal system to which everyone has equal and non-discriminatory access is very much at the heart of state responsibilities. The state produces law and order and all citizens consume this service and the demand thus is very much on the state itself. It is the human right itself that is produced and consumed and that is very much defined in terms of the relationship between the state and (individual) citizens.¹⁷ Even if the distinction is not sharp, this is different with respect to economic, social and cultural human rights. In a market economy at least, employment is provided by private entrepreneurs, houses are built by contractors and rented out by private and semi-public companies and associations, education is provided by both public and private institutions, cultural expressions are produced by artists, both individually and in joined efforts. The state as a duty bearer for the provision of these rights maybe can force or entice private parties to produce the rights after all, but that requires redirecting means in a different direction than the owners of the means of production initially intended.¹⁸ This is even more evident when it concerns the realization of a decent standard of living. To offer a decent standard of living requires income redistribution. The state taxes the well off to provide for those without the means of existence. The demand then is not on the state, but on the well endowed citizens, even though the solidarity is run through the state.¹⁹ Donnelly (2003) discusses the compensation for those that do not do well in terms of the welfare state, which is better suited to guarantee the provision of recognized human rights than the free market.²⁰ The costs of this solidarity, and the provision of economic, social and cultural rights are more unpredictable than the costs of civil and political rights. If the economic situation in a country turns bad, for reasons that may or may not be caused by national economic policy, there will be an increase in the number of people that come to depend on solidarity expenditures. The state may need to increase the burden on the remaining incomes to live up to its obligations. The burden on a relatively small part of the population may result in opposition or even a diminution of legitimacy of the state on their part. The (welfare) state (the social compromise which has been reached on state level) cannot influence the expenditures other than by changing the claim on the system, for instance by limiting the potential claims on the system.

¹⁴ This distinction is widely recognized in legal literature.

¹⁵ See also Van Hoof (1984).

¹⁶ A similar issue can be found in Sen (2000: 119) when he discusses the relationship between *income-earning* ability and *income-using* ability as an empirical phenomenon in poverty studies.

¹⁷ It has to be acknowledged that the legal system also functions to mediate between citizens and private part. Eide (2006: 244), for example, points out that human rights are not merely intended as protection from the state, but also require measures by the state to prevent violation of human rights by other actors.

¹⁸ This may quickly violate the right to property (UDHR, art. 17), which in many economic studies on development holds a pivotal role.

¹⁹ This made it easier for the communist countries, where the state commanded the means of production, to provide for these rights in the 1950s and 1960s. The state was responsible and able to produce the economic rights and the demand for those rights were demands on the state itself. This would explain the different positions between the western states and the communist ones during the cold war (De Kort, 2002: 138).

²⁰ Sen (2000) discusses elements of the welfare state and the impact on incentives in relationship to the development of capabilities.

But this may alienate those that depend on that system and again may give rise to increased opposition or reduced legitimacy of state policies.

Although duty bearers of the human rights are peoples and nations, individuals too need to respect the rights. In its preamble the UDHR calls on "... all peoples and all nations, to the end that every individual and every organ of society shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance..." Individuals, however, are no parties in the UDHR and the claim of the state on its citizens is at the heart of politics and the legitimacy of the state. Countries may differ considerably in the level of solidarity that they are willing to provide, especially if it is organized by the state, as the discussions in the United States show very clearly.

4. The Right to Development

The main duty bearer for civil and political rights in a country is the state. There is not much other countries can directly do to provide for these rights in a delinquent state without violating the sovereignty of that state. This is different for economic, social and cultural rights. The state may again be the duty bearer, but if the state fails to provide for these rights, there is the possibility, by means of an international transfer of income, that other countries provide for these rights.²¹ Actually, article 2.1 of the ICESCR requires states to undertake steps, individually and through international assistance and co-operation, to the maximum of their available resources, with a view to achieving progressively the rights adopted in the present Covenant (...). The RTD is even more explicit in the obligation towards international co-operation. Article 3.3 states that States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development (...). Article 4.2 requires sustained action to promote more rapid development of developing countries, and states that effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development. Whether or not the RTD entails a claiming right for the developing countries on the developed countries is part of the debate on the RTD. In its article 1, the RTD describes the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." Kirchmeier (2006:12) discusses the question whether peoples, or the states and their governments as representatives of the people can issue a claim against other states (as representatives of other peoples). Developed countries, the United States in particular, oppose a reading that gives claiming rights on developed countries. They reject the notion of a nation's right to development, for the simple reason that nations do not have human rights. Chauffour (2009:8) argues that the RTD is "a flawed concept that has been politically skewed since its inception and, thus, proved to be largely impractical." The RTD, however, is a declaration, as was the UDHR in 1948. It expresses a moral appeal, rather than a legally binding commitment. The chairwoman of the commission that prepared the UDHR, Eleanor Roosevelt, believed that such a declaration could become a force for change (Glendon 2001:86). Arguably, she has been right and the RTD can in this context be understood as a further step towards the realization of human rights.

The question then becomes what would be the best way forward to practically realize the ambitions of the RTD. The UDHR was followed by two legally binding covenants, five

²¹ Pogge (2005a) calculates that it would cost the rich world a mere 294 billion dollar, or 1.15 per cent of its aggregate national incomes to enable every person in the world a daily income of 2 dollars per day, a widely used World Bank indicator of world poverty. Official development aid (ODA), however only is 0.22 per cent of the rich worlds aggregate income and only five small countries fulfill the obligation to spend 0.7 per cent of their national income to ODA, which is the internationally accepted norm.

conventions, and inspired regional arrangements.²² It was also followed by many appeals on governments to honor human rights by other governments, public international organizations and by non-governmental organizations. The effects of these developments are difficult to quantify as it is hard, for example, to determine whether the American refusal to allow China into the WTO on account of Chinese violations of civil and political human rights actually influenced Chinese behavior. Or to measure the effect of Amnesty International's letter campaigns on behalf of individual prisoners on the plights of these prisoners or their (potential) fellow prisoners.²³ And it of course is difficult to measure the effects of the legalization of rights itself.

The RTD did not as of yet result in any legally binding commitments, but was confirmed in both the Vienna Declaration of 1993, and in the Millennium Declaration of 2000. In this latter document, the world leaders also decided, and this was new, on a number of specific goals to eradicate poverty. One of these specific goals was "to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or afford safe drinking water." (MD, art. III.19)²⁴ Although no specific instrument is given to achieve this goal (or any of the others), the MD also calls on the industrialized countries "to adopt ... a policy of duty- and quota-free access for essentially all exports from the least developed countries; to implement the enhanced programme of debt relief for the heavily indebted countries without further delay and to agree to cancel all official bilateral debts of those countries in return for their making demonstrable commitments to poverty reduction; and to grant more generous development assistance, especially to countries that are genuinely making an effort to apply their resources to poverty reduction." (MD art. III. 15). As with earlier declarations, the MD is a moral appeal, but it is a rather specific political appeal as well, and as mentioned above it formulates specific goals, next to the non-committal appeals that are often written down and left to be specified in accompanying activities. It is also specific in its recommended policies, including pointing out the duty bearers for these policies. The MD foresees a combination of income transfers from rich countries to poor ones and policies that enable the poor to develop themselves. International transfers of income are generally more sensitive politically than national transfers of income, even though there is no fundamental difference between the two.²⁵

As indicated in the introduction, there is discussion whether human rights belong in the legal domain. Many of the rights are "injusticiable". But Sen (2006a) argues that neither "injusticiability", nor infeasibility can be used as arguments to put the RTD outside the domain of human rights, as the objective precisely is to work towards feasibility and realization and to consider what reasonably can be done towards that goal. Nor does an ambiguity of obligation infer that there is no obligation. He continues that this is "nothing like an automatic agreement on some pre-determined formula, but a commitment to participate in a process, which includes an exercise of social ethics, within each country and across borders." Sen (2006a: 7) A fundamental denunciation of the RTD comes from Chauffour (2009) argues that economic, social and cultural rights constitute positive, "nonjusticiable" claims, as they are the output of the development process, rather than the input. Economic development, he continues, "is not about claims of citizens on the state or claims of developing countries on their more developed counterparts; it is primarily about empowerment and freedom." (Chauffour, 2009: 47) That changes the focus. The constituent parts of freedom are personal

²² See footnote 8 for the UN covenants and conventions. Within Europe, the European Court of Human Rights allows citizens of member states to bring cases against their governments.

²³ Amnesty International reports do mention the developments in the numbers of (political) prisoners in countries or in the reported violations of human rights, but it is hard to determine what caused the changes.

²⁴ Pogge (2005b) is critical of this goal, which, he claims, is an old goal, first accepted at the World Food Summit of 1996, and watered down by halving the proportion of people living in poverty rather than halving the number of people, and by taking 1990 as the base year, thus including China's results in economic growth.

²⁵ See for instance Pogge (2008: 100–102).

choice, voluntary exchange, freedom to compete and protection of persons and property and the instruments to achieve these are a market economy, a legal structure, a law enforcement system that puts contracts into effect and protects property rights, as well as a monetary arrangement that facilitates access to sound money. Thus, the market economy itself becomes the aim for development. There are many economic books in praise of the market economy, not just for its efficiency enhancing qualities – competition necessitates a continued drive for efficiency to survive – but also for its freedom enhancing qualities.

5. Economic Development

With respect to economic development, economic analysis generally attributes great benefits to the process of globalization which lifts many people in developing countries out of poverty, although the spoils often are unequally distributed within countries. At the same time, globalization has reduced the discretion with which countries can determine their domestic policies and it has unnerved many non governmental organization that point out the disadvantages of globalization and the dominance of western policies that goes with it. In this reading, globalization may indeed result in a 'race to the bottom'.²⁶

The RTD itself does not feature very much in the economic analyses of development as the narratives of development and human rights are different. Economists focus on economic growth, rather than on realizing human rights. But implicitly, and sometimes explicitly as well, economist often assume good things to come from development.²⁷ Friedman (2005:5), for instance, argues that a rising standard of living for the majority of people is not just about material gains but that it also shapes the social, political and moral character of people. It fosters greater opportunity, tolerance of diversity, social mobility, commitment to fairness and dedication to democracy. Bhagwati (2004) focuses on globalization as a source for economic prosperity, but also makes a case that globalization is socially benign as much as it is economically beneficial. Economic growth will reduce child labor as people do no longer need the fruits of child labor; globalization will narrow the gender gap, as firms overpaying men will lose market share to firms that pay men and women equal (their marginal productivity); (global) markets will promote democracy as rural producers are able to bypass the local dominant class and become more independent; and globalization will lead to improvements in labor standards rather than result in a race to the bottom. At several places in his book, Bhagwati challenges the wisdom of imposing norms to protect vulnerable groups in developing countries as being counterproductive.²⁸ A trade theorist by profession, Bhagwati argues that these norms often act as trade barriers imposed by developed countries to protect employment and production in these rich countries thereby shutting out developing countries from the benefits of globalization.²⁹

Development economists focus on the lack of capital in developing countries which impedes their development (De Soto, 2000, Easterly, 2001). They stress the importance property rights. In developed countries the absence of well defined property rights and capital markets make it impossible to collateralize assets and turn them into capital to finance investments.³⁰

²⁶ The 'race to the bottom' alludes to the competition between countries to attract (foreign) capital and business, where countries will lower standards, environmental, labor and others, to win over investments. Capital will flow to countries with the lowest standards, or so the argument goes.

²⁷ Chaffour (2009) is an excellent example of this position.

²⁸ Osmani (2006:264) argues that the human rights normative framework has a particular pre-occupation with individuals and groups that are vulnerable, marginal, disadvantaged, or socially excluded. Globalization might lead to a so-called 'race to the bottom', and addresses the vulnerable individuals and groups. Osmani adds, as Bhagwati argues as well, that there is little supportive evidence for the 'race to the bottom' argument.

²⁹ This is not to say that Bhagwati opposes regulation. He acknowledges that legal activism has brought developed countries a lot of good, also in terms of economic growth, but he challenges the imposition of these norms to developing countries.

³⁰ De Soto does a point out that the development of such a well defined legal system took centuries in the west and required rooting formal law in social contracts and extra-legal relationships.

Other factors that support higher growth are to have better educated people, 'good' policies, the right incentives (and some luck). There is no one size fits all approach to development and the most successful development came from countries that tried for themselves, borrowing ideas, institutions, technologies that suited them best, both in the private and in the public sector. Easterley (2006) is true to his economic nature by arguing that free markets and accountable governments provide feedbacks that support the right development choices. The nature of free market and accountable governments, however, are hard to describe. There is wide agreement that institutions matter, but it is unclear how they matter precisely.³¹

Alston (2005:780) criticizes mainstream economic thinking for the lack of definition when they advocate the importance of establishing and enforcing the rule of law.³² There only is reference to facilitate a better business environment. The most precise reference to rights is to property rights, which is taken to be a formal title to property owners. This dismisses the human rights perspective of development, which in the case of property would require a notion on the discriminatory practices that limit or prevent access of certain groups to property in the first place. From a human rights perspective, the objective to achieve an enabling climate for private sector activity would include the following tasks:

- the elimination of laws and practices designed to exclude or marginalize certain ethnic, linguistic, religious, or other minority groups in their efforts to compete in the market place on an equal footing with dominant groups in society;
- the removal of discriminatory laws and practices that keep women from owning land and acting as fully empowered economic agents;
- measures designed to ensure freedom of association and freedom of press;
- the provision of judicial or other remedies in response to cases of discrimination;
- efforts to ensure the free flow of information, including a free press, access to economic statistics, and alternative sources of information, all of which are essential ingredients for a market economy; and
- efforts to reform the police service to ensure that the rule of law provides security to all citizens so that private life, including business, can proceed effectively.³³

He expresses similar critique where it concerns the importance that economic analysts attribute to 'strengthening of public sector capacity and improvement of the quality of governance', and offers a similar list of tasks to introduce more precision in relation to the human rights agenda.

Osmani (2006:269) argues that the narrow concept of economic development is important, but not enough. "Development must entail fuller realization of economic, social and cultural rights on the one hand and civil and political rights on the other." This equals the indivisibility of human rights as it is expressed in the Vienna Declaration. Closely related to this is the issue whether the RTD concerns the outcome of development or the process itself. This is an important issue as human rights are usually perceived as absolute rights. It is, for instance, impossible to sacrifice some education in exchange for housing. But if resources are limited, the standard economic argument focuses on trade offs. Means that are used to fulfill the right to education for instance cannot be put to use to fulfill the right to (affordable) housing. With development, more specifically economic growth, the trade off is somewhat different; a large

³¹ See e.g. Rodrik (2000). An empirical study of the economic effects of human rights is Blume and Voigt (2007) They conclude that "high degrees of human rights are conducive to economic growth and welfare in a significant manner." Basic human rights and property rights are conducive for investment while none of the four groups of rights that they study, basic human rights, property rights, civil rights and emancipatory rights, have negative impact on the economic variables, GDP, investment, average year of schooling among others.

³² Alston (2005) directly refers to the views as expressed in the Global Monitoring Reports that are produced by the IMF and the World Bank.

³³ The point then becomes by which policies the rest of the world can stimulate, help or force countries to achieve these precise points.

improvement in the availability of housing can be achieved without actually sacrificing education, even if an improvement of the access to education cannot be attained. In that case a Pareto improvement is still possible.³⁴ This, however, would be a negative reading of the principle of indivisibility of the rights, as opposed to a positive reading of the RTD in which a sustainable advancement of any right depends on a similar advance of all other rights (Kirkemann and Otto, 2006: 46). Sengupta (2006: 17) points out that the right to development is “a right to both the process and the outcomes of the process. Development is not a finite event, but a process over time.” He argues that even if development is instrumental in achieving the desired outcomes, that does not disqualify development as a right itself. It is a substantive right in itself as it passes the legitimacy and coherency tests.³⁵ In this reading development includes economic and non-economic aspects of poverty reduction, such as institution building, democratic support and legal and policy reform, explicitly. A rights based approach to development requires accountability on both the outcome and the process. The constituent elements of a rights based approach to development are:³⁶

- That development efforts benefit from clearly defined normative or legal principles;
- There is a clear division of responsibilities based on a framework of rights holders and duty-bearers;
- Individual and group entitlements and rights are crucial in the creation of equity, non-discrimination and well-being;
- Human rights trump political and economic expediency.

This does not read very different from the general observations in economic development literature, but the principle is different indeed; especially the fourth principle makes clear that economic growth cannot advance, unless it honors the human rights principles.³⁷ There cannot be compromise in that field. It is also different in the importance of duties and obligations. The economic development literature is rather silent about duties and obligations, especially in the international order. From the perspective of human rights these are very important. Human rights are linked to individuals and to enjoy them should be independent of nationality. The international (legal) order, however, is pre-eminently built on the sovereignty of states and individuals have to appeal to their own sovereign to claim their rights.³⁸ This leads us back to wisdom of claims on the developed countries to support the realization of human rights in developing countries. As indicated above, many developed countries are unwilling to submit to legal claims on their development policies from developing countries in particular.

³⁴ One has a Pareto improvement if the new constellation shows better results on any single goal without any other goal being worse of. But there still alternative use of scarce resources as the provision of human rights in the present may go at the expense of a higher income, and an easier realization of human rights in the future.

³⁵ An explicit definition of these tests is to be found in Sengupta (2007: 334); “The legitimacy test involves the moral judgment that a right is of paramount importance and thus raises it to the level of a human rights. The procedures to be followed would make such moral judgments largely, if not universally, shared, and not arbitrarily advanced. The coherence tests links it to the duties whose plausibility depends on (a) whether performance of these duties enhances the likelihood of the right – the higher the likelihood the more plausible the right; and (b) the opportunity cost of these duties should not be too high, in the sense that the alternative values that are sacrificed by performing these duties should not be generally unacceptable.”

³⁶ Kirkemann and Otto (2006) at 55.

³⁷ There is a kind of a catch 22 here as for human rights principles to be honored, there is a need for economic growth. The RTD is a human right, but as the authors on economic development argue at the same time the realization of human rights may impede development.

³⁸ This even goes for individuals who have access to internationally acknowledged courts, such as the European Court of Human Rights. Rulings of this court for example are binding to participating states, but the court still depends on the cooperation of the states in executing the ruling.

6. Implementation

This does not mean that developed countries are not interested in the well being of developing countries and their citizens. As indicated above, the Millennium Development Goals (MDG) are focused on reducing poverty, increasing education, rolling back diseases, reducing child mortality among others, which are all human rights made tangible by defining specific targets to be achieved by the year 2015.³⁹ In that respect, we can appreciate the MDG as an expression of the inner logic of the RTD. The international community commits itself to helping less developed countries achieving human rights and development. However, Salomon (2006:98) argues that "despite global rhetorical consensus, and some incremental advances, the international community of states is failing to move expeditiously towards setting this key commitment in motion."⁴⁰ She distinguishes between the obligations of each state and that of the collective obligations of the international community of states. The actions and structural arrangements of the latter may actually constrain the ability of states to develop and fulfill their human rights obligations. Salomon argues that the international community has the obligation to secure a system that is globally just.⁴¹ Thus far, international organizations, the International Monetary Fund (IMF) and the World Trade Organization (WTO) in particular, have been hesitant to include human rights in their programs and argue that human rights are beyond their goals and purposes.⁴² Benedek (2007) argues that such a position is untenable as countries that have submitted to obligations in treaties, agreements, or other organizations, such as the covenants on human rights and other UN based activities, cannot ignore such obligations in other organizations. Thus the IMF and the WTO are under the obligation to respect, protect and fulfill human rights, even if their mandates do not mention them.⁴³

Gouwenberg (2009:35) discusses the option of a new declaration or the option to develop guidelines for implementation which can be used by states and non-state actors. An advantage of guidelines is that they "are flexible in character and could therefore adjust more easily to changing situations or increased consensus or support on certain topics " She also discusses the legally stronger option of a convention on the RTD, but concludes that this may not add much to the existing and recognized human rights language and may run in political difficulties as much as lengthy negotiations and ratifications.

With the increasing importance of developing countries in the world, it is likely that these countries demand a place at the tables where the rules are made. As they often represent people that are poor, it is also likely that economic and social rights and the international responsibility towards these rights are moving up on the international policy agenda. Furthermore, as with the French declaration of rights of man and citizen and the UDHR, there is an inner logic in the RTD and it may follow a similar path. Declaratory at first, it finds its way into policies and legal manifestations. But as with the French declaration and the UDHR, it will also attract discussion on the merits of the economic rights. These were left out of the French declaration, but found a way into the UDHR, and seem to be even more important in the RTD. These rights, at least a legal manifestation of these, attracted fundamental criticism

³⁹ Alston (2005) observes that in the 59 national MDG reports that he analyzed (the number available in August, 2004) there is very little reference to human rights, thereby neglecting a crucial dimension of the development equation.

⁴⁰ The Millennium Declaration also stresses the principle of shared responsibility and links it to principles of equity and justice (Salomon, 2006:102 fn 37).

⁴¹ Wallach and Woodal (2004:161) observe that no country has ever developed under the conditions and terms required by the WTO. A similar point is made by Reinert (2007) who also argues that developing countries should do as developed countries did, not as developed countries say they have to behave. Pogge (2005a) argues that the developing world is no equal partner in the negotiations with the developed world, but have no alternative than to join its institutions.

⁴² As states form the membership of the international community, international organizations find it difficult to act against one of its members.

⁴³ The dividing line cannot be drawn sharply and in its policies the international economic organizations take a pragmatic course. The debt relief program of the IMF, for instance, does include social dimensions (Boisson de Chazournes, 2007).

in political discussions, for instance in the United States, which did not ratify the ICESCR, in philosophical discussions, in the rejection of positive (second generation) rights, to which economic and social rights broadly speaking belong, and in economic discussions, where it is argued that economic and social human rights may actually be counterproductive with regard to economic development. More economic development generally leads to more human rights, but locking in human rights in a strategy of development may actually result in slower development, at least in the strict sense of increasing income and production. At the same time, as Sengupta (2006:23) argues, it has to be acknowledged that all human rights went through a long process of normative and procedural justification.⁴⁴ This process involves political argument as well as legal expertise. As the discussions on earlier manifestations of human rights show, there are economic issues too, which could be advanced with input. This is even more important when, as is the case with the RTD, the object of human rights increasingly enters the field of economic development.

⁴⁴ Sengupta, also an economist, was the UN Independent Expert on the Right to Development, and in that capacity closely involved in theoretical and practical discussions on the RTD.

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