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ECONOMIC AND SOCIAL RIGHTS AND SOCIAL JUSTICE MOVEMENTS: SOME COURTSHIP, NO MARRIAGE, NO CHILDREN YET

Chapter for Ida Lintel, Antoine Buyse, Brianne McGonigle Leyh, eds. *Defending Human Rights: Tools for Social Justice*, Cambridge: Intersentia, 2012.

MARLIES GLASIUS

1. INTRODUCTION

The existence of hunger, homelessness, preventable disease, and illiteracy in the world can be considered as fate, a tragedy, a predicament, or an injustice. Each of these terms implies different value judgments about whether there is any (human or divine) culpability attached to these ills, whether there is a duty to correct them, and whether they can in fact be resolved.

This chapter will consider the successes and limitations of global civil society attempts to frame access to food, housing, health, and education as individual human rights, and hunger and malnutrition, homelessness and inadequate housing, lack of access to health, and education as violations of human rights. It will also consider why the economic and social rights framing has not been prominent in the global social justice movements of the last decade, and why it has been conspicuously absent from the anti-austerity and democracy protests of 2011.

An economic and social rights framing tends to answer the questions of blame, obligation, and solubility in the affirmative. Unlike many other diagnoses, it seeks the solution at the level of the individual. But the answers to where the blame lies and, more importantly, where the obligation to guarantee the right might lie, are often confused and undetermined. This confusion and uncertainty arises from three basic tensions inherent in the economic and social rights frame, each of which could be considered either as a handicap or as a creative tension.

The first tension is that between the two systems of norms on which the invocation of human rights, including economic and social rights, rests. Human rights are instinctive but also contested moral norms. People are shocked by malnutrition or homelessness just as they are by torture or unfair detention. They feel it as an injustice, an infringement on human dignity, particularly when it coincides with conspicuous wealth. Hence, statements like ‘everyone has the right to an education’ or ‘absolute poverty is a violation of human rights’ have a resonance with poor and not

so poor people from different parts of the world. At the same time, human rights are also legal norms, laid down, in many variations, in instruments of international and national law, with or without implementation systems. The two normative systems have developed in tandem, and are partly interdependent, but they are also in tension.¹ These frictions come out particularly forcefully when it comes to the obligations attached to economic and social rights. Morally, the concept that ‘everyone has the right [...]’ could point towards a wide range of social actors having far-reaching responsibilities. Legally, even the precise obligations of States are far from determined, and any obligations extending beyond States are even more uncertain and controversial.

This brings us to the second tension and source of confusion. There is a paradox at the heart of human rights law, which again comes out most forcefully in relation to economic and social rights. On the one hand, the very manner in which human rights are expressed signifies a breach with the tradition of absolute sovereignty, according to which each State could treat its own citizens as it pleased, and no other State had a right or responsibility to take an interest. On the other hand, human rights law is also the product of an era that still thought largely in terms of stable populations sitting tight behind their borders, being subject only to national political and economic forces. On the obligations side of human rights law there is a heavy assumption that every State has specific obligations to the individuals under its jurisdiction, or at a minimum to its own citizens, that go very much beyond obligations to the citizens of the rest of the world. When it comes to obligations to the citizens of the rest of the world, international law becomes more nebulous and controversial. This finds expression in debates surrounding the Responsibility to Protect, for instance, but it is also a particularly hot issue when it comes to the obligations of rich States in relation to the economic and social rights of citizens of poor States. The notion that non-State actors, including inter-governmental organisations, transnational corporations or non-governmental organisations, might have legal human rights obligations is even more underdeveloped. The state-oriented way of thinking about obligations has the advantage of legal certainty, and it is in fact in this area that most legal victories have

¹ See for instance Hart, H.L.A., *The Concept of Law*, Clarendon Press, Oxford, 1961, pp.205-206; Sen, A., ‘The Right Not to be Hungry’, in: Alston, P. and Tomasevski, K. (eds.), *The Right to Food*, Martinus Nijhoff and SIM, Utrecht, 1984, pp. 73-75.

been booked. But it is also increasingly felt to be inadequate to addressing social justice issues in a globalised and privatised world.

The third tension exclusively concerns economic and social rights, and relates to their position in political theory. They find themselves at the crossroads, or in the cross-fire, of a historic confrontation between two political ideologies: liberalism and socialism. Liberals believe that individual rights are the key to a decent political system that transcends despotism, and as such they ‘trump’ matters of normal political debate and policy choice. However, the classical canon of civil rights as it emerged at the heart of liberal thinking during the Enlightenment did not include rights to health, housing, or education, and many self-defined liberals would place all welfare issues in the ‘policy choice’ rather than in the ‘inalienable rights’ category. Socialism, while it comes in even more strands and variations, basically diagnoses inequality between the classes, not despotism, as the main problem to be addressed by a decent political system. It does, therefore, consider redistribution as a political imperative, to achieve socio-economic equality between people. But it typically conceives of such schemes at the collective level, and is suspicious of the notion of individual rights, which it associates with bourgeois liberalism. Hence, the pairing of ‘economic and social’ with ‘rights’, while it need not be inherently incompatible with either system, has enemies on both sides, and few champions who root their argument in political theory. The second and third of the tensions described here are graphically represented in table 1, which shows how economic and social rights could be seen as transcending all positions, or appealing to none.


	Socialist	Liberal
State focus	Distributive policies	Civil rights
	 Economic and social rights	
Global focus	Global social justice	Civil and political human rights

Table 1: The Place of Economic and Social Rights in Political Thought

At worst, economic and social rights can be seen as an obscure sub-discipline of international human rights law, simultaneously disconnected from Realpolitik and

from grassroots movements through a rarefied utopian legalism with little connection to the real world. At best, they can be seen as a value system that bridges and transcends liberalism and socialism, has a direct appeal to deprived people, and can, if it is further developed at the implementational level, deliver social justice on a global scale. This chapter will explore which of these two descriptions best fits the current status and near future of economic and social rights.

Elsewhere I have described how economic and social rights, starting with the right to food, were beginning to get put on the agenda by philosophers, lawyers and grassroots activists from the 1980s, how mainstream human rights and development organisations began to gingerly adopt economic and social rights frames, and numerous specialised organisations emerged, from the 1990s.² In this chapter, I go on to describe the separate trajectories of human rights activism and global social justice activism in the late 1990s and early millennium, and describe some emerging synergies. I then discuss the curious absence of economic and social rights framings from the central concerns of the social movements of 2011. I end with a reflection on what unresolved issues advocates for economic and social rights would need to tackle to bridge the gap between these movements, and give economic and social rights a central place in alternative visions to the failed neoliberal recipes for global governance.

2. TWO ACTIVIST TRADITIONS; LIMITED SYNERGY

2.1. LIMITS OF LEGALISM AND THE TREND TOWARDS BROAD-BASED CAMPAIGNS

Perhaps the greatest moment of victory in legal advocacy for economic and social rights has been the South African Constitutional Court's judgment in the *Grootboom* case. In 1996, South Africa inaugurated a new post-apartheid Constitution, encompassing a Bill of Rights which included explicit recognition and concrete descriptions of a number of economic and social rights. Irene Grootboom and others, finding themselves homeless, had squatted a vacant farm near Capetown. They were evicted through a court order and had their homes bulldozed and their possessions

² Glasius, M., 'Pipe Dream or Panacea? Global Civil Society and Economic and Social Rights', in: Glasius, M. Mary Kaldor, M. and Anheier, H., (eds.), *Global Civil Society 2006/7* Sage, London, 2006, pp. 62-93; Glasius, M., 'Global Civil Society and Human Rights', in: Goodheart, M. (ed.) *Human Rights: Politics and Practice*, Oxford University Press, Oxford, 2009, pp. 149-153.

burnt. In 2000, the South African Constitutional Court had to decide whether 'reasonable legislative and other measures' had been taken to fulfil Grootboom's 'right to have access to adequate housing'. It found that, since emergency relief measures were lacking, the housing programme was not reasonable and therefore unconstitutional.³ The *Grootboom* case was hailed by human rights lawyers all over the world. But in 2004, Grootboom and several thousand others still lived in make-shift conditions, sharing a foul-smelling sanitary block with about twelve toilets and some showers and washbasins, mostly blocked.⁴ In 2008, Grootboom died at the age of 39, still living in a shack.⁵

Nonetheless, it would be misplaced to write off the *Grootboom* case as a pyrrhic victory without real-world consequences. In South Africa itself, the judgment provided inspiration to the Treatment Action Campaign (TAC) on retroviral drugs.⁶ TAC succeeded first in persuading the South African Supreme Court that the right to health required national roll-out of a particular anti-retroviral (ARV) drug, and then, in coalition with international NGOs, in persuading the WTO that there needed to be an exemption to the TRIPS agreement that would allow the manufacture and distribution of cheap versions of ARV drugs to combat HIV/Aids in developing countries. But it has also booked many other successes, primarily but not exclusively related to HIV/Aids treatment, in Thailand, Brazil and other countries.⁷ Patients (especially people with HIV/Aids), health professionals, human rights lawyers, development organisations and anti-privatisation activists are all part of a growing movement based around the 'right to health'. Whereas 15 years ago invocation of this right was generally met with the sceptical comment that one cannot claim a right to be healthy, now a right to 'the highest attainable standard of health' is widely accepted in both medical and development circles.

India has been the scene of a similarly broad-based campaign on the right to food, where legal claims, policy advocacy, and the appeal of lived experience are merged.

³ De Vos, P. 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness', *South African Journal on Human Rights*, Vol.17, (2001), 258-276.

⁴ Schoonakker, B., 'Treated with Contempt', *Sunday Times*, South Africa, 21 March 2004; Whittal, J., Muzondo, I., Dewar, D., Barry, M., 'Informal Settlements: Breeding Grounds of Conflict', *Reconciliation Barometer*, Vol. 2, No. 2, 2004, pp. 5-8.

⁵ Joubert, P., 'Grootboom Dies Homeless and Penniless', *Mail and Guardian*, 8 August 2008.

⁶ *Idem*.

⁷ Seckinelgin, H., 'Time to Stop and Think: HIV/AIDS, Global Civil Society and People's Politics', in: Glasius, M., Kaldor, M., and Anheier, H. (eds.), *Global Civil Society 2002*, Oxford University Press, Oxford, 2002, pp. 123-125.

The Indian Supreme Court had long since established that the right to life protected by the Constitution incorporates aspects of the rights to food and health⁸, and there was a long-established, though erratic and corrupt, system of public distribution of food to the needy. In response to petitions by the People's Union for Civil Liberties, the Supreme Court has given binding force to existing famine codes, and directed the State governments to cancel the licences of retail ration shop dealers which did not open on time, overcharged, made false entries, or engaged in black marketing, and appointed its own commissioners from the ranks of civil society to monitor progress in executing its rulings. The Court's proactive stance has caused a much wider campaign to emerge. Besides public interest litigation, the Right to Food Campaign organises marches, rallies and fasts, initiates public hearings, conducts research, and engages in media advocacy and lobbying. Provision of mid-day meals to school-children has been a particularly effective campaign target.⁹

Another momentous area of synergy has been over the right to water. This right was initially formulated largely outside the human rights movement. It has caught the attention of development organisations, particularly of Care International. But it also has connections with anti-dam campaigns, with political conflicts such as that between Palestine and Israel, and with anti-privatisation campaigns, the most famous case being that of Bechtel in Bolivia..¹⁰ Like food, water is so vital to human life that to claim it as a right has intuitive appeal. Subsequently, it was embraced by the human rights community as being constituted by particular aspects of the existing rights to food and health, culminating in the adoption of a 'General Comment' on the right to water by the UN Committee on Economic, Social and Cultural Rights (CESCR) in November 2002.¹¹

2.2. SOCIAL JUSTICE ACTIVISM AND ITS SUSPICION OF RIGHTS

⁸ Shah, S. 'Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India', *Vanderbilt Journal of Transnational Law*, Vol.32 (1999) 435-486.

⁹ Right to Food Campaign, available at: www.righttofoodindia.org/index.html; Patnaik, B., Adviser to the Commissioners of the Supreme Court of India: Right to Food, Interview 21 November 2005.

¹⁰ See Dicke, W. and Holland, F. (eds.), 'Water: A Global Contestation', in: Glasius, M., Kaldor, M., Helmut Anheier, H. (eds.), *Global Civil Society 2006/7*, Sage, London, 2006, pp. 122-146.

¹¹ Committee on Economic, Social and Cultural Rights (2002). *General Comment No. 15: The Right to Water*, UN Doc. E/C.12/2002/11, (2003); Filmer-Wilson, E., 'The Human Rights-Based Approach to Development and the Right to Water', *Netherlands Quarterly on Human Rights*, Vol. 23, No. 2, 2005, pp. 213-241; Nelson, P.J. and Dorsey, E., 'At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs', *World Development*, Vol. 31, No. 12, 2003, pp. 2013-2026.

The 'anti-globalisation movement', now usually referred to as alter-globalisation or global social justice movement, famously burst on the scene at the World Trade Organisation meeting in Seattle in 1999. It had roots in anti-imperialist thinking and specific struggles in the South such as the Zapatista uprising and the Ogoni movement, as well as in environmentalist and labour rights movements in the North. While the mix of groups and intellectual traditions was rich, human rights activism was remarkably absent from it. Neither the anti-Bank coalition 'Fifty Years is Enough', nor the loose anti-corporate and anti-WTO network 'Peoples' Global Action', for instance, had any participation from human rights groups, nor, for that matter, specialised economic and social rights groups.¹²

The absence may be explained by a combination of suspicion and moving in parallel circuits, simply not knowing each other. Although the human rights community and the social justice community did not neatly correspond to the older political labels 'liberal' and 'socialist' respectively, each had a tendency, informed by the Cold War and the period immediately after, to understand each other according to these labels. The social justice suspicion towards human rights, and human rights advocates, in particular, can be understood in light of the appropriation of human rights rhetoric by the 'victors' of the Cold War. The fall of the Wall was widely presented as a triumph for market capitalism and 'liberal values', that is, civil and political rights, simultaneously. The Clinton administration was the most human rights friendly US government in two decades, and the World Bank too embraced its own version of human rights in the post-Washington consensus, conflating neoliberal orthodoxy with respect for human rights in statements like: 'by helping to fight corruption, improve transparency, and accountability in governance, strengthen judicial systems, and modernize financial sectors, the Bank contributes to building environments in which people are better able to pursue a broader range of human rights'.¹³ The human rights movement did little to dispel the notion that human rights and free market reforms were two sides of the same coin. This was not because it necessarily endorsed this notion, although some individuals and groups probably did and still do, but rather because it was in some ideological disarray. It would condemn

¹² Glasius, M., 'Pipe Dream or Panacea? Global Civil Society and Economic and Social Rights', in: Glasius, M. Mary Kaldor, M. and Anheier, H., (eds.), *Global Civil Society 2006/7* Sage, London, 2006, pp. 62-93.

¹³ World Bank, 'Development and Human Rights: The Role of the World Bank', World Bank: Washington DC, 1999, p.3.

State violence used against for instance Ogoni or Zapatista leaders, but it would not comment in any way on the nature of their political struggle.

Its traditional insistence that human rights were above politics, so useful during the Cold War, was getting in the way of gaining a political voice. Moreover, human rights organisations had become very professionalized and legally oriented. The activists forming a human chain around the centre of Birmingham to protest against third world debt in May 1998 and the lobbyists pushing to establish an International Criminal Court at a UN conference in Rome a month later, for instance, had little or nothing in common in terms of tactics or networks. Arguably, the specialised economic and social rights groups such as Food First Information and Action Network (FIAN), the Centre on Housing Rights and Evictions (COHRE) or the Center for Economic and Social Rights (CESR) would have been much more natural allies to the anti-capitalist movement. Their worldview was much more unreservedly close to that of the protestors; they had grassroots links as well as experience of international fora such as the UN, and they had a language at their disposal that might have appealed to the anti-capitalist movement, which, at the time, was justly accused of knowing much better what it was against than what it was for. But whatever the reason, these groups were not involved in the emergence of the alterglobalization movement in the late 1990s

2.3. THE WORLD SOCIAL FORUM: SEPARATIONS AND SYNERGIES

A decade ago, the World Social Forum (WSF) emerged as a place of convergence and cross-over between different types of global civil society activists.¹⁴ Gradually, the human rights community became increasingly absorbed into these events, which emerged out of the alter-globalisation movement. The 2005 WSF in Porto Alegre made human rights one of its 11 themes, and about one-third of the events held in the human rights space concerned economic and social rights-related themes.¹⁵

Still, the evidence of a complete convergence between human rights activists and the social justice movement around economic and social rights remained mixed. Prior to the 2005 WSF in Porto Alegre, a thematic WSF on Health took place, attended by

¹⁴ Glasius, M. and Timms, J., 'Social Forums: Radical Beacon or Strategic Infrastructure?' in: Glasius, M., Kaldor, M., and Anheier, H. (eds.), *Global Civil Society 2005-06*. Sage, London, 2005, pp. 190-238.

¹⁵ Forum Social Mundial (World Social Forum), *Programmacao [Programme]*, 2005.

800 people, which adopted the 'right to health' as its lead theme¹⁶ A follow-up session to this event during the WSF, entitled 'Right to Health: Neoliberalism or Social Movement', saw participants from Argentina, India, Colombia and Burundi describing the consequences of privatisation, austerity measures and military conflict for the right to health in their respective countries, and describing the social movement action being undertaken against this. Further participants from Argentina and Mexico stressed the need to give medical students a more 'people-oriented education' and to protect the use of alternative medicine by indigenous groups from State repression and corporate interests. The principal terms in the discourse of this workshop were 'neoliberalism' and 'struggle'. Participants used their own, self-defined concept of the right to health, and no reference was made to the International Covenant on Economic, Social and Cultural Rights, or to any national lawsuits or legal provisions concerning the right to health.¹⁷).

The next day, another workshop on economic and social rights took place in the human rights space, entitled 'Economic, Social and Cultural Rights in the International System: Shadow Reports to the ESC Rights Committee and the Challenges of the Working Group on the Optional Protocol'. Apart from the author of this chapter and one Belgian development worker, there was no overlap between participants in this workshop, which included the French member of the CESCR, and the previous workshop. As the title would suggest, the discussion focused on sharing experiences regarding the practice of submitting parallel civil society reports to the State reports to the UN Committee, and on the negotiations on the Optional Protocol. Key terms in the discourse of this workshop were 'justiciability', 'strategising', and 'lobbying'. The phrases 'neoliberalism' and 'struggle' were not used.¹⁸

At a workshop on the right to housing, however, the dynamics were rather different. Here, participants ranged from a Geneva-based international lawyer who described the provisions and legal avenues that existed regarding the right to housing, national-level activists from Egypt and Brazil who described a variety of tactics, from legal appeals or political negotiations to direct action and use of the media, to a Brazilian from Sao Paulo who had recently become the victim of slum clearance, and

¹⁶ World Social Forum on Health, *available at*: www.fsms.org.br/ingles/.

¹⁷ Author's participant observation.

¹⁸ Author's participant observation.

had come to the Forum looking for help. An instant petition was drafted, and further discussions took place about how to address the situation of his community.

Further evidence of emerging synergies can be found in the functioning of ESCR-Net, whose members include usual suspects such as FIAN and COHRE, a social justice think-tank like Focus on the Global South, sections of Amnesty International and ActionAid, as well as much more radical grassroots groups like the Movimento Sem Terra from Brazil or the Kensington Welfare Rights Union from the US. Minutes of the inaugural meeting show the latter type of groups to be particularly interested in learning how to use international law to their advantage, while human rights lawyers emphasised that a human rights culture with popular support needed to be built.¹⁹

3. CRISES AND MOVEMENTS

In December 2008, after two decades of legal advocacy, the Optional Protocol on Economic, Social and Cultural Rights was unanimously adopted by the UN General Assembly. At the time of writing, it had attracted eight of the ten ratifications required to make it enter into force and allow citizens of the ratifying States to make complaints about violations of economic, social and cultural rights to the Committee.

Also in 2008, the developing world suffered from spiking food prices, and the US experienced a banking crisis related to sub-prime mortgages which has since developed into a credit crisis in many countries in the Western world. Apart from having a direct impact on the right to work, the crises are impacting on State welfare provisions, developing country exports, development aid, migrant remittances and tourism. Millions were expected to be affected by an increase in extreme poverty, leading to lack of access to education, health and adequate housing even before the crisis spread to the EU.²⁰

As a result of the financial crisis, the outlook and policy prescriptions of the main international financial institution, the International Monetary Fund (IMF), has become widely discredited. State leaders such as Nicolas Sarkozy and Indian Prime Minister Manmohan Singh have declared that they would 'refuse to sacrifice hundreds of

¹⁹ Report of Founding General Assembly and Inaugural ESCR-Net Conference, *available at: www.escr-net.org/about/about_show.htm?doc_id=405592*.

²⁰ Stephany Griffith-Jones and José Antonio Ocampo, *The Financial Crisis and its Impact on Developing Countries*, Working Paper, United Nations Development Programme, New York, January 2009.

thousands of [...] jobs on the altar of neoliberalism'.²¹ This ought to be good news for economic and social rights advocates. The IMF has in the past stated that it 'was not a signatory to the Covenant' and it 'was not the Fund's function to ensure respect for economic, social or cultural rights'.²² Various governments had made it clear to the CESCR that, when negotiating with the IMF, they did not have the power or leeway to resist particular measures in the name of human rights.²³ The intellectual denouncement of the IMF in the wake of the financial crisis ought to be redressing this imbalance.²⁴ Yet although the chorus of protests against neo-liberal market solutions in general and the IMF in particular has grown to include leaders of major powers, economic and social rights have not taken their place in the discourses of either politicians or protestors.

From Russia to the Middle East and North Africa to Europe and the US, 2011 has been a year of social mobilisation and unrest unlike any other since 1968. As I have argued with co-authors elsewhere, an analytical distinction of these movements into democratisation movements on the one hand and anti-austerity movements on the other hand obscures the deeper similarities in their framings, which have emerged in part from past transnational cross-fertilisations and in part from a recognition of common circumstances.²⁵ The Indignados, the Occupy Movement and the Arab Spring have all targeted the inequalities, unsustainability and corruption that they saw as outcomes of unbridled and unregulated capitalism. More particularly, comparisons may be drawn between the language and methods in Tunisia, Syria and especially Egypt and those in Greece and Spain. In both Tahrir Square, Cairo and Syntagma Square, Athens, there has been an emphasis on human dignity which is constructed as requiring fulfilment of basic socio-economic needs, treatment with respect by authorities, and participation in determining one's fate.²⁶

But what human rights advocates would see as the offspring of the recognition of universal human dignity, universal human rights, were not an important part of the

²¹ Pleyers, G., *Alter-Globalization: Becoming Actors in the Global Age*. Polity, Cambridge, 2010.

²² Dowell-Jones, M., *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit*, Martinus Nijhoff, Leiden, 2004, p. 79.

²³ *Ibidem* at p. 80.

²⁴ Saiz, I., 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis', *Journal of Human Rights Practice*, Vol. 1, No. 2, 2009, pp. 277-293.

²⁵ Anheier, H., Kaldor, M. and Glasius, M., 'The Global Civil Society Yearbook: Lessons and Insights 2011-2011', in Kaldor, M., Moore, H.L., and Selchow, S., *Global Civil Society 2012: A Decade of Critical Reflection*, Palgrave Macmillan, Basingstoke, 2012, pp. 2-26.

²⁶ *Ibidem* at p. 7.

language and symbolism of these movements. Moreover, the specific language of economic and social rights, appropriate to the circumstances as it may seem to the initiated, has been conspicuously absent from the framings of these movements. With the Western movements of 2011 ostensibly already evaporating, and the Arab Spring revolutions turning into long-term political struggles with varied but uncertain outcomes, human rights advocates must reflect on two questions: Why was our rights language absent? And, is there still scope for creative interaction between economic and social rights frames and social justice activism?

4. UNRESOLVED ISSUES

Below, I offer some tentative reasons why there has not been a durable ‘marriage’ between, or ‘off-spring’ from, the human rights movement and the alter-globalisation movement, and why consequently the movements of 2011 did not recognise a human rights parent.

4.1. OBLIGATIONS BEYOND THE STATE

A first explanation may lie in the excessive focus of lawyers on the State as the official duty-bearer in relation to human rights. There is general consensus that, whatever the ‘maximum available resources’ of developing countries might be, they are insufficient to fully realise economic and social rights. Therefore, these rights can only ever be fulfilled if it is accepted that the obligations emanating from economic and social rights go beyond the State of citizenship or residence.

The idea that obligations – moral, political or legal – fall on more than one actor is not in itself problematic. Moral philosophy is quite at ease with the idea of concurrent obligations, and so are domestic legal systems. But there are huge political and practical obstacles to the recognition of concurrent human rights obligations at the international level. As Kuennemann puts it: ‘obligations are trapped between the nation state and the international community [...]. The result is a situation where the maximum of available resources is neither reached internationally nor nationally, with a convenient excuse to blame the other side’.²⁷

²⁷ Künnemann, R. *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights*,

Whereas alter-globalisation activists have rhetorically been holding powerful States, international institutions and corporations to account all the time, human rights lawyers have just in the last decade begun to inquire into the nature of ‘extra-territorial obligations’ on the part of States and of inter-governmental organisations. Obligations of transnational corporations or non-governmental organisations, whether political, moral or legal, are even less elaborated. This is an area where economic and social rights advocates need to catch up quickly if their work is to have any relevance to those deprived of health, housing or education in a globalised and privatised world.

4.2. ‘COSTING’ HUMAN RIGHTS

A second reason may lie in the unease of the human rights community with debates about cost. Kenneth Roth of Human Rights Watch has argued that at least at the State and possibly at the inter-State level, there are not enough resources to fulfil all human rights. Therefore, human rights advocates should stay away from resource issues, because their recommendations would interfere with other legitimate forms of spending.²⁸ Leonard Rubenstein, on the other hand, claims that ‘the amounts needed are high but within reach’.²⁹ Neither really has a sufficient empirical basis for their claim. The doctrine of ‘progressive realisation’ is equally problematic. The ‘non-retrogression principle’, is based on a developmentalist assumption that all States are gradually becoming better off. How is this to apply even to Greece after the credit crisis, let alone to the Democratic Republic of Congo after a decade of war?

The questions that are being asked of economic and social rights regarding costing were never asked of civil and political rights. Hence, we have no idea how to cost human rights in general, as may be illustrated through the example of the right to form trade unions and engage in collective bargaining, a hybrid between a civil and an economic right. It is generally considered as a ‘negative right’, without cost implications. But as Dowell-Jones argues, while this right may carry no direct cost for the State, it may drive up wages and therefore carry a cost for employers and, in turn,

http://www.lancs.ac.uk/universalhumanrights/documents/FIAN_ETOsandICESCR.pdf, last accessed 27 September 2012, 16.

²⁸ Roth, K., ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization’, *Human Rights Quarterly*, Vol. 26, 2004, pp. 63-73, at p. 65.

²⁹ Rubenstein, L.S., ‘How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth’. *Human Rights Quarterly*, Vol. 26, 2004, pp. 845-865 at p. 856.

for the national economy.³⁰ In contrast, the same collective bargaining freedoms may also prevent wild-cat strikes, and smoothen cooperation between employers and employees, improving the predictability and output of productive processes in a country. There is no definitive answer to the question whether the right to form trade unions can be considered cost-neutral, costly or profitable to the State.

So what approach should economic and social rights advocates take to the resource issue? One approach would be to emphasise the hidden benefits of policies that respect, protect and fulfil human rights, arguing that they lead to a virtuous cycle of social well-being and financial stability for all. Such reasoning would be contestable to say the least. Another approach is to take the moral high ground, and argue that human rights must be fulfilled regardless of the cost, as has always been the approach to civil and political rights. A third, more pragmatic approach is taken by those who engage in budget analysis. Instead of trying to establish what a State's 'maximum available resources' are, it considers what kinds of budget allocations are most blatantly not using maximum available resources, i.e. diverting money to less legitimate causes. From there it may be possible over time to close in on the 'difficult cases', such as the recent bank bail-outs. This approach would undoubtedly lend itself best to dialogue and synergy with the recent movements both in the West and in the Arab world, which have been very much focused on ill-spending of public funds.

4.3. HIERARCHY AND POLITICAL CHOICE

A third reason why economic and social rights have appeared a-politically utopian may lie in the human rights community's disinclination to reflect on the boundaries between legal obligations and democratic choices.

Protection of citizens' rights through law courts is a mechanism deeply rooted in different legal systems, going back to enlightenment thinking and even earlier practice. But the doctrine of separation of powers, which laid down the competence of courts to judge state laws and policies against a set of rights, and if necessary overturn them, was premised on the notion of an overzealous State interfering in the lives of its citizens. It did not have an under-performing or neglectful State in mind. Economic and social rights trenchantly raise the issue of how far judges can go in not just proscribing but prescribing specific policies. The right to food case in India, described

³⁰ Dowell-Jones, *op.cit.* note 19, p. 48.

above, is a case in point. The Supreme Court has gotten very hands-on indeed in telling the States how to manage food distribution.

In the case of the right to education one could go even further. Many economic and social rights lawyers would argue on the basis of the principle of ‘non-retrogression’ that if secondary or tertiary education has once been free, introduction of fees becomes a human rights violation. A judiciary panel could go along with such a decision and forbid reintroduction or raising of fees. If so, what space does that leave for democratic debate and political choice on social policies? Should the electorate not have any say in *how* to implement the right?

In order to answer these questions, it may be necessary to re-examine the idea of a hierarchy of human rights, or more accurately, a hierarchy of aspects of rights. Human rights lawyers, traumatised by the competing rights ideologies put forward in the Cold War, have generally shied away from the idea that some rights might be more imperative than others.³¹ They have hid behind the formula that all human rights are universal, indivisible and interdependent and interrelated, and posited that each of them trumps the normal cut-and-thrust of political decision-making.

Yet it is intuitive, on the basis of needs, that not all rights, or more accurately not all aspects of rights, are equally vital. Paid holidays are not as essential as food. The reluctance to barter with human rights, and particularly with economic and social rights, has laid human rights activists open to the charge of being maximalist and unrealistic, writing ‘letters to Santa Claus’.³² Yet, in practice choices are made. It is not accidental that most global civil society activity in the area of economic and social rights began with the right to food.

While much scholarly work has been carried out on defining precisely what elements of rights are ‘non-derogable’ in times of political crisis, there has been no parallel effort on economic rights. One of the most controversial questions to answer in this respect would be whether hierarchy must be established solely on the basis of need, or whether questions of cost can also play a role. Reflecting on this might be a common task not just for lawyers, but also for moral and political philosophers, as well as for the activists now invoking ‘human dignity’ as requiring a socio-economic

³¹ For an exception see: Seiderman, I., *Hierarchy in International Law: The Human Rights Dimension*. Intersentia, Antwerp, 2001.

³² Orwin, C. and Pangle, T., ‘The Philosophical Foundation of Human Rights’, in Plattner, M. F. (ed) *Human Rights in Our Time: Essays in Memory of Victor Baras*, Westview Press, Boulder, Co, 1984, p. 15

baseline. The right to health may be a particularly good test-case, as aspects of it do deal in life and death, but fulfilment can be much more costly than fulfilment of the right to food.

4.4. RIGHTS AS INSTRUMENTS OF STRUGGLE OR INSTRUMENTS OF LAW

Finally, as argued in the introduction, rights can be interpreted as legal guarantees or as moral claims. Their power lies precisely in the fact that, much of the time, they are both simultaneously. But as more actors have entered the economic and social rights arena, there is a divergence of views on what exactly a rights frame entails. Human rights lawyers typically base their rights-claims on international law, whilst social justice activists typically take a self-defined right, based on collectively identified primary needs, as their point of departure. Human rights lawyers have enjoyed bringing grassroots groups the message that they have legally defined rights, but usually prefer not to emphasise that these rights may be rather more limited than the affected communities envisage.

The anti-austerity movements on the other hand do not appear to have a clear conception of basic needs, let alone economic and social rights. The tools developed by human rights scholars could help in making such claims, provided they recognise the interconnection between political processes and law-formation.

It is questionable whether the dominant civil society practice to date, of fudging the distinction between legal rights and moral-political claims, is sustainable. Some bottom-up rights coincide with those in international law, and others, such as the ‘right to water’, were relatively easy to reconcile with it. But others have stretched the tolerance and imagination of the lawyers. This includes the ‘right to the city’,³³ envisioned by its proponents as including elements of appropriation (‘reclaiming the streets’) as well as participation in urban decision-making.³⁴ Another important area of contention is around the right to food. FIAN insists on using ‘right to food’ as its framing: ‘The political expansion of the rights-based language contains the risks for those rights, which are already legally binding, of being seen more as political

³³ Lefebvre, H., ‘Right to the City’, in Kofman, E. And Lebas, E. (eds. and translators) *Writings on Cities*, Blackwell, Oxford, 1996; Harvey, D., ‘The Right to the City’, *New Left Review*, Vol. 53, 2008.

³⁴ Brown, A. and Kristiansen, A., *Urban Policies and the Right to the City: Rights, Responsibilities and Citizenship*. UNESCO, Paris, 2009.

demands'.³⁵ But the worldwide network of peasant movements, Via Campesina, is arguing for a 'right to produce food', which would entail among other things a right to land and territory, a right to seed and traditional agricultural knowledge and practice, a right to information and agriculture technology, a right to the means of agricultural production, freedom to determine price and market for agricultural production, a right to biological diversity and a right to preserve the environment.³⁶

If such distinctions are not openly discussed and negotiated, the gaps between human rights lawyers and grassroots movements may not be bridged. Some of the old suspicions, particularly between human rights lawyers and social justice activists, that the other party are bourgeois lap-dogs or bearded revolutionaries respectively, may re-emerge.

5. CONCLUSION

Economic and social rights advocates began as a very small group. Gradually, in the 1990s, they overcame the Cold War legacies of government manipulation and rhetoric. The adoption of the economic and social rights frame by mainstream human rights and development organisations, governmental and non-governmental, may have come at the price of an excessive orientation towards global policy-makers, either very legally oriented or co-opted into development-speak.

In a few places such as South Africa, Brazil and India, the field appeared to have been thrown wide open, and new collaborations were being forged between different civil society actors, from different levels and from different fields. But economic and social rights have hardly featured in the vibrant mobilisations of 2011, and have not been able to establish themselves as a well-recognised alternative paradigm to discredited neoliberal policies.

The attractions of the economic and social rights frame are still the same: the simplicity and moral appeal of the idea that 'everyone has the right to' have their most basic needs met, the flexibility of this framework, vesting rights universally in the individual, conceptually allowing for the identification of a variety of obligation-

³⁵ Windfuhr, M. and Jonsen, J., *Food Sovereignty: Towards Democracy in Localized Food Systems*. ITDG Publishing, Rugby, 2005, p. 24.

³⁶ Edelman, M. and James, C., 'Peasants' Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come?' *Journal of Peasant Studies*, Vol. 38, No. 1, 2011, pp. 81–108.

holders beyond the State, and the – rudimentary – international legal basis for such obligations. The greatest contributions to economic and social rights have so far been made by coalitions of legal experts and grassroots activists. Such coalitions do not appear to be emerging from the latest spate of mobilisations in 2011, but it may be too early to give up hopes for convergence. Driven by a diverse, imaginative and determined set of global civil society actors, the economic and social rights frame could yet become the instrument of choice for achieving social justice in a globalised and privatised world.