場次三：專題演講
Panel III: Speech

主持人/Moderator ：黃秀端 教授
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社會經濟和文化權利之進展與政治

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壹、導論

我今天是想討論由世界人權宣言(UDHR)所衍生的兩項人權公約中，處理「經濟、社會與文化權利」（ESC）的那一項，即社會經濟與文化權利國際公約（(ICESCR)）。我將從如何定位此一公約，並在更廣泛地保障這些權利開始。進而觸及到在國家管轄內與國際體系中社會與經濟層面的不正義。讓我先來談談我指的究竟是什麼？

貳、社會與經濟上的正義

過去幾年，在我土生土長的紐西蘭以及其他地方，像是日本或是更遠的海地。重大災難的發生，突顯出人類基本需求之底線-如食物、水、避難所與衛生，也包涵了仍在發生中的，在工作、教育與家庭生活方面的不足。危難憂患之時，我們本能的注意到這些需求並採取行動。對災難地受害者，全世界的人們迅速伸出援手。（在日本震災之後，一篇報紙上的文章正描述出我們作為人類最值得一提的特徵：我們共同具有的人性。）

然而在世界的各個地方，基本需求的匱乏仍出現在許多人的日常生活之中。社會與經濟上的正義之理念始於這樣的前提，就是將這些令人難堪的貧窮、剝削與排除，視為無法接受之景象，但這些事情卻正發生在我們周遭。經濟（*oikumene*）原來的意義為家計的管理，在最寬廣的意義上，應該是要讓所有人都能滿足其基本需求並享有人類生活中的基本尊嚴；令所有人各自的潛能都應得到發展的機會。無論是在地方、國家或是國際社會，這都是我們攜手追求共善的唯一可能。

諾貝爾經濟學獎得主沈恩（Amartya Sen）在最新的一本書 *The Idea of Justice* 中提到：我們的直覺足以讓我們辨識出不正義，無論是發生在我們自身或是他人身上。除以之外，當我們面對不正義時，我們更能辨認出那些情況是可以被平復的。沈恩以此發展出一套關於正義的理論，或該說是理念；這套理論讓我們能為這些不正義建立起立即，同時也是長期的解決之道。為了讓解決之道能被接受，並經得起考驗，沈恩認為不正義的警訊必須受到具有批判性且具客觀性的檢驗。

在檢驗中，普遍的公眾討論乃是必經之路，甚至如他自己所承認地，解決不正義的方法可能不只一種。這些評估與討論必須將制度上之缺陷與行為上之失度的重大程度納入思考。

現代人權運動的誕生，足可視為對不正義之界定與尋求平復在時代中劃出一條分水嶺。1945 年的聯合國憲章與 1948 年的世界人權宣言都對二次大戰末期所發生的暴行做出回應，將之視為最極端、最徹底的不正義。但是憲章與宣言亦都是沈恩的「第二階段」之例子，是在多元聲音理性思考和反思下的結果。其不企求去平復過去-著實也作不到-但是希望設下行為的框架與準則，使這些不正義不要再次發生（如同憲章前言所提及的一般）。

某種程度上，在過去的六十年間，人權的理論和實踐有確實有所進展。其成果可見於最近的身心障礙者權利公約(CRPD ，2006)與原住民族權利宣言(DRIP，2007)。此一進展被稱之為「權利革命」(the rights revolution)。在其中，我所關注的社會與經濟正義與經社文權利扮演著重要角色。

政治哲學家邊沁的一段話，可將我適才所提及的，妥善地連結在一起。

作為人權之一環，經濟與社會權利之理念如同一種道德直覺。在這資源充足且人類知識盈滿之世界，任何人應被保證享有不虞匱乏之生活。同時，被排拒在不虞匱乏生活之外者，乃是不正義的受害者。(Beetham 1995)

參、權利的語彙

首先，關於權利的字眼通常只有一到兩個。這是因為有許多對人權奇怪的想法（這或許不符合這裡的情況，不過最好還是一開頭就先把我要談得搞清楚。）無論是對人權進行倡議，或在學者與實踐者的口中被談論，往往都只短短地用「人權」兩個字含括一切。用這兩個字代稱，各社群的使命與關懷中，各種人類權利與義務間的連結。由此所描繪出的人權圖像全然地偏向個人性的權利，個人可以透過法庭不計一切的追求權利，對大多數人來說像是諷刺漫畫的內容，但此種模式看來仍受較多人相信。接下來，我們將更詳細的去看關於經社文權利的諸多迷思。

肆、重新界定經濟、社會與文化權利

在被納入世界人權時宣言，經社文權利，至少在西方，已擁有悠久的歷史。在對抗奴隸制與為女人發聲的反歧視運動中；在國家層級的勞動相關法律，像工廠法中，或像國際勞工組織(ILO)中經社文權利亦產生影響，在公共衛生領域，則首開風氣，讓健康照顧被視為所有人的基本需求。

縱使有這段歷史、縱然被納入世界人權宣言，經社文權利在尋求作為一種「真正的權利」，尋求和公民與政治權利（CP）被平等看待時，仍步上了一條顛簸之路。可以聽聽看聯合國經濟、社會與文化權利委員會在 1993 年的維也納世界人權會議時所指出的：

> 令人吃驚的現實是…….許多國家與國際社會仍持續地對廣泛存在的經濟、社會及文化權利上之缺失視而不見。但當這些事情與公民和政治權利有關時，就會被宣告為恐怖和暴亂的體現，並因此引發立即性的行動。儘管口頭上說沒有差別，但實際效應上，對公民和政治權利之侵犯顯然地被看作更加的重大、更加的不可忍受。同時對經社文權利仍存有大量且直接的否定

有許多理由造成此不願意行動之現象：反應冷戰情勢的東西方意識形態差距，在由世界人權宣言而衍生的兩項密不可分地國際人權公約中畫出了界線，但這卻超出了原本的立意。經社文權利被畫到蘇聯的那一方。兩公約的不同說法也造成了影響。像是義務（見 ICESCR,第二條第一款）在 ICESCR 中的說法中，給人的印象是經社文權利不必立即施行。「第一代、第二代人權」的說法，也讓公民和政治權利看起來具有優先性。對經社文權利的認識往往也不是將之視為一種「真正」的權利，不是種「法律上」的權利，這讓西方律師覺得很陌生。種種理由導致經社文權利在各個層級都只享有更少的資源。其被排除在大憲章與權利法案之外，同時也甚少有關於經社文權利的法律見解。並在國際層級缺乏訴訟機制（一項關於此一程序的任擇議定書），但這些都能在對防止公民和政治權利的侵害上被運用。

在過去的 20 年中，（在各個層級）其較低的法律位階漸漸的有所提昇。著作與學說充實了經社文權利。但律師、決策者與一般大眾對其所抱持的遲疑仍未消失。所以我今天想著重在以下三個層面來消除對經社文權利的遲疑，指出各種主張的謬誤，也許將有助於改變。這三個層面是：經社文權利的定義與義務、經社文權利的可訟性以及如何在廣大地全球發展脈絡下落實經社文權利。這些問題雖然有理論上的解答，但在實踐上的落實仍有所阻礙。

伍、對權利進行定義

對經社文權利最常見的一種批評大概就是它「太含糊」，沒辦法明確的透過法庭或政策措施強制施行。它並沒有講清楚如何在作為權利持有者的個人層次上施行，也沒有說明相應的義務將由誰承擔。

但這些主張都忽略了學術界、實務界上或晚期來自法庭自身，都產出了某些重要成就足以解決前述困境。尤其是，如同其他關於經社文權利之事務，乃由聯合國所指派之經濟、社會與文化權利委員會（CESCR）監督經社文公約的執行。

從 1990 年起，委員會努力的透過兩項主要管道去實現經社文權利：對國家報告得觀察結論與一連串更廣泛基礎得的一般性意見（GCs）。但以上種種，我必須補充我十分尊重在場的律師，都並不是強制性的法律。但是這些負責進行監督或推廣公約的專家的觀點，使得一般性意見特別地具有高度說服力。

某些條文，如十分重要的第 3 號一般性意見（1990），從本質上賦予國家在公約下的義務。包含：不可迴避、對受害人採取行動與三項「核心義務」：尊重、保障與落實。其他各項則能為特定權利提供更詳盡的分析。這些典型的一般性意見，舉例來說，第 14 號關於健康權的一般性意見包涵了關於各種情況下對權利的詳細定義，例如免於歧視的主題下，包涵了其國際義務、怎樣構成侵犯、在地方層級的適用、非國家行為者的義務等等，如眼前所見的十分完整。透過汲取學院般的禪精竭虙（如「林堡宣言」、「關於侵犯經濟、社會、文化權利行為的馬斯特里赫特準則」）或實踐者與 NGOs(像是居住與反迫遷中心與國既特赦組織)，以及晚近由法庭自身，委員會能夠靠自己做出種種法律見解。

在這全球化且國家不再那麼居於中心地位的世界，一些國家之外的政治實體同樣地會在此一議題上受到關注。這些實體同樣有義務去尊重、保障並落實經社文權利，即作為所謂的權利承擔者。除此之外，國家內部的武裝團體，有時宛如另一個政府，國際組織如：是國際間的金融與貿易組織和跨國公司，也一樣被看作是能對經社文權利有所貢獻的。承襲最後一點，我們進一步可透過種種指標、基準與預算分析去發展出一套監察、評估與測量在經社文權利上之進步的方法。

以上種種努力為消解另一個關係到經社文權利之迷思建立了基礎。該項迷思為：堅持經社文權利不具有可訟性。可訟性是指能透過法庭審判或其他法律程序進行討論並加以施行。這便是我接下來所要談到的議題。

既便沒有人認真去討論法律自身是否足以引領人權進步，法律仍然是十分重要的工具。不只是律師，對許多人來說，這與如何認定「權利」是牢牢綁在一起的。當然，毋庸置疑的，透過各種由國家所簽署的國際條約，在前面所提及的歷史進程中，人權已然普遍的受到肯認。

然而爭論仍未消逝。經社文權利無法清楚地被架構，同時無法透過國內法強制施行，令經社文權利不被視為一種真實的權利。另一個理由乃是經社文權利之關懷乃是針砭社會政策和資源分配，並對行政機關、決策者以及預算制定者提出建言。對司法部門來說，將自身介入此一爭論，乃是越過了三權分立之界線。

在這裡，歷史背景同樣地造成很大的影響。如先前所提及，西方律師，早已對政治與公民權利之相關法律論據十分嫻熟（從大憲章到法官裁示）。對較不熟悉的領域卻會戒慎恐懼。前述現象，因果循環地讓經社文權利，直到晚近仍未被奉於與大憲章、權利法案並列之高位。同樣地，直到晚近，在 ICESCR 下並沒有屬於個人的訴訟機制，像是，ICCPR 於 1966 年所制定的任擇議定書所能發揮之功效。ICCPR 的監察機構，即人權委員會(HRC)已然針對進行訴訟之相關權利做

出法律見解。在各區域層級也有同樣的機制。但經社文權利卻沒有。不過近二十年來，情況漸漸轉變。

在國際上，許多新近的人權機制，像是身心障礙者權利公約(CRPD，2006) 原住民族權利宣言(DRIP，2007)都無分公民、文化、經濟、政治與社會納入所有權利。此一不可分割性與相互依賴性反應著世界人權宣言與維也納宣言之精神，並重新肯定我們應以同等地標準看待經社文權利。在 2008 年的聯合國大會中所頒布的任擇議定書使個人能根據 ICESCR 向委員會提起訴訟。此任擇議定書雖然尚未生效，卻能為此一權利的真實性進行背書。其同時也強化了經社文權利的地位與可訟性。可想而之的，更多的義務亦將隨之而生，無論是在國際或國內層次。前段所提及的委員會之細部工作，將由參與者、行動者，尤其是大型的國際 NGOs，透過倡議、透過律師、透過決策者、透過學院共同的加以實行。

在地方層級，經社文權利普遍—當然或許不是全面地—被包涵在憲法及權利法案之內。有個早期的例子就是 1948 年的印度憲法，其已將經社文權利含納在內，但僅有指導性原則。在更近期的憲法中，經社文則被納入為憲法的權利。例如 1996 年的南非憲法就是一例，其將居住權與醫療照顧納入保障（至今已有數不清的例子）。直接納入憲法的作法亦能對法庭形成鼓舞。像是南非憲法法庭就願意審理關於經社文權利之案件—比方說居住權、醫療照顧或是最新近的水權

其他司法體系也表現出類似的傾向。舉例來說，哥倫比亞憲法法庭已然對享有醫療照顧之權利做相當全面地判決。區域組織亦朝向類似方向前進。比方說社會權利歐洲委員會所審理的，*居住與反迫遷權利中心訴義大利政府案*與非洲人權及民族委員會所受理的 *SERAC and CESR 訴奈及利政府案，居住與反迫遷人類中心訴蘇丹政府*。（最近則是肯亞的案例）

有趣的是，若我們檢閱關於某些經濟與社會權利之歷史，像是工作權、佃權或教育權早已成為法庭裁定的主題。我們可以回頭去看美國的經典案例：*布朗訴托皮卡教育委員會案*(1954)，雖然許多這類侵犯經社文權利的案件是在歧視的角度下被檢視。你可以翻開國際法院紀錄和點開居住與遷徙權利中心的網站，可發現許多關於經社文權利的判例。

所以，問題不再是經社文權利是否具有可訟性，很明顯地「有」！如同我所提及的眾多案例。當下的問題是在於如何讓跳脫訴訟的外殼：那些該讓法官退場，而讓決策者、行政官員或是立法單位來接手？法院在檢查各種被詳盡說明的方案或措施時，應保留多少餘地？又該在各種資源之分配上作出多詳細的建議？

（重要案例：*: Grootboom, the TAC 案, the "engagement" 案*）

基於以上焦慮，對於那些在這條路上躊躇不前得律師與法官，我將引用英國法官 Lord Denning 在 70 年前的案例中之見解作為建議：

> 另一面又會有什麼爭論？只有這點我們無法在任何案例中尋獲解答。這樣的說法至少不會對我造成妨礙。如果我們不破除舊規，我們就無法往

任何地方前進。讓法律一成不變，令世界徒具和諧對兩者都不是好事。

陸、全球脈絡下的經社文權利

我想要回到我一開始所提的，在全球脈絡下所發生的不平等與剝削。舉例來說，海地仍然處於震災後的重建階段，我們在這看到了一個許多人受苦於極端貧困中的例子。剝削與被邊緣化將讓貧窮成為揮之不去的循環。類似的情況也出現在「開發中」國家。要如何能在這遼闊範圍中實現社會與經濟上的正義？又要如何能在這廣大脈絡中對經社文權利施以援手。這裡我們將透過交互地以論述與發展策略兩個層面來看人權。顯然的，既有的著作把這件事講得太複雜，且把主題扯得太遠。不過今天我僅會討論「國際合作及援助上」這一部份。

國際合作及援助如今皆以成為聯合國編制內的作業。其在與維和、社會正義與人權（既使字面上不這樣用）以及經濟發展相關的早期文件中早以被肯認。比方說國際勞工組織的組織章程(ILO 1919)。很明確地，在聯合國憲章的第一條第三款，亦將之納入宗旨之內。

> 促成國際合作，以解決國際間屬於經濟、社會、文化及人類福利性質之國際問題。(亦可見於 13,、55 和 56 條)

隨後的各類人權文獻亦納入此一機制：如世界人權宣言的 22 條及 28 條。ICESCR 的第一條第二款、11 及 12 條。1989 年兒童權利公約的第四條與 24 條第四款關於健康權方面的規定，並充分落實於 2006 年的身心障礙者權利公約第 32 條當中。其在條約機構的書寫下反覆出現，比方說在人權委員會、聯合國特別報告員之筆下，特別是在關於健康、居住、對婦女所施行之暴力等方面；並在聯合國的會議記錄中也反覆被提及，像是維也納宣言與 1993 年行動綱領的前言與第一條之中。

「國際合作與援助」的重要性無論在人權上或是發展方面均受到肯定，從對 1986 年發展權利宣言的爭論開始，其就變成 一項重大議題。（見 Salomon 2007; Hunt 2008)）在實踐層次，其中一項概念乃是推動發展企業，其能透過許多種方式實行：比方說透過多邊及雙邊機制：如聯合國和其他締約機構、各類援助及發展計畫、由國家直接靠自己實行或由國際組織中的成員為之，或由其他行為者，像是國際性的金融與貿易組織、跨國公司（MNEs）以及非政府組織(NGOs)，。其也被近來諸多全球性援助計畫-比方說千禧年發展目標(MDGs)-的參與者視為自身之使命。比方說目標 8 便是在提倡要「制訂促進發展的全球夥伴關係」。

但是，很明顯的可以看出，像海地這類國家，就是因為缺乏這些計畫的援助，而難以將之達成。經社文權利委員會便是在此一層面上，將國際援助及合作視為「可用資源」的一部分。第二條第一款的義務便包涵了，當有需要的時候可向「國

際尋求援助及合作」。舉例來說，在若干總結描述與一般性意見中，委員會皆鼓勵國家透過報告尋求援助並述明其需求。（見 Hunt 2008; Carmona 2009）

作為國際社會的一分子，在此，已開發國家擔當著不同地角色與責任。如同先前所提及的，大多數這些國家皆肯認在發展脈絡中，國際援助的角色，尤其是簽署了千禧年發展目標的國家。但千禧年發展目標並沒有賦予法律上的連帶責任，無疑的這將是令各國更積極任事的一項動力。這不單令人失望，更有許多學術性的意見指出，這將使朝向千禧年發展目標的發展架構與人權架構間相關努力，在兩者間長期且徹底地缺乏一統合機制，縱使這兩者間有相當多的共通之處。

但最近，有更多努力肯定且運用兩者作為互補性的議程。

已開發國家在發展架構下，可以直接透過雙邊或多邊協定進行捐助。他們同時也是國際條約體的成員，像是金融方面的國際組織如，世界銀行、國際貨幣基金（IMF）；或是貿易相關連的世界貿易組織（WTO）。或是說跨國公司的母國（或該說是註冊國）。漸漸地，尤其是透過日益增加地，關於健康、水、工作與社會安全（前面所提及地），透過深思熟慮的一般性意見，委員會利用公約第二條第一款的機制，將維護公約之權利納入在國際體系中，賦予這些已開發國家某些角色與責任。

如果一個已然簽署公約的國家，想要確實擔起捐助者的角色，其需要承擔特定義務。在其向受助者所提出的各項計畫中，無論是單獨或是有其他捐助者，至少需要詳查確認各項權利是否受到侵害，不管是因其自身或是因第三方（即尊重與保護之責任）。被界定為「核心義務」者亦必須被確保。這些計畫之施行不得帶有歧視，同時弱勢群體也不能因此處於更不利的位置。並需要充分地對協商，參與以及其他發展權利進行規定。這些計畫必須受到審視，捐助者必須承擔責任且需有公平之程序(Hunt 2008)。援助不僅是指經濟援助，也包含貿易、投資政策。同時也必須強調，這些基於捐助國而產生的援助與合作計畫，仍具有一項附帶義務，其必須對自身之人民負起最基本的責任。

委員會，以及尤其重要地，關於健康權的特別報告員，同樣必須重視這些義務國作為國際金融體系成員的角色。再次強調，這些義務乃是在保障公約中的各項權利，因此當在這些條約機構中參與決策制定或提出方案時，條約機構中的成員國必須同樣地注重前面所列的所有需求。有一份由特別報告員所書寫的文件，其乃是關於瑞典在烏干達的作為，十分完整地呈現出這些義務，作為世界銀行與 IMF 的成員，其同時也評估瑞典作為成員國之應盡責任。。

在其他地區，委員會與特別報告員同樣地注重關於貿易與投資的國際組織，其成員國之責任。舉例來說，在加拿大的觀察結論中，委員會建議該國應該重視「在貿易與投資協定中確保公約中各項權利的優先性，特別是在『北美自由貿易協定』(NAFTA)第六章所規定之關於投資者與國家間糾紛之裁定上。」(Hunt 2004) 其再次強調公約下的責任，像是健康權，WTO 的成員國必須在圍繞著「與貿易

有關之智慧財產權協定」（TRIPS）和「關稅暨貿易總協定」（GATT）的各項談判中，特別注重其決策對於開發中國家之健康權的影響。

國際性的經貿組織、WTO 與跨國公司同樣地作為被審議的主體。在所有案例中，仍持續摸索著，是否該對各種實體課以人權上之責任？而又如何納入？以及納入哪些層面？直到今時今日，是否將這些責任**直接**施加於任一個案例中，仍是個具爭議性的問題。

總而言之，直到現在，國家在各種角色中作為捐助者而行動時，國家義務的性質與範圍仍是個正在開展中問題。同時還有更大更具爭議性的問題：是否「國際社會」有義務對發展中國家的要求提供援助與合作？還是其應繫之於某些特定國家或實體，比方說聯合國及其相關機構、國際經貿組織與區域性組織？

換句話說，實際上到底誰具有這些義務，誰是義務的「承擔者」？就像康德被沈恩所沿用的概念：「不完全責任」。究竟是誰必須伸出援手，而又必須作到什麼地步？(Sen 2009)究竟是所有有錢的國家亦或是少數特定富國？既使在此一脈絡下，即這篇文章所提及的發展脈絡，對各國來說，援助有一個較為明確之目標，像是 GDP 的 0.7%。（千禧年發展目標 8，第 32 號目標），此一指標仍然僅有建議性質。委員會也在若干觀察結論中承認這一點。(Carmona 2009; Hunt 2008)但既使委員會不再將之視為是種**義務**。然而某些國家仍然準備接受將此一目標作為自身之義務，比方說加拿大(cited in Carmona 2009, note 57)跟德國。但有些國家，像是瑞典雖然已達成此一標準，但仍不願意將之視為義務。最可行的或許就是，將**必須採取步驟往此一目標邁進**視**為一種義務。**

柒、結論

最後一段或許聽起來只是理論，同時十分複雜。但我的目的是在於展示我們如何能在全球脈絡中去發展、應用現存的理論與法律架構去促進經社文權利之實現。這需要求國家與其他實體為其所扮演的各種角色負起某些特殊的政治承諾，無論是在貿易談判中、在金融磋商中、在援助方案的設計與施行中。這項政治承諾尚未被滿足，尤其是在這經濟衰退之時。但我們也必須記住對於某些人或某些群體來說，這個時機並非他們所經歷最惡劣的時刻。同時我們在維護人權上的努力必須直接地去對此一處境，力求改變。

但我們不應該忘記，這些在國內層次或許可以更容易達成-但這仍需面對政治上的抗拒與種種急迫的需求。如同本文一開始所提到的，有太多的事情要做了：要透過憲法來保障經社文權利？或至少透過法律？法院是否願意正視這些浮現中的議題？任何方案，像是健康照顧或教育，是否平等的開放給被邊緣化的社會群體，例如原住民或是新移民？這不只是不平等的世界也是貧富不均的社會，唯有承認與實現這些在 ICESCR 的經社文權利才可能產生改變。

經濟、社會與文化權利

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作為人權之一環，經濟與社會權利之理念如同一種道德直覺。在這資源充足且人類知識盈滿之世界，任何人應被保證享有不虞匱乏之生活。同時，被排拒在不虞匱乏生活之外者，乃是不正義的受害者。

D.Beetham, *What Future for Economic and Social Rights?* 43 Political Studies Special Issue, 1995

壹、社會、經濟和文化權利之源頭

任何形式的差別待遇—提倡反對奴役以及女性運動。

勞動人權：工業革命、工廠法（the Factories Acts）與聯合國國際勞工組織（ILO）

公共衛生與福利國家：”醫療照顧權利”之起源

貳、國際法中的框架

聯合國憲章（1945）

世界人權宣言（UDHR，1948）

人權世界會議之維也納宣言與行動綱領（1993 年 6 月 14-25 日制訂，1993 年 7 月 2 日施行）

所有人權皆是普世、不可分割且交相支撐並互相關連的（維也納宣言第五條）

參、社會經濟與文化權利是「第二階段」嗎？綜觀 1948 到 1990 年間的發展

經濟、社會與文化權利國際公約(ICESCR, 1966)

第二條第一款：

每一締約國家承擔*盡最大能力*個別*採取步驟*或*經由國際援助和合作*，特別是經濟和技術方面的援助和合作，採取步驟，以便用一切適當方法，

尤其包括用立法方法，*逐漸達到*本公約中所承認的權利的充分實現。（斜體為作者自行加入）

【cf：經濟、社會與文化權利國際公約(ICESCR, 1966)第二條第一款】

某些關於社會經濟與文化權利的迷思

不是真正的權利，僅是法律上的權利

「第 X 代人權 」 的說法表示其居於次要地位

'Positive' as opposed to 'negative' rights.

相對於消極權利的積極權利。

歷史因緣造成其在發展歷程與結果上有所不同

並沒有被納入大憲章與權利法案，故相關法律見解較少。

缺乏個人申訴的機制。

在各個層級，可援引的資源均較少。

肆、重新宣告社會經濟與文化權利乃是一種「真正的權利」

一、定義何謂權利

聯合國社會、經濟與文化權利委員會

過程：第 3 號一般性意見：遞約國義務

相關權利的例子：一般性意見 14 號-健康權

一般性意見 15 號-水權

一般性意見 18 號-工作權

一般性意見 20 號-禁止歧視

消除對婦女一切形式歧視公約(1979)

兒童權利公約(1989)

身心障礙者權利公約(2006)

原住民族權利宣言(2007)

社會經濟與與文化權利正在發展中的法律見解

(1)不可分割的概念

(2)最低核心義務見第 3 號一般性意見

(3)有層次地達成：尊重、保障與落實

(4)指標與基準

(5)行為上的義務與其結果

(6)裁量餘地原則（審慎斟酌）

(7)侵權分析法

(8)預算分析

在經濟、社會與文化權利國際中公約中的林堡原則
（見 http://www2.law.uu.n/enlish/sim/instr/limburg/asp）

關於侵犯經濟、社會、文化權利行為的馬斯特里赫特準則（1997）

非國家行為者的責任

舉例來說：跨國公司、國際經融機構（世界銀行與國際貨幣基金組織）;世界貿易組織（WTO）、武裝叛亂團體

聯合國網站：www.un.org; www.ohcr.org; <www2.ohchr.org/English/bodies/cescr>

國際勞工組織：www.ilo.int

國際特赦組織：http://www.amnesty.org/

居住與遷徙權利中心(COHRE)　www.cohre.org

商業人權資源中心 http://www.business-humanrights.org

二、經濟社會與文化權利的可訟性

社會經濟與文化權利國際公約任擇議定書。 聯合國大會決議，A/RES/63/117, 2008

南非政府等訴 *Grootboom 等人案*

南非憲法法庭，案件 Case CCT 11/00, (2001)1 SA 46 (可見於 online at www.concourt.gov.za/)

南非衛生署等訴治療行動運動等案，南非憲法法庭案件，CCT8/02, Judgment of 5 July 2002.

Mazibuko 等訴約翰尼斯堡市案（Phiri 地區的水權案）

南非憲法法庭案件 CCT 39/09, 2009（可見於南非憲法法庭與 *Occupiers of 51*

佔領 *51 Olivia Road 訴約翰尼斯堡*[2008] ZACC 1 – see (2008) 8 HRLR 703

Joe Slovo 社區居民訴 Thubelisha Homes 等(2010) – see (2010) 10 HRLR 360

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居住與牽徙人類中心訴蘇丹政府（9/7/2010, 非洲人權委員會）(可見於居住與牽徙人類中心網站）

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可訟性的經驗比較 ICJ, 2008

伍、經濟、社會與文化權利，貧窮與發展

聯合國憲章(1945)：前言

> 聯合國憲章第一條第三款，三、促進國際合作，以解決國際間屬於經濟、社會、文化、及人類福利性質之國際問題，且不分種族、性別、語言、或宗教，增進並激勵對於全體人類之權及基本自由之尊重。

發展權宣言（1986）

聯合國千禧年目標（並見於 2000 年聯合國千禧年會議之千禧年宣言）可見於 http:// www.undp.org/mdg/

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Progress and Politics in the Fulfillment of Economic, Social and Cultural Rights

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I. Introduction

My brief for today was to discuss the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two Covenants deriving from the Universal Declaration of Human Rights (UDHR), and the one which deals with economic, social and cultural (ESC) rights. I want to begin however by placing the Covenant and the rights it protects in a wider context, in addressing questions of social and economic injustice, both at home in a domestic jurisdiction and globally in the international family of nations. Let me illustrate what I mean here.

II. Social and economic justice

This past year, both in my native New Zealand and elsewhere, in Japan or, if we go further back, in Haiti, events have occurred which have brought into sharp relief the rockbottom importance of basic human needs – to food, water, shelter, sanitation, as well as the ongoing effects which lack of these can mean for work, education and family life. In times of crisis and confusion such as these, we recognize and respond instinctively to such needs – and in all these cases people all over the world have rushed to help. (A newspaper article after the Japan quake described this as one of the most attractive features of our being human, our common humanity).

But in societies all around the world there are people suffering the neglect of these basic needs on a daily basis. The idea of social and economic justice begins from the premise that this situation - the scandal of poverty, deprivation, exclusion which we see all around us – that this situation is unacceptable; that the *oikumene,* the ordering of the household of the state, economics in its broadest sense, should be such that all have access to these basic needs and thus to a life of human dignity; that all should have the chance to develop, each to their own potential. This is only possible

in a community working together for the common good, whether it be a local group, a state or the international community of nations.

Amartya Sen, the Nobel prize winning economist, in his recent book *The Idea of Justice*, argues that we can all instinctively recognize instances of injustice, either to ourselves or to others, when we are faced with them, and, moreover, recognize instances where such injustice can be seen to be remediable. Sen then develops a theory, or perhaps an idea, of justice, which can lead to constructing both immediate but also long term solutions to remedy such injustices. For such solutions to be acceptable and durable, Sen argues, these signals of injustice must then be critically and objectively examined: genuine public discussion is needed, even though, as he acknowledges, in the end, there may turn out to be more than one way in which such injustices may be resolved. Such assessment and discussion must include a consideration of the importance of both institutional shortcomings and behavioural transgressions (that is,…).

It can be argued that it was precisely in such a watershed moment of identifying and then seeking to remedy perceived injustice, that the modern human rights movement was born. Both the Charter of the United Nations in 1945 and the following 1948 UDHR were a response to the atrocities, the ultimate fundamental injustices, revealed at the end of WWII. But the Charter and the UDHR were also an example of Sen's next stage, the result of reasoned reflection from a plurality of voices. They were not intended to remedy the past – that could not be done – but to set up structures and guide behaviour so that such injustices should not occur again (as noted in the Preamble to the Charter).

The same is true of the raft of subsequent developments of human rights theory and practice in the six decades since, right through to the recent Convention on the Rights of Persons with Disabilities (2006 CRPD) and the Declaration on the Rights of Indigenous peoples (2007 DRIP), in what has been called "the rights revolution", within which I will focus on social and economic justice and the role that ESC rights can play to bring that about.

The links I have been seeking to make here are nicely brought together by political philosopher, David Beetham:

The idea of economic and social rights as human rights expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these are the victims of a fundamental injustice. (Beetham 1995)

III. A word about rights

But first, just a word or two about rights in general. And this only because there are so many odd ideas around about human rights (that may not be the case here, of course, but it is good to make it clear at the outset what I am talking about). When human rights advocates and academics and practitioners speak of human rights they are using shorthand: "human rights" stands for a nexus of human rights and obligations, within a web of community commitment and concern. The picture of human rights as totally individualistic, pursued at all costs and everyone else's expense through the courts, would be recognized by most people as a caricature – but some such model seems to be still what many believe. We will look at some other myths about ESC rights specifically in a moment.

IV. Reclaiming Economic, Social and Cultural Rights

Already by the time of their inclusion in the UDHR, ESC rights had a long history, at least in the West: in the anti-discrimination campaigns against slavery and for women's rights; in labour laws, both nationally, such as in the Factories Acts, and internationally, through the International Labour organization (ILO); in public health initiatives which lead to recognition of the need for health care for all.

But despite this history, despite their inclusion in the UDHR, ESC rights have had a rocky road to acceptance as 'real rights', as equally recognizable and important as civil and political (CP) rights. Hear the complaint of the UN Committee on Economic, Social and Cultural Rights to the Vienna World Conference on Human Rights in 1993:

> [t]he shocking reality [is]…that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights, which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights…

There are a number of reasons for this reluctance: West/East ideological differences reflected in the Cold War, leading to the drawing up of two binding Covenants from the UDHR, rather than the one which was originally intended, and the identification of ESC rights with the Soviet Bloc; the different language of these

two Covenants, as regards obligations (see ICESCR, Art. 2(1)), with the language of the ICESCR giving rise to the perception that ESC rights need not be implemented immediately; the use of terms like "first and second generation", which suggest a priority for CP rights ; the perception that ESC rights are not 'real' rights, not 'legal' rights, they being less familiar to Western lawyers. All of these reasons led to less resources being devoted to ESC rights at any level, to their exclusion from Constitutions or Bills of Rights and so to there being a less well developed jurisprudence on ESC rights; and to the lack of a complaint mechanism at the international level (an Optional Protocol process) such as has long been available for breach of CP rights.

In the last two decades this position of lower status (if any status at all) has been gradually improving. Books are written and courses taught, devoted entirely to ESC rights. But still scepticism remains, amongst lawyers, policy makers and the public generally. So I want to concentrate today on three areas where in particular I think that the removal of such skepticism, the exposing of the falseness of the underlying arguments, might help to make a difference. Those three areas are: the definition of ESC rights and obligations; the justiciability of ESC rights; and the fulfillment of ESC rights in the wider global development context, where theory now offers solutions but practice continues to prevent their realization

1. Defining Rights

One of the criticisms leveled against ESC rights has been that they are too 'vague', not able to be clarified sufficiently to be enforced through the courts or to ground policy initiatives. Nor, it is argued, is it at all clear how these rights can be held or exercised by individuals (who are the 'rights-holders') nor on whom the corresponding obligations would lie, that is who the 'duty-bearers' would be.

But this is to ignore the considerable work which has been done to resolve these difficulties, by academics, by practitioners, latterly by the courts themselves. Especially in this, as in other matters concerning ESC rights, a leading role has been taken by the UN committee appointed to oversee the ICESCR, the CESCR. Since 1990 this Committee has worked diligently through the two main methods available to it, Concluding Observations on State party reports and a series of more broadly based General Comments (GCs). None of these, I should add in deference to the lawyers present, is binding law; but as the views of an expert body charged with the oversight and promotion of this Covenant, the GCs in particular are highly persuasive.

Some are procedural, such as the important GC 3 (1990), on the nature of states parties' obligations under the Covenant, including non-regression, action for the most

vulnerable, 'core obligations', the three - fold obligation to respect, protect, fulfill. Others are devoted to a detailed analysis of a particular right. Thus a typical GC, for example GC 14 on the right to health, includes such matters as a detailed definition of the right in various circumstances; topics such as non-discrimination, and the right as applicable to particular groups; the obligations of states, including their international obligations; what constitutes a violation of the right; implementation measures at the local level; the obligations of actors other than states – pretty comprehensive as you can see. Through these the Committee has built up a 'jurisprudence' of its own, which has been taken up and elaborated by academics (see Limburg, Maarstricht), practitioners and NGOs (e.g. COHRE, AI) and latterly by the courts.

In this globalised and less state- centric world, considerable attention is now also being paid to identifying those entities, besides the state, which might also have obligations to respect, protect or fulfill an ESC right: that is what other duty-bearers there might be. Besides the State, these might include armed groups, which are sometimes effectively alternative governments, international organizations, such as international financial and trade organizations, and MNEs. A lot of work has also been done on considering what might be meant by "available resources" which can devoted to ESC rights. In connection with this last point, advances have also been made in developing ways of monitoring, evaluating and measuring progress in the promotion and protection of ESC rights, through indicators, benchmarks and budget analyses.

All this work has laid the foundations for disabusing another bogey or myth associated with ESC rights, the insistence that they are not justiciable, that is able to be argued in and enforced through the proceedings of a court or other tribunal. It is to this issue that I now turn.

2. Justiciability

While no-one would seriously argue that the law is enough on its own to advance the cause of human rights, it nevertheless remains a very important tool. For many, and not just for lawyers, it is closely tied to the identification of a 'right'. Of course, it is true that human rights are now firmly recognized in international law through the treaties which states have ratified and the processes described above.

But the argument has been, and is still commonly made, that ESC rights are not really rights because they cannot be clearly articulated and thus enforced in a domestic court of law. A second reason given is that ESC rights are concerned with questions of social policy and resource allocation and that these are the domain of the executive and the policy makers and budget setters who advise them. That for judges

to involve themselves in these decisions would cross the line which demarcates the constitutional separation of powers.

The historical background has been important here too: as mentioned earlier, Western lawyers, while long familiar with arguing for CP rights in the courts (from Magna Carta to the Judges' Rules), have been wary of less familiar territory. As both consequence and cause, ESC rights have not, until recently, been enshrined in Constitutions or Bills of Rights; nor, again until recently, has there been an individual complaint mechanism attached to the ICESCR, an Optional Protocol, such as has been available for CP rights since 1966. The monitoring body of the ICCPR, the Human Rights Committee (HRC), has built up a body of jurisprudence around those rights. The same is true of the various regional mechanisms. But not for ESC rights. But in the last two decades this has all gradually changed.

At the international level, more recent human rights instruments, such as the CRPD and the DRIP, have included all rights without distinction, civil, cultural, economic, political and social. The indivisibility and interdependence reflected in the UDHR and the Vienna Declaration are thus re-affirmed and with them, of course, the equal standing of ESC rights. In 2008 the UN General Assembly adopted an Optional Protocol (OP) to the ICESCR, which allows an individual complaint for breach of ESC rights to the CESCR. This OP, though not yet in force, likewise makes a statement about the reality of these rights. It also strengthens the status and justiciability of ESC rights, and the obligations which are their corollary, both at the international and consequently at the domestic level as well. And the careful work of the CESCR, described in the previous section, has been taken up by practitioners and activists, particularly in larger NGOs, by advocates and lawyers, by policy makers and by academics.

At the local level, ESC rights are now commonly – though perhaps not yet routinely – included in Constitutions and in Bills of Rights. There was an early example as a precedent in the Indian Constitution of 1948, where ESC rights were included, but only as Directive Principles. In more recent constitutions, ESC rights are included as fully-fledged rights. Thus, for example the South African Constitution of 1996 protects a number of ESC rights, including those to housing and healthcare. (There are now numerous other examples). Such direct incorporation has encouraged courts, such as the South African Constitutional Court, to be willing to adjudicate ESC rights, such as housing, healthcare and, more recently, access to water. (*Refer to cases here).*

The same willingness is apparent in other jurisdictions. For example, the Colombian Constitutional Court has delivered a comprehensive judgment on the right

to healthcare. A similar willingness is apparent in regional forums: for example, *COHRE* v *Italy* in the European Committee on Social Rights and *SERAC and CESR* v *Nigeria* and *COHRE* v *Sudan*, both from the African Commission on Human and Peoples' Rights. (*Recent Kenyan case*).

What is interesting is that, when we come to look at the record, cases concerning some economic and social rights, such as work rights, tenancy rights or the right to education, have long been the subject of court determinations. We could go right back to the US seminal case of *Brown* v *Board of Education* in 1954/5, although many of these earlier cases approach the violation of ESC rights through the lens of discrimination. You can now go to books (ICJ) and websites (COHRE) and find there documented hundreds of cases in which ESC rights are adjudicated.

So, the question is no longer whether ESC rights are or can be justiciable. They clearly are and can. As many of these cases I have mentioned attest, the question now is rather how we nut out the contours and limits of that justiciability: where does the work of the judge end and that of the policy maker and the administrator – or the legislator - take over? How far should a court retain oversight of any programme or instruction which it may have specified? How detailed should the court's recommendations be as to the allocation of resources? (*Outline examples here: Grootboom, the TAC case, the "engagement" cases).*

And to those anxious counsel and judges who are hesitant to even begin to move in this direction I would offer the advice of Lord Denning from a case some 70 years ago:

> "And what is the argument for the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both".
>
> (*Packer* v *Packer* [1953] 2AllER 127, 129).

V. ESC rights in the wider global context

I would like now to take us back to the beginning of this presentation and to the broader global context of inequality and deprivation. For example, Haiti is still trying to even begin to re-build after the earthquake there: here we have an example of a society where many are mired in extreme poverty, caught in a poverty cycle of deprivation and marginalization. A similar situation can be found in many

'developing' countries. How might social and economic justice be achieved in this wider forum and how might the idea of ESC rights be of assistance in this broader context? Here we are concerned with the intersection of human rights with the discourse and methods of development. Obviously there are books – libraries – written here too on a complex and fast moving subject. But today I want to pick up just one aspect of it, the concept of 'international cooperation and assistance'.

This concept of international cooperation and assistance is now well established in both the standard-setting and work of the United Nations. It had been recognized as a necessary component in earlier documents which acknowledged the links between peace-making, social justice, human rights (even if not then so named) and economic development, for example in the Constitution of the International Labour Organisation (ILO 1919). It is crucially embedded in the Charter of the United Nations in Article 1(3), where the purposes of the United Nations include

> "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character," (see also articles 13, 55 and 56).

This articulation is followed by its incorporation into various human rights documents: from the UDHR, in Articles 22 and 28; the ICESCR, in Articles 1(2), 11 and 12; the Convention on the Rights of the Child (1989), in Articles 4 and 24(4) in relation to the right to health; to very fully in Article 32 of the Convention on the Rights of Persons with Disabilities (2006). It reappears in the writings of the Treaty Bodies, as for example of the Human Rights Committee, of the UN Special Rapporteurs, especially those on health, housing and violence against women, and in the records of UN meetings, such as the Vienna Declaration and Programme of Action (1993), in the Preamble and Article 1.

The importance of 'international cooperation and assistance' is also recognized in the crossover between human rights and development, beginning with the controversial Declaration on the Right to Development (1986), where it is a major theme (see Salomon 2007; Hunt 2008). It is in fact one of the concepts which drives the development enterprise, demonstrated in many ways, both multilaterally and bilaterally: by the UN and other international bodies, in aid and development programmes, by States themselves directly and by their membership of other international organisations and by other entities/actors, such as international financial and trade institutions, multinational corporations (MNEs) and non-governmental organizations (NGOs). And it underpins the most recent commitment of many of these players to the task of mutual global support, the 2000 Millenium Development Goals (MDGs), particularly Goal 8, which calls for the "creation of a global

partnership for development".

But as the example of Haiti makes clear, there are states which are simply not in a position without assistance to plan for these goals, let alone achieve them. This is where the CESCR has utilized the concept of international assistance and cooperation, recognizing these as part of the 'available resources' of that state. The obligations created by Article 2(1) thus include that of seeking such assistance from other states or from the 'international community' as a whole, when it is needed. Thus, for example in a number of its Concluding Observations and General Comments, the Committee has encouraged states to seek such assistance and to identify such needs in their reports (see Hunt 2008; Carmona 2009).

Meanwhile, more developed states are seen to have different roles and responsibilities as part of the network of the international community. As noted above, most of these states have recognized a role of international assistance in the development context, particularly in their signing on to the MDGs, which in general have a dual domestic/international focus, especially when MDG 8 is factored in. But the MDGs make no pretence to create legally binding obligations, which no doubt was a factor in their enthusiastic take –up. It has been disappointing and the subject of much adverse academic comment that there was for a long while an almost total lack of co-ordination between work towards the MDGs and the human rights framework, despite a considerable amount of commonality in substance. For it can be argued that the work of both can be greatly advanced by any linkage.

But in fact more recently there have been more efforts to recognize and implement a complementary agenda (Carmona 2009).

Developed states play a number of roles within this development framework: they can be direct donors, in a bilateral or a multilateral context; they are also members of international bodies, financial (IFIs), such as the World Bank and the International Monetary Fund (IMF), and trade-related, such as the World Trade Organisation (WTO); they are also often the host (that is, the registration) state for multinational enterprises (MNEs). Gradually, especially through its increasingly elaborate General Comments on health, water, work, social security (mentioned earlier), the Committee has grafted on to these roles the requirement of upholding the rights set out in the Covenant in each of those international contexts, through the mechanism of Article 2(1).

Thus if a state is already fulfilling a role as a donor and has ratified the Covenant, it has certain obligations. In its programmes with receiving states, whether alone or with other donors, it is required to see that, at the very least, rights are not infringed, either by itself or by third parties (duties to respect and protect) and that identified

'core obligations' are upheld; that programmes are administered without discrimination and vulnerable groups not disadvantaged; that there is ample provision for consultation, participation and other 'development' rights; that programmes are monitored, donors accountable and rules of procedural fairness observed (see Hunt 2008). The assistance provided should not be limited to financial assistance but include, for example, trade and investment policies. It should be stressed that the obligation of assistance and cooperation resting on donor states remains a subsidiary obligation, with the primary duty to its people remaining with the state itself (see GCs 1, 2 and 3, 1990 and Hunt 2008).

The Committee, and especially the first Special Rapporteur on the Right to Health, have also considered the obligations of states in their role as members of international financial institutions. Here again these obligations are to uphold Covenant rights and therefore state representatives on those bodies must likewise observe all the requirements listed above, when contributing to decision-making in the planning and carrying out of the programmes of those bodies. One of the fullest expressions of these duties in this context is documented in the Special Rapporteur's report where, in relation to the aid programmes which Sweden has undertaken in Uganda, he also undertook a mission to the World Bank and the IMF to assess Sweden's responsibilities as a member of those bodies (Hunt 2008).

Another area where both the Committee and the Special Rapporteur have again drawn attention to the responsibilities of states as members of international organisations is that of international trade and investment. For example, in its Concluding Observations on Canada, the Committee recommended that the state party consider "ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-State disputes under chapter XI of the North American Free Trade Agreement (NAFTA). The Special Rapporteur in 2003 undertook a mission to the World Trade Organisation. In his report on this mission (Hunt 2004), he highlighted again the duties under the Covenant, as regards the right to health, of WTO member states, stressing especially their responsibility to consider the effects of their decisions on the right to health in developing states in negotiations around the TRIPS and GATT agreements.

The roles and human rights responsibilities of other actors in these processes, the IFIs, the WTO and MNEs, have also been subject to scrutiny. In all these cases, there is a continuing exploration of whether, how and to what extent these various entities might incur human rights responsibilities. In each of these cases, however, at the present time, the attaching of such responsibilities **directly** is still problematic and

contested**.**

In summary then, at present, the question of the nature and extent of a State's obligations when it is acting as a donor in any of these various roles is still developing. Even more problematic is this broader question: if the 'international community' has an obligation to provide international assistance and cooperation at the request of a developing state, just how is that to be sheeted home to particular states or other entities, such as the UN and its agencies, the IFIs or regional groupings?

In other words, just who has these obligations, who are the 'duty bearers', in concrete terms? They are, as Amartya Sen describes, following Kant, "imperfect obligations", addressed to anyone who is in a position to help and to which a certain amount of ambiguity will necessarily be attached (Sen 2009). Do they rest then on all rich countries, or any particular rich country? Even in a context, in this case a development context, where a specific target of aid assistance is recommended for each state, as for example a target of 0.7% of GDP (MDG 8, target 32), such a target is seen only as a recommended guide. The Committee has so recognized it in a number of its Concluding Observations (see Carmona 2009; Hunt 2008). But even the Committee has stopped short of seeing this as an **obligation**. There are some indications that some states, Canada (cited in Carmona 2009, note 57) and Germany, for example, might be prepared to accept this target as obligatory. But even a state such as Sweden, which is already in fact meeting this figure, is reluctant to accept an obligation here. The most that can probably be claimed is that there is **an obligation to take steps towards** such a target.

VI. Conclusion

This last section in particular may all sound very theoretical and complicated. But my purpose here has been to show that there are now theoretical, legal structures which can be developed and implemented to advance ESC rights in the global context. What is now required is some real political commitment by states, in all their various roles, and by other entities, in trade talks, in financial dealings, in aid design and delivery. It is this political commitment which is lacking, especially in difficult recessionary times like now. But we might remember that for some people and some groups, these times are no worse than those they experience all the time. And it is to working to change those circumstances that our human rights efforts must be directed.

But we should not forget either where that can be perhaps more easily done – but where it is also politically resisted and urgently required – on the domestic level. As the first part of this presentation suggests, there is much to be done here as well: are

ESC rights constitutionally protected or at least by legislation? Are the courts knowledgeable about the issues raised? Are any protections which are available, equally available to marginalized groups in society, such as indigenous people or migrants, as regards, for example, health-care or education? For it is not only in an unequal world but in prosperous but unequal societies, that the full recognition and fulfillment of the rights enshrined in the ICESCR can effect change.

Economic, Social and Cultural (ESC) Rights

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The idea of economic and social rights as human rights expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these are the victims of a fundamental injustice.

D.Beetham, *What Future for Economic and Social Rights?* 43 Political Studies Special Issue, 1995

I. The Origins of ESC Rights

Early approaches to discrimination – campaigns against slavery, the 'women's movement.

Labour rights: the industrial revolution, the Factories Acts, the International Labour Organization (ILO)

Public health and the welfare state: the origins of a 'right to healthcare'

II. The International Legal Framework

Charter of the United Nations (1945)

Universal Declaration of Human Rights (UDHR, 1948)

Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, Adopted12 July 1993

All human rights are universal, indivisible and interdependent and interrelated (Vienna Article 5)

III. Are ESC rights "second class"? an overview from 1948 to 1990

International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)

Article 2(1):

Each state party to the present Covenant undertakes *to take steps*, individually and *through international assistance and cooperation*, especially economic and technical, to *the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant, by all appropriate means, including particularly the adoption of legislative measures (italics added).

[Cf. International Covenant on Civil and Political Rights (1966), Article 2(1)]

Some myths about esc rights

Not 'real', that is legal rights

'Generations' language suggests inferiority;

'Positive' as opposed to 'negative' rights.

Consequential historical differences in approach and outcome

Not included in Constitutions or Bills of Rights and so less jurisprudence

No individual complaint mechanism

Less resources at all levels

IV. Reclaiming ESC rights as "real rights"

1. Defining Rights

UN Committee on Economic, Social and Cultural Rights (CESCR)

Process: General Comment 3 – on the Nature of State Parties' Obligations

Examples of Rights: General Comment 14 – on the right to health

General Comment 15 – on the right to water

General Comment 18 - on the right to work

General Comment 20 – on non-discrimination

Convention on the Elimination of all Forms of Discrimination against Women (1979)

Convention on the Rights of the Child (1989)

Convention on the Rights of Persons with Disabilities (2006)

Declaration on the Rights of Indigenous Peoples (2007)

The developing jurisprudence on esc rights

(1) the concept of indivisibility

(2) the concept of the 'minimum core content' (see GC 3)

(3) the multi-layered approach – to respect, protect, fulfil

(4) indicators and benchmarks

(5) obligations of conduct and result

(6) the 'margin of appreciation' (discretion)

(7) a 'violations approach'

(8) budget analyses

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) (see http://www2.law.uu.n/enlish/sim/instr/limburg/asp)

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) (see http://www1.umn.edu/humanrts/instrec/Maastrichtguidelines_html)

The liability of non-state actors

For example: MNEs; IFIs (The World Bank and the IMF); the WTO : armed opposition groups

UN sites: www.un.org; www.ohchr.org; <www2.ohchr.org/English/bodies/cescr>

International Labour Organisation www.ilo.int

Amnesty International http://www.amnesty.org/

Centre on Housing Rights and Evictions (COHRE) www.cohre.org

Business and Human Rights Resource Centre http://www.business-humanrights.org

2. The Justiciability of ESC Rights

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights**,** GA Resolution, A/RES/63/117, 2008

Government of the Republic of South Africa et al v Grootboom and Others, Constitutional Court of South Africa, Case CCT 11/00, (2001)1 SA 46 (available online at www.concourt.gov.za/)

Minister for Health et al v Treatment Action Campaign et al, Constitutional Court of South Africa, Case CCT8/02, Judgment of 5 July 2002.

Mazibuko and others v City of Johannnesburg (the Phiri right to water case):

Case CCT 39/09, 2009 (in the Constitutional Court see site above and the COHRE site)

Occupiers of 51 Olivia Road v *City of Johannesburg* [2008] ZACC 1 – see (2008) 8 HRLR 703

Residents of Joe Slovo Community v Thubelisha Homes et al (2010) – see (2010) 10 HRLR 360

Colombian Constitutional Court, Decision T-760/2008, 31/7/2008

COHRE v Italy Complaint No. 58/2009, Decision 25/06/2010, European Committee on Social Rights

SERAC and CESR v *Nigeria*, African Commission on Human and Peoples' Rights (Comm. No 155/96, 2001)

COHRE v Sudan (29/7/2010, African Commission on Human and Peoples' Rights (see COHRE website)

Brown v *Board of Education* (1954)347 U.S 483: (1955)349 U.S 294

COHRE (2003) "*Litigating economic, social and cultural rights: achievements, challenges and strategies*

Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experiences of justiciability, ICJ, 2008

V. ESC Rights, Poverty and Development

Charter of the United Nations (1945) Preamble

Article 1(3): to achieve international cooperation in solving international problems of an economic, social, cultural cult or humanitarian character

Declaration on the Right to Development (1986)

The Millennium Development Goals [and see Millennium Declaration, Millennium Assembly of the UN, 2000]. See http:// www.undp.org/mdg/

UNDP, *Human Development Report 2000: Human Rights and Human Development* (UNDP 2000)

"In Larger Freedom: towards development security and human rights for all",

Report of the Secretary General, UNDoc.A/59/2005

Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Paul Hunt; Addendum: Missions to the World Bank and the International Monetary Fund in Washington D.C. (20 October 2006) and Uganda (4 -7 February 2007), A/HRC/7/11/Add.2, 5 March 2008.

A.Sen, *Development as Freedom*, (Oxford, 1999); *The Idea of Justice*, (Oxford, 2009)

T.W.Pogge (ed.), *Freedom from poverty as a human right; who owes what to the poor?* (OUP, 2007)

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M.S Carmona, "The Obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights: A possible entry point to a human-rights based approach to Millenium Development Goal 8", Int. J. of HR. 13(1), 2009

Further reading

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A.Chapman and S.Russell (eds.) *Core Obligations: Building a framework for economic, social and cultural rights* (Intersentia 2002)

M.Ssenyonjo *Economic, Social and Cultural Rights in International Law (*OUP 2009)

M.Langford (ed.) *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (CUP 2008)