The Ambiguity of Indivisibility

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This paper will outline in broad contours three interrelated questions. The first two are quite general: “Has the global consensus on human rights changed?” and “Was there ever a consensus?” The third question, related to the first two, is more specific: “What are the implications of ambiguity across different generations of human rights?” These are challenging questions, and answering them in any meaningful way requires a historical perspective that reaches back to the beginnings of the contemporary, post-World War II international human rights order created under the auspices of the United Nations – the various declarations, treaties, and monitoring regimes that have been developing since the founding of the UN in 1945. On the surface, one might conclude that the existence of core norms and institutions – the Universal Declaration, the two International Covenants, and a host of other core treaties and their monitoring and petition mechanisms – denotes one form of consensus. These treaties and institutions were drafted through sometimes-intense negotiation processes that included input from nearly every country in the world. On average, each of the major human rights treaties enjoys the support of overwhelming numbers of UN member states. Nearly every member state has gone through at least one round of the Human Rights Council’s Universal Periodic Review mechanism. Indeed, on these terms, the international community has come a very long way since the two Covenants entered into force in 1976, with a paltry 35 ratifications each\(^2\) – an outcome that took ten years to achieve from the time they were adopted by the General Assembly in December 1966.

Conceptually, in 1993 – forty-five years after the adoption of the Universal Declaration by the UN General Assembly – the international community declared that all human rights “universal, indivisible and interdependent and interrelated” – a now familiar and ubiquitous mantra reaffirmed dozens of times per year in resolutions by numerous international and regional organizations, NGOs, and scholars and writers. Judging by the sheer number of appearances of this phrase, one might surmise that on these matters, there is also consensus. The notion that human rights are

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2 This represented only 23% of the UN member-states in 1976.
indivisible is anchored in the structure and form of the Universal Declaration itself – a unified catalogue of political, civil, economic, social and cultural rights that represents an organic whole. The term “indivisibility” arose as a tonic to the fact of two separate Covenants: that despite the division of the UDHR’s organic unity into separate treaty regimes, the two categories are fundamentally equal and inseparable from one another.

If one explores the antecedents to the Universal Declaration – draft proposals and actual bills of rights that were developed during World War II and the early years of the UN, some with antecedent roots stretching back to the 1920s – one notices that core economic and social rights were nearly always included in any catalogue of basic or fundamental rights. Upon its founding in 1946, the Commission on Human Rights was tasked with drafting an “international bill of rights,” which was to include a statement of principles, a legally binding convention (the Covenant), and measures of implementation and enforcement. Most agreed that some basic economic and social rights needed to be reflected in the bill. But because the Covenant was the core element of this tripartite formulation, there were some objections to the inclusion of economic and social rights, especially by the British, who were in favor of a Covenant that included only a limited range of civil and procedural rights. As for the Americans, Eleanor Roosevelt too seemed to waver about their inclusion. It depended on what kind of instrument the drafting committee of the newly formed Commission on Human Rights was talking about – a declaration of principles, or a legally binding convention.

The problem, it seemed, was that as it was originally conceived, the international bill of human rights was to have been a single, unified bill with three parts. In the early stages of the drafting, it was this approach to a unified bill that caused hesitation amongst the Americans, the British, and the Soviets – the latter of which were always wary of the third part of the bill, about international measures of implementation or enforcement. So long as the “bill of rights” was to be presented in this tripartite, unified format, discussions over any part of it were slow going.

Not until the Commission decided to separate the “bill” into two parts was the Commission able to move forward with a draft Declaration that would include all categories of rights. A separate Declaration would constitute a statement of principles, but would not be considered on its own to be legally binding. It would, however, be a definitive statement of what constituted fundamental human rights, giving clarity to the passages in the UN Charter about human rights. People everywhere now would know what that meant.
And so, the Universal Declaration of Human Rights – an organic whole; a fundamental unity that included a robust catalogue of civil, political, economic, social and cultural rights – was adopted \textit{nemine contradicente} in December 1948. But there would be a very long pause in the development of human rights norms and institutions between 1949 and the early 1980s – a time during which significant rifts developed between the global North and South over the nature of human rights as legally binding commitments, over the relative importance of the two categories of rights vis-à-vis one another, and how the language of indivisibility would reflect those fundamental differences. During this time, a majority of post-colonial states was beginning to articulate a vision of global economic justice within the language of rights (but not yet \textit{human} rights) that turned indivisibility into a priority for economic and social rights over civil and political rights. By the time the international community met in 1993 at Vienna to recommit to the international project of promoting human rights as \textit{universal and indivisible}, there had been a sea-change in membership in the international human rights regime, at least formally. It would seem that some kind of a consensus around “indivisible human rights” had finally been achieved. But had it?

In what follows, this essay will very briefly examine the historical development of these key issues and debates about the nature of human rights and how they related to other important demands of the post-colonial south, especially trade and economic development. It will then turn to a brief examination of the implications of this lack of consensus about “indivisible human rights” in terms of their contemporary relevance. These are presented only in a sketch outline, suggesting avenues that will need further development.

\textbf{Indivisibility}

The language or rhetoric of indivisibility was born during the sometimes acrimonious debates at the United Nations over the drafting of the Covenant on Human Rights after 1949. The debates in the Commission were sometimes sharp, but nothing like what occurred especially in the Third Committee of the General Assembly in 1950 and 1951. While there were many items under discussion, it was the debate about whether to include economic, social and cultural rights in the draft Covenant, followed by a debate about whether to divide the Covenant once those rights had been included, that were the most heated.

What fundamentally divided the global North and South during this period were fundamental disagreements over what prompted the \textit{need} for such rights, with respect to the promotion of individual freedom, national independence, sovereignty, prosperity, wealth, and
development. The language of rights-based demands for global economic justice began in the mid-1960s, when Senegal’s Doudou Thiam first articulated a “right to development” as a right held by the post-colonial South against the international community in general, and the global North in particular. But the right to development was not yet framed as a human right.

While there were no countries that outright rejected one category of rights (civil/political, or economic/social/cultural), beginning in the 1950s an increasing majority of the post-colonial Global South moved to rearticulate the notion of “indivisibility” as actually entailing a prioritized hierarchy, as presented in Table 1. The table should be read from the bottom-up: for each of the goals in the table, there is a higher goal that must be met first. The realization of civil and political rights is at the bottom. The most important priority is political independence (formally achieved by decolonization), followed by economic self-determination, and so forth. The rhetorical elements contained in the table emerged since at least the early years of the drafting of the two human rights Covenants in the early 1950s. By the mid-1970s, the table was complete, from bottom to top.

Table 1. Hierarchy of the Right to Development (arrow indicates “dependence on”)

<table>
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<tr>
<td>Achievements of Political Self-Determination and Sovereign Independence</td>
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<tr>
<td>Acknowledgment (by the Global North) of the rights of post-colonial states to develop</td>
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<tr>
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<tr>
<td>Acknowledgement (by the Global North) of their duties: the establishment of NIEO, including permanent sovereignty over natural resources and non-interference</td>
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<tr>
<td>Access to trade and/or untied aid; Ability to Use Natural Resources</td>
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<tr>
<td>Ability to Implement Development Planning and Access to Development Resources</td>
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<td>✆</td>
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<tr>
<td>Sustained economic growth</td>
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This reprioritization was deeply enmeshed with the Global South’s much more grand critique of post-war global capitalism and their project of securing recognition by the Global North of their “right to development” of the mid-1960s, which eventually became the New International Economic Order agenda of the mid-1970s.

In this re-articulation, the achievement of global economic justice for the developing world was the main priority, and this became a prerequisite to the achievement of economic and social rights, only after which could civil and political rights be secured. However, it is important to keep in mind that the original “right to development” as it was articulated in the mid-1960s was a right of post-colonial states against the global north in particular and the international community in general. The language of rights began to transform the question of global economic injustice from a (merely) moral one into a legal framework of entitlements and duties. While the “right to development” phrasing was eventually dropped, this movement culminated in the 1974 Charter on the Economic Rights and Duties of States (CERDS).

It was only after the adoption of this new global economic “programme” (the NIEO and CERDS) that the “right to development” was resurrected – this time as a human right. While one genealogical root of the resurrected R2D was quite unrelated to the events leading up to the NIEO and CERDS, by the late 1960s the Commission on Human Rights was increasingly concerned about the human rights dimensions of (especially economic) underdevelopment, and had requested a major study\(^3\) of those relationships. The release of the revised version\(^4\) of that report, coincident with the adoption of the NIEO and CERDS, created an atmosphere that further entrenched the prioritization of economic development (read as prerequisites for the enjoyment of economic and social rights) over civil and political development (and rights) in the Commission – but under the

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3 The first report, “The Widening Gap” (E/CN.4/1108 and Add. 1-9) was completed in 1973 and presented to the Commission at its 29th session.

banner of “indivisibility.” By the time the Declaration on the Right to Development was adopted in 1986, it was declared an “indivisible part” of human rights.

At least at the level of global rhetoric, a new consensus about the indivisibility of human rights was established at the 1993 World Conference on Human Rights. The Vienna Platform of Action clearly repudiated the relativist challenge to the universality and (real) indivisibility of human rights in its paragraph 5:

All human rights are universal and indivisible and interrelated and interdependent….While the significance of national and regional particularities and various historical, cultural and religious factors must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms (emphasis mine).5

If we compare this phrasing with the manner in which the notion of indivisibility was framed in the 1968 Proclamation of Teheran, the Final Act of the (first) International Conference on Human Rights, we notice a most remarkable difference:

Since all human rights are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.6

The new consensus on indivisibility reflected at Vienna in 1993 was accompanied by an attitudinal shift on the part of the global South with respect to what was increasingly called “globalization.” The NIEO and CERDS failed to gain any significant traction, and were both followed by the global economic slump of the late 1970s and early 1980s. These events spurred neoliberal, market-based responses to slow economic growth which developing countries (or, rather, the elites in developing countries) began to embrace. With the collapse of communist regimes in Eastern Europe and the Soviet Union from 1989-1991, the rise of the “Asian Tigers” (Japan, Taiwan, Singapore, and South Korea) and especially China’s turn toward markets, the redistributive, (sometimes) socialist approaches to development that so many developing countries had embraced during the postcolonial period was largely abandoned. The NIEO and CERDS, which began as the “right to development,” were effectively dead.

5 Vienna Declaration (1993), para 5
6 Proclamation of Teheran (1968), para 13
In many cases, these shifts in attitude went so far as to include a “democratic” component – market reforms were accompanied by a modicum of political reform – what some people called “market democratization.” While some of these reforms were significant in some countries (notably in East Asia), still successful and rapid development was pursued with strong state support, and a variety of state-led development models took root. This model became much more attractive than demanding a “right to development” from a reluctant and stingy Global North.

By the late 1990s, the majority of states in the global South were largely following the global North’s lead – to accept the realities of late global capitalism and find a place within that new reality. The policy directives of the “Washington Consensus” were clear: export-led growth was the key to future prosperity. But in terms of human rights, the values and hierarchies implicit in the “right to development” remained in place. In exchange for playing the game of global capitalism, driven by markets rather than a development model based on redistribution of global wealth, the global South expected that the global North would turn a blind eye to the negative consequences that these development policies were likely to have, especially when it came to civil and political rights (and even many economic rights). In many cases, the global North complied (especially the United States).

Implications

What, then, are the implications of ambiguity about the relationships between the two “grand categories” of political/civil, and economic/social/cultural rights when it comes to the broader goal of “development” in the context of late capitalist globalization? We can think of “ambiguity” in several different ways:

- A lack of consensus about the role of the state in the protection, promotion and fulfillment of both civil/political, and economic/social rights;
- Uncertainty about the most appropriate roles to be played by non-state actors in the achievement of human rights and development: should they be providers, or watchdogs? Charities, or advocates?
- Finally, there is great ambiguity about the ways in which Northern-based NGOs should go about their work in promoting human rights and development goals in tandem. Some have embraced a “human rights approach” to development. But most NGOs continue to treat development and human rights as separate goals with different priorities and logics. Northern donors have their own agendas, which are in many cases pursued without much
input or participation from those living these realities on a day-to-day basis. Again, the ambiguity here rooted in a largely contested terrain about the proper “balance” between civil society and state-based institutions when it comes to human rights.

- Uncertainty with respect to the state as an agent responsible for fulfilling economic and social rights, especially in the Global South. From the 1960s until quite recently, the rhetoric of indivisibility was really about the hierarchical prioritization of pursuing development as a way to achieve the fulfillment of economic and social rights, which was intimately tied to the international politics of aid, trade and development policies. This prioritization required strong interventionist states – first in the form of somewhat command-driven economic planning (through the 1990s); later, with the embrace by elites of the globalization model of development, through state-led capitalist development policies, which often times have been detrimental to both sets of human rights.

These ambiguities about the role of the state as the primary political agent responsible for the protection, promotion and fulfillment of human rights leads us to consider a shift in power dynamics between and among various actors, state and non-state:

- For more than 40 years, the liberal welfare state consensus of the post-World War II period has been in decline. This consensus was deeply embedded in the Universal Declaration model of especially economic and social rights, with the state playing a more significant role in fostering the conditions necessary for widespread prosperity within their societies. With the retreat of the state under neo-liberal economic policies (lower taxes; more privatization; the erosion of “traditional welfare”), we have seen the fulfillment of economic and social guarantees such as those included in the Universal Declaration and the ICESCR in jeopardy. The retreat of the state in the global North has been accompanied by the growth of civil society – especially the power and influence of market actors (which I consider to be part of civil society)
- Meanwhile, in the Global South, in many cases we see the opposite: market-based rapid development has take place largely because, rather than in spite of, strong state-led policies. The imperative of rapid economic growth on the part of state elites has largely been accompanied by an abrogation of state responsibility for the protection and promotion especially of core civil and political rights, but also of economic and social rights. As with the
global North, we see in the global south the dramatic rise in the power and influence of non-state actors (especially market actors) largely with the imprimatur of governing elites, *all in the name of “development.”*

- Because governing elites in largely undemocratic states in the global South have joined the “globalize or die” consensus of economic development, long gone are the days when talk of neo-colonialism or neo-imperialism were *de rigueur*. Today, we have the annual World Economic Forum event (some might call it a “media orgy”) in Davos, Switzerland, attended by … just about everyone except for North Korea’s Kim Jong-Un. The emergence of the G-20 as an adjunct to the G-8 reflects this consensus.

- Finally, we must consider how new and evolving institutions and authority structures – such as the Human Rights Council – have responded to these trends. How has the Human Rights Council dealt with the topic of “indivisibility” and the “right to development”? To what extent does it foreground this central principle about human rights, and more importantly, how has it done so?

In conclusion: before the 1990s, the question, “is there a consensus about the indivisibility of human rights?” would have yielded one of two answers: “no” or “not really.” While there may have been a consensus around the *existence* of the principle of indivisibility, there was no such consensus on the practical meaning of that principle in different parts of the world (esp. between the global North and South). Since the 1990s, while we may have some consensus, at the level of governments and global elites, about the “right path” for economic development, this consensus is largely problematic for the indivisibility of human rights in both the global North and South. What we see today is quite a bit of toleration of government policies for achieving economic growth comes at the expense of violations of civil, political, and economic and social rights.