

SOCIAL EXCLUSION AND
POVERTY REDUCTION IN
LATIN AMERICAN AND
THE CARIBBEAN

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THE WORLD BANK



ACADEMIA DE CIENCIAS Y LETRAS
DE COSTA RICA

Social Exclusion and Poverty Reduction in
Latin America and the Caribbean
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1818 H Street, N.W., Washington, D. C. 20433,
U.S.A.

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Manufactured in Costa Rica
First printing. August 2001

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Cover design by Valeria Varas

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RECIBO 50 2001

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BASIC RIGHTS AS A REFERENCE FOR EXPLAINING THE PARADIGM OF CITIZENSHIP AND DEFINING THE BOUNDARIES OF SOCIAL EXCLUSION

JAIME ORDÓÑEZ¹

HYPOTHESIS AND THEORETICAL AND PRACTICAL PROBLEMS OF THE PROPOSAL

This work attempts to explain the development of civil and political rights as well as economic, social, and cultural rights over the past ten years by analyzing the normative formation of these legal rights and the existing procedures by which citizens can demand their right to adjudication. The purpose is to show the relationship between determined levels of confirmation of these rights and the concept of citizenship.

The hypothesis proposes the existence of a set of civil, political, economic, social and cultural rights (setting and defining minimum standards

1. This paper is a summary of two technical and conceptual studies. It builds upon some of the results of a project called "The Equality of Modern Times," in which the author participated, under the direction of Dr. Antonio A. Cançado Trindade, as part of a group of specialists designated by the Inter-American Institute of Human Rights and the Economic Commission for Latin America, to conduct a study on the development of economic, social and cultural rights in Latin America. It also restates information from research completed by the Center for Strategic Studies in 1997 and 1998 on the topic of legal rights and adjudication by A. Torrealba Navas and the author of this paper within the context of the Project on State Reform and Decentralization. In the last version, we thank Vanessa Retana, a researcher at the Center for Strategic Studies, for her significant contributions. This paper also restates parts of the theories developed in both of the above-mentioned papers. Therefore, it is necessary to give credit where it is due. This study also proposes certain theoretical and practical elements used to explain the relationship between fact indexes, similarity indexes and legal processes, as compulsory bases for the advancement of economic, social and cultural rights and the development of the definition of citizenship in the region.

of confirmation) as a parameter for defining the question of citizenship. This set of minimum indexes helps establish a standard for measuring the effectiveness of basic citizen's rights, which serves as the basis for defining the terms: social inclusion and social exclusion.

The verification and exercise of this set of basic rights or human rights, which will be examined in the following pages, presents some difficulties and doubts about concepts and facts within the process of classifying possible transgressions as well as the legal scope they cover. These difficulties stem from the existing differences between civil and political rights, on one hand, and economic, social and cultural ones, on the other. According to the theory of human rights, which has been examined thoroughly, the aforementioned rights imply that the state has the *obligation of not acting*, whereas the economic, social and cultural rights imply the opposite; the state, and society as a whole, has the obligation of acting. Therefore, both groups of rights naturally possess their own distinct sets of similarities. Civil and political rights protect a state, a situation, and a whole concept, the verification and exercise of which does not allow for limits or doubts. For example, *freedom of assembly must be complete*, or there is no freedom at all. The same is true for the *freedom of expression and political liberty*. There is a similarity in the sense that the judicial norm (the article in the constitution which protects the freedom of speech, for example) does not allow any doubt regarding the content or the scope it covers or the actions that would be considered violations of the right.

This is not true of economic, cultural and social rights, because their essential characteristics are often mistaken, elusive, and indeterminate. In the case of the *right to education*, if we agree that participating in the educational process as a student is the manner in which that right is exercised, the boundary by which the right is protected is not well defined. This could imply elementary school, secondary school, or a university education – depending on the context or the economic possibilities of each country. Historically, this has been the means of measuring social evolution in many developed or developing societies during the last century. If, at the end of the nineteenth century, the "educational frontier" in many countries was elementary school, at the beginning of the twenty-first century the boundary is secondary school, or, in some countries, a university education. These are "changing frontiers" that are relative to the historical process of each country and their individual capacities, their socio-economic evolution, and their participation, or lack thereof, in the development process of the new economic world order. For example, the "educational frontier" in Sweden, at present, is very different from that of Haiti or Paraguay. These frontiers are closely related to the social advantages that these rights or benefits

generate within each specific society. This implies an almost obligatory relativism of these boundaries that verifies the extent to which people can exercise their rights and operate under prescribed norms in demanding that their rights be respected and exercised.

The objective of this previous digression is to methodologically point out the strengths and weaknesses of the theory of human rights (e.g. civil and political, economic, social and cultural) as an instrument for setting frontiers or boundaries for the phenomenon of social exclusion. These limitations are related to the different aspects or profiles that define the values of citizenship. Citizenship can be defined as the ability to enjoy a set of rights and values that include the individual's integration and participation in society, or it can also be defined as a sense of belonging to a community. Thus, the human rights theory seems to have developed a differentiated level in relation to the main profiles that define citizenship. There is the area of freedom (civil and political rights), the area of equality or material well-being, and the option of exchange (economic, social and cultural rights). The international community has developed a very well defined norm for boundaries of the protection of civil and political rights, even taking into account legal rights. However, there are no clear guidelines defining economic, social and cultural rights. The existing uncertainty about the definition of the boundaries of these rights constitutes a limitation that hinders the right to demand justice as well as the social right to an education, housing, health, and food.

HUMAN RIGHTS (OR FUNDAMENTAL CITIZEN'S RIGHTS) AS A STANDARD FOR THE DEFINITION OF CITIZENSHIP

Human rights are a constantly changing notion. The debate regarding the definition and concept of human rights has gone through an evolution characterized by endless defining and redefining of concepts. However, three aspects of human rights have remained constant in the analysis and are generally considered to be essential to the concept: human integrity, freedom and equality. The systems containing specific rights and responsibilities for the different states have developed a set of legal productions on the constitutional, administrative, civil and family, mercantile and corporate, a process which has strengthened the ways to protect the citizen. In general terms, the progress made in this area has been verified on the level of civil and political rights. The great ideological tradition of the French Constitution

and its Civil Code was borne from the ideology of political reform during the (Illustration/Post-Revolution) period. It should be seen as an ideological premise of a historical period that evolved from the republican reform of the eighteenth century and marked the nineteenth century and the beginning of the twentieth century.

For this reason, the traditional vision of human rights has been limited in dimension to civil and political rights. Included in this perspective are the following: the right to life, liberty and security; the right to be free of discrimination based on ethnicity, color, gender, language, religion, social class or political opinion; the right to vote; the right to free speech, and freedom of the press; the right to not suffer arbitrary invasion of privacy, family or home; and legal rights such as the right to due process and the presumption of innocence until guilt can be proven.

Aspects related to the economic and social dignity of the human being have been viewed as an appendage and, consequently, show very little development. While no distinction should be made between civil and political rights, on one hand, and economic, social, and cultural rights, on the other hand, the former are considered part of the classic concept of human rights, while the latter are mainly associated with doctrinal and normative developments which only recently gained importance at the beginning of this century.

CIVIL AND POLITICAL RIGHTS (THE DIMENSION OF FREEDOM AS A STANDARD FOR THE DEFINITION OF CITIZENSHIP)

The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, is the most important document related to the subject of Human Rights. Although it lacks legal character, since it's not a treaty, it has great moral and political value.²

2. Máximo Pacheco says that despite limitations and imperfections in the Universal Human Rights Declaration, it has had a great influence. Its principles are considered ideals that all nations should try to attain. In many countries these rights are not exercised, but that does not mean that the Declaration is not valid. See "Los Derechos Fundamentales de la Persona Humana" in *Estudios Básicos de Derechos Humanos II*, San José, Inter American Human Rights Institute, 1995. p. 90. Héctor Gross Espiell states that it must be considered similar to an expression of international custom or as an interpretation of the Chart supported by the international community or as an expression of general principles that, because of their fundamental nature, has these characteristics.

While the Declaration was being drafted, the decision was made to create various texts of a conventional nature that would imply a legal obligation to respect human rights and to create international mechanisms for the promotion and protection of these rights. Because of the time lapse between the Declaration of 1948 and the two Pacts – one about Civil and Political Rights, and the other one about Economic, Social and Cultural Rights – both written in 1966, the concept of the subject matter to be addressed in these agreements also evolved. The result, a product of this process of evolution, was two texts containing rights that were originally excluded from the Declaration, such as the free will of nations, which is included in both Conventions. In the last stage of preparing the two Pacts, it was decided to include an Optional Protocol to the Civil and Political Rights Agreement, the main innovation of which was the inclusion of an individual communication mechanism for reporting human rights violations.³

Although both agreements are important to the field of human rights and have been approved by states of diverse regions and political, ideological and social systems, the number of participating states is very low. The system of implementing and controlling the Pact on Civil and Political Rights has not been efficient.⁴ Even though there are differences between the civil and political rights and the economic social and cultural ones,⁵ it should not be forgotten that these are just formal categories, since human rights are integral, interdependent and indivisible. This has been stipulated in numer-

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3. "The system for applying the Civil and Political Rights agreement depends on the obligatory presentation of reports to the Human Rights Commission, which was established in the Pact (Articles, 28-45). Through an independent declaration of ratification or adhesion to the Pact, states will acknowledge the Commission's competence to act whenever there is a violation of the Human Rights Agreement. Each state will report all violations of the Agreement (Articles 41-42). In relation to the participating states, the Commission will also exercise the function of an Optional Protocol through which it will receive violation reports and decide what type of communication will be used to report violations of the Agreement. (Articles 1-6, of the Protocol). The coexistence of various international, universal and regional procedures regarding these communications has led to complicated interpretation problems which have been remedied only in recent years by the international practice in applying these rights." Gross Espiell (Héctor). *Op. cit.* pp. 35-36.
 4. Contentious state interests foreseen in the Pact on the Civil and Political Rights (Article 41) – only sixteen states have recognized the authority of the Commission to act in these cases – has not worked, and it has not been applied in other universal and regional instruments as is the case of the International Convention on Eliminating All Forms of Racial Discrimination (Article 11) and the American Convention on Human Rights (Article 45). There are some exceptions resulting from the implementation of the system established by the European Commission (Article 24). Gross Espiell (Héctor). *Op. cit.* p. 37.
 5. To each classification, a set of third generation rights, or solidarity rights, has been added to cover items such as the right to peace, the right to development and the right to a safe and healthy environment.

ous international and regional texts on the subject.⁶ Because of the nature of the subject matter, it is not acceptable to categorize human rights hierarchically.

Civil and political rights, considered first generation rights, are much more consolidated in relation to the protection and definition of their content.⁷ It is affirmed that these rights generally imply a necessary abstention on the part of the state, and therefore they require passive action. It cannot be stated independently that the State must refrain from action. It should also be understood that it is the State's "task to guarantee an environment of public order in which these rights can be fully and freely exercised without discrimination, and it should also establish and maintain conditions in which order – needed to exercise freedom – really and effectively exists." Therefore, the principal responsibility of the state is to prevent the violation or injury, either by omission or by action, of civil and political rights and by either a governmental agency or representative or any other person responsible for governmental functions or administrative duties. There is an international regime that protects civil and political rights providing that all other internal defense resources have been exhausted, and after it has been proven that the State has in effect violated the rights of the citizen.

Each one of the Human Rights Agreements stipulates different mechanisms for implementing the protection of rights. In the case of the Civil and Political Rights Agreement, the Optional Protocol has been added to include procedures enabling individual citizens to present lawsuits in the event that their rights have been violated. The International Agreement on Civil and Political Rights has been drafted with greater legal precision and includes some rights that are not covered by the Universal Declaration of Human Rights. For example, it includes the protection of ethnic, religious and linguistic minorities, along with other members of their community, and the right of minorities to enjoy their own culture, practice their religion, and use their own language. Other relevant rights making this text innovative, since they are not mentioned within the Universal Declaration of Human Rights, include: protection from incarceration due to inability to fulfill a

6. Héctor Gross Espiell details that the holistic notion of human rights "is implicit in the Chart of the United Nations, is restated and classified in the Universal Declaration of Human Rights of 1948, and is definitely confirmed by the Universal Human Rights Agreements which were approved by the General Assembly in 1966 and have been in effect since 1975, as well as in the Tehran Proclamation of 1968, and the General Assembly Resolution, adopted on December 16, 1977, on the criteria used to improve the process of enjoying human rights." *Op. cit.* p. 325.

7. For instance, in the American regional arena, the American Convention profusely declares civil and political rights, but not economic, social and cultural rights.

contractual obligation; the right of prisoners to receive humane treatment and respect based on their inherent condition as human beings; the right of children to have a nationality and to be protected as minors. Notwithstanding, the Universal Declaration does include some important rights that are not included in the Agreement. These include the right to own property, the right to seek and be granted asylum, and the right to have a nationality in general terms. The right to own property was not included in the Agreement because of ideological and political differences between the countries represented in the United Nations. They were not able to agree on the definition or the scope this right would entail.

In the Americas, civil and political rights protected regionally are, essentially, those covered by the following texts: The Reformed Charter of Organization of American States (OAS), the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The three documents are related, however, it should be noted that the Declaration contains civil and political rights as well as economic, social and cultural rights, and it is the document with the greatest enumeration of rights. The American Convention fundamentally stipulates civil and political rights. The Reformed Charter, although it establishes few concrete rights, refers to "general economic, social, and cultural norms" which, it can be said, implies the existence of rights in these areas. The source for validating this is the American Declaration of Human Rights (Buergethal, Norris and Shelton, 1998).

This classic concept has been questioned. It is said to be very limited in scope, since human rights requires more multidimensional and holistic approach. In effect, economic, social and cultural rights (ESCR) are developed within the framework of civil and political rights which include the right of every human being to have an adequate standard of living, to be educated, to have work, and to receive equal compensation for equal work performed, and the right minorities to enjoy their own culture, religion and language. Minorities and those social groups that are at a disadvantage, such as women, children, and indigenous peoples, are gradually acquiring renewed importance. This evolution has been heightened by the celebration of three forums: the World Summit on Social Development, held in Copenhagen in March, 1995; the United Nations Conference on Human Settlements (Habitat II), held in Istanbul in 1996; and the World Summit on Nutrition, held in Rome in November, 1996. These events clearly emphasize the importance of economic, social and cultural rights.

THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS (THE DIMENSION OF EQUALITY IN THE CITIZENSHIP PARADIGM)

The correlation between civil and political rights and economic, social and cultural rights (ESCR), as has been previously noted, does not allow for an easy comparative methodology from the perspective of the creation of norms and their protection. In addition to the substantial difference in emphasis placed on the classic civil rights in comparison to ESCR there is also a fundamental difference regarding the perceived role of the State. Civil rights, in order to be exercised, regularly demand non-interference on the part of the State, while ESCR frequently demand action on the part of the State for their development and protection. Therefore, we cannot categorically affirm that, in order to enjoy civil and political rights, only the passive role of abstention is desired from the State. Nor can it be said that ESCR explicitly require solely active measures on the part of the State.

Although there is some truth in the previous statement, a few things must be specified. For example, in some aspects of the right to receive an education, which constitutes a so-called social right, inhibition on the part of the state is highly convenient, particularly when there is a desire to preserve its ideological liberty. This also occurs in the case of cultural rights which were generally imposed by a cultural penetration process carried out by centralized governments with no respect for the particular ethnic, cultural, religious and ideological characteristics of many nations. There are instances during which the participation of the state is convenient and necessary for the development of civil and political rights. An example can be found in the election process, which needs to be organized and financed by the State so the process will effectively take place. This activity should never involve trying to influence citizens ideologically, but instead the State should offer the infrastructure and resources to permit electoral competition and equality, so that citizens can participate freely in elections without ideological interference. In synthesis, the specific nature of each right, in essence, commands a different type of role from the State.

On the other hand, there is the constant problem of legal enforcement of ESCR. Undeniably, it is necessary to overcome a series of ideological problems regarding the function of the State and society, particularly in relation to the objectives of redistribution of wealth and the search for social equality and human dignity. Dedication to this level essentially means that a serious commitment should be made to attaining social integration, solidarity and equality, including the always-conflicting debate concerning

distribution of income. Economic, social, and cultural rights are intended to foster the well being of the most vulnerable groups, such as the economically disadvantaged, so the decision to promote these rights lies within the responsibility of the economic and social policies of the governments. One problem is that the implementation of these rights relies heavily on the economic prospects and material resources of each state. This is believed to be the reason that, in many situations, the concept of progressively applying these rights implies not demanding them, but instead they automatically should be included gradually within the policies of the states.⁸ According to the demands put forth in international instruments written on to this topic during the last decades, the state should guarantee a minimum threshold for ESCR, independent of the level of economic development. On the other hand, basic human rights have been constituted at a regional and national level, as an instrument for legitimizing the judicial organization of Western democracies. Almost every single constitution has at least a chapter or a set of norms making reference to ESCR as a substantial component of the rights of citizens.⁹

In some cases, there are problems of uncertainty not only in classification, but also in the instruments of protection. Trade union rights and propriety rights are constantly cited for the difficulty of classifying both. In the European system, the right to have an education is in the First Protocol of the European Committee about Human Rights and not in the European Social Charter. Notwithstanding, this problem clearly calls for urgent creative measures that will formulate more precise methods to allow the consolidation of ESCR. In light of the integrity of the human rights issue, a

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8. "The ESCR have been compared to civil and political rights because of certain characteristics that seem to differentiate them. Civil and political rights are considered immediately legally demandable. The state cannot condition their time of effectiveness on the lack of resources. Consequently, the right to life, to respect the personal integrity of the human being, to freedom, among others, should be respected and guaranteed completely." Rodríguez Pinzón (Diego), Martín (Claudia), Ojea Quintana (Tomás), *La Dimensión Internacional de los Derechos Humanos. Guías para la Aplicación de Normas Internacionales en el Derecho Interno*. IDB and American University, Washington, D.C., 1999, p. 340. Notwithstanding, as it was noted previously, this statement is not true at all times since there are ESCR that are immediately enforceable.
 9. "The basic human rights, that Max Weber contemptuously ranked as 'rational fanaticism' are a key component in the judicial orders of the western democracies even if their epistemological value is not very clearly stated. They are actually becoming gradually strengthened. They are becoming the central pillars on which social and political balance is based. They maintain an awareness of the difference between civil society and the technocratic superstructure of power and keep the difference between what is public life and what is private life distinctly clear, concepts borne from the best liberal tradition." Robles Morchon (Gregorio), *Los Derechos Fundamentales en la Comunidad Europea*, Madrid, Editorial Ceura, 1988, p. 11.

decline in implementation of ESCR directly deteriorates the development of the civil and political rights. This situation definitely threatens the basic principles of the Economic, Social, and Cultural International Agreement.¹⁰

Then, there is the problem of whether or not it's possible to adjudicate these rights. The responsibilities assumed by States and by the international community in the international documents regarding these rights must be implemented in good faith by each country.¹¹ Even if this principle is applied to all present-day human rights systems, there are certain drawbacks for the effective application of the ESCR, especially the fact that the existence of these rights is ignored and excluded by many. Another drawback is that clarifying the scope, content and duties of these rights is a slow and difficult process. The basic principles that made the United Nations General Assembly approve two different agreements are the same ones used to justify the separation of these rights – civil and political rights and ESCR – as two different "categories" of rights. During the approval of these agreements, it was considered that the civil and political rights were immediate and absolute rights, whereas the ESCR depended on programming and should be strengthened gradually. Consequently, their identity as rights was justifiably questioned.

Also during that time, a similar presumption was pondered in relation to the issue of the adjudication of these rights.¹² It was determined that civil and political rights could be adjudicated, since they were easily applied in courts or by other judicial entities, while ESCR had a more political nature.

10. In 1996 the 30th anniversary of the adoption of the Agreement and the 20th anniversary of when it went into was celebrated. One hundred and thirty-five States participated in the process of writing and adopting the Agreement. Refer to the *Plan for Improving the Implementation of the International Agreement on Economic, Social and Cultural Rights*. United Nations High Commission on Human Rights and the Committee on Economic, Social and Cultural Rights, at <http://www.unhchr.ch>.

11. This is a general clause added to article 26 of the Vienna Convention on the Rights of the Citizen, 1969.

12. "The effectiveness of the international protection of the ESCR are related to two basic dimensions: The international surveillance and supervision of the implementation of the ESCR in general, and the application of norms that recognize these rights in specific cases. The first ones are generally related to the legislative and budgetary policies of the states, and the second is related to the enforceability issue of certain specific ESCR in courts of justice or any other type of entity related to fighting for rights." Rodríguez Pinzón (Diego), Martín (Claudia), Ojea Quintana, (Tomás). *Op. cit.* p. 357. The enforceability issue – understood as the possibility to report in front of a judge or justice system tribunal to adhere to at least some of the obligation stated as the object of the law – is problematic in the case of the ESCR due to the concept of progressive development discussed. Today it is more generally recognized that some of these rights are immediately applicable, for example, union rights are of this nature, as is equal remuneration for equal work, and the right to free and mandatory primary education. In particular, see Cançado Trindade (1998: 578).

Additionally, it was agreed that civil and political rights were considered "free" and did not require any cost. It was further assumed that their essential content was related to the duty of the State to not interfere with the integrity and freedom of the citizen.

On the contrary, concerning the ESCR, its implementation was ranked as onerous, it is understood that the State should provide the social safety of the citizen, The arguments concentrated on the problem related to the different obligations the state has that result from the two sets of rights. As was expected, those states that did not want to take into account the responsibility of the obligations derived by the ESCR would at least commit to ratifying an instrument that only contained the civil and political rights. Notwithstanding, the predictions were wrong because almost all the countries that have signed the Civil and Political Agreement have also adopted the Economic, Social and Cultural Agreement.

Even though ESCR are recognized in many international agreements on human rights, it is necessary at the level of the United Nations to emphasize other documents relevant to this subject, such as the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Children. At the regional level, the American Declaration of Rights and Duties of Man was enacted at the Ninth American International Conference in Bogotá, in 1948. The Additional Protocol to the American Convention on Matters of Economic, Social and Cultural Rights¹³ was approved in San Salvador at the XVIII General Assembly of the Organization of American States on November 17, 1988 ("Protocol San Salvador"). These instruments clearly indicated that the region was becoming aware of the importance of ESCR.¹⁴

13. The principles and norms of the regional system of the protection of human rights is found in the American Declaration of Rights and Duties of Man in the OAS Charter – the basis of the system both Protocols (the additional protocol concerning matters of Economic, Social, and Cultural Rights in 1988 and the Protocol related to the Abolition of the Capital Punishment in 1990), and the protection sectors of the Conventions (the Inter American Convention to Prevent and Penalize Torture in 1985, and the Inter American Convention about People Missing by force in 1994, and the Inter American Convention to Prevent, Penalize and Eradicate Violence against Women of 1994).

14. The American Declaration of Human Rights established in its foreword that "the principal objective is the protection of the basic human rights and the creation of circumstances that allow for the spiritual and material progress:" The Declaration has also progressively incorporated human rights in general. In much the same way, the articles 11, 12, 13, of the Protocol of San Salvador guarantees the right to health, a safe environment, nutrition and education. Refer to Rodríguez Pinzón (Diego), Martín (Claudia), Ojea Quintana (Tomás). *Op. cit.* p. 342.

Economic, Social, and Cultural Rights – which have been directly promoted in recent years by the international documents on human rights – coincide, in general, with public policies on social investment matters within the so-called Welfare State. In some of these cases, the problem lies in vague terminology, with terms like "the right to a dignified quality of life," or terms of a normative order, being used to define the scope of legal rights, as mentioned previously.

The right to a dignified quality of life. Basically, there are three international human rights documents that guarantee the right to health and an adequate level of life.¹⁵ While the meaning of an "adequate level of life" has not been precisely defined, Article 25 of the Universal Declaration of Human Rights includes a valuable approximate meaning. This instrument indicates that having a dignified level of life means to have *food, clothing, housing, medical attention, and the necessary social services*. The Convention on the Rights of Children includes an integrated explanation about what a quality life entails. Without a doubt, human beings require fulfillment of more than just the basic needs to attain a satisfactory way of life. This involves a cultural value that cannot be precisely specified, since it depends upon the society of which an individual is a part. In material terms, an appropriate standard of living has been classified or explained as one that is above the poverty line. The essential components of this right include access to sufficient nutrition – probably the component considered most important – along with basic medical attention and an adequate control and prevention of diseases.

Adequate housing has been defined as that which offers adequate privacy, space, safety, lighting, ventilation, infrastructure, and location in relation to the work place and basic needs. In recent forums, it has been noted that there is a huge gap between the rights regarding housing and the actual conditions present in real life situations. Even in developed regions such as Europe, at least 5 million people are presently without housing, and housing policies do not meet the needs of the people that require assistance. Yet, there are many documents regarding human rights that include the right to adequate housing.¹⁶

15. It is (i) the Universal Declaration of Human Rights, article 25(1) that proposes that every human being has the right to an adequate standard of living, and should have access to health and the well being of the person and the family. (ii) the International Economic, Social and Cultural Rights Agreement, in which article 11 establishes that the Participating States recognize the right to have an adequate standard of living for the every human being and for the family. And (iii) the Convention for the Rights of Children, in which in article 27, consecrates the right that every child has to an adequate standard of living for his or her physical, spiritual, moral and social development.

16. Among them is the Universal Declaration of Human Rights – article 25(1), the International

There are two groups of rights to which health is usually attributed. First, the protection of health could legitimately imply the limitation of other human rights, and the right to receive health services creates more rights for the citizen and correlative obligations for the government. Thus, many limitations on other rights have been generated due to the tradition of public health, but investigation of whether or not the right to health is adequately utilized is a relatively new field. Because the international community has acknowledged that provision of health programs is a right for every citizen, does not mean that every citizen will have the opportunity to be healthy. Neither the governments nor the nations can ensure a specific situation of health, since that depends on the influence of the environment and the genetics of the individuals.

Thus, there are various reasons why the right to health is not fully acknowledged by the international community. First, economically speaking, because it implies a considerable investment by the governments to guarantee public health services for all the citizens. The second reason is that the opportunity to acquire health services is closely linked to other factors (outside the area of health care), which either weaken or strengthen this right. According to the World Health Organization, those factors include other aspects of development of the society, since in some cases it could be more convenient for individuals to have access to jobs, income, housing, nutrition, drinking water to establish the well – being of the people. (Tomasevsky 1992).

The relationship between the right of ownership and economic and social rights is certainly polemic. There must be a redistribution of wealth and access to resources if there is to be an effective development of social rights. Among these rights is the right of ownership, which compliments and protects social rights. In the classic concept, the right to ownership is limited to protecting the institution of private ownership from arbitrary intervention. That the right to property, in a general sense, constitutes a link to an adequate quality of life for the individual does not conflict with social and economic rights. Article 17 of the Universal Declaration of Human Rights states that every human being has the right to have private property individually or in association with others. Notwithstanding, when the International Economic, Social and Cultural Rights Agreement and the Civil and Political Rights

Convention on the Elimination of All Forms of Discrimination – article 5(e)(iii), the Convention on the Rights of the Child – article 27, the Convention on the Elimination of Discrimination Against Women-article 14(2), the Convention on the Protection of Migrant Workers and their Families – article 43. However, housing rights as applied to society as a whole were eliminated from the principal regional instruments on human rights such as the San Salvador Protocol.

Agreement were written, a considerable effort was made to include the right to ownership, but it was not successful. However, since the countries shared more legal and social conditions, regional documents did include the right to property. For example, the first article of the European Human Rights Committee guarantees that any physical or juridical person can peacefully enjoy their property and applies the necessary conditions to limit the interference in citizens' enjoyment of ownership.

There is also the right to have a job, which is considered a basic human right, but is also a socio-economic right – the common denominator for both is work. In its limited traditional definition, work has been considered merely as a form of economic survival. In the twentieth century, however, this concept has evolved to adapt to a more holistic vision. In effect, work is actually one dimension of an interdependent system of labor conditions, social justice, and universal peace. Additionally, the most modern perceptions include work as a human value, a social need, and a means for personal growth and the development of personality.¹⁷ The international labor legislation was borne long before the establishment of a human rights framework, even though it was limited to certain labor categories and with fragmentary objectives in relation to the extent of protection provided. The International Labor Organization (ILO) has broadly developed this type of legislation. After the Second World War, efforts to legislate problems related to work at an international level were seen in the Civil Rights Law, both at a regional and universal level. Today, the right to work and labor laws are present in many documents published by the United Nations, Europe (under the European Commission), in America (Organization of American States, OAS) and Africa (Organization of African Unity, OAF).

Tentatively, it has been affirmed that the spectrum of human rights related to work can be divided into the following sub-categories: rights related to work (freedom to work without being enslaved, no forced or mandatory labor, freedom to work); rights derived from the job (work schedules, annual paid vacations, etc.); equal treatment and non-discrimination rights; and instrumental rights (freedom of association, freedom of organization, etc.). Because it is a current topic, it should be emphasized that one of the greatest difficulties faced by labor rights is that it (when the positive advantages have not been exploited) allegedly has caused the deterioration of healthy competition. This issue was vigorously discussed during the negotiations in connection with "dumping" and its social ramifications during the Uruguay Round and in the conversations concerning the General Agreement on Trade and Tariffs (GATT).

17. Drzewicki (Krysztof), "The Right to Work and Rights in Work," in *Economic, Social and Cultural Rights. A Textbook*. *Op. cit.* p. 169.

ECONOMIC RIGHTS AS STANDARD FOR THE DEFINITION OF THE THRESHOLD OF CITIZENSHIP AS A MINIMUM INDICATOR FOR SOCIAL INCLUSION STANDARD

Human Rights constitute a reference for setting the boundaries or thresholds of citizenship. The paradigm of citizenship, or the process of exercising of basic essential rights, would set the scope or space in which people verify the values of integration, participation, or being a member of society which determine their social inclusion *versus* social exclusion (refer to Sojo, in this volume). Also assumed in this is the concept of boundaries of citizenship, defined as the threshold of actual enjoyment or non-enjoyment of civil and political rights, and also the economic, social and cultural rights that permit human civil rights and values.

The process of constructing these rights has been the result of an extensive consolidation of historical legal-ethical demands with universal characteristics. Recently, they have been developed¹⁸ as a set of values to be put into effect in a systematic and interactive way, which means that their goals can only be reached when simultaneously put into effect with the values and objectives of other rights in system.

In the following table, columns A, B and C are the economic, social and cultural rights-values that constitute the pillars of the threshold of citizenship (it is the area of confluence and systemic interaction of the three variables).

18. See CEPAL-IHR, *La igualdad de los modernos* (Reflections about the putting into effect of economic, social and cultural rights in Latin America) San José-Santiago, 1998. For an integral paper, refer to Cançado Trindade, Antonio, "La relación entre el desarrollo sustentable los derechos económicos, sociales y culturales: tendencias recientes." *Estudios Básicos de Derechos Humanos*, IHR, San José, Costa Rica, 1995.

Table 1

**Set of Human Rights and Values Which Constitute
the Threshold of Citizenship**

<i>Threshold of Citizenship</i>		
ECONOMIC VALUE – RIGHTS	SOCIAL VALUE – RIGHTS	CULTURAL VALUE – RIGHTS
<ul style="list-style-type: none"> •Right to Economic participation •Right to commerce •Right to have basic needs satisfied •Right to organize businesses •Right to be part of a trade union or any other similar organization 	<ul style="list-style-type: none"> •Right to have an education •Right to health •Right to housing •Right to nutrition •Right to work 	<ul style="list-style-type: none"> •Right to have a generic access to culture, provided as a service from the state •Right to develop cultural manifestations that respect ethnic identities (religion, language, etc.) •Right to freely express any aesthetic, ideological, ethical or philosophical manifestation.

The correlation of the elements that comprise each group of value-rights also has multiple, interactive characteristics (Cañado 1992; Ordóñez y Vasquéz 1991). The elements of each of these sets of rights find relationships with each other in all possible combinations and functions, as constants that put into effect the value-right concept intersecting each other in the three different areas (economic, social and cultural), generating dynamics in which they all put into effect these rights simultaneously (Sosnowski 1999).¹⁹ This characteristic is important because, from the point of view of the construction of the threshold of citizenship, there are no rights or values with a hierarchical priority in this area. This has a practical and direct implication for social development policies, since they include the putting into effect the essential consumption and participation of exchanges (Sen 1981). From what was said previously, it can be inferred that there are two operating factors. On one hand, there is the existence of the goods that allow

19. In this sense, refer to resolution No. 41-128 of the General Assembly of the UN, specially Article 6, Paragraph 2. "All the human rights and basic freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the application, consideration and protection of the civil, political, economic, social and cultural rights."

participation within the social exchange networks, which could be expressed at different levels or abilities. On the other hand, there are the goods that make consumption possible, which could also be considered securities.

SECURITIES OR ESSENTIAL CONSUMPTION

On one hand, securities or essential consumption are classified individually or under a family category for practical and statistical effects; securities or essential consumption refers to those factors that satisfy the main biological needs. In general terms, these satisfying factors (and the indexes of fulfilling basic needs) have to do with the essential requirements for human economic support and for which satisfaction is (or should be) imperious, independently from social or historical context present at the time. Within this scope, minimum biological basic needs include issues like health, nutrition, clothing and housing. In this field, boundaries of minimum well-being situations are proposed by which the definition of a comparison standard will be made (based on established criteria) as a specific social reference, or a society with its own pattern of normalcy. Notwithstanding, there are any *legal rights in relation to essential consumption, neither at the national nor at the international level*. The non-existence of legal rights establishing obligations concerning this issue uncover the wide field of work still pending in international law and human rights, and constitutional rights and internal laws of countries.

THE CREATION OF OPPORTUNITIES FOR PARTICIPATION WITHIN SOCIAL EXCHANGE

The so-called threshold of citizenship has to do with the establishment of minimum competition situations that allow for the creation of opportunities supported in the long term simultaneously with the securities or the essential consumption. Of course, the political situation should be balanced by the transitional circumstances in each country or state, which could eventually force great opportunity investments in securities or essential consumption.

To conclude, the following table summarizes a model of synthetic indicators, according to the proposal made by CEPAL-IIHR

Table 2

**Synthetic Indicators of Essential Consumption,
Creation of Capacities and Opportunities**

<p><i>Fulfillment of Essential Consumption</i> (Satisfaction of Minimum biological needs)</p>	<p><i>Creation of Opportunities for Participation</i> (Satisfaction of the threshold of citizenship)</p>
<ul style="list-style-type: none"> • Nutrition • Housing • Health • Security (against life-threatening situations) 	<ul style="list-style-type: none"> • Minimum Income • Education • Stable job • Access to information • Political Participation
<p>Aid Investment</p>	<p>Potentiality Investment</p>

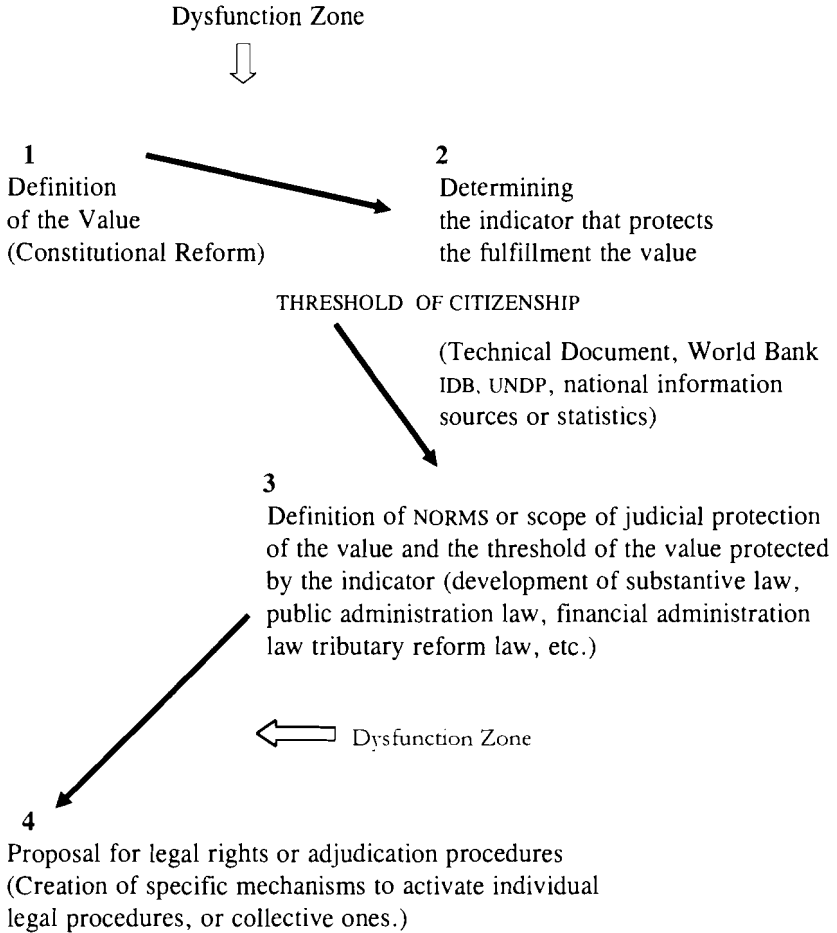
**THE PROBLEM OF THE LEGAL NORMS AND
DJUDICATION AN EXAMPLE FROM THE AREA OF
INSTITUTIONAL REFORM**

It has been proposed by the scientific judicial community that the development of economic, social, and cultural rights will not be possible until – and the same is true for developing a model for synthetic indicators – the levels of legal rights and adjudication are clearly defined by norms. The process of defining a set of norms could be described as follows: once the threshold has been established in reference to the protected value (to be determined by a given indicator), immediately proceed to set a "judicial protection" for the threshold that has been defined by the indicator. This protection will only be possible once certain aspects are defined. These aspects are: what will be the threshold of legal protection (normative area), and it should be consistent with the legal rights process or the creation of judicial norms. Once this has been established, the process of judicial definition should be completed by the creation of an effective mechanism that will allow for the claiming of a right (in a court of justice), activating the adjudication mechanisms to put these rights into effect. This is the process that defines legal rights or adjudication.

These processes have cause, concept and time sequence characteristics. Defining the concept of legal rights (definition of the legal scope) is not possible without first defining the indicators and conducting a concrete analysis of the facts in question related to the indicator. In much the same way, the definition of these mechanisms and the instruments of adjudication are not possible without first defining how to set the norms or the legal boundaries of the value (refer to the scheme). Areas where a dysfunction or distortion is observed occur when the correlation among values and objectives is not clearly defined beforehand (technical, political, or economic), and the indicators could function as parameters for measuring the results or define the legal demanding procedures. Even when legal rights have been acceptably defined (when there is a law that defines the judicial scope covered by the right) there is no adequate solution in which legal procedures guarantee adjudication to put right into effect. The dysfunction could be explained from the analysis graph used as reference to define correlation among objectives, categories, concepts and indicators (refer to following scheme):

Graph 1

Determining the Functional Indicators as Standards for defining Legal Rights and Adjudication Concepts



CONCLUSIONS: A CRITICAL EVALUATION

The fact that there are still no specific, internationally-accepted indicators to measure economic, social, and cultural rights makes it difficult to diagnose how the exercise of these rights should be processed. Therefore, they are generally related to the issues of social equity in relation to economic, social, and socially integrated aspects, which are part of cultural rights. Consequently, the traditional socio-economic indicators can present only a partial view, and they concentrate on those aspects strongly related to the right of citizens to economically support themselves and their families, e.g. work, safety, health, nutrition, education, and maintain an adequate standard of living with adequate housing conditions. In most cases there are indicators, with some exceptions, developed using certain instruments presented by the United Nations Development Program (UNDP) and its Annual Report for Human Development as an Index for Human Development (IHD). However, the process for defining these issues requires more conceptual, methodological and operational specification.

Even in the cases where advances were made with the legal rights procedure concept internationally defined, problems related to social exclusion and social inclusion can still be found. These problems are related to verifying the nationally defined indexes that act as correlative aspects and other internal elements defined by each independent nation. Social exclusion or social inclusion terms (enjoyment of complete citizenship rights) not only depend on the verification processes that analyze these standardized indexes. They also depend on the way different factors related to this, such as enjoyment of rights and capacity, affect each other. The way each nation has defined the concept of poverty should be analyzed. This definition should be related, not only to the fact of whether each citizen can obtain an adequate standard of living by being able to have their basic needs satisfied, but also to other environmental, cultural and political issues. The parameters are related to each nation and will be able to be determined using synthetic indicators, such as those proposed by CEPAL and IHRI (1997). In both cases (the standards related to the international indexes and the synthetic national ones), the theory and practice could play an important role in the process of formulating enforceable norms supporting legal rights and adjudication.²⁰

20. The index is intended as a reference to be compared with international standards. This will open the possibility for creating norms that set the international borders in order to define how citizens enjoy the rights and values protected by them and analyze violations or transgressions.

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