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Human Rights and Sovereign Debts in the Context of Property and Creditor Rights

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ABSTRACT

Post-War conceptions of human rights have evolved independently of long-established theory and practice of property and creditor rights, to the detriment of the development and implementation of human rights law. This chapter attempts to build a first bridge between these two fields of law. It begins by recalling the strikingly different origin and implementation of ‘human’ versus property and creditor rights, because the differences have significant implications. Human rights laws are more honoured in the breach than in the observance in most parts of the world, principally because states accepted international standards governing the treatment of their own nationals in their own territory while reserving to themselves the sovereign right to enforce those rights as they saw fit. In sharp contrast, when it comes to property and creditor rights, there are few gaps between principled intentions, legal mandates, and actual enforcement. Property and creditor rights are important for the attainment of other human rights, especially those of an economic nature, and many human rights are connected to, and are rather inseparable from, broadly conceived property rights. There follows a discussion of the still wide gap between aspirational human rights and economic reality. The time has come for human rights scholars to ratchet down their expectations to match the very limited capacity of low-income and formerly communist countries most prone to human rights deficiencies to import the Western European welfare state model. The final section focuses on the poorly understood interconnections between sovereign debts and human rights. Neglect of property and creditor-rights considerations has led many contemporary human rights advocates down an infertile, if not inappropriate, intellectual and policy path. Speculation that contracts governing cross-border debts and investments may not be sufficiently compelling, at least relative to human rights commitments, is unwarranted and counterproductive.

KEYWORDS: Human rights, property rights, creditor rights, sovereign debt, HIPC

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Introduction*

The ample literature on human rights, including that focusing on economic rights, makes only occasional mention of long-established property and creditor rights. The omission may be rooted in the fact that most of the declarations and conventions on human rights issued in the last five decades gave unduly short shrift to private-property and creditor rights. Here, I begin by reflecting on the strikingly different origins of ‘human’ versus property and creditor rights, because the differences have implications. I subsequently highlight the importance of the enforcement of property and creditor rights for the attainment of other human rights, especially those of an economic nature. There follows a discussion of the wide gap between aspirational human rights and economic reality. Then, I shed light on the poorly understood interconnections between sovereign debt and human rights, because most writings on the topic fail to recognize the trade-offs and incompatibilities that arise because of existing property and creditor rights. Neglect of property and creditor-rights considerations has led many contemporary human rights advocates down an infertile intellectual and practical path.

Origins of human, property and creditor rights

The foremost human rights documents are the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in December 1948, plus two associated treaties, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both approved in December 1966 and effective as of March 1976. Combined, the three documents are commonly known as the International Bill of Human Rights.

The UDHR contains thirty articles that refer largely to civil and political human rights, with articles 17, 23, 25, and arguably 26, enumerating fundamental rights of an economic nature, though they are often referred to as social rights.¹ Listed first is article 17, the right to own property, from which no one is to be arbitrarily deprived. In second place (article 23) are the

* Draft of a chapter to be published in *Sovereign Debt and Human Rights*, edited by Ilias Bantekas and Cephas Lumina (Oxford and New York: Oxford University Press, forthcoming in 2018).

¹ See <http://www.un.org/en/universal-declaration-human-rights/>

rights to free choice of employment; just and favourable work conditions; protection against unemployment; equal pay for equal work; just and favourable remuneration ('ensuring for himself and his family an existence worthy of human dignity'); and freedom to form and join trade unions.

Then comes (article 25) the right to an adequate standard of living, which includes 'food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood,' with 'special care and assistance' provided for motherhood and childhood. Finally, and since a basic education is integral to an adequate standard of living, article 26 recognizes the right to education, which encompasses free and compulsory elementary education, 'generally available' technical and professional education, and higher education 'equally accessible to all on the basis of merit'.

With the notable exception of property rights, which disappear from view, and the lack of any mention of creditor rights, these basic economic rights are also included and expanded upon in the ICESCR, which follows the structure of the UDHR and the ICCPR and features thirty-one ambitious articles.² Articles 6, 7 and 8 focus on specific elements of employment rights. Articles 6 and 7 detail the right to work, benefit from vocational training, and enjoyment of fair wages and equal remuneration for equal work; a decent living; safe and healthy working conditions; promotion opportunities; and vacations. Article 8 dwells on protections of trade union rights, and article 9 spells out the right to social security, including to social insurance.

Articles 10 through 14 of the ICESCR cover the rights of mothers and children, including to childbirth-related benefits; rights to an adequate standard of living, including adequate food, clothing and housing; the right 'to the enjoyment of the highest attainable standard of physical and mental health'; and the right to education. These entitlements are specified in considerable detail. Governments are to improve food production, conservation and distribution methods, and to ensure an equitable distribution of food supplies relative to needs. They are to reduce infant mortality and to prevent, treat and control epidemic, endemic, occupational and other diseases. Beyond providing compulsory and free elementary education, secondary and university

² See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

schooling is to be made ‘generally available and accessible to all’ – and to become progressively free of charge.

These United Nations instruments spawned similar treaties at the world’s regional levels: the European Convention on Human Rights (ECHR), an international treaty that entered into force in 1953; the American Convention on Human Rights (ACHR, 1978); the African Charter on Human and Peoples’ Rights (ACHPR, 1981); and the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (HRD, 2012). All of these treaties feature lists of similar civil, political, social and economic rights – and all of them recognize some rights to property, with the European and Inter-American system having developed the relatively broadest concept of property under human rights jurisprudence.³ However, as in the case with the UN treaties, these regional undertakings include neither a free-standing right to private property – the right to acquire property is not specified – nor do they make any mention of creditor rights. Their protections against expropriation and regulatory takings are weak.⁴

Property rights, to a greater or lesser extent, are also recognised in several other multilateral treaties born out of the United Nations. These are the International Convention on the Elimination of All Forms of Racial Discrimination (1969); the Convention on the Elimination of All Forms of Discrimination against Women (1981); the Convention relating to the Status of Refugees (1954); and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (2003).

The origin of the human rights movement that gave rise to these treaties, and to the greater public awareness – including within the legal profession – of the need to expand recognition and observance of civil, political, social and economic rights, has been the subject of debate. By far the most common starting point for modern histories of human rights is the post-World War II period. This is illustrated by the recollections of the late Louis Henkin, widely considered one of the most influential scholars of international law:

International human rights law... began with the Universal Declaration of Human Rights [and ...] did not draw on old international sources, or on ancient notions of natural law, or on Roman law, or on modern sources of international politics, not

³ Chrystin Ondersma, ‘A Human Rights Framework for Debt Relief’ (2014) 36 U Pa J Int’l L 269, 325-26.

⁴ Jacob Mchangama, ‘The Right to Property in Global Human Rights Law’ (2011) 33 Cato Policy Report 1.

even on the 18th-19th century 'international standard of justice' for foreign nationals. Rather, it derives wholly from contemporary national sources.⁵

Some have argued that the history of international human rights can plausibly be pushed back by at least 100 years, because the Anglo-American campaign to end slavery (1833-65) and the international suffrage movement to secure the vote for women (1888-1928), foresaw the twentieth century approaches to civil and political rights.⁶ The widespread adoption of treaties against the slave trade introduced the idea that violations of human rights were offenses of concern to humankind generally, and particularly in the United States, it was campaigners for abolition, who had mastered grassroots organizing, that became the chief promoters of women's legal rights.

Others have made the case that, on the contrary, it was not until the 1970s that a utopianism coalesced in the international human rights movement, such that had never existed before.⁷ The year 1977, in particular, is believed to have marked a watershed in the international human rights movement, because that was when Amnesty International won the Nobel Peace Prize, and also when U.S. President Jimmy Carter invoked human rights as the guiding principle for his foreign policy. As has been pointed out, the words 'human rights' almost never were used in English prior to the 1940s, but in 1977 they appeared in the *New York Times* nearly five times as often as in any prior year in that newspaper's history.⁸

The short record of aspirational human rights jurisprudence and practice contrasts sharply with the rich history of organically developed property and creditor rights. Reliable generalizations about the earliest concept of property rights among hunter-gatherers are that it emerged as the unintended consequence of food collecting, ancient tool- and weapon-making, and the erection of temporary shelter.⁹ The development of farming, in the millennia since 10,000 BC, expanded the concept of private ownership by encouraging individual families and tribes to claim control

⁵ Louis Henkin, 'Human Rights and State "Sovereignty"' (1996) 25 *Georgia J Int'L & Comp Law* 31, 39-40.

⁶ Margaret Keck and Kathryn Sikkink, 'Historical Precursors to Modern Transnational Social Movements and Networks' in John A Guidry, Michael D Kennedy and Mayer N Zald (eds) *Globalizations and Social Movements* (Michigan UP 2000) 35; Jenny S Martinez, 'Human Rights and History' (2013) 126 *Harvard Law Review Forum* 221.

⁷ Samuel Moyn, 'The Last Utopia: Human Rights in History' (Belknap 2010) 1; Stefan-Ludwig Hoffmann, 'Introduction: Genealogies of Human Rights' in Stefan-Ludwig Hoffmann (ed) *Human Rights in the Twentieth Century* (CUP 2011) 4.

⁸ *Ibid*, Hoffmann, 4.

⁹ James E Krier, 'Evolutionary Theory and the Origin of Property Rights' (2009) 95 *Cornell LR* 139, 158.

of the land committed to cultivation.¹⁰ As populations concentrated around agricultural areas, control over prime land became more valuable, claims on property began to be documented, and deference gave way to new enforcement customs and mechanisms. ‘Possession, as any property lawyer knows, remains the cornerstone of most contemporary property systems – nine points of the law, the root of title, and the origin of property’.¹¹

In the Mediterranean, private ownership rose to visible prominence in the ancient Greek states and later in the Roman Empire, and for its citizens it extended to land, slaves and goods. Rome facilitated trading activity by defending private ownership and by legitimizing contractual agreements.¹² During the Dark Ages in Europe, however, private ownership gave way to collective proprietorship, and thus land became the property of local abbeys, feudal villages, and peasant farms.¹³ It was mainly in the large cities, beginning with the important city-states in northern Italy and the lowlands, where new forms of mercantilist activities that emerged during the Renaissance rekindled efforts to improve upon an individual’s right to private property.¹⁴ The rule of law reasserted itself, especially in England with King John’s signing of the Magna Carta in 1215. Gradually, the monopolistic feudal economy gave way to mercantilism, and later to increasingly free markets that functioned on the back of effective rights to private property.¹⁵

The recognition of private property rights advanced in the late 1700s, in the wake of the American and French Revolutions. The Declaration of the Rights of Man and of the Citizen, adopted by France’s National Constituent Assembly in 1789, is a fundamental document in the history of civil rights whose content reflected many of the ideals of the American Revolution. Its article 17, in particular, states the following: ‘The right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity’.¹⁶

During the early 1800s, property rights were codified throughout Europe and beyond and the French Civil Code of 1804 was particularly influential. It was promulgated throughout the

¹⁰ Harold Demsetz, ‘Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership’ (2002) 31 *J of Legal Studies* 653, 667.

¹¹ Krier (n 9) 159.

¹² Demsetz (n 10) 667.

¹³ Demsetz (n 10) 668.

¹⁴ Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Univ of California Press 2008) 91.

¹⁵ *Ibid* 64.

¹⁶ See http://www.constitutionnet.org/files/declaration_of_the_rights_of_man_1789.pdf

Napoleonic Empire and served as a model for the legal codes of more than twenty nations throughout the world.¹⁷ The Code's article 544 established private, absolute and exclusive property as the main form of property legally attainable, at the expense of the other two major regimes that had prevailed since medieval times, namely: collective property (the Commons) and dissociated property (the *Dominia*). It defined property as the 'right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes'.¹⁸

Creditor rights, namely, the procedural provisions that enable persons to collect money or goods or services that they are owed, have a long history likewise measured in millennia. In very primitive societies, the figures of debtors and creditors were generally unknown, and thus there were no written rules addressing what we now recognize as fraud, or regulating the distribution of a debtor's estate among his creditors.¹⁹ Given the circumstances, payments were uniformly contemporaneous with the delivery of goods, and thus cash was king.

Sales on credit were a feature of less primitive societies, and thus there arose the possibility that one of the contracting parties would be late in performing. Public opinion provided two powerful sanctions in cases of late payment: one had religious roots; the other was a brutal form of the procedure of execution. Typical of the former was the practice of the creditor sitting himself at the debtor's entrance, there to remain until the obligation was fulfilled. 'The expected payment was seldom delayed, for public opinion would have punished instantly and severely the debtor who allowed his creditor to become exhausted or to die of starvation before his door'.²⁰

The other means of compelling payment was seizing the debtor by force and coercing him to work until the obligation was settled – or seizing the debtor's relatives and selling them into bondage for the same purpose. The Law of the Twelve Tables, the legislation dating to 451 BC that stood at the foundation of Roman law, illustrates this latter sanction because it codified it. According to Table III, if a debtor failed to fulfil his obligation, the creditor could arrest him. And after having thrice publicly invited anyone, without success, to come forward and pay the

¹⁷ Michela Barbot, 'When the History of Property Rights Encounters the Economics of Convention: Some Open Questions Starting from European History' (2015) 40 Historical Social Research 78, 80.

¹⁸ See http://www.napoleon-series.org/research/government/code/c_code2.html

¹⁹ Louis E Levinthal, 'The Early History of Bankruptcy Law' (1918) 66 U Pa LR 223, 228.

²⁰ Ibid 229.

debt at issue during a sixty-day period, the debtor ‘shall suffer capital punishment or shall be delivered for sale abroad across the Tiber River’.²¹

In the course of time, execution for debt came to be directed against the property of the debtor rather than his person, probably because debtors often were delinquent to more than one creditor, and yet only the one who moved first could seize the debtor. Rutilius Rufus, a Roman Consul around 105 BC, is credited with having introduced a process of general execution against a debtor’s property known as *bonorum emptio*, an innovation that established the foundations of a bankruptcy regime.²² Whether the debtor was solvent or insolvent, whether there were many creditors or one, the proceeding was the same, leading to a sale of the entire estate of the debtor for the benefit of his creditors. It was also in ancient Rome that elaborate provisions for vitiating fraudulent transfers of property belonging to insolvent debtors were framed. Any act or forbearance by which a debtor diminished the amount of his property divisible among his creditors was held to be a fraud against creditors.²³

As was the case with property rights, creditor rights also eroded during the Dark Ages in Western Europe, but by the twelfth century the region was experiencing a restoration in commercial and intellectual life. A substantial merchant class developed trade networks ranging from England in the north to the Crusader States in the east, and with them came a revival of credit extension – as well as the application of the Roman system of private liquidation of the estates of insolvents. Elaborate regulations concerning bankruptcy are traced as far back as 1313, and over time the doctrine that a suspension of payment by a debtor renders him subject to a bankruptcy process spread throughout Europe, principally from the Italian cities to the German and French territories and beyond.²⁴

In thirteenth century England, during the reign of King Edward I, change came in the form of parliamentary statutes that dealt harshly with defaulting debtors. Interestingly, Parliament excused this severity in the preamble to the first of these statutes – the Statute of Acton Burnett of 1283 – on the ground that foreign merchants would not do business in England unless

²¹ See http://avalon.law.yale.edu/ancient/twelve_tables.asp

²² William Smith, William Wayte and George E Marindin (eds), *A Dictionary of Greek and Roman Antiquities* Vol 1 (John Murray 1901) 306; Levinthal (n 19) 231.

²³ Levinthal (n 19) 239.

²⁴ Ibid 242-44; Edward A Tomlinson, ‘Security for a Commercial Loan: Historical and International Perspectives’ (1999) 23 *Md J Intl L & Trade*, 77, 77-81.

provided with a ready means for securing payment of their debts.²⁵ Even so, debtors devised various means of evading coercive imprisonment and/or liquidation of their estates, a fact that prompted the earliest forms of bankruptcy legislation in England: the Bankruptcy Act of 1542, as amended in 1570 and 1603 through successive acts of Parliament. The Elizabethan statute specified the process whereby, on petition of the creditor, the Chancellor and other bankruptcy commissioners would summon the bankrupt before them, examine him under oath, and if necessary imprison him until he forfeited his possessions, at which point his estate was distributed to his creditors.²⁶

Bankruptcy entered French law by the Ordinance of 1673, that country's initial commercial codification. In the United States, the first federal law on the subject was the Bankruptcy Act of 1800, which was limited to traders and provided only for involuntary proceedings, but was followed by several reforms culminating in the enactment of the Bankruptcy Act of 1898, which established the modern concepts of debtor-creditor relations. Fast forward to today, and all things considered, property rights have been recognized as 'the most frequently asserted and doggedly fortified right in world history'.²⁷

There is thus a striking difference between how international human rights principles have developed post-World War II, on the one hand, and how private-property and creditor-rights principles have developed during the past two millennia, on the other. Human rights initiatives have followed mainly a top-down model: drafted and codified during a period of years at the supranational level reflecting universal aspirations, governments have accepted them via subscriptions to international treaties. Property and creditor-rights laws, in contrast, have evolved in an organic, bottom-up manner: drafted, codified, implemented and then reformed throughout the centuries, they reflect practical societal needs and market realities.

As a corollary, there is also a major difference in how these two sets of jurisprudence have been implemented. Human rights laws, whether addressing political, economic or other rights, remain far from honoured in most parts of the world. Empirical studies suggest that states that ratify human rights treaties do not improve their human rights performance, or else that the treaties

²⁵ Tomlinson (n 24) 77.

²⁶ Jay Cohen, 'The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy' (1982) 3 J Legal Hist 153, 155-56.

²⁷ Moyn (n 7) 17.

have been associated with worse human rights practices.²⁸ Even in the wealthy United States, for instance, the wish list of economic entitlements in the UDHR – in particular, articles 23, 25, and 26 – is yet to become reality despite the passage of nearly seventy years. Moreover, any casual reading of daily news headlines, especially out of Africa and the Middle East, offers a painful reminder of the abject implementation failures, in even the most basic of civil and political rights, in dozens of signatory countries around the globe where atrocities are still commonplace.

A plausible explanation for the yawning gap between theory and practice is that the normatively strong human rights system has been largely ineffectual because of a major procedural defect. States have accepted authoritative international standards governing the treatment of their own nationals in their own territory – but only because they reserved to themselves the exclusive, sovereign right to enforce those rights as they saw fit.²⁹ Despite the passage of time, it is evident that most states are very reluctant to tolerate national legislation or institutions that will restrict their freedom of manoeuvre in relation to human rights-related policies – especially in countries most in need of respect for basic human rights.³⁰ Indeed, there is such aversion among states to countenance still more rights obligations that when an issue like human trafficking, say, is framed as a transnational crime, it receives much more state support than when put forth as a human rights issue.³¹

In sharp contrast, there are few gaps between principled intentions, legal mandates, and nuts-and-bolts reality when it comes to property and creditor rights. These rights have been grafted through the ages into constitutions, laws, regulations and everyday procedures because, for the most part, they are homegrown, perceived as necessary, and widely accepted. The implementation of property rights, in particular, does not pose a challenge to sovereign authority, because states can always exercise their rights to eminent domain, especially for public use, appropriating for themselves personal and even intangible property – as long as they pay just compensation. While it is often hard to demonstrate the justiciability of violations in human

²⁸ Adam S Chilton and Eric A Posner, 'The Influence of History on States' Compliance with Human Rights Obligations' (2017) 56 *Va J Int'l L* (forthcoming).

²⁹ Only the gravest of crimes, such as genocide, crimes against humanity, and war crimes, are subject to international enforcement. 'All other human rights violations--that is, nearly all human rights violations--remain covered by the principle of national implementation of internationally recognized human rights'. See Jack Donnelly, 'State Sovereignty and International Human Rights' (2014) 28 *Ethics & International Affairs* 225, 231-32

³⁰ *Ibid* 229; Philip Alston, 'Against a World Court for Human Rights' (2014) 28 *Ethics & International Affairs* 197, 201.

³¹ Volha Charnysh, Paulette Lloyd and Beth A Simmons 'Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons' (2015) 21 *European J of International Relations*, 323.

rights before national courts, it is easy to do so when it comes to breaches of property or creditor rights since they are governed almost exclusively by domestic law, except when covered by international investment agreements.

Relationship between human, property and creditor rights

Most of the academic literature on human rights makes little mention of the importance of strong property and creditor rights. This may be because of the perception that the latter are associated with business interests rather than the needs of ‘ordinary people,’ but as will be made clear below, nothing could be further from the truth. It may also reflect the purist view that property and creditor rights are to be considered separately, if at all, because they govern the relationship between humans and objects, whereas human rights govern how humans treat fellow humans.³² This is a narrow and unhelpful interpretation.

The result of these approaches is that by now these rights lack shared jurisprudential concerns, substantive connections, or even a common language.³³ In countries where the rule of law is well developed and reliably enforced, such separation between property and human rights need not be a major concern. In transition, post-conflict, and most other developing nations, however, where state power has been misused and the rule of law has been applied inadequately and unevenly, the disconnect is singularly unhelpful.

Billions of people around the world still lack secure property rights, hampering the attainment of their economic, political and social rights because land and housing are the most important assets of the poor.³⁴ Absence or insecurity of property rights is a central and ubiquitous cause of poverty, not only in the very poorest nations, but also in the largest middle-income countries such as Brazil, China, India and Russia. When property rights are not secure, economic transactions are hindered; efficient and sustainable resource use is unlikely; the evolution of effective credit markets is delayed; investment and entrepreneurial activities are discouraged; and thus the process of economic development has a hard time gaining traction.

³² Tim Hayward, ‘Human Rights vs Property Rights’ (2013) JWI Working Paper 2013/04, 3.

³³ Ting Xu and Jean Allain, ‘Introduction’ Ting Xu and Jean Allain (eds) *Property and Human Rights in a Global Context* (Hart 2016) 1, 2.

³⁴ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (Commission on Legal Empowerment of the Poor and UNDP 2008) 64.

In many countries, land rights and security of tenure constitute the basis for access to food, livelihoods, housing and development for a large percentage of the population. Land is in many cases necessary also for the realization of other economic, social and cultural rights. Therefore, just and inclusive land rights have the potential to play a catalytic role in economic growth, development and poverty alleviation. Yet, land rights are still often viewed as part of the realization of other fundamental rights, such as the right to food or the right to water, rather than as a stand-alone human rights priority. Access, redistribution and guarantee of land rights are also crucial issues in post-conflict situations, especially in Africa and the Middle East. In those societies, property grievances need to be addressed in order to prevent new seeds of conflict being planted.

In recent years, the UN Committee on Economic, Social and Cultural Rights (CESCR) has adopted a number of statements highlighting the need to respect land rights, explicitly referring to them in relation to other areas such as housing, forced evictions, food, water, health and cultural life. Thus far, however, there is still no clear and comprehensive statement on the fundamental importance of the right to land.³⁵

The urban poor, especially in Latin America, generally live in large shantytowns on the outskirts of major cities and are often migrants from the countryside in search of economic opportunities and personal security. However, that search is usually fruitless, because a pervasive feature of these squatter settlements is the vicious circle of illegality in which residents find themselves. Because the settlements habitually originated in land invasions, incomers do not have legally recognized property rights: their slums have no legal standing and thus basic amenities and services such as clean water, electricity, and sewage are not readily available. Other basic public services, such as health, education and police and fire prevention are likewise generally unavailable. Conflicts and disputes arising within these shantytowns rarely reach official channels and are thus decided by force, via illegal alternatives, or left unresolved to fester.³⁶

Another unfortunate fact in many developing countries is that women face legal and social barriers that prevent them from owning or inheriting assets, opening bank accounts, or accessing

³⁵ Minority Rights Group International, *Moving Towards a Right to Land* (MRG 2015) 4, available at <http://minorityrights.org/wp-content/uploads/2015/10/MRG_Rep_LandRights_Oct15.pdf> accessed 16 April 2017.

³⁶ Julio Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America' 2 *The World Bank Legal Review: Law, Equity, and Development* (World Bank 2006) 113, 121-22.

credit on their own. Discriminatory family, marital property and inheritance laws are pervasive particularly in Africa and the Middle East, rendering them legally inadequate and thus constraining a woman's ability to engage in economic activity and realize her economic rights. Along with legal restrictions on women's mobility, employment outside the home, and administration of personal assets, those laws present barriers to women's economic opportunity.³⁷ Strong property rights protection is required to ensure that women can engage as productive agents of economic growth and avoid destitution in case of widowhood or divorce. Women's rights in relation to land, including equality with respect to property rights, inheritance, and titling of land and homesteads need to be modernized. Evidence shows that where land is securely held by women they are better able to support themselves and improve their families' access to health care, education, and means of survival.³⁸

Still another priority to help advance the achievement of economic, political and social rights is to promote the creation of systems for collateralising moveable and intangible property – an example of how strong and effective creditor rights can help. Although many people in the developing world lack secure rights to use and transfer property, most own some tangible (moveable) or intangible property, such as intellectual property, brands or reputations. To the extent that this type of property is held securely and can be used to access credit and to create and grow businesses, the poor will have increased borrowing opportunities and investment capacity. Experience in a variety of developing countries shows that there are important legal reforms that if implemented will allow the poor to leverage their movable and intangible property.³⁹

This brings us to a critique of the view that human rights are of a different nature than property and creditor rights, one that is prevalent in the human rights literature.⁴⁰ In this connection, the

³⁷ Mary Hallward-Driemeier, *Enterprising Women: Expanding Economic Opportunities in Africa* (World Bank 2013) 159.

³⁸ Ana Palacio, 'Legal Empowerment of the Poor: An Action Agenda for the World Bank' (World Bank: March 2006) 26

<<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LegalEmpowermentofthePoor.pdf>> accessed 16 April 2017.

³⁹ Commission (n 34) 71.

⁴⁰ 'Whether the right to property should be a human right is a controversial question. It seems less worthy of protection than, for example, the right to life, the right not to be enslaved, or even the right to respect for the home and private life.' Tom Allen, *Property and the Human Rights Act 1998* (Hart 2005) 1. 'Property rights govern what may be done by "persons" with "things". Human rights govern how humans may be treated by other humans. ... [W]e can recognize protection of property as a human right when that property is a necessary means for the fulfilment of other basic human rights. But this is by no means a more generalised defence of property rights as human rights.' Hayward (n 32) 3, 11. See, more generally, Jeremy Waldron, *The Right to Private Property* (Clarendon 1988).

libertarian perspective is illuminating. It holds that property and human rights are inextricably linked, and not just because the former enable several of the latter, but also because, at their core, a number of human rights actually involve the assertion of property rights.

Human rights recognize each man's inalienable property right free of any coercive interference, and from this right to property follows the right to the services that one delivers. Each individual is the owner of himself, and thus the ruler of his own person; the human body is the first property of a human being.⁴¹ A man's right to personal freedom, then, is his property right in himself.⁴² Consequently, when the UDHR states in article 4 that 'no one shall be held in slavery or servitude ...' it is repudiating a condition in which humans' right of self-ownership is disrespected, because a master is expropriating the services that a human renders.⁴³

In like manner, other UDHR rights can be considered extensions of the libertarian principle that each individual is the owner and ruler of his own person. Thus, article 1 ('all human beings are born free and equal in dignity and rights ...') follows logically from a recognition of each person's inalienable property right over his own being. So does article 2 ('everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind ...'), because discrimination depreciates the property value of humans being discriminated against. Article 3 ('everyone has the right to life, liberty and security of person') is but a reaffirmation of the concept that humans with property rights are free to utilize their own persons as they see fit. Article 5 ('no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment') likewise affirms the inalienable right to self-ownership. And so on and so forth with several other UDHR articles spelling out human rights rooted in the libertarian conception of property rights, which goes beyond the relationship between humans and objects.

There is, moreover, another sense in which a number of human rights are essentially property rights, a sense obfuscated in the extant literature. Take, for example, the human right to press and Internet freedom, covered under article 19 UDHR ('everyone has the right to freedom of opinion and expression ... through any media ...'). The extent to which this right is exercised

⁴¹ Francis Cheneval, 'Property Rights as Human Rights' in Hernando de Soto and Francis Cheneval (eds) *Realizing Property Rights* (Rüffer & Rug 2006) 11.

⁴² Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 271.

⁴³ Murray N Rothbard *For A New Liberty: The Libertarian Manifesto* (Ludwig von Mises 2006) 50. Even from a non-libertarian perspective, 'One should not hesitate to acknowledge a great debt which human rights law owes to property law'. Jean Allain, 'Property in Persons: Prohibiting Contemporary Slavery as a Human Right' Ting Xu and Jean Allain (eds) *Property and Human Rights in a Global Context* (Hart 2016) 93, 112.

freely depends on how the state manages the distribution of newsprint, the licenses necessary to operate radio and television broadcast stations and any direct censorship of the airwaves and the Internet. If licenses to broadcast in a radio frequency spectrum are denied to political opponents, then the human right to a free media is compromised. If, on the other hand, radio broadcast permits are allocated by a non-governmental body through a transparent auction process, then the human right to a free media is much more likely to be respected. This illustrates how the human right to freedom of expression through any media outlet hinges on who owns the rights to newsprint, radio and TV broadcasting, and to uncensored Internet communications, and on how those rights are allocated. A human right like freedom of opinion and expression through any media, in this light, becomes essentially a property rights issue.

Consider also the human right to freedom of assembly, protected under article 20 UDHR ('everyone has the right to freedom of peaceful assembly ...'). This right will be exercised when a privately owned convention hall or stadium is rented by anyone who can afford it regardless of their political or other leanings. Once the property is thus reserved for occupancy, the right of peaceful assembly can be realized because people will be able to come together; they will be able to speak, listen and mingle; and they will be free to distribute or exchange printed or audio-visual materials. However, if said facilities were owned by the local or national government, or by private owners who can be pressured by state officials and if political or social dissidents were denied their right to rent the hall or stadium in question then the human right to peaceful assembly will have been thwarted. The human right of free assembly thus hinges on the property right to hire an assembly hall from its owners.⁴⁴

In short, many human rights are connected to, and are rather inseparable from, broadly conceived property rights. At the very least, human rights advocates should admit that property and creditor rights are complementary to other human rights and thus cannot be neglected. The irony is that early conceptions of human rights developed throughout history in close association with notions of private property rights. The entitlement to civil and political rights championed in both the American and French Revolutions was tied to property issues and early proponents of what nowadays would be recognized as 'human rights' considered property rights just as important as the freedoms of religion and speech.⁴⁵

⁴⁴ Ibid 51.

⁴⁵ Commission (n 34) 66.

There is good reason why human rights, as we now know them, are of relatively recent vintage: the world has functioned for millennia without a conception – never mind the implementation – of the many individual rights that came to be enshrined in various international conventions after the end of World War II. Throughout human history, many civilizations came to be regarded as successful even though they engaged in practices now considered unacceptably immoral, like slavery, discrimination, and cruel punishment. These societies developed despite failing to acknowledge rights to self-determination, religious freedom, direct representation, equal pay for equal work, free education, or social security.

Property and creditor rights, on the other hand, evolved naturally to prevent or solve societal conflicts. Because of widespread recognition that they are necessary for commerce and investment to thrive, they have been upheld and enforced universally by nation states, especially so in an increasingly interconnected, efficient and modernizing world. And without trade and investment there cannot be vigorous economic progress – especially the kind of progress that can generate the resources necessary for society and particularly the state, to afford the aspirational entitlements that in the last seven decades have come to be identified as ‘human rights’.

The gap between aspirational human rights and economic reality

Most legal literature and United Nations documents on human rights gloss over the fact that the least developed countries are structurally and otherwise on a very different trajectory than that which Western Europe has travelled since the end of World War II. In the poorest and least rights-compliant parts of the world, economic, political, cultural and other realities are simply not amenable to a ‘cutting and pasting’ of the twentieth century European model of the welfare state for the purpose of realizing human rights. To paraphrase Kenneth Dam, the first instinct of lawyers, which is to transplant world-class legal and welfare institutions to developing countries in the hope that human rights will flourish, is sure to keep producing little more than a harvest of dead leaves.⁴⁶

⁴⁶ Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings 2006) 6.

In human rights law, the state is traditionally considered the obligated party, because states are parties to the treaties central to the human rights regime. More significantly, states are also the obligated party because so many of the aspirational human rights – especially the economic and social ones – are expected to be delivered by their governments. As recalled by Louis Henkin, ‘almost from [its post-War] beginning, the international law of human rights followed the movement within states from “the liberal state” to “the welfare state”’.⁴⁷ Whereas the Universal Declaration drew on liberal national constitutions for its civil and political rights, for its economic and social rights ‘it drew on the welfare systems initiated in the nineteenth century by Western European states’.⁴⁸

Exhibit A when it comes to human rights mandates with steep price tags attached is the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Consider its article 2: ‘Each State Party to the present Covenant undertakes to take steps ... 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.’ In article 6, which deals with the right to work it stipulates that: ‘the steps to be taken by a state party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment...’ Article 9 declares that: ‘the states parties to the present Covenant recognize the right of everyone to social security, including social insurance.’ And in article 11 it states that the parties: ‘recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions [and they] will take appropriate steps to ensure the realization of this right.’ States are also obligated to take measures to ensure ‘the highest attainable standard of physical and mental health’ (article 12) and to provide educational services at the primary, secondary and tertiary levels free of charge in order to realize ‘the right of everyone to education’ (art. #13-14).

These economic rights are very expensive to deliver and difficult to adjudicate because of the large financial resources they demand. They entail substantial government initiative, administration and spending in multiple and complex areas – including ones in which many

⁴⁷ Henkin (n 5) 34.

⁴⁸ Ibid 40.

economists would prefer that states delegated to the private sector, either in principle or on grounds of unaccountability, corruption and inefficiency in the public sector. The establishment of a welfare state also fosters an entirely paternalistic vision of government, promoting dependence and a false sense of entitlement to a life people may have no intention of working or paying for. It clashes as a prescription with the evident need for low-income countries to encourage entrepreneurship, open up investment opportunities, facilitate hiring of labour in the formal economy, establish new businesses, and unleash market forces in order to jump-start their economic development.

It is estimated that nearly three-fourths of the world's population do not enjoy access to a comprehensive social security system, namely, one that ensures the realization of the privileges embodied in various human rights treaties by providing essential health care, unemployment compensation and supplemental income for persons earning very low pay, as well as retirement and disability benefits. Government spending on social protection and health ranges from the equivalent of 27 percent of GDP in Western Europe down to under six percent in Africa and Asia, with the world average (weighted by total population) at less than 10 percent of GDP. Only 12 percent of unemployed workers worldwide actually receive unemployment benefits, with effective coverage ranging from 64 percent of the unemployed in Western Europe to less than three percent in the Middle East and Africa.⁴⁹

There are good reasons why the Western European welfare state has not been successfully exported to the developing world in the past decades – particularly not to the most politically, socially, and economically fragile states where human rights abuses are a daily phenomenon. The most pragmatic reason is that governments in most developing countries consider it impossible to raise the kind of permanent tax revenues that would be necessary to underwrite welfare benefits akin to those that Western Europe offers and the ICESCR prescribes. While governments in the Eurozone, on average (2014-16), take in revenues equivalent to 46 percent of GDP, their counterparts in low-income developing economies – from Bangladesh to Zimbabwe – reap on average a mere 16 percent of GDP, namely, about one-third as much.⁵⁰ Doubling, never mind tripling, their tax take in order to afford a European welfare state would be a completely unattainable objective.

⁴⁹ ILO, *World Social Protection Report 2014-15* (ILO 2014).

⁵⁰ IMF, *Fiscal Monitor: Debt: Use It Wisely* (IMF April 2017) 113, 127.

In fact, most poor-country governments cannot conceivably offer unemployment or retirement benefits, at least not to the vast majority of their people. Between half and three-quarters of their labour force operates in the underground economy – largely in agriculture, construction, small-scale manufacturing, and services – and thus workers neither pay the contributions necessary to cover the cost of such benefits nor can they properly document instances of employment for pay, on the one hand, and unemployment without pay, on the other. Indeed, informality is one of the important characteristics of labour markets around the world, with millions of (mostly small) enterprises and over a billion workers operating in the shadows. In more than half of reporting developing countries – from destitute Madagascar to relatively wealthy Uruguay – the share of informal employment in non-agricultural areas exceeds 50 percent, and in about one-third of countries it accounts for at least 67 percent of total non-farm jobs.⁵¹

Beyond the tight fiscal space that limited tax revenues generate, it is hard to imagine that many governments in developing countries, not least in Africa and the Middle East, could acquire the administrative capacity to deliver welfare-like benefits effectively, given the power struggles and rent-seeking activities that have consumed them. As it is, domestic factors and political arrangements have solidified non-egalitarian and corrupt institutions in many developing countries, such that the more privileged classes are traditionally the largest beneficiaries of any public social spending. Moreover, the welfare state as known in Europe is an alien concept in most low-income countries, where the role of governments in the delivery of services is typically far less important than that of informal family and tribal networks, who provide the bulk of income support and social services.

Even in middle-income developing countries, many of which have attempted to introduce elements of the European welfare state, results have not always been satisfactory or productive. One reason is that economic development is a process whereby workers gradually shift from low- to high-productivity activities, and generally from agriculture into manufacturing and services, and where they benefit from the adoption of more capital- and technology-intensive production processes. The result is an increase in labour productivity, which is the basis for rising wages and salaries, and thus the increase of national incomes.

⁵¹ ILO, *Women and Men in the Informal Economy: A Statistical Picture* (ILO 2013) 8.

In Mexico, for instance, social policy – the set of programs through which governments offer health services, housing loans, day care services, and various types of pensions to workers of any income level, type of employment, or labour status – has acted as a drag on that country’s structural transformation process. The reason is that those well-intentioned interventions have slowed down the reduction of low-productivity agricultural employment and the increase in high-productivity jobs elsewhere in the economy. They have subsidized inefficient self-employment and other forms of non-salaried employment, as well as illegal salaried employment. Therefore, they have interfered with the process by which workers seek jobs that are more productive and firms invest, grow, adopt new technologies, train workers, and take measures to increase their efficiency.⁵²

In sum, the expectations of human rights advocates have not kept pace with the very limited capacity to institute a European welfare state, especially in the low-income countries most prone to human rights deficiencies. The common practice for scholars working on human rights and social policy in developing countries has been to advocate for larger shares of public spending on welfare. Little or no attention has been paid to the necessary revenues and administrative capacity, or to counterproductive impacts on economic incentives and this has led scholars down a barren path covered with Professor Dam’s proverbial dead leaves.

The time has come for realistic, context-specific proposals that take account of cultural realities, political-economy issues, budgetary constraints, development imperatives, and imperfect institutions. The private sector, and not the public sector, will likely have to play a major role in the generation of jobs and the provision of health, insurance, educational and other services. Good intentions are much more likely to be successful when European or other alien legal and economic models are adapted to local environments.⁵³ Until then, it should not surprise or disappoint that states disagree about which human rights should have priority, what scarce resources are allocated to alleviating human rights violations, and how cultural variations and institutional differences are respected.⁵⁴

⁵² Santiago Levy, *Good Intentions, Bad Outcomes: Social Policy, Informality, and Economic Growth in Mexico* (Brookings 2010) 3.

⁵³ Ian Gough, ‘European Welfare States: Explanations and Lessons for Developing Countries’ in Anis A Dani and Arjan de Haan (eds) *Inclusive States: Social Policy and Structural Inequalities* (World Bank 2008) 39, 64.

⁵⁴ Eric Posner, ‘Human Welfare, Not Human Rights’ (2008) 108 *Columbia LR* 1758, 1760.

Interconnections between sovereign debt, human rights, and property and creditor rights

Legal writings on the interconnections between sovereign debt and human rights betray their authors' lack of familiarity with economics and finance and also with the lessons of practical experience in impoverished and rights-deprived countries around the world. In particular, few legal scholars and human-rights advocates have engaged in a critical analysis of what has transpired, in the past decade-and-a-half, in the many low-income countries that became beneficiaries of debt forgiveness from official bilateral and multilateral agencies. The mostly shallow and incomplete approach to the interconnections between sovereign debt and human rights has led many contemporary writers astray in their thinking, expectations and policy recommendations.

A common point of departure for most human rights attorneys, debt-forgiveness campaigners, and UN Human Rights Council representatives is the claim that in many of the world's poorest countries the fulfilment of debt-service obligations has frequently come at the expense of social expenditures that contribute to the realization of human rights.⁵⁵ According to Dustin Sharp:

In cases where a highly indebted state spends a significant portion of its budget on debt servicing, it stands to reason that less money will generally be available to progressively realise rights to things like health and education, and in many instances it will be hard for the state to satisfy core minimum obligations.⁵⁶

Indeed, according to Sabine Michalowski, 'resources that are dedicated to debt repayment will not be available in order to improve the social rights situation in the country, and vice versa'.⁵⁷

The trade-off between debt service and social spending is an oft-repeated assertion that has its origin in misleading anecdotal claims long made in Jubilee 2000 campaign materials – the coalition of religious organisations that has been advocating for debt forgiveness (cancellation)

⁵⁵ Christian Barry, 'Sovereign Debt, Human Rights, and Policy Conditionality' (2011) 19 J of Pol Philosophy 282, 284-86; Cephias Lumina, 'Sovereign Debt and Human Rights' in *Realizing the Right to Development* (UN 2013) 289, 292-94; United Nations Human Rights Council, 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina' (A/HRC/20/23 10 April 2011), 3.

⁵⁶ Dustin Sharp, 'The Significance of Human Rights for the Debt of Countries in Transition' in Juan P Bohoslavsky and Jernej L Čeranič (eds) *Making Sovereign Financing and Human Rights Work* (Hart 2014) 47, 49.

⁵⁷ Sabine Michalowski, 'Sovereign Debt and Social Rights: Legal Reflections on a Difficult Relationship' (2008) 8 Hum Rts LR 35, 37.

of the debts of the poorest countries since the early 1990s.⁵⁸ The claims have a faulty logic. To illustrate: during the 1980s, the twenty-nine countries (from Afghanistan to Zimbabwe) now considered the world's poorest made US\$17¼ billion in debt-service payments on their long-term foreign debt, the equivalent of 2⅔ percent of their average annual GDP.⁵⁹ Yet, this does not mean that during the 1980s these countries had less money to 'progressively realise rights to things like health and education'.

The reason is that, during the 1980s, the twenty-nine countries also obtained US\$42½ billion of new long-term foreign loans, the equivalent of 6¾ percent of their average annual GDP – such that they actually enjoyed a net of US\$25¼ billion in additional long-term funds with which to 'progressively realise rights to things like health and education'.⁶⁰ To put it in perspective, the countries had on average an extra four percentage points of GDP – an economically meaningful amount – they could spend, each year, for whatever purposes the loans were intended. The elemental mistake made by the Jubilee campaigners, and by all those who have since parroted their line, is akin to alleging that home mortgage payments force homebuyers to cut back on their food or health or educational spending.

It should not surprise, therefore, that the claim of a trade-off between foreign debt service and domestic social spending finds no support in the economic literature. The more credible hypothesis concerns a potential trade-off between a rapidly growing stock of foreign debt and domestic social spending, given the threat of higher taxes and debt service a borrowing binge may portend. The evidence on this issue is mixed, however. One author who assessed how rising external debt burdens influenced the composition of government spending in forty-seven developing countries during 1972-2001, found that in Africa and the Middle East it had impacted negatively government investment outlays and current spending other than on salaries, which in fact tended to increase.⁶¹ Since a large part of social expenditure involves salaries paid to government employees in education and health, this finding suggests that human-rights-related budgetary spending actually was more than shielded from the adverse effects of rising

⁵⁸ Ann Pettifor, 'The Jubilee 2000 Campaign: A Brief Overview' in Chris Jochnick and Fraser A Preston (eds) *Sovereign Debt at the Crossroads* (OUP 2005) 297.

⁵⁹ World Bank, *International Debt Statistics 2017* (World Bank 2017).

⁶⁰ Ibid.

⁶¹ Saeid Mahdavi, 'Shifts in the Composition of Government Spending in Response to External Debt Burden' (2004) 32 *World Development* 1139.

debt burdens – a conclusion consistent with prior research results on the resilience of this type of spending to austerity campaigns.

On the other hand, researchers looking at whether government spending on health and education relative to GDP were affected by changes in the ratio of total (external and domestic) public debt to GDP, found the opposite trend using a panel of up to fifty-seven developing countries for the period 1985-2003.⁶² Following an increase in the stock of total debt relative to GDP, governments typically reacted prudently, by cutting spending growth and raising revenues by an amount beyond the increase in their interest bills, thus tightening somewhat the overall fiscal stance, and in the process, trimming new allocations to social spending.

The preoccupation with the potential fallout from rising debt and debt-service burdens that has permeated the human rights literature is also gravely misplaced. Ever since the early 2000s, social spending of the kind that supposedly contributes to the realization of human rights – at least as per the welfare-state model embraced by most advocates – has actually increased rapidly in the world's poorest and least human-rights compliant nations. During this period, most low-income countries benefited from the best external environment in decades: massive debt forgiveness from their official creditors under the HIPC Initiative, as enhanced in the mid-2000s; a historic boom in commodity prices and thus exports and tax revenues, especially during 2002-2011; and easier-than-ever access to new financing, especially from the private international capital markets at exceedingly favourable interest rates.⁶³

The key trends were the following. The same group of twenty-nine poorest countries, which had seen their combined total external indebtedness skyrocket from the equivalent of less than 50 percent of their GDP prior to 1982 to over 125 percent by 1994, registered a major cut in that ratio to under 30 percent of GDP during 2010-14.⁶⁴ In relation to total export earnings, the group's total external debt, which had jumped to over 600 percent by the mid-1990s from under 300 percent in the early 1980s, came down precipitously to under 110 percent by 2011-12. The poorest countries' annual debt-service payments on long-term foreign debt, which had risen to

⁶² Eduardo Lora and Mauricio Olivera, 'Public Debt and Social Expenditure: Friends or Foes?' (2007) 8 *Emerging Markets Review* 299.

⁶³ IMF, 'Macroeconomic Developments in Low-Income Developing Countries: 2014 Report' (18 September 2014).

⁶⁴ World Bank (n 59).

the equivalent to two percent of GDP in the early 1980s, and had jumped to over three percent by the mid-1990s, shrunk to less than one percent of GDP in 2008-10.

Before the HIPC Initiative, the thirty-six countries (from Afghanistan to Zambia) that became eligible for debt forgiveness, including twenty-six of the twenty-nine world's poorest countries, were spending on average slightly more on debt service than on health and education combined. Since the mid-1990s, and as per the HIPC's requirement that governments allocate debt-service savings to social spending, they were ramped up markedly: their spending on health, education and other social services went up from less than six percent of GDP prior to 2000 to almost nine percent in recent years.⁶⁵ On average, such spending (nine percent of GDP) was about five times the current amount of debt-service payments (less than two percent).

Consequently, the question that should have been raised for research and intelligent discussion is whether the increase in social expenditures that transpired has indeed contributed to the enhanced realization of human rights in the most deprived parts of the world – yet, we are not aware of any quantitative studies or thoughtful reflection along these lines in the legal literature. To be sure, recent, comprehensive reports on the state of human rights around the globe, produced by authorities like Amnesty International and Human Rights Watch, highlight few instances of advancements in human rights, and on the contrary they warn of retrogression in the many conflict-ridden and destitute countries in Africa and the Middle East.⁶⁶ But at least casual empiricism has prompted one human rights academic, Daniel Sharp, to acknowledge that while 'basic maths – comparing money spent on debt servicing with funds budgeted for public health programmes, for example – suggests that debt relief has great potential to help governments progressively realise economic and social rights, the reality is far more complicated'.⁶⁷

Economists have been busy shedding light in their area of competence, which is the link between government expenditures and advances in health, education and other social objectives. Interestingly, their research into the recent surge in social spending in low-income countries

⁶⁵ IMF, 'Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)—Statistical Update' (15 March 2016).

⁶⁶ Amnesty International, 'Report 2015/16: The State of the World's Human Rights' 2016; Human Rights Watch, 'World Report 2017: Events of 2016' 2017.

⁶⁷ Sharp (n 56) 51.

constitutes a powerful indictment of the approach that throwing more money – including debt-service savings – at health, educational and other problems is the appropriate way to progress.

As it turns out, the endemic inefficiency and corruption prevalent in low-income countries has rendered higher government spending largely ineffectual in the HIPC universe. For example, it has been estimated that governments in Africa could have boosted life expectancy by five years if they had followed best healthcare practices; by comparison, a ten percent increase in public health spending per capita has tended to yield an increase in life expectancy of a mere two months.⁶⁸ According to another study, improving the quality of governance in Sub-Saharan Africa is imperative in order to improve health outcomes: the same increase in public spending on health has been twice as effective in reducing under-five years' mortality, as well as in increasing life expectancy at birth, in countries with good-quality relative to poor-quality governance.⁶⁹ Yet, a third research project concluded that a greater share of public health provision has not improved quality of life and life length itself. It found that reduction of inequalities in access to, and the provision of, health and educational services is a far more significant determinant of longer and healthier lives.⁷⁰

Studies of higher public spending on education have reached similar conclusions: education spending has been highly inefficient in many emerging and developing economies, and especially so in Africa. By eliminating inefficiencies, according to one estimate, lower-income economies could have raised their average net enrolment rate by 36 percentage points without any increase in existing spending levels.⁷¹ Another study concluded that the effect of debt relief on educational expenditures in the HIPC countries, if any, could not be captured in statistical studies, suggesting that government spending is not the primary vehicle through which improvements in educational variables materialize.⁷²

⁶⁸ Francesco Grigoli, 'A Hybrid Approach to Estimating the Efficiency of Public Spending on Education in Emerging and Developing Economies' (2015) 2 *Applied Economics and Finance* 19.

⁶⁹ Innocent Makuta and Bernadette O'Hare, 'Quality of Governance, Public Spending on Health and Health Status in Sub Saharan Africa: A Panel Data Regression Analysis' (2015) 15 *BMC Public Health* 932.

⁷⁰ Oliver Serfling and Zunera Rana, 'The Role of Governance on Promoting Longer, Healthier Lives – Empirical Evidence for Developing and Developed Countries' (2015) Hochschule Rhein-Waal Discussion Papers in Behavioural Sciences and Economics 2/2015, available at: <https://www.hochschule-rhein-waal.de/sites/default/files/documents/2016/11/15/discussion_papers_in_behavioural_sciences_and_economics_no2.pdf> Accessed 16 April 2017.

⁷¹ Grigoli (n 68).

⁷² Jesús Crespo Cuaresma and Gallina Andronova Vincelette, 'Debt Relief and Education in Heavily Indebted Poor Countries' in Carlos A Primo Braga and Dörte Dömeland (eds) *Debt Relief and Beyond: Lessons Learned and Challenges Ahead* (World Bank 2009) 35.

It is no wonder, therefore, that the low-income countries that have benefited from massive debt forgiveness have not shown a correspondingly meaningful improvement in measurable quality-of-life indicators – despite the hike in social spending. At last count (2016), the majority of the thirty-six HIPC countries previously mentioned do not meet, and are not on track to meet, any of the eight Millennium Development Goal (MDG) outcomes, as well as the Sustainable Development Goals (SDGs), which are the successors to the MDGs. The poorest achievements by the HIPC countries involve precisely the much-favoured education and health-related sectors. Specifically, only a handful (one to three) of the thirty-six HIPCs is within reach of the MDG targets in the areas of: (1) an increase in primary school completion rates; (2) a decrease in maternal mortality rates, and; (3) an escalation in access to improved sanitation facilities. Only seven of the thirty-six, or 19 percent, of the HIPCs are within striking distance of the MDG target in the area of decreased infant mortality rates.⁷³

The proverbial writing was already on the wall more than a decade ago, when two reputable development economists asked the question: ‘What Has 100 Billion Dollars’ Worth of Debt Relief Done for Low-Income Countries?’ Their answer was that early analysis of the data as of the mid-2000s was not providing much support for the idea that debt relief was effective in achieving its stated objectives, e.g., improving policy performance and enhancing economic growth, investment, total government spending and tax collection.⁷⁴ Other contemporaneous studies also found that debt relief provided under the HIPC Initiative was having little impact on either investment or growth, probably because of the absence of the enabling institutions and business environment that provide the foundation for market economies.⁷⁵

Since that time additional economic studies have concluded that there is no clear evidence that debt forgiveness enabled higher investment or faster economic growth, except in the few countries with sound economic and political institutions,⁷⁶ or else under favourable economic

⁷³ IMF (n 65) 15-16.

⁷⁴ Nicolas D Chauvin and Aart Kraay, ‘What Has 100 Billion Dollars’ Worth of Debt Relief Done for Low-Income Countries?’ (2005), draft, World Bank available at <<http://siteresources.worldbank.org/DEC/Resources/ChauvinKraayWhatHasDebtReliefAccomplishedSept2005.pdf>> Accessed 16 April 2017.

⁷⁵ Serkan Arslanalp and Peter B Henry, ‘The World’s Poorest Countries: Aid or Debt Relief?’ in Chris Jochnick and Fraser A. Preston (eds) *Sovereign Debt at the Crossroads* (OUP 2005) 174.

⁷⁶ Pernilla Johansson, ‘Debt Relief, Investment and Growth’ (2010) 38 *World Development* 1204; Andrea F Presbitero, ‘Debt-Relief Effectiveness and Institution Building’ (2009) 27 *Development Policy Review* 529.

circumstances,⁷⁷ and mainly in the absence of armed conflict.⁷⁸ Consequently, it is difficult to disentangle pure debt-relief effects from other benign and concurrent factors. The evidence suggests that many destitute countries cannot escape poverty traps even when they obtain debt forgiveness, because debt burdens were never the binding constraint: their weak institutions, incompetent administrations, distorted markets, weak property and creditor rights, and political instability constitute the undesirable foundations that usually keep them mired in poverty.

These hard facts and research findings, however, have largely been ignored by the human rights community, and thus they have not enlightened the understanding of the relationship between sovereign debt and human rights among human rights lawyers and activists. In some cases, notably the legal experts that have served the United Nations as independent experts on foreign debt issues, a denial of reality has led them to double down on fiction. According to Cephas Lumina, who held the post of UN Independent Expert during 2008-2015:

Governments should not be placed in a situation where they are unable to ensure the realization of basic human rights because of excessive debt repayments. It may be contended that states' responsibility to ensure the enjoyment of basic human rights may take priority over their debt-service obligations, particularly when such payments further limit the ability of states to fulfil their human rights obligations.⁷⁹

And as per Juan Pablo Bohoslavsky, who serves as UN Independent Expert since 2014:

Countries are concerned that, if they fail to make debt payments, they will be unable to access capital at a reasonable cost in the future. This pragmatic reaction to markets, however, should not be confused with an absolute legal obligation to repay. Under certain circumstances, particularly when economic, social and cultural rights [are] at risk, the operation of contract[s] may not be sufficiently compelling to ask the populations of sovereign states to fully repay their debts in a timely manner.

⁷⁷ Sandra R Marcelino and Ivetta Hakobyan, 'Does Lower Debt Buy Higher Growth? The Impact of Debt Relief Initiatives on Growth' (2014) IMF Working Paper/14/230, available at <<https://www.imf.org/external/pubs/ft/wp/2014/wp14230.pdf>> Accessed 16 April 2017.

⁷⁸ Luca Bandiera, Jesús Crespo Cuaresma, and Gallina Andronova Vincelette, 'Drivers of Growth in Fragile States: Has the HIPC Process Helped Fragile Countries Grow?' in Carlos A Primo Braga and Dörte Dömeland (eds) *Debt Relief and Beyond: Lessons Learned and Challenges Ahead* (World Bank 2009) 71.

⁷⁹ Lumina (n 55) 292-93.

... The scope of the *pacta sunt servanda* principle is thus limited by sovereignty and human rights.⁸⁰

These provocative opinions lack legal justification and are counterproductive, especially given the increasingly heavier reliance, even by low-income countries, on funding from private rather than official (bilateral and multilateral) sources of debt finance. During the six-year period 2010-2015, private-sector sources of finance (commercial banks, bond investors, suppliers and other) provided 95 percent of the net debt flows (disbursements minus principal repayments) into the entire universe (123 countries) of low- and middle-income countries, while official sources accounted for the remaining five percent. But even for the forty-four countries in Sub-Saharan Africa (from Angola to Zimbabwe), during the same six years, private sources of finance accounted for almost half (48 percent) of their net debt-related capital inflows. In contrast, until the early 2000s, private sources of finance delivered only a negligible amount of net debt finance to Sub-Saharan Africa.⁸¹

Whenever a developing-country government enters into a cross-border loan agreement with private-sector lenders, or signs an international bond indenture with foreign investors, the government almost always has to provide a waiver of its sovereign immunity to jurisdiction and from execution. Such a waiver ensures that if the debtor state breaches its contract with the lenders or investors, it will not seek immunity from suit, execution, or enforcement by virtue of its status as a sovereign. Therefore, sovereign debtors borrowing outside of their own territory are usually answerable in foreign courts for their performance of their commercial contracts under the doctrine known as the restrictive theory of sovereign immunity.

By the same token, whenever commercial disputes arise involving sovereigns and private-sector creditors, the overwhelming majority of the time they are negotiated rather than litigated.⁸² The presentation of arguments involving human rights priorities, odious debts, economic necessity, political constraints, and the like may be voiced in a private negotiating room – but they have no standing in a courtroom, especially in London, New York or other financial centres where contract law rules supreme. The Argentina litigation and arbitration saga during 2002-2016 was

⁸⁰ United Nations, 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights' (A/70/275 4 August 2015) 14.

⁸¹ World Bank (n 59).

⁸² Lee C Buchheit and G Mitu Gulati, 'Responsible Sovereign Lending and Borrowing' (2010) 73 *Law & Contemp Probs* 63, 69.

the notable exception that proved the rule that sovereigns are well advised to negotiate, rather than litigate, their commercial disputes.⁸³

Given that creditors can usually rely on enforceable legal rights, especially in their own jurisdictions, governments that decide to service debt in the knowledge that they are compromising their social rights obligations may find themselves in violation of their international obligations under treaties such as the ICESCR. However, such a violation, according to Michalowski:

[D]oes not have any legal consequences, whereas defaulting on debt servicing could result in lawsuits the debtor countries are likely to lose. In reality, then, where states face conflicting obligations, international law does not provide adequate mechanisms to encourage compliance with social rights obligations, and debtor states have instead little choice but to prioritise their contractual obligations.⁸⁴

It is ironic that any human-rights lawyer should be advocating that states ought to disrespect the rights of their creditors whenever their budgetary resources prove insufficient to underwrite the alleged delivery of economic and social rights. As previously mentioned, and because of widespread waste and inefficiency, the thirty-six countries that already obtained massive debt forgiveness from their official creditors have little to show for the significant increase in government spending for health and education services that said forgiveness afforded them.

Second, defaulting on foreign debt obligations is a serious matter because of the reputational, economic and financial damage that usually follows. The impression conveyed, that a government default constitutes a ‘free lunch’ option that releases fiscal resources for domestic spending purposes, is highly misleading because it disregards the lessons of historical experience – especially in cases of coercive or punishing debt restructurings, when the fallout has been severe.⁸⁵

Third, government defaults undermine what in developing countries usually are already weak and fragile legal, institutional and regulatory safeguards for lenders and investors, whether

⁸³ Arturo C Porzecanski, ‘The Origins of Argentina’s Litigation and Arbitration Saga, 2002-2016’ (2016) 40 *Fordham Int’l LJ* 41.

⁸⁴ Michalowski (n 56) 67-68.

⁸⁵ Christoph Trebesch and Michael Zabel, ‘The Output Costs of Hard and Soft Sovereign Default’ (2017) 92 *European Economic Rev* 416.

domestic or foreign.⁸⁶ Attracting loans and investments to developing countries – especially the poorest – requires that repayment and transfer risks be reasonable and manageable. International trade is a system of commercial relationships predicated on contractual agreements involving a wide range of creditors and constituencies. The extension of cross-border credit is grounded on its timely repayment and its costs are influenced by the risks and potential for default, as well as the associated expenses and delays of recovery.

The suggestion that property and creditor rights may be sacrificed at the altar of welfare spending is thus sheer folly, given the abundant evidence in the financial, economic and legal literature that respect for property and creditor rights is a fundamental prerequisite for the forward evolution and prosperity of nations.⁸⁷ Good investor protection, broadly defined as the contents and enforcement of regulations that protect investors in property and securities, combined with independent and reliable judicial and regulatory institutions, foster the development of financial markets, promote capital accumulation, encourage entrepreneurship and innovation, enable fruitful domestic and international trade, and thus boost economic growth and development.

As David Kinley has stated:

[T]he golden eggs of economic prosperity are essential ingredients in any plans or policies that seek better to protect and promote human rights, so to kill their progenitor or even to hinder significantly her fecundity would indeed be a serious problem. Uncompromising demands that the goose be neutered – that is, that the profit motive ought to be dispensed with, or the whole idea of trade liberalisation be abandoned, or aid be entirely decoupled from liberalist economic conditionality – are simplistic, counter-productive and today, thankfully, infrequently voiced arguments for better human rights observance.⁸⁸

Finally, government defaults are very blunt weapons. In an increasingly integrated world where foreign lenders and investors are active also in domestic financial markets, and where local banks, corporations and individual investors are also involved in the international capital

⁸⁶ World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Rights Systems' (2016).

⁸⁷ Andrés Fernández and César E Tamayo, 'From Institutions to Financial Development and Growth: What Are the Links?' (2017) 31 J Economic Surveys 17.

⁸⁸ David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (CUP 2009) 23.

markets, it is difficult for governments to target a default in a way such as to prevent damage to human rights beyond those of the creditors. The case of Argentina is once again very instructive. For many years after the fall of a brutal military dictatorship in 1983, the families of those abducted, tortured and killed ('disappeared' during a 'Dirty War') fought to get successor governments to admit responsibility and pay compensation, including for survivors. Amends were finally made starting a dozen years later, in the mid-1990s, when a first wave of political prisoners and families of the dead were given government bonds in compensation for their suffering.⁸⁹

A few years later, in late 2001, a successor administration infamously defaulted on its obligations to bondholders, and caught in the net were the few thousand bonds given out in compensation for human rights abuses. Their owners petitioned to be exempted from losses of as much as 70 percent that the government sought to impose, but were told they could not be excluded because otherwise the legal principle that all creditors must be treated equally would be infringed, thereby exposing the government to a flood of lawsuits from the other jilted creditors.⁹⁰ They went on to pursue justice in the courts of Argentina, but despite support from a government ombudsman, they had no success.⁹¹ Directly impacted by the 2001 default were also hundreds of thousands of retirees in Argentina and Italy, whose rights to social security were thus seriously affected.⁹²

Conclusion

Post-War conceptions of human rights have evolved independently of long-established theory and practice of property and creditor rights, to the detriment of the development and implementation of human rights law.

The divergence in legal evolution of these two specialized areas owes much to the isolation in which they operate, and is part of a broader phenomenon of fragmentation in international law akin to the gulf that separates the concept of property as protected in human rights law versus in

⁸⁹ Christina M Wilson, 'Argentina's Reparation Bonds: An Analysis of Continuing Obligations' (2005) *Fordham Int'l LJ* 28, 786.

⁹⁰ Larry Rohter 'Argentine Default Reopens "Dirty War" Wounds' *New York Times* (New York, 12 March 2002).

⁹¹ Wilson (n 89).

⁹² Porzecanski (n 83).

international investment law.⁹³ Notwithstanding evident similarities and important interconnections, there is hardly any interaction and cross-citation between human rights scholars, on the one hand, and property and creditor-rights scholars, on the other. Therefore, notions and ideas from one field of international law are virtually unknown in another, and legal problems and solutions common in one field are ignored by the other. Just as lamentable, whereas property and creditor-rights scholars are usually well versed in, or at least acquainted with, economic and financial concepts and their problem-solving applications, it is evident that human rights scholars are woefully unprepared in this regard.

The objective of this chapter was to build a first bridge between these two fields of law. It began by recalling the strikingly different origin and implementation of ‘human’ versus property and creditor rights, because the differences have significant implications. Human rights laws are more honoured in the breach than in the observance in most parts of the world, principally because states accepted international standards governing the treatment of their own nationals in their own territory while reserving to themselves the sovereign right to enforce those rights as they saw fit. In sharp contrast, when it comes to property and creditor rights, there are few gaps between principled intentions, legal mandates, and actual enforcement.

The importance of the recognition of property and creditor rights for the attainment of other human rights, especially those of an economic nature, was then highlighted. Many human rights are connected to, and are rather inseparable from, broadly conceived property rights. At the very least, human rights advocates should admit that property and creditor rights are complementary to other human rights and cannot be neglected – especially when considering trampling over them.

There followed a discussion of the still wide gap between aspirational human rights and economic reality. The time has come for human rights scholars to ratchet down their expectations to match the very limited capacity of the low-income and formerly communist countries most prone to human rights deficiencies to import the Western European welfare state model.

⁹³ Ursula Kriebaum and Christoph Schreuer, ‘The Concept of Property in Human Rights Law and International Investment Law’ in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 86.

The final section focused on the poorly understood interconnections between sovereign debt and human rights. Neglect of property and creditor-rights considerations has led many contemporary human rights advocates down an infertile, if not inappropriate, intellectual and policy path. Speculation that contracts governing cross-border debts and investments may not be sufficiently compelling, at least relative to human rights commitments, is unwarranted and counterproductive.