

ARTICLE: The *Millennium Development Goals*: Milestones or Millstones? Human Rights Priorities for the Post-2015 *Development Agenda*

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Author: Mac Darrow*

LexisNexis Summary

... Derided by their most ardent detractors as "Major Distracting Gimmicks," critics of the MDGs have pointed to the secretive circumstances of their birth, their technocratic and reductionist nature, their lack of ambition, their failure to address root causes of poverty, their failure to factor in legal obligations pertaining to social rights, their gender-blindness, their failure to address poverty in rich countries, their weak accountability mechanisms, their limited uptake by social movements in the Global South, the potentially distorting character of target-driven policymaking, and the propensity of the MDGs to "crowd out" attention to important issues that didn't make it into the global list, for example, social security or social protection. ... Whether national poverty lines are consistent with internationally recognized human rights standards depends on a number of factors including whether they: (a) capture relevant dimensions of the right to an adequate standard of living; (b) reflect the depth and severity (rather than just the incidence) of poverty; (c) are disaggregated to capture the grounds of discrimination prohibited under human rights treaties; (d) include indicators for monitoring important poverty-reducing policies (in addition to MDG indicators which typically monitor the outcomes of policy measures); and (e) are sufficiently ambitious. ... The Summit Outcome includes welcome commitments to provide sustainable access to safe drinking water and basic sanitation in the context of health and environment-related MDGs, but fails - in these specific contexts - to commit to affordable and culturally appropriate services, which are normative attributes of the rights to water and sanitation as well as critical determinants of access to water and sanitation services in practice. ... These are among the reasons why human rights have historically gained such little traction in inter-governmental *development* debates, and conversely, why the consensus on so many other aspects of the human rights agenda in the Summit Outcome is so notable. ... In a recent sampling of country progress in Asia and the Pacific, for example, a decrease in income poverty was found to be strongly, but not uniformly, associated with economic growth, but there was a much weaker relationship with infant and maternal mortality, and only little impact on education targets. ... Comparative contributions of human rights principles and economic reasoning to policymaking The preceding analysis, while necessarily nuanced in terms of its findings on the impacts of human rights claims, and while expressly limited to just one of many spheres of human rights claiming (viz legal claims through the formal court system), helps to dispel absolutist assumptions about the role and contributions of human rights in public policymaking. ... Instead, more modestly, Daniels focuses upon the requirements for fair deliberative processes that meet four minimum conditions: (1) the "publicity condition," which calls for public access to the rationales for priority-setting decisions, and public justification; (2) the "relevance requirement," assuring that stakeholders agree on what kinds of reasons are relevant to setting priorities, which involves adequate participatory processes, evidence-gathering and vetting of reasons and arguments by all those affected by a decision; (3) the "revision and appeals" condition, guaranteeing mechanisms for challenges and dispute, and opportunities to revise policies in line with new arguments; and (4) the "regulative condition," which calls for public regulation of the process to ensure that the preceding three conditions are met. ... The human rights framework itself doesn't resolve difficult trade-offs and questions about prioritisation of limited resources, but it does offer a value framework that complements and in some respects challenges the dominant assumptions of neo-classical economics. ... While national and local redress mechanisms will usually (but not always) be most proximate and practically useful, states should more systematically reflect progress towards the MDGs in their national reports to the international human rights treaty bodies and Universal Periodic Review process of the United Nations Human Rights Council. ... Candidate *Goals* and Targets A post-2015 global monitoring framework should include a

* Ph.D. Chief, MDGs Section, Office of the United Nations High Commissioner for Human Rights (OHCHR). The views in this article are expressed in a personal capacity, and are not necessarily the views of the United Nations or OHCHR. The author is grateful to Alicia Yamin, Malcolm Langford, John Tobin, Sally-Anne Way, Stephen Humphreys and Varun Gauri for comments on an earlier draft.

goal, target(s) and indicators capturing essential civil and political rights prerequisites for public participation and effective and equitable service delivery. ... Non-discrimination and the principle of substantive equality must be integrated more effectively into all **goals**, and the necessary investments must be made at both national and global levels for the additional data required to be collected, in line with Member States' commitments at the MDGs Summit. ... The aid lobby will no doubt be challenged to some extent by the emerging research revealing the growing proportion of poor people living in middle-income countries, demanding a more explicit focus on individuals (rather than countries), inequalities, and distribution within countries, as well as a reconceptualisation of the architecture and purposes of aid in different contexts in the medium to long term.

Highlight

"Not everything that can be counted counts, and not everything that counts can be counted." Albert Einstein

Text

[*55]

Introduction

In September 2010, world leaders met for the High Level Plenary Meeting on the *Millennium Development Goals* ("MDGs Summit"). The MDGs Summit took place with great fanfare, attracting close to 140 heads of state and government, as well as leaders from civil society, foundations and the private sector.¹ It launched important aid initiatives and generated unprecedented agreement by Member States on the importance of human rights in efforts to achieve the *Millennium Development Goals* ("MDGs"). [*56] But how successful was this event, measured against its **goals**, and what are the human rights implications of the MDGs Summit with regard to future **development** and aid policy?

Global summits have not enjoyed an easy ride in the court of public opinion.² Global summitry has been a veritable industry since the 1990s, convened at great expense to the international taxpayer, generating (and recycling) a great wealth of largely pre-scripted and partially implemented promises to improve the human condition. Global promises are, it has been noted, "easily set but seldom met."³ If past global summit commitments had been achieved, we would all have been healthy by 2000, trade would be "fair," and twenty-four thousand children would not be dying each day through poor sanitation and easily preventable causes.⁴ Given this track record of unmet **goals**, why should the MDGs Summit continue to merit our attention?

Certain global conferences have enjoyed comparatively strong political support, have established institutional frameworks for long-term cooperative action, and, arguably, have contributed positively to global social progress.⁵ The

¹ Media Advisory, United Nations Department of Public Information, United Nations Convenes World Leaders to Spur Action Against Poverty: Summit on the Millennium Development Goals, 20-22 September (Sept. 17, 2010), available at <http://www.un.org/en/mdg/summit2010/pdf/Media%20Advisory%20MDG%20Summit%2017%20Sept.pdf>.

² See, e.g., James Gustave Speth, *Red Sky at Morning: America and the Crisis of the Global Environment* 8-9 (2004); Bill Jamieson, *Global Summitry Exposed for the Sham it Plainly Is*, *Scotland on Sunday*, July 22, 2001; Cf. Richard Jolly, *The MDGs in Historical Perspective*, 41 *IDS Bulletin* 48 (2010) (arguing that there has been more progress in implementing global development goals than is commonly recognised).

³ Jan Vandemoortele, *Millennium Development Goals: Looking Beyond the Averages*, *OECD Observer* (Aug. 2002), http://www.oecdobserver.org/news/fullstory.php/aid/768/Millennium_Development_Goals:Looking_beyond_the_averages.html.

⁴ Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, Sept. 6-12, 1978, P V; World Declaration on the Survival, Protection and Development of Children, World Summit for Children, New York, Sept. 29-30, 1990, P 20; United Nations Millennium Declaration, G.A. Res 55/2, U.N. Doc. A/Res/55/2 (2000) (Sept 18, 2000), P 13.

⁵ Jolly, *supra* note 2, at 48-49. See also S. Jacob Scherr & R. Juge Gregg, *Johannesburg and Beyond: The 2002 World Summit on Sustainable Development and the Rise of Partnerships*, 18 *Geo. J. Int'l Envtl L. Rev.* 425, 439-46, 460-63 (2006) (discussing the contributions of the 2002 World Summit on Sustainable Development to a global partnership approach to global environmental problems).

2000 *Millennium* Summit⁶ is especially noteworthy because in the first half of 2001, to prevent the *Millennium* Declaration from lapsing into oblivion, a U.N. inter-agency expert group extracted a small number of quantifiable human *development* commitments from the voluminous body of the *Millennium* Declaration, and established a global campaign and international monitoring regime under the auspices of the U.N.⁷ These *goals* (the MDGs) encapsulate an important subset of internationally recognised socio-economic rights and set global targets from the baseline year of 1990 to (for the most part) a 2015 end date. While a global assessment of their impact is premature, the MDGs have undoubtedly raised the profile and popular awareness of *development* [*57] issues, changed the terms of international *development* policy, and helped to bring a stronger focus to neglected social rights, such as the right to food, education and health.

The key premise of this paper is to show that the agreed upon global summit commitments are alone insufficient; equally if not more important for progress is sustained political mobilisation and innovative use of the commitments. This paper begins with a short history of the MDGs initiative, along with an appraisal of its significance. A short analysis of the process and outcomes of the MDGs Summit follows, evaluated through the prism of human rights. The purpose is not to undertake a cost-benefit analysis of the MDGs Summit for its own sake. Rather, the purpose is to sharpen and strengthen arguments for integrating human rights in national MDG-based *development* planning, and to position human rights more clearly and strategically in policy debates for the post-2015 *development* agenda.

II. The MDGs Through a Human Rights Lens

This Section begins with a short review of the historical origins of the MDGs and their significance for *development* policy and financing. It then examines some of the more pertinent human rights critiques, leading into an appraisal of the significance of the MDGs Summit outcomes. Afterward, priorities and proposals for the post-2015 *development* agenda are discussed.

A. History and Significance of the MDGs

The MDGs comprise eight time-bound, measurable human *development goals*, with eighteen globally agreed targets and forty-eight indicators.⁸ Examples include: (1) between 1990 and 2015, halving the proportion of people suffering hunger and living on less than USD1 per day; (2) achieving universal primary education; (3) halting and beginning to reverse HIV/AIDS by 2015; and (4) reducing by three-quarters the maternal mortality ratio. Significantly, in MDG 8, donor countries agreed to a number of commitments in connection with aid, trade, debt relief, access to essential medicines and technology transfer.⁹ The inclusion of donor [*58] commitments in this global compact for poverty reduction helps to explain why the MDGs have attracted broader support than their predecessor, the "International *Development Goals*" produced by the Organisation for Economic Cooperation and *Development* (OECD) in the 1990s.¹⁰ Secluded from public view in the months following the MDG Summit, the architects of the MDGs could scarcely have imagined their eventual impact on the global *development* discourse, if not *development* policy on the ground.

The MDGs bring a number of advantages to *development* work, and indirectly also to human rights. Notably, the MDGs embody a wide international consensus, and provide a framework for mobilising resources to help realise a

⁶ The outcome document of the Millennium Summit was the Millennium Declaration, which contains a raft of commitments on development, peace and security, human rights and humanitarian action. *Supra* note 4.

⁷ United Nations Millennium Development Goals, <http://www.un.org/millenniumgoals/> (last visited Feb. 17, 2012).

⁸ *Id.*

⁹ Target 8.A is to "develop further an open, rule-based, predictable, non-discriminatory trading and financial system." Target 8.B is to "address the needs of the least developed countries," through such measures as tariff free and quota free access for least developed countries' exports, expanding debt relief and cancelling official bilateral debt, and "more generous ODA [Official Development Assistance] for countries committed to poverty reduction." Target 8.C addresses the "special needs of landlocked developing countries and small island developing States." Target 8.D deals with debt sustainability, Target 8.E seeks to ensure access to affordable essential drugs in developing countries, and Target 8.F deals with the availability of information and communications technology. The only other targets without dates are Target 1.B on achieving full and productive employment and decent work for all, Target 7.A on integrating the principles of sustainable development into country policies and programmes, and Targets 5.A and 5.B on maternal health.

¹⁰ OECD Development Assistance Committee, *Shaping the 21st Century: the Contribution of Development Cooperation* 8-11 (May 1996) available at <http://www.oecd.org/dataoecd/23/35/2508761.pdf>.

small but significant number of socio-economic rights. The manageable scope and quantifiable character of the MDGs theoretically makes them amenable to “costing” at the national level, which in turn facilitates analysis of the “fiscal space” and resources required for their realisation, including through official *development* assistance (ODA),¹¹ where domestic resource constraints so require. At least implicitly, in these respects, the MDGs challenge “Washington Consensus” economic policies and ideologically-driven fiscal conservatism,¹² which have imposed unwarranted constraints on domestic policy space and budgets for social spending in many poorer countries.¹³

The MDGs harness the power of numbers to provide a framework for evidence-based policymaking and the power of simple ideas to mobilise public opinion. This is supported by a global *Millennium* Campaign. The MDGs provide global benchmarks for accountability, and facilitate cross-country comparisons of human progress. Some have claimed the MDGs have improved data collection, statistical methods and monitoring of important attributes of human well being beyond crude surrogates such as per capita Gross Domestic Product (GDP).¹⁴ Some have also claimed the MDGs have facilitated cross-sector collaboration in *development* work.¹⁵ [*59] Perhaps more controversially, the MDGs have also been credited as the catalyst for increased pro-poor public expenditure, debt cancellation in over thirty countries, steady increases in aid levels, improvements in child mortality, education enrollments, and representation of women in parliament, and helping nearly half a billion people escape “dollar-a-day” poverty.¹⁶ As to their normative attributes, it has also been argued that the MDGs - interpreted in line with other international declarations and world summit outcomes - have strengthened the claims of certain socioeconomic rights as binding norms of customary international law.¹⁷

Some claim that high among the MDGs’ virtues are their simplicity, statistical rigour, and feasibility.¹⁸ In principle, a relatively small list of human *development goals* more readily mobilises public opinion and political action than a lengthy list. With a number of notable exceptions, as will be demonstrated later in this paper, the issues included in most MDGs are clear, and have solid indicators with robust data sets at the national level with which to facilitate monitoring. This serves to reduce interpretation bias. The “feasibility” of the MDGs is said to draw from the fact that the (usually) 2015 endpoint for the various *goals* is defined by reference to the rate of progress that actually oc-

¹¹ ODA refers to official aid undertaken with the promotion of economic development and welfare as the main objective on concessional financing terms. For a full definition see OECD, Glossary of Statistical Terms, available at <http://stats.oecd.org/glossary/detail.asp?ID=6043>.

¹² In 1989, the economist John Williamson christened the “Washington Consensus,” a set of economic policy reforms for developing countries. This 10-point policy checklist advocated fiscal and monetary soundness, openness to trade and investment, financial liberalization and regulation, privatization, deregulation and secure property rights. See Moises Naim, *Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?* 21 *Third World Q.* 505, 505 & n.1 (2000) (citing to *Latin American Adjustment: How Much Has Happened* (John Williamson ed., 1990)).

¹³ See Naim, *supra* note 12 (criticising the conceptualisation and implementation of this policy package).

¹⁴ Jan Vandemoortele, *If Not the Millennium Development Goals, then What?* 32 *Third World Q.* 9, 10-11 (2011).

¹⁵ *Id.*; Jan Vandemoortele & Enrique Delamonica, *Taking the MDGs Beyond 2015: Hasten Slowly*, 41 *IDS Bulletin* 60 (2010). *Contra* Lancet & London International Development Centre, *The Millennium Development Goals: A Cross-Sectoral Analysis and Principles for Goal-Setting After 2015*, 376 *Lancet* 991 (2010) (arguing that the fragmented nature of the MDGs and their corresponding targets has encouraged vertical organisation of service delivery and limited the scope for policy coherence and operational synergies).

¹⁶ Salil Shetty, *Countdown 2015: Accelerating Progress on the MDGs*, Presentation, Stockholm, Sweden (Mar. 24, 2010). However Shetty also observes that political will is the most valuable commodity of all, noting that financial bailouts in 2009 totalled USD 18 trillion, whereas total aid given in the last 49 years has been less than USD 2 trillion. *Id.* For more qualified assessments of the impacts of the MDGs, suggesting that impact is more evident in re-framing development discourse than in mobilising resources in donor and developing countries, see Richard Manning, *The Impact and Design of the MDGs: Some Reflections*, 41 *IDS Bulletin* 7 (2010); see also Andy Sumner & Claire Melamed, *Introduction - The MDGs and Beyond: Pro-Poor Policy in a Changing World*, 41 *IDS Bulletin* 1, 2-3 (2010) (noting the methodological difficulties of proving and attributing positive impacts to the MDGs).

¹⁷ Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 *Hum. Rts. Q.* 755, 771-75 (2005).

¹⁸ Vandemoortele, *supra* note 14, at 10-12, 14-16.

curred between 1965 and 1990.¹⁹ In other words, the operative assumption is that if the world was able to achieve aggregate progress at a certain rate between 1965 and 1990, continued progress at the same rate through to 2015 should be "feasible."

B. Human Rights Critiques of the MDGs

Notwithstanding the suggested benefits outlined above, not everybody sees the MDGs as an unalloyed boon for human *development*, let alone human rights. Derided by their most ardent detractors as "Major Distracting Gimmicks," critics of the MDGs have pointed to the secretive circumstances of their birth, their technocratic and reductionist nature, their [*60] lack of ambition, their failure to address root causes of poverty, their failure to factor in legal obligations pertaining to social rights, their gender-blindness, their failure to address poverty in rich countries, their weak accountability mechanisms, their limited uptake by social movements in the Global South, the potentially distorting character of target-driven policymaking, and the propensity of the MDGs to "crowd out" attention to important issues that didn't make it into the global list, for example, social security or social protection.²⁰

These critiques are relatively well rehearsed, however there are a number of trenchant problems that deserve particular attention when considering the lessons to be drawn for the post-2015 *development* agenda. These are: tensions between MDG progress and authoritarian governance; procedural and legitimacy concerns; problems relating to poor specification; inappropriate scale of ambition based upon unreliable and arbitrary assumptions about feasibility; misinterpretation and misapplication of the MDGs at the national level; the failure to address growing inequalities; tensions with international human rights legal standards; and colonisation of the MDGs by economic growth and aid lobbies.

1. The MDGs can provide a fig leaf for authoritarian regimes

Recent events in the Middle East, and what has become known as the Arab Spring, have put into sharp relief the uncomfortable juxtaposition between MDG achievement and authoritarian governance in various parts of the world. Tunisia, for example, was an international poster-child of the MDGs, right up until its revolution of early 2011.²¹ This is not a mere [*61] problem of appearances. While no country has a clean human rights slate, lavishing praise where it is not due offers a fig leaf of legitimacy to authoritarian regimes, masks underlying inequalities and structural discrimination and oppression, and de-oxygenates local emancipatory struggles. Of course, one could argue that

¹⁹ Jan Vandemoortele, MDGs: Misunderstood Targets? International Poverty Centre, One Pager No. 28, at 762 (2007) (outlining various critiques of the MDGs).

²⁰ See, e.g., Alston, *supra* note 17; Office of the United Nations High Commissioner for Human Rights, Claiming the Millennium Development Goals: A Human Rights Approach, U.N. Doc. HR/PUB/07/3 (2008) (hereinafter "Claiming the MDGs"); Separate Paths? MDGs and Human Rights in Theory and Practice (Malcolm Langford, Andy Sumner & Alicia Yamin eds., forthcoming 2012); Ashwani Saith, From Universal Values to Millennium Development Goals: Lost in Translation, 37 Dev. & Change 1167 (2006); Paul J. Nelson, Human Rights, the Millennium Development Goals, and the Future of Development Cooperation, 35 World Dev. 2041 (2007); Sakiko Fukuda-Parr, Are the MDGs Priority in Development Strategies and Aid Programmes? Only Few Are! Int. Poverty Centre, Working Paper No. 48 (2008); Thomas Pogge, Global Justice and the First U.N. Millennium Development Goal, Evening Address at the University of Oslo Global Justice Symposium (2003), available at www.etikk.no/globaljustice; Peggy Antrobus, Gender Equality in the New Millennium: Goal or Gimmick? Isis Int'l (May 3, 2007); Paul Nelson & Ellen Dorsey, new rights Advocacy: Changing Strategies of Development NGOs and Human Rights (2008).

²¹ According to the UNDP, Tunisia was the 7th fastest mover on the "Human Development Index" (HDI; a composite measure of education, health and income indicators) in 2010. United Nations Development Program, Human Development Report 2010: The Real Wealth of Nations, at 3, 29, 47 (2010) (hereinafter HDR 2010). However, the UNDP noted problems of inequality and lack of political freedom. *Id.* at 54, 69. MDGs "success stories" showcased at the September 2010 MDGs Summit included Ethiopia and Rwanda, whose MDGs achievements (which in Rwanda's case include the world's highest representation of women in Parliament, a notable achievement indeed, see *id.* at 91) sit uncomfortably with broad human rights critiques emerging through the Human Rights Council's Universal Periodic Review process. See Universal Periodic Review, <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/ETSession6.aspx> (Ethiopia, 6th session, 2009) and <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/RWSession10.aspx> (Rwanda, 10th session, 2011), respectively. See also Amnesty International, The State of the World's Human Rights (2011) at 140-42 (Ethiopia), 274-76 (Rwanda), available at <http://www.amnesty.org/en/library/asset/POL10/001/2011/en/519da037-1492-4620-9ed5-cac8f1cfd591/pol100012011en.pdf>. These two countries are also among the lowest ranking countries on UNDP's inequality adjusted HDI "empowerment" table (a composite measure of agency, accountability, and certain political freedoms and civil liberties) and "Multidimensional Poverty Index" (MPI). The MPI measures ten indicators in three dimensions of human development (health, education and living standards), beyond income poverty. Critically, the MPI index captures not only the share of people who are "multidimensionally poor" but also the intensity of their poverty. See HDR 2010 at 95-97, 154, 163, 167.

the democratic movements in Tunisia, Egypt and elsewhere may not have taken root without the education (including girls' and women's education) and health gains achieved with the support of resources and incentives associated with the MDGs campaign. But this is a weak palliative without proper analysis of the complex counterfactuals and claims of the rights-holders themselves, and without considering how modest revisions to the MDGs framework as proposed further below might correct such biases.

2. The MDGs emerged from a faulty process and are poorly specified

Substantive deficiencies in the MDGs have been widely remarked upon, and certain of these will be elaborated further below. These, to some extent, are linked to the process that brought them into being. The lawyer-poet John Godfrey Saxe, in a quote popularised by Otto von Bismarck, remarked: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made."²² A similar comment might pertain to the MDGs, hatched behind closed doors and shaped by special interests and the proclivities of particular *development* agencies as much as by any coherent conceptual design or consistently rigorous statistical parameters.²³

The problem of poor specification is perhaps most notorious in connection with the income poverty target in MDG 1. Target 1.A commits states to "halve, between 1990 and 2015, the proportion of people whose [*62] income is less than one dollar a day." Income is clearly a crude poverty measure, and states are expected to monitor poverty by reference to national poverty lines that more capture aspects of multi-dimensional poverty.²⁴ Whether national poverty lines are consistent with internationally recognized human rights standards depends on a number of factors including whether they: (a) capture relevant dimensions of the right to an adequate standard of living; (b) reflect the depth and severity (rather than just the incidence) of poverty; (c) are disaggregated to capture the grounds of discrimination prohibited under human rights treaties; (d) include indicators for monitoring important poverty-reducing policies (in addition to MDG indicators which typically monitor the outcomes of policy measures); and (e) are sufficiently ambitious.²⁵ The poor specification of Target 1.A has permitted a wide range of subjective interpretations, justifying a dramatic upward revision of headcount poverty estimates by the World Bank in 2008 at the same time that researchers elsewhere concluded that Sub-Saharan Africa's progress towards Target 1.A was on track.²⁶ Clearer specification would reduce the range of such wildly different interpretations.

3. The definition of "feasible" progress is arbitrary and unambitious

Other methodological ambiguities are equally troubling, relating to the baseline year for the MDGs and the assumptions underpinning their desired level of ambition. Target 1.A is, again, illustrative. It is a little known fact, outside the MDGs cognoscenti, that Target 1.A was preceded by a more ambitious pledge at the 1996 World Food Summit in Rome, to "halve the number [rather than proportion] of extremely poor people between 1996 [rather than 1990] and 2015." The reformulation of this pledge in Target 1.A, referring to "proportion" rather than absolute numerical reduction, and moving the baseline year back to 1990 from 1996, were not matters of mere semantics. First, a proportionate, rather than absolute, reduction is less ambitious given the effects of population growth. As Thomas Pogge explains: "The proportion of extremely poor people is a fraction that has the number of extremely poor people in the numerator and some reference population in the denominator. A fixed reduction in the value of such a fraction, here by one-half, can come about through a decrease in the numerator and/or through an increase in the denominator. The greater the increase in the denominator, which occurs simply through [*63] population growth, the less

²² Fred R. Shapiro, Quote ... Misquote, N.Y. Times Magazine (July 21, 2008), http://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html?_r=1 (sourcing the quote to the March 29, 1869 edition of the Daily Cleveland Herald).

²³ William Easterly, Was Africa Set Up to Fail on the Millennium Development Goals? Aidwatch (June 1, 2010), <http://aidwatchers.com/2010/06/was-africa-set-up-to-fail-on-the-millennium-development-goals/>, (noting the different methodological approaches to measuring various MDG targets, and the different consequences that this may have in terms of how progress (or the lack of it) is characterised, depending upon a given country's starting point and resource constraints); see also Vandemoortele & Delamonica, *supra* note 15, at 61-62.

²⁴ For useful discussions on the methods to establish national poverty lines see Martin Ravallion, Poverty Lines in Theory and Practice, World Bank Living Standards Measurement Study, Working Paper No. 133 (2008); Defining Poverty in the Developing World (Frances Stewart, Ruhii Saith & Barbara Harriss-White eds., 2007); and UNDP's MPI, *supra* note 21.

²⁵ Edward Anderson & Andy McKay, Human rights, the MDG income poverty target and economic growth, Background Paper prepared for the OHCHR Study, Global Analytical Survey of MDG reports and MDG-related strategies from a human rights perspective, 2009 at 3-5 (on file with author).

²⁶ Jan Vandemoortele, Do the MDGs Really Need More Targets on Human Rights, in Langford et al., eds., *supra* note 20.

of a reduction needs to be achieved in the numerator.”²⁷

Second, moving the baseline back to 1990 makes it legitimate to measure the effects of income poverty reduction in China between 1990-1996, making the *goal* more achievable. Yet, China’s large reduction was based upon strong growth performance and public policies that self-evidently preceded and had nothing to do with the MDGs. With these factors in view, Pogge argues that the recalibrated MDG Target 1.A, if fulfilled, would reduce the number of extremely poor people by only twenty per cent between 1996 and 2015, compared with the target of a fifty per cent reduction under the 1996 World Food Summit. By lowering the MDG 1.A bar, the number of extremely poor people deemed morally acceptable in 2015 rises by 496 million (from 828 to 1,324 million) and shrinks by more than half (from 828 to 332 million) the reduction pledged in 1996. The result, in Pogge’s assessment, is an additional six million morally acceptable deaths from poverty-related causes annually.²⁸

A further illustration of the feasibility concern, beyond Target 1.A, is MDG 5 on maternal health, which is the *goal* least likely to be met in global terms. Maternal deaths occur on a shocking scale in many countries, from 200 to over 1,000 deaths per 100,000 live births in various areas of Africa and South, East and Central Asia on best available estimates. This is largely preventable and occurs due to deeply ingrained discrimination, although rarely is adequate and disaggregated data collected or are deaths investigated.²⁹ MDG Target 5.A (“reduce by three quarters, between 1990-2015, the maternal mortality ratio”) is more ambitious than most of the other MDGs 1 to 7, as a three-quarters reduction would constitute more rapid progress than was achieved between 1960 to 1990. For this reason, MDG Target 5.A has been criticised in some quarters for its over-ambition (in departing from the presumptively “feasible” line of progress between 1960 and 1990),³⁰ at the same time as the U.N. High Commissioner for Human Rights has criticised its lack of ambition, arguing, in line with the logic of Pogge’s critique of Target 1.A, that most maternal deaths are easily avoidable and that even if Target 5.A were met 125,000 women and girls will still have died needlessly.³¹

[*64] The foregoing critiques of Targets 1.A and 5.A reveal the potentially momentous moral implications of ostensibly technical and statistical assumptions and methodological choices, given a certain minimum will to translate policy commitments into action. Tensions between ambition and feasibility, or principle and pragmatism, underpin many of the human rights critiques of the MDGs. An assessment of compliance with socio-economic rights obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)³² calls for an objective assessment of the adequacy, or in some national jurisdictions, the “reasonableness,” of a government’s fiscal and policy efforts. Governments bear the onus of demonstrating that they are doing the best they can within the maximum extent of available resources.³³ There is a range of tools and techniques to help evaluate compliance, without pretense at precision, and a rich body of comparative jurisprudence at national, regional and international levels from which to draw.³⁴ In broad terms, assessments of policy efforts can be made in three ways: measuring behind (by reference to the past rate of progress), across (by reference to the progress being achieved by similarly situated countries) and within (an objective assessment of national capacities, drawing upon economic modeling, costing assess-

²⁷ Thomas Pogge, *The First United Nations Millennium Development Goal: A Cause for Celebration?* 5 J. Hum. Dev. 377, 383 (2004).

²⁸ *Id.* at 377-82, 389-90; Thomas Pogge, *Millions Killed by Clever Dilution of Our Promise*, CROP Poverty Brief 2-3 (2010), available at www.crop.org/viewfile.aspx?id=218. Pogge’s calculations are based upon the assumption, drawn from WHO and UNDP data, that thirty percent of all human deaths are caused by poverty-related causes such as starvation, diarrhea, tuberculosis and other preventable diseases.

²⁹ Report of the Office of the United Nations High Commissioner for Human Rights on Preventable Maternal Mortality and Morbidity and Human Rights, U.N. Doc. A/HRC/14/39 (Apr. 16, 2010).

³⁰ Vandemoortele, *supra* note 14, at 14.

³¹ Navanethem Pillay, U.N. High Commissioner for Human Rights, *Statement at the Millennium Development Goals Review Summit September 2010: “Women at the Centre of Achieving the MDGs”* (Sept. 20, 2010), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10360&LangID=e>.

³² G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

³³ Comm. on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations* (Art. 2, Para. 1, of the Covenant), 5 Sess. P 9., U.N. Doc. E/1991/23 (Dec. 14, 1990).

³⁴ Human rights accountability methodological tools are surveyed in Eitan Felner, *Closing the “Escape Hatch”: A Toolkit to Monitor the Progressive Realisation of Economic, Social and Cultural Rights*, 1 Oxf. J. Hum. Rts. Prac. 402 (2009); and Ignacio Saiz, *Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis*, 1(2) Oxf. J. Hum. Rts.

ments, and fiscal space analysis).³⁵ If the “feasibility” of the MDGs at a global level is determined by mere extension of the rate of progress between 1960 and 1990, one may well ask: “why bother with the MDGs at all?” After all, human *development* progress prior to 1990, such as it was, occurred without the benefit of the MDGs “global compact.” Committing to a continuation of past global trends seems singularly unambitious from this point of view, and in any case, such global extrapolations offer an entirely inadequate basis for measuring national progress.³⁶

[*65] From a human rights perspective it can also be argued that ambitious targets are especially warranted for problems, such as maternal mortality and morbidity, that are determined more by deeply entrenched discrimination and inadequate political will than by resource constraints.³⁷ Even should we fall short of Target 5.A in global terms, as is presently the case, failure may paradoxically have value in exposing the underlying causes of the problem, thereby mobilising public outrage and political pressure for action. Conversely, unduly modest targets may constitute complicity in failure.

4. The MDGs have been misinterpreted, or misused, in practice

Some of the other more serious concerns relate not to the formulation of particular MDGs, but to the manner in which they have been interpreted or applied at the national level. The MDGs, interpreted sensibly, were not intended to constitute a complete *development* agenda, and do not say anything about the policies needed to achieve the *goals*. To transpose the global MDGs targets and indicators - directly and literally - within national planning frameworks, has resulted in the MDGs sometimes furnishing the basis for praise where it is not warranted, as well as unfair criticism where governments have in fact been making serious efforts.³⁸ The signals from the U.N. have not been entirely consistent in this respect.³⁹ The relevance of the “global” MDGs as human rights benchmarks, and proxies for specific obligations under human rights treaties, is deeply dubious without tailoring to national conditions and resource constraints, and without disaggregating data and monitoring progress at the sub-national level across different population groups.

5. The MDGs are equity-blind and may have exacerbated global and country-level inequalities

[*66] The “equity-blindness” of the MDGs is probably the feature that has generated the strongest criticism. In this article the term “equity” refers generally to notions of fairness and distributive justice.⁴⁰ The global MDGs pro-

Prac. 277-93 (2009). For insightful analyses of comparative social rights jurisprudence, see *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Alicia Ely Yamin & Siri Gloppen eds., 2011); *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Malcolm Langford ed., 2008); and *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Varun Gauri & Daniel Brinks eds., 2008).

³⁵ Anderson & McKay, *supra* note 25 (arguing that all three methods have distinctive advantages as well as limitations, and should be used together as far as possible). To rely exclusively upon “measuring behind” the MDGs method fails to capture critical changes in national circumstances such as increasing value of a country’s main export or, conversely, a financial or environmental crisis.

³⁶ See Hamid Tabatabai, *MDG Targets: Misunderstood or Misconceived?* International Poverty Centre, One Pager, No. 33, Apr. 2007. For some targets, such as reducing child mortality, successful trajectories are more likely to follow an S-shaped than linear curve, reflecting the relative effort and inputs required at different stages of progress. See William Easterly, *How the Millennium Development Goals are Unfair to Africa*, 37 *World Dev.* 26 (2009). In a more radical departure from traditional measurement techniques, other commentators have argued that the focus should be on the rate of progress, rather than meeting MDG-based targets themselves. See Sakiko Fukuda-Parr & Joshua Greenstein, *How Should MDG Implementation be Measured? Faster Progress or Meeting Targets?*, (International Policy Centre for Inclusive Growth, Working Paper No. 63, 2010).

³⁷ U.N. Doc. A/HRC/14/39, *supra* note 29, at 7.

³⁸ See, e.g., discussion *supra* note 21; Easterly, *supra* note 23.

³⁹ For example, the co-chair of the U.N. inter-agency expert group responsible for the MDGs, Jan Vandemoortele, has consistently argued for tailoring the global MDGs to national conditions. See, e.g., Vandemoortele, *supra* note 19. But U.N. reports have frequently stated, or at least implied, that the global MDGs are intended to be taken literally as national targets. See, e.g., United Nations, *Millennium Development Goals Report 14* (2011) (hereinafter U.N. MDGs Report 2011) (“Trends observed in South-Eastern Asia, Eastern Asia and Latin America and the Caribbean suggest that they are likely to meet the hunger-reduction target by 2015... . Based on current trends, sub-Saharan Africa will be unable to meet the hunger-reduction target by 2015.”).

⁴⁰ See United Nations Development Programme, *Human Development Report 2011: Sustainability and Equity: A Better Future for All* (2011) (discussing the philosophical origins of the term equity in liberal theory and the capabilities approach to human development, and distinguishing inequities from inequalities in social outcomes). Not all inequalities are “inequitable,” or unfair, in this

vide global assessments of human *development* progress based upon "average" outcomes. As a result, the MDGs may inadvertently occlude analysis of differential outcomes for populations in the upper versus lower income quintiles, or overlook the particular barriers faced by women, children, indigenous peoples, minorities, persons with disabilities, and other groups who may face discrimination. Taken literally, the MDGs may easily be achieved in many countries without any effort to reach the most marginalised populations. In the worst cases, this can divert attention disproportionately to the "lowest hanging fruits" and populations that are easiest to reach, thereby exacerbating existing inequalities.

Since the year 2000, inequalities between and within countries have been increasing.⁴¹ Recent research by UNICEF showed that in eighteen out of twenty-six developing countries with a decline in under-five mortality (U5M) of ten percent or more, inequality in U5M between the poorest twenty per cent and richest twenty per cent either increased or stayed the same, and in ten of these countries inequality increased by ten percent or more.⁴² UNICEF's research showed that immediate efforts to reach the most excluded groups are efficient in the longer run,⁴³ contrary to popular assumptions, apart from compelling normative and moral considerations.

Certain MDG indicators, notably the U5M and net enrolment ratio indicators, do compare progress between the bottom and top income quintiles. The indicators for Target 7.C, monitoring access to improved water sources and sanitation facilities, call explicitly for disaggregation between urban and rural areas, and the official guidance on MDG [*67] indicators asks that data for all MDGs be disaggregated "as far as possible" by sex and disparities between urban and rural areas.⁴⁴ But disaggregation is inadequate in practice.⁴⁵ The official guidance on MDG indicators provides little if any instruction on disaggregation along many other potentially relevant axes of discrimination prohibited under human rights treaties. On disparities between ethnic groups, the U.N. handbook only remarks that "analysing data on specific ethnic groups may be a sensitive issue in the country," without any guidance as to why monitoring disparities along ethnic or other lines might nevertheless be essential, and how sensitivities might be addressed, or what proxies might be feasible where necessary.⁴⁶

Gender equality is a particular concern. At the *Millennium* Summit, Member States committed themselves to promote "gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate *development* that is truly sustainable."⁴⁷ Seventy per cent of people living in poverty are women, and nearly two-thirds of the 780 million people who cannot read are women. However, MDG 3 ("promote gender equality and empower women"), Target 3.A, focuses only on eliminating gender disparities in primary and secondary education, "preferably by 2005," and in all areas of education by 2015. Two of the three indicators include the share of women in paid employment in the non-agriculture sector, and percentage of women in parliament. But this ex-

sense. However human rights law obliges States to guarantee not only formal equality of opportunities under the law, but also to put in place positive measures to level the playing field and ensure substantive (even if not perfect) equality of outcomes, taking into account the justice of original conditions. Comm. on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, paragraph 2, International Covenant on Economic, Social and Cultural Rights), 42nd session, May 4-22 2009, at 8-9, 37-39, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

⁴¹ Robert Wade, *Globalisation, Growth, Poverty, Inequality, Resentment and Imperialism*, in *Global Political Economy* 617 (John Ravenhill, 3d ed., 2011); United Nations Research Inst. for Soc. Development, *Combating Poverty and Inequality: Structural Change, Social Policy and Politics* 62-76 (2010); HDR 2010, *supra* note 21, at 72-77; Isabel Ortiz & Matthew Cummins, *Global Inequality: Beyond the Bottom Billion: A Rapid Review of Income Distribution in 141 Countries*, (UNICEF Soc. and Econ. Policy, Working Paper, Apr. 2011). While estimation methods and assumptions vary, it seems that disparities in income, health and other indicators of well-being are larger across nations than within nations: Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* 136 (2011).

⁴² UNICEF, *Progress for Children: Achieving the MDGs with Equity* 9, at 22 (2010).

⁴³ *Id.*

⁴⁴ United Nations, *Indicators for Monitoring the Millennium Development Goals*, 17, 64-68, U.N. Doc. ST/ESA/STAT/SR.F/95 (2003).

⁴⁵ See, e.g., Office of the United Nations High Commissioner on Human Rights, *MDGs and Human Rights in Practice: A Review of Country Reporting* 9-14 (2010). On the causal significance of ethnic and geographic exclusion for the MDGs see Langet & London International Development Centre Commission, *supra* note 15, at 15. See also Report of the Independent Expert on Minority Issues, *Achieving the Millennium Development Goals (MDGs) for Minorities: A Review of MDG Country Reports and Poverty Reduction Strategies*, U.N. Doc. A/HRC/4/9/Add. 1 (Mar. 2, 2007).

⁴⁶ United Nations, *supra* note 44, at 13, 15, 17, 19, 21, 23, 33.

⁴⁷ Millennium Declaration, *supra* note 4, P 20.

cludes many other areas - including the private sphere - where women and girls experience discrimination. Data shortages are certainly a critical constraint in many countries. But this is often more a matter of political will than resource constraints. Discrimination issues, including violence against women and other root causes of marginalisation, should be better reflected in the structure of the MDGs, within applicable statistical parameters, as well as in national reporting.⁴⁸

6. Certain MDGs may undermine international human rights law [*68] standards

In certain cases, the specific formulation of particular MDGs may conflict with or undermine international human rights treaty standards. For example, MDG 2 (universal primary education) omits the requirement that primary education be free-of-charge, in an about-face from previous summit commitments and in defiance of overwhelming empirical evidence on how formal and informal fees reduce school attendance and completion rates.⁴⁹ There is an obvious difference between the elimination of school fees as a legal obligation, rather than a matter of good policy. This is not a case of an explicit and direct conflict. However, it does at the very least underscore the need to interpret the MDGs in line with corresponding international human rights standards.

Target 7.C has also drawn criticism in this respect. This target commits states to "halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation."⁵⁰ All MDGs are functionally related to varying degrees, and water and sanitation are critical for achieving education, food, health, and child mortality *goals*. The right to water under Article 11 of the ICESCR, as interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) and recently accepted by the U.N. General Assembly and Human Rights Council, includes an explicit concern for safety and quality, as well as affordability, or water for domestic or personal use.⁵¹ The *Millennium Declaration*, in paragraph 19, had referred to halving the number of people unable to access or afford "safe" drinking water. However the affordability criterion did not survive translation to the MDGs beyond the implicit acknowledgement of the requirement for "sustainable" access, and the safety criterion was reflected in the title of the target but not the indicators, which measure only access to an "improved source" (such as a protected well or piped water). The critical problem with this formulation is that "improved" sources are not necessarily safe in practice; that is to say, water can be piped into an improved facility from a contaminated source. UNICEF rapid surveys in six countries found that fifteen to thirty-five percent of "improved" water sources actually contained contaminated water.⁵² Moreover, pilot studies [*69] by the United Nations Human Settlement Programme (U.N.-Habitat) show that if other normative components of the right to water are monitored - in particular, affordability and regularity of water supply - the true picture regarding water accessibility worsens quite dramatically.⁵³ Taking the key human rights criteria into account, the number of those who lack of access to safe water may actually be closer to three bil-

⁴⁸ Tackling violence against women would address the gender dimensions of the Development Goals," Statement of the United Nations Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Rashida Manjoo, Geneva, Dec. 6, 2010, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10582&LangID=E>. For further recommendations, including additional targets on land ownership and political representation, see Malcolm Langford, A Poverty of Rights: Six Ways to Fix the MDGs, 41(1) IDS Bulletin 83, 85 (2010).

⁴⁹ UNICEF, *supra* note 42, at 34; U.N. MDGs Report 2011, *supra* note 39, at 17; UNESCO, Education for All Global Monitoring Report: Reaching the Marginalised, 45, 165-66, 186-90 (2010). Goal 2 of the internationally agreed goals flowing from the 1990 Jomtien Summit and World Education Forum in Dakar, Senegal, April 26-28, 2000, is: "Ensuring that by 2015 all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to, and complete, free and compulsory primary education of good quality" See Dakar Framework for Action, U.N. Doc. ED-2000/WS/27, P 7(ii) (Apr. 26-28, 2000).

⁵⁰ See official list of MDG indicators, *supra* note 7.

⁵¹ Human Rights Council Res. 15/L.14, Rep. of the Human Rights Council, 15th Sess., U.N. Doc. A/HRC/15/L.14 (Sept. 24, 2010); G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010); CESCR, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

⁵² WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, Report of the First Consultation on Post-2015 Monitoring of Drinking Water and Sanitation 18-19 (May 3-5, 2011), available at http://www.wssinfo.org/fileadmin/user_upload/resources/Report-on-WHO-UNICEF-Berlin-Consultation-May-2011.pdf [hereinafter JMP Post-2015 Consultation Report].

⁵³ Virginia Roaf, Ashfaq Khalfan & Malcolm Langford, Monitoring Implementation of the Right to Water: A Framework for Developing Indicators, Global Issue Papers, No. 14 (2005). See also the report of the (former) independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation. Report of the Independent Expert on the Issue of Human Rights Obligations Related to Safe Drinking Water and Sanitation, 65th Sess., U.N. Doc. A/65/254 (Aug. 6, 2010).

lion people rather than the official estimate of 900 million!⁵⁴ The U.N.'s unduly glowing portrayal of global progress towards "safe" water does no service to these problems and complexities.⁵⁵

Target 7.D is perhaps the most inappropriately framed and unambitious of all MDG targets. Target 7.D, emanating from the "Cities Without Slums" initiative of the Cities Alliance, as reflected in paragraph 19 of the *Millennium Declaration*,⁵⁶ commits states to "achieve[] a significant improvement in the lives of at least 100 million slum-dwellers," a mere ten percent of those living in slums worldwide. U.N.-Habitat has reported that 227 million people have moved out of slum conditions since 2000; but at the same time, the total number of people living in slums has actually increased during this period, to over one billion in 2005, with 828 million in developing countries alone in 2010. Target 7.D fails to refer to secure tenure, which is the foremost consideration for most people in informal settlements, along with other important attributes of the right to housing.⁵⁷ [*70] A number of countries have misinterpreted this Target, or misappropriated the "Cities Without Slums" slogan as the target, and certain countries have even reported on slum clearances as a policy measure to achieve MDG 7.⁵⁸

But perhaps the most obviously defective *Goal* on its face is MDG 8 ("global cooperation"), given its lack of any quantifiable, time-bound targets.⁵⁹ This bald omission prevents MDG 8 from offering any basis to hold richer countries and donor organisations to account for poverty in low-income countries to which the former may, in particular cases, bear varying degrees of factual, moral, and legal responsibility.⁶⁰ Moreover, the international commitment towards "fair" trade in the *Millennium Declaration* was "lost in translation" to the MDGs, with MDG 8 now referring only to "free" trade. This is not to suggest that human rights accountability should categorically swing the way of extra-territorial obligations of donor countries. While some poorer countries are genuinely unable to realise even minimum essential levels of socioeconomic rights despite good faith efforts, in the great majority of cases governments can and ought to be doing a great deal more for their own populations. MDG 8 can and should not be seen as a get-out-of-jail-free-card for any country with respect to its international human rights obligations. But the fact that quantitative, time-bound targets are confined to developing countries' obligations alone results in a lopsided global part-

⁵⁴ JMP Post-2015 Consultation Report, supra note 52, at 24.

⁵⁵ U.N. MDGs Report 2011, supra note 39, at 53-54: "Progress to improve access to clean drinking water has been strong. Globally, coverage increased from 77 per cent in 1990 to 87 per cent in 2008. If this trend continues, the MDG drinking water target of 89 per cent coverage will be met - and likely surpassed - by 2015." The report contains some discussion of rural/urban disparities and differential progress by wealth quintile (though nothing on gender-based disparities), however the upbeat headline observations are based solely upon measurements of improved infrastructure rather than whether the drinking water from improved sources is actually safe - or alternatively life-threatening - in practice.

⁵⁶ See Cities Alliance, Cities without Slums, available at <http://www.citiesalliance.org/ca/cws-action-plan>.

⁵⁷ U.N./OHCHR (2008), supra note 20, at 40-42. Under Article 11 (1) of the ICESCR, States 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." The CESCR defines the right to adequate housing as "the right to live somewhere in security, peace, and dignity," including requirements of adequacy, affordability, habitability, accessibility, availability of essential services and infrastructure, and protection against forced evictions. See CESCR, General Comment 4, The Right to Adequate Housing, 6th Sess., U.N. Doc. E/1992/23, PP 7-8 (Dec. 19, 1991); CESCR, General Comment 7, The Right to Adequate Housing: Forced Evictions, 16th Session, 1997, U.N. Doc. E/1998/22, Annex IV (May 20, 1997). The U.N.'s handbook on monitoring the MDGs does include discussion of the "proportion of households with access to secure tenure" as an indicator relevant to the predecessor to MDG 7, Target D, although this is not in the official list of MDG indicators, and as at 2003 it was recognised that data for this indicator were not generally available. See United Nations, supra note 44, at 68-69; the official list of MDGs indicators, available at <http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm>.

⁵⁸ See, e.g., Viet Nam Achieving the Millennium Development Goals 50 (Aug. 2005), available at http://www.undg.org/archive/docs/6623-Viet_Nam_Fourth_MDG_Report.pdf. See also U.N./OHCHR, supra note 45, at 9; Marie Huchzermeyer, Cities with "Slums": From Informal Settlement Eradication to a Right to the City in Africa 34-45, 167-223 (2011). Conscious of these gaps, the United Nations now encourages States to go beyond MDG Target 7.D in terms of the ambition of their targeting at national, regional and local levels as well as in promoting "access to affordable land with secure tenure and to create the conditions in which people are able to carve out and sustain a livelihood." See U.N. MDGs Report 2011, supra note 39, at 57.

⁵⁹ Supra note 9.

⁶⁰ Cf. Thomas Pogge, World Poverty and Human Rights (2nd ed., 2008) (positing an institutional cosmopolitan theory of global social justice premised upon our shared participation in global economic institutions, and the inequitable distribution of resources and opportunities mediated through those institutions).

nership for poverty reduction, and a seriously imbalanced framework for global accountability.⁶¹

7. MDGs have been co-opted by the growth and aid lobbies

More fundamentally still, beyond defective formulations in the global monitoring framework, is that the actual economic and social policies through which states have purportedly pursued the MDGs still appear overwhelmingly to be circumscribed within a long discredited neo-liberal [*71] economic growth model.⁶² Defying all evidence to the contrary,⁶³ the global *development* policy debate remains dominated by the implicit formula: "faster economic growth + more foreign aid + better governance = MDGs." The fact that inequality has increased in the majority of countries, for the majority of the MDGs, is, in Vandemoortele's view, "dismissed as irrelevant or a passing phase."⁶⁴

In this regard it is sobering to note that global progress towards the MDGs, and the income poverty target in MDG 1, in particular, has been driven largely by aggregate gains through economic growth policies in China and India, based upon policies that pre-dated the MDGs. The drive towards higher growth rates is all the more evident in the continuing fallout from the global economic crisis. If growth continues as the dominant policy objective as an end unto itself, without sufficient concern for its complex and contingent theoretical and empirical relationships with inequality, and with insufficient appreciation of the reverse causal relationship between social investments and growth, the recipe for the future might well be increasing global and national inequalities, insecurity and human rights violations.⁶⁵

C. Conclusions on the MDGs' Impacts

The MDGs emerged from obscurity but have influenced *development* discourse and policy to a degree far beyond the expectations of their architects, supporting a vision of *development* in line with Amartya Sen's human capability theories rather than per-capita GDP growth. The MDGs' impacts on national poverty reduction policies and human *development* outcomes have been variable and more difficult to assess. Nevertheless, improvements in statistical methods and global monitoring of human *development goals* may to some degree be attributed to the MDGs. But human rights shortcomings are evident as well. Human rights advocates have responded to the MDGs in different ways: some continue to condemn [*72] the MDGs, some ignore them entirely, and others pragmatically engage with the MDGs as potential vehicles for human rights realisation. Most of the human rights treaty bodies and Special Procedures of the U.N. Human Rights Council concerned about the MDGs fall into the third category.

However, many of the critiques appear to reflect differing understandings about what the MDGs were intended to be. As originally conceived, the MDGs were intended as collective (not country-specific) targets. They were designed for a wide audience beyond policymakers and *development* practitioners, in order to simplify human *development* messages and to help generate the political will necessary to translate commitments into action. In the words of one of their architects and main proponents, the MDGs were designed to be "useful servants but poor masters," and those who would criticise particular countries (or entire regions, such as Sub-Saharan Africa) for missing the *goals* are "missing the point."⁶⁶ Global *goals* and targets must self-evidently be adapted to national conditions and particu-

⁶¹ See Aldo Caliari & Mac Darrow, International Cooperation, MDG 8 and Human Rights, in Langford et al., eds., supra note 20, for a human rights critique of MDG 8.

⁶² See, e.g., Degol Hailu, Is the Washington Consensus Dead? International Policy Centre for Inclusive Growth, One Pager No. 82 (2009), available at <http://www.ipc-undp.org/pub/IPCOnePager82.pdf>; Rick Rowden, We've Yet to Kill Off the Washington Consensus, The Guardian, Nov. 24, 2010, available at <http://www.guardian.co.uk/global-development/poverty-matters/2010/nov/24/washington-consensus>. The 2011 global monitoring report produced by the staffs of the World Bank and International Monetary Fund (IMF) includes a preponderant focus on economic growth as the main ingredient for achieving the MDGs, a conclusion supported by "preliminary econometric results." World Bank and IMF, Global Monitoring Report 2011: Improving the Odds of Achieving the MDGs: Heterogeneity, Gaps and Challenges 5 (2011).

⁶³ See, e.g., HDR 2010, supra note 21 (rejecting economic policy templates and illustrating the many economic development trajectories that have achieved reasonable human development outcomes in practice).

⁶⁴ Jan Vandemoortele, The MDG Conundrum: Meeting the Targets Without Missing the Point, 27 Dev. Pol'y Rev. 355, 363-64 (2009).

⁶⁵ See generally Horizontal Inequalities and Conflict: Understanding Group Violence in Multiethnic Societies (Frances Stewart ed., 2008); World Bank, World Development Report 2011: Conflict, Security and Development 30, 75-76 (2011) (showing a causal relationship between group-based inequalities and violent conflict).

⁶⁶ Vandemoortele, supra note 64, at 359, 363.

larities. As the experience of the World Summit for Children made clear, global *goals* "first need to be adapted to the specific realities of each country... . Such adaptation of the *goals* is of crucial importance to ensure their technical validity, logistical feasibility, financial affordability and to secure political commitment and broad public support for their achievement."⁶⁷ Adaptation must include measuring disparities, which - with a just a few exceptions - are absent from the MDGs' focus on global averages.

But for a great many governments and constituencies, the need to tailor or contextualise the MDGs to national conditions is not self-evident. Even when tailoring has been undertaken, for example in setting more ambitious targets or sub-national targets to capture disparities between regions, or adding "governance" targets, human rights questions and contradictions remain.⁶⁸ What role should human rights play, therefore, in the articulation or adaptation of MDGs targets at the national level, and in their implementation? This has been the subject of an extensive literature since the year 2005, and was also on the agenda for the negotiations leading to the September 2010 MDGs Summit in New York, the subject of the next Section of this Article.

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III. MDGs Summit Outcome Document

The MDGs Summit Outcome Document ("Summit Outcome")⁶⁹ represents a significant advance in terms of U.N. policy and inter-governmental agreements on human rights and *development* issues. Human rights have been a highly politicised issue in inter-governmental debates on *development*, particularly in recent years in the United Nations General Assembly's (G.A.) Triennial Comprehensive Policy Review process (TCPR, now the Quadrennial Comprehensive Policy Review or QCPR).⁷⁰ Previous World Summit and global conference outcomes have been rich in human rights content, including for example the *Millennium* Declaration and 2005 World Summit Outcome,⁷¹ which is not the case for those focusing on *development* or aid issues specifically, such as the TCPR and Monterrey Consensus 2002 on financing for *development*.⁷² This Section of the Article offers a short review of the salient features of the Summit Outcome from a human rights perspective, along with its weaknesses, as the basis for conclusions about its significance as a platform and framework for international negotiations towards the post-2015 *development* agenda.

A. The Summit Outcome Contains Many Explicit Human Rights References and Commitments

The Summit Outcome contains an impressive number of explicit human rights references and commitments, as well

⁶⁷ Id. at 358 (quoting UNICEF, UNICEF Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s, P 6 (1990), available at <http://www.unicef.org/wsc/plan.htm>).

⁶⁸ Viet Nam and Cambodia are examples of national tailoring in terms of the content and level of ambition of the MDGs. Thailand and Kenya are among the countries that have adopted sub-national targets, and Mongolia adopted an additional MDG 9 on "human rights, good governance and anti-corruption." See U.N./OHCR, *supra* note 45, at 9-14. None of these countries have been immune from human rights criticism in the international media and human rights monitoring bodies, including on grounds of structural inequalities and discrimination against particular groups of people. Mongolia's MDG 9 includes a target to "develop a zero-tolerance environment to corruption in all spheres of society" which, while presumably well-intended, gives rise to obvious human rights risks in terms of heavy-handed law enforcement policy.

⁶⁹ See Millennium Development Goals Summit Outcome Document, G.A. Res. 65/1, U.N. Doc. A/RES/65/1 (Sept. 17, 2010). A compendium of commitments of member states, international organisations and private foundations and corporations is contained in the MDG Summit Matrix (Nov. 12, 2010), http://www.un.org/en/mdg/summit2010/pdf/MDGSummit_Matrix_12Nov2010_rev2.pdf.

⁷⁰ See Triennial Comprehensive Policy Review, U.N. Doc. A/RES/62/208 (Mar. 14, 2008). The main purpose of the TCPR, and its successor the QCPR, is to evaluate the effectiveness and efficiency of the U.N. development system's support to national development efforts, in the context of global summit commitments.

⁷¹ See 2005 World Summit Outcome, U.N. Doc. A/RES/60/1, (Oct. 24, 2005).

⁷² Final text of agreements and commitments adopted at the International Conference on Financing for Development, Monterrey, Mex., June 18-22, 2002, Monterrey Consensus on Financing for International Development, U.N. Doc. A/CONF.198/11 (2003), available at <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf>. Paragraph 11 of the Monterrey Consensus recognised the importance of human rights in the context of good governance and "market-oriented policies," and paragraph 12 recognised the importance of empowering women and protecting labour rights. Otherwise human rights are at best implicit.

as quite an impressive degree of congruence with substantive human rights policy recommendations as reflected in the jurisprudence of international human rights bodies. There are certainly a range of areas where the document could have been strengthened, especially in terms of the lack of succinctness in the overall vision of *development* portrayed in the document, and the generality of many of the Action Agenda commitments. The total number of commitments (over one hundred) hardly constitutes a succinct statement of *development* priorities, and there are real questions as [*74] to how much of the aid pledged at the MDGs Summit was actually "new," and how much will actually be delivered. However, in the context of an intergovernmental negotiation of this kind, and the difficult compromises that this entails for both the Global North and South, the explicit human rights commitments are significant in principle and, potentially, in practice.

The introductory part of the Summit Outcome (paragraphs 1-35) is replete with human rights references. While it is customary for human rights to permeate preambular parts of global conference outcome documents, it is unusual for this to occur with the frequency and specificity exhibited in the Summit Outcome. Beyond recognising the purposes and principles of the U.N. Charter and linkages between human rights, *development*, and peace and security, (the so-called "3 pillars" of the U.N. system), ⁷³ states indicate that they will be guided by the U.N. Charter "with full respect for international law and its principles." ⁷⁴ Moreover, states explicitly recognise the importance of human rights for achieving the MDGs, specifically, as well as for *development* generally. ⁷⁵ General human rights and *development* linkages are commonly recognised in summit outcome documents, but not human rights and MDGs links in particular. Moreover, in a stocktaking of successful policies for achieving the MDGs, states note the importance of "respecting, promoting and protecting all human rights, including the right to *development*; increasing efforts to reduce inequality and eliminate social exclusion and discrimination; [and] enhancing opportunities for women and girls and advancing the economic, legal and political empowerment of women." ⁷⁶ These are notable advances, although the document does not reiterate the 2005 World Summit Outcome commitments to mainstream human rights in national *development* policies and the work of the U.N. ⁷⁷ in the same clear terms.

The Action Agenda (paragraphs 36-81 of the Summit Outcome) is also strong in terms of textual references to human rights. Paragraph 70(u) of the Summit Outcome reaffirms "the right of everyone to have access to safe, sufficient and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger." ⁷⁸ Paragraph 71(a) commits states to "realizing the right of everyone to education and reemphasizing that education shall be directed at the full *development* of the human personality and the sense of its dignity and [*75] shall strengthen respect for human rights and fundamental freedoms." In relation to *Goal 5*, states commit themselves to "taking steps to realize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including sexual and reproductive health." ⁷⁹ On health more generally, states commit themselves to a number of measures relating to health education and literacy to ensure respect for human rights, and promote and protect human rights in combating HIV. ⁸⁰

There are a number of explicit human rights commitments relating to gender equality and women's empowerment in the Summit Outcome, including commitments in sub-paragraph 72(a) to take actions to achieve the *goals* of the Bei-

⁷³ See Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations* 103 Am. J. Int'l Law 446 (2009) (critically appraising human rights mainstreaming in development and the "three pillars" premise of the U.N. Charter).

⁷⁴ Summit Outcome, *supra* note 69, P 2.

⁷⁵ *Id.* PP 3, 12, 13, 53, 54.

⁷⁶ *Id.* PP 23 (j), (k), (l). Taken as a whole, paragraph 23 reads like a check-list for a human rights approach to achieving the MDGs, calling for (among other things) setting targets for universal access to social services, ensuring adequate participation, non-discrimination and accountability, among other measures.

⁷⁷ 2005 World Summit Outcome Document, *supra* note 71, P 126.

⁷⁸ See CESCR, General Comment 12, *The Right to Adequate Food* (Art. 11), U.N. Doc. E/C.12/1999/5, PP 7-13 (May 12, 1999) (which elaborates on the normative content of the right to food under the ICESCR, and includes criteria relating to the adequacy and sustainability of food availability and access).

⁷⁹ Summit Outcome, *supra* note 69, P 75(a).

⁸⁰ *Id.* PP 75(i), 76(b).

jing Declaration and Platform for Action⁸¹ and Cairo Conference on Population and *Development*,⁸² as well as to fulfill States Parties' obligations under the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁸³ and the Convention on the Rights of the Child (CRC).⁸⁴ These commitments are especially noteworthy in the context of a U.N. inter-governmental agreement on *development* issues, specifically recalling and reinforcing legally binding commitments of states under human rights treaties. States also commit to strengthening their laws and programmes to prevent and punish violence against women and girls, in conformity with international human rights law, as well as to "equal access to adequate housing, property and land, including rights to inheritance."⁸⁵ The right of all women to decent work is also recognised, within the framework of applicable conventions of the International Labour Organisation.⁸⁶

Beyond the explicit references to human rights discussed above, there are other respects in which the substantive policy recommendations in the Summit Outcome are consistent with human rights standards as interpreted by international human rights monitoring bodies. For example, there is a consistent focus in the Action Agenda on accessibility, affordability and quality of social services, as well as on universal access to basic social services, consistent with international human rights jurisprudence.⁸⁷ The draft repeatedly calls for an analysis and assault on the [*76] "root causes" of lack of access to basic services,⁸⁸ including barriers caused by discrimination, which is a core normative attribute of internationally recognised socio-economic rights.⁸⁹

B. The Summit Outcome Also Has a Number of Weaknesses

Perhaps unsurprisingly, there are also a number of human rights omissions, ambiguities and tensions in the text. For example, as is the case for MDG 2 itself, as was seen in subsection II.B.6, *supra*, eliminating user fees is listed among policy options to achieve universal primary education, but states did not reaffirm the human right to universal free primary education under the ICESCR and CRC. On MDG 5, there is no explicit requirement that states repeal laws that discriminate against women and girls, notwithstanding the continuing evidence of their harmful impacts.⁹⁰ The lone commitment of Member States on the "worst forms of child labour" framed the issue principally as a matter of international cooperation, to the neglect of more localised and immediate imperatives to prohibit and punish such unconscionable practices.⁹¹ The Summit Outcome includes welcome commitments to provide sustain-

⁸¹ Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Report of the Fourth World Conference on Women, 1-132 U.N. Doc. A/CONF.177/20/Rev.1 (1996).

⁸² International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the International Conference on Population and Development, U.N. Doc. A/CONF.177/13 (1994). This conference was significant, among other reasons, for the commitments of states to recognise and protect sexual and reproductive rights, which is essential not only for their own sake, but also for the achievement of the maternal health targets under MDG 5. See U.N. Doc. A/HRC/14/39, *supra* note 29.

⁸³ GA Res. 34/180 (Dec. 18, 1979).

⁸⁴ GA Res. 44/25 (Nov. 20, 1989).

⁸⁵ Summit Outcome, *supra* note 69, PP 72(g), (k).

⁸⁶ *Id.* P 72(d).

⁸⁷ *Id.* PP 51, 70(g). See, e.g., CESCR, *supra* note 78, PP 7-13; [CESCR, General Comment 14, The Highest Attainable Standard of Health, 22nd Session, Apr. 25-May 12, 2000, U.N. Doc. E/C.12/2000/4 P 12](#) (Aug. 11, 2000); CESCR, General Comment 19, The Right to Social Security, 39th Session, Nov. 5-23 2007, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008). See also U.N. Independent Expert on the Question of Human Rights and Extreme Poverty to the U.N. Human Rights Council, U.N. Doc. A/HRC/11/9 (Mar. 17, 2009) (by Magdalena Sepúlveda Carmona) (on the subject of cash transfer programmes), and to the U.N. G.A., U.N. Doc. A/65/259 (Aug. 9, 2010) (on social protection measures to achieve the MDGs). The latter report argues at paragraph 74: "Ensuring respect for [the principles of equality and non-discrimination, in the context of the MDGs] implies a preference for schemes that are universal. While targeting mechanisms may be seen as a way in which to reach those in extreme poverty, States must remain focused on the ultimate goal [of universal access]. While policies should prioritize the most vulnerable and disadvantaged, in accordance with human rights standards, they must also form part of longer-term strategies to progressively ensure universal coverage."

⁸⁸ See, e.g., Summit Outcome, *supra* note 69, PP 71(d), 75(d).

⁸⁹ See CESCR, General Comment 20, *supra* note 40.

⁹⁰ Cf. U.N. Doc. A/HRC/14/39, *supra* note 29.

⁹¹ Summit Outcome, *supra* note 69, P 70(f) commits States to take "appropriate steps to assist one another in the elimination of the worst forms of child labour, strengthening child protection systems and combating trafficking in children through, *inter alia*,

able access to safe drinking water and basic sanitation in the context of health and environment-related MDGs,⁹² but fails - in these specific contexts - to commit to affordable and culturally appropriate services, which are normative attributes of the rights to water and sanitation as well as critical [*77] determinants of access to water and sanitation services in practice.⁹³ These are hardly fundamental shortcomings in the larger scheme of the MDG Summit negotiations, however they are worth underscoring in view of the recent recognition of the human rights to water and sanitation by the U.N. General Assembly and Human Rights Council, and the very poor record of achievement by Member States on the sanitation target, in particular.

More problematical, however, are contradictions - or at least latent tensions - between the Summit Outcome's environmental commitments and the right to adequate housing under the ICESCR. On its face, there are clearly a number of virtuous features in the material provision of the Summit Outcome (paragraph 77(k)), in which states commit themselves to accelerated progress towards MDG 7 (environmental sustainability) through means including participatory national urban planning strategies and promoting equal access to public services.⁹⁴ The problem, however, is that the main *goals* expressed in this commitment are not necessarily internally consistent: that is, to "[work] towards cities without slums, beyond current targets, through reducing slum populations and improving the lives of slum-dwellers." If we take into account the misinterpretation or misappropriation of Target 7.D that has occurred in the past,⁹⁵ the given formulation risks encouraging a disproportionate focus on "reducing slums" rather than slum upgrading, with no reflection of the right to security of tenure, which is a right critical to most if not all people living in slums.⁹⁶ This language might lead to slum clearance policies unless the need for slum upgrading and the security of land tenure are stated more explicitly. In implementing this commitment and in connection with negotiations towards the post-2015 *development* agenda, it is vital to emphasize the commitment in the 2005 World Summit Outcome to prioritize slum prevention and slum upgrading policies,⁹⁷ as opposed to slum clearance policies, and interpret such commitments in line with the minimum procedural and substantive guarantees associated with the right to adequate housing under the ICESCR.

[*78]

C. Principles of Equality and Non-discrimination Feature Prominently, Far More than Principles of Participation and Accountability

Beyond evoking specific human rights standards, the Summit Outcome also recalls and reinforces certain operational principles characteristic of a human rights-based approach to *development*, notably, equality and non-discrimination, participation, and accountability.⁹⁸ The principles of equality and non-discrimination feature prominently and systematically throughout both the introductory part as well as the Action Agenda. Commitment to equality

enhanced international cooperation and assistance, including support for social and economic development, poverty eradication programmes and universal education." See ILO, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention 182, 87th Sess., June 1999 (June 17, 1999), which rightly recognises that poverty causes and contributes to child labour, and that education is part of the solution (preamble, and Art. 8). However the "worst" forms of child labour covered by the Convention include such practices as slavery and procurement of children for armed conflict, prostitution, pornography and drug trafficking (Art. 3). In these circumstances, immediate actions to prohibit, monitor and criminalise such practices should surely have been prioritised (Arts. 1, 5 and 6).

⁹² Summit Outcome, supra note 69, PP 73(d), 73(f), 74(f), 77(h).

⁹³ See U.N. Doc. A/65/254, supra note 53.

⁹⁴ Summit Outcome, supra note 69, P 77(k) commits States to "[work] towards cities without slums, beyond current targets, by reducing slum populations and improving the lives of slum-dwellers, with adequate support of the international community, by prioritizing national urban planning strategies with the participation of all stakeholders, promoting equal access for people living in slums to public services, including health, education, energy, water and sanitation and adequate shelter, and by promoting sustainable urban and rural development."

⁹⁵ Vietnam Achieving the Millennium Dev. Goals, supra note 58 and accompanying text.

⁹⁶ On the sources and content of the right to adequate housing, see CESCR, Gen. Comment 4, supra note 57.

⁹⁷ World Summit Outcome, supra note 71, P 56(m), commits States "to achieve significant improvement in the lives of at least 100 million slum-dwellers by 2020, recognizing the urgent need for the provision of increased resources for affordable housing and housing-related infrastructure, prioritizing slum prevention and slum upgrading, and to encourage support for the United Nations Human Settlements Foundation and its Slum Upgrading Facility."

⁹⁸ For a discussion of these and other principles see United Nations Common Understanding on a Human Rights Based Approach to Development Cooperation (2003), available at http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Ap

and non-discrimination is particularly strong in the context of gender equality and gender mainstreaming⁹⁹ and in relation to the *goal* of "sustained, inclusive and equitable economic growth,"¹⁰⁰ as well as in commitments to guarantee universal access to social services and social protection¹⁰¹ and promote "more equitable access to economic opportunities and special services."¹⁰² The principles of equality and non-discrimination are also implicit in commitments to ensure universal access to food, education, decent work, HIV treatment and health (including reproductive health) services.¹⁰³ Member States also committed themselves explicitly to eliminate social exclusion and discrimination,¹⁰⁴ "combat[] inequality at all levels,"¹⁰⁵ focus on the poor and "vulnerable" including persons with disabilities,¹⁰⁶ take steps to ensure the rights of indigenous peoples on the basis of equality and non-discrimination,¹⁰⁷ address the root causes of inequalities, disparities, exclusion, and discrimination affecting children in education,¹⁰⁸ end discrimination against women and girls in education,¹⁰⁹ address the root causes of maternal mortality and morbidity including violence against women,¹¹⁰ and address the stigmatization and discrimination of people living with HIV.¹¹¹ Importantly, there is also repeated recognition of the need for disaggregated data and strengthening [*79] of national statistical systems, to improve and monitor public policies and address discrimination.¹¹² These commitments, if implemented, would fill significant gaps in the MDGs framework.

The principle of participation is reflected reasonably strongly in relation to the empowerment and participation of women in political and economic decision-making processes, as well as in the commitment of states to encourage participation in national urban planning strategies under MDG 7.¹¹³ But beyond this, the references to participation in the Summit Outcome appear to be quite tokenistic and technocratic. Participation is highlighted as an instrumental need in connection with the improvement of national health governance and sanitation,¹¹⁴ and more generally in connection with promoting the "involvement" of people living with HIV/AIDS in national HIV strategies.¹¹⁵ At the global level, there is recognition of the importance of increasing the voice and representation of poorer countries on the governing bodies of the international financial institutions.¹¹⁶ Member States also call for civil society organisations (CSOs) and non-government organisations (NGOs) to "enhance their role in national *development* efforts,"¹¹⁷ however governments' duties to enable such participation are not mentioned.

proach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf; U.N./OHCHR, Frequently Asked Questions on a Human Rights Based Approach to Development Cooperation, HR/PUB/06/8 (2006), available at <http://www.ohchr.org/Documents/Publications/FAQen.pdf>; Mac Darrow & Amparo Tomas, Power, Capture, Conflict: A Call For Human Rights Accountability in Development Cooperation, 27 Hum. Rts. Q. 2, 471 (2005).

⁹⁹ Summit Outcome, supra note 69, PP 3, 12, 72.

¹⁰⁰ Id. PP 23(b), 41, 70(b).

¹⁰¹ Id. PP 51, 70(g).

¹⁰² Id. P 28.

¹⁰³ Id. PP 70(j), 71(a), 72(d), 76(j), 73(a), 75(c) respectively.

¹⁰⁴ Id. P 23(k).

¹⁰⁵ Id. P 5.

¹⁰⁶ Id. P 28.

¹⁰⁷ Id. P 55.

¹⁰⁸ Id. P 71(d).

¹⁰⁹ Id. P 72(b).

¹¹⁰ Id. P 75(d).

¹¹¹ Id. P 76(c).

¹¹² Id. PP 23(s), 68, 72(h), 73(j).

¹¹³ Id. PP 72(f), 77(k) respectively. The former commitment compensates to a modest degree for the relatively weak MDG 3 commitments in relation to women's empowerment, as discussed supra subsection II.B.5.

¹¹⁴ Id. PP 73(h), 77(j) respectively.

¹¹⁵ Id. P76(c).

¹¹⁶ Id. P 40.

¹¹⁷ Id. P 17.

There is no explicit recognition in the Summit Outcome of participation as a right, and no specific commitments to guarantee freedom of expression and association or other indispensable human rights guarantees for active, free and meaningful participation. With the two exceptions mentioned above,¹¹⁸ participation is treated more as a duty or privilege than a right, or alternatively (as in the case of sanitation) as contributions by user groups to service delivery. The Summit Outcome encourages "broad consultations and participation of all relevant stakeholders" in national *development* strategies, but this comes with the caveat "as appropriate for each national context."¹¹⁹ The unfortunate implication, therefore, is that broad consultations and participation may not be appropriate in certain national contexts, at the discretion of the government of the day. This falls well short of the interpretation of "national ownership" reflected in the OECD's policy guidance on this subject,¹²⁰ and is a far cry from the idea of participation as [*80] a human right.¹²¹

These flaws are regrettable, but hardly surprising in the context of an inter-governmental negotiation of this kind. The idea of participation is honoured more in the theory than practice of *development*, and is rarely embraced and implemented as a human right. In the context of the MDGs and the delivery of basic social services, participation is especially prone to instrumentalisation or colonisation, often reduced to the involvement of communities and user groups in service delivery (or cheap labour, in crude terms), rather than control over policy choices.¹²² This is not to trivialise the challenges involved in making participation effective in any given context. "Active, free and meaningful" participation¹²³ is by definition threatening to those in positions of power, whatever the demonstrated benefits for human *development*. From donor organisations' perspectives, creating space and capacities for effective participation is often seen to run against the grain of financial disbursement and results-based management imperatives. These are among the reasons why human rights have historically gained such little traction in inter-governmental *development* debates, and conversely, why the consensus on so many other aspects of the human rights agenda in the Summit Outcome is so notable.

As with participation, the Summit Outcome reveals a number of shortcomings insofar as the principle of "accountability" is concerned, which mirror deficits in MDG accountability mechanisms in practice.¹²⁴ [*81] "Accountabil-

¹¹⁸ Supra note 113 and accompanying text.

¹¹⁹ Summit Outcome, supra note 69, P 36.

¹²⁰ See OECD Development Assistance Committee (OECD-DAC), Action-Oriented Policy Paper on Human Rights and Development (2007), Principle 6 ("Consider human rights in decisions on alignment and aid instruments."), <http://www.oecd.org/dataoecd/50/7/39350774.pdf>. See also the report of the 3rd High Level Forum on Aid Effectiveness, Accra Agenda for Action, available at <http://www.oecd.org/dataoecd/58/16/41202012.pdf>. In P 13(c) of the Accra Agenda for Action, donor and partner countries undertook to "ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability."

¹²¹ Cf. Darrow & Tomas, supra note 98, at 506-10; U.N./OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, U.N. Doc. HR/PUB/06/12(2006), available at <http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>; Guideline 5, Participation, at 14-16; U.N./OHCHR, Claiming the MDGs, supra note 20, at 11-12; U.N./OHCHR & WHO, Human Rights, Health and Poverty Reduction Strategies, U.N. Doc HR/PUB/08/05 (2008), at 14-20, available at http://www.ohchr.org/Documents/Publications/HHR_PovertyReductionsStrategies_WHO_EN.pdf.

¹²² Cf. U.N./OHCHR, supra note 45, at 28.

¹²³ The term in quotations derives from the U.N. Declaration on the Right to Development, G.A. Res. 41/128 (Dec. 4, 1986).

¹²⁴ The principle of accountability has relatively well-defined content in light of international human rights standards. See, e.g., Darrow & Tomas, supra note 98, at 511-14; U.N./OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, supra note 121, at 17-19. The General Assembly carries out an annual development dialogue on the follow-up to the Millennium Declaration and the 2005 World Summit Outcome, and States are invited to make presentations of their progress towards meeting the MDGs to the Economic and Social Council's Annual Ministerial Review. See G.A. Res 60/265, 91 56, U.N. Doc. A/RES/60/265 (July 12, 2006). The biennial "Development Cooperation Forum" of the U.N. Economic and Social Council (ECOSOC) also reviews global trends and progress on development cooperation relating to the MDGs: World Summit Outcome, supra note 71, P 155(b). Global, regional and national MDG reports are also produced by, or with the support of, the United Nations, and as of November 2011 the United Nations was establishing an "Integrated Implementation Framework" as a global platform to monitor the delivery on commitments from the September 2010 MDGs Summit, see <http://www.un.org/News/Press/docs/2010/sghsm13244.doc.htm>. However, the established MDG accountability mechanisms are notoriously weak. There is no independent monitoring or evaluation of national MDG reports, no forum for complaints, and only seven countries chose to give presentations to the ECOSOC Annual Ministerial Review in 2009. Salil Shetty, supra note 16.

ity” is the leitmotif of human rights approaches to *development*; however it can mean many different things to different people. For present purposes, drawing from principles of public administration, human rights and global administrative law,¹²⁵ “accountability” refers to policymakers and other duty-bearers being held to transparent and objective performance standards, informed by international human rights law, against which they are answerable to those affected by their decisions and actions. The three closely related purposes of accountability, under this definition, are to strengthen incentives for delivering on global and national legal and policy commitments, improve policymaking and service delivery, and ensure that those whose rights are infringed have timely and effective redress.¹²⁶

The Summit Outcome refers to accountability - and more generic “good governance” or rule of law principles - in a number of contexts, including in relation to healthcare,¹²⁷ sustainable *development* and the eradication of poverty, and hunger,¹²⁸ as well as gender equality, women’s human rights and empowerment.¹²⁹ Anti-corruption commitments also feature in the document, and there are references to the idea of “mutual accountability” between developing and donor states, although these references could have been strengthened by explicitly prioritising accountability of both developing and donor governments directly to individuals affected by the aid relationship.¹³⁰ However, the most obvious accountability deficiencies relate to the lengthy and undifferentiated nature of the commitments themselves. The commitments of states in the Action Agenda are generally expressed to be non-inclusive, and a list of over one [*82] hundred commitments is more difficult to monitor than a shorter, prioritised list. The poor or vague formulation of certain recommendations is another problem,¹³¹ although these kinds of deficiencies are hardly novel or surprising within the challenging constraints of a political negotiation of this kind. The idea that there should be effective (or any) redress for failure to achieve the social rights embodied in the MDGs is anathema.

As for donor country accountability more particularly, the commitments in the “MDG 8 - Global Partnership” part of the Action Agenda are numerous. Commitments in the latter part include: reaffirming international aid commitments from previous global conferences; implementing the Doha “*development*” round of trade negotiations and Gleanegles commitments on aid to Africa; ensuring access to affordable medicines through public health flexibilities under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and eliminating agricultural subsidies.¹³² However, these commitments are not necessarily new. While they may offer a guide to the interpretation of MDG 8 going forward, they do not cure structural accountability defects in MDG 8 and its lack of time-bound monitorable targets and do not offset the poor implementation record in practice.¹³³

¹²⁵ Under emerging principles of global administrative law, accountability requires that administrative bodies meet adequate standards of transparency, participation, reasoned decision, legality, and provide effective review of their decisions. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Probs.* 15 (2004-2005). For fuller analysis of accountability rationales, principles and mechanisms in the context of the MDGs, see U.N./OHCHR & Centre for Economic and Social Rights, *The Millennium Development Goals: Who’s Accountable?* (forthcoming 2012).

¹²⁶ For a useful exposition of the concept of redress in the context of service delivery, see Varun Gauri, *Redressing Grievances and Complaints Regarding Basic Service Delivery*, Policy Research Working Paper No. 5699, World Bank (June 2011), at 2-7.

¹²⁷ Summit Outcome, *supra* note 69, P 63.

¹²⁸ *Id.* P 11.

¹²⁹ *Id.* PP 12, 72.

¹³⁰ *Id.* P 78(c) for example recognises “that the commitments made by developed and developing countries in relation to the Millennium Development Goals require mutual accountability.” The term “mutual accountability” is a term of art in aid effectiveness jargon; however, the challenge in practice is to ensure that accountability between donor States and organizations and partner country governments does not displace the accountability of each towards the supposed subjects and beneficiaries of development, that is to say, individuals and communities in the partner country. See, e.g., Marta Foresti, David Booth & Tammie O’Neil, *Aid Effectiveness and Human Rights: Strengthening the Implementation of the Paris Declaration*, 53-61 (2006), available at <http://www.odi.org.uk/resources/download/1538.pdf>.

¹³¹ For example, it is hard to see how a government could be held to account for failure to implement “forward-looking economic policies,” see Summit Outcome, *supra* note 69, P 70(b), or to implement “political, economic, social, financial and technical solutions in the short, medium and long term” in response to the global food crisis, *id.* P 70(n).

¹³² *Id.* PP 78(a), (e), (t), (p).

¹³³ See U.N. MDG Gap Task Force, *Millennium Development Goal 8: The Global Partnership for Development: Time to Deliver*, Sales No. E.11.I.11 (2011) (giving an overview of international progress towards MDG 8 and outlining serious shortcomings in virtually all MDG 8 Targets).

D. Conclusions Concerning the Human Rights Significance of the Summit Outcome

The Summit Outcome reflects a number of significant strengths from a human rights point of view, but also a number of clear weaknesses. However, the limitations discussed in Section III.A, while noteworthy, are not fatal to the conceptual integrity of the document as a whole, and should not detract from the remarkable inter-governmental consensus on human rights being indispensable for the realisation of the MDGs. Whatever the particularities and trade-offs of the Summit Outcome negotiating process, the resulting human rights commitments deserve to be taken seriously. The main focus should now be on determining how best to capitalise upon the document's strengths, while marshalling international human rights law in order to fill gaps and help resolve ambiguities. In this regard, the document asks that the General Assembly review the MDGs annually, "including in the implementation of this outcome document."¹³⁴ In effect, this may be taken to mean that the MDGs should be interpreted, implemented and monitored in light of the Summit Outcome's human rights commitments. [*83] The U.N. Secretary General is also asked to report annually on progress, and the President of the General Assembly is asked to organise a Special Event on the MDGs in 2013.¹³⁵ These provisions provide important milestones and entry points for the more effective positioning of human rights in the lead-up to negotiations on the post-2015 *development* agenda.

IV. Problematising and transcending the "value added" paradigm

Ever since human rights entered the *development* lexicon in the 1990s, their proponents have been pressed to demonstrate the "value added," in instrumental and presumptively quantifiable terms, of human rights in *development*. Rightly or wrongly, this remains the dominant framing of human rights in *development* debates. While the text of the Summit Outcome document reflects both consequentialist and deontological justifications for human rights,¹³⁶ the former justifications by definition appeal to the more pragmatic dispositions of negotiators, economists and policy-makers. Hence the debates about the substantive justifications for human rights, in an already complicated international *development* landscape, can be expected to intensify towards 2015.

There is of course nothing in the human rights regime that precludes consequentialist justifications outright,¹³⁷ and no reason why those asserting the relevance, or even primacy, of human rights should not be put to proof. The *development* marketplace is crowded and heterogeneous, hardened by history and ideological conflict, and inured to passing theories, charlatans and fads. Those who have been toiling for decades in *development*'s name are surely entitled to understand what, precisely, newer entrants into the marketplace are bringing, what the distinctive contributions of any putative new paradigm are, and exactly where - according to the new paradigm - prevailing theories and orthodox methods of *development* work are falling short. The problem does not lie in the legitimacy of the "value added" question; rather, what may be problematic are the assumptions underpinning the question, and the failure of many participants in the human rights and *development* debate - particularly from within the field of neo-classical economics but also many human rights practitioners - to exhibit the degree of critical self-reflection, [*84] humility, and spirit of open inquiry necessary for effective engagement on complex interdisciplinary questions.

This Section begins by outlining three contestable assumptions or problems relating to the "value added" challenge, specifically: (1) the assumption that human rights necessarily require a wholesale paradigm shift (the absolutist assumption), (2) ideological assumptions inconsistent with human rights (free market fundamentalism), and (3) the assumption or contention that the "value added" of human rights lies in their contribution towards economic growth (the confusion of means with ends). Once traversing these problematic premises, the discussion moves to a deeper analysis of the principles, processes, and mechanisms through which human rights may influence service delivery and policymaking relevant to the MDGs. This part of the discussion draws upon a growing empirical literature on the impacts of social rights litigation in different countries and regions, as well as theoretical accounts of the relationship

¹³⁴ Summit Outcome, supra note 69, P 79.

¹³⁵ Id. PP 79, 81.

¹³⁶ Consequentialism refers to theories that hold that the outcomes of one's conduct are the appropriate basis for moral judgments about that conduct, whereas deontology derives the rightness or wrongness of conduct from the character of the behaviour itself. Empirical justifications of human rights in development are more readily conformable to the former kind of reasoning. The Summit Outcome recognises both kinds of justification, although more explicitly in the former (consequentialist) case. Supra notes 74-75 and accompanying text. For justifications reflecting deontological reasoning, at least implicitly, see, for example, id. P 2 (States indicate that they will be guided by the U.N. Charter "with full respect for international law and its principles.").

¹³⁷ See John Tobin, *The Right to Health in International Law* (2012) at 57-58 (referring to the first two preambular paragraphs of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948)).

between human rights and neo-classical welfare economics. The Section concludes by offering a nuanced and synthetic articulation of decision-making principles drawn from the theory and practice of human rights, focusing on the role of human rights in revaluing policy debates, challenging problematic assumptions of neoclassical economics, correcting market failures, strengthening accountability for policy choices, and re-politicising *development*, thereby opening space for social change. In doing so, this Section exposes and transcends the reductionism and pure consequentialism inherent in the "value added" challenge, and frames a case for more focused interdisciplinary dialogue leading towards 2015.

A. The Absolutist Assumption

The first problem relating to the "value added" challenge is that it may implicitly convey the assumption that the validity and relevance of human rights to *development* depend upon all features of the human rights framework being unique and hitherto unknown in *development*. This is partly a substantive problem, and partly one of poor communication. Responsibility for this problem lies at least in part at the feet of those who would advocate for a categorical paradigm shift based uniquely on human rights. Unduly categorical claims may foreclose legitimate critical inquiry into potentially contentious premises of the international human rights regime, such as the theoretical universality of human rights and questions about the indivisibility and inter-dependence of rights in practice,¹³⁸ and may overlook well-established human *development* theories and practice that run in very similar directions. One of the more significant contributions of the 2003 U.N. Common Understanding on a Human Rights Based Approach to *Development* Cooperation was to recognize a distinction and [*85] a synergistic relationship between attributes of the human rights regime that are distinctive and "essential" to *development* programming, as against "good *development* practices" generally.¹³⁹ Whilst arguably too categorical a distinction in the abstract, the underlying intention is sound: to encourage a healthy degree of humility and thorough understanding of the policy and operational context within which human rights arguments should be located.

B. Ideological Blinkers and Free Market Fundamentalism

The second problem concerning the "value added" challenge stems from the comparative power of the epistemic communities within the *development* field, and the dominance of neo-classical economics in particular.¹⁴⁰ From the perspective of the latter, human rights - and social rights in particular - may be disparaged as abstract or purely aspirational norms or categorical ethical imperatives with an anti-market bias, promoted by idealists blissfully disconnected from the hard trade-offs necessary in a world of limited resources. Human rights may be categorically dismissed as inherently subjective and value-laden, compared with the putatively objective and value-neutral science of economics,¹⁴¹ and hence deserving of a particularly high standard of proof. For example, the World Bank Chief Economist for Africa recently argued that human rights were "neither necessary nor sufficient" for achieving education or health outcomes. Human rights, the Chief Economist contended, are "not necessary because countries that score very low on human rights indicators (for civil and political rights), such as China and Cuba, score high on various health and education indicators."¹⁴² Human rights are "not sufficient because countries that have constitutions with well delineated and judicially enforced human rights, such as India and South Africa, have relatively poor human *devel-*

¹³⁸ These kinds of concerns are raised in Vandemoortele, *supra* note 26. See generally David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 Harv. Hum. Rts. J. 101 (2002).

¹³⁹ *Supra* note 98.

¹⁴⁰ Neoclassical economics refers to approaches to economics focusing on the determination of prices, outputs and income distributions in markets as a function of theories of supply and demand, premised on rational choice theory under which self-interested, profit-maximising individuals seek to maximise individual gains through voluntary exchange on the basis of full, relevant information. E. Roy Weintraub, *The Concise Encyclopedia of Economics* (1st ed., 1999-2008) available at <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>.

¹⁴¹ Critics have questioned the value-neutral stance of neoclassical economics, pointing to its political and ideological assumptions. See, e.g., George DeMartino, *Global Economy, Global Justice* (2003); Conrad P. Waligorski, *The Political Theory of Conservative Economists* (1990).

¹⁴² Shanta Devaraja, *Human Rights and Human Development. Africa can ... End Poverty* (June 20, 2011) <http://blogs.worldbank.org/african/human-rights-and-human-development>. (referring to a debate on human rights as a necessary condition for human development (defined as education, health and social protection) that took place at the World Bank in April 2011).

opment outcomes.”¹⁴³ At the heart of that commentator’s concern is the fear that “making health and education [*86] human rights often implies that governments should finance and provide health and education services,” yet “there is plenty of evidence that governments in many countries do badly at delivering these services to poor people.”¹⁴⁴

Certain fallacious assumptions in this reasoning are immediately apparent. For instance, the author appears to equate human rights with civil and political rights alone, and limits the scope and significance of human rights to constitutional entrenchment and judicial enforcement. Moreover, contrary to well-established doctrine and practice relating to social rights,¹⁴⁵ the author appears to equate social rights categorically with positive entitlements and direct service provision by the state. But the more striking problem, and perhaps the most revealing irony, lies in the author’s apparently categorical rejection of public action in favour of the market. This privileging of the market runs contrary to the nuance reflected in the World Bank’s prior research on pro-poor service provision,¹⁴⁶ and does so without a corresponding evaluation of market failures. A balanced and credible analysis would require acknowledgement of the profound contradictions embedded within the history of the “free market” myth;¹⁴⁷ the value-laden assumptions and mythologies of neo-classical welfare economics;¹⁴⁸ the many damning evaluations of privatisation programmes in various contexts, which show that private actors can also fail in service provision;¹⁴⁹ and continuing fallout from regulatory failures in global [*87] financial, energy, commodities and other markets in recent times, demanding, at a minimum, capable regulatory states.¹⁵⁰ Indeed, even prior to the 2008 global financial crisis, a former director of the IMF’s Economics Department called attention to the unacceptable degree of abstraction to which the “complete markets” model has led us, arguing that in the real world of asymmetric information, rights violations and weak institutions, a better starting point for economic analysis would be to “assume anarchy”!¹⁵¹

Free market ideology, the unwarranted downgrading of public action, and simplistic assumptions about the anti-

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ See, e.g., Langford ed., *supra* note 34; Henry Shue, *Subsistence, Affluence, and U.S. Foreign Policy* (1996).

¹⁴⁶ Devarajan was the co-lead author of World Bank, *World Development Report 2004: Making Services Work for Poor People* (2003). The latter report, *World Development Report 2004*, was somewhat schizophrenic on the role of public service provision and perhaps overly enthusiastic about the potential of markets; however it notably avoided the extreme proposition that the private sector should be doing everything. For a critique, see Tim Kessler, *Review of the 2004 World Development Report “Making Services Work for Poor People,”* International Development Economics Associates (Oct. 8, 2003), available at http://ideaswebsite.org/news/oct2003/print/print018003_Tim_Kessler.htm.

¹⁴⁷ See Rodrik, *supra* note 41 (tracing the history and contemporary legacies of Keynesian economic thought and the idea of the regulated market, and noting the contradictions between free market dogma and the history of industrial policy and state-supported economic development in Europe, the U.S.A., Asia and elsewhere).

¹⁴⁸ Daniel Seymour & Jonathan Pincus, *Human Rights and Economics: The Conceptual Basis for their Complementarity*, 26 *Dev. Pol. Rev.* 387, 390-92 and 399-400 (2008). The tendency of so-called “softer” social sciences (including in the field of economics) to seek objectivity and predictiveness through mathematical precision is known as “physics envy.” See Andrew W. Lo & Mark T. Mueller, *Warning: Physics Envy May Be Hazardous to Your Wealth*, *Quantitative Finance Papers*, Working Paper (Mar. 19, 2010), available at http://arxiv.org/PS_cache/arxiv/pdf/1003/1003.2688v3.pdf.

¹⁴⁹ Of course this is not to disparage private provision of services, but rather, to underscore the complexity of the challenge of justifying the optimal public/private model for a given sector in particular circumstances. For a flavour of the controversies and outcomes of recent evaluations, see Bretton Woods Project, *World Bank’s Privatisation Approach to Health Services Fails to Deliver*, Bretton Woods Update No. 75 (Apr. 5 2011), available at <http://www.brettonwoodsproject.org/art-567917>; and World Health Organisation, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, Final Report of the Commission on the Social Determinants of Health (2008) at 132-44, http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf (highlighting adverse distributional impacts attributed to excessive privatisation, commodification and commercialisation of health services); see also U.N. Doc. A/HRC/15/31, Jun. 29, 2010 (an authoritative and nuanced analysis of the topic of private sector participation in the delivery of water and sanitation services); Tony Judt, *Ill Fares the Land 188-92* (2010) (a deeper philosophical reflection).

¹⁵⁰ Rodrick, *supra* note 41, at 237.

¹⁵¹ See Raghuram Rajan, *Assume Anarchy? Why an Orthodox Economic Model Might Not Be Best Guide for Policy*, *Fin. & Dev.* 56 (Sept. 2004), available at <http://www.imf.org/external/pubs/ft/fandd/2004/09/pdf/straight.pdf>. In contrast to the confident nostrums of neo-classical economics, Rajan’s injunction is consistent with John Maynard Keynes’ insistence upon the essential unpredictability of human affairs. See Tony Judt, *What is Living and What is Dead in a Social Democracy?*, *N.Y. Rev. Books*, Dec. 17, 2009 - Jan. 13, 2010, at 86.

market bias of human rights suggest what behavioural economists call "over-confidence bias" or "Pygmalion complex" in psychological terms - a state in which we become intoxicated by our own disciplinary perspective, overestimate our analytical rigour, and fail to be sufficiently self-critical or humble in the face of deep complexity.¹⁵² It may also indicate "confirmation bias," which is the tendency to discount contradictory data and remain committed to original assumptions despite conflicting evidence.¹⁵³ Dani Rodrik draws a distinction within economics between "hedgehogs" who believe in the singular idea that freeing up markets is always the right solution no matter what the context, and "foxes" who embrace complexity and believe the devil is in the detail.¹⁵⁴ In Rodrik's view "an honest practitioner of academic economics should respond with a blank stare when asked what the implications of his work are for policy. 'That depends on so many other things,' would be the appropriate answer ... When the hedgehog's stylized models become the basis for one grand narrative, the world needs to run for cover."¹⁵⁵

C. Confusing Means with Ends - Human Rights As Inputs To Growth Objectives

[*88] The final and perhaps most obvious problem with the "value-added" challenge lies in the question-begging assumptions buried within it: value-added in terms of what? In posing the value-added question, we do not always explicitly disclose our frame of reference. Should the legitimacy and relevance, or "added value," of human rights depend upon their contribution to economic growth, as many influential voices have argued? For example, former Lead Economist Jean-Pierre Chauffour, in the World Bank's International Trade Department, has argued for a limited set of "economic freedoms" and civil and political rights, the latter based upon the Freedom House indices, as, supposedly, empirically proven prerequisites for sustained economic growth drawn from a sample of one hundred countries over a thirty-year period.¹⁵⁶ By contrast, so-called "entitlement rights," the stuff of the MDGs, are negatively associated with economic growth, as they imply greater government intervention, which is simplistically assumed to automatically restrict growth.¹⁵⁷ A detailed review of this strongly "minimal state" libertarian thesis is beyond the scope of this article,¹⁵⁸ but appears difficult to reconcile with the policies of the faster growing economies in recent history. From the industrializing Global North in the early twentieth century through to the so-called "Asian Tigers," economic rises and recoveries have relied as much upon active industrial policy, labour market regulation and (in Malaysia's case) capital controls, as upon the magic of the marketplace alone.¹⁵⁹ Indeed, neo-liberal **[*89]** orthodoxy

¹⁵² Jerome Groopman, *Health Care: Who Knows Best?* N.Y. Rev. Books, Feb. 11-24, 2010, at 12, 13.

¹⁵³ *Id.*

¹⁵⁴ Rodrik, *supra* note 41, at 114-23. The hedgehog and fox metaphor is attributed to the Greek lyric poet Archilochus (Seventh Century BC): "The fox knows many things, but the hedgehog knows one big thing."

¹⁵⁵ *Id.* at 134.

¹⁵⁶ Jean Pierre Chauffour, *The Power of Freedom: Uniting Human Rights and Development* 31-48, 77-85, 131-33 (2009). It is worth noting that the U.S. government funds seventy-five per cent of Freedom House's budget. See Nikhil K. Dutta, *Accountability in the Generation of Governance Indicators*, 22 *Fla. J. Int'l L.* 401, 458 (2010). Some critics describe Freedom House as a "conservative American think tank," or in certain cases even a "right-wing propaganda agency." John D. Nagle, *Introduction to Comparative Politics* 95 (1985). See also Edward S. Herman & Frank Brodhead, *Demonstration Elections* 7 (1984). More specifically, researchers have claimed that Freedom House's conservative bias has undermined the reliability of its country ratings. See Kenneth A. Bollen, *Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984*, in *Human Rights and Statistics* 188, 205 (Thomas P. Jabine & Richard P. Claude eds., 1992).

¹⁵⁷ According to Chauffour, protecting certain limited economic, civil and political "freedoms" demands an effective but limited state. "Since economic freedom is essentially restricted by the extent of state coercion (usually by means of taxation and regulation), the scope of the state should not trespass beyond the level necessary for citizens to protect and maintain liberty itself." Chauffour, *supra* note 156, at 85. However, the fact that liberty, as well as entitlements, depend on taxes, is not sufficiently recognised. Cf. Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999).

¹⁵⁸ For a recent critical review, see Gyan Basnet, *Book Review* 11 *Hum. Rts. L. Rev.* 206 (2011) (challenging Chauffour's conceptual framework, depth of human rights research and normative justifications, and practical implications of the author's central theoretical precepts relating to capital accumulation and the wealth creation process); see also Stephen P. Marks, *The Past and Future of the Separation of Rights into Categories*, 24 *Md. J. Int'l L.* 209, 240 (2009) (rebutting Chauffour's suggested hierarchy of rights), Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 *E.J. Int'l L.* 815 (2002) (for a comprehensive and powerful rejection of libertarian assumptions about social rights in the context of trade law).

¹⁵⁹ See Rodrik, *supra* note 41, at 16-17 (noting the complementary role of the market and the state in the history of economic globalization and the fact that governments have in fact expanded along with markets in industrialised economies in order to provide social protection and other institutional prerequisites for a functioning open economy); Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialisation* 297-331 (2003) (providing an authoritative and nu-

was what made the financial crisis worse for some of these countries in the first place.¹⁶⁰ Those countries that have benefited most from free-market globalization are those that have embraced its precepts only selectively.¹⁶¹ The greater and more tragic irony is that countries pursuing neoliberal policies aimed at diminishing state intervention in the economy have often done so through vigorous state intervention with authoritarian tendencies.¹⁶²

These obvious contradictions bring to mind the over-confidence and confirmation biases discussed in Section IV.B, *supra*, and strong echoes of the "growth is good for the poor" debates of the early 2000s, which assumed that focusing only on economic growth would be sufficient to improve human *development*. In 1999, two World Bank economists, David Dollar and Aart Kraay, published research purporting to show that the incomes of the poor rise in tandem with overall growth, suggesting that the best way to raise their incomes is to stimulate growth.¹⁶³ Their research found a ready audience among neo-classical economists but a decidedly cooler and more critical reception elsewhere, on methodological and ideological grounds.¹⁶⁴ Tellingly, when forced to confront the complexity and uncertainty of the causal relationships between growth and poverty [*90] reduction, Kraay conceded that based on the available data his paper could equally have been entitled "Growth is Good for the Rich"!¹⁶⁵ Controversies of this kind underscore the contested and potentially subjective character of economic justifications for both growth and human rights, even when supported by putatively "hard" econometric evidence. Even if the growth and poverty reduction relationship were clearer, suggesting that we should prioritise growth as a policy objective, there is simply no consensus on the policies necessary to achieve growth in different country situations.¹⁶⁶ But more fundamentally, for many heterodox economists and human rights and *development* practitioners, valuing human rights as mere inputs to economic growth trivialises and instrumentalises human rights and ignores central tenets of human rights theory and lessons from claiming rights in practice. It also obscures critical distinctions between the deontological and consequentialist conceptual foundations of human rights and economics, and confuses and arguably inverts the proper direction of the inquiry.¹⁶⁷

The empirical arguments about economic growth and human rights are evolving and contested; however, the available evidence does seem to support a number of headline propositions. The first of these is that while economic growth strategies have lifted many people out of poverty, they have often failed to redress the situation of the poorest of the poor and have even exacerbated existing inequalities. Son and Kakwani found that during 237 growth spells in

anced analysis of the complex interactions between the State and the market in Taiwan, South Korea, Japan and Hong Kong); Joseph Stiglitz, *Globalisation and Its Discontents* 89-132 (1999) (arguing that neo-liberal economic policies contributed to the East Asian crisis in the late 1990s). See also *supra*, note 147 and accompanying text. Chauffour's short discussion "The Scope of the State" freely cites libertarian thinkers such as Milton Friedman and Friedrich Hayek, but strangely fails to engage with Wade's seminal work "Governing the Market," resulting in a skewed portrayal of the East Asian development experience. Chauffour, *supra* note 156, at 85-89.

¹⁶⁰ Stiglitz, *supra* note 159.

¹⁶¹ Rodrik, *supra* note 41, at 3-46, 142-49.

¹⁶² Asa Laurell, *Globalizacion y reforma de estado*, in Saude, equidade e genero: Um Desafio as Politicas publicas 43 (A.M. Costa, E. Merchan-Hamann & D. Tajer, eds., 2000), cited in Alica Ely Yamin, Oscar Parra-Vera & Camila Gianella, *Colombia: Judicial Protection of the Right to Health: An Elusive Promise?*, in Yamin & Gloppen eds., *supra* note 34, at 197.

¹⁶³ David Dollar & Aart Kraay, *Growth is Good for the Poor*, 7(3) *J. Econ. Growth* 195 (2000).

¹⁶⁴ See, e.g., Howard White & Edward Anderson, *Growth Versus Distribution: Does the Pattern of Growth Matter?* 19 *Dev. Pol'y Rev.* 267 (2001) (criticising Dollar and Kraay's methodology and suggesting instead that a proper interpretation of the data supports redistribution of resources in favour of the poorest income quintile); Andrew Sumner, *Epistemology and "Evidence" in Development Studies: A Review of Dollar and Kraay*, 25(6) *Third World Q.* 1167 (2004) (critiquing the methodology and supposed "evidence basis" of Dollar and Kraay's thesis); Mark Weisbrot, Dean Baker, Robert Naiman & Gila Net, *Growth May be Good for the Poor - But are IMF and World Bank Policies Good for Growth?* Center for Economic and Policy Research (May 11, 2001), available at <http://ces.univ-paris1.fr/membre/Poncet/EIM/Critic%20%20Weisbrot%20Baker%20Naiman%20Neta.pdf> (highlighting a range of data errors, the complexity of the relationship between growth and poverty reduction in practice, and the precious few statistically significant causal connections that can be drawn beyond the general positive correlation between economic growth and incomes of the poor).

¹⁶⁵ Sumner, *supra* note 164 at 1177 n. 21.

¹⁶⁶ See, e.g., Rodrik, *supra* note 41, at 174; William Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* 21-140 (2001). The author is grateful to Varun Gauri for discussions on this theme.

¹⁶⁷ For example, by way of analogy, Amartya Sen has argued that certain human freedoms are constitutive, or a defining attribute of development. See Amartya Sen, *Development as Freedom* (1999). The question of the "added value" of those freedoms to development is self-evidently circular, at best, under this conception of development.

eighty countries, only twenty-three per cent led to pro-poor outcomes.¹⁶⁸ Conversely, many poorer countries have demonstrated that significant human rights progress is possible even with limited resources, through political commitment and re-prioritising public spending.¹⁶⁹

Second, an analysis of *development* experience over the last several decades shows remarkably low correlations between economic growth and human *development* (comprising a subset of human rights), with cases where economic growth did not advance human *development*, and conversely, where there were impressive gains in human *development* without consistent strong growth.¹⁷⁰ Third, there is no consistent relationship between economic growth and the achievement of the MDGs, more specifically. In a recent sampling of country progress in Asia and the [*91] Pacific, for example, a decrease in income poverty was found to be strongly, but not uniformly, associated with economic growth, but there was a much weaker relationship with infant and maternal mortality, and only little impact on education targets.¹⁷¹ Fourth, growth that exacerbates inequalities cannot be considered sustainable, and may even generate or fuel violent conflict.¹⁷² The extent to which growth translates to poverty reduction depends, among other things, on existing levels of inequality: the more unequal a society, the less impact that improved growth will have on reducing poverty.¹⁷³ Higher income inequalities within countries has also been correlated with higher poverty headcount, higher unemployment, higher crime, lower average health, weaker property rights, elite capture of public services and rule-setting forums, and lower social mobility.¹⁷⁴ Finally, suggestions that democratic transitions may undermine economic performance or that growth should precede democracy seem myopic, self-serving and anecdotal, at best.¹⁷⁵ Empirical studies have affirmed the importance of political rights for economic growth.¹⁷⁶ Conversely, higher income inequalities within countries have been associated with slower transitions to democratic regimes and more fragile democracies.¹⁷⁷ Lessons from the Arab Spring (whether or not democratic reforms are consolidated) may contribute valuably to our knowledge of these complex relationships, subject to the inevitable methodological limitations and problems in generalizing across country situations.

Correspondingly, there is increasing evidence indicating that countries will enjoy better opportunities for economic growth if people are able to [*92] enjoy their socio-economic rights. For example, between thirty to fifty percent of Asia's economic growth from 1965 to 1990 has been attributed by the World Health Organisation to improvements

¹⁶⁸ Hyun Son & Nanak Kakwani, Global Estimates of Pro-Poor Growth, Int'l Pol'y Center for Inclusive Growth, (Working Paper No. 31 Oct. 2006), available at <http://www.ipc-undp.org/pub/IPCWorkingPaper31.pdf>.

¹⁶⁹ UNDP, supra note 21, at 45-64; Susan Randolph, Sakiko Fukuda-Parr & Terra Lawson, Economic and Social Rights Fulfillment Index: Country Scores and Rankings, The Hum. Rts. Institute, Univ. of Conn., Economic Working Papers Series. Working Paper No. 11 (Sep. 2009).

¹⁷⁰ UNDP, supra note 21, at 45-64.

¹⁷¹ United Nations & Asia Development Bank, A Future Within Reach: Regional Partnerships for the Millennium Development Goals in Asia and the Pacific 41 (2008). The notable exception to the correlation between growth performance and the income poverty target was Cambodia where, based upon 2008 data, there was only a one percent reduction in income poverty for every ten percentage points in growth.

¹⁷² See Stewart ed., supra note 65; Andrew G. Berg & Jonathan D. Ostry, Inequality and Unsustainable Growth: Two Sides of the Same Coin? I.M.F. Staff Discussion Note 11/08, Apr. 8, 2011, available at <http://www.imf.org/external/pubs/ft/sdn/2011/sdn1108.pdf>.

¹⁷³ World Bank, World Development Report 2006: Equity and Development 86 (2006).

¹⁷⁴ See Wade, supra note 41, at 674-81.

¹⁷⁵ Dani Rodrik & Romain Wacziarg, Do Democratic Transitions Produce Bad Economic Outcomes, (Working Paper, Dec. 2004), available at <http://www.hks.harvard.edu/fs/drodrik/Research%20papers/democracy.pdf>. The authors observe that cross-country regression analyses typically find that democracies are associated with no statistically significant changes in economic growth, but with significant reductions in economic volatility. However these studies do not help us understand what happens during and in the immediate aftermath of transitions to democracy. Using annual frequency data to examine the within-country effects of democratization on economic growth, Rodrik and Wacziarg contend that "major democratic transitions have, if anything, a positive effect on economic growth in the short run." Id. at 2. According to the authors, "this is especially true for the poorest countries of the world and those that are marked by sharp ethnic divisions. Democratizations tend to follow periods of low growth rather than precede them. Moreover, democratic transitions are associated with a decline in growth volatility."

¹⁷⁶ See, e.g., Robert J. Barro, Determinants of Economic Growth: A Cross-Country Empirical Study 59 (1997).

¹⁷⁷ Wade, supra note 41, at 675.

in reproductive health and reduction in infant and child mortality and fertility rates.¹⁷⁸ Conversely, the failure to invest in basic social and economic rights can be very costly indeed; for example, maternal and newborn deaths slow growth and lead to global productivity losses of \$ 15 billion each year.¹⁷⁹ The World Bank has estimated that economic losses from the failure to invest in basic sanitation ranged from two to seven per cent of national GDP, in a recent sampling of Southeast Asian countries.¹⁸⁰

Of course, none of this is to impugn economic growth per se, far from it. Buffeted by global economic and financial crises, it is clear that many states will need to improve growth performance in order to create jobs and achieve sustainable improvements in social conditions. Member States at the MDGs Summit highlighted economic growth as an important condition for sustainable and equitable *development*, and committed themselves to the *goal* of "sustained, inclusive equitable" economic growth. But implicit in this recognition is the proposition that growth in and of itself is not sufficient, and will not automatically translate to human rights improvements. To conclude otherwise confuses means with ends. If internationally recognized human rights are an imperfect proxy for the good life, economic growth, alone, is far less so.¹⁸¹ Growth should always be understood as a means towards the ends of social justice, human dignity [*93] and well-being, rather than the ends of a sound economic policy, or as a proxy indicator of good governance or fiscal and policy effort.

D. The Relevance and Impacts of Human Rights on Public Policy and Service Delivery

The preceding discussion suggests three important weaknesses in the "value added" challenge. But, more specifically and pertinently, what does the evidence say about the impacts of human rights, and social rights (commensurate with the MDGs), on human well-being? And how do human rights standards, principles and accountability mechanisms influence policy and service delivery, relevant to the MDGs? This Section first examines the available empirical evidence on the impacts of social rights litigation - as one of the better-studied theatres and modes of human rights claiming - on resource allocations in the social sectors and human *development* outcomes. While the more authoritative studies are relatively recent, and while the data and methodological gaps are considerable, the discussion shows that legalised human rights claims have now become an increasingly prominent feature in policymaking. Taking account of this evidence, such as it is, this Section then explores broader currents of thinking about the ways in which human rights standards, principles and accountability mechanisms can influence policymaking and service delivery, noting tensions as well as possible points of articulation with economic perspectives.

1. Impacts of social rights litigation - what does the evidence say?

There are many levels at which one could address an inquiry into the outcomes of human rights claims. Human rights claims are commonly asserted through a range of means, such as social mobilisation, political campaigning,

¹⁷⁸ WHO and the Partnership for Maternal, Newborn and Child Health, *Maternal, Newborn and Child Health Network for Asia and the Pacific: Investing in Maternal, Newborn and Child Health - The Case for Asia and the Pacific*, Geneva (2009). More generally, see Peter Lindert, *Growing Public: Social Spending and Economic Growth Since the Eighteenth Century* (2004) (arguing that, contrary to neo-liberal ideology, social spending has contributed to rather than inhibited economic growth).

¹⁷⁹ WHO and the Partnership for Maternal, Newborn and Child Health, *supra* note 188, at 3.

¹⁸⁰ World Bank, *Economic Impacts of Sanitation in Southeast Asia: A Four-Country Study Conducted in Cambodia, Indonesia, the Philippines and Viet Nam Under the Economics of Sanitation Initiative (ESI)*, 34 (Feb. 2008), http://www.wsp.org/wsp/sites/wsp.org/files/publications/Sanitation_Impact_Synthesis_2.pdf. See also WHO & U.N.-Water, *U.N.-Water Global Annual Assessment of Sanitation and Drinking Water* (2010) at 9 (summarizing economic benefits, as well as costs).

¹⁸¹ There is extensive literature on the limitations of per capita Gross Domestic Product (GDP, the sum total of the goods and services produced in a year) as a measure of a society's well-being, including within the emerging science of "happiness" studies. See, e.g., Richard Layard, *Happiness: Lessons from a New Science* (2005) (exposing weaknesses in conventional economic theory through clinical insights from psychology and behavioural economics, and challenging neo-classical assumptions about market behaviour and the fixed and individualised nature of preference formation). Among the more significant and consistent findings is that experience of day-to-day happiness is relational, and less correlated with income than is subjective life evaluation. See Daniel Kahneman & Angus Deaton, *High Income Improves Evaluation of Life but not Emotional Well-Being*, *Proceedings of the National Academy of Sciences*, Sept. 21, 2010, available at www.pnas.org. See also the final report of the Stiglitz-Sen-Fitoussi Commission at http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf (proposing ways of measuring multi-dimensional well-being beyond the per capita GDP proxy).

and social accountability mechanisms¹⁸² at national and sub-national levels, as well as formal court claims and accountability mechanisms under global or regional human rights treaties. Surprisingly, comparatively little of this wide field of practice has been subjected to serious quantitative investigation.¹⁸³ Nevertheless, there is an emerging comparative literature on the impacts of social rights adjudication in national court systems from which one may draw certain illuminating albeit nuanced conclusions on the relevance of human rights to [*94] policymaking, with the strong caveat that this is but one small part of the overall human rights accountability picture.

Claiming basic social services as a matter of human right has made an empirically observable difference in many countries, although the conclusions from the more credible studies are necessarily nuanced.¹⁸⁴ Disentangling cause and effect, and quantifying outcomes, are notoriously difficult in this context. The complexity of the analytical and interpretive challenges and counterfactuals is compounded in predatory states and societies marked by long legacies of deeply entrenched discrimination, where political institutions are corrupt and where litigation - whatever the weaknesses in the court system - may be among the few avenues for expressing grievances. The distributional impacts of litigated human rights claims must be interpreted in this light.¹⁸⁵ Judicial decisions can have both positive and negative (intended or unintended) effects, both directly and indirectly, as well as systemic effects beyond the parties to a dispute. Often the decision itself may be of secondary importance in the context of a broader social movement and political strategy for social change. Causation and attribution are especially challenging in such complex multivariate regressions, particularly over a period of time sufficient to evaluate social outcomes.

Subject to these caveats, the record to some extent seems to confirm the intuition that lawyers and formal court processes may sometimes be part of the problem rather than the solution for those suffering greatest discrimination, particularly in many poorer countries. In some countries and for some issues it seems that human rights claims through the formal court system may have distorted public spending towards the middle and lower-middle classes, thereby possibly exacerbating existing inequalities.¹⁸⁶ [*95] The Colombian Constitutional Court famously has issued a raft of programmatic orders in social rights cases with potentially significant budget implications, provoking concerns about negative externalities and the proper limits of the judicial role.¹⁸⁷ However, proving failure can be as hard as proving success. On the specific issue of the distributional impacts of legal claims on health budgets, Yamin notes that "we simply do not have robust evidence to conclude that the funds for paying for litigated care are systematically coming at the expense of important preventative public health measures or the infrastructure of the health system it-

¹⁸² These include public expenditure reviews, social audits, "community scorecard" initiatives and suchlike, wherein individuals and communities are able to hold governments and private authorities to account for service delivery.

¹⁸³ See, e.g., Gauri, *supra* note 126. Gauri examines three kinds of redress procedures - administrative venues within government agencies, independent institutions outside government departments, and courts. Gauri remarks on the paucity of policy research on "redress" or grievance procedures in service delivery, *id.* at 2, while noting nevertheless the importance of "rights consciousness" as a prerequisite to the effectiveness of legalized rights claims and judicial review, *id.* at 7.

¹⁸⁴ The most authoritative and illuminating empirical investigations of the effects of social rights litigation are Gauri & Brinks *eds.*, *supra* note 34, and Yamin & Gloppen *eds.*, *supra* note 34. For a wide-ranging and thorough comparative jurisprudential analysis of human rights claims, see Langford *ed.*, *supra* note 34, and for an exploration of social rights litigation in juxtaposition with democratic politics, see *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Roberto Gargarella, Pilar Domingo & Theunis Roux, *eds.*, 2006).

¹⁸⁵ Ottar Maestad, Lise Rakner & Octavio L. Motta Ferraz, *Assessing the Impact of Health Rights Litigation: A Comparative Analysis of Argentina, Brazil, Colombia, Costa Rica, India and South Africa*, in Yamin & Gloppen *eds.*, *supra* note 34, at 296.

¹⁸⁶ Right to health litigation in Brazil, India and Colombia has been questioned on this basis. See, e.g., Octavio Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?* 11 *Health & Hum. Rts.* 33 (2009); Daniel M. Brinks & Varun Gauri, *A New Policy Landscape: Legalising Social and Economic Rights in the Developing World*, in Gauri & Brinks *eds.*, *supra* note 34, at 309, 314; Ottar Maestad, Lise Rakner & Octavio L. Motta Ferraz, *supra* note 185, at 274, 299. The latter authors note that the distributional impacts of health rights litigation depends upon a range of factors, such as the type of claim (individual or collective), the judicial system (civil or common law, access to courts, interpretation of the right to health), and various attributes of the health system itself. Ottar Maestad, Lise Rakner & Octavio L. Motta Ferraz, *supra* note 185, at 300. On the issue of inequalities, the authors conclude that "the litigation wave has not yet matured to a stage where its long-term effects can be properly judged," but that "with regard to those cases that seem to have increased inequities, in a historical perspective, rights have always been first claimed by the middle classes and later extended to the general population." *Id.* at 300-01.

¹⁸⁷ See, e.g., Rodrigo Uprimny Yepes & Diana Rodriguez Franco, *Aciertos e insuficiencias de la sentencia T-760 de 2008: implicaciones para el derecho a la salud en Colombia*, 18 *Observatorio de la Seguridad Social* (2008). For a response to some of these concerns, see Alicia Ely Yamin & Oscar Parra Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33(2) *Hastings Int'l & Comp. L. Rev.* 101-30 (2010); Yamin, Parra-Vera & Giannelli, *supra* note 162, at 116, 120-22, 124-25, 127 (In relation to the Colombian Constitutional Court's most ambitious judgment

self.”¹⁸⁸

Conversely, in their recent empirical study of health and education claims in Brazil, Indonesia, India, South Africa, and Nigeria, Gauri and Brinks concluded that human rights law has become a “permanent and prominent part of the policymaking landscape,” and that “legalizing demand for [socio-economic] rights might well have averted tens of thousands of deaths [in the five countries studied] and has likely enriched the lives of millions of others.”¹⁸⁹ In South Africa approximately one million life years were estimated to have been saved through court-ordered access to low-cost medication to prevent mother-to-child transmission of HIV.¹⁹⁰ While courts are hardly the most progressive forums, and are as susceptible to elite capture as any institution, public interest litigation and the indirect effects of individual claims have been shown to bring substantial benefits for the poor in particular cases.¹⁹¹ The results of social rights jurisprudence have tracked constitutional rights to an appreciable [*96] degree,¹⁹² suggesting the instrumental importance of explicit formal human rights protections. And while national and local accountability mechanisms are in principle the most proximate and accessible forums for redress for most people, recent statistical and case study research suggests, with certain important qualifications, that the ratification of human rights treaties may lead to better human rights practices on average. The research covers areas of specific relevance to the MDGs in the fields of health, reproductive rights, education, and child rights.¹⁹³

(case no. T-760/08)). The latter authors note that, contrary to popular assumptions, “the Court did not seek to legislate health policy or displace the executive branch. Rather, it carefully followed what had been envisioned in prior legislation and called for the political branches of government to undertake the functions that correspond to them. Also, critically, the Court attempted to foster a broad-based debate about the contours of a right to health care in Colombia’s highly plural society.” Yamin, Parra-Vera & Giannelli *supra* note 162, at 127.

¹⁸⁸ Alicia Ely Yamin, *Power, Suffering and Courts: Reflections on Promoting Health Rights through Judicialization*, in Yamin & Gloppen, eds., *supra* note 34, at 352-53.

¹⁸⁹ Brinks & Gauri, *supra* note 186, at 303. For an insightful analysis of the preconditions for the effective adjudication of social rights claims, see Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in Langford ed., *supra* note 34, at 3-45.

¹⁹⁰ Ole Frithjof Norheim & Siri Gloppen, *Litigating for Medicines: How Can We Assess Impact on Health Outcomes?*, in Yamin & Gloppen eds., *supra* note 34, at 320.

¹⁹¹ Brinks & Gauri, *supra* note 186, at 305, 338-40. By way of illustration the authors estimate that “about 350,000 Indian girls a year are newly enrolling in school as a result of the indirect effects of the right-to-food litigation” in that country, *id.* at 328. By way of further example, “reports in Costa Rica trace an 80% decline in AIDS mortality to the constitutional chamber’s decisions to mandate the provision of ARVs. Moreover, the mere possibility of judicial enforcement can produce different political behavior and opportunities for negotiation for social movements.” Alicia Ely Yamin, *Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Approach to Health*, 10(2) *Health & Hum. Rts.* 1, 6 (2008).

¹⁹² Brinks & Gauri, *supra* note 186, at 317; Langford, *supra* note 189, at 44. The supra-constitutional status of human rights treaties has been identified as an enabling factor in Costa Rica’s social rights jurisprudence. See Bruce M. Wilson, *Costa Rica: Health Rights Litigation: Causes and Consequences*, in Yamin & Gloppen, *supra* note 34, at 142.

¹⁹³ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009). The observed effects vary in accordance with the human rights in question and the existing degree of mobilisation around that right, and are more observable in so-called “transitional” states rather than stable regimes (whether democratic or autocratic), among other variables. For comparative empirical models and analytical approaches see Varun Gauri, *The Cost of Complying with Human Rights Treaties: The Convention on the Rights of the Child and Basic Immunization*, 6 *Rev. Int’l Org.* 33-56 (2011) (using Simmons’ “domestic politics theory of compliance” where the (modest and partial) observed effects of CRC ratification are attributed largely to “agenda-setting influences” among bureaucratic entrepreneurs and relative fiscal costs of compliance); Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 *Int’l Soc.* 115-41 (2008) (pointing to the level of democracy and mobilisation as the major determinants of treaty compliance); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights Practices in a Globalizing World: The Paradox of Empty Promises*, 110 *Am. J. Soc.* 1373-1411 (2005). For an analysis of norm socialisation from an international relations standpoint, see Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press, forthcoming 2011); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 *E.J.I.L.* 171-83 (2003). For other more qualitative studies exploring the influence and domestication of international human rights treaty obligations, see Alexis Palmer et al., *Does Ratification of Human-Rights Treaties Have Effects on Population Health?* 373 *Lancet* 1987-92 (June 6, 2009); Philip Alston & John Tobin with Mac Darrow, *Laying the Foundations for Children’s Rights: An Independent Study of Some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child*, UNICEF Innocenti Insight No. 10 (2005); Cf. Oona Hathaway, *Testing Conventional Wisdom*, 14 *E.J.I.L.* 185-200 (2003); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002)).

But the relevance of human rights to *development* is not, or should not be, straitjacketed within the evolving contours of the empirical debates. This is not an objection to “evidence” per se, of course, which is indispensable for good policymaking. Rather, it is a comment on the faith we place in the predictive ambitions of hard science, within a far wider and more complex normative and value-based framework of decision-making, whether those values are explicit or implicit. As Gauri and Brinks remind us, “We should not ... allow scepticism born of methodological rigidity to convert us into the proverbial drunkard who loses his keys at the doorstep but searches under the lamppost where the light is.”¹⁹⁴ The objectivity of [*97] quantitative methods¹⁹⁵ and “evidence-based” policymaking is often over-stated. Statistical assumptions may be marshalled to support many conflicting ideologies and policy preferences.¹⁹⁶ Some of the more prominent and influential *development* policy agendas, including the failed policies of the structural adjustment era, can hardly be said to have been evidence-based, even though they were at one time widely accepted and continue to be revived, including in the MDGs context.¹⁹⁷ It is important to know, and as far as possible quantify, the respects in which human rights do or do not contribute to other important public policy *goals*, or at least those policy *goals* that are more obviously amenable to definition without reference to human rights. But commitments to eliminate malnutrition, child labour, violence against women and avoidable maternal deaths should not depend upon empirical justifications expressed in terms of contributions to *development* or economic growth. Whatever the empirical arguments, from normative or deontological perspectives, investing in and respecting these and other vital human rights is justified on moral or legal grounds, without more.

The international human rights framework does not, self-evidently, occupy the entire field of emancipatory potential.¹⁹⁸ The universality of internationally recognised human rights is legitimately a matter of vigorous theoretical and empirical debate,¹⁹⁹ and the meanings of human rights in [*98] practice are dynamic, evolving and contested.²⁰⁰ It may well be possible to identify a set of values to which the great majority of individuals and communities worldwide

¹⁹⁴ Varun Gauri & Daniel Brinks, Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights, in Gauri & Brinks eds., supra note 34, at 25. The authors were commenting on the empirical challenges in quantifying the indirect benefits flowing from the legalisation of social rights claims.

¹⁹⁵ Definitions of quantitative, as distinct from qualitative, methods of analysis are many and varied. However, in general terms, “analyses which are based on non-numerical information, which are specific and targeted in their population coverage, which in their design require active involvement from the population covered, which use inductive methods of inference and which operate in the broad framework of social sciences other than economics, we tend to label as ‘Qualitative.’ Those which are based on numerical information, which are general in their population coverage, which require only passive involvement of the population covered, which use deductive (usually statistical) methods of inference and which rely on the neo-classical economic framework, we tend to label as ‘Quantitative.’” Ravi Kanbur, Q-Squared? A Commentary on Qualitative and Quantitative Poverty Appraisal, in Qual-Quant Qualitative and Quantitative Poverty Appraisal: Complementarities, Tensions and the Way Forward, 1, 7 Cornell University, (Ravi Kanbur, ed.) Mar. 11-12, 2001, 7, available at <http://www.arts.cornell.edu/poverty/kanbur/QOZ.pdf>.

¹⁹⁶ See, Vandemoortele & Delamonica, supra note 15, at 62; and discussion supra Sections IV.A-C.

¹⁹⁷ UNDP, supra note 21, at 46-50; see also supra notes 62-64 and accompanying text, and discussion supra Sections IV.B-C.

¹⁹⁸ There is a vast Critical Legal Studies literature on this point. See, e.g., Peter Gabel, Symposium: A Critique of Rights, The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves, *62 Tex. L. Rev.* 1563 (1984). For thoughtful critiques of human rights’ hegemonic tendencies, along with the conditions under which their emancipatory potential may be realised, see James Souter, Emancipation and Domination: Human Rights and Power Relations, 3(2) *J. Law, Pol. & Soc.* 140 (2008); Marius Pieterse, Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited, 29(3) *Hum. Rts. Q.* 796 (2007); see generally Kennedy, supra note 138.

¹⁹⁹ See, e.g., Samuel Moyn, *The Last Utopia: Human Rights in History* (2010) at 217-27 (arguing that a genuine social movement around international human rights arose only the mid-1970s, in the wake of successive failure of competing “utopian” political projects). Moyn’s thesis has proven controversial; certain key assumptions concerning the evolution and impact of social rights, pretences of international human rights towards utopianism, the role of human rights in displacing, sapping or cloaking ideological contests, and privileging of a narrow strand of human rights constituting “minimal constraints on responsible politics,” can certainly be challenged. For other criticisms see, e.g., Belinda Cooper, *New Birth of Freedom*, *N.Y. Times*, Sept. 24, 2010, available at <http://www.nytimes.com/2010/09/26/books/review/Cooper-t.html>.

²⁰⁰ See John Tobin, Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation, *23 Harv. Hum. Rts. J.* 1 (2010) (critiquing textual or formalist approaches to legal interpretation of human rights treaties); Jeremy Perelman & Katharine G. Young, Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice, 9(1) *NW J. Int’l Hum. Rts.* 27 (2010) (articulating a sociological perspective in which meanings of human rights are grounded in communities’ realities and constructed from collective memory).

at a given time would subscribe,²⁰¹ but this could never be captured in a static fashion within a single set of global legal standards. For those governments that are sincere about implementing their international human rights treaty commitments, there are often very significant challenges in translation and norm socialisation.

Similar caveats apply to claiming human rights in practice. While the legalisation of rights claims has exerted powerful and positive influence in many cases, as we have seen, empirically verifiable conclusions about adjudicating rights claims are necessarily tentative and qualified. There have been many qualitative studies and comparative jurisprudential analyses of social rights litigation in recent years, but comparatively few reliable impact studies, embracing relatively few rights. Even for a particular type of human rights claim within a particular jurisdiction, there may be limits to which conclusions are generalisable. Successful and pro-poor rights claims depend on a wide range of factors, including legal and political opportunity structures. Many of the examples of successful rights claims have been observed where the claims take place within the context of wider processes of social and political mobilisation.²⁰² But disentangling the causal significance of the various factors involved in vindicating rights can be challenging, especially when assessing indirect systemic effects of rights claims over the longer term.²⁰³ Similar caveats apply to recent empirical investigations of the impacts of human rights treaty ratification.

[*99] None of these nuances appear to have stemmed the tide of human rights policy statements in bilateral and multilateral donor agencies, nor the proliferation of human rights-based approaches by a wide range of *development* actors at global, national and local levels. This reminds us that the world will still turn, guided by values, observed experience, and best available evidence, even without resolving the myriad "unappeasable ambiguities" in quantitative terms.²⁰⁴ Nevertheless, further empirical work and evaluation in the above areas will provide valuable inputs into the longer-term project of ensuring that human rights are valued and integrated appropriately in *development* policymaking, including in connection with the process and design of the post-2015 *development* agenda.

2. Comparative contributions of human rights principles and economic reasoning to policymaking

The preceding analysis, while necessarily nuanced in terms of its findings on the impacts of human rights claims, and while expressly limited to just one of many spheres of human rights claiming (viz legal claims through the formal court system), helps to dispel absolutist assumptions about the role and contributions of human rights in public policymaking. Within the constraints and parameters discussed above, international human rights should be seen not as an extraneous and utopian political project, but rather, a comparatively objective and feasible framework of claims and obligations corresponding to minimum substantive guarantees for a life with dignity, and an increasingly important vocabulary and toolkit for empowerment. Human rights have tangible - even if not necessarily prescriptive - implications for *development* policymaking. The practical relevance of international human rights in any context will depend on a great many factors including the degree to which individuals and communities are aware of their entitlements and can be enabled to voice their claims, and the existence of effective and accessible administrative, judicial and other mechanisms hold duty-bearers (usually, but not exclusively, the state) to account.

While the human rights legal framework itself is not a template or blueprint for policymaking, it does require that the policy choices and difficult trade-offs involved in policymaking satisfy minimum procedural and substantive standards, quite apart from the relative strength of their empirical claims. Articulating the distinctive principles, channels and institutional mechanisms through which human rights may positively influence public policymaking is a quintessentially context-specific undertaking, in relation to which the jurisprudential lessons surveyed above are but one

²⁰¹ See, e.g., Deepa Narayan et al., *Voices of the Poor: Can Anybody Hear Us?* (2000); *Voices of the Poor: Crying out for Change* (Deepa Narayan, Robert Chambers, Meera K. Shah & Patti Pettesch eds., 2000); *Voices of the Poor: From Many Lands* (Deepa Narayan & Patti Pettesch eds., 2002) (discussing the results of a multi-country research initiative and participatory poverty assessments that reveal quite a striking consonance between experiences of poverty in different countries and regions, and showed the importance, in particular, of voice and power in people's own definitions of poverty).

²⁰² Langford, *supra* note 34, at 45; Sharnjeet Parmar & Namita Wahi, *India: Citizens, Courts and the Right to Health: Between Promise and Progress?*, in Yamin & Gloppen eds., *supra* note 34, at 171; Brinks & Gauri, *supra* note 186, at 321-22.

²⁰³ The studies surveyed in this article suggest that positive indirect effects on policymaking, for a wider population, have been more commonly observable in common law jurisdictions, where judges observe precedent (obviating claimants from filing multiple claims in relation to similar matters), and where the legal infrastructure permits class claims. "Symbolic" impacts have also been observed in certain cases, relating to both "the redefinition of the issue and transformation of public opinion about the problem." Yamin, *supra* note 188, at 363.

²⁰⁴ The term in quotations was borrowed from a discussion of some of the more intractable dilemmas of social rights adjudication. See *id.* at 336.

dimension. Promoting a deeper and broader dialogue and appreciation of the techniques of reasoning in the fields of economics [*100] and human rights, and their relative contributions to policymaking, will continue to be a significant challenge during international negotiations towards the post-2015 *development* agenda. The fact that the human rights field is not bound within any particular discipline no doubt complicates the task.²⁰⁵ There is, nevertheless, extensive literature on this topic, and a diversity of approaches to consider, drawn from the comparative jurisprudential studies surveyed in Section IV.D.1, *supra*, as well as social sciences, and political and moral theory more generally.

Varun Gauri, for example, argues that there is much in common with a social rights and economic approach to service delivery, particularly in the fields of education and health. Both approaches are concerned with participation, transparency and accountability in service delivery, for different but to some extent overlapping motives. Certain distinctive policy consequences do accompany the choice of approach, however. In Gauri's analysis there are three "important, but not irreconcilable" differences in social rights and economic policy. The first difference lies in the intrinsic (rather than instrumental) importance and morally compelling nature of the mechanisms and processes for the delivery of health and education services under a rights approach. Second, rights approaches are preoccupied with distributions in outcomes, which may be evidence of discrimination, rather than average outcomes. Finally, in Gauri's view, rights approaches are better able to accommodate "adaptive preferences," defined as "the habit of individuals subject to deprivation to lower their standards regarding what they need, want, and deserve." Economics, by contrast, "does not easily accommodate individuals who do not maximise their own welfare," though many solutions proposed by economists do in fact help to improve information and strengthen service delivery in ways that can change individuals' sense of what they have and what they deserve.²⁰⁶ Nevertheless, Gauri is skeptical about the contributions of social rights to resolving complex trade-offs in public policymaking, given the "incommensurability" (or indivisibility and inter-relatedness) of rights.²⁰⁷ Gauri suggests that resolving competing rights claims in a large population is "inevitably an activity without a formula, and one that relies on judgement guided by principle,"²⁰⁸ although his rejection of social rights as "binding constraints" on policymaking²⁰⁹ may be unduly pessimistic in light of subsequent research into social rights claims in developing [*101] countries.²¹⁰

Other commentators have since gone further in attempting to reconcile the economics and human rights perspectives. Seymour and Pincus offer an engaging reconciliation of decision-making principles drawn from neo-classical welfare economics and human rights theory.²¹¹ The authors explore contested premises of welfare theory, challenging the ethical biases embedded in the "Pareto optimality" criterion²¹² and the "voluntariness" of voluntary exchange as the basis for determining socially optimal outcomes. They argue that the disciplines of welfare economics and human rights are not inherently contradictory, but instead, that the human rights framework furnishes normative principles relevant to decision-making (for example, that child labour is a bad thing irrespective of efficiency gains to production). This in turn aids economists in dealing with issues of exploitation and power relations, while the field of welfare economics provides tools to guide specific policy choices and trade-offs.²¹³

Langford, on the other hand, suggests a more "nuanced" approach to assessing the boundaries of human rights and eco-

²⁰⁵ See Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 *Harv. Hum., Rts. J.* 301-15 (Spring 2002) (discussing inter-disciplinary challenges and other complexities involved in teaching human rights).

²⁰⁶ Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, in *Human Rights and Development: Towards Mutual Reinforcement* 61-83, 79-80 (Philip Alston & Mary Robinson eds., 2005).

²⁰⁷ *Id.* at 80-81. See also Yamin, *supra* note 188, at 364-65 (discussing the false consciousness problem and importance of human rights in the context of empowering individuals to demand change).

²⁰⁸ Gauri, *supra* note 206, at 81.

²⁰⁹ *Id.* at 71.

²¹⁰ See, e.g., Gauri & Brinks, *supra* note 34.

²¹¹ Seymour & Pincus, *supra* note 148.

²¹² Pareto optimality is the basic choice rule in economics under which a policy change is to be preferred if it leaves at least one person better off and no one worse off than other possibilities. *Id.* at 391.

²¹³ *Id.* at 403-04.

conomic claims.²¹⁴ Taking the example of social security policy, Langford questions the extent to which the reasoning and analytical tools of welfare theory may be relied upon to determine policy choices between different models of child grants, where empirical claims either way are weak or heavily contested. In these kinds of circumstances, he argues, the meaning of human rights legal standards may be capable of being ascertained with sufficient precision, reliability, and, at least implicitly, legitimacy, to shape public policy and help resolve such challenging trade-offs.²¹⁵

A further approach worthy of consideration, originating in the public health field from the ethicist Norman Daniels, is the "accountability for reasonableness" decision-making framework.²¹⁶ This approach appears to reflect the "reasonableness" test applied by courts in determining social rights claims in different parts of the world, with South Africa as the emblematic case.²¹⁷ However, the author makes no such explicit connection. Daniels' approach is premised upon certain specific attributes of a human rights approach to health, including the mobilising power of a human rights claim, broadening the policy arena in which health is pursued [*102] (to include underlying and social determinants of health, such as environmental, cultural, political and social factors), and a focus on accountability, monitoring, and good governance.²¹⁸ However Daniels eschews the relevance of any unifying philosophical justification for human rights in the context of resolving problems of conflict and prioritisation in decision-making. He argues that such a theory is elusive and overly general.²¹⁹ For this reason, the human right to health (as recognised in international law) does not feature to any appreciable extent in Daniels' analysis.

Instead, more modestly, Daniels focuses upon the requirements for fair deliberative processes that meet four minimum conditions: (1) the "publicity condition," which calls for public access to the rationales for priority-setting decisions, and public justification; (2) the "relevance requirement," assuring that stakeholders agree on what kinds of reasons are relevant to setting priorities, which involves adequate participatory processes, evidence-gathering and vetting of reasons and arguments by all those affected by a decision; (3) the "revision and appeals" condition, guaranteeing mechanisms for challenges and dispute, and opportunities to revise policies in line with new arguments; and (4) the "regulative condition," which calls for public regulation of the process to ensure that the preceding three conditions are met.²²⁰ While the conditions outlined above are already entrenched in many expressions of a human rights approach to public health, as well as emerging principles of international public administrative law,²²¹ Daniels suggests that they are not sufficiently integrated into priority setting. The advantage of the "accountability for reasonableness" process is the fact that it makes explicit reasonable moral disagreements among people on policy choices affecting health, and it is said to offer a superior claim to legitimacy in resolving disagreements.²²²

However there are weaknesses in Daniels' approach as well. The first problem is more a question of what is left out of Daniels' approach, rather than what it includes. Daniels' procedural model lays claim to superior legitimacy, however the premises and preconditions through which credible and inclusive processes may lead to fair limit-setting decisions in health care (an important objective of accountability for reasonableness) are not explained. As Yamin has warned, the same conditions that have been shown to cause market failure in the health sector, such as moral haz-

²¹⁴ Malcolm Langford, *Social Security and Children: Testing the Boundaries of Human Rights and Economics*, in *Freedom From Poverty as a Human Right* 193-218 (Böring and A. Andreasson, Stephen Marks & Arjun K. Sengupta eds., 2009).

²¹⁵ *Id.* at 212-13.

²¹⁶ Norman Daniels, *Just Health: Meeting Health Needs Fairly* (2008). There is a long history of "reasonableness" in political philosophy dating back to W.M. Sibley, *The Rational Versus the Reasonable*, 62(4) *Phil. Rev.* 554-60 (1953).

²¹⁷ Sandra Leibenberg, *Adjudicating Social Rights Under a Transformative Constitution*, in Langford ed., *supra* note 34, at 75-101.

²¹⁸ Daniels, *supra* note 216, at 313.

²¹⁹ *Id.* at 315.

²²⁰ *Id.* at 328-29; Norman Daniels & Sofia Gruskin, *Justice and Human Rights: Priority Setting and Fair Deliberative Process*, 98 *Am. J. Pub. Health* 1573, 1576 (2008).

²²¹ In their founding paper for their Global Administrative Law Research project at New York University, Kingsbury, Krisch and Stewart argue that accountability can be promoted by ensuring that administrative bodies meet adequate standards of procedural participation and transparency, reasoned decisions, legality in accordance with substantive standards, and by providing effective review of their decisions, drawing to various degrees on principles of international human rights law. See Kingsbury et al., *supra* note 125, at 37-42.

²²² Daniels, *supra* note 216, at 329.

ard, asymmetrical information between health providers and patients, and [*103] decisions under conditions of scientific uncertainty, will also likely cause partial democratic failure when the debate is situated within the wider public.²²³ Preconditions for active, free and meaningful participation include, at a minimum, guarantees of free expression and association. The habit of individuals suffering discrimination to internalise their condition and revise their expectations downwards (Gauri's "adaptive preferences"²²⁴), are a more fundamental cause of market failure. A human rights framework of analysis may help expose structural causes of exclusion, build individuals' "capacities to aspire,"²²⁵ and help to level the playing field for a conversation more likely to generate outcomes that are genuinely fair from the perspective of the most marginalised members of society.²²⁶

The second, closely related problem concerns Daniels' justification for marginalising the human right to health as recognised in international law on the grounds that we lack a global consensus on the philosophical justifications for the right to health. There undoubtedly is no global consensus on a completely theorised right to health, and in a pluralistic moral universe it's hard to see how there could be. Daniels' premise therefore seems to offer a dubious basis for subordinating the right to health as recognised in international law. This is particularly so in light of alternative theories plausibly advanced by Sunstein, Tobin and others on the legitimacy and comparative practical importance of "incompletely theorised agreements" and by implication the quixotic character of the quest for moral absolutes.²²⁷ The latter theories are not new. Engaging with them would have strengthened the conceptual foundations of Daniels' framework.

The third problem, flowing from the above, is that Daniels' account offers no clear path to incorporating judicial reasoning and substantive law from national courts and regional and global human rights monitoring bodies.²²⁸ These obligations go well beyond process duties privileged in [*104] Daniels' conceptual approach, to include substantive obligations relating to the accessibility, quality, affordability and cultural appropriateness of services and suchlike. States also have obligations to "take steps" to implement social rights within the maximum extent to available resources, to avoid and rectify discrimination, to prioritise essential minimum service levels, and to oblige organs of the state to justify - on the basis of objective evidence - any retrogressions and limitations on rights.²²⁹ Substantive standards are also explicitly part of the framework for transparent participation, public justification and remedies under emerging principles of global administrative law.²³⁰

There is no reason why human rights law and jurisprudence should be exempt from the requirement of deliberative discussion. To the contrary, the role of the judiciary and the legalisation of rights claims are vital matters of debate in any society, whatever its democratic credentials. The jurisprudence of international human rights monitoring bodies, while achieving increased impacts in the adjudication of claims in national courts, has attracted considerable criti-

²²³ Yamin, *supra* note 188, at 356.

²²⁴ Gauri, *supra* note 206, at 79-80.

²²⁵ The term "capacity to aspire," attributed to anthropologist Arjun Appadurai, refers to equality of agency of individuals (rather than equality of opportunity alone) in relational rather than atomistic terms and in social and cultural context. See Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in *Culture and Public Action*, 59-84 (Vijayendra Rao & Michael Walton eds., Stanford University Press, 2004).

²²⁶ See A. Rid, *Justice and Procedure: How Does "Accountability for Reasonableness" Result in Fair Limit-Setting Decisions?* 35 *J. Med. Ethics* 12 (2008) (critiquing the disconnect between procedure and fair limit-setting outcomes in the context of Daniels' "accountability for reasonableness" model).

²²⁷ Cass Sunstein, *Incompletely Theorised Agreements*, 108 *Harv. L. Rev.* 1733, 1748 (1995). Analysing the philosophical literature, John Tobin argues for a "social interest theory" of human rights (or more particularly, the right to health), building upon "interest theories" of Joseph Raz, Amartya Sen and Charles Beitz, but recognising the contested and historically contingent nature of interests advanced in support of human rights claims, and relying upon the process of deliberation as the principal source of moral justification. See Tobin, *supra* note 137, at ch. 2.

²²⁸ See Tobin, *supra* note 137 and the references *supra* note 34, discussed in this Section of the article.

²²⁹ For additional analysis of these kinds of obligations in the context of public policymaking in the health field, see Tobin, *supra* note 137, at ch. 5.

²³⁰ Kingsbury et al., *supra* note 125, at 37-42, noting substantive requirements for administrative decision-making such as proportionality and the requirement of a remedy, drawn from human rights jurisprudence.

cal debate.²³¹ But the fact that the state has voluntarily assumed obligations in relation to the subject matter of rights under treaty law surely warrants that those obligations are given due prominence in framing and informing public debate. The fact that human rights, including numerous social rights, are now reflected in the great majority of constitutions reinforces this view.²³²

Substantive human rights obligations are contemplated, at least implicitly, among the many inputs to participatory deliberative processes under the "relevance" condition (principle three of Daniels' framework), and indeed, Daniels and Gruskin do venture exactly this kind of synthesis between "accountability for reasonableness" and human rights-based approaches.²³³ But in terms of the "accountability for reasonableness" framework per se, strong justification is surely warranted for overlooking the specific and legally binding articulations of the normative content and obligations relating to human rights of different kinds, which emerge with surprising consistency across jurisdictions, regions and legal systems.²³⁴ The desired justification certainly does not emerge from the accountability [*105] for reasonableness framework as originally posited.

3. Conclusions on the contributions of human rights to policymaking

The discussion in this Section sought to address problems inherent in the "value-added" challenge to human rights in *development* policymaking. This Section exposed and refuted some of the more objectionable ideological premises and methodological pitfalls of the neoclassical economic and libertarian critiques of rights. It also sought to analyse the pathways through which human rights may influence service delivery and policymaking in practice, and to critically review some of the more promising theoretical reconciliations of economics and human rights.

The most obvious conclusion to be drawn from the foregoing analysis is that there is no simple formula governing the integration of human rights within *development* policymaking and service delivery. The purpose of the present discussion is not to reconcile the various conceptual models surveyed, but rather to probe their premises, nuances and interstices, and to illustrate the superficial and reductive nature of the "value added" question as a banner for purely consequentialist reasoning and instrumentalist approaches. The privileging of one form of reasoning over another is as artificial as it is myopic: as Seymour and Pincus observe, "when confronted with real life choices, we intuitively seek to reconcile [deontological and consequentialist] perspectives."²³⁵ To do otherwise is sheer methodological zealotry.

Taking into account the conceptual approaches previously discussed, along with comparative jurisprudential trends, human rights contribute to policymaking by ensuring informed, free and meaningful participation, providing forums for dialogue, enriching democratic deliberation, re-"valuing" policy discussions and unsettling the myth of technocratic expertise. Human rights are fundamentally about power: the human rights normative framework provides principles, vocabularies and tools for contestation, helping to destabilise prevailing power relations, reshape the field of political possibilities, repoliticise *development*, and open up space for social change.²³⁶ Human rights are also about responsibility: beyond the atomistic paradigm of individual responsibility in neoclassical economic models, the human rights framework helps to delineate and strengthen responsibilities of governments, institutions and other rel-

²³¹ A good example is the current debate concerning the jurisprudence of the Committee on Economic, Social and Cultural Rights on the "minimum core" concept. See Tobin, *supra* note 137; Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *Yale J. Int'l L.* 113 (2008).

²³² For a comprehensive survey of the constitutionalisation of economic and social rights in Africa, Latin America, Asia and Eastern and Central Europe, see database of the Toronto Initiative on Economic and Social Rights (TIESR), available at <http://www.tiesr.org/data.html>.

²³³ Daniels & Gruskin, *supra* note 220, at 1576.

²³⁴ Langford, *From Practice to Theory*, *supra* note 189, at 43-44 (noting certain key commonalities in approach, as well as divergences, in a review of over two thousand judicial and quasi-judicial decisions from twenty-nine national and international jurisdictions).

²³⁵ Seymour & Pincus, *supra* note 148, at 398.

²³⁶ Brinks and Gauri characterise the judicial role in social rights adjudication-- which informs but does not constitute the framework of the present inquiry - as dialogical and "iterative experimentation" (rather than a "command and control" caricature). This echoes Sabel and Simon's analysis of experience from U.S.-based public interest litigation wherein litigation "upsets the status quo, creating the context for a joint search for new solutions to ongoing problems." Sabel & Simon, *supra* note 186, at 323. See Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015, 1101 (2004).

evant actors to regulate the affairs of the state in a manner compatible with agreed fundamental values. Finally, human rights are about accountability: human [*106] rights strengthen the culture of public justification for policy choices based upon transparent and objective criteria,²³⁷ requiring accessible and effective mechanisms of redress when rights are violated.

The concept of human rights rarely operates as a "trump card," automatically taking precedence over other social *goals*, and neither does it proffer a blueprint for policymaking. The human rights framework itself doesn't resolve difficult trade-offs and questions about prioritisation of limited resources, but it does offer a value framework that complements and in some respects challenges the dominant assumptions of neo-classical economics. The human rights framework helps to: (1) correct political market failures, (2) call into question the justice of original distributions of power and resources underpinning the Pareto rule, (3) interrogate the "revealed preferences" of the putatively self-interested rational individual, and (4) resolve principal-agent problems²³⁸ and asymmetries in access to information. Human rights argumentation may also help to re-frame and re-value technocratic cost-benefit calculations, expose ideological biases in policymaking,²³⁹ and challenge decisionmakers to justify simplistic inter-temporal or horizontal trade-offs and assumptions about short-term pain for longer-term gain.

The analytical frameworks and approaches surveyed above lay down important markers for continuing interdisciplinary dialogue on the comparative contributions of human rights, economics and other social sciences in policymaking, augmented and enriched by a burgeoning body of comparative social rights impact studies. A continuing commitment to dialogue and interdisciplinary collaboration, particularly at the sectoral level where specific policy and operational implications of human rights can more effectively be worked through, will be indispensable for a more productive synthesis between human rights and the MDGs in a post-2015 *development* agenda.

V. Recommendations for the post-2015 *development* agenda and global monitoring framework

The September 2010 MDGs Summit produced a general understanding of the direction of international *development* cooperation going forward, rather than a clear vision statement or a roadmap of the future of international *development*. The large number of commitments obscures the fact that many of the promises and aid pledges are not new, and do little to [*107] cure the accountability shortcomings in MDG 8. But the extensive catalogue of human rights commitments is nonetheless noteworthy; intergovernmental negotiations on *development* issues are often highly politicized, and consensus can be hard to achieve. The human rights consensus in certain areas - including women's rights and gender, reproductive rights, right to food, health, and promoting universal access to basic services - is significant. This consensus offers a potentially useful advocacy platform for integrating human rights within national MDG strategies, tailoring the MDGs to national conditions, and summoning political will and resources to collect disaggregated data and strengthen national statistical systems.

The Summit Outcome was to some extent the product of its own circumstances, yielding uncertain implications for future inter-governmental negotiations on *development* issues. Nevertheless, the challenge now is to grasp the Summit Outcome and make use of it in creative ways, mobilising to ensure that the human rights consensus is actually implemented in practice, and is not undermined or forgotten in the negotiation of successor agreements. Building upon the Summit Outcome and its aftermath, this Section of the article identifies a number of human rights priorities for the post-2015 *development* agenda. The discussion begins with a number of general parameters regarding the need to align and tailor global *goals* and targets to human rights standards, calibrate an appropriate level of ambition, and strengthen accountability mechanisms and participatory processes. It then considers in more detail the substantive and statistical criteria that should guide prioritisation in the post-2015 agenda. It also discusses possible new *goals* and targets to be included within a successor global monitoring framework, parameters for indicator *development*, and finally, proposals for addressing discrimination and promoting substantive equality.

A. Strengthening Accountability and Participation

²³⁷ Langford, *supra* note 189, at 43.

²³⁸ Principal-agent theory in political science and economics deals with problems of moral hazard (wherein a party insulated from risk behaves differently from how it would behave if it were fully exposed to the risk), as well as conflict of interest and inadequate or asymmetrical access to information in agency relationships - problems which are inherent in situations of delegated legislative authority to executive agencies.

²³⁹ See, e.g., Yamin, Parra-Vera & Gianella, *supra* note 162, at 107, 110; Yamin, *supra* note 188, at 340-42 (discussing the track record and future potential of courts to act as bulwarks against ideologically-driven liberalisation, commodification and privatisation policy agendas).

An explicit human rights focus can buttress arguments for tailoring and customising the MDGs, and successor “global” targets to the particularities and original conditions of developing countries, in line with obligations in the ICE-SCR and other relevant instruments. Future determinations of the feasibility of *development* targets should not assume the reasonableness of past *development* trajectories, or too readily assume that progress should be linear. Rather, such assessments should be informed by country-specific political economy analyses and quantitative assessments of the measure of progress that is objectively reasonable under particular circumstances.²⁴⁰ Tools to guide this kind of analysis are already in use, including by certain human rights monitoring bodies. However, generating demand for more widespread use remains a key challenge; for example, in a review of [*108] twenty-two Poverty Reduction Strategy Papers (PRSPs)²⁴¹ in 2008, including countries in which national MDG costing exercises were carried out with the U.N.’s support, none of the PRSPs referred to these cost estimates.²⁴² The increased mobilisation of human rights constituencies, communities and social movements around the subject matter of the MDGs, demanding these as a matter of right, may help to generate both the political will and resources for action.

The human rights framework may also strengthen arguments for participatory decision-making processes, equitable outcomes, and accessible and effective accountability mechanisms at all levels, including administrative and judicial mechanisms, as discussed in Section III.C.²⁴³ Aligning and tailoring global MDG targets to duly ratified international human rights treaty obligations, as outlined above, is an essential step towards strengthened accountability for human *development* outcomes. Contextually relevant targets, established through participatory processes, should be embedded in national plans of action and legal and budgetary frameworks, with clearly defined institutional responsibilities, benchmarks, indicators, and mechanisms for monitoring and redress.²⁴⁴ Participation is not only a right, but can help cure some of the “ownership” deficiencies in the MDGs.²⁴⁵ While national and local redress mechanisms will usually (but not always) be most proximate and practically useful, states should more systematically reflect progress towards the MDGs in their national reports to the international human rights treaty bodies and Universal Periodic Review process of the United Nations Human Rights Council. States which have not yet done so should adhere to the Optional Protocol to the ICESCR in order to permit individual complaints.²⁴⁶

[*109] Within and beyond the U.N. system, the thinking regarding post-2015 global arrangements is already well underway. In 2012 the United Nations Secretary General appointed a Task Team to carry out consultations and propose a vision and road map for the post-2015 *development* agenda.²⁴⁷ In the spring of 2012, a High Level Panel of Eminent Persons will be appointed by the Secretary General to advise on practical measures to overcome global

²⁴⁰ See supra notes 34-35 and accompanying text.

²⁴¹ PRSPs are medium-term poverty reduction national plans that the World Bank and International Monetary Fund require to be in place as prerequisites for concessional loans and financial assistance.

²⁴² Richard Manning, Using Indicators to Encourage Development: Lessons from the Millennium Development Goals, Report for Danish Institute for International Studies, DIIS Report No. 2009:01 at 37.

²⁴³ See discussion supra Section III.C.

²⁴⁴ See U.N./OHCHR, supra notes 20, 45. See also Alicia Yamin, Towards Transformative Accountability: Applying a Rights-based Approach to Fulfil Maternal Health Obligations, 12 Sur: International Journal on Human Rights (2010); Lynn Freedman, Human Rights, Constructive Accountability and Maternal Mortality in the Dominican Republic: A Commentary, 82 Int’l J. Gynecology & Obstetrics 111 (2003) (proposing a framework for transformative accountability in the context of maternal health (MDG 5), addressing human rights obligations at global, national and local levels, and including national planning and budgetary processes as well as judicial and informal accountability mechanisms, as well as “constructive accountability” mechanisms at facility level).

²⁴⁵ Lancet & London International Development Centre Commission, supra note 15, at 11-14.

²⁴⁶ For recommendations to this effect, see U.N. Doc. A/65/254, supra note 53, and for a more detailed set of recommendations addressed to human rights treaty bodies, see Alston, supra note 17, at 821-27. See also Margaux J. Hall, Using International Law to Promote Millennium Health Targets, 28 Wis. Int’l L.J. 74 (2010) (discussing the potential utility of the complaints procedure under the Optional Protocol to the CEDAW Convention). Significantly, on August 10, 2011 the CEDAW committee handed down the first decision of any treaty body in relation to a maternal mortality communication. The Committee found that the (deceased) applicant had suffered discrimination in accessing maternal health services on the grounds of her sex and ethnic origin, and recommended that the government of Brazil (the respondent) provide reparations to the victim’s family and implement a range of other legal and policy measures. U.N. Doc. CEDAW/C/49/D/17/2008, Aug. 10, 2011 (Restricted).

²⁴⁷ See United Nations Economic and Social Council, Millennium Development Goals and the Post-2015 Development Agenda, available at <http://www.un.org/en/ecosoc/about/mdg.shtml>.

development challenges, taking into account the U.N. Task Team's report.²⁴⁸ The report of the High Level Panel of Eminent Persons will inform inter-governmental deliberations on the post-2015 *development* agenda, including a "special event" on the MDGs in 2013.²⁴⁹ Drawing from the lessons of the *Millennium* Declaration and 2010 MDGs Summit, in which space for civil society participation was minimal, it will be critical for a post-2015 agreement to be more inclusive, led by representatives from the Global South rather than Northern donors. While civil society uptake and ownership of the MDGs in the Global South has been uneven at best, recent surveys indicate a clear grassroots demand for a post-2015 *development* framework.²⁵⁰ The quality of the consultation process will be a key determinant of the legitimacy and ultimate impacts of the post-2015 global monitoring framework.

B. Prioritisation and Triage - Criteria for Determining the Scope of the Post-2015 Agenda

As vital as inclusive processes are, however, the post-2015 consultation process must be carefully managed in order to avoid inflaming tensions between those urging greater inclusion in future global *development goals* and those arguing that less is more - i.e., that a narrow focus on a small set of measurable global targets is indispensable for the purposes of statistical rigour, comparability, and political mobilisation.²⁵¹ Human rights critiques of the MDGs often argue for the inclusion of additional *goals*, targets and indicators into the global list. This has resulted in the expansion of the MDGs in 2007 to encompass decent work and sexual and reproductive health (the latter having originally been excluded in 2000 by a strong [*110] political and faith-based coalition), as well as calls for *goals* and targets on such matters as economic growth, governance, climate change, secondary education, infrastructure and even electricity.²⁵² But a "badly decorated Christmas tree" laden with *goals* would serve no useful purpose.²⁵³ Strong leadership, clear communication and effective management of expectations throughout the consultations process are therefore crucial.

In preparing for the discussions ahead, many human rights proponents will be forced to do something that they do not like doing: prioritise. The same applies to all other stakeholders. A clear vision of *development* could help define the boundaries and parameters for the prioritisation exercise. The 2010 MDGs Summit experience shows how challenging the quest for a succinct and coherent negotiated vision statement can be. Nevertheless, a clear concept and definition would help structure the various consultation exercises underway, promote coherence, and identify synergies within a manageable list of post-2015 *goals* and targets.²⁵⁴ With or without a clear conceptual chapeau, agreement will be needed on the specific purposes and audiences for a post-2015 global monitoring framework. A critical distinction must be made at the outset between the parameters and requirements for monitoring at the global level, as opposed to at the national and sub-national levels. There needs to be a clear agreement that any global monitoring framework requires explicit tailoring to national conditions and resource constraints, in line with international human rights treaty standards. The failure to be clear about the MDGs' purposes was certainly among its most regrettable shortcomings from the outset.

²⁴⁸ Id.

²⁴⁹ Summit Outcome, supra note 69, P 79.

²⁵⁰ Amy Pollard, Andy Sumner, Monica Polato-Lopez & Agnes de Mauroy, 100 Voices: Southern perspectives on what should come after the Millennium Development Goals (March 2011) at 2, available at <http://www.cafod.org.uk/resources/policy/aid-and-governance/100voices>. On the relatively weak uptake of the MDGs by civil society to date see Nelson, supra note 20; Ellen Dorsey & Paul Nelson, *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs* (2008).

²⁵¹ See Vandemoortele, supra note 26.

²⁵² See Vandemoortele & Delamonica, supra note 15, at 63; Daniel Kaufmann, Casting Light on the MDGs through better Governance and Less Corruption, *The Kaufmann Governance Post* (Sept. 28, 2010), <http://thekaufmannpost.net/casting-light-on-the-mdgs-through-better-governance-and-less-corruption/>.

²⁵³ Jan Vandemoortele, *The MDG Story: Intention Denied*, *Development & Change* 1-21, 11 (2011).

²⁵⁴ It has been argued that the lack of a coherent vision of development in the process leading to the MDGs "generated a poorly aligned means, ends and sometimes competing ideas about normative aspiration (e.g. economic growth vs. sustainability), which has made the MDG project less useful than it could have been, since opportunities to link the goals together coherently have been missed and a rigorous approach to assessment has been overlooked." *Lancet & London International Development Centre Commission*, supra note 15, at 1008. Drawing from Amartya Sen's theories, it has been suggested that a guiding conception of development as "a dynamic process involving sustainable and equitable access to improved well-being" could provide a rational and principled structure for post-2015 development goals, based upon five guiding principles: holism, equity, sustainability, ownership and global obligation."Id. at 1008-11.

Subject to this threshold question of objectives, discussion will then be needed on the relative importance, as well as limitations and possible drawbacks, of quantitative measurement, and how qualitative criteria and methods may play a more active role. Both are surely needed for a potentially wide range of purposes,²⁵⁵ including vetting the issues for [*111] inclusion in the post-2015 global monitoring framework. Statistical rigour should be encouraged for the sake of objective monitoring and evidence-based policymaking.²⁵⁶ The desire for quantifiable expressions of human progress can be viewed as an attempt "to create a basis for mutual accommodation in a context of suspicion and disagreement," thereby promoting procedural regularity and enhancing public perceptions of fairness.²⁵⁷ However, the ideal of objectivity should not too readily be assumed.²⁵⁸

When weighing the candidates for inclusion in a post-2015 global list, consideration must also be given to the "crowding-out" problem, meaning the potential of the MDGs to inadvertently overshadow other important issues that have not made it onto the global list. Prioritisation should be guided by substantive human rights criteria from a normative or deontological standpoint, as well as empirical evidence of where the major bottlenecks most commonly are for any given right (or corresponding global *goal* or target). Prioritisation should take into account what the most clearly proven interventions are in local contexts, and what proxy measures might be feasible for human rights or *goals* left out of the list. Hardened by the MDGs experience, the post-2015 prioritisation exercise should also explicitly anticipate the gaps that will likely arise in a new global list of *goals* and targets, and the thematic and operational linkages that such gaps might inadvertently foreclose.²⁵⁹

Agreement on a succinct set of ten *goals* may offer a path between the Scylla of MDG proliferation and the Charybdis of the status quo. Consistent with the rationale behind the existing list, any additional global *goals* should be capable of expressing widely recognised ends, rather than means, of human *development*.²⁶⁰ Careful deliberation will be needed to select the appropriate baseline year for any new set of targets and the period over which they are to be achieved: an excessive time horizon lacks credibility, but an excessively long period exerts little political pressure. Consideration will also be needed on whether performance is to be expressed in relative or [*112] absolute benchmarks,²⁶¹ mindful of the controversies relating to Target 1.A discussed in subsections II.B.2 and II.B.3. Interim targets should be included for the sake of political accountability,²⁶² with longer-term targets aiming for universal access.²⁶³

²⁵⁵ Kanbur, *supra* note 195 at 1. As Ravi Kanbur explains: "Numerical information can be more easily aggregated, but it can miss out on nuance and texture. General coverage aids representativeness, but can lose context. Statistical inference can help in discussion of causality, but misses out on the power of inductive approaches... . The key, then, is how to make the best of complementarities while minimizing tradeoffs."

²⁵⁶ For arguments highlighting the importance of statistical rigour in the context of the health-related MDGs, see Amir Attaran, *An Immeasurable Crisis? A Criticism of the Millennium Development Goals and Why They Cannot be Measured*, 2 PLoS Medicine 955 (2005), available at <http://www.plosmedicine.org>.

²⁵⁷ Theodore Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* 149, 187, 223 (1995).

²⁵⁸ As Porter points out, quantitative analysis is often subject to "pressures to reify its terms, to deny the validity of human judgement, to lust after the impersonality of purely mechanical objectivity." *Id.* at 187. See also Dutta, *supra* note 156, at 415-16.

²⁵⁹ See *supra* note 254 and accompanying text.

²⁶⁰ An ideal set of global targets is one that expresses the many dimensions of human well-being yet includes a limited number of targets; that addresses the complexity of development yet exploit the charm of simplicity; that embodies agreed principles yet allows for quantitative monitoring; that reflects global priorities and universal standards yet is tailored to the domestic situation and local challenges; and that specifies the destination yet spells out the journey for getting there." Vandemoortele, *supra* note 14, at 9-10.

²⁶¹ Vandemoortele & Delamonica, *supra* note 15, at 63.

²⁶² Vandemoortele, *supra* note 14, at 20.

²⁶³ See U.N. Doc. A/65/254, *supra* note 53, PP 12-17 (arguing for the importance of setting targets for universal access in the context of the rights to water and sanitation). Others commentators have ventured more far-reaching arguments for the concept of universalism in the context of social policy, challenging the approach of targeting in the MDGs and aiming for a re-politicisation of the development agenda. See, e.g., Andrew M. Fischer, *Towards Genuine Universalism within Contemporary Development Policy*, 41 IDS Bulletin 36 (2010); Thandika Mkandawire, *Targeting and Universalism in Poverty Reduction*, U.N. Research Inst. For Social Development, Social Policy and Development Programme Paper No. 23 (2005).

The requirement that post-2015 *goals* should focus on ends rather than means would appropriately exclude putative targets for economic growth, infrastructure, electricity and the like, however important the latter may be from an instrumental standpoint. A modest rationalisation of existing health-related *goals* should help to accommodate a small number of additional priority concerns, although the unacceptable scale of avoidable maternal deaths surely demands that maternal health be given due prominence in the post-2015 list. The integration of donor states' commitments as far as possible within the revised list might also expand the space for additional priority issues, rather than quarantining all such commitments within MDG 8. This would also help to reinforce the relevance of the MDGs and the reality of poverty in all countries, irrespective of their relative per capita GDP, while recognising the rising proportion of income-poor individuals living in middle-income countries. An integrated structure of this kind may also more effectively communicate the need for a genuine global partnership and policy coherence in order to achieve specific human *development* outcomes.²⁶⁴

C. Candidate *Goals* and Targets

A post-2015 global monitoring framework should include a *goal*, target(s) and indicators capturing essential civil and political rights prerequisites for public participation and effective and equitable service delivery. The inclusion of civil and political rights guarantees can be justified on both normative and instrumental grounds, building upon the modest concessions on these issues by Member States at the 2010 MDGs Summit.²⁶⁵ Certain countries have added "governance" *goals* to their [*113] nationally customised MDGs. However this practice warrants critical review from methodological and ideological perspectives, given the inherent elasticity of "governance" concepts and the dubious motives that governance agendas may conceal, as well as more explicit human rights conflicts.²⁶⁶ Recent work on human rights indicators offers considerable material and inspiration from which to draw for global monitoring purposes, particularly when it comes to tailoring globally-agreed indicators to the national and sub-national levels.²⁶⁷ There is a veritable industry in voice and accountability measurement as well.²⁶⁸ Grassroots aspirations for civil and political rights are being voiced as loudly now as ever, and would presumably come through strongly in any

²⁶⁴ For arguments along these lines, see Caliri & Darrow, *supra* note 61. Target 8.E ("In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries," *supra* note 7) is the most obvious target for rationalisation and integration within a revised global health goal, however there may be further potential for rationalisation, for example in relation to indicators dealing with sectoral targeting of ODA.

²⁶⁵ It has sometimes been suggested, too categorically, that "democratic accountability, human rights and the rule of law" are indispensable for achieving quantitative targets such as those expressed in the MDGs, and that therefore, at least implicitly, the MDGs can be taken as a proxy measurement for the former (qualitative) concerns. See Myles A. Wickstead, *Holding on to the MDGs (For Now)*, 41 *IDS Bull.* 123, 124-25 (2010). The recent uprisings in star MDG performers in the Arab region have strongly rebutted this assumption, reaffirming the intrinsic importance of all human rights - civil, social, cultural, economic and political, whatever their instrumental relationships. However, for an indication of some of the conceptual and methodological challenges relating to standardised global human rights indicators, see Kate Raworth, *Measuring Human Rights*, 15 *Ethics & Int'l Aff.* 111, 113-15, 128-31 (2001); Nancy Thede, *Human Rights and Statistics: Some Reflections on the No-Man's Land Between Concept and Indicator*, 18 *Stat. J. U. N. Econ. Comm. for Eur.* 259, 265-69 (2001) (referring variously to problems of conceptualisation, contextualisation, relativity, interpretation, subjectivity, feasibility, and data limitations). A composite "Human Rights Accountability Index" offers one potentially practical means of overcoming such limitations, bringing together indicators relating to States' formal adherence to human rights treaties, respect for procedural obligations, and responsiveness to outcomes of human rights monitoring procedures. See Philip Alston, *Promoting the Accountability of Members of the New U.N. Human Rights Council*, 15 *J. Transn'l L. & Pol'y* 49-94, 87-93 (2006).

²⁶⁶ Mongolia's "zero-tolerance" anti-corruption target was discussed, *supra* note 68. By way of other examples, the government of Turkmenistan included a target on combating terrorism as part of its national goal on developing global partnerships, and Afghanistan added a goal on security with a target to increase military expenditure as a proportion of GDP and overall public expenditure. See Millennium Development Goals Report: Turkmenistan (2003), available at http://www.undg.org/archive_docs/4509-Turkmenistan_MDG_Report_-_English.doc at 59-61; Islamic Republic of Afghanistan, Millennium Development Goals Report (2010), available at <http://www.undg.org/docs/11924/MDG-2010-Report-Final-Draft-25Nov2010.pdf> at 43. For a wider-ranging critique of the governance agenda in development see James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 *Buff. Hum. Rts. L. Rev.* 107 (1999).

²⁶⁷ U.N./OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. Doc. HRI/MC/2008/3 (June 6, 2008), available at http://www2.ohchr.org/english/issues/indicators/docs/HRI.MC.2008.3_en.pdf; Report of the United Nations High Commissioner for Human Rights, U.N. Doc. E/2011/90 (Apr. 26, 2011), available at http://www2.ohchr.org/english/issues/indicators/docs/E-2011-90_en.pdf.

²⁶⁸ See, e.g., Governance and Social Development Resource Centre, *Helpdesk Research Report: Voice and Accountability Indexes*, Mar. 3, 2009, available at <http://www.gsdrc.org/docs/open/HD575.pdf>; Measuring Work on Voice and Accountability: A Guide

genuinely participatory post-2015 consultations process. A self-standing *goal* on civil and political rights would best highlight the intrinsic importance of these rights; however, a plausible alternative might be to group these rights within a self-standing “enabling environment” *goal*, which may also include global partnership commitments relating to aid, trade, debt relief and investment, to the extent [*114] that the latter are not integrated within health-related or other MDGs.²⁶⁹

Social security, or social protection, is another obvious candidate for inclusion in an updated list of global human *development* priorities, given recent normative advancements concerning the right to social security²⁷⁰ and the importance of securing a social protection floor in the midst of global economic, environmental, and social crises. Safeguarding the right to work is also vital in times of crisis, and a number of countries have included employment-related *goals* in their national plans.²⁷¹ Youth unemployment has ignited or intensified anti-authoritarian and anti-globalisation movements worldwide. Normative advances concerning the right to work strengthen the case for its inclusion in a post-2015 agreement,²⁷² although some commentators have questioned how far “decent work” objectives could usefully be advanced through a post-2015 global agreement as distinct from national policies.²⁷³

There are also strong arguments to include water and sanitation as a self-standing *goal*, given the recent recognition by the General Assembly and Human Rights Council of the human rights to water and sanitation, the comparative lack of progress in realising these rights, and the powerful evidence of their fundamental importance for the achievement of other human *development goals*.²⁷⁴ The human rights traction in these sectors is now strong. In 2011 the WHO/UNICEF Joint Monitoring Programme for Water and Sanitation (JMP)²⁷⁵ and a number of influential multilateral and bilateral donor organisations launched a work programme to help define the post-2015 monitoring framework in the water and sanitation sectors. In May 2011 the above organisations committed to integrate the rights to water and sanitation into the global monitoring framework for the water [*115] and sanitation indicators in MDG Target 7.C, exploring how qualitative attributes of these rights - such as affordability, accessibility, continuity and safety - may be factored into MDG monitoring.²⁷⁶ This may serve as a valuable precedent and source of inspiration for other MDGs.

Finally, no post-2015 agreement could be credible or effective without meaningful commitments to deal with the problem of climate change. Climate change is a quintessential tragedy of the commons, a global market failure fuelled by the failure of national politics. Climate change has been characterised as a “profound denial of freedom of action and a source of disempowerment.”²⁷⁷ The human rights dimensions of this issue are the subject of a burgeoning lit-

for Developing Practitioners, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/media-room/news-stories/2010/measuring-work-on-voice-and-accountability/>.

²⁶⁹ See Centre for International Governance Innovation, *Toward a Post-2015 Development Paradigm (II)*, June 20-24, 2011, Bellagio, Italy (proposing an enabling environment goal as one of twelve new post-2015 development goals).

²⁷⁰ See CESCR, General Comment 19, *supra* note 87; Langford *supra* note 214. See also U.N. Doc. A/HRC/11/9 (Mar. 17, 2009), P 15; U.N. Doc. A/65/259 (Aug. 9, 2010), P 10, *supra* note 87.

²⁷¹ Examples include Argentina, which created a stand-alone goal “promoting decent employment” following its economic crisis in 2001. See Republica Argentina, *Objetivos de Desarrollo del Milenio (2010)*, available at <http://www.undg.org/docs/11540/Argentina-ODM-2009.pdf> at 38-49. For an analysis of Target 1.B (decent work) and its indicators from a human rights perspective, see Gillian MacNaughton & Diane Frey, *Decent Work, Human Rights, and the Millennium Development Goals*, 7 *Hastings Race & Pov. L.J.* 303, 331-43 (2010).

²⁷² CESCR, General Comment No. 18, *The right to work*, U.N. Doc. E/C.12/GC/18, 35th session (Feb. 6, 2006); see also MacNaughton & Frey, *supra* note 271 (on the I.L.O.’s “decent work” agenda).

²⁷³ Claire Melamed & Andy Sumner, *A Post-2015 Global Agreement: Why, What, Who? Background paper for Overseas Development Institute/U.N. Development Program workshop on a Post-2015 Development Agreement*, Cairo, Oct. 26-27, 2011, available at <http://www.odi.org.uk/resources/download/6075.pdf> at 29.

²⁷⁴ See U.N. Doc. A/65/254, *supra* note 53.

²⁷⁵ The WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation (JMP) is the official United Nations mechanism tasked with monitoring progress towards the MDG 7 targets relating to drinking water and sanitation. See WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, available at <http://www.wssinfo.org/> (last visited Mar. 22, 2012).

²⁷⁶ See JMP Post-2015 Consultation Report, *supra* note 52.

²⁷⁷ United Nations Development Program, *Human Development Report 2007/8, Fighting Climate Change: Human Solidarity*

erature.²⁷⁸ Indicator 7.2 for MDG target 7.A (ensuring environmental sustainability) refers to “CO2 emissions, total, per capita and per USD1 GDP (Purchasing Power Parity, or PPP),” although the lack of any quantified time-bound performance benchmark makes this indicator ineffective and un-monitorable. However, addressing climate change cannot be reduced to developing new targets and indicators. Climate change fundamentally challenges prevailing consumption patterns, commercial and political incentives, and ways of thinking about both human rights and *development*. The human impacts and causes of climate change are now very clear to any impartial and informed observer, and the global tipping point towards potentially catastrophic and irreversible harms is likely to occur well within the framework of the post-2015 agenda.²⁷⁹ Inequalities within countries are a likely marker for vulnerability to climate shocks,²⁸⁰ hence any principled and effective post-2015 [*116] agreement will need to take into account not only national capacities and relative responsibilities for greenhouse gas emissions, but also in-country inequalities.²⁸¹ Financial requirements for mitigation in developing countries are estimated to reach \$ 140-175 billion a year by 2030 with associated financing needs of \$ 265-565 billion, and the additional investment and financing required for climate change adaptation purposes may be between \$ 30-100 billion annually.²⁸² Sustainable transitions to clean energy pathways also require rapid progress on technology transfer.²⁸³ Hence, international cooperation is essential. Unsustainable consumption patterns in both the Global North and South, and what Henry Shue termed “luxury emissions,”²⁸⁴ are clearly difficult topics of political discussion, as the slow progress of global climate change negotiations attests.²⁸⁵ But the failure of the post-2015 *development* agenda to grapple with these issues would constitute a shameful missed opportunity and an abrogation of human rights responsibilities.

D. Indicators for the Post-2015 Global Monitoring Framework

The OECD-hosted Global Project on Measuring the Progress of Societies concluded its 2008 report with four lessons for indicator *development*: (1) be clear about one’s objectives and how one expects to achieve them; (2) be realistic about what an indicator set can achieve; (3) never underestimate the importance of the process of designing

in a Divided World 31 (2007). As the authors of Human Development Report observe, “one section of humanity - broadly the poorest 2.6 billion - will have to respond to climate change forces over which they have no control, manufactured through political choices in countries where they have no voice.” Id.

²⁷⁸ On the relationships between climate change and human rights, see *Climate Change and Human Rights* (Stephen Humphreys, ed., 2009); Siobhan McInerney-Lankford, Mac Darrow & Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* 7-8, 47-53 (2011); Mac Darrow, Jackie Dugard, Anne-Mari Karlsson & Karin Lexen, *Climate Change and the Human Rights to Water and Sanitation*, (Position Paper for the United Nations Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation), 11-16, 27-31, 35-37 (2010), available at http://www.hydrology.nl/images/docs/alg/U.N.HCR_Climate_Change_Right_Water_Sanitation.pdf.

²⁷⁹ For an alarming but credible assessment of the latest scientific evidence, see James E. Hansen & Makiko Sato, *Paleoclimate Implications for Human-made Climate Change*, in *Climate Change at the Eve of the Second Decade of the Century: Inferences from Paleoclimate and Regional Aspects: Proceedings of Milutin Milankovitch 130th Anniversary Symposium* (A. Berger, F. Mesinger & D. Sijaci, eds., 2011). On recent projections, in order to avoid dangerous levels of greenhouse gas emissions, the total amount of global emissions needs to fall by 2050 by at least 50 to 85 percent from 2000 levels. This means that heavily polluting OECD countries will need to have cut their emissions by 80 to 90 percent, and developing countries will probably need to cut their collective emissions by 30 to 60 percent, having peaked by the year 2025. Stephen Humphreys, *Conceiving Justice: Articulating Common Causes in Distinct Regimes*, in Humphreys, ed., *supra* note 278, at 305.

²⁸⁰ Human Development Report 2007/2008, *supra* note 277, at 79.

²⁸¹ Perhaps the best-known model that integrates the three vital criteria of relative responsibility, capacity, and in-country inequalities, is the “Greenhouse Development Rights” framework. See Paul Baer et al., *The Greenhouse Development Rights Framework: The Right to Development in a Climate Constrained World* (Rev. 2d ed. 2008).

²⁸² World Bank, *World Development Report 2010: Development and Climate Change* 22-23 (2009). Mitigation refers to efforts to prevent greenhouse gas emissions, and adaptation refers to the responses to foreseeable and existing climate-related harms.

²⁸³ For a human rights analysis and recommendations concerning climate change technology policy, see International Council on Human Rights Policy, *Beyond Technology Transfer: Protecting Human Rights in a Climate-Constrained World* (Versoix: ICHRP, 2011).

²⁸⁴ Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15(1) *Law & Pol’y* 39-60 (1993).

²⁸⁵ The legislative centrepieces of the global climate change regime are the United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on its Seventh Session, Addendum, UNFCCC/CP/2001/13/Add.1 (Jan. 21, 2002); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22. On the slow progress, see Brian Brady & Matt Chorley, *Durban Conference: The forgotten planet*, *The Independent* (Dec. 4, 2011), <http://www.independent.co.uk/environment/climate-change/durban-conference-the-forgotten-planet-6272110.html>.

and agreeing the indicators; and (4) think long-term: be persistent and flexible.²⁸⁶ Indicators in general terms should be valid, relevant and effective in measuring what they purport to measure. They should also be reliable, enabling consistent application across different contexts by different groups of people at different times. Proposed indicators at the global level should be measurable, time-bound, cost-effective to collect, [*117] easy to communicate for advocacy purposes, and open to cross-country comparisons. The process of indicator *development* should itself observe accountability principles, including transparency about data sources and methodology.²⁸⁷

Data sources themselves should be cost-effective, standardised, population-based, and comparable across countries and over time, and contribute to strengthening national monitoring capacity.²⁸⁸ All relevant data sources should be explored - events-based data relating to observable human rights violations, standards-based data expressed in quantitative ordinal scales, national socioeconomic and administrative statistics, and survey-based data - within their respective limitations.²⁸⁹ When considering the statistical parameters, it should be borne in mind that much data that are presently available at country level - for example through Demographic Health Surveys, which are increasingly income and gender-disaggregated - are not being used. Much more data could be collected were there the political will to do so, although for the purposes of global monitoring there are limits to the number of additional questions that can be added to existing household survey instruments. The lag time in the generation of baselines and measurement tools for new indicators should also be borne in mind in terms of any proposals to be proposed to the Secretary General's High Level Event in 2013, and subsequently to Member States in 2015.²⁹⁰

As vital a variable as statistical rigour is, however, it cannot be the sole gatekeeper for the post-2015 *development* agenda, and should not arbitrarily or categorically trump substantive policy considerations.²⁹¹ "To foreswear the use of available, though imperfect, data does not advance scholarship," and does little to redress the worst excesses of human behaviour.²⁹² Moreover, the weight that one may place on statistical parameters might vary, to some extent, depending upon the relative priority of global communications and advocacy purposes of the post-2015 agenda, as distinct from its monitoring or planning purposes. For example the maternal mortality ratio (an outcome or impact indicator) is a far weaker indicator than measures of coverage such as skilled birth [*118] attendance and availability of emergency obstetric care (an input, effort, or process indicator), given the well-known problems of underreporting and misreporting of maternal deaths.²⁹³ But under certain conditions and caveats, the former indicator might nevertheless serve useful advocacy objectives for a broad global audience, bringing visible attention to the scandal of avoidable maternal deaths in a way that other measures, on their own, cannot.

There may be deeper problems with indicators from the perspective of public management theory. For example, in the context of the MDGs, Rosga and Satterthwaite warn of the potential for the human rights indicators project "to close space for democratic accountability and purport to turn an exercise of judgement into one of technical measure-

²⁸⁶ Manning, *supra* note 242, at 20 n. 22.

²⁸⁷ Nikhil K. Dutta, *supra* note 156; U.N./OHCHR (2011), *supra* note 269, P 5.

²⁸⁸ JMP Post-2015 Consultation Report, *supra* note 52, at 41.

²⁸⁹ Todd Landman, Measuring Human Rights: Principle Practice, and Policy 26(4) Hum. Rts. Q. 906-31, 923-24 (2004); U.N./OHCHR (2008), *supra* note 269, PP 13-14.

²⁹⁰ Developments in indicator measurement tools could typically take two to five years, for indicators not currently captured in existing data collection systems. These must be applied consistently in a significant number of countries, although with survey cycles taking three to five years, initial reporting on a new baseline could take anywhere from seven to twelve years. Capturing changes following that baseline could take an additional five years. JMP Post-2015 Consultation Report, *supra* note 52, at 42-43.

²⁹¹ *Supra* notes 253-66 and accompanying text. For concerns that technical statistical parameters have displaced the "relevance and effectiveness" criteria for the decent work indicators in Target 1.B, see MacNaughton & Frey, *supra* note 271, at 340-42.

²⁹² James C. Strouse & Richard P. Claude, Empirical Comparative Rights Research: Some Preliminary Tests of Development Hypotheses, in *Comparative Human Rights* 52 (Richard P. Claude ed., 1976), cited in Landman, *supra* note 289, at 909.

²⁹³ See UNICEF, WHO, & UNFPA Guidelines for Monitoring the Availability and Use of Obstetric Services (1997) at 7-14, available at http://www.childinfo.org/files/maternal_mortality_finalgui.pdf. There are two indicators for Target 5.A: Indicator 5.1 is the maternal mortality ratio, and indicator 5.2 is the proportion of births attended by skilled health personnel. As an illustration of the problem of indicator validity and misreporting, a decline in the former ratio may in fact reflect improved surveillance rather than declining maternal deaths. For other problems, see Attaran, *supra* note 256, at 957-58.

ment.”²⁹⁴ In a similar vein, within a deeper critique of the political economy of the MDGs, Poku and Whitman question the utility, and even the possibility, of measuring and costing the MDGs, and argue that “what counts as ‘momentum’ in the years to 2015 cannot ... be reduced to statistical indicators.”²⁹⁵ The debates on post-2015 indicators would do well to heed these critiques.

More specifically, global MDG indicators should go beyond standard “outcome” or impact measures (U5M, maternal mortality ratio, literacy rates and so forth) to include a modest number of indicators that capture human rights commitment as well as fiscal and policy effort and inputs necessary to achieve desired outcomes, to the extent that these can be generalised across countries.²⁹⁶ The latter kinds of indicators promote accountability for human *development* outcomes by providing the basis for evidence-based judgments on the extent to which outcomes (positive as well as negative) are the result of conscious policy choices, or omissions, of human rights duty-bearers (typically, but not exclusively, authorities of the state), or alternatively the result of accident or purely exogenous factors. Examples of commitment indicators would include human rights treaty ratification and constitutional protection of rights, observance of procedural [*119] obligations under the U.N. Human Rights Council, and responsiveness to procedural outcomes.²⁹⁷ Indicators of fiscal or policy effort might include the percentage of the national budget dedicated to particular rights or corresponding MDGs. The obligation to put in place a national plan for the realisation of particular rights is a core obligation under human rights treaties, as well as a very real necessity in practice if the *goal* of universal access is to be seriously pursued, especially in notoriously fragmented sectors such as water and sanitation.²⁹⁸

Indicators relating to the outcomes of human rights claims before national courts might seem intuitively important, although justiciability is just the tip of the human rights accountability iceberg. However, efforts to demonstrate the relevance and validity, in statistical terms, of such indicators must confront the problem that redress mechanisms and preconditions for accessing them are most often lacking in countries where violations are most pronounced. As in the field of treaty ratification,²⁹⁹ there may be significant empirical challenges in demonstrating a cause-effect relationship between inputs and desired outcomes. In Colombia and Brazil, as discussed in subsection IV.D.1, judicialised dispensation of curative (rather than preventive or basic) health services appears to have distorted public spending priorities towards the middle classes.³⁰⁰ While these are admittedly unusual cases, they do bear out the possibility that judicial redress, in some conditions, may frustrate rather than further the objectives of a good national health plan.

However, as with the post-2015 menu generally, the relevance of these kinds of indicators cannot be determined exclusively by the evolving and contested nature of the empirical evidence. There are inevitable limitations on the extent to which we will be able to generalise with any confidence (statistically and otherwise) across countries and societies on the institutional prerequisites for effective pro-poor human rights claims. Nevertheless, rights without remedies ring hollow in theory as well as in practice. The programme logic of the post-2015 global monitoring framework would be incomplete without careful analysis of the role of human rights accountability mechanisms, including but not limited to judicial and quasi-judicial forums, within the wider scheme of incentives for better service de-

²⁹⁴ Ann Janette Rosga & Margaret L. Satterthwaite, The Trust in Indicators: Measuring Human Rights, [27 Berkeley J. Int'l L. 253, 258 \(2009\)](#). In similar vein, see Sally Engle Merry, Measuring the World, Vol. 52, Suppl. 3, *Current Anthropology* 83 (Apr. 2011); David Kennedy, Challenging Expert Rule: The Politics of Global Governance, [27 Sydney L. Rev. 5 \(2005\)](#).

²⁹⁵ Nana Poku & Jim Whitman, The Millennium Development Goals and Development After 2015, 32 *Third World Q.* 181, 187 (2011).

²⁹⁶ On human rights indicators generally, see U.N./OHCHR 2008 and 2011, *supra* note 267. “It is important to note that process indicators are not poor substitutes for impact indicators. Process indicators, in fact, provide a great deal of extremely useful information that impact indicators do not,” helping to explain variations in outcomes and highlight needed policy interventions. See U.N. Guidelines for Monitoring the Availability and Use of Obstetric Services, *supra* note 293, at 21.

²⁹⁷ See Alston, *supra* note 265 at 61-67, 87-96. Procedural obligations could include compliance with requests for provision of information to Special Procedures of the U.N. Human Rights Council, issuance by countries of standing invitations to Special Procedures, and timely submission of reports to human rights treaty bodies. Responsiveness could include responses to recommendations flowing from treaty body, Special Procedure and Universal Periodic Review processes.

²⁹⁸ These kinds of process, effort, or “input” indicators are already being collected at the global level for the MDG water and sanitation targets, in addition to comparative data on national policies, institutions, human resource investments, stakeholder coordination and harmonisation, and aid flows. See World Health Organization & U.N.-Water, *supra* note 180 at 37-70.

²⁹⁹ *Supra* note 193 and accompanying text.

³⁰⁰ *Supra* note 186 and accompanying text.

livery. Prioritising among the various possible choices [*120] of "input," "commitment" and "process" indicators should be somewhat easier than for many outcome indicators given that data for many of the former indicators is increasingly available in global databases.³⁰¹ It seems appropriate, therefore, to highlight the identification of commitment and policy effort (or process) indicators as a priority field for further empirical investigation and interdisciplinary debate towards 2015.

E. Tackling Discrimination and Promoting Substantive Equality

Perhaps the biggest problem in historical terms, underlying virtually all others, remains inequality. Most individuals and almost every culture, religion and philosophical tradition value notions of equality for its own sake.³⁰² However, since the year 2000, inequalities have increased between and within countries.³⁰³ The MDGs are certainly not solely responsible for this, but their equity-blindness arguably makes them complicit. This is first and foremost a moral issue, and it undermines the MDGs' progress on their own terms. Hence, the *goal* of substantive equality should be at the centre of the post-2015 debate. Non-discrimination and the principle of substantive equality must be integrated more effectively into all *goals*, and the necessary investments must be made at both national and global levels for the additional data required to be collected, in line with Member States' commitments at the MDGs Summit.

Disaggregation by income quintiles and gender, and to some extent age and ethnicity, already occurs through some of the major survey instruments, such as Demographic Health Surveys and UNICEF's Multiple Indicator Cluster Surveys, although these surveys often bypass the growing ranks of people living in informal settlements. The latter deficiencies need to be addressed as a matter of priority, and disaggregated data collected more systematically. Additional grounds of discrimination should be included in line with evidence of where social exclusion is greatest in the sectors corresponding to the MDGs, while taking into account the prohibited grounds of discrimination under human rights treaties.³⁰⁴ This involves a delicate balance between normative concerns and statistical feasibility parameters, including reliability and comparability. Data availability is another constraint, although including additional fields for [*121] data collection, linked to human rights standards, may help to create national demand for that data.³⁰⁵ Nevertheless, weighing the opportunity costs of household-level data collection is a serious matter. As Manning remarks, we appear to be seeing "a growing mismatch between the multiple demands for monitoring and the ability of local systems to generate credible data. There is a danger that an "MDG Results Industry" could consume a lot of resources to rather little effect."³⁰⁶

Of the many grounds of discrimination covered by the human rights treaties, renewed efforts are needed to capture discrimination on the grounds of ethnicity, and ideally also religious or political belief. Patterns of exclusion along ethnic lines have been documented in many countries where MDGs progress is - in aggregate terms - otherwise broadly on track. As Stewart decries, a dearth of international statistics on ethnic exclusion reflects, as well as causes, this lack of focus.³⁰⁷ These are obviously thorny issues, not helped by the limited and truncated guidance

³⁰¹ See Landman, *supra* note 289, at 926-28. Data relating to treaty ratification, periodic reporting, and responsiveness to recommendations of international human rights mechanisms is available at www.ohchr.org. The TIESR database, *supra* note 232, contains a comprehensive set of quantitative information on the constitutional status of economic and social rights in developing countries. The latter indicator has some empirical backing given and to the extent that successful human rights litigation tracks explicit constitutional human rights provisions, *supra* note 192. But the relevance of constitutionalisation of rights as an indicator, and other possible indicators such as the existence of a national human rights institution, may depend significantly upon the national context, calling into question their relevance in the post-2015 global list. See Alston, *supra* note 265 n. 114 and accompanying text.

³⁰² World Bank, *supra* note 173, at 18. See also *supra* note 40 and accompanying text.

³⁰³ See *supra* note 41 and accompanying text.

³⁰⁴ CESCR, General Comment No. 20, *supra* note 40.

³⁰⁵ Statement of Francesca Perucci (U.N. Inter-Agency Expert Group on MDG Indicators), Experts Group Meeting to Support the Advancement of the Post-2015 U.N. Development Agenda, New York, Feb. 27-29, 2012 (statement given on Feb. 28, 2012).

³⁰⁶ Manning, *supra* note 242, at 38.

³⁰⁷ Frances Stewart, Horizontal Inequalities as a Cause of Conflict: A Review of CRISE Findings, World Development Report 2011, Background Paper 5 (2010).

from the U.N. system.³⁰⁸ Yet Demographic and Health Surveys have included an ethnic variable in fifty-five of the seventy-seven countries covered to date,³⁰⁹ and many countries in Latin America, Asia, and Oceania (less so in Europe and Africa) collect data on ethnicity in their national censuses.³¹⁰ The experience in Latin American countries where social and economic inequalities can be extreme shows that disaggregation by ethnicity is possible even in the most egregious situations given minimal political will, although clearly the overall record is crying out for improvement.³¹¹ Disaggregation by regions within a country may offer a viable proxy measure, in some circumstances.

Disaggregation by disability is another issue meriting full attention in view of the U.N.'s recent global survey suggesting that more than a billion individuals today experience disability with attendant impacts on health, education achievement, economic opportunities, and poverty.³¹² Disability [*122] disproportionately affects those already poor or otherwise vulnerable, and discrimination is among the drivers of the exclusion of persons with disabilities from economic and social life. Much more is now known about the kinds of legal and policy measures, services, and investments necessary to realise the human rights of persons with disabilities. However, lack of rigorous and comparable data on disability and evidence on programmes that work do, to varying degrees, continue to impede understanding and action.³¹³ The post-2015 *development* negotiations offer a timely opportunity to redress these imbalances and injustices, building on the normative framework of the Convention on the Rights of Persons with Disabilities, including its specific commitments relating to *development* cooperation.³¹⁴

Self-evidently, inequalities in society cannot be adequately addressed on a piecemeal, indicator-by-indicator basis.³¹⁵ The values of equity and equality need to be hard-wired into the DNA of the post-2015 agreement. Nevertheless, there is a range of ways in which the technical design and adaptation of global *goals* and targets could better address discrimination issues and promote the *goal* of substantive equality. Fukuda-Parr, for example, has argued for the introduction of an additional global *goal* on reducing inequality within and between countries.³¹⁶ Certain countries have adopted this approach; for example, Romania's national MDG report includes an additional target to reduce illiteracy among the Roma, and the government of Vietnam has added targets to its health and education *goals* in order to close the inequality gap between minorities and other groups.³¹⁷ Weighting quintile-specific values in a way that

³⁰⁸ See supra, notes 44-46 and accompanying text.

³⁰⁹ Stewart, supra note 307, at 5. However, Stewart also notes that these surveys lack many relevant variables and are not conducted at sufficiently regular intervals.

³¹⁰ See United Nations Statistical Division, *Ethnicity: A Review of Data Collection and Dissemination* (Aug. 2003), <http://unstats.un.org/unsd/demographic/sconcerns/popchar/Ethnicitypaper.pdf>. The number of countries collecting this data is likely higher in 2011, although the census data is generally only collected every ten years and hence not capable of capturing and enabling policy responses to short-term variations. The author is grateful to Nicolas Fasel for discussions on this issue.

³¹¹ Simone Cecchini & Francesco Notti, *Millennium Development Goals and Human Rights: Faraway, so Close?* 12 J. Hum. Dev't & Capabilities 121, 121-33 (2011) (reporting that 10 out of 25 country reports in the Latin American region provided data on at least one MDG indicator for indigenous people or afro descendants (typically revealing alarming disparities when this was done), and from the year 2000 most national censuses included questions on the ethnic self-identification of the population).

³¹² World Health Organisation & World Bank, *World Disability Report* 191-92 (2011).

³¹³ Id.

³¹⁴ Final Rep. of the Ad Hoc Comm. on a Comprehensive and Integral Int'l Convention on the Prot. and Promotion of the Rights and Dignity of Persons with Disabilities, 61st Sess., Dec. 6, 2006, U.N. Doc. A/61/611 (2006). Article 32 of the Convention calls for making general development activities more disability-inclusive, with emphasis on capacity-building, cooperation in research and technology transfer, and economic assistance as appropriate.

³¹⁵ Manning, supra note 242, at 22.

³¹⁶ Sakiko Fukuda-Parr, *Reducing Inequality - the Missing MDG: A Content Review of PRSPs and Bilateral Donor Policy Statements*, 41(1) IDS Bulletin 26, 34 (2010).

³¹⁷ See Millennium Development Goals: Romania 14 (2010), available at http://www.undg.org/docs/11956/MDG_Romania_Progress_Report_2010.pdf; Socialist Republic of Viet Nam, *Viet Nam Achieving the Millennium Development Goals* (2005) available at http://www.undg.org/archive_docs/6623-Viet_Nam_Fourth_MDG_Report.pdf; although for indications of the human rights challenges facing ethnic and other minorities in that country see Report of the Independent Expert on minority issues, Gay McDougall, Addendum: Mission to Vietnam (5-15 July 2010), U.N. Doc. A/HRC/16/45/Add. 2 (Jan. 24, 2011), available at <http://access-dds-ny.un.org/doc/UNDOC/GEN/G11/103/82/PDF/G1110382.pdf?OpenElement>.

rewards progress in the lower income quintiles³¹⁸ and disaggregating by regions or sub-national units are among the other options to be considered. Thailand's MDG-plus framework, for example, adds specific targets for disadvantaged regions in [*123] the country and Argentina has established targets to reduce inter-provincial inequality by ten percent for child mortality and maternal health *goals*.³¹⁹ The government of Kenya has set targets for each region in that country to improve water and sanitation access by ten percent each year. And Bangladesh has introduced targets corresponding to indicators for depth and severity of income poverty.³²⁰ Devising appropriate, reliable and cost-effective methods to assess "affordability" of basic services across countries should be taken up as part of this challenge.³²¹

VI. Concluding Reflections

The MDGs symbolise an unprecedented global partnership for poverty reduction. Born in relative obscurity in the wake of the *Millennium* Summit, the MDGs have exerted an impact on *development* discourse and policy well beyond the expectations of their architects. Yet, on present indications, they may well prove to be the world's biggest unmet promise. It is essential to learn from the lessons of this experience as negotiations towards the post-2015 *development* scenario gather momentum.

A new global deal is needed, rooted in ethics of universalism, equality, solidarity and global social justice, and framed and buttressed by human rights. The main barriers to realising the MDGs are deficits in political will, rather than resources. The human rights framework can help to close the accountability gap and strengthen incentives for action, mobilising individuals and communities to demand the MDGs as a matter of right, rather than charitable dispensation.

But can solidarity and enlightened self-interest trump parochialism and short-run domestic political incentives? The 2015 negotiations will likely occur in a more fractious and divided world compared with the millennial moment that spawned the MDGs. The attacks on September 11, 2001 brought a new era of global insecurity in which human rights violations are increasingly justified, by democratic and authoritarian regimes alike, in the name of "freedom" and "stability." The financial, food, water and climate crises have been among the other game-changers, imposing disproportionate and unjust burdens upon the poorest populations (often [*124] also in low-income countries), in a global scramble for scarce resources and rising inequalities within and between countries.³²² The Arab Spring, backed by the communications revolution, has heralded a welcome re-affirmation of the universality of human rights aspirations while at the same time generating brutal backlashes within and beyond the Arab world.³²³ The "occupy" movements joined individuals across the globe in a common struggle against corporate greed, social injustice and rising inequalities. However, the most powerful source of identity for most people remains the community and nation state

³¹⁸ Vandemoortele & Delamonica, *supra* note 15, at 64-67. Uruguay's social security target (national Target 1.B), for example, prioritises progress in the lowest quintile. See Uruguay, MDGs Report (Nov. 2010), available at <http://www.undp.org/mdg/reports.shtml>.

³¹⁹ See Langford, *supra* note 48, at 86-87. The value of sub-national targeting is borne out in UNDP's analysis of Thailand's MDGs progress, bringing out regional and other inequalities. See Ellen Dorsey, Mayra Gomez, Bret Thiele & Paul Nelson, *Falling Short of our Goals: Transforming the Millennium Development Goals into Millennium Development Rights*, 28(4) *Neth. Hum. Rts. Q.* 516, 517 (2010).

³²⁰ Langford, *supra* note 48, at 86-87.

³²¹ The Millennium Summit committed States to "halve the proportion of people who are unable to reach or to afford safe drinking water," however the affordability element was dropped by the U.N. expert group due to its lack of measurability. Vandemoortele, *supra* note 253, at 4. Recent work on affordability indexes based on household expenditures on water and sanitation as a proportion of household income, with differential benchmarks for developing and industrialised countries, might give inspiration to post-2015 MDG deliberations on this issue, subject to more rigorous investigations into the validity and comparability of national benchmarks, cross-subsidisation effects, and potentially viable proxy measures. See, e.g., Henri Smets, *De L'eau Portable a un prix abordable* (2008).

³²² See, e.g., UNDP *supra* note 40, at 13-17; Human Development Report 2006: *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (2006).

³²³ See Hussein Agha & Robert O'Malley, *The Arab Counterrevolution*, N.Y. Rev. Books, Sept. 29-Oct. 12, 2011, at 42 (providing a more nuanced appraisal of the Arab Spring uprisings than some of the more triumphalist accounts in mainstream Western media); see also Guy Standing, *The Precariat: The New Dangerous Class* (2011) (for a provocative but prescient analysis of some of the root causes of global disenfranchisement from the perspective of labour market economics).

rather than a putative global polity.³²⁴ These tensions, amid shifting configurations of geopolitical and economic power, set an uncertain scene - at best - for negotiating a new global compact against poverty. Holding the line on the 2010 MDGs Summit commitment to "respect" international human rights law in MDG policy should be a minimum requirement to ensure greater coherence between human rights and *development*, trade, investment and environment policy.

The MDGs have been driven by the power of numbers, and in a climate of policy disagreement and mistrust the drive towards quantifiable and reductive expressions of human progress will certainly continue. Debates on the future of the MDGs will likely include revisiting the global framework of *goals*, targets and indicators. Appropriately designed targets, with adequate accountability mechanisms, can in principle strengthen incentives for delivery on human rights obligations, as can league tables which permit in-country and cross-country comparisons. Statistics, in turn, play an indispensable role in informing evidence-based policymaking, allowing measurement over time and space of the various inputs and stimuli that guide, and impede, global human rights progress. Towards 2015, we should be talking more about how to measure what we treasure, rather than treasure what we measure.

However there is a superficial allure in the "power of numbers" and the promise of empirical verification. In the well-worn truism: "There are three kinds of lies: lies, damned lies, and statistics."³²⁵ Statistics have to [*125] "shoe-horn complex, moving phenomena into clear categories," with varying degrees of correspondence to actual realities on the ground.³²⁶ Used uncritically, indicators - which are intended only to "indicate" - may inadvertently supplant the objectives to be achieved. Contestable assumptions and value judgements within statistical methods, and the indicators industry in particular, should be brought to the surface and challenged. Moreover, misconceived targets and "results-based management" can distort *development* priorities, privileging short-term quantifiable and reportable results over longer-run qualitative changes.³²⁷ For these reasons, deliberations towards a post-2015 global monitoring framework cannot be de-linked from deeper questions about the values, incentive structures and ideologies underpinning quantitative methods, as well as those animating international *development* policy and institutions more generally.³²⁸

The world has moved on from the "global planners'" understanding of *development* that, arguably, helped spawn the MDGs and their predecessors, the International *Development Goals*.³²⁹ Hence the post-2015 discussion needs to be first and foremost about basic values, as well as the incentive systems and accountability structures that may stimulate human rights realisation at the national level. We must also take careful stock of why, as some have claimed, the MDGs have been misinterpreted or misused.³³⁰ Is genuine misunderstanding really at play, or could there also have been conscious misappropriation in order, for example, to paper over unpalatable truths and root causes of *development* problems? Or to justify entrenched *development* orthodoxies and ideologies? Or to perpetuate configurations of power under existing aid relationships? How can the MDGs avoid being colonised by the aid and growth lobbies? How might it be possible for the MDGs, and a post-2015 agreement, to operate in practice as a servant for human rights, rather than as a master for extraneous ideological or policy motives?

³²⁴ Rodrik, supra note 41, at 231, drawing from the World Values Survey databank at <http://www.worldvaluessurvey.org/services/index.html>.

³²⁵ While this aphorism, popularised by Mark Twain, is frequently attributed to Benjamin Disraeli, it has earlier provenance in an article by Leonard H. Courtney, Baron Courtney of Penwith, To My Fellow-Disciples at Saratoga Springs, 26 The Nat'l Rev. 21-26, 25 (1895), available at <http://www.york.ac.uk/depts/math/histstat/courtney.pdf>. The remark was thereafter quoted in the Journal of the Royal Statistical Society. For further history, see University of York, Mathematics Department, Lies, Damned Lies and Statistics, available at <http://www.york.ac.uk/depts/math/histstat/lies.htm>.

³²⁶ Ranil Dissanayake, Lies, Damned Lies and Distorting Normative Categorisation, Aid Thoughts Web Log, (Jan. 29, 2011), <http://aidthoughts.org/?p=2036>.

³²⁷ As Saith argued, "institutionalising targets in bureaucracies and governmental regimes usually invites misuse and manipulation of statistics and the misrepresentation of outcomes." Supra note 20, at 1174.

³²⁸ Wade, supra note 41, at 686.

³²⁹ Duncan Green, From Power to Poverty, Oxfam Weblog, Nov. 3, 2011 available at <http://www.oxfamblogs.org/fp2p/?p=7409> (reviewing some of the main changes in developing thinking and practice since the year 2000, including systems thinking, complexity theory, and the diminishing role of aid, and the consequences that these have for a successor global agreement to the MDGs).

³³⁰ Vandemoortele, supra note 19. Cf. Tabatabai, supra note 36 (arguing that poor design, rather than innocent misunderstanding, is the problem). The literal transposition of global goals and targets is said to be the principal manifestation of this "misunderstanding."

The aid lobby will no doubt be challenged to some extent by the emerging research revealing the growing proportion of poor people living in middle-income countries, demanding a more explicit focus on individuals (rather than countries), inequalities, and distribution within countries, as well as a reconceptualisation of the architecture and purposes of aid in [*126] different contexts in the medium to long term.³³¹ Growth fetishists, similarly, will be challenged to articulate the particular mechanisms through which growth can yield inclusive and sustainable human *development* outcomes in specific country contexts, given the mounting evidence of the many possible proven pathways to *development*.³³² But the vested interests behind these lobbies are formidable, and will likely be marshalling at the MDG gates with renewed vigour towards 2015.

The international human rights framework can serve a vital purpose in helping to ensure that the negotiations towards 2015 focus on legitimate ends of human *development*, corresponding to internationally agreed upon human rights norms, rather than context-specific and contested means. Any successor global monitoring framework must include an explicit understanding that "global" *goals* and targets have very specific and limited, albeit important, purposes, to help raise the public consciousness about important facets of human *development* and generate political will and social mobilisation for action. National planning targets are quite a different matter. This may not entirely eliminate wilful misapplication of post-2015 global *goals* and targets, but it would at least deny the perpetrators a ready excuse for doing so.

Finally, few policy debates will be of greater importance leading towards 2015 than the debates about economic growth versus substantive equality, and the conditions under which growth policies may best contribute to inclusive, sustainable and pro-poor human *development goals*. These debates are all the more pressing in the circumstances of ongoing and compounding global crises discussed earlier in this Section. Governments principally owe human rights obligations to their own populations. In this respect, the growth of poverty and inequalities in middle-income countries gives fresh impetus and relevance to the international human rights framework. But the causes of poverty are not always endogenous, even in middle-income countries. There are a myriad ways in which good faith human rights implementation efforts continue to be impeded by actions and omissions at the global level. Regulatory failures in global finance, commodity market distortions, and the unfolding calamity of climate change are among the most glaring examples.³³³

The continued relevance and legitimacy of international human rights law will depend, in great part, on the pace and extent to which it evolves to [*127] meet these existential challenges of global inter-dependence. This should not be seen as a get-out-of-jail-free-card for governments in lower income countries, which are governed under international human rights law by a specific set of obligations of conduct and result that only partially depend upon international cooperation. Unlike many other international legal regimes, the human rights treaty regime is not a reciprocal one in the sense that a given state's obligations are contingent upon the performance of others. Nevertheless, to the extent that the causes of poverty are exogenous, richer countries will have fewer and fewer excuses to avoid binding and appropriately calibrated commitments for more effective global cooperation under human rights treaties and post-2015 global partnership arrangements. Whether the MDGs' successors are a milestone towards global social justice, or a millstone around the necks of the poorest, will depend upon the degree to which governments of richer and poorer countries alike can be held accountable for their human rights obligations.

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³³¹ Andy Sumner, *The New Bottom Billion: What if Most of the World's Poor Live in Middle Income Countries?* (2011), available at <http://www.ids.ac.uk/index.cfm?objectid=C0605688-DAE8-991C-849CE712A60753E0>. And as Vandemoortele and Delamonica have argued, *supra* note 15, at 61: "compared with trade and other financial flows, foreign aid is something of an over-blown sideshow."

³³² HDR 2010, *supra* note 21, at 45-64.

³³³ See, e.g., David Kinley & Mary Dowell-Jones, *Minding the Gap: Global Finance and Human Rights*, 25 *Ethics & Int'l Aff.* 183 (2011); Report of the U.N. Special Rapporteur on the right to food, Olivier de Schutter, *Agribusiness and the right to food*, U.N. Doc. A/HRC/13/33, Dec. 22, 2009; Report of the U.N. Special Rapporteur on the right to food, Olivier de Schutter, *Crisis into Opportunity: Reinforcing Multilateralism*, U.N. Doc. A/HRC/12/31, July 21, 2009; Darrow et al., *supra* note 278.