Human Rights and Wrongs: A Look from the Reverse Angle of Costs and Obligations

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I. INTRODUCTION

Most of us welcome the emphasis increasingly placed on human rights. We applaud their expansion within the domestic legal order. We rejoice when we see them recognized internationally, and this despite the misguided if not perverse experience in their name, where a long-standing local ethnic conflict in need of impartial remedial intermediation was dealt with by a one-sided destructive and inconclusive bombardment of an entire nation. Human rights are here to stay and expand. The more we proclaim our devotion to human rights, however, the more we should be concerned about their sanctification in the abstract, in a utopia of wishful thinking, without adequate reference to the corresponding obligations as well as the costs of implementation. Indeed, there is an added reason to worry when, as is all too often the case, the glowing rhetoric about human rights comes from questionable sources (countries with poor records and bureaucrats and professional defenders who make an easy career out of it) but, most importantly, when formal enunciation is equated with meaning and reality and the inquiry stops there.

The literature on fundamental human rights has been quite extensive and the most controversial aspects relate to so-called social and economic rights. Efforts are being made at this time (November 2000) to incorporate them into a Charter of Fundamental Rights of the European Union (Draft Fundamental Charter)[1] which will be considered at the Summit Conference of December 2000 in Nice. The intention eventually

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1. Charte 4487/00, 28.9.00, *available at* fundamental.rights@consilium.eu.int.

is to add them to the treaty or, even better, to its hoped-for constitution, or at least to dress them up in a formal declaration or proclamation. These developments justify a reexamination of some basic issues.

Let me start with a reminder that human rights, like all rights, must be approached at many levels, starting with their definition and purpose, and continuing with their reconciliation among themselves. Human rights are limited not only by other human rights but also by human necessities. At a deeper level, any right is empty if it does not require some action or omission by an ascertainable obligor.[2] This corresponding obligation in a very real sense limits the freedom or appropriates the resources of some other person or agency, potentially invading his own rights, so that every time that a right is asserted, some balancing must be made with the "counter-right" of lack of obligation. Consequently, in the final configuration of the right, the benefits to the claimant must be weighed against the costs to those who carry its burden on some acceptable scale of values.

Indeed, a more precise approach to rights may be seen through the lens of the "wrongs," i.e., by asking what conduct by which person violates a given right. In the end, not only the "right" of the holder but also the "obligation" of the respondent ought to have some reasonably ascertainable contours so that a qualified person called upon to implement them in a particular situation should often be able to determine what should be done and by whom. Optimally that person should be an impartial reviewer, independent of the parties and vested with the authority to issue binding orders, hence the talk about the "judicialization" of rights. But even if the decision-maker is for example a functionary of the executive branch, so long as he is required to give reasons for his action and the criteria are sufficiently precise, there is some substance to the whole process. To the extent that a right is not capable of violation, it lacks substance.

I propose to test my concerns about the lack of attention to the obligation and the cost side of human rights in the context of three categories of rights that have received wide attention: the right to free expression, the right to work, and the right to life. I will seek to show that free expression is basically unproblematic. By contrast, the "right to work" is plagued not only by serious uncertainties but also by inattention to the cost of obligation. However, the more precise and substantive it

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2. *Cf.* the recent draft, *Universal Declaration of Human Responsibilities*, prepared by the Inter-Action Council, for introduction in the U.N. General Assembly, discussed in A. Clapham, *Globalization and the Rule of Law, No. 61 Review of the International Commission of Jurists* 17, 25-27 (1999), reflecting the Asian perspectives about obligation.

seeks to become, the greater the burden of implementation and improbability of realization. Hence, the line between good intentions and good results here is pretty thin. Finally, I will delve into the intricacies of the right to life, explaining why it requires some very hard thinking and even harder choices.

II. THE RIGHT TO FREE EXPRESSION

The traditional right to free expression easily meets the requirement of being relatively clear and of linking rights to obligations on the basis of a wide consensus on values and methods. Both the nature of this traditional right and the identity of the obligor are unproblematic. Its main thrust as a freedom is negative: it calls for abstention, for noninterference by the government and, by extension, other authoritative agents in the course of their public functions. The means to insure respect and enforcement of the right are also well settled. The right is typically enshrined in the constitution and the government must impose neither prior restraints and censorship nor subsequent punishment on those who exercise it. The legislative and the executive branches of government must not infringe upon it and the judicial branch must protect it through injunctions, awards of reparations and all other procedural weapons in its arsenal.

To be sure, there has been some controversy about its scope: What modes of expression are covered? Is everyone equally entitled to it? Where do we draw the line between action and expression? Also, its reconciliation with other rights and interests have been debated at length: how is it limited by the rights of others, which government must also protect? For example, freedom of expression may collide with the right of others to their property (public forum, home, private means of expression), to their good name (libel), to the honesty of transactions (fraud), to the freedom not to hear (peace and quiet), to ethical mores (obscenity), to national security (military secrets), to electoral probity (campaign financing), and so forth. A special remedy, in the direction of transparency, which is debatable in the United States of America at least for individuals, would be to require those who engage in expression, especially the media, to identify themselves and provide full information about their finances and interconnections. In Europe, and especially in Greece, there is high concern about the undue political influence, reaching the boundaries of corruption, of the major mass media, when owned or controlled by persons who have connections with the government (public procurement, etc.), and attempts are being made, going beyond disclosure, to prohibit such enterprises and their associates

from having any dealings whatsoever with the government. Overall, however, there exists a reasonable consensus in the United States, and in Europe, about where and how to draw most lines, derived from the common understandings about worth and purpose: free expression has great, indeed primordial, value both for self-government and for self-realization of the citizen. Therefore, its limits must be narrow, well defined, and justified.

In recent times, it has been also argued that the traditional right is not enough, that we also need to subsidize a right of "effective" free expression, protecting it not only against the government but also against others, especially now that media concentration and technology have enabled those with money to dominate the marketplace of ideas and drown out the voice of us simple citizens. Considerations of equality also come into play here. A drastic way to take care of this concern is to abolish private property altogether or at least to equalize property holdings, something that nobody seriously advocates. Another, equally objectionable way would be for the government to diminish the voices of some so that others can be better heard. Rather than yield to these approaches, less objectionable ideas have seen the light.

From the perspective of equalizing opportunity of expression, the government may be affirmatively enabled, or even obliged, to fund a system of public media or to require the private media to create some public "space" where every citizen could be given "equal" access to some exposure. This has been done to a limited extent, for example, in the United States of America where some public media provide citizen access and where the licensees of some type of private media, e.g., cable television, have been forced to provide a public-access first-come-first-served channel. In terms of results, however, these windows of opportunity have not brought about significant changes in the available mix of information and ideas. It should be noted that the Draft Fundamental Charter shares some concern about this, although the subject apparently remains controversial. It is quite fascinating that while in the prior version 4422/00, dated July 28, 2000, paragraph 2 to article 11, on freedom of expression, stated that "Freedom of the media and freedom of information shall be guaranteed with due respect for pluralism and transparency," the version 4487/00 of September 28, 2000, reduced this to "[t]he freedom and pluralism of the media shall be respected," thus eliminating both the "transparency" and "freedom of information" aspects and substituting simple "respect" in place of "guarantee."

Incidentally, we should be careful not to confuse government intervention to strengthen the right of expression of the citizens with the right of expression of the government itself. Indeed, in some countries, for example, the United States of America, the government has no right to use public resources to express its views beyond supplying information for the benefit of the citizens. On the other hand, we should distinguish between government expression as such, which is limited, and the undeniable role of the government to promote educational and cultural goals through many means, including the direct or indirect funding of public programs. To be sure, this both forces the citizen to subsidize some kind of "expression" which he may find distasteful or indifferent and deprives him of resources that he may have used for some other expression. However, the right to expression does not stand alone and must co-exist with the other functions of government in a free and democratic society, including public support of education and culture.

Focusing now on the cost of the right to free expression, on what sacrifices it brings about, the burden appears to be minimal. The obligor, the government, must not interfere, so there is no out-of-pocket direct expense. The potential negative impact of this noninterference on the smooth operation of governmental functions is also negligible. Its protection and reconciliation through the courts adds very little additional cost. Even government funding of some "public access" does not demand major resources. Thus, the indirect cost to the very holder of the right and to the other citizens by reason of their share in the related public expenditures is insignificant. The burden to tolerate and be exposed to unwanted or offensive expression in certain circumstances and to be affected by its influence on others is quite minor and not invariably harmful, given the specific limitations discussed earlier.

In conclusion, we have seen that the right to free expression, in terms of content and obligation, is sufficiently defined and adequately enforceable, and that its benefits by far exceed its burdens and costs.

III. THE RIGHT TO WORK

Within the so-called "second generation" of economic and social human rights, the "right to work" has achieved prominence. Indeed, given the high unemployment in Europe, it is currently looked upon as a promising instrument of social policy, and this is a good time to give it another look. We find some references to the right to work not only in many constitutions in Europe[3] ("Work constitutes a right which is

3. *Cf.* GREECE CONSTITUTION art. 22.1.

protected by the state"),[4] but also in the Draft Fundamental Charter, in the United Nations Covenant on Economic, Social and Cultural Rights (U.N. Covenant),[5] and in the European Social Charter of the Council of Europe (Social Charter).[6] Our review will focus mainly on them.

For the uninitiated, the right to work would suggest a freedom—the choice of one's employment and occupation without government interference[7]—and this would appear consistent with the general system of freedoms protected by traditional human rights as well as the more modern rights to develop one's personality and to pursue one's economic goals. At first glance, the various texts appear to support this perception.

Look, for example, to article 6 of the U.N. Covenant, which provides:

> 1. The States . . . recognize the right to work, which includes the right of everyone to the *opportunity to gain his living by work which he freely chooses or accepts*, and will take appropriate steps to safeguard this right.
> 2. The steps to be taken . . . include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions *safeguarding fundamental political and economic freedoms to the individual.* (emphasis supplied)

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4. *Id.*
5. 993 U.N.T.S. 3.
6. 1996 Revision, E.T.S. 163.
7. *Cf.* the "right to work" laws in some states in the United States, allowing a worker to disobey the strike calls of his union. On the "right to work," two major recent U.S. contributions are Kenneth Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523-71 (1997), a thorough examination of the employment data and a thoughtful analysis and exploration of the constitutional implications and of the methods of implementation, and James Gray, *Labor's Constitution of Freedom*, 106 YALE L.J. 941-1031 (1997), containing a full historical review of the perspectives and attitudes of organized labor on these issues. For the continuing debate in the United States of America on "economic" and "social" rights more generally, see Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97 (1994); Barbara Stark, *Economic Rights in the United States and International Human Rights Law*, 44 HASTINGS L.J. 79 (1992); Lynn A. Baker, *The Myth of the American Welfare State*, 9 YALE L. & POL'Y REV. 110 (1991); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990); Jon Elster, *Is There (or Should There Be) a Right to Work?*, *in* DEMOCRACY AND THE WELFARE STATE (Amy Gutmann ed., 1988); Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987); Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Thomas Frank, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811 (1984). For Europe, a useful recent manual is L. BETTENE, THE PROTECTION OF FUNDAMENTAL SOCIAL RIGHTS IN THE EUROPEAN UNION (1996). *See also* Matthew C.R. Craven, *The Domestic Application of the International Covenant on Economic, Social and Cultural Rights*, 40 NETH. INT'L L. REV. 367 (1993).

Article 15 of the prior version of the Draft Fundamental Charter referred in its heading only to the "freedom to choose an occupation" and included in paragraph 2 "the freedom to seek employment, to work." Part I.1 of the Social Charter also states that "everyone shall have the opportunity to earn his living in an occupation freely entered upon."

A closer examination, however, shows that the main thrust of the "right to work" in most instruments goes in the opposite direction. At its core we find not a freedom at all but an entitlement of everyone to a "job" which is "decent," sometimes intertwined with a right to a life which itself is decent. Observe, for example, that in article 6 of the U.N. Covenant, the freedom to work is just "included" in a more general "right to work" which obliges the government "to pursue . . . policies and techniques to achieve . . . full and productive employment," and article 7 adds:

> The States . . . recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular
> (a) Remuneration which provides all workers, as a minimum, with:
> (i) Fair wages and equal remuneration for work of equal value . . .
> (ii) A decent living for themselves and their families; . . .
> (b) Safe and healthy working conditions;
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
> (d) Rest, leisure and reasonable limitation of working hours . . . .

In addition, article 8 defines and protects the right of workers to unionize and to strike. The Social Charter is more detailed and comprehensive in the articulation of work rights along these lines.[8]

It is quite noteworthy that, by contrast, the Draft Fundamental Charter, under "Solidarity," covers only what may be called working conditions and environment, e.g., rights of workers to information and

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8. *See, e.g.*, Social Charter pt. I. 2-6, 8-10, 12, 19-22, 24-29; *id.* pt. II, art. 1 (the right to work), art. 2 (the right to just conditions of work), art. 3 (the right to safe and healthy working conditions), art. 4 (the right to fair remuneration), art. 5 (the right to organize), art. 6 (the right to bargain collectively), art. 7 (the right of children to protection), art. 8 (the right of employed women to protection of maternity), art. 9 (the right to vocational guidance), art. 10 (the right to vocational training), art. 20 (the right to equal opportunities and equal treatment without discrimination on the grounds of sex), art. 21 (the right to information and consultation), art. 22 (the right to take part in the determination and improvement of the working conditions and working environment), art. 24 (the right to protection in cases of termination of employment), art. 25 (the right of workers to the protection of their claims in insolvency), art. 26 (the right to dignity at work), art. 27 (the right of workers with family responsibilities), art. 28 (the right of workers' representatives), art. 29 (the right to information and consultation in collective redundancy procedures).

consultation (art. 27); collective bargaining (art. 28); placement services (art. 29); fair and just working conditions for health, safety and dignity, plus limited hours, rest and vacation (art. 31); as well as to certain rights of children and women (arts. 32-33). In particular, there is no reference to a right to work (notwithstanding the provocative addition, in the last version of article 15, of a "right to engage in work" and to the freedom to pursue a freely chosen or accepted occupation), to a right to continued employment or to a right to "fair" wages. Incidentally, the European Commission perceives the Draft as providing "an adequate basis for securing a consensus," noting that certain "rights" such as the "right to work" and the "right to an equitable wage" were not included as "simply setting policy objectives."[9]

The first, and obvious, question is: is it possible to transform the wish and hope for a decent job into a set of "rights?" The answer is both yes and no and must be divided into two parts, one with respect to the "decency" and the other as to the "availability" of a job, with more yes and less no in the first as contrasted to the second part. At the same time, whatever rights are articulated here must be adjusted to the demands of other, potentially conflicting, rights and values.

Yes, a real definition of a "decent" job could be provided by setting up binding standards of decency either directly by labor legislation or through a process, e.g., collective bargaining between the "social partners" (labor unions and employer associations). Indeed, all the above texts enumerate many standards of this kind regarding conditions of employment. The face side of this coin, the labor benefits side, sounds very appealing. On the other side, however, we find three heavy costs. First, the economic freedom and autonomy of the participants, including the workers, to make different and individualized arrangements which suit them better are reduced. Second, to the extent that these standards do not always produce efficient outcomes, there is waste. The total social wealth is decreased, thus affecting also the share of labor. And third, there exists a real and major danger that the more "decent" a job the fewer of them will be available in the economy and the greater the resulting unemployment. Hence the answer must be negative to the second part of the question.

So, a "no" should be added here. These standards are debatable unless two things are also taken into account: (1) they must be drawn carefully to minimize interference with the respective freedoms and

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9. Commission Communication on the Charter of Fundamental Rights of the European Union, Com (2000) 559 final, Sept. 13, 2000.

(2) how far they apply in a particular context must be decided by reference, so to speak, to what the market can bear. Both of these considerations require a delicate balance. For example, we may all agree with articles 6 through 8 of the U.N. Covenant that the conditions of a decent job must be "just and favorable" to ensure "fair wages and equal remuneration" and a "decent living for workers and their families," "safe and healthy working conditions," "equal opportunity to promotion," "rest and leisure" and the "right to strike," as well as the right not to be forced to perform services. However, we must be aware that the broadness and vagueness of these notions and the fact that they are stated in absolute terms not only significantly limit the "freedom" to employment of the worker (thus, restricting his "opportunity to gain his living by work which he freely chooses or accepts" under article 6.1) as well as of the employer, but generate uncertainty as well as disassociation from what the "market can bear." On the other hand, replacing the "fair wage" with a set "minimum" one, thus making it concrete and current, adds too much inflexibility especially over time. In conclusion, the answer on the "decent" job issue is a carefully balanced and conditional yes-no.

Yes, a real right to a "job" could be created by requiring either the government or the employers, through some formula and procedure, to provide a specific job to everyone who asked for it. There is no question, however, that the cost would be enormous. Total central planning could do it, and create real rights, but the bureaucracies, inefficiencies and favoritism that inevitably would accompany it are forbidding. Requiring or encouraging private employers, through carrot-and-stick rules and policies, to hire persons that they would not have otherwise taken, with the government remaining as the employer of ultimate resort for the rest, would again involve too high a cost of the same kind as compared to the expected results. No wonder that no one even comes close to suggesting a system of guaranteed jobs as it would place inordinate burdens on the productive process and at the same time dwarf the rights to property and to economic freedom of the others. The above texts surely do not purport to create such a right. A more moderate interpretation would call on the government to guarantee a decent "wage" to everyone regardless of employment, in which case the right would transmute or merge into the right to social welfare, or even to life. An additional complication is that a "right to work" presupposes that there is a (dependent) employment relationship, i.e., it assumes that the economy is operated by employers (obligors) and employees (rightholders). What happens, however, to those who are self-employed?

Consequently, no, the various texts do not create a "real" right to work. Notice, for example, the key qualifying language in article 6 of the U.N. Covenant, which refers to (undefined) "policies and techniques that the government must take in order to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding political and economic freedoms." I presume that all of us recognize that there are many ways to run an economy at various stages of development. These may involve an infinite number of details and techniques and different economic philosophies and systems for the production and distribution of social wealth (socialism, capitalism, third road, etc.). To attempt to predict and control what employment opportunities may become available to whom at any one time and stage, and to formulate rights and corresponding obligations, is a task far more complex than guessing the future on the basis of astrological observations. If we add the competing constraints which derive from the stronger and more specific right to property, as well as from the basket of freedoms guaranteed to every person, then we realize that perhaps we are doing no more than chasing rainbows in the field of politics. In other words whether the employment system of any one state qualifies as providing ample and good opportunities is purely a political question to be judged only at the general level of good governing. Yes, of course, all of us ardently wish and hope that, among other things, the economy should be operated in a manner that produces good employment opportunities for everyone who wants to be employed. But this does not generate real rights by any stretch of the imagination in terms of either content or enforceability.

The mechanisms for enforcing this "right to work" are consistent with this interpretation. No direct effect or applicability mechanisms for recognition and vindication have been created, and articles 16 through 23 of the U.N. Covenant merely provide for reporting by the states to the U.N. Secretary General and to the Economic and Social Council for discussions and consultations and the like. There is no indication that any "blacklisting" or other sanctions were ever imposed on signatory nations that may have violated these provisions. As regards the Social Charter, the states merely agree to consider part I as a "declaration of the aims" which they will pursue by "all appropriate means"[10] and to adopt domestic laws, regulations, agreements and other appropriate means to implement those provisions of part II which they have accepted.[11] Notice

10. Social Charter pt. III-A.
11. *Id.* pt. V-I, 1a-d.

also that it is sufficient if most of this is done with respect not to all but only "the great majority of the workers concerned."[12] The Draft Fundamental Charter refers only quite generally to a right of everyone whose rights and freedoms are guaranteed to "an effective remedy before a tribunal" and a fair trial (art. 47.1). Equally lax enforcement, without some form of accountability, let alone justiciability, occurs in the comparable national constitutional clauses.

Articles 136 through 137 of the Treaty of the European Union, as amended in Amsterdam, generated a certain excitement about labor and employment goals hardening into law. However, a closer examination shows not only that these provisions are stated in vague terms and relate mostly to standard working conditions, and that wages, unionization, strikes and lock-outs are specifically excluded (art. 137.6), but also that these goals should be pursued gradually through limited-range directives (art. 137.2). Furthermore, the social protection of workers, protection at termination, and expenditures for employment and job creation require a unanimous decision of the Council.

The foregoing analysis addressed the right to work in the context of "obtaining" a job. There is also, however, a hybrid, derivative and qualified right to "retain" work and here the existing provisions have more bite and substance and deserve a special look. Article 24 of the Social Charter requires a valid reason for termination of employment, namely, one related either to the capacity and conduct of the worker or to the "operational requirements" of the employer, whereas article 30 of the Draft Fundamental Charter protects against "unjustified dismissal." Three observations are in order here. First, as a matter of principle, since a right against dismissal is essentially a right to a job, it should be no greater than any right to obtain a job. Otherwise, those who seek a job not only are treated less favorably in terms of rights without adequate reason but also the actual opportunities for them to obtain a job are reduced in view of the likely increased reluctance of employers to hire. Second, the significant transaction costs generated by the necessity to justify and defend a dismissal should discourage any but the most limited definition of what dismissal is "unjustified." Third, a very narrow protection here would be consistent with its classification within the "decency" rather than the "job" entitlements.

Now let us address the difficult question of how this right to a "decent job" relates to the more general right to social protection, to a "decent life." This inquiry will also prepare the ground for our

12. *Id.* pt. V-I.2.

consideration of the right to life. In the U.N. Covenant, the states undertake the additional obligation to provide to everyone an "adequate standard of living" (art. 11.1), the "highest attainable standard of physical and mental health" (art. 12.1), and so forth. The "policy" of the Social Charter (part I), to be pursued by all appropriate means, is "the attainment of conditions in which the [listed] rights and principles may be effectively realized." These include the rights of everyone to the "highest possible standard of health attainable" (art. 11), "social and medical assistance" if the individual is without adequate resources (art. 13), "social welfare services" (art. 14), "social protection" for the elderly (art. 23), "protection against poverty and social exclusion" (art. 30), "housing" (art. 31), etc. Various articles in part II seek to define these rights further. Typical is, for example, article 11 on the right to health. With a view to ensuring its effective exercise, the parties undertake to take appropriate measures designed *inter alia* to (1) remove as far as possible the causes of ill-health, (2) provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health, and (3) prevent diseases. Finally, articles 34 through 35 of the Draft Fundamental Charter speak of entitlement to "social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age" (art. 34.1), "social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources" (art. 34.3), and "preventive health care and the right to benefit from medical treatment" (art. 35), in all instances as provided under national and community laws, which suggests an equal protection rationale.

Putting aside the qualified, relativistic language that defines these rights, and the indirectness of the mechanisms for enforcement, it would appear that they are conceived as lesser and supplementary to the right to a decent job. In other words the needs of the worker for a decent life are primarily protected through labor laws and policies. Consequently, the main beneficiaries of these rights are the unemployed or unemployable and the indigent.

In my view, this is the wrong approach, and this is not only because of the major technical and operational difficulties of deciding where the protection of the decent job ends and the right to a decent life begins. In my judgment, the priorities ought to be reversed. The major right and concern should be to safeguard the decent life. Employment is a false target, since it is only part of, and a method for, the pursuit of the good life. The end goal is adequate resources for a decent living and this should cover everyone both employed and unemployed. Indeed, on the

way to the best of all possible worlds of the future, the more the production of goods and services becomes massive and automated, the more leisure time will be generated and the less human effort and thus employment will be needed. The major concern will be not how to reward the laborers through "wages" but how to empower everyone through a share of property. A look at the exponential increase of the ownership of the means of production by the American public through the stock market, including mutual funds, investment companies, and retirement and pension plans, would be quite instructive. In the end, the real issue is how to distribute justly the resources that an efficient free-market economy produces, while providing maximum free time, not other-directed "employment," for everyone to develop his own personality and life style.

Reversing the priorities produces also an extremely important side benefit: it makes it possible to leave employment to the needs and processes of the market, supporting everyone at a decent level of life but without forcing workers upon unwilling employers and into artificial and controlled employment straight jackets. In other words, in a properly functioning economy, especially where free competition and nondiscrimination are protected, the state should stay out of the employment picture.

The key question then is where should we draw the "decent life" support line and how we should implement it. It is crucial to start with a proper understanding of what such support means and for what it is intended. The rhetoric about "social and economic rights," "solidarity," "welfare state" and the like should not obscure the fact that, both for ethical and practical reasons, resources should not be distributed equally. There is an overwhelming consensus in our society, express or implicit, that, on the high side, both in terms of efficiency, cost-benefit and merit, the distribution of social wealth should be based on contribution; whereas, on the low side, a "basic income," i.e., resources for a decent standard of living for all, not equality, should be guaranteed.

Support for basic income, of course, is costly but it is possible to give it the flesh and bones of a real right and to adopt efficient implementing procedures so that it is amply justified when measured against the enormous benefit gained. First, basic really means "basic," i.e., at a level of decent subsistence, given the standard of living in the relevant community. In order not to create disincentives to work and not to encourage too much loafing, the level of support for former workers in the unemployment compensation category cannot be too high. Second, the least bureaucratic and simplest way to administer a system of

distribution would ideally entitle everyone to basic income in the form of a public stipend simply for being a member of a particular community, for example, by merely showing his identity card. Alternatively, a requirement of lack of means could be imposed, but the enforcement is difficult given the possibilities of dissimulation and corruption. Another variation would be, still within a range of "basic," to adjust the stipend upward for reasons of clear and pressing need, again, however, generating a new set of loopholes. To make sure that the stipend is indeed used for subsistence and not wasted in luxuries, and especially that parents or custodians are using it for the benefit of children, a good portion could be provided in kind, especially as it concerns basic needs such as education, housing, health services, even food. This portion need not be supplied by public institutions but could be channeled through vouchers in the private economy.

On a global scale, any obligation undertaken by the "have" nations to support the basic income of the people in the Third World should necessarily be accompanied by measures to insure that the economies of those nations are properly managed and open and that their governmental institutions operate at a minimal level of efficiency and honesty. Simply put, nations may not fortify themselves behind notions of national independence and sovereignty over their natural resources and still claim that the others have some enforceable duty to share their wealth with them, especially with their ruling elites, as if they were citizens of the same state. The legal philosopher John Rawls, who would maximize the claims of distributive justice through egalitarian standards in his famous *Theory of Justice* (1971), clearly distinguishes in his recent treatise *The Law of the People* (1999) between the strong internal solidarity requirements and the lesser support due to those in foreign countries.

Our conclusions on the "right to work" can be summarized as follows: (1) there is a major difference between the right to a "decent" job in the sense of conditions of work, and that same right in the sense of the availability of work; (2) the right to a "decent" job could be given reasonable substance by mandatory rules, e.g., labor legislation, but we should be careful not to so burden the economy that both the cost in efficiency of production is too high and the availability of employment is lessened; (3) the right to a decent "job" realistically is more of an aspiration, and, given the different views as to what makes a more productive and efficient economy, and considering the costs and burdens of interfering in the labor markets, it is best covered by an adjustment of the right to a "decent life" through a "basic income" support level. We

will explore the question of how this right to a "decent life" relates to the right to life in general in the next and final Part of this study.

IV. THE RIGHT TO LIFE

The most basic and hallowed "right to life," enshrined in tradition, is reiterated quite emphatically also in the modern texts. For example, article 6.1 of the U.N. Covenant on Civil and Political Rights[13] speaks of an "inherent right to life" which "shall be protected by law" and provides that "no one shall be arbitrarily deprived of his life." In the subsequent paragraphs of article 6, the imposition of the death penalty is circumscribed. Article 2.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[14] recognizes that "everyone's right to life shall be protected by law" and commands that "no one shall be deprived of his life intentionally" except under the most limited circumstances, including, however, not only a properly imposed death sentence but also "defense . . . from unlawful violence." Article 2 of the Draft Fundamental Charter not only articulates a right to life but also prohibits the death penalty altogether.

In pursuit of the meaning of "life" in these contexts, it is generally accepted that first, the state shall not itself intentionally kill a person except in the most extraordinary circumstances; and second, the state has an affirmative obligation to protect against the taking of life by others. When we try to particularize these commands, however, we enter a field of ambiguity, and the persuasiveness of the answers ranges widely:

(1) On the obligation not to kill, what is the meaning of "intentional" (a term found only in one of the texts but subsumed in all) and of "taking?" How about the state knowingly placing a person in (probable/possible) harm's way or generating a related risk? Drafting a person into the army or security forces, at least in wartime, should qualify as an intentional act leading to taking but is justifiable on grounds of necessity and of the overriding principle that *salus populi suprema lex est.* Comparable support comes for sanctioning killing in self-defense, at least when life is threatened. Generating risks, however, is far more complex. If the state were, for example, to impose compulsory vaccination against a dreaded disease, knowing that a certain percentage of the recipients, however small, were likely to die, would it not be intentional but justifiable killing? In another direction, how about merely doing nothing and allowing a person to die from hunger or from

13. 999 U.N.T.S. 171.
14. 213 U.N.T.S. 221.

lack of medical care? In the end, except in the rare situation of the state itself pulling the switch, which is prohibited except under the most strict and specified conditions, is the obligation of the state to respect life only a requirement that, in what it does and does not do, it take into account the value of human life through an overall cost/benefit justification?

(2) On the affirmative obligation to prevent others from taking life (the negative obligation not to interfere with the right of self-defense is less problematic), what measures are necessary? Inevitably these will limit the freedoms of everyone and also consume common resources. Should they not also be chosen on the basis of a cost/benefit analysis? In other words, how much sacrifice of overall liberty plus monetary expense is justified or required for each life saved? Is it not clear that unavoidably we do place (consciously or unconsciously) a monetary value on human life, no matter the rhetoric?

(3) After all, what is the real meaning of "life?" How much of it should be sacrificed before it is constitutes a "taking?" Some extreme examples would be placing someone in a permanent coma or cutting off his arms and legs. To be sure, the first would be considered as "killing" and the second would trigger the rights to personal security and integrity, which are also protected, as well as the prohibitions against torture, cruel and unusual punishment, and so forth. The underlying assumptions, however, are more controversial and could lead us into more provocative territory. Indeed, should we not ask the basic question whether "life" is only a quantity or must it include also a certain quality? This reminds me of joke from the times of Stalin in the Soviet Union. During a reception for a delegation of western visitors on the seventh floor of a building, Stalin bragged that his generals were so devoted to him that they would do anything he asked. To prove his point, he ordered the first general to jump out of the window to his death, and he promptly obliged, followed by a second and a third. As the fourth general was getting ready to jump, a visitor intervened: "General, are you really willing to sacrifice your life for comrade Stalin?" Then came the reply, "But, sir, do you really call what we lead here 'life'"?

It seems to me that the "value-of-life" calculus, in the context of the obligation of the state not to harm life as well as to protect it, should take into account both life's length and content. Indeed, many of the lesser but important human rights at least in comparison to life itself, such as the freedom of expression and the right to a "decent job" or to a "basic income" that we discussed above, are intended to make life more worthwhile and this fundamental rationale should extend to the definition of life itself.

A puzzle that has been challenging and tormenting legal theorists is whether some life or lives may, or perhaps even should, be sacrificed when it is certain that this will save more lives. For example, is it justifiable for the driver of a trolley out of control, which is fatally headed toward a group of people, to spare them by turning it in the direction of a single person?[15] Or may a group of shipwrecked persons kill and eat one of their number in order to save the rest of them from certain starvation[16] or throw someone overboard to prevent the sinking of the boat?[17] A noble answer to these questions is total denial. Human life is sacred and invaluable. Not even a single human life may ever be sacrificed to save whatever number of lives, let alone to achieve some other worthwhile objective. Perhaps this is true when it comes to pulling the trigger or turning the switch. My much more mundane point is that the state is constantly making decisions and enforcing rules that intentionally (knowingly and probably) result in the loss of lives and that this is generally accepted, at least subconsciously, and considered justifiable.

Let me illustrate from my professional experience. Some time ago on a TV program in Ohio, I debated the chief of highway police on whether the speed limit on interstate highways should be raised from fifty-five to sixty-five miles per hour. His opposition was based on the "irrefutable" argument that at sixty-five miles per hour so many more (e.g., 600) people will die on the Ohio highways each year, which was unacceptable since the taking even of a single life was not permitted. I asked him quite simply why then the state does not reduce the speed limit to forty-five or even five miles per hour. Would not many more lives be thus saved? I am still awaiting an answer other than "but this is obviously too slow"! Another unanswered and more sophisticated question was whether preventing the waste of, for example, five billion motorist hours on the highways at fifty-five miles per hour outweighed the statistical risk of an additional death due to the increased speed limit.

Indeed, in real life, the state is weighing lives not only against other lives but against other values. Mandatory rules or even just the allocation of funds, e.g., for medical care, for the construction of buildings and highways, for the safety features of products, probably for almost

15. For a recent discussion of this age-old hot potato, see, e.g., G. CHRISTIE, THE NOTION OF AN IDEAL AUDIENCE IN LEGAL ARGUMENT 89-107 (Kluwer 2000); G. Christie, *The Defense of Necessity Considered from the Legal and Moral Point of View*, 48 DUKE L.J. 975, 1011-41 (1999).

16. Dudley & Stephens, 14 Q.B.D. 273 (U.K. 1884).

17. United States v. Holmes, 26 F. Cas. 360 (E.D. Pa. 1842).

everything that the state does, "affect" life, not just its quality but also its quantity. This means that a cost/benefit calculus is unavoidable and the only question is whether we will do it with awareness and deliberation or will let it happen intuitively and haphazardly. But have no fear, cost/benefit does not mean crass materialism, not even utilitarian consequentialism! The values and weights that go into the calculation depend on the chosen ethic. Such a system can be not only nonmaterialistic but also deontological, e.g., the altruistic satisfaction of obeying a spiritual command could count on the side of "benefits"! In the end, what is needed is a more sophisticated understanding of what is meant when we say that life is invaluable and inviolable, especially in contexts beyond the pure and simple execution of a person by the state.

V. CONCLUSION

Our inquiry into human rights began with a celebration and continued with certain fundamental inquiries. We argued that, in order to give these rights flesh and bones, their substance and purpose must be clarified, must be delineated, and the methods for their implementation must be delineated through corresponding obligations. Both of these inquiries necessitate not only that the benefits to the recipients be extolled but also that the burdens and costs that they impose on others in terms of their own human rights, especially freedoms and resources, be included in the calculus on some acceptable scale of values. These "others" are not just the state in the abstract but potentially all of us to the extent that we are required to act, abstain or fund, directly or indirectly, the process of implementing these rights. By the way, such scale of values need not be narrowly economic and materialistic, not even utilitarian in a consequentialist sense. But without such a scale, we are lost in an uncharted sea of rambling intuitions that can be neither verified nor disputed.

I have tried to show that the right to free expression is sufficiently clear, concrete, self-contained, and matched by commensurate obligations and cost/benefit justifications to pass muster. By contrast, the right to work, i.e., to a "decent" "job," is problematic on many scores. It not only overlaps and is confused with the right to a "decent life" but, rather than focusing on the real target, income support, it is fixated on interfering with the labor market, with all the accompanying distortions and bureaucracies which burden the production process. Even if we were to disaggregate the "decency" of work from the "availability" requirement and to focus on the first idea through labor-protective obligations, extra care is needed to make sure that this will be pursued

through market-imitating rules, and, more importantly, that it will not adversely affect the availability goal. As to the "availability" of work itself, no proposed system of rights contains corresponding obligations that have any substance, reflecting the recognition, at least implicit, that the dysfunctions and burdens of such an approach are prohibitive.

Finally, the "right to life" is both the most specific and the most complex. It is specific to the extent that it refers to the obligation of the state not to execute anyone except under the most precise and limited circumstances and safeguards. It is complex not only because the philosophical dilemma between the quantity and the quality of life must be addressed but also, and principally, because it requires a counterintuitive awareness and acceptance of the proposition that many things that the state does or allows generate risks to life so that, in the end, the value of life, like all other values, must inevitably be placed in the balance.