



Pogge -vs- Sen on Global Poverty and Human Rights¹

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ABSTRACT

This Paper is part of a broader project examining the ways in which Amartya Sen's "capability approach" provides a framework for thinking about global poverty as a *denial* or a *violation* of basic human rights. The Paper compares the "capability approach" as a basis for thinking about global poverty and human rights with the alternative framework developed by Thomas Pogge. Both the "capability approach" and Pogge's theory of "severe poverty as a violation of negative duties" support the idea of "freedom from severe poverty as a basic human right". However, there are important differences. The Paper examines the limitations of Pogge's "apparent minimalism" and establishes the ways in which Sen's treatment of the "capability approach" and human rights moves beyond a "minimalist normative position" whilst avoiding Pogge's charge of "implausibility".

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INTRODUCTION

This Paper compares Sen's "capability framework" as a basis for thinking about global poverty and human rights with Pogge's theory of "severe poverty as a violation of negative duties". It examines the nature of Pogge's "minimalism" and rejects the view that Pogge's "Implausibility Thesis" poses a fundamental challenge to Sen's treatment of the "capability approach" and human rights.

Global poverty, human rights and Pogge's "Implausibility Thesis"

In a series of interventions in theoretical debates about global poverty and human rights, Pogge has defended a theory of "severe poverty as a violation of negative duties". The clarificatory remarks in Pogge (2005: 67) suggest that acceptance of the "Minimalist Working Assumption" that human rights correlate with fundamental negative duties entails neither a rejection, nor an acceptance, of the proposition that human rights correlate with fundamental positive duties - but rather makes no further assumptions on this issue. Nevertheless, Pogge has repeatedly called into question the positive conceptions of "freedom from severe poverty as a basic human right" based on the general obligations of those "in a position to help". He contends that conceptions of this type are often "implausible" because they are associated with "open-ended" duties of assistance and aid (e.g. 2004, 7-8). An important objective of this current Paper is to examine whether Sen's treatment of the "capability approach" and human rights falls foul of this "Implausibility Thesis" (subsequently referred to as Pogge's "First Implausibility Thesis", or "PIT-1").

The link with Pogge's more general critique of the "capability approach"

The issues raised in the current Paper are also relevant to Pogge's (2002b) critique of the "capability approach" as a theory of social justice. This suggests that a "plausible" and "widely shared" criterion of social justice is unlikely to compensate for the effects of personal heterogeneities and environmental / contextual variables *per se* (rather than for the effects of personal heterogeneities and environmental / contextual variables that are attributable to past and current inequalities in access to resources). In aiming to achieve equality in the "space" of capabilities and functionings (rather than in the "space" of resources), the "capability approach" gives rise to "open-ended" duties, and is "overextended" and "implausible" (subsequently, Pogge's "Second Implausibility Thesis", or PIT-2)². Whilst focussing on the subject of global poverty and human rights, the Paper has more general relevance for the assessment of PIT-2.

²Pogge (2002b) recognises that there might be other reasons than justice (e.g. duties arising from charity and / or solidarity) to support compensations for capability-based rather than

1. GLOBAL POVERTY, HUMAN RIGHTS AND THE “CAPABILITY APPROACH”

The ways in which the “capability approach” provides the basis for the elucidation of a sub-class of human rights that focuses directly on the valuable things that people can *do* and *be* - including the capability to be adequately nourished (unaffected by endemic hunger and starvation), to enjoy adequate living conditions (with access to adequate shelter, housing and sanitation), to lead normal spans of life (unaffected by premature mortality or “excess” morbidity) and to read and write (unconstrained by illiteracy and inadequate educational provision - has been an important theme in recent work by Sen (e.g. 1982ab, 1984, 1999, 2000, 2004, 2005) and others³. Vizard (2005, forthcoming) suggests that Sen’s treatment of this idea has moved international debates about global poverty and human rights forward in four key ways.

1.1 Elucidation of a sub-class of “capability-rights”

First, in moving beyond the Rawlsian position, Sen has argued that individual substantive freedoms in the form of the valuable beings and doings that people can and do achieve can be incorporated into ethical evaluation and included among the constituent elements of human freedom without losing objectivity. This central argument provides the basis for the development of a theoretical framework in which basic capabilities are viewed as the objects of basic human rights that governments have obligations to respect, defend and support. For example, Sen has argued that if a person (x) has reasons to value a life without hunger and would choose such a life, then the capability of this person to achieve adequate nutrition is directly relevant to his or her real opportunity to promote her objectives and is expansive of her freedom. Conversely, deprivation in the capability to achieve adequate nutrition restricts

resource-based inequalities. However, he develops three arguments to support the thesis that resources rather than capabilities should be the focal variable of a theory of social justice.

(1) As a metric used as a part of a public criterion of social justice, for the comparative evaluation of individual advantage, the “resourcist” metric can in principle take account of differences attributable to the effects of personal heterogeneities (e.g. disability) and to the effects of contextual variables (natural disasters, climatic variables etc).

(2) As a criterion of social justice, “resourcism” “has every reason” to take account of personal heterogeneities caused by past inequalities in access to resources, and to compensate for the effects of past wrong-doing, as well as ensuring that the current institutional order neither produces nor reinforces such inequalities.

(3) Resourcism can also take account of the ways in which social rules exacerbate the effects of adverse contextual variables (e.g. the ways in which adverse environmental events might be exacerbated by social rules that result in population groups living in mud huts).

³This Essay focuses on Sen’s work. Other key contributions in this area include Nussbaum (1997, 1999abc, 2000, 2003, 2004, 2005).

x's real opportunity to promote her objectives and is admissible as a "freedom restricting" condition. The valuation of "capability-freedoms" is associated in Sen's conceptual framework with derivative classes of "capability-rights" and corresponding obligations - with the valuation of basic and central states of being or doing linked to claims on others to *respect* the "capability freedom" (through negative acts of omission and non-interference) and to *defend* and *support* the "capability freedom" (through positive acts of assistance and aid). In this way: "Minimal demands of well-being (in the form of basic functionings, e.g. not to be hungry), and of well-being freedom (in the form of minimal capabilities, e.g. having the means of avoiding hunger)" can be conceptualised as rights that "command attention and call for support" (Sen 1982a 4-7/15-19; 1985a, 217; 1985b, 21-24; 1992a, 66-8; 1993a; 1999a,13-35/54-86)⁴.

1.2 Departure from logical models that view all admissible human rights as co-possible and realizable

Second, Sen relaxes certain logical conditions that libertarian models impose on the admissibility of human rights based claims. For example, Nozick (1974, 28-30) focuses on a narrow class of fundamental freedoms and human rights that are in logical terms "mutually co-possible". This approach is intended to give rise to a "frictionless" model of fundamental freedoms and human rights that rules out all conflicts and incompatibilities - with a class of "universal negative rights" (characterised in terms of a set of "universal negative obligations" of omission and restraint) being viewed as logically co-possible (and therefore "admissible"), but "universal positive rights" (characterised in terms of "universal positive obligations" of assistance and aid) being viewed as not logically co-possible (and therefore ruled out by the model). In contrast, the "capability approach" relaxes the requirement of logical co-possibility and allows for the possibility of fundamental freedoms and human rights that are limited by resources and other cost and feasibility constraints - with Sen suggesting that fundamental freedoms and human rights can be coherent and meaningful even when the immediate and complete realization of a human right is not possible. For example, the positive obligations associated with "capability-freedoms" and "capability-rights" may not relate directly to valuable states of being and doing (x) (that may be currently unachievable), but to policies and programmes p(x) that promote the achievement of (x) as an immediate or cumulative outcome - with violations involving the absence and inadequacy of policies and programmes p(x) (rather than the non-fulfilment of (x) *per se*) (Sen, 1982d; 2000a).

⁴ For a different emphasis on the interpretation of Sen's position here, see Osmani (2005: 215-216), who argues that it is only when the causes of poverty directly relate to command over resources that 'capability failure' can be characterised as a denial of human rights.

1.3 Emphasis on “consequence-sensitive” ethical frameworks and on the development of systems of “goal-rights”

Third, Sen has argued that the greatest scope for establishing general positive obligations to relieve poverty, hunger and starvation may arise in rights-based ethical systems that are “consequentialist but not welfarist” (1982b, 358). If rights are purely instrumental (e.g. as in the utilitarian-based forms of consequentialism) then there is no case for including the realization of rights in the specification of the fundamental objectives of a system; whilst if rights are viewed as fundamental, but are characterised in terms of negative constraints (as in the libertarian framework) then individuals are not required to promote human rights-fulfilments through positive acts of assistance and aid. In contrast, Sen has advocated the development of “consequence-sensitive” ethical frameworks, with the fulfilment of human rights being included among the fundamental objectives of a goal-based ethical system, and the value of human rights fulfilments (and the disvalue of non-fulfilments) being taken into account in the evaluation of states of affairs. Sen’s defence of this position has addressed a number of the traditional concerns regarding consequential ethical systems and intrinsic valuation (including those relating to the accommodation of agent relative values and deontic concerns such as special ties and integrity) through the development of “evaluator relative outcome functions”. He concludes that the development of “consequence-sensitive” frameworks can provide a far-reaching basis for linking moral obligations to the goal of human rights fulfilments through “consequence-sensitive” links” and for elucidating the general obligations of third parties “in a position to help” (1987b: 56-57,70-78; 1982a: 3-20, 38-39; 1985a: 217; 1985b: 14-19).

1.4 Extension of theories of human rights to the domain of “imperfect obligation”

Fourth, Sen’s treatment of the “general obligations of those in a position to help” emphasises the validity of the extension of theories of human rights into the domain of “imperfect obligation”. His position here represents an important departure not only from the libertarian but also from theories in the liberal tradition that make analytical space for the concept of positive obligation - but that maintain that, in the context of income poverty and other forms of basic deprivation and impoverishment such as hunger and starvation, ill-health and illiteracy, positive obligations are not associated with counter-party human rights. For example, O’Neill (1986, 1993, 1996) departs from the libertarian position and defends the admissibility of a general class of “universal positive obligations” - including far-reaching “universal positive obligations” to relieve income poverty and other forms of basic deprivation and impoverishment. However, she limits the reach of a theory of fundamental or human rights to the domain of “universal perfect obligation”, and disputes the idea that “universal positive obligations” to relieve poverty, hunger and starvation are associated with counter-party human rights that are coherent, meaningful and enforceable. In contrast, Sen has argued that the valuation of human rights in “consequence-sensitive” ethical systems is *not* contingent on the precise specification of rights-obligations links, or on codification in

positive law; and the development of “consequence-sensitive” ethical systems provides a basis for linking human rights to “imperfect obligation” as well as to “perfect obligation” (1982a, 2000). He has argued that rights can relate to goal-promotions rather than to the achievement of particular actions (giving rise to the general sub-class of “goal-rights”) (1982a, 3 8; 1982b, 347; 1985b, 2002a, 645) and that “imperfect obligations” are associated with a requirement of “reasonable action” - allowing for “permitted limitations” when goal-fulfilments are not mutually compatible (2004: 10; c. r. section 4).

2. POGGE ON “SEVERE POVERTY AS A VIOLATION OF NEGATIVE DUTIES”

Pogge’s (2002a, 2004) sets out a theory of global poverty and human rights that emphasises the ways in which it is possible to establish severe poverty as a human rights violation under a “minimalist normative position” which assumes that justice and human rights involve only “specific minimal constraints - more minimal in the case of human rights - on what harms persons may inflict upon others” (2002a: 13). The underlying rationale is to develop a theory of severe poverty as a violation of human rights on the basis of the assumption that human rights impose not a fundamental positive duty to assist and aid the poor, but rather a fundamental negative duty which imposes a constraint on conduct that causes harm⁵. Pogge views a fundamental negative duty of this type as imposing a constraint on conduct that causes severe poverty, and an associated restriction on the imposition of institutions that cause severe poverty. He contends that, by adopting this approach, it is possible to characterise human rights based claims arising from severe poverty in terms of rectification for harm done by past and present conduct (rather than in terms of fundamental positive duties of assistance and aid), and to arrive at a characterisation of “severe poverty as a violation of human rights” on the basis of a “minimalist normative assumption” that is likely to attract widespread support.

2.1 Establishing severe poverty as a human rights violation under a “minimalist normative assumption”

The central aim in Pogge (2002a, 2004) is to establish severe poverty as a human rights violation under the “Minimalist Working Assumption” given in Box 1. Under this “Minimalist Working Assumption”, the establishment of human rights based claims is critically dependent on the attribution of causal responsibility. However, Pogge contends that it is possible to go significantly beyond the libertarian position on human rights without denying its central tenet (that human rights entail only negative obligations) by establishing that social institutions have a *causal* role in generating insecure access to the objects of human rights. Given (1) the proposition that institutions have a *causal* role in the generation

⁵Pogge adopts the following terminological distinctions: (1) duties are morally fundamental; (2) some duties are *generative* duties - that is, duties that, in conjunction with appropriate empirical circumstances, create more specific moral reasons of action: obligations (2005: 68).

and persistence of poverty and (2) the proposition that individuals have responsibility (albeit collectively) for the creation and perpetuation of such institutions, he maintains that fundamental freedoms and human rights can be viewed as giving rise to negative obligations of individuals and collective agents to refrain from supporting such institutions. Failure to respect negative obligations is viewed not in terms of the failure to assist and aid those who are in desperate need, but in terms of causal responsibility for the generation and persistence of poverty.

2.2 The distinction between the *active causation* of severe poverty and the *failure to alleviate* severe poverty

Pogge's theory of "severe poverty as a violation of negative duties" places particular emphasis on the "important ethical distinction" between the *active causation* of severe poverty and the *failure to alleviate* severe poverty for the establishment of human rights based claims. For example, under the "Minimalist Working Assumption" given in Box 1 agents "must refrain from (actively) causing others' human rights to be unfulfilled". Furthermore, in considering the claim that we are responsible for any poverty deaths that we actively cause, but not for poverty deaths that we might have prevented, Pogge suggests that his own position accords with the libertarian position (2002a: 13). Nevertheless, Pogge's underlying motivation is to transcend traditional debates and to construct a "middle position" between the libertarian emphasis on negative constraints (which he rejects on the grounds that people are entirely disconnected from deprivations that they do not directly bring about) and consequential approaches (which he rejects on the grounds that people are held to have obligations in relation to *all* deprivations, regardless of their causal relation to them). In making analytical space for this "middle position", Pogge suggests that under particular empirical circumstances fundamental negative duties entail "derived duties to perform positive actions" - including an important category of "positive derived duties" to undertake actions aimed at compensating protection and reform.

Box 1

Proposition 1 (Pogge’s “Minimalist Working Assumption”)

“[H]uman rights impose only negative duties: Human rights require that agents *not harm* human being in certain specific ways but they do not require that agents help or protect anyone whose human rights are unfulfilled or threatened ... [The assumption that] human rights impose only negative duties means that they require only omissions, not acts, and that they can be violated only by acts, not by omissions. Agents must refrain from (actively) causing others’ human rights to be unfulfilled” (Pogge, 2004a: 8).

Propositions 2 and 3 (Pogge’s “Institutional Understanding of Human Rights”)

“A human right to X gives rise to a moral claim against all others that they not harm you by cooperating, without compensating protection and reform efforts, in imposing upon you an institutional order in which you lack secure access to X as part of a foreseeable and avoidable human rights deficit” (2005: 67).

“[A]ny institutional order that foreseeably and avoidably produces an excess of severe poverty and of mortality from poverty-related causes manifests a human rights violation on the part of those who participate in imposing this order” (2004a: 17).

2.3 The class of “positive derived duties” and Pogge’s “institutional understanding” of human rights

The idea of a class of “derived positive duties” that are ultimately justified in terms of a fundamental principle of negative duty (rather than a fundamental principle of positive duty) is of great importance for debates about global poverty and human rights. In defending this idea, Pogge emphasises that the establishment of human rights based claims should be contingent on the attribution of causal responsibility - with “derived” positive obligations characterised as being “triggered” by non-compliance with a fundamental negative duty “not to actively cause harm”, rather than by fundamental positive duties of assistance and aid (with no “active causality” established). He contends that a class of “positive derived duties” can be characterised as a class of “remedial duties” that follow from a fundamental principle of negative duty (rather than a fundamental principle of positive duty), and that is consistent with the categories of positive duties accepted by libertarians (2005: 68). Hence:

“[A] very important source of positive obligations with regard to severe poverty in the modern world is our negative duty not to participate in the imposition of social institutions under which some lack secure access to the objects of their human rights” (2004: 12).

Pogge further contends that the “institutional understanding of human rights” encapsulated in Propositions 2 and 3 in Box 1 can be justified and elucidated within a negative theory of human rights that focuses on causal responsibility. More specifically, he suggests that the far-reaching position on human rights encapsulated in Propositions 2 and 3 can be achieved by accepting the libertarian *normative* assumption that human rights correlate with a fundamental principle of negative duty but not with a fundamental principle of positive duty, whilst challenging the libertarian *factual* claim that the existing global order is not causing poverty and harming the poor (2002, 12). This is achieved by invoking a socio-economic theory that suggests that global institutions, rules and processes can be shown to play a causal role in generating and perpetuating severe poverty.

2.4 The relevance of socio-economic analysis of the *causes* of severe poverty

Pogge’s theoretical framework highlights the important links between the justification of a class of fundamental or human rights and the socio-economic analysis of the *causes* of poverty, hunger and starvation. There are interesting parallels here with Berlin’s characterisation of freedom, which characterises negative freedom as the absence of coercion (where coercion implies “the deliberate interference of other human beings” in a personal sphere), whilst nevertheless recognising the important links between socio-economic analysis of the causes of poverty and the evaluation of human freedom.

“[If] my poverty were a kind of disease ... this inability would not naturally be described as a lack of freedom ... [If] my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it ... I think myself a victim of coercion or slavery. [T]his use of the term depends on a particular social and economic theory about the causes of my poverty ... I begin to speak of being deprived of freedom (and not simply about poverty) only if I accept that theory ...” (Berlin, 1969, 122-123).

The debates about the interpretation of this paragraph have far-reaching implications, with narrower readings focussing on the notion of *intentionality*, and broader readings emphasising the ways in which the outcomes of social and economic processes (including market outcomes) might be characterised as “freedom limiting” conditions if their consequences, though *unintended*, are *foreseeable* or *alterable*. Similarly, the empirical reach of Pogge’s theory is critically linked to a background theory of socio-economic causation. For example, in developing a human rights critique of World Trade Organisation patent rules set out in “TRIPS” agreements, Pogge’s (2005) highlights the ways in which global economic and financial - the intellectual property rights agricultural subsidies,

dumping practices, restrictions on developing country market access, as well as the impact of structural adjustment, debt repayments and other economic and development policies - can be viewed as causing foreseeable and avoidable forms of severe poverty, morbidity and mortality, and therefore as a basis for establishing human rights based claims.

3. CRITICAL ANALYSIS OF POGGE'S POSITION

How convincing is Pogge's attempt to derive the far-reaching "institutional view" of human rights encapsulated in Propositions 2 and 3 in Box 1 from the "Minimalist Working Assumption" reflected in Proposition 1? This section highlights three limitations.

3.1 Reliance on a controversial theory of socio-economic causation

First, the empirical reach of Pogge's normative framework is critically dependent on a controversial background theory of socio-economic causation. Pogge's theory does not therefore necessarily cover all cases of severe global poverty, but rather all cases of "a certain kind of impoverishment that other agents are causally and morally responsible for" (2004: 4). As discussed in section 2.4, many of Pogge's practical applications and illustrations are critically dependent on a background socio-economic theory that attributes casual responsibility for severe poverty on a massive scale to the "present global order". However, the proposition that "features of the present global order cause massive severe poverty", and that many or most cases of severe poverty will therefore fall within the reach of a negative theory of human rights, requires far-reaching theoretical and empirical investigation. In particular, the status of two categories of cases of severe poverty with respect to the establishment of human rights based claims requires further examination. These are:

- Cases of severe poverty included within the scope of Pogge's negative theory of human rights, but only because they fall within the reach of a contested theory of causality.
- Cases of severe poverty excluded from the scope of Pogge's theory, because they fall outside the reach of Pogge's theory of causality.

The first category of cases raises far-reaching and controversial theoretical and empirical questions concerning the evaluation of trends in global poverty and inequality; nature and scope of the underlying explanatory variables; the relative weight to be given to global institutions versus other variables such as domestic factors (including domestic economic policy, domestic political and institutional arrangements, cultural variables, climatic and environmental factors, economic endowments and inter-personal variations); the nature of the evidential thresholds of "causation" and the use of baseline comparisons; and the

differential impact, aims and functions of different international institutions (of, for example, WHO, UNDP and FAO, the WTO, the World Bank and the IMF)⁶. In relation to the second category of cases, even if global institutions can be shown to generate and perpetuate a large proportion of the world's cases of severe and extreme poverty, other cases may nevertheless fall beyond the “causality” threshold and therefore outside the characterisation of severe poverty as a human rights issue. Examples might include, for example, cases of severe poverty attributable to interpersonal variations that cannot be attributed to socio-economic causes (e.g. inherited disability), to factors widely attributed to “bad luck” (e.g. harsh climatic conditions or having poor factor endowments such as being land-locked) and to other contextual variables (including natural disasters). Consider a poor country A in which cases of severe poverty are generated by a natural disaster the loss of livelihood and shelter caused by an environmentally induced Tsunami or an earthquake or flood, and where resource and feasibility constraints prevent an adequate domestic response. If cases of severe poverty of this type cannot be plausibly characterised as being caused by rich-country imposition of global institutions, then they apparently fall outside the reach of Pogge's theory of causation and culpability, and therefore of his negative theory of human rights.

3.2 Is the position set out in Pogge (2002a, 2004) accurately characterised as a “minimalist normative position”?

Second, Pogge's theory arguably goes beyond a “minimalist normative position” (which provides the stated basis of his theory of “severe poverty as a violation of negative duties”). As discussed in section 2.3, Pogge maintains that a sub-class of “positive derived duties” can be related to a fundamental principle of negative duty, rather than a fundamental principle of positive duty, on the grounds that “positive derived duties” fall within the reach of “causal” and “special” relationships and are triggered by non-compliance with the fundamental negative duty not to cause harm. However, this sub-class of “positive derived duties” seems to go beyond a “minimalist normative position” in important respects. In particular, Pogge's assessments of the conditions under which severe poverty is *actively caused* relate to the notions of the *foreseeability and avoidability* of severe poverty - and as will be shown below, assessments of this type cannot be entirely independent of the formulation of evaluative judgements about the “adequacy” or “reasonableness” of actions taken to prevent and to alleviate severe poverty. In the absence of the development of subordinate evaluative criteria of this type, Pogge's class of “derived positive duties” can be subjected to the critique of “open-endedness” and “implausibility” (c.r. section 4).

⁶See, for example, Cruft (2005), Gilibert (2005) and Patten (2005), Risse (2005) and Barry (2005).

3.3 Does the distinction between “active causation” and “failure to alleviate” play a pivotal role in Pogge’s theory of global poverty and human rights?

Third, many of Pogge’s practical illustrations and applications, based on the “institutional view” of human rights set out in Propositions 2 and 3 given in Box 1, seem to de-emphasise the distinction between actively causing severe poverty, and failing to prevent severe poverty, in the establishment of human rights based claims. Gilibert (2005: 542) notes that Pogge’s “positive derived duties” are only compatible with the minimalist normative premises of the libertarian rectification model if the objective of the compensations is strictly to remedy the harm caused for past conduct, rather than ensure that the objects of human rights are fully secure. In other words, human rights based claims under Pogge’s negative model might be expected to arise not from a human rights deficit *per se*, but rather should strictly relate to the element of non-fulfilment associated with harmful conduct in the form of “active causation”. However, many of Pogge’s applications and illustrations, based on the “institutional understanding” of human rights specified in Box 1, seem to adopt an evidential threshold regarding the establishment of human rights claims that seem to go beyond this position by de-emphasising the distinction between the “active causation” of severe poverty and the “failure to prevent” severe poverty (a distinction which is apparently critical to the formulation of the “minimalist normative assumption” on the basis of which Pogge proceeds). For example, in a recent discussion of the human rights case for reform of intellectual property rights arrangements, Pogge argues that TRIPS agreements violate human rights because there exists an alternative institutional scheme that could have prevented the human rights denials that exist under the current institutional scheme. In making this argument, Pogge makes use of an evidential threshold regarding the establishment of human rights claims that seems to go significantly beyond a “minimalist normative premise” that critically turns on the ethical distinction between the “active causation” of harm and the “failure to take alleviate harm”. In particular, Pogge blurs the distinction between (1) harm “actively caused” by international economic agreements and (2) the failure of such arrangements to alleviate and prevent severe poverty in ways that are reasonably possible. The distinction between human rights claims arising from the “active causation” of severe poverty (involving “specific minimal constraints - more minimal in the case of human rights - on what harms persons may inflict upon others”) and human rights claims arising from the failure to take reasonable action to alleviate and prevent severe poverty is minimized - with the “failure to alleviate” (reduce / prevent) avoidable and foreseeable mortality and morbidity (by establishing an appropriate incentive structure that can ensure appropriate research, development and supply of essential medicines in poor countries) being viewed as establishing human rights based claims. The charge of “re-labelling” has been discussed in the secondary literature in this context (e.g. Patten, 2005: 27)⁷.

⁷For further discussions of Pogge's treatment of positive duty, see the various discussions in Pogge (forthcoming).

4. HOW PLAUSIBLE IS SEN'S TREATMENT OF POSITIVE OBLIGATION?

Given these limitations, how plausible is the “capability approach” as an alternative theoretical framework for thinking about global poverty and human right? Sen’s treatment of positive obligation can be interpreted as building on Kant’s recognition of the role of “subordinate principles of judgement” in evaluating the fulfilment of “universal imperfect obligation”⁸. For example, Sen emphasises the distinction between a domain of “compulsory action” (involving “perfect obligations” to perform or not to perform specific actions) and a domain of “reasonable action” (involving “imperfect obligations” to take reasonable actions towards specified objectives or “ends”). He does not providing a complete / specific “list” of subordinate principles on the basis of which considerations of this type are to be balanced, or a full account of the procedures by which such principles might be developed. In this sense, Sen’s treatment of the concept of “reasonableness” - including his treatment of the basis on which actions might be evaluated as reasonable or unreasonable - is underdeveloped. Nevertheless, his discussion suggests the importance of the following considerations:

- The fundamental importance of human rights being protected and promoted
- Special concern with actions and causal responsibility for violations
- The nature and scope of pragmatic constraints
- The extent to which actions of the agent can make a difference (either singly or in conjunction with others)
- The alternative actions or courses of action that might have been performed
- Whether or not the outcome can be affected by collective action and institutions
- Commitments, values and special relationships.

4.1 Can the fulfilment of “imperfect obligation” be impartially evaluated? The underlying theoretical debates

This emphasis raises important underlying questions about the interpretation and contemporary application of the distinction between “universal perfect obligation” and “universal imperfect obligation” set out in Kant (1991 [1785]: 83-86) and 1996 [1797]. In particular, Sen’s treatment of the concept of “imperfect obligation” raises the underlying question of whether Kant’s position entails *moral indifference* to the actions or courses of action chosen by agents in relation to “imperfect obligation”, or whether there is scope for *impartial evaluation* of actions or courses of action (given commitment to particular “material maxims”). Kant’s mapping between the class of “imperfect duties” and “wide

⁸ “[T]he doctrine of right has to do only with narrow duties, whereas ethics has to do with wide duties. Hence the doctrine of right, which by its nature must determine duties strictly (precisely), has no more need of general directions (a method) as to how to proceed in judging ... but ethics, because of the latitude it allows limits imperfect duties, unavoidably leads into questions that call upon judgement to decide how a maxim is to be applied in particular cases, **and indeed in such a way that judgement provides another (subordinate) maxim ...**” (Kant, 1996 [1797]: 168 emphasis added).

duties” suggests a “latitude for choice” in relation to actions and / or courses of action that agents should perform or not perform - providing recognition that, in the realm of “imperfect obligation” it is not possible to specify precisely “in what way one is to act and how much one is to do by the action” (1996 [1797]: 390; c.f. note 4). However, this “latitude for choice” is related to the presence of pragmatic considerations and judgements, and to the nature and scope of feasibility constraints⁹. It does not provide a “license for exceptions”, but rather a means of making obligations compatible where goal-fulfilments are not mutually co-possible⁹.

These elements of Kant’s framework have been interpreted in different ways. For example, Sullivan maintains that “[s]ince we are rarely in a position to know all the factors that may go into others’ decisions, we are also rarely, if ever, in a position to judge how well or badly they are fulfilling their positive obligations” (1996: xix). Wood suggests that Kant’s position implies moral indifference with the exception of cases where the actions or courses of action performed entail “general abandonment of the required end” (2002: 5). O’Neill questions whether Kant should be interpreted as implying indifference between any acts or courses of action of the required type, and raises the need for an account of practical judgement in the Kantian framework (2002: 336). Sen’s work takes these broader debates forward by building on Kant’s recognition of the need for the development of “subordinate ethical principles - especially “subordinate evaluative principles” relating to the notion of “reasonableness” - in the domain of “imperfect obligation”. His analysis highlights the possibility of a framework for the impartial evaluation of the fulfilment of “imperfect obligation” based on “subordinate evaluative principles” of this type.

4.2 Can “imperfect obligations” establish counter-party human rights?

Sen’s approach is important because it provides the basis of a radical departure from ethical theories that suggest that human rights do not extend to the domain of “imperfect obligation”. As discussed in section 1.4, many contemporary theories of human rights are based on this classic interpretation of the Kant’s theory of fundamental rights - with the class of “universal imperfect obligations” characterized as falling strictly *outside* the domain of a theory of fundamental rights, and outside the domain for which legislative enforcement is possible. For example, according to the classic interpretation, whilst Kant’s “obligation of beneficence” can be established as a “universal imperfect obligation” under Kant’s “universal law”, duties of beneficence fall within a sub-set of duties that are ethically binding but not legally binding, and that are not associated with claimable counter-party rights (Kant (1991 [1785]). 84-86; 1996 [1797]: 23, 31-32, 152-156, 168-9)¹⁰. In interpreting and

⁹ Hence “a wide duty is not to be taken as permission to make exceptions ... but only as permission to limit one maxim of duty by another (e.g. love of ones neighbour in general by love of ones parents) ... (1996 1797]: 153).

¹⁰Kant’s division of the “doctrine of duties in general” into the system of the *Doctrine of Right (Ius)* and the system of the *Doctrine of Virtue (Ethica)* is classically interpreted in terms of the distinction between a set of duties that are suitable for judicial enforcement and

developing the Kantian framework, O'Neill has argued that whereas "universal perfect obligations" (relating to the performance of specific actions) can be adequately reflected in a rights-based ethical framework, "universal imperfect obligations" (relating to the promotion of "maxims" / "ends of action" or "policies" or "goals") will be "unallocated" and "neglected". She views general positive obligations to relieve poverty, hunger and starvation as being located in the realm of virtue rather than justice, and as having "subordinate status in an ethical system in which the concept of rights is fundamental" (1996: 127-8).

5. IMPLICATIONS OF SEN'S APPROACH FOR THE DEVELOPMENT OF A THEORY OF HUMAN RIGHTS

Sen provides an alternative point of departure. His emphasis on the development "subordinate principles of judgement" (particularly in relation to the notion of the "reasonableness" of actions or courses of action performed) provides a basis for viewing the positive obligation of *reasonable* assistance and aid as an allocated obligation (owed to all by all), and as being associated with counter-party human rights (rather than special or institutional rights) in terms of which and in terms of which systems of positive law and institutional arrangements should be justified and judged. His analysis suggests the importance of the development of a framework of ethical, social and legal norms for evaluating the fulfilment of imperfect obligations of this type, and points towards a theory of human rights in which practical action that fails to satisfy a "reasonableness" threshold can be characterised in terms of *non-fulfilment* or *violation* of human rights-based claims.

5.1 Can "imperfect obligations" be meaningfully linked to a class of enforceable and justiciable counter-party rights?

Sen's conceptual framework can be interpreted as challenging interpretations and applications of the "Kantian Framework" that limit the domain of enforceable and justiciable individual rights to the domain of "universal perfect obligation". In her analysis of Kant's treatment of the "fundamental principles of right", O'Neill cautions against a *simplistic* division of duties into "duties of right" and "duties of virtue". She recognises that the

a set of duties that are cannot be enforced by external sanction and must by definition be performed voluntarily, on exclusively ethical grounds. Duties falling within the first sub-set are often characterised as (1) essentially "negative", "limiting" and "non-conflicting" (or "co-possible") 2) determined relatively strictly and precisely 3) suitable for enforcement by external sanction / judicial enforcement 4) associated with counterparty rights. Duties falling within the second sub-set are often characterised as 1) "wide" rather than "narrow" (dealing with maxims / ends of action /goals rather than particular actions that should be performed); 2) relatively "undetermined" 3) not suitable for enforcement by external sanction / judicial enforcement 4) not associated with counter-party rights. (See, for example, Kant (1991 [1785]). 84-86; 1996 [1797]: 23, 31-32, 152-156, 168-9).

distinction between a “law of justice” prescribing actions, and a “law of virtue” prescribing maxims, is not precise - both embody general principles, and entails elements of indeterminacy that can only be resolved through judgement, agreement and institutionalisation, and that may require far-reaching judicial and administrative procedures. Nevertheless, she maintains that whereas “universal perfect obligations” are *sufficiently determined* to characterise a relationship between an agent and a recipient, and are associated with a class of counter-party liberty rights, “universal imperfect obligations” are characterized by their *relative* generality and *relative* indeterminacy. They are to be viewed primarily *not* in terms of a rights-based relationship between an agent and a recipient, but rather in terms of the character of agents (as “required virtues”), and are “unclaimable” in the sense that they require action, but do not specify for whom or to whom action is to be directed (e.g. 1996: 147-148; 2002a, 340)¹¹.

In contrast, Sen’s emphasis on the development of “subordinate principles of judgement” (particularly in relation to the notion of the “reasonableness” of actions or courses of action performed) provides a basis for viewing the positive obligation of *reasonable* assistance and aid as an *allocated obligation* (owed to all by all) that is *de-limited* (rather than “*open-ended*”) and *sufficiently determined* to provide the basis of a claimable human rights-based relationship between agents and recipients. Furthermore, in his treatment of “imperfect obligation”, Sen has often emphasised that the idea of human rights can have an important role outside the legal domain, and that the justification and elucidation of the idea of human rights is not contingent on the degree of precision necessary for codification and judicial enforcement (e.g. 2000). Yet his conceptual framework provides a point of departure for extending the notion of “imperfect obligation” beyond the ethical domain, and for viewing positive obligations of *reasonable* assistance and aid as being *enforceable* and *justiciable*. This approach has particular “value added” for the development of a normative framework in which emerging international legal standards in the field of global poverty and human right can be meaningfully and coherently elucidated and understood.

5.2 “Value added” of the “capability approach” for the conceptualisation of emerging international standards in the field of global poverty and human rights

Theoretical debates about the legal status of international standards in the field of global poverty and human rights mirror the ethical debates about the status of “imperfect obligations” in important ways. The human right to a standard of living adequate for survival and development - including adequate nutrition, safe water and sanitation, shelter and housing, access to basic health and social services and education - is a basic human right that

¹¹O’Neill does not deny the possibility of universal rights to goods and services. However, she characterises universal rights of this type as sets of rights “whose counterpart obligations [are] distributed according to one or another institutional scheme, hence strictly speaking ... special right[s]” (i.e. as “universally distributed” special or institutional rights) rather than as (pre-institutional) “fundamental” or “human rights” (1996: 132-3).

governments have individual and collective obligations to respect, protect and promote is reflected in legally binding international treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹². In the past, sceptics often argued that the obligations of governments under Article 2 of the ICESCR relate to the “promotion of general goals” rather than to the performance and non-performance of specific actions, and cannot be adequately determined in a sufficiently concrete way for enforcement and justiciability. In contrast, emerging international standards in the field of global poverty and human rights point towards an alternative interpretation - with Article 2 being viewed as establishing binding positive obligations of assistance and aid - including positive obligations of assistance and aid on non-national governments.

Sen’s conceptual framework has “value added” as a normative framework for the characterisation of Article 2 of the ICESCR as the *legal* (not just *the ethical*) embodiment of a “universal imperfect obligation” to promote a human rights-based goal. Whilst this positive obligation may be interpreted as giving rise to a particular responsibility not to violate internationally recognized human rights by actively causing global poverty (including through policies and programmes), it is not conditional on the “active causation” of severe poverty by the obligation holder. The analysis above suggests that this obligation can be meaningfully and coherently elucidated in terms of an underlying normative premise that recognizes that human rights give rise to positive claims of “reasonable assistance and aid” in relation to the defence and support of basic “capability rights” on the part of those in a position to help.

Emerging case law in the field of global poverty and human rights further underlines the important role that an evidential framework based on “subordinate evaluative principles”, and judicial scrutiny of the notion of “reasonableness”, can play in making international obligations in the field of global poverty and human rights enforceable and judiciable. For example, the jurisprudence of the South African Constitutional Court has established the justiciability of the socio-economic human rights recognised in Articles 26-29 of the South African Constitution whilst delimiting the nature and scope of the positive duties involved through the development of subordinate evaluative criteria based on the notion of “reasonableness”. It has reasoned that in cases where it is not possible to achieve minimum levels of economic and social rights for the entire population, compliance with the Constitution is to be evaluated in terms of the “reasonableness” of the actions that duty-holders perform in the light of the results achieved. In several landmark cases, policies and programmes that fail to satisfy a “reasonableness” threshold have been found to be in violation of the Constitution¹³.

¹² Available at <http://www.ohchr.org/english/law/cescr.htm>.

¹³ See The Constitution of the Republic of South Africa [Act 108 of 1996]; Government of the Republic of South Africa, the Premier of the Province of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality v Grootboom and others, decided on 4 October 2000, Case CCT 1100 Constitutional Court of South Africa (subsequently “Grootboom”); Minister of Health and others v Treatment Action Campaign and others, decided on 5 July 2002, Case CCT 8 / 02 (subsequently, TAC). Available electronically at www.concourt.gov.za. These cases are discussed in Vizard (forthcoming) Chapter 5.

CONCLUSION

Pogge's argument that a class of "derived positive duties" can ultimately be justified in terms of a fundamental principle of negative duty that focuses on causal responsibility (rather than a fundamental principle of positive duty) is of great importance for debates about global poverty and human rights. However, Pogge's attempt to defend this idea within a "minimalist normative framework" raises certain inconsistencies and tensions. In moving from the "Minimalist Working Assumption" encapsulated in proposition 1 in Box 1 to the "institutional understanding of human rights" encapsulated in Propositions 2 and 3, Pogge de-emphasises the importance of the distinction between actively inflicting severe poverty, and failing to prevent severe poverty, in the establishment of human rights based claims. In addition, Pogge's class of "derived positive duties" is critically dependent on the formulation of subordinate evaluative judgements about the "adequacy" (or "reasonableness") of actions taken to prevent and alleviate severe poverty.

Sen's treatment of the "capability approach" and human rights emphasises the explicit introduction, development and justification of "subordinate evaluative criteria" of this type. The analysis in this Paper suggests that this approach provides a basis for moving beyond a "minimalist normative position" whilst avoiding Pogge's charge of "implausibility". Sen's emphasis on the development of "subordinate principles of judgement" (including subordinate principles relating to the notion of "reasonableness") has been shown to provide a basis for delimiting positive obligations of assistance and aid, and for avoiding the charge of "open-endedness" associated with PIT-1. The Paper has explored the "value-added" of this approach in extending a theory of human rights to the domain of "imperfect obligation", and for establishing cross-disciplinary links with international human rights law.

Whilst the current Paper has focussed on the subject of global poverty and human rights, these arguments have broader relevance for the assessment of Pogge's critique of the "capability approach" as a theory of social justice. In particular, Sen's treatment of the "subordinate principles of judgement" (including "subordinate principles of judgement" relating to the notion of "reasonableness") might be successfully invoked as a basis for the critical assessment of PIT-2.

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