

# THE WELFARIST APPROACH TO HUMAN RIGHTS TREATIES: A CRITIQUE

Seth Korman\*

*This Essay provides analysis and some criticism of the argument that international human rights treaties should focus more on development and welfare and less on basic negative rights. It argues that “welfarist” treaties that completely ignore human rights concerns will in theory harm heterogeneous societies with significant minority populations. In focusing only on development goals—for example, economic, health, or education improvement—such treaties might discourage longer-term political or social reform and provide support for governments that do little for minority populations. While the old adage that “a starving person doesn’t care about democracy” remains true, treaties that promote only economic welfare will necessarily do little to alleviate minority persecution and discrimination and may even institutionalize it.*

*The Essay concludes by proposing a compromise: treaties that specifically target minority populations and ask their respective governments to improve the welfare of these socially marginalized groups. Treaties that encourage nations to improve the economic and social welfare of minority or other disenfranchised populations would have the dual effect of improving welfare while focusing on (and requiring the granting of rights to) the poorest and most marginalized groups.*

INTRODUCTION .....	96
I. POSITIVE VS. NEGATIVE RIGHTS: WHY THE LATTER CANNOT BE COMPLETELY IGNORED .....	98
A. The Traditional Approach .....	98
B. The Human Rights Critics and the Welfarist Approach .....	101
II. THE SHORTCOMINGS OF THE WELFARIST MODEL.....	103
A. Inherent Problems .....	103
B. Theoretical Failure of the Welfarist Approach: A Test Case .....	105
1. Potential Harmful Effects of the Welfarist Approach .....	105
2. The Incompatibility of Ignoring Rights and the Protection of Indigenous Peoples.....	107
3. A Potential Compromise .....	108
CONCLUSION: THE REAFFIRMED IMPORTANCE OF RIGHTS PROMOTION.....	109

---

\* Editor-in-Chief, UCLA Law Review, Vol. 57. Thanks to Juliet Howland, Helen Hwang, Darcy Pottle, Ann Roller, Alyssa Simon, Mason Winters, and the other editors of the UCLA Law Review. All errors are my own.

## INTRODUCTION

In a 2008 essay, Eric Posner adds to the ongoing debate between proponents of human rights and advocates of welfare-first approaches by coming down firmly in the latter camp, noting that human rights treaties do little for citizens of many of the poorest countries.<sup>1</sup> He contends “that states that ratify human rights treaties do not improve their human rights performance, or, at least, that improvements are small and sporadic and hard to measure.”<sup>2</sup> He then argues that welfarist treaties—treaties that compel nations to improve the basic welfare and living conditions of their citizens—are in fact better positioned to bring about the desired long-term effects of treaties that focus solely on the codification of rights.<sup>3</sup>

This argument has value. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) have each been ratified by a significant number of countries<sup>4</sup> that categorically fail to uphold many of the treaties’ negative and positive rights<sup>5</sup> (although the ICESCR focuses much more heavily on positive rights<sup>6</sup>). Of the eight countries recently listed as the most repressive in the world,<sup>7</sup> five have signed or acceded to one or both of these treaties, yet all of these governments make insufficient efforts to conform the treatment of their citizens to the norms and rights required by these two international covenants. At the same time, recent alleged American violations of the Geneva Conventions<sup>8</sup> and of the United Nations Convention Against Torture<sup>9</sup> demonstrate the inherent vagueness and malleability of treaties that

---

1. Eric A. Posner, Essay, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008).

2. *Id.* at 1762.

3. *See id.* at 1769–78.

4. *See* Office of the U.N. High Comm’r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (July 14, 2006), <http://www2.unhcr.org/english/bodies/docs/status.pdf>.

5. Negative rights are those that the government cannot take away; these include such freedoms as a right to marry and the right to free speech. Positive rights, on the other hand, are rights to specific government action, including the right to education and the right to healthcare. For a more detailed discussion of positive and negative rights, see JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 30 (2d ed. 2003).

6. *See infra* note 28 and accompanying text.

7. *Survey Lists World’s Most Repressive Regimes*, USA TODAY, May 6, 2008, [http://www.usatoday.com/news/world/2008-05-06-human-rights\\_N.htm](http://www.usatoday.com/news/world/2008-05-06-human-rights_N.htm) (“Eight countries were judged by Freedom House, the New York-based organization, to have the most repressive regimes. They were Cuba, Libya, Myanmar, North Korea, Somalia, Sudan, Turkmenistan and Uzbekistan.”).

8. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006) (holding that the trial of a detainee by military commission violates the Geneva Conventions).

9. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

defend negative rights. If such negative-rights treaties can be interpreted in ways that provide for many exceptions and allow rights to be infringed, such treaties carry little authoritative value.

The crux of the welfarist position rests on a not necessarily unfounded (though still unproven<sup>10</sup>) belief that rights treaties do little to improve the daily conditions of those living in poverty or under autocratic regimes,<sup>11</sup> and that long-term economic improvement justifies a diminished focus on the expounding of human rights norms in favor of efforts to maximize base human welfare. This chain-of-causation argument then necessarily shelves human rights treaties: “The tentative case for focusing on economic growth and other welfare measures as a means for improving human rights, then, rests on a theory that (1) aid and pressure can cause other states to become wealthier, and (2) increasing wealth causes populations to demand that their governments respect human rights.”<sup>12</sup>

The problem, however, with the welfare-first approach is that it too quickly glosses over the potential negative implications of a diminished focus on rights, particularly rights that should protect threatened or minority groups. While the approach addresses a real problem with negative-rights based treaties (i.e., their ineffectiveness), it ignores the fact that, though a push for societal welfare-maximization may benefit the majority of a population, it also has the potential to brush aside rights-based protections for minority groups in favor of overall increases in standards of living.

This Essay addresses this potential danger inherent in the welfarist approach and proposes a potential solution. Part I briefly looks at the debate between the competing welfarist and rights proponents and discusses advantages and disadvantages of the welfarist model. Part II then explains and elaborates on a flaw in the welfarist model through the lens of indigenous peoples and minority rights, demonstrating the harmful ramifications of ignoring rights-based approaches for these and similar minority populations. Finally, the Essay concludes by arguing that all aid treaties—even those designed solely to raise human and social welfare—must incorporate some negative rights elements. It argues that a viable solution may exist in welfarist treaties that specifically target minority or indigenous populations, which would have the effect of

---

10. The European Convention on Human Rights has been widely acclaimed as a successful rights-based treaty. Even a number of non-EU countries have signed on and abide by its precepts. See Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, Mar. 9, 1953, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=1&DF=06/11/2009&CL=ENG>.

11. See Posner, *supra* note 1, at 1769–73.

12. *Id.* at 1796.

improving welfare while affirming the need to empower and to enforce the rights of these marginalized peoples.

## I. POSITIVE VS. NEGATIVE RIGHTS: WHY THE LATTER CANNOT BE COMPLETELY IGNORED

### A. The Traditional Approach

Outside of the international development context, human rights advancement in the postwar era has arguably predominantly focused first on the expansion of negative fundamental freedoms and then on the expansion of positive fundamental rights.<sup>13</sup> Today, similarly, the broader human rights movement is widely viewed as “involving the spread of liberal constitutions among states,”<sup>14</sup> which steers the general focus toward the encouragement of domestic and international codification of basic rights and freedoms. The bevy of major human rights treaties, conventions, and declarations, such as the ICCPR and ICESCR, the Universal Declaration of Human Rights,<sup>15</sup> the conventions against torture<sup>16</sup> and genocide,<sup>17</sup> and the Convention on the Rights of the Child,<sup>18</sup> generally first highlight a series of innate rights ideals (negative rights), and then encourage particular governmental treatment of its citizens (positive rights). One commentator justly separates the two categories as “first-generation rights, [which] largely occupy the focus of human rights practitioners and advocates,” and “[s]econd-generation rights, [which] are traditionally the province of development agencies.”<sup>19</sup>

The categorical distinction between negative and positive human rights was developed by Isaiah Berlin, who, in his famous essay “Two Concepts of Liberty,” distinguished between the two major sets of rights as “freedom from” vs.

13. One commentator aptly describes that “the generational account of rights is often associated with the conception of negative and positive rights. Negative rights come close to the first generation of human rights. They prohibit certain government actions. Positive rights correspond to the second and third generations of human rights. They impose moral obligations on governments to provide public goods and services.” Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 *IND. J. GLOBAL LEGAL STUD.* 413, 428 n.60 (2009).

14. HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 59 (3d ed. 2008).

15. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

16. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

17. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

18. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

19. Michael Ashley Stein, *Disability Human Rights*, 95 *CAL. L. REV.* 77–78 (2007).

“freedom to.”<sup>20</sup> Berlin then condemned positive rights as “curbs to freedom”<sup>21</sup> and noted that only negative rights guarantee true freedom from oppression:

Pluralism, with the measure of “negative” liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of “positive” self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many . . . . To say that in some ultimate, all-reconciling, yet realizable synthesis, duty is interest, or individual freedom is pure democracy or an authoritarian state, is to throw a metaphysical blanket over either self-deceit or deliberate hypocrisy.<sup>22</sup>

Berlin’s compatriots agreed. John Rawls’s “law of peoples” emphasized a “special class of human rights, such as freedom from slavery and serfdom . . . and security of ethnic groups.”<sup>23</sup> Hannah Arendt<sup>24</sup> wrote on the dangers posed by non-equal guarantees of rights: “We are not born equal; we become equal as members of a group on the strength of our decision to *guarantee* ourselves mutually equal rights.”<sup>25</sup>

The mostly western founders of the United Nations were profoundly influenced by this liberal philosophy.<sup>26</sup> Beginning at Nuremburg, the West’s principle response to the horror of the Great Wars and the collective post-imperial guilt has been a discerning effort to catalog and pronounce the many negative rights—political, civil, religious, etc.—that required protection.<sup>27</sup> The ICCPR is the

20. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 131 (1969).

21. *Id.* at 169.

22. *Id.* at 171.

23. JOHN RAWLS, *THE LAW OF PEOPLES* 79 (1999).

24. Incidentally, Berlin apparently could not tolerate Arendt. See Michael Ignatieff, *Acceptance Speech at the Hannah Arendt Prize Ceremony: Arendt’s Example 9* (Nov. 28, 2003) (transcript available at <http://www.hks.harvard.edu/cchrp/pdf/arendt.24.11.03.pdf>) (“Isaiah Berlin disliked few intellectuals more than he disliked Hannah Arendt. I have tried to understand how two figures who have meant so much to me could have been so thoroughly opposed.”).

25. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 301 (1973) (emphasis added). See also Ignatieff, *supra* note 24, at 7 (“Arendt teaches us, moreover, that rights cannot be protected by well meaning movements of global cosmopolitanism, appealing to moral universals held to be true everywhere, but only by legitimate and democratic nation states, which guarantee rights as part of their constitutional architecture and which provide clear remedies in law and a guarantee of civic inclusion to all its members regardless of origins. It is citizenship—real actual belonging in political community—not abstract belonging to the human species—which will protect the human rights of all.”).

26. See DAVID INGRAM, *LAW: KEY CONCEPTS IN PHILOSOPHY* 11 (2006) (“Many founders of the United Nations Charter and the United Nations Universal Declaration of Human Rights (1948) found support for these documents in universal moral standards.”); FERNANDO R. TESON, *A PHILOSOPHY OF INTERNATIONAL LAW* 121 (1998) (“The United Nations Charter was predicated on this liberal premise.”).

27. See generally *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

quintessential example of this type of treaty: It enumerates mostly negative, protective rights but leaves unclear any specific implementation requirements. (Its companion, the ICESCR, which enumerates mostly positive, aspirational rights, interestingly grew out of the Soviet Union's and its eastern-bloc allies' reluctance to promote the political rights anathema to authoritarian communist government.<sup>28</sup>) By insisting on the promotion of these negative rights, human rights advocates sought to bring rights awareness to the developing world<sup>29</sup> and hoped that this greater enlightenment would pave the way for the subsequent expansion of general welfare.<sup>30</sup>

Recently, there has been some pushback. Critics of those who insist on prioritizing negative rights, while in no way critical of the need to advance human rights, see faults and inefficiencies within the greater human rights agenda.<sup>31</sup> These critics demonstrate that the human rights movement, while successful in encouraging western countries to adopt baseline freedoms and rights, has failed to bring about the de facto manifestation of these rights in the countries where they are most needed. As we shall see, this argument has currency, and there likely exists, in certain circumstances, a strong case for an emphasis toward development and economic growth at the temporary expense of rights establishment. However, this critique is horribly out of place in other cases and might

---

28. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 582 (3d ed. 2005) ("Briefly, the schism in human rights is a product of the bipolar ideological confrontation between the East and the West immediately following the Second World War. While the Soviet Union and its socialist allies posed as champions of economic and social rights, the West touted the primacy of civil and political rights. Soon after the adoption of the UDHR in 1948, positions hardened and eventually the UN decided to develop two separate covenants for the two sets of rights, each with different institutional and enforcement mechanisms and strategies."); Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, 48 VA. J. INT'L L. 719, 734 (2008) ("As a general matter, where the United States supported negative rights embodied in the ICCPR, the Soviet Union recognized positive rights found in the ICESCR.")

29. See generally HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY (George J. Andreopoulos & Richard Pierre Claude eds., 1997) (including a number of essays on ways to educate people and institutions on negative rights, with a particular focus on the developing world).

30. A contemporary example of this approach can be seen in the Human Rights Watch's approach towards Zimbabwe. The HRW Africa Director, speaking in March 2009, advocated: "The government of Zimbabwe should take clear action toward restoring the rule of law and respect for human rights before the international community releases longer-term development aid." *Zimbabwe: Reform Justice System*, HUMAN RIGHTS WATCH NEWS, Mar. 26, 2009, <http://www.hrw.org/en/news/2009/03/26/zimbabwe-reform-justice-system>.

31. See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002); Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487 (2006); see also DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004) [hereinafter KENNEDY, REASSESSING].

actually do more harm than good for certain populations, particularly heterogeneous societies with distressed minority populations.<sup>32</sup>

#### B. The Human Rights Critics and the Welfarist Approach

David Kennedy draws a distinction between human rights activists and humanitarian policymakers. The former, he explains, “articulate what the universal requires,” while the latter do not just “please constituencies, but . . . foster outcomes which vindicate humanitarian values and objectives.”<sup>33</sup> To him and other critics of the rights-first approach, rights activists miss the forest for the trees—they frequently focus too intently on upholding specific rights while ignoring bigger-picture development concerns. Karl Klare agrees, to an extent, explaining that human rights advocates should “appeal to more concrete . . . analyses of the relevant social and institutional contexts than rights discourse offers”<sup>34</sup> and critiquing human rights activists’ too-narrow focus on rights that disregards societal structural concerns.

Importantly, critics of the rights-first approach are not critical of the rights being espoused, but of the manner in which activists attempt to realize these rights. Kennedy, for example, commends the intentions of human rights activists but admonishes much of their work: “Much humanitarian expertise consists of broad ideas and shared arguments,” and, “[l]ike other experts, humanitarians can get caught by the blind spots and biases of their professional vocabularies.”<sup>35</sup> Essentially, he argues, the rights-first approach is not the most efficient means for spreading the rights that are at the center of activists’ work.

The welfarist approach, on the other hand, recommends that the current regime of rights-based treaties and conventions be replaced, or at least augmented, by agreements that promote economic and social development: “The goal is to encourage states to pressure governments to improve well-being.”<sup>36</sup> Posner explains in further detail:

A welfarist treaty would obligate states to promote the well-being of the global population [but] . . . a viable welfarist treaty would not obligate states to equalize the wealth of individuals across borders—indeed, even

---

32. In a country lacking enforced protective rights, an improvement in general welfare will likely benefit the majority population while harming the minority. See David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Restraint*, 75 U. CHI. L. REV. 1329, 1348 (2008) (“A winner-take-all majoritarian system by design disadvantages the minority.”).

33. KENNEDY, REASSESSING, *supra* note 31, at xvii.

34. Karl Klare, *Legal Theory and Democratic Reconstruction*, in STEINER ET AL., *supra* note 14, at 488, 489.

35. KENNEDY, REASSESSING, *supra* note 31, at xxiii.

36. Posner, *supra* note 1, at 1778.

the most egalitarian states do not go this far for their own populations. Instead, a welfare treaty might establish welfare floors or some other system of priority that identified the lowest-welfare states. These states would have a legal obligation to raise the welfare of their populations, or to try to do so, and other states would have the obligation to pressure or help low-welfare states to live up to their welfarist obligations.<sup>37</sup>

As opposed to rights-based approaches, which often lack meaningful metrics by which to measure success, the welfarist model seeks to use quantitative benchmarks to ensure that states meet their welfare obligations and to promote treaties that encourage (or even require) underperforming states to improve measurable indicators, such as literacy and per capita GDP.<sup>38</sup> Furthermore, drawing from the law and economics movement, welfarists focus on the utility-maximization aspects of humanitarian policymaking and agenda setting. As a result, they are likely to place greater value in short- to medium-term development and economic improvement, as opposed to necessarily longer-term campaigns of rights promotion and education. The model thus relies on the carrot of foreign aid and the stick of quickly rescinding that aid if developing states fail to meet certain benchmarks.<sup>39</sup> Although vague on details of enforcement, Posner advocates a sort of strict liability approach—any evidence of extreme domestic poverty would trigger immediate international scrutiny and pressure on that country's government.<sup>40</sup>

Even strong proponents of rights-based approaches acknowledge, or at least understand, the intent of the welfarist approach. Martha Nussbaum accepts the necessity of structural institution-building in developing nations in order to provide an actual framework for the protection of rights (although she qualifies this acceptance with her fundamental belief in the power of rights, noting that “the very fact that the promotion of human capabilities is the central goal [of human rights promotion] gives the debate about structure a point and a focus . . . .”<sup>41</sup>). Likewise, Amartya Sen, a staunch supporter of conventions like the U.N. Declaration of Human Rights<sup>42</sup> and a recent critic of the welfarist school,<sup>43</sup> still maintains the belief that international pressure should be used to “remove or substantially reduce the handicap” of poorly run or

---

37. *Id.* at 1775.

38. *See id.* at 1781–83.

39. *See id.* at 1796–99.

40. *Id.* at 1775.

41. MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* 313 (2006).

42. *See* Amartya Sen, *The Power of a Declaration*, *NEW REPUBLIC*, Feb. 4, 2009, at 30.

43. Kenneth J. Arrow, *A Note on Freedom and Flexibility*, in *CHOICE WELFARE, AND DEVELOPMENT: A FESTCHRIFT IN HONOR OF AMARTYA K. SEN* 7 (K. Basu et al. eds., 1995).



developing nations,<sup>44</sup> a notion that is at least moderately compatible with Posner's argument.<sup>45</sup>

But the welfarist approach has some structural flaws. As Posner himself admits, the approach assumes that democratic governance is a reliable precursor to an improvement in communal welfare,<sup>46</sup> which is itself an oft-critiqued western mindset not necessarily taken as fact in other parts of the world. As such, a repressive regime or authoritarian government might in fact be able to improve certain statistical benchmarks—improve GDP, or decrease poverty—but only by (or in concert with) reducing other freedoms. San Francisco's ill-conceived attempt to bus its homeless to other counties<sup>47</sup> no doubt decreased the city's homeless population, yet it also had the detrimental side effect of infringing on civil liberties. Posner's argument also assumes that international pressure—through treaties or even direct action—can and will have democratizing effects.<sup>48</sup> Despite these assumptions, Posner's argument remains sound: From an overall societal welfare-maximizing perspective, the welfarist approach could raise average welfare. The question is, however, at what expense?

## II. THE SHORTCOMINGS OF THE WELFARIST MODEL

### A. Inherent Problems

The welfarist model fails to address a number of pressing concerns. Because the model focuses on raising living standards across an entire country,<sup>49</sup> it enables regimes to pick and choose where (and to whom) development aid is sent. In most (nondemocratic) developing countries, such aid would theoretically be sent to those who are favored by the regime in power; this then would only increase inequality and likely breed resentment and perhaps violence, both antithetical to attempts to improve overall societal welfare. In the development

---

44. Amartya Sen, Tanner Lecture on Human Values: Equality of What? 218 (May 22, 1979) (transcript available at <http://www.tannerlectures.utah.edu/lectures/documents/sen80.pdf>).

45. Posner himself argues that "Nussbaum and Sen are both 'welfarists' in the broader sense that they emphasize that states should advance the well-being of people." Posner, *supra* note 1, at 1767. However, Posner qualifies this statement by noting that recently "Sen [has distanced] himself from (what I call) welfarism, and seems to argue that his support for human rights is based on concern for 'freedom' rather than 'utility.'" *Id.* at 1767 n.38.

46. *Id.* at 1789.

47. See, e.g., Kevin Fagan, *City Resolves Tiff Over City Bus Ride Program*, S.F. CHRON., Jan. 28, 2006, available at [http://articles.sfgate.com/2006-01-28/bay-area/17277683\\_1\\_greyhound-therapy-homeless-people-crandall](http://articles.sfgate.com/2006-01-28/bay-area/17277683_1_greyhound-therapy-homeless-people-crandall).

48. Posner, *supra* note 1, at 1789.

49. It remains unclear as to whether a treaty that pressures a developing country to selectively raise living standards only in certain areas could exist.

context, welfarist treaties—those that force a country to agree to improve GDP or access to education, for example—will thus require either (a) massive foreign investment so as to simultaneously address all areas of a target country,<sup>50</sup> (b) selective approaches that may on paper inflate some demographic statistic but in reality have little impact on the majority of countrymen,<sup>51</sup> or (c) an unequal distribution of development aid.

The real problem with the welfarist model is revealed when confronted by a diverse society containing weakly protected minority groups. Because the approach focuses on general economic welfare while deemphasizing the broader rights agenda, it necessarily ignores the upholding of certain rights standards in favor of greater economic or welfare development. While this focus poses less of a problem in relation to positive rights,<sup>52</sup> the welfarist agenda unquestionably conflicts with the promotion of negative, or more natural and fundamental, rights.

The rights of minorities—ethnic, religious, indigenous—not to be treated differently because of their minority identity are fundamental negative rights<sup>53</sup> derived from the basic freedoms of life, liberty, and equality. While such protections are recognized in the United States and other western nations, minority rights are near nonexistent in many developing nations. There have, of course, been attempts to address this concern. Article 27 of the ICCPR states that, “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>54</sup> Similarly, the 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic,

---

50. And the presumptively autocratic rulers of these impoverished countries will likely be quite reticent to allow large-scale foreign development schemes.

51. For example, the construction of oil wells, or even manufacturing facilities, might boost gross GDP, especially in countries lacking significant industrial infrastructure, but employ only a fraction of the population and do little to raise median wages.

52. Because positive rights deal with services and benefits provided by the government, welfarist approaches are more compatible with the promotion of these rights. On the other hand, if people see welfarist treaties as impositions created by the West, then whatever social or economic benefits, from school and home construction to electricity generation, may be viewed solely as foreign aid or foreign direct investment and not part of their own (positive) set of human rights.

53. See Christopher A. Bracey, *Getting Back to Basics: Some Thoughts on Dignity, Materialism, and a Culture of Racial Equality*, 26 CHICANO-LATINO L. REV. 15, 28 (2006). Bracey notes also that such rights aren't necessarily sufficient: "Dignity, therefore, demands more than a chimera of equal opportunity premised upon abstracted negative rights and prohibitions on racial discrimination. Instead, it focuses upon real freedom and real opportunities in the form of securing the necessary material preconditions to exercise basic freedoms on an equal basis." *Id.*

54. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171.

Religious and Linguistic Minorities<sup>55</sup> elaborated a nonbinding list of positive and negative rights for minority populations and their governments, respectively. Yet despite their joining in the ratification of the ICCPR or the acceptance of the U.N. Declaration, many poorer nations lack any real incentive to actually act on the merits of the agreements to which they have acceded. More importantly, no welfarist approach or welfarist treaty addresses this problem; rather, they pin their hopes on a presumption that general economic improvement will later trigger an expansion of additional freedoms.

## B. Theoretical Failure of the Welfarist Approach: A Test Case

The area of indigenous rights provides a theoretical test case for an analysis of how the welfare-first, rights-second approach actually has the potential to harm some people it seeks to protect. First, an application of the welfarist model to the protection (and rights) of indigenous peoples demonstrates the inherent danger of focusing solely on improving general societal welfare without simultaneously promoting a set of negative rights. While the welfarist model's "carrot and stick" approach,<sup>56</sup> in which aid can be revoked if economic-improvement benchmarks are not achieved,<sup>57</sup> is theoretically more forgiving when negative rights are violated,<sup>58</sup> it seems incompatible with affirmative protection of minority and indigenous populations and might potentially lead to nations favoring certain segments of the population while ignoring others. I will address each of these two issues in turn.

### 1. Potential Harmful Effects of the Welfarist Approach

Posner addresses the concern that "human rights advocates, especially those committed to vindicating negative rights, will not easily be persuaded that a welfarist approach could be desirable" and notes that as societies grow and become more prosperous, citizens are better able to lobby their government to support certain human rights.<sup>59</sup> Yet this truism is easily taken for granted.

---

55. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc. A/Res/47/135/Annex (Dec. 18, 1992).

56. See Posner, *supra* note 1, at 1799.

57. See *id.* at 1798.

58. To contrast the welfarist approach to problems with the traditional aid approach, see *id.* at 1797 ("This approach is in tension with the usual justification for foreign aid, which is to help the worst-off populations. Most of the poorest people in the world live in states that violate human rights. When states withdraw aid from human rights abusing governments, they risk further impoverishing the people whose rights are being violated.")

59. *Id.* at 1794.

Discrimination persists in many developed countries, and campaigns for equal rights and antidiscrimination have taken decades to effectuate change. And worse, minority and indigenous groups are often left aside even in these civil rights struggles.

In the United States, Mexico, and other postcolonial nations, economic development over the past centuries has in fact lifted many out of poverty and enfranchised the majority groups so that they can demand rights from their governments. As a result of an expansion of positive rights, the majority of citizens have greater negative freedoms and greater access to governmental services. At the same time, however, indigenous and minority citizens have not realized the same benefits, nor have they gained enough access to their political systems to advocate sufficiently for their own rights and interests.<sup>60</sup> In the United States, there have been only a handful of Native American members of Congress (and only Tom Cole of Oklahoma, at present),<sup>61</sup> and there remains a disproportionately small number of minority members of Congress. Similarly, Mexico has elected only one indigenous president in its entire history (Benito Juarez, in 1858).<sup>62</sup> This problem extends beyond North America. Amongst postcolonial countries, there is currently only one indigenous head of state, Evo Morales of Bolivia. As of 2008, Australia has only had two aboriginal members of parliament, both in the lower house.<sup>63</sup> Because protection and respect for indigenous rights is at most an emerging international norm,<sup>64</sup> majority populations in the United States and elsewhere have ignored indigenous populations, to a certain degree, when the majority's newly enfranchised status allowed it to lobby for its own increased rights.<sup>65</sup>

---

60. While indigenous peoples in the United States do have some degree of autonomy on reservation land, they still lack title to land that was traditionally theirs. Moreover, the uneven economic development has left many indigenous tribes impoverished and isolated from mainstream American society.

61. See Congress.org, Congressional Directory, <http://www.beavoter.com/congressorg/directory/demographics.tt?catid=all> (last visited Sept. 6, 2010); About Tom Cole, <http://cole.house.gov/about/biography.shtml> (last visited Sept. 6, 2010).

62. E.g., JOHN J. BUTT, *THE GREENWOOD DICTIONARY OF WORLD HISTORY* 178 (2006).

63. See Barry Cohen, *An Aboriginal PM? Get Some Aboriginal MPs First*, SPECTATOR, Dec. 3, 2008, available at <http://www.spectator.co.uk/australia/3062321/an-aboriginal-pm-get-some-aboriginal-mps-first.shtml> (blaming "apathy and indifference" for the lack of aboriginal representation).

64. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 61–72 (2d ed. 2004).

65. For example, South Africa's indigenous groups did not benefit—and were to some extent ignored—after the collapse of the Apartheid government. Attempts to ensure adequate representation on par with other South African citizens (post-1994) have, according to one report to the United Nations, proven unsuccessful. See *Observations on the State of Indigenous Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples: South Africa* (Nov. 20, 2007), available at <http://www.culturalsurvival.org/files/SouthAfrica.pdf>. Similarly, throughout Latin America, independence movements frequently left behind indigenous and minority populations. See, e.g., Jose Hernandez, *Hispanics Blend Diversity*, in *HISPANIC CULTURES IN THE UNITED STATES: SOCIOLOGY* 26 (Felix Padilla

Similarly, a welfarist approach that seeks by treaty or otherwise to lift the overall welfare of a given society without simultaneously advocating for rights would likely fail to help these minority groups. Furthermore, as nations seek to meet economic or other general welfare metrics imposed by welfarist models, individual rights protections will no doubt continue to take second chair to economic development—as exemplified in much of Latin America, where economic concerns, principally involving natural resource exploitation, trump respect for minority or indigenous rights.<sup>66</sup> Without an established baseline rights regime (or at least basic equity benchmarks), considered a necessity by rights-first human rights proponents, there would be no assurance that development is spreading equitably.

Critics may argue that this is in fact the point, and that a relaxation of equality or negative-rights standards is a necessary evil to promoting more tangible development. Because, as Posner notes, both development and human rights proponents focus on the “poorest states [that] usually [also] have the worst governments,”<sup>67</sup> rights advocates cannot expect overnight change in government repressions—though they should not allow this to deter further encouragement of economic development. Yet common ground may still exist.

## 2. The Incompatibility of Ignoring Rights and the Protection of Indigenous Peoples

Because indigenous groups in many countries traditionally lacked many of the legal protections available to the general population, they have had to instead seek out *increased* protections for their culture, land, and livelihood. Such heightened protections—manifested either as government benefits or as specific rights—were necessary to protect indigenous populations from the will of the majority populations. For example, in Australia, New Zealand, and South Africa, the judicial branches have remained the principal protectors of indigenous peoples in recent years and have defended rights of indigenous native title to ancestral land against the wishes of the state government.<sup>68</sup> Without these

---

ed., 1994) (“Although the Latin American independence movement of the nineteenth century attempted to break with colonialism, the new ruling elites . . . continued subordinating people of Native and African origin.”).

66. In Belize and Nicaragua, native groups have been in conflict with oil companies that have received resource concessions from cash-hungry national governments. See ANAYA, *supra* note 64, at 265–71.

67. Posner, *supra* note 1, at 1758.

68. See, e.g., *Mabo v. Queensland II* (1992), 175 C.L.R. 1; *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680 (H.C.); *Alexkor Ltd. v. Richtersveld Cmty.*, 2003 (8) AUSTL. INDIGENOUS L. REP. 55 (CC) (S. Afr.).

announced protections, indigenous groups would likely suffer or lose their protected status as the greater society focused on economic development and welfare maximization.

Welfarist approaches to development that ignore rights-based advocacy risk harming minority and indigenous groups by focusing on economic concerns and ignoring potential assimilationist side effects.<sup>69</sup> In countries that lack strong judicial enforcement mechanisms, rights-based advocacy by the international community is much more important: Without it, minority populations have no protection against at worst a tyrannical majority or, alternatively, assimilationist pressures that grow out of economic development. Measures such as the U.N. Declaration on the Rights of Indigenous Peoples<sup>70</sup> were enacted for this very purpose and reinforce the idea that, for indigenous peoples and other minority groups that lack the protections of their own state, international rights regimes and rights advocacy remain paramount to their survival.

### 3. A Potential Compromise

There may be a third option that combines certain elements of both welfarist and rights-based approaches: treaties that specifically target poor, minority, or indigenous populations. This option mirrors the shifting paradigm in the development community away from direct aid to foreign governments and toward more local development, microfinance initiatives and smaller, targeted projects.<sup>71</sup> For example, instead of creating a multilateral treaty obligating party states to meet baseline per-capita GDP or infant-mortality figures, why not propose a convention that forces parties to alleviate specific problems of minority or indigenous groups? Not only would such a treaty appear more equitable—both developed and developing nations would be forced to tackle the problems simultaneously—but it would also have the effect of channeling attention (and thus development assistance) directly to minority populations. A multilateral treaty that decreased indigenous (or minority-group) poverty

---

69. Examples include the forced assimilation of aboriginal children in Australia or the less formal assimilation processes—such as off-reservation boarding schools—that existed in the United States.

70. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 107th plen. mtg., U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

71. See, e.g., DIRK BERG-SCHLOSSER & NORBERT KERSTING, POVERTY AND DEMOCRACY: SELF-HELP AND POLITICAL PARTICIPATION IN THIRD WORLD CITIES 199 (2003) (“The experiences of the last development decade show that such integrated development programmes can be successful. . . . [S]upport at different levels (national, local and neighborhood) should come into effect without, as before, trying to deal with a wide spectrum of different problems and tasks. . . . Thus, development cooperation . . . is now limited to a few strategic, project components.”); see also Nicholas Watt & Patrick Wintour, *Andrew Mitchell Outlines Tory Plans for Targeted Aid*, GUARDIAN, Jan 1, 2010 (discussing plans to shift British aid to smaller, targeted projects, a decision that a number of other countries have already taken).

would both recognize the marginalization of those populations (thus promoting negative rights) and at the same time channel development assistance to those communities. While such projects would potentially be unpopular with developing nations' governments or majority groups, they could be implemented as requirements alongside other welfare-increasing aid: States would only receive development funding if they agreed to specific assistance to distressed, minority, or indigenous populations. This would seemingly provide a sufficient carrot and stick for the proponents of welfarist assistance while at the same time satisfying (some) demands of rights-first advocates.

#### CONCLUSION: THE REAFFIRMED IMPORTANCE OF RIGHTS PROMOTION

Posner and the welfarists' essential premise is that with an increased focus on economic development and welfare-maximizing treaties, "not only would welfare improve; human rights probably would as well, as people obtain the means to demand that their rights be respected."<sup>72</sup> While this argument has currency with regard to homogenous societies in need of economic development, it fails to address the realities of the often diverse communities in the developing world. The brief discussion herein highlights the potential dangers of overrelying on a welfarist approach and demonstrates a real danger if wealthy nations and human rights activists cease to focus on rights-based advocacy. Minority populations will undoubtedly remain threatened if the international chorus constantly trumpeting the importance of fundamental negative rights simply abandons their advocacy. As such, the welfarist model cannot be instituted in isolation.

This Essay is not intended to disparage the intentions of welfarist proponents. In fact, their basic argument, that negative rights-based treaties are not bringing stability and freedoms to less-developed countries and are not increasing welfare and standards of living, is frequently quite on point. The U.N. Declaration of Human Rights and the ICCPR have in fact not brought free elections to, say, Libya or the Sudan, nor increased GDP in other parts of the developing world. Proponents of welfarist treaties understand that in many developing countries, domestic institutions "weak or corrupt"<sup>73</sup> to adequately protect certain negative rights. Thus, these proponents advocate for tangible improvements in the hope that increased standards of living will eventually result in demand for greater negative rights.

---

72. Posner, *supra* note 1, at 1801.

73. *Id.* at 1798.

Yet such hope seems overly optimistic as well. Improved living standards in China and Saudi Arabia over the past decades have not resulted in increased political suffrage. Similarly, reports abound about the ineffectiveness of some foreign aid.<sup>74</sup> Despite the billions donated to developing countries, GDP growth and foreign investment do not in isolation guarantee long-term development, nor, and most importantly, do they result in increased suffrage and citizen empowerment. Moreover, minority populations, for example the Uighurs in China<sup>75</sup> or minority groups in Southeast Asia,<sup>76</sup> are often left further behind by nationally measured economic development. Welfarist treaties that promote base economic development and ignore political protections for citizens and minorities run the risk of exacerbating domestic problems by preserving social and political structures—such as authoritarian governments or caste systems—that harm minority groups or prevent the expansion of base negative rights. Even treaties that require countries to improve GDP, increase literacy, or promote other positive rights must still incorporate some negative rights requirement. Targeted welfare treaties that focus on improving the welfare of minority or indigenous populations might provide such a solution.

Posner does touch on some of the critiques of the welfarist approach<sup>77</sup> but brushes them aside in arguing that “a treaty is just a means to an end.”<sup>78</sup> Yet a treaty promoting development at the expense of political or social equality may in fact be just as detrimental (or ineffective) as those that simply espouse negative rights: Short-term benefits brought about by aid and development may bear little long-term fruit if corrupt and repressive governments or ingrained social inequality remain institutionalized. Aid must remain linked, at least tangentially, to a requirement that recipient states abide by commitments to certain freedoms and equality. Posner rightly notes that “the aid regime and the human rights regime work at cross purposes”<sup>79</sup> and that “[this] tension between the human rights and foreign aid regimes threatens to derail progress toward the overlapping goal of both . . . .”<sup>80</sup> This Essay argues—or hopes—that a treaty that combines rights and development elements and that targets specific

---

74. See, e.g., Dambisa Moyo, *Why Foreign Aid Is Hurting Africa*, WALL ST. J., Mar. 21–22, 2009, at W1 (“[E]vidence overwhelmingly demonstrates that aid to Africa has made the poor poorer, and the growth slower. The insidious aid culture has left African countries more debt-laden, more inflation-prone, more vulnerable to the vagaries of the currency markets and more unattractive to higher-quality investment.”).

75. See Ian Johnson, *Uighurs Lose Economic Ground to Han*, WALL ST. J., July 21, 2009, at A8.

76. See *Economic Growth in Viet Nam Is Not Shared Equally by All Ethnic Minorities*, ID21, Apr. 27, 2008, <http://www.id21.org/society/s7bbb2g1.html>.

77. See Posner, *supra* note 1, at 1800.

78. *Id.*

79. *Id.* at 1799.

80. *Id.* at 1798.



minority groups may improve welfare *and* promote rights protection, and thus satisfy the concerns of all development advocates.