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## Measuring “Progress” and “Regress” in Human Rights: Why We Need a Set of Social Contract Measures to Replace Indices of Violations and Slogans

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**Abstract:** This article presents a set of structural social contract measures that can be used as a basis for overall measurement of both the “progress” (or “regress”) of specific countries or cultures towards achieving the international standards of human rights as well as for promoting the success of specific human rights organizations in their interventions in the areas of human rights as a whole. The current approaches to measures of human rights focus on a spotty set of outcomes: either numbers of human rights violations (symptoms of inequalities), subjective perceptions of rights and freedoms, conformity with or copying of particular institutions or laws in reference countries, and on particular socio-economic results to the detriment of others. Since none of the existing indicators today focus on the underlying structural processes of rights balancing and protections that come out of law and social contract theory in the form of positive rights (freedom to): oversight of powerful institutions, or equal opportunity for individual and community access to institutions and to resources, this article points the way to reorienting the measures.

### A. Introduction

Several weeks ago, the upper management of one of the oldest and most prominent global human rights organizations, Amnesty International (AI), invited me for a meeting to discuss their strategy, monitoring and evaluation measures. AI originally began as a “watchdog” to note violations of individual political rights by countries and to promote campaigns to advocate for protection of individuals and groups. More recently, AI has recognized the importance of working on issues of human rights as a whole and on concentrating not only on “awareness” but also on human rights education and social change. Indeed, AI recognizes that in many countries, including major industrialized countries that once claimed to be the leaders in promoting human rights, there has been a significant “rollback” or regress on civil liberties and social equality as well as in many other forms. Much of the organization’s work had shifted away from promoting progress on rights to simply stopping the flood of attacks on human rights and dismantling of rights protections that are now occurring on a global scale.

What shocked me in that discussion and that has given rise to this article, is that despite several measures of quality of some of its technical inputs like “awareness raising” (social marketing) campaigns, AI, in fact, had no measures of overall progress or regress of countries or communities in human rights. Without such measures, it was and is unable to point to the speed and severity of

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global regress or to actually measure the organization’s real impact on human rights. Nor does any other organization appear to have such professional measures.

Though there is a universal “outcome” standard for measuring protection of rights at one of the two levels of human rights – at the cultural/community level, measuring cultural viability and survival in a way that could give meaning to the international community’s law on criminalizing genocide, as opposed to the level of individual rights – AI does not even use that measure. Nor does any other major human rights organization use this measure, though some smaller organizations and studies for UNESCO do at least recognize the approach.<sup>2</sup> I have worked to standardize this outcome measure at the level of cultural rights, focusing on cultural health and viability. The approach is based on language survival as a litmus test for cultural rights and can be expanded using a “Red Book” approach for endangered cultures as a measure for cultural/community level rights outcomes.<sup>3</sup>

At the level of individual rights, however, there is no overall standard set of measures that either defines an “outcome” of individual rights or that offers an indicator list of “structural” (legally enforceable) rights guarantees. While there are some global measures of “freedom” or “democracy” that have been used as proxies for human rights, the measures are spotty and many are subject to challenge for being politically or ideologically motivated. Often, they are just rankings rather than objective standards of measurable progress. Where they do look for evidence of specific kinds of institutional structures that could be related to rights protections, the underlying approach is often to serve interests of elites in creating spheres of influence and assimilating cultures to a set of complementary institutional forms, rather than to actually promote individual rights, themselves.<sup>4</sup>

In short, despite histories that can date some 50 years like that of AI, human rights organizations have not designed any real measure or set of measures to use for their overall long-term performance on individual rights or any category of rights. Though there is a general perception of equality and freedoms that is shared by those working in the rights community, there is no “Orwellian Index,” for example, to measure how close or far contemporary industrial countries may be towards the dark, dystopian totalitarian visions of Orwell’s *1984*.<sup>5</sup> Furthermore, nor is there even an agreed categorical list of requirements for structural legal rights protections in contemporary industrial societies. Organizational strategic plans and targets used by rights organizations like AI seem to change categories and priorities at whim.

Human rights organizations today are essentially throwing money at “campaigns” and at ameliorating individual symptoms of structural political inequalities. They offer no systematic focus on the underlying system changes that would achieve progress in human rights. Note that this is not a criticism just of AI. In fact, almost all organizations working in the human rights field create the impression that they are co-dependent on human rights violations to justify their mission and continued funding. It appears as if they have no real way to measure or to work towards long-term impacts. This may be one of the reasons why it has also been easy for many of the violators

<sup>2</sup> See Paris-Fontenoy, *Language Vitality and Endangerment*, UNESCO AD HOC EXPERT GROUP ON ENDANGERED LANGUAGES 1, 6 (Mar. 10-12, 2003); see also Michael Krauss, *The World's Languages in Crisis* LANGUAGE, 68 LANGUAGE 1, 6 (1992).

<sup>3</sup> See David Lempert, *Why We Need a Cultural Red Book for Endangered Cultures*, Now, INTERNATIONAL JOURNAL OF MINORITY AND GROUP RIGHTS (2010); <http://david.dracula0.googlepages.com/home>.

<sup>4</sup> See NOAM CHOMSKY AND EDWARD HERMAN, *THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM* (1979); see also TONY EVANS, *THE POLITICS OF HUMAN RIGHTS* (2001); see also SAVIC OBRAD, *THE POLITICS OF HUMAN RIGHTS* (2002).

<sup>5</sup> GEORGE ORWELL, 1984 (1949).

of human rights (governments and international organizations), themselves, to design so-called “human rights” projects that are little more than public relations window dressing or “rightswash,” and why human rights organizations often seek their money and blindly follow their set guidelines.<sup>6</sup>

In an effort to professionalize the non-governmental sector and to hold both governments and NGOs accountable to scientific and professional standards and to international law, I began several years ago to build the infrastructure for measurement and oversight in international interventions.<sup>7</sup> In recent articles, I have taken some of the initial steps to establish indicators and benchmarks through which the public and organizations can hold international development actors accountable to international law and to their mission statements for their interventions. These inexpensive and easy-to-use tools can create accountability and transparency in the use of public funds in development interventions.

I have now published a series of 12+ indicators that will serve as a treatise on the law of international development, focusing on universal treaty definitions of development, sovereignty and areas of rights,<sup>8</sup> along with ethics codes,<sup>9</sup> in addition to measures and approaches in specific areas like cultural rights, as noted above.

Moreover, this article presents a set of structural social contract measures to be used as a basis for overall measurement of both the “progress” (or “regress”) of specific countries or cultures towards achieving the international standards of human rights. These measures can then be used for promoting the success of specific human rights organizations in their interventions in the areas of human rights as a whole.

Today, the current approaches to measures of human rights have failed. Current approaches focus on a spotty set of outcomes: numbers of human rights violations (symptoms of inequalities); subjective perceptions of rights and freedoms; conformity with or copying of institutions or laws in reference countries and in particular, socio-economic results to the detriment of others. Since none of the existing indicators today focus on the underlying structural processes of rights balancing and protections that come out of law and social contract theory in the form of positive rights (freedom to): oversight of powerful institutions, equal opportunity for individual and community access to institutions and to resources, this article points the way to reorienting the measures.

As such, this article begins with professionally recognized and universally legislated standards for defining and listing areas of human rights, in structurally enforceable social contract forms, universal aspirations for outcomes and social science tests of what is possible. These standards form the basic set of potential structural and outcome measures.

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<sup>6</sup> See David Lempert, *A ‘Democracy Building’ Development Project Indicator for NGOs and International Organizations*, 11 GLOBAL JURIST 2 (2011); see also David Lempert, *A Human Rights Education Project Indicator for NGOs and International Organizations*, 3 INTERAMERICAN JOURNAL OF EDUCATION FOR DEMOCRACY 1 (2010).

<sup>7</sup> See David Lempert, *Why We Need an International Development Donor Monitor*, POLICY INNOVATIONS (Jan. 2008), <http://www.policyinnovations.org/ideas/policylibrary/data/01464>.

<sup>8</sup> See David Lempert, *A Dependency in Development Indicator for NGOs and International Organizations*, 9 GLOBAL JURIST 2 (2009).

<sup>9</sup> See David Lempert, *Holding the Powers that Be Accountable to Our Ethics Code to Protect Our Integrity and the Peoples We Serve*, 24 HUMAN RIGHTS 2 (1997).

This piece then explains how the debate on the politicization of rights in the era of globalization has diverted attention from structurally enforceable social contract forms in a way that has undermined the earlier legal consensus on human rights, and that has undermined effective measurement. In fact, an examination of existing measurement approaches shows how these approaches fail to link coherently with the set of professionally recognized and universally legislated standards for human rights.

Accordingly, this piece then proposes a measurement framework of structurally enforceable social contract forms for balancing power in key areas that are essential to achieving the full set of rights protections, as well as for achieving existing and potential outcome measures.

## **B. The Theory of Measuring Human Rights**

Today, one often hears from academics about the lack of agreement as to how to define human rights, and that human rights are culturally specific, that the ideas of universals are a myth and that it is difficult to even try to measure human rights.<sup>10</sup> Much of that discourse may be a result of the politicization and distortion of rights discourse by elites who do not wish to be held to international standards or who believe that they can advance their careers by supporting such distortions in ways that are at odds with protecting and promoting rights. In fact, there *is* a standard definition of rights. There is also a solid core of approaches for which to define and list areas of human rights, grounded in specific professional disciplines, which complement and reinforce each other. There are also professionally recognized and universally legislated standards for defining and listing categories of human rights: in structurally enforceable social contract forms and universal aspirations for outcomes. There are also social science tests of what is possible. These all form the basic set of potential structural and outcome measures.

### A Definition of Human Rights and its Elements

There is a definition of human rights that comes out of centuries of legal tradition in complex societies. In fact, the same definition is used by the international community in its universal consensus. Where there is confusion today, it is often the result of academics and practitioners creating new definitions, and then claiming that by these new definitions, such rights are intangible or disputed.

In Anglo American jurisprudence, the textbook definition of a “right,” dating back some 250 years, is that of a contractual term noting an agreement between parties for which there exists an institutional structure for enforcement and a remedy for its failure or breach.<sup>11</sup> Human rights then, are those rights created in a “social contract” that establishes how individuals (at the level of individuals) and communities/cultures (at the level of communities and/or cultures) interact with each other to be governed and to resolve disputes.<sup>12</sup>

In establishing the universality of these human rights, the United Nations recognizes the same element of legal enforceability that is the basis of contract, established by individuals and groups with each other. As such, “[h]uman rights are universal legal guarantees protecting

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<sup>10</sup> See Sally Engle Merry, *Measuring the World: Indicators, Human Rights and Global Governance*, 52 CURRENT ANTHROPOLOGY S83 – S95 (2011).

<sup>11</sup> See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69).

<sup>12</sup> See JEAN JACQUES ROUSSEAU, OF THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (1762).

individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.”<sup>13</sup>

The idea is that these rights are “natural” beliefs embedded in human nature and human interactions in ways that are universal, as this is now being confirmed in studies of children across cultures in their understandings of fairness and reciprocity. There is a biological (neural, cognitive) basis for human understanding of equity and fairness in relations.<sup>14</sup> Though cultures shape this to fit different environments, the natural concepts of fairness and “rights” are universal prior to being shaped by (the various forms of “social contract” that are specific to each) culture in the context of specific environments.

The source of current confusion in the definition of human rights is a result of the shortening and over simplification which sometimes omits references to law. The 18<sup>th</sup> century legal doctrines in Anglo American law described by Blackstone, and the continental law reflected in Rousseau’s discussion of social contract, both presented above, must be taken together. Human rights are fulfilled through a “social contract” and contract, by definition, includes the elements of institutional processes for enforcement and remedies. By contrast, the meaning is less clearly stated in the current U.N. definition of human rights, cited above. Nevertheless, there is ample proof that the U.N. definition, in calling for “legal guarantees,” is implying the requirement of “institutional processes for enforcement and remedies” even without finding the word “social contract.”

Although the U.N. definition does not incorporate legal terms, when the U.N. offers ways of measuring rights, it specifically mentions “structural, process, and outcome” measures that are rooted in law.<sup>15</sup> Such “structures” include both legal institutions and laws established through agreement, with processes to carry them out to achieve the outcomes. These are the elements of contract, agreement and enforcement. Where “rights holders” are individuals, the contracts are a social contract.

Today, academic criticisms of the universality of human rights regimes claim that they are rooted in Western tradition and legal systems (whose history is that of the Roman and Greek Empires as well as earlier legal traditions of the ancient Near East), and that this creates cultural biases that makes human rights ambiguous and unknowable. The basis of this critique is a misunderstanding. The universality of human rights regimes is based on the concept of social contract and the protections of parties to each social contract, in the same way that laws protect the rights of individuals to contract relations with each other. The outcomes of these social contracts can potentially take an infinite number of forms while adhering to these basic principles. However, these forms must not be held to a single, universal standard. Accordingly then, it is in trying to enforce uniformity on political, economic and social systems are where those who claim to support “universal” rights are at fault, and additionally, where the idea of “universality” is misstated. Thus, the problem in human rights practice does not involve the bedrock definitions. Instead, the problem is in the abuses of current measurements and current international interventions in the name of rights.

Both the history of social contract and the universal consensus on human rights in international law recognize and protect two distinct levels of rights; one of them at the level of cultures/communities. International human rights law protects indigenous approaches to legal

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<sup>13</sup> Human Rights Indicators: A Guide to Measurement and Implementation 10 (2012), [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf).

<sup>14</sup> See DONALD W. PFAFF, *THE NEUROSCIENCE OF FAIR PLAY: WHY WE (USUALLY) FOLLOW THE GOLDEN RULE* (2007).

<sup>15</sup> See *supra* note 13, at 35.

systems and to definitions of individual rights through the legally enforceable U.N. Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).<sup>16</sup> Social contract traditions recognize these rights in “federalism” protections to balance cultural rights, such as those in the United States Constitution as negotiated among “states” with specific cultural traditions and geographies.<sup>17</sup>

The fear that the concepts of “social contract” are themselves culturally biased is circular reasoning. Such concepts simply seek to eliminate even the basic definition of “rights” and to eliminate the basis for any agreement at all. Indeed, the reality today among industrial and industrializing countries is that their legal systems, from Africa to Asia to South America, largely embody Western legal traditions and concepts. These legal traditions and concepts date back to centuries of imperialism, cultural diffusion and modern convergence, and are now mixed with many other traditions and systems in different environments. Nevertheless, this history of contact of cultures offers the basis for cultures to meet with each other and to accept a basic definition as the starting point for then discussing this concept of rights in its multiple applications.

To fully understand the concept of rights within the framework of this definition requires moving from the abstract to the practical. Because the definition of rights implies an agreement in the form social contract, fulfilling specific legal elements, there are specific examples that date back to the history of the term more than 200 years ago.

Two examples of how human rights meet the full legal definition of enforceability through the inclusion of three specific rights elements – (a) social contract (the structural element) denoting a categorical right, (b) procedural elements for enforcing those rights, with remedies to assure balances of power, and (c) outcomes (measurable results demonstrating the effectiveness of the protection) – are described in Table 1, below, with one example from each of the two levels of rights (cultural/community and individual). Both rights are taken from the United States Bill of Rights dating back to 1789 (also shown more fully in Table 2 below). The first example of a community or collective right, is taken from the Second Amendment to the United States Constitution, and the second, an example, of an “individual right,” is taken from the Seventh Amendment. However, neither of these specific rights are yet to exist in international treaty documents, as treaties do not state actual mechanisms for rights to exist but only aspirations for those rights. Both the right to sovereignty for communities (and the linked right to life and security) and the right to legal remedies and due process for the protection of individual political (and social) rights are enshrined in international treaties, such as the International Declaration of Human Rights in Articles 3, 6, and 8; the Genocide Convention; Article 1 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and Article 16 of the International Covenant on Civil and Political Rights (“ICCPR”) (see Table 3, below).<sup>18</sup>

<sup>16</sup> See Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.

<sup>17</sup> See U.S. CONST.; see also DAVID LEMPERT, THEORIES OF DEMOCRACY, A RETURN TO DEMOCRACY: THE MODERN DEMOCRACY AMENDMENTS, A RETURN TO COMMUNITY: THE NEW FEDERALIST AMENDMENTS (unpublished trilogies).

<sup>18</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, (Dec. 10, 1948), <http://www.un-documents.net/a3r217a.htm>; see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; see also International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; see also Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.

**Table 1 (A).** Examples of Human Rights and Their Elements, by Definition

<i>Human Right (and Category)</i>	<i>Structure (Social Contract)</i>	<i>Process</i>	<i>Outcome</i>
<i>Cultural/Community Right</i>			
Right to a local militia (Right to sovereignty of a cultural group and the Right to life and security) [From the U.S. Constitution, Bill of Rights, Amendment II.]	Political autonomy with recognized local structures including a military for defense and security.	National and international level balancing of military, national security and police powers to reduce tensions and military spending and to promote equity.	Integrity of cultures and communities in all of their political, economic and social spheres, free of pressure and assimilation or other form of cultural genocide and an equitable balance of military powers among cultures/communities.
<i>Individual Right</i>			
Right to a civil jury in a civil court case (Right to legal remedies, requiring due process right to an impartial body) [From the U.S. Constitution, Bill of Rights, Amendment VII.]	Individual autonomy as both a legal actor in bringing actions and participating in judging them through the recognized structure of an empowered jury.	Appropriate funding for and protection of jurors as well as limiting the procedural power of State judges.	Social and political equality as well as other rights protections of workers.

### Generating the Universal Sets of Human Rights Structures and Outcomes, Both Theoretical and Possible

There are 3 core social scientific approaches for generating a universal set of human rights structures and outcomes that work to complement each other and to verify a set of outcomes. The first approach (*the axiomatic, inductive approach*) starts in political theory, and begins with a concept that individuals and cultures are both independent. This approach then works inductively to construct a social contract that all parties would view as “fair,” “just” and “equitable,” without knowing their initial starting point endowments of wealth and power compared to other individuals and groups.

A second approach (*a cross cultural inductive research approach into human aspirations for “development” and “rights”*) works cross culturally to identify the universal and common aspirations of individuals and cultures in two independent but interrelated steps. One step is to

determine the opportunities that individuals and cultures would seek (that political scientists identify as “positive liberty” or “freedom to” and that other social scientists refer to as “development goals” for human development). The next step would determine what protections individuals and cultures would need (“negative liberty” or “freedom from”) in the form of “rights” and “resources” to achieve these goals. These goals are now established universally in international treaties, although there are some imperfections and contradictions that can, at least theoretically, be resolved. This approach is also inductive but starts with data collection as well as with actual international negotiations of treaties.

The third approach (*a deductive, empirical approach to human rights based on the determinative factors for and constraints on what is possible*) is rooted in anthropology. It starts with the theoretical ideals and stated aspirations, above, and examines empirically what is possible given the human record of societies in different historical environments, the balances of power and “rights” that exist in these conditions, and how they change. This deductive, social science approach can determine what is possible and how constraints on social relations operate.

Furthermore, these scientific approaches establish rights on objective grounds. Instead of human rights being viewed merely as codes of “moral” or “religious” views and aspirations, the social science approaches distinguish them from religious invocations. They can, instead, be recognized as principles of balancing power and creating consensus in ways that offer long-term benefits for human survival through protection of human cultural and individual diversity. Indeed, there is now increasing recognition that societies that protect human cultural and individual diversity are those that are most adaptive and resilient with the greatest potential for promoting human integration with changing environments for human survival. That means that the social science of “human rights” ultimately works as a set of mechanisms to promote human survival in ways that may be directly measurable.

Social science is, admittedly, imperfect at the level of societies, because it is not possible to run controlled experiments and there is a limited amount of observed data that is always being supplemented slowly, with new cases. Nevertheless, social scientists have developed methods of “thought experiments” and testing of theories using axioms that can be used in parallel with, and as a test of actual data, in ways that confirm the different approaches. In this way, these three social science approaches do offer the basic “science” of human rights. Controversies may develop where political preferences seek to replace efforts at culturally neutral, objective tests and where data is only partial, but these problems are always inherent in social sciences (and in natural science). They are simply challenges to improve measures and predictions.

These three social science approaches, setting the groundwork for measures of progress (or regress) on human rights, can be explained in greater detail as follows:

#### (1) The Axiomatic, Inductive, Political Theory and Social Contract Approach to Human Rights

One aspect of social science modeling has been to start with assumptions about humans in the “state of nature” and then to derive “ideal” systems on this basis. However, this approach has imperfections. Admittedly, economics has long been faulted for making assumptions about the “rational economic actor” that are based on economic greed, that has led to the discipline creating models of consumption, production and exploitation that are far from the human ideal and human reality. By contrast, some of the starting assumptions of political theory were more firmly based

on actual behaviors and innate beliefs on justice,<sup>19</sup> that have led to the building of theories of contract and social contract.

The starting assumptions for “human rights” are based on the “Golden Rule” that is a universal human concept (“Do unto others as you would have others do unto you”). This is, in fact, a mathematical principle or axiom of “symmetry” and “transitivity” that is the basis of human rights concepts.<sup>20</sup>

Political philosophers like John Rawls have developed theories of “justice” through inductive thought experiments, asking individuals to assume an “original starting position” in which they are contracting with others to build a society that they view as “fair” and meeting their needs.<sup>21</sup> Instead of starting with their current social status, wealth, and advantages or disadvantages, the thought experiments begin with the assumption of a “veil of ignorance,” where individuals imagine that their initial advantages will all be random and that the risks they would face in life would also be random. From this “ex ante” position, individuals determine the types of relative powers and protections they would need to best protect their own long-term benefits both as individuals and as members of cultures/communities. The result is to derive the ideal “social contract” that political philosophers also envisioned.<sup>22</sup>

The problem with this social contract theory is that it has been difficult for political philosophers to actually move from these abstract concepts to the design of a universal social contract that could easily be adapted to different societies. Most people cannot really think through an entire system and how it should work. In fact, few citizens (or scholars) are trained in law and in public administration or management skills and in the psychology of information processing and decision-making, that are all relevant to institutional oversight, transparency, political equality and rights protections. Still, even fewer think of abstract problems like building a workable utopia. Instead, individuals are more likely are preoccupied with their next meal and next job. Thus, the idea of moving from the “state of nature” to an actual working system has also been viewed as abstract and unrealistic, since few societies start from scratch and from positions of relative equality, where observers could see this social experiment at work.

However, there exists an example of such a system. After the independence of the American colonies from Britain in 1776, they set about trying to establish a government that would balance 13 different colonies that each had different cultural origins (several British but also German, Dutch, Swedish and French, as well as nearby Spanish and Native American territories), as well as different economies and traditions. At the individual level, while there were large racial and gender inequalities, the basic economic and political unit throughout all of these former colonies was the independent, male headed household. These household units, with the political rights held by the male head, were also the independent social contractors who sought to protect and balance their interests.

In fact, they did negotiate various social contracts. Their first effort (The Articles of Confederation) failed. The second effort was not accepted until several compromises that recognized autonomous powers of communities and cultures (i.e. communities and “states”) as well as individual rights in the form of a second attached document to “The Constitution of These

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<sup>19</sup> See *supra* note 14.

<sup>20</sup> See WALTER T. STACE, *THE CONCEPT OF MORALS* (1937); see also WILLIAM E. PADEN, *INTERPRETING THE SACRED: WAYS OF VIEWING RELIGION* 131–32 (2003).

<sup>21</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>22</sup> See *supra* note 12.

United States.” The finally agreed upon initial contract included a “Bill of Rights” proposed by the “Anti-Federalists” who contracted for several representative mechanisms (like militias and juries) as part of the contract.<sup>23</sup>

Using the tools that exist today for public administration, managerial oversight, communications, psychology, decision science and law, one can recognize all the specific mechanisms of balance and oversight in the U.S. Constitution and in its cultural context. One can also see how industrialization and technological change has reoriented almost every one of these balances and weakened all of the original control systems. The corporation, the national security state and the national military are all new, and there has never been a renegotiation of the social contract in the United States or an unpressured negotiation among relatively equal actors establishing such a social contract anywhere else.<sup>24</sup>

Social contract principles can, however, inductively be transferred to imagine an ideal social contract for oversight and control of these organizations as well as for new balances of power in contexts like those of today. One would need to imagine direct mechanisms of citizen oversight and control in several forms, including inspection bodies of representative citizens with independent judicial powers, as forms of participatory democracy to assure meaningful “human rights” in modern societies.

I have pioneered exactly such a theoretical, inductive, model ideal, using the principles of the original U.S. Constitution’s social contract and translating them to modern societies both for a revised form of federalism, to balance cultural and community rights, and individual rights balancing.<sup>25</sup> Some of these principles for the individual rights are highlighted in short pieces<sup>26</sup> as well as in models for individual rights protection in newly “independent” states like Ukraine.<sup>27</sup>

## (2) The Cross-Cultural, Inductive Research Approach into Universal Human Aspirations for “Development” and Human Rights

The process of generating a list of cross-cultural universal aspirations for “development” and for “human rights” has already taken place, but not in the work of social scientists. Nevertheless, such a process can be confirmed by social science. It has occurred in international negotiations among nation-state leaders, starting in 1945 at the end of World War II, and continued since then. The body of international treaties now offers a consensus of “universal” aspirations, with many of them referred to as “rights” even though they do not meet all of the elements of the definition of “rights” that the U.N. itself recognizes. Certainly, the negotiating bodies to international agreements are some nearly 200 nation states and they are not fully representative of the globe’s 6,000 human cultures and peoples. Nevertheless, these nearly 200 states that cover the globe are diverse and have reached an agreement on these lists. The goal of these lists fits into the framework of the United Nations and its mandate following World War II: to provide a system of global peace and security for long term human survival and benefit.

<sup>23</sup> See U.S. CONST.; see also BRUTUS, *To the Citizens of the State of New York in THE COMPLETE ANTI-FEDERALIST* 1787 (Herbert J. Storing, ed., 2008).

<sup>24</sup> See Lempert, *supra* note 17.

<sup>25</sup> *Id.*

<sup>26</sup> See David Lempert, *Development and Constitutional Democracy: A Set of Principles for ‘Perfecting the Market*, 36 THE JOURNAL OF DEVELOPING SOCIETIES 1 (1996).

<sup>27</sup> See David Lempert, *Ukraine’s New Constitution: Continuity Under the Banner of Change with a Proposal for Authoritarian to Democratic Transitions*, 2 DEMOKRATIZATSIYA 2 (1994).

Overall, there are some disagreements as to the exact universal core of human rights treaties, which is why an approach (described below) of trying to define categories and boundaries of aspirations may be a key to identifying areas of rights to be measured. Indeed, the total number of international declarations continues to increase with individual groups of rights holders and, now, groups of rights practitioners and/or economic producers and government sectors, each advocating for recognition in an international agreement. Some of the existing treaties are legally enforceable, such as the Genocide Convention and the Rome Statute of the International Criminal Court that defines crimes against humanity.<sup>28</sup> Other treaties are not internationally enforceable on nation states and they were passed at different times. Some of their principles are then elaborated in “declarations” that are considered less “binding.” The wording is not always consistent from one treaty to the next, though they are mostly reinforcing and overlapping. There are also slightly different lists of signatories to each.

Among the central core human rights treaties are the International Declaration of Human Rights (“IDHR”) and two follow-up treaties: the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>29</sup> Generally, the U.N. Convention on the Rights of the Child (“CRC”) and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) are also considered with these.<sup>30</sup> Occasionally, the Genocide Convention and the Geneva Convention (IV) on International Humanitarian Law applicable to the treatment of civilians during times of war are additionally considered along with these.<sup>31</sup> Finally, the U.N. Charter is also considered to be in the same category among these mentioned above.<sup>32</sup>

It is a judgment call on where to place the U.N. Declarations that include the Declaration on the Rights of Indigenous Peoples, the Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities and the Rio Declaration on Environment and Development that appears to create rights for sustainable development and choice of consumption patterns to protect it.<sup>33</sup>

<sup>28</sup> See *supra* note 16; see also Rome Statute of the International Criminal Court (Jul. 17, 1998).

<sup>29</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, (Dec. 10, 1948), <http://www.un-documents.net/a3r217a.htm>; see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; see also International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; see also Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.

<sup>30</sup> See Convention on the Rights of the Child, GA 44/25, (Nov. 20, 1989), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>; see also Convention on the Elimination of All Forms of Discrimination Against Women (1979), <http://www.un.org/womenwatch/daw/cedaw/>.

<sup>31</sup> See *Convention IV relative to the Protection of Civilian Persons in Time of War*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Aug. 12, 1949), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>.

<sup>32</sup> See United Nations Charter. 59 Stat. 1031. (Jun. 26, 1945).

<sup>33</sup> See Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (Sept. 15, 2007); [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf); see also U.N. Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities (Dec. 8, 1992), <http://www.un.org/documents/ga/res/47/a47r135.htm>; see also Report on the United Nations Conference on Environment and Development (Jun. 3-4, 1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

Given the overlaps in how international treaties present “rights,” and the fact that not all of the “rights” contain all of the elements meeting the definition of “rights,” it makes sense to list them first as “aspirations,” and then to see how they fit with the definition for various elements of “rights.”

Many international treaties on rights specifically mention “human rights” that can be placed onto a list of such rights, but not all of them do. At the same time, many of these treaties also mention general aspirations that are indistinguishable from “human rights” or that are now viewed as “rights.” These are defined using the term, “development,” even though there is no Convention on development; only the Declaration on Environment and Development, which appeared decades later in 1992.<sup>34</sup>

Since the international agreements on human rights do not define any social contract provisions that would make rights enforceable and that would establish power balances, the best way to view these treaties are as lists of universal “aspirations,” even though they may or may not be labeled as “rights.” Such aspirations fall into two types. One is the list of the opportunities that individuals and cultures would seek (that political scientists identify as “positive liberty” or “freedom to”) that are really the subcategories of universal goals for “development.” The other is the list of protections that individuals and cultures would need (“negative liberty” or “freedom from”) in the form of “rights” and “resources” to achieve these goals. Since both are two sides of the same coin, they can also be used to validate each other and to solidify the list of international human rights while presenting their elements. If there is a universal aspiration for development, there needs to be a corresponding legal basis either in power and/or protection that would make it an enforceable part of social contract to meet the definition of “rights.” Social science can work with these treaties to confirm and solidify these lists and then to work towards systematic measures of progress towards achieving them.

In fact, a previous article of mine began this process. I used the existing international treaties that list “human rights” as well as those that also reference “development” as the basis for deriving the international consensus aspirations of “development,” and placed them in a unified framework of “Universal Development Goals.”<sup>35</sup> Several different treaties and declarations that are nearly universal (signed by most, but not all country members of the United Nations) contain the same “development” wording alongside wording for rights. These can be used to derive a list of all areas of development where there is agreement. In fact, there are 13 identifiable “universal development goals” in the treaties, at four different levels (individual, community, between communities/cultures, and internationally). These are presented later in this article (in Table 4) in a comparison of the “development goals” and “human rights” to show where the list of human rights has left some gaps that are needed to fulfill development goals, and how both sets can be used together in creating measures of progress or regress.

Indeed, the list of rights can also be better categorized in order to make them easier to measure and to reflect categories derived inductively and axiomatically in defining social contract (the first approach, above). I believe that there are a number of identifiable rights categories for

<sup>34</sup> See Report on the United Nations Conference on Environment and Development (Jun. 3-4, 1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

<sup>35</sup> See David Lempert, *Universal Development Goals for this Millennium*, 12 *CONSCIENCE* (2014); see also David Lempert, *A Vision for International Development and a Tool for Comparisons*, 16 *JOURNAL FOR ECONOMICS AND SOCIAL POLICY* 2 (2014).

power balancing and oversight through social contract at the level of individual rights protections and at the level of cultural rights protections (federalism), in addition to corresponding outcome measures that are roughly 20 in number (not exact because some of them cross categories). These are presented in later sections of this paper (Tables 6 and 7). This is an antidote to the continued expansion of rights agreements with a seemingly infinite number of aspirations. As such, it establishes a bounded framework, though there may be a changing number of sub-categories as social complexity and technologies transform the context of power relations and opportunities.

### (3) An Empirical, Deductive Approach to Human Rights based on What is Sustainable and Possible

The least developed aspects of the social science of human rights are the studies of which rights are possible in different societies and the studies of how the existence of specific rights influences human well-being as well as long-term cultural survival and sustainability. There are two extreme assumptions relating to how different approaches to human rights appear in different societies and on whether and how change may occur. Proponents of both assumptions seem to prevent social scientists from testing either one. One belief is that political and social systems, including human rights systems, invoke a meaning of free political choice that people of a society can make at any time. However, this belief defies social science reality, entirely.

The other belief is that cultural choices are predetermined by environmental, geographic and technological factors, and that no free choice is possible at all. The implication of this assumption is that current systems, whether outsiders view them as “violations” of rights principles, can only be changed by outside influences and interventions which themselves would be a violation of rights. Thus, both of these positions make it difficult to measure progress on human rights. They interfere with an understanding of what may or may not be culturally appropriate and sustainable without an understanding of the pathways to achieving such. Meanwhile, there seems to be social science evidence to demonstrate that systems where there is the greatest expression of social contract rights, as evidenced by diversity of cultural approaches and individual freedoms, along with mechanisms for achieving consensus, are the most adaptable, stable and productive. Nevertheless, there are also counterexamples and arguments about this relationship, such as the stability and survival of the Han Chinese culture even without many aspects of social contract rights.

Political science assumes, without testing or questioning, that systems of free will in the choice of political and legal systems are an independent variable. The discipline has catalogued comparative rights regimes but because it starts with this fixed assumption it has not developed theories of predicting how and why different regimes arise other than through hegemonic influences that force client states (weaker, subordinate, dependent, or “satellite” countries”) to conform to certain structures. Though the discipline recognizes that imposed legal and political systems and rights regimes may or may not result in actual “rights” changes, depending upon whether the essential “deep structure” of the culture (technology, relations with the environment, and approaches to economic and social needs) is also changed, it has not pursued this further.<sup>36</sup>

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<sup>36</sup> By contrast, the discipline of Anthropology originally began with the assumption that cultures are products of their environment and political/legal systems are driven from environmental factors. Often linked with this assumption is the belief that these systems should not be changed, and their current inequalities should remain, even if such cultures and societies are not sustainable. Recently, however, the prediction of systems that arise in various environments and with different technologies, along with the study of how and whether systems can change on their

In efforts to promote this area of inquiry, I have also completed some comparative research and modeling in this field in predicting political systems and “federal” systems.<sup>37</sup> So far, these results suggest that there is limited opportunity for cultures to change, since their forms are largely determined. Thus, it appears that societies are likely to collapse before they are likely to change their political and legal institutions, since these are fundamental aspects of their cultures that resist change. To understand the basic concepts, one can think of industrial societies over the past century. In contemporary societies, there appears to be a high correlation between the existence of a middle class and social contract rights and political equality, reflecting this distribution of economic power. At the same time, there is also a correlation between technologies, industry and resources with the existence of a middle class. Where there are more highly concentrated resources or technologies, and where productivity depends on this concentration, there is concentrated economic power with little political equality. Similarly, when there are dispersed resources, dispersed means of production (production technologies) and little chance or need for industry to be concentrated, there is dispersed economic power. Additionally, there is also dispersed political equality through social contract rights.

In both the early agrarian United States where households owned their means of production and in the 1960s, where education allowed individuals to open their own medical clinics, law firms and small businesses to compete in non-concentrated industries, there were forms of social contract democracy with a distribution of political rights among those who represented the units of production. By contrast, where technologies and the resources needed for those technologies are costly or concentrated, economic control has become concentrated and social contract rights have become limited. In many countries, today, where militaries control resources that are the key to the economy, or where there are few and concentrated industries (that seek the military to protect them), there is a direct correlation with political inequality and a weakening of human rights. Although one can imagine systems that disperse oversight and power, it is difficult to see how that could come about given empirical historical data on political systems and on pathways of change.

Nevertheless, interventions would protect many cultures where there are high concentrations of power and little in the way of social contract rights, against internal violence and collapse if there were ways to work with cultures to do so. The pathways to establishing sustainable cultures and appropriate rights systems – without undermining traditional cultural aspects and restoring aspects of the cultures that may have once been sustainable – is not easy. This is why much of the focus on “promoting human rights” today seems to focus on destroying cultures and

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own, have been eliminated from the discipline. The approaches have been replaced only with the “moral” belief that cultures should not be urged to change (even if change might protect them from collapse) other than to copy certain forms found in industrial countries, like political rights for women. Meanwhile, the discipline has also eliminated scientific hypothesis testing in examination of contemporary societies. The only examination of these questions remains in “political anthropology” which has traditionally been part of archaeology. That subfield’s approach has largely been to tell stories about the evolution of complex society but without any predictions of how and where different systems of rights could arise or change. See DAVID LEMPERT, PREDICTING POLITICAL SYSTEMS USING ECONOMIC, ENVIRONMENTAL AND RELATIONAL VARIABLES, *SOCIAL EVOLUTION AND HISTORY* (2016); see also David Lempert, *The Myth of Social Progress, Revisited*, 5 *HUMAN FIGURATIONS: LONG TERM PERSPECTIVES* 1, (Mar. 2016); see also David Lempert, *Classifying Cultures by Their Relations in Groups: Drawing from Models in Psychology and Ecology*, 13 *SOCIAL EVOLUTION AND HISTORY* 1, 99-134 (Mar. 2014).

<sup>37</sup> *Id.*

absorbing them into a global, industrial system in ways that actually undermine cultural rights in the name of rights.<sup>38</sup>

### Linking the Three Social Science Approaches

The three social science approaches to identification of human rights can be viewed as conceptually linked for the purposes of defining and identifying rights, as well as for their measurement.

- The universal aspirations for development and for rights to protect such development (the second method, above) can be viewed as the “outcome” goals of human rights. These aspirations offer the basis for measuring “outcomes.”
- The ideal social contract forms for balancing power in ways to achieve those aspirations (the first method, above) can be viewed as the “structural procedures” for achieving human rights goals. These can be potentially measured by “structural social contract” indicators.
- The potential limits to what is possible within the environments where these outcomes are sought (the third method, above), raises questions about whether human rights changes are possible or at least to what extent and by what mechanisms. This sets the framework for human rights actions and for measuring the value and success of such actions.

Therefore, no human rights system can have any impact unless it considers all three of these approaches together, since rights are both their legal structures and their effective outcomes, placed in their social and cultural context.

Table 1B takes the same two examples of human rights that were introduced in Table 1A and examines them again in terms of these three approaches as a prelude to creating measurement categories for rights. What is interesting to see here in Table 1B is that there seem to be some clear recognition of aspirations in development in international treaties, but the list of rights still only partly matches development aspirations. The structural mechanisms that were clearly stated to achieve these goals in a basic international rights document like the U.S. Bill of Rights more than two centuries ago, do not appear in treaties. Moreover, these two specific rights, though key to achieving international aspirations, also seem to have disappeared from the international human rights system even though they are part of the historical basis for concepts of human rights. Furthermore, there are now questions as to whether the achievement of these two historic and fundamental areas of rights are even possible in contemporary state systems!

This structuring of the analysis of human rights now offers a basis for creating appropriate measurement systems for a list of basic rights. At the same time, it offers a basis for demonstrating how the current international approach to human rights is in fact undermining the possibilities for appropriate measurements.

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<sup>38</sup> See Lempert, *A Human Rights Education Project Indicator*, *supra* note 6.

**Table 1 (B).** Examples of Human Rights as Derived by Different Social Science Approaches

<i>International Legal Consensus in Treaties (Approach 2)</i>		<i>Structure (Social Contract) (Approach 1)</i>	<i>Constraints and Limitations (Approach 3)</i>
<i>Universal Development Goal</i>	<i>Human Right (and Category)</i>		
<i>Cultural/Community Right</i>			
Global Development Goals (11 and 12): Social Equity of Cultures; Political Equity/Equal rights for Cultures	Right to sovereignty of a cultural group (ICCPR; ICESCR). Right to life and security (IDHR). Integrity of cultures and communities in all of their political, economic and social spheres, free of pressure and assimilation or other form of cultural genocide (Genocide Convention).	Right to a local militia. Political autonomy with recognized local structures including a military for defense and security.	No State Member of the U.N. seems willing to allow this right unless the state formed as a result of different groups with militaries coming together. Even when they do, balance seems to be the exception to the rule with one side ultimately assimilating or eliminating the other following civil war. This right in the U.S. has disappeared.
<i>Individual Right</i>			
Societal Level Development Goals (7 and 8): Social Equity and Equal Opportunity; Political Equity/Equal Rights	Right to legal remedies (IDHR, ICCPR). However, due process in civil trials and civil juries are not even recognized in international treaties, nor is equality in the courts.	Right to a civil jury in a civil case. Individual autonomy as both a legal actor in bringing actions and participating in judging them.	Where this right originally existed, such as in the U.S., it has been whittled away with jury powers now limited by judges, low salaries for jurors and high costs to request a civil jury, as well as limiting laws using juries. Inequalities here reflect the inequalities in the society of corporate wealth.

### C. The International Community’s Recent Ideological Transformation of the Definition of Human Rights and Implications and How This Has Undermined Measurement

While there is a social science approach towards identifying human rights and their various elements, there has been a failure to generate a clear list of these rights with their key elements. Additionally, there has been a failure to link the list of rights with real measures. There is a simple reason why this systematization of human rights into clear categories has yet to occur and remains a subject of confusion. It is because the international system, in claiming to be in promotion of human rights immediately after World War II, has actually worked to distort its own definitions of human rights since then. The result has been to undermine the basis of human rights in legally enforceable social contracts to balance power and to ensure citizen participation and oversight of government and non-governmental concentrations of power. This politicization of rights debate in the era of globalization has diverted attention from structurally enforceable social contract forms in a way that has undermined the earlier legal consensus on human rights, and that has undermined effective measurement. The basis of the United Nations system in the governments of “nation-states” has created a fundamental contradiction with the goals of social contract. The result has been the replacement of rule of law goals with goals of globalization in which powers are essentially concentrated in the leaders of nation states and the ruling ethnic groups. Rather than promote rights, this system has promoted a return to forms of colonialism that undermine any real and professional approaches to defining, measuring and achieving human rights. Thus, moving towards measures requires understanding and overcoming this structural barrier that now pervades discussions on rights.

This section analyzes the ideology of the international system that underlined human rights approaches, then shows how the definitions and measures were also corrupted to eliminate structural social contract mechanisms as well as the goals of power balancing among individuals and cultures. A comparison of the international community’s development aspirations (its “universal development goals”) with its list of universal human rights also helps reveal these gaps. Looking at the U.N.’s current approaches to measures shows how the ideology has now directly influenced and worked to dismantle systematic professional measures. A final subsection shows how the ideology of globalization, largely based in the approaches of European colonialism prior to World Wars I and II, seems to have replaced the goals of human rights agreements, established after World War II, in an attempt to prevent another potential world war. With this ideology now driving the U.N. system, it may now be impossible to generate any effective human rights measures within that international system, today.

#### How the International System Undermined its Professional Approach to Human Rights

While the definition of the United Nations system on human rights recognizes the inextricable connection of rights with legal enforcement through social contract, in a system of balancing of powers and direct citizen control over their governments and other institutions, the U.N. now undermines that approach.

The U.N. system is clear that “[h]uman rights are universal legal guarantees protecting individuals and groups.”<sup>39</sup> As noted above in the sections, this language and its meaning come directly out of social contract theories of human rights and definitions of contract. In other words, rights are only “guarantees” when they are enforceable. Accordingly, they are only enforceable

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<sup>39</sup> See *supra* note 13, at 10.

when remedies and enforcement bodies exist through contract. The contracting parties to such enforceable contracts are the citizens holding rights with other citizens. The bodies they create, such as the courts, are created by that contract and either staffed directly by citizens (in juries) or by people who are directly under the control of the citizens, subject to hiring, firing and payment by citizens. All of this is clear not only in “social contract theory” but in the history of representative government, as well as the legal system that has developed over more than two centuries to regulate it.

The key legal principle behind a “legal guarantee” when it comes to government actions is the legal principle of “master-servant” that is at the heart of public administration. This principle of law defines “servants” as directly responsible to their “masters.” In public administration, the “legal guarantee” that protects the rights of citizens from abuse by government officials is that the citizens are the “master” and the government employees are the “(public) servants” who serve them. In the tasking of public servants, citizens both maintain control and establish mechanisms for remedies to enforce the rights of citizen control. Similarly, under the laws, organizations of institutional authority that collect public and private resources are also subject to public chartering and to citizen oversight through a social contract.

The United Nations also makes it clear that this contracting power that resides in individual citizens and cultures or communities cannot be assumed or transferred away. The U.N. is clear that “[h]uman rights are universal, inalienable, interrelated, interdependent and indivisible.”<sup>40</sup> Furthermore, an “inalienable” power must be a direct and enforceable one. This also implies that rights exist in a balanced way. Moreover, the concept of rights being “indivisible” implies that the legal “guarantee” must be through a contract that balances power in a unified and systematic way, or in other words, through a structural form, rather than acts piecemeal through legislation or financing.

Nevertheless, after defining human rights in this way, consistent with social contractual power balancing and enforcement, the United Nations system simultaneously eviscerates this principle when it describes how rights should be viewed and achieved. In practice, the U.N. redefines human rights as emerging from a top-down approach rather than through a contract, in ways that disempower both citizens and minority cultures/communities, making citizens servants to their governments and powers behind them. The U.N. creates a legal fiction that legitimizes pre-existing authority of nation-state governments without any social contract or law that establishes citizens and minority cultures/communities as their dependents. These nation-state authorities “bestow” rights on their citizens as grants or benefits at the whim of the authorities. This creative legal fiction is embodied in specially created ideological terms that reinforce existing authority. Rather than promote social contract obligations, the U.N. assigns decisions on rights to nation-state authorities who are euphemistically called “duty bearers” (meaning, pre-existing U.N. legitimated government authority) while the people over whom they rule are euphemistically called “rights holders” (citizens and minority cultures/communities subject to the potential abuses of pre-existing power). According to the U.N., “[t]he underlying feature of human rights is the identification of rights holders, who, by virtue of being human, have a claim to certain entitlements, and duty bearers, who are legally bound to respect, protect and fulfill the entitlements associated with those claims.”<sup>41</sup> This language of “duty bearers” directly undermines the social contract approach of enforceable “legal guarantees,” of power balancing, and of citizens and communities/cultures as “masters” and authorities as their “(public) servants.”

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

The basis of this concept of “duty bearer” simply reflects that the U.N. system is a system of created “nation-states” with the elite representatives of these states (their militaries and foreign policy representatives) negotiating international agreements. Technically, these signatories do have “duties” to citizens under rights treaties. In keeping with the basic principles of rights treaties, those duties are to negotiate afresh the social contracts in their societies to meet the obligations of “legal guarantees” of citizens and weaker communities/cultures through power balancing. However, this is not how the international system has used this language. Instead, they have used it to legitimize a concept of rights that dates to the feudal ages and back to pre-democratic political theories (of Hobbes, Locke, and Machiavelli, in western political science, as well as Confucius and Ashoka in some Asian political science) in which a pre-existing elite acting under a “mandate of Heaven” or other created religious authority, bestows benefits on its populations in a “contract” that allows it to maintain its power.

Certainly, the idea of a “rights holder” is itself a fiction. By definition under law, one does not have a “right” unless there is an enforceable remedy. This implies the existence of power balancing and a social contract among citizens, themselves, to protect their interests as well as to balance the power of their communities/cultures. In the current U.N. discourse however, this has disappeared. The “rights holders” are dependent in the manner of feudal serfs and slaves.

The correct analogue to a “rights holder” in a system of “legal guarantees” is not a “duty bearer.” Instead, it is the “rights abuser.” The balance to be attained is between the “victim” (the “rights holder” whose rights are violated) and the “abuser” (the violator of the rights of the rights holder). This, again, is a clear power dynamic. The solution to preventing the abuses by the “abuser” is to focus on outcomes such as balances of power and on structural mechanisms of social contract.

Indeed, in many cases today, the “abusers” who violate rights are in fact the very government officials whom the U.N. system legitimizes as the “duty bearers.” Where these “duty bearers” are the abusers themselves, there can be no expectation of solutions. This is as absurd as calling the wolves guarding the henhouse the “duty bearers” and the hens that they are guarding (to eat) as “the “rights holders.” However, this is what the U.N. system has done. In other cases, such as current and historic slave trades, the “abusers” are the purchasers, in a foreign country, while the “victims” are in the originating country. They are not the governing “duty bearers.” The U.N. system however, does not even recognize the abusers. It only recognizes the “duty bearers” in the countries of the victims. The problem is that in many countries with dependent, weak or fragmented governments, it is difficult to find these supposed “duty bearers” without suggesting that the actual social contract rights which are needed for protection may extend beyond the current nation-state (to other actors in the international system). Thus, the U.N. system’s focus on nation-state governments as “duty bearers” works to create a smoke screen that hides the realities of contemporary power in the international system as well as within nation-states themselves. Indeed, actors who violate rights may be foreign corporations or foreign militaries. The distorted language used by the U.N. to hide the realities of power in the international system and in nation-states in fact puts the victims of various inequalities at greater risk.

This system, as the U.N. has now redefined it, is what sociologists view not only as a feudal view, but as one that manipulates the victims to promote the authority of the abusers. They refer to this approach as “regulating the poor.”<sup>42</sup>

### How the Measurements of Human Rights Have Been Undermined

In addition to changing the accepted definitions and principles for human rights, the U.N. system has now undermined and confused all of the measurements. Tables 1A and 1B above, in the first section of this paper, demonstrate how the international definitions of human rights and the social science of human rights revealed an interlocking system of aspirations and social contract legal enforcement principles that, together, achieve measurable balances of power with positive and negative freedoms. The specific outcomes are power balances achieved through social contract. The structural mechanisms are directly linked to them as the structural measures for achieving these outcomes. The “human rights” can be seen as the list of aspirations that are the intermediate link between the power balances and the structural mechanisms to achieve them. By detaching the structural mechanisms and the outcome measures of power balances from the concept of human rights, the U.N. system has stripped human rights of both their meaning and their measures. Along with replacing the accepted definition of rights with a set of fictional nonsense terms of “duty bearer” and “rights holder,” the U.N. system has also redefined outcomes and structures in ways that are also nonsense.

It is easy to see what has happened by comparing the traditional identification of human rights as “legal guarantees” (the definition that the U.N. system uses but does not fulfill) with the current identification of rights. Under the U.N. approach, rights are only aspirations to be filled, top-down, by government bureaucrats, stripped of all enforceable guarantees, as if they are no more than social services for the poor or bread for the masses. There would be nothing wrong with listing rights as aspirations so long as these aspirations are then linked to specific structural mechanisms for “legal guarantees” that offer power balancing and enforcement. However, the U.N. system has eliminated this linkage.

### The Historical Approach to Rights, Combining Structure and Social Contract with Aspirations

In historical statements of human rights, like the U.S. Bill of Rights from the Constitution,<sup>43</sup> there seemed to be little danger of rights being stripped of structural social contract guarantees and the intended outcomes of power balancing. That is because the Bill of Rights listed the rights in very specific legal terms that combined specific structural mechanisms for power balancing (like independent militaries for communities/cultures and juries in civil cases) with specific legal language on how the parties were to interpret the terms.

A summarized version of the Bill of Rights is presented in Table 2. The left column presents the respective right and the place it appears in the first Ten Amendments to the Constitution which comprises the Bill of Rights.

In Table 2, those “rights” that are in fact specific structural provisions or that can be understood in the context of the time as recognizing specific legal structures, are highlighted in yellow. Six of these ten “human rights” are in fact social contract mechanisms and another is a

<sup>42</sup> See FRANCES FOX PIVEN AND RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1993).

<sup>43</sup> See U.S. CONST.

standard contract clause. Along with them are three other limitations of powers for clarity, to assure no misunderstandings or attempts by government to expand its power (the limitations are on military and government in criminal prosecution and punishment). These are presented along with the contract enforcement provisions.

Among the assumptions of that time, for example, were that there existed competitive political parties as well as independent, competitive media, and that citizens could freely form and access both, without legal obstacles or financial obstacles (unlike today in the U.S. and in most places elsewhere). There was also no existing corporate power to oversee. Those corporations that would arise, starting in the early 19<sup>th</sup> century, would come directly under government charter and oversight in ways that for a time assured effective citizen control, unlike today. There was also no overseas hegemonic power to consider, as the country had just been freed from British rule and was far from any other political or economic interference. Note that the rights listed are civil and political rights, and not social rights other than the protections of “federalism” for culture and communities. There is no economic policy here. The existence of equal opportunity for household heads who were the contractors to this agreement and for their family members was assumed.

The second text column in Table 2 compares the 10 rights in the U.S. Bill of Rights with those lists of rights that are mentioned in universal human rights treaties, today. The mismatch between the two is clear. Where there are specific social contract mechanisms, there is no correlative right in international treaties. Only the specific legal language limiting government action in ways that establish clear legal understandings for interpreting the power balances that are agreed, are put in writing. In other words, the list of aspirations that are in universal human rights treaties today are simply the clarification language. The force of the Bill of Rights as a social contract is in the structural legal mechanisms that are the enforcement guarantees and the power balancing for achieving the aspirations and not in the aspirations, themselves, but it is these that have disappeared in the U.N. system listing of rights.

The history of the U.S. Bill of Rights also makes clear the intent and purpose of these natural rights. Agrarian communities did not agree to a central government. In fact, they thwarted an earlier attempt to create one (the Articles of Confederation). This faction, the “Anti-Federalists,” agreed to this social contract only with recognized structural enforcement powers that gave them political equality and assured their protection.<sup>44</sup>

These “Anti-Federalists” did not see “rights” as a theological list of goodwill for their political opponents to promise and then to achieve later. They did not recognize government officials as “duty bearers” promising to enforce rights of “rights holders.” Instead, they saw rights as recognition of contractual enforcement mechanisms of citizen and cultural power to supplement the system created by the post-colonial military. Moreover, the enforceability was not based on measures of impact/outcome but on these institutional, structural process mechanisms. Compared to this approach, the international approach today is backwards.

Much of what the Anti-Federalists thought they had secured in the way of protections has been eroded. The goals of power balancing and protection of citizen rights have not been protected because the power balancing goals were not written explicitly in the contract. None of the assumptions about how specific mechanisms and goals were to be achieved, or about the context in which the contract was written, were included in the “social contract” of the Bill of Rights. All that has not been written down has been stripped away because judges are not anthropologists imagining the context in which a contract operated and giving full meaning to its intent. In fact,

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<sup>44</sup> See BRUTUS, *To the Citizens of the State of New York in THE COMPLETE ANTI-FEDERALIST 1787* (Herbert J. Storing, ed., 2008).

much of what has been written down has also been eroded, as is demonstrated for two of the rights in the Bill of Rights, in the final right hand column of Table 1B.

It is this historical knowledge that should have infused the systematization of human rights. While it is possible that it partly did, the U.N. has now worked to strip it away.

**Table 2.** U.S. Bill of Rights (10 Amendments)

<i>No.</i>	<i>Content</i>	<i>Correlative in International Human Rights Doctrines</i>	<i>Social Contract Enforcement</i>
1	Freedom of the Press (Assumed equal individual access)	Not in international rights treaties	Individual access to press to exercise direct oversight over public and private power
	Freedom of Speech	IDHR 19; ICCPR 19	
	Freedom of Religion	IDHR 18; ICCPR 18	
	Freedom of Association	IDHR 18, 20; ICCPR 18, 21	
	(Political Parties: Protection of Existing Associations such as Multi-Party Competition)	Not in international rights treaties	Political Competition
2	Individual right to arms (against government and others)	Not in international rights treaties	Independent power against the state/police and others
	Right of Armed Militias	Not in international rights treaties	Independent power against military and police
3	No quartering of soldiers in peacetime	Not in international treaties	A restriction on size and activities of military power
4	Right to Privacy	IDHR 12; ICCPR 17	
5	Grand Jury indictments in major cases	Not in international treaties	Citizen check on Prosecutorial power
	Jury Trials in Criminal Cases	Not in international rights treaties	Citizen check on Criminal Law enforcement
	Due Process	IDHR 6, 7, 8, 9, 10, 11, 17; ICCPR 9, 15, 16	
	Freedom from Self-Incrimination	ICCPR 14	

	Non Discrimination	ICCPR 26	
6	Assistance of Counsel in Criminal Trials	Not in international treaties	Citizen check on Prosecutorial power
7	Jury Trials in Civil Cases	Not in international treaties	Citizen check on Inequality and on Judicial power
8	Limitations on Punishment	IDHR 5,10; ICCPR 7	
9	Rights remain with people and powers of government cannot be expanded	Not in international treaties	Contract clause for clarity and protection
10	State Autonomy	Partly in ICESCR 1	Federalism/Cultural Protection
	State Contractual Authority	Not in international rights treaties	Federalism: Balancing of Cultural Powers

### The Weakness of International Rights Statements and Failure to Link to Overall Power Balancing Goals or Structural Social Contract Mechanisms

The international system’s presentation of human rights today, described above, is a statement of universal “aspirations.” Although mostly a set of statements of “negative liberty” or “freedom from” abuse, this set of international documents simultaneously creates a system of “positive liberty” or “freedom to” in the form of aspirations for “development” hidden within it.

Table 3 presents a list of human rights that are identified in some of the major international treaties. The first two columns identify the right in short form along with its source. Indeed, there is now a proliferation of rights treaties that continues to expand the list. The purpose of this presentation is to make it clear that the listing is potentially infinite as proponents continue to come up with details of their concerns, and that it is not directly actionable because the rights are not linked with the real outcome goals for rights; achieving power balances through structural mechanisms like those presented as rights in the Bill of Rights.

The third and fourth column of the Table clarify what each of the rights is about. The rights are really about power balancing with certain groups and the “outcomes” that underlie the rights are in fact these balances of power. The human rights treaties, however, do not categorize the rights into these categories which are their true goals and the ways of measuring performance and progress.

In column four, five distinct categories emerge that help to demonstrate the underlying goals of the listing of human rights.

- The majority of human rights are in fact designed for power balancing for individual rights in the oversight of government and economic power. To make these rights enforceable, the structural mechanisms that are needed are those of political equality and social equality that allow for effective oversight and management of institutions and for checking the power of individuals.

- A second set of human rights is designed to ensure a balance of powers among cultures/communities (i.e., an effective system of federalism) that assures equal political and social rights among communities/cultures.
- A third set of rights combines social policy and equal opportunity. For a social contract to be sustainable, individuals and communities need to be empowered. Part of that empowerment is through education and access to resources as well as partly through institutional mechanisms.
- There are growing areas of “rights” that are really social policies. These are not traditionally contracted rights at all. The general definition of rights is that there are systems of inequality and that one has a “right” against others to maintain this balance. Social policy does not fit into this construct at all. It seems to represent the transition of international policy goals, perhaps for “regulating the poor,” into statements of “rights” without clear justification. In fact, the obligation on social policy, to assure welfare, may be more clearly linked to an obligation for sustainability within a resource base. This would include limits to population growth and consumption to assure balances, rather than requirements for public spending that are unsustainable. This seems to fit with the treaty obligations on sustainability and culture protection.<sup>45</sup>
- There is a final area of rights that also challenges traditional notions of rights as well as the U.N. system’s definition of rights. In an era of globalization, “social contracts” at the level of individual societies and governments may not be enough to balance power and protect rights. The international system, itself, is currently outside of effective citizen control and power balancing. It is a new actor in rights.

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<sup>45</sup> See *supra* note 33.

**Table 3.** Categorization of the List of Internationally Recognized Human Rights

<i>Name or Type of Right</i>	<i>Source in International Law</i>	<i>How it Would be Enforceable (Asserted Against Whom)</i>	<i>Measure and Mechanism of Right</i>
Life, Liberty, Security also International Agreements (see below)	IDHR 3; ICCPR 6	Government; Private parties;	Social contract equality; Oversight of Government; Access to Civil Law
Freedom from Slavery and Forced Labor, Debtors' Prison	IDHR 4; ICCPR 8, 11	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Freedom from Torture	IDHR 5; ICCPR 7	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Legal status as a person; right to legal remedies	IDHR 6, 8; ICCPR 16	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Protection against discrimination, inequality	IDHR 7	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Freedom from arbitrary arrest, detention or exile	IDHR 9; ICCPR 9	Government	Social contract; Oversight of Security State
Criminal due process; habeus corpus; self-incrimination	IDHR 10, 11; ICCPR 9, 11, 14, 15, 16	Government	Social contract; Oversight of Security State
No ex-post facto law	ICCPR 15	Government	Social contract; Oversight of Security State
Respectful punishment and incarceration	ICCPR 10	Government	Social contract; Oversight of Security State
Privacy and dignity	IDHR 12; ICCPR 17	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Protections against hate speech	ICCPR 20	Government; Private Parties	Social contract equality; Oversight of

			Government; Access to Civil Law
Legality of Adult consensual activity	ICCPR 17	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Freedom of movement	IDHR 13; ICCPR 12	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Right to marriage and family	IDHR 16; ICCPR 23	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Nondiscrimination of parentage	IDHR 25	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Family leave for protection of children	ICESCR 10	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Right to property	IDHR 17	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Freedom of religion, thought	IDHR 18; ICCPR 18	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Free speech and access to information	IDHR 19; ICCPR 19	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Freedom of assembly and association	IDHR 20; ICCPR 21	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law
Right to participate in government	IDHR 21	Government; Private Parties	Social contract equality; Oversight of Government; Access to Civil Law; Equal opportunity to political capital
Right to electoral representation	IDHR 21	Government	Social contract equality;

through free and fair elections			
Non Discrimination	ICCPR 26	Government; Private	Social contract; Equal opportunity; Civil law access
Equal Rights for Women	CEDAW	Government, Private Parties	Social contract equality; civil law; equal opportunity
Self Determination (group rights)	ICESCR 1	Other Cultures	Federalism contract
Right to Culture and Language (see also below)	ICCPR 27	Other Cultures	Federalism
Social security	IDHR 22; ICCSR 9	Government	Social policy; equal opportunity
Education	IDHR 22, 26; ICESCR 13, 14	Government	Social contract equality; equal opportunity
Work	IDHR 23; ICCSR 6	-	Social policy; equal opportunity
Unions	IDHR 23; ICCPR 22; ICCSR 8	Private Parties (Corporations)	Civil law
Work conditions, leisure	IDHR 24; ICCSR 7	Private Parties (Corporations)	Social policy; Civil law
Food, Clothing, Housing, Health Care	IDHR 25; ICESCR 11	-	Social policy
Physical and Mental Health development	ICESCR 12	-	Social policy
Tolerance education	IDHR 26		Social policy
Culture and science	IDHR 27; ICESCR 15	?	Social policy
[Several aspects of childhood development]	Child Rights Convention Provisions	?	Social policy
Right to Asylum; appeal for resident aliens	IDHR 14; ICCPR 13	International agreements with other nations	Social contracting under international law
Right to a Nationality	IDHR 15; ICCPR 24	International agreements with other nations	Social contracting under international law
Life, Liberty and Security (see also above)	IDHR 3; ICCPR 6; Geneva	International agreements (for collective	Social contracting under international law

	Convention 4; Genocide Convention	security) with other nations	
Freedom from Slavery and Forced Labor, Debtors’ Prison (see also above)	IDHR 4; ICCPR 8, 11; Geneva Convention 4	International agreements (for collective security) with other nations	Social contracting under international law
Freedom from Torture (see also above)	IDHR 5; ICCPR 7; Geneva Convention 4	International agreements (for collective security) with other nations	Social contracting under international law
Right to Culture and Language (see also above)	Geneva Convention; Rome Statute; Genocide Convention	International agreements (for collective security) with other nations	Social contracting under international law

The way these rights are stated in international treaties also raises some questions as to whether they can be enforceable. For example, there is a clear difference between the “right to information” and the right to equal participation in media, the latter of which is assumed in the Bill of Rights. There is also a clear difference between “participation in government” or “freedom of association,” and the right to establish political parties on an equal basis. All are implied for them to be realized, but the U.N. system does not spell out any of these linkages to “legal guarantees.” There are no rights to jury trials, oversight panels, or grand juries and no descriptions of these mechanisms in a list of “solutions and mechanisms for legal guarantees” anywhere in international rights treaties. There is no right to militias or to military protection for cultures or for federal systems. There is no mention of split executives, split judiciaries (to balance cultural rights in a system of federalism) or removal of government officials. Therefore, the U.N. system’s statements de-fang the earlier “legal guarantee” approaches to rights.

Nor is there any method for examining the “deep structure” of systems to determine the existing power balances and how they work. There is no consideration of government balances of powers or definitions of power(s). Note that there are not specific types of institutions or laws to be copied from one system and implanted to another, the way many human rights interventions are now designed (hiding motives of assimilation under the guise of rights). What is missing however, are the social contract mechanisms of power balancing through redistribution of control of real power (e.g., military, police, economic power or media) and through direct participation in processes where power is exercised (e.g., prosecution and judicial determination).

For the rights that would be enforceable under international law, the U.N. system does not recognize other governments as duty bearers other than in acts of war, and does not create or imply independent rights against governments where one is not a citizen. Only a government may ask another government to enforce them or seek to enforce them through the U.N. where there is an existing enforcement agreement.

### The “Flip Side” of Universal Human Rights Goals: Universal Development Goals Provide the Aspirational Categories for Human Rights, but they have been Discarded

The place to look for the overall categories of goals and measurements should be in the universal development goals. This “inverse” of the list of human rights is, itself, contained in the rights treaties, and establishes very clear categories of “outcome goals” for human rights in terms of balances of power. Theoretically, if the U.N.’s definitions were consistent and coherent, specific legal structures (i.e., social contract structural approaches to human rights) could then be defined as goals in regular plans for achieving these development goals. This is not what has happened. The development goals are not even formally recognized and there is no effort to create any kind of legal consistency or codification of these treaties other than, perhaps, through my own efforts to now create this codification. It is only through the technique of statutory analysis, that those “universal development goals” found in international treaties, are even now recognized in the academic literature at all.<sup>46</sup>

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<sup>46</sup> See David Lempert, *Universal Development Goals for this Millennium*, 12 *CONSILIENCE* (2014); see also David Lempert, *A Vision for International Development and a Tool for Comparisons*, 16 *JOURNAL FOR ECONOMICS AND SOCIAL POLICY* 2 (2014).

Next, Table 4 lists the 13 “universal development goals” in four key categories.<sup>47</sup> Since the “development goals” are really the inverse of “rights” in the international system, the two columns should be nearly identical. This is because the goals are based in and furthered by rights, and the rights are a restatement of the goals: “freedom to” and “freedom from” are the flip side of each other.

In fact, the lists of “human rights” do not yet perfectly match up with the universal development goals, even though they are both taken from the same sets of treaties. This reiterates the problem inherent in current international lists of human rights. That said, not only are statements in the international system for “rights” just part of the aspirations for development, but they without links to structural measures for enforceability. Even more so, they are not adequately linked with their expected outcomes in terms of “development” for expanding human potential by offering political and social equality at the individual and cultural/community level. There are weaknesses in promoting the rights of cultures/communities, which reflects one of the inherent weaknesses in the current international system and the system of human rights. Although cultures are theoretically protected by law under the Genocide Convention, the international system is extremely weak in establishing the basic structural mechanisms and aspirations for full cultural protections in systems of federalism. There are similar weaknesses in the steps towards political and social equality.

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<sup>47</sup> The list is in the left-hand column in this four-sectioned table. In the right-column lists rights that are found in human rights treaties that can be matched up with the development goals.

**Table 4.** Overlap between Human Rights Categories and “Universal Development Goals” in U.N. Treaties**1. Individual Development Goals:**

	<b>Overall Objectives</b>	<b>Corresponding Human Rights</b>
1.	Physical (body) development:	Child Rights Convention; Right to food, clothing, housing, health care (IDHR 25, ICESCR 11); Physical health development (ICESCR 12); Social security (IDHR 22, ICCSR 9)
2.	Mental development:	Child Rights Convention; Right to education (IDHR 22, 26; ICESCR 13, 14); Mental health development (ICESCR 12)
3.	Spiritual (appreciation of natural world) development:	Child Rights Convention; Culture and science (IDHR 27, ICESCR 15)
4.	Moral (appreciation of others as individuals) development:	Child Rights Convention; Tolerance education (IDHR 26)
5.	Social (appreciation of community) development:	Child Rights Convention; Tolerance education (IDHR 26)
6.	Cultural (appreciation of one’s identity) development:	Child Rights Convention; Family leave for protection of children (ICESCR 10); Culture education (IDHR 27, ICSR 15)

**2. Societal Level Development Goals**

	<b>Overall Objectives</b>	<b>Corresponding Human Rights</b>
7.	Social equity/ Social progress/ Equal opportunity for individuals	Legal Status as a person; right to legal remedies (IDHR 6, 8, ICCPR 16); Protection against discrimination, inequality (IDHR 7); Equal rights for women (CEDAW); Non Discrimination (ICCPR 26); Freedom from Slavery and Forced Labor, Debtor’s Prison (IDHR 4, ICCPR 8, 11); Right to Work (IDHR 23, ICCSR 6); Right to unionize (IDHR 23, ICCPR 22); Right to humane work conditions and leisure (IDHR 24, ICCSR 7); Privacy and dignity (IDHR 12; ICCPR 17); Legality of Adult consensual activity (ICCPR 17); Right to marriage and family (IDHR 16,

		ICCPR 23); Non-discrimination of parentage (IDHR 25); Right to property (IDHR 17); Freedom of religion, thought (IDHR 18, ICCPR 18); Right to culture and language (ICCPR 27); Most of these Reaffirmed in Child Rights Convention [Never stated as positive liberty, only negative (freedom from restriction but not for equality)]
8.	Political equity/ Equal rights for individuals:	Legal Status as a person; right to legal remedies (IDHR 6, 8, ICCPR 16); Protection against discrimination, inequality (IDHR 7); Equal rights for women (CEDAW); Non Discrimination (ICCPR 26); Freedom from Slavery and Forced Labor (IDHR 4, ICCPR 8, 11); Freedom from Torture (IDHR 5, ICCPR 7); Freedom from arbitrary arrest, detention or exile (IDHR 9, ICCPR 9); Criminal due process, Habeus corpus, self-incrimination (IDHR 10, 11, ICCPR 9, 11, 14, 15, 16); No ex-post facto law (ICCPR 15); Respectful punishment and incarceration (ICCPR 10); Free speech and access to information (IDHR 19, ICCPR 19); Freedom of assembly and association (IDHR 20, ICCPR 21); Right to participate in government (IDHR 21); Right to electoral representation through free and fair elections (IDHR 21); Reaffirmed in Child Rights Convention [Never stated as positive liberty, only negative (freedom from restriction but not for equality)]
9.	Peace/ Tolerance/ De-militarization for individuals:	Life, Liberty, Security (IDHR 3, ICCPR 6); Equal rights for women (CEDAW); Non Discrimination (ICCPR 26); Protections against hate speech (ICCPR 20); Freedom of movement (IDHR 13, ICCPR 12); Freedom of religion, thought (IDHR 18, ICCPR 18); Right to culture and language (ICCPR 27); Right to Asylum (IDHR 14, ICCPR 13); Social security (IDHR 22, ICCSR 9); Reaffirmed in Child Rights Convention

### 3. Cultural/ Community Level Goals

	<b>Overall Objectives</b>	<b>Corresponding Human Rights</b>
10.	Sustainability/ (sovereignty) of cultures:	Life, Liberty, Security (IDHR 3, ICCPR 6, Geneva Convention 4, Genocide Convention); Self Determination (group rights) (ICESCR 1); Right to culture and language (ICCPR 27, Geneva Convention, Rome Statute, Genocide Convention); Right to a nationality (IDHR 15, ICCPR 24); Child Rights Convention on education and transmission of culture

#### 4. Global Development Goals

	<b>Overall Objectives</b>	<b>Corresponding Human Rights</b>
11.	Social equity/ Social progress/ Equal opportunity of cultures:	Self Determination (group rights) (ICESCR 1); Right to culture and language (ICCPR 27) [Implied in the Genocide Convention, Rome Statute and other treaties but not recognized]
12.	Political equity/ Equal rights for cultures:	Self Determination (group rights) (ICESCR 1); [Implied in the Genocide Convention, Rome Statute and other treaties but not recognized]
13.	Peace/ Tolerance/ De-militarization for protection of cultures:	Life, Liberty, Security (IDHR 3, ICCPR 6, Geneva Convention 4, Genocide Convention); Self Determination (group rights) (ICESCR 1);

#### United Nations System Approaches to Measures Strips the “Structural” and “Outcome” Goals of their Required Content

Despite a lack of explicit reference in international human rights treaties to either the underlying “universal development goals” for balancing powers through political and social equity at the individual and cultural/community level, and even though the treaties do not define structural social contract law mechanisms that would provide “legal guarantees,” the U.N. system is mandated to do this. In fact, it claims that it does do this. The reality, however, is that it has substituted a different agenda that undermines its stated goals.

The treaty system for human rights imposes two obligations on its state parties. The U.N. system calls them: (1) the “obligation of conduct” and (2) the “obligation of result.”<sup>48</sup> If state parties were to correctly identify power balancing as its “obligation of result,” and structural social contract mechanisms as the way to provide “legal guarantees” for its list of human rights in fulfillment of its “obligation of conduct” (following the example in Table 1B), it would in fact fulfill its mandate of promoting human rights.

The U.N. system does, of course, by its own definition of human rights, recognize changing power balances through social contract as a means to achieving them, but it also finds a way to avoid having to do so. Rather than identify this approach as the required one, it redefines it as only one among several possible measures that it offers as ineffective substitutes. The U.N. system allows for the substitution of “participation, accountability and effective remedies” for what it calls

<sup>48</sup> See *supra* note 13, at 12.

“cross cutting” goals (categorical approaches to imbalances of power that are recognized, for example, as “discrimination”).<sup>49</sup>

To short-circuit the system of achieving rights, the U.N. has redefined “structure” and “outcomes.” Additionally, the U.N. has refocused its achievements on social policy (essentially, “regulating” or “buying off” the poor), in place of any changes in relative power or of any real oversight and accountability of the “rights abusers.”

Table 5 offers an analysis of the U.N. system categories for measurements of the fulfillment of human rights, and how they should be professionally corrected to assure that the measurements are consistent with social science and professional notions of human rights. The left-hand column presents the three categories of measures that the U.N. system now uses. The central column lists the measures that the U.N. system now offers as linked with achieving human rights. Finally, the right-hand column re-labels the types of indicators that the U.N. system uses in ways that make it clear which are significant and relevant and which are simply without merit.

In place of structural social contract law mechanisms, the U.N. system splits its indicators into both “structural” and “process” indicators so that “processes” like the passage of an unenforceable law or the creation of an “action plan” that allocates more money (such as for health care) can substitute for a real change in relative power.<sup>50</sup> Although it seems like a cruel joke, one of the main measures that the U.N. system now offers as an example of a “structural” change, is simply the signing of another one of its treaties. Unfortunately, most of the practitioners in the “human rights” community today seem to follow this blindly, and, perhaps cynically agree to actions that are meaningless, or are perhaps unaware. However, one of the main measures of “progress” towards human rights as of a decade ago was “the state of ratification of international human rights standards.”<sup>51</sup>

In examining the measurements and indicators that the U.N. system now uses for its work in rights overall, there is a clear shift away from any kind of empowerment and power balancing in every category other than for women’s rights. The focus is now on social policy, with the measure being the transfer of funds to groups such as women and children, or to particular sectors such as education and health. In other words, of the 40 or so areas of rights listed in Table 3, the U.N. system essentially now focuses only on about 10% of those, while excluding the rest. Though the U.N. claims that rights are “interdependent and indivisible,”<sup>52</sup> that is not how the system works in implementation. The system seems to be unaccountable.

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<sup>49</sup> *Id.* at 41.

<sup>50</sup> *Id.* at 35.

<sup>51</sup> See R. Malhotra and N. Fasel, QUANTITATIVE HUMAN RIGHTS INDICATORS: A SURVEY OF MAJOR INITIATIVE, NORDIC NETWORK SEMINAR IN HUMAN RIGHTS RESEARCH (Mar. 10-13, 2005), <http://www.gaportal.org/sites/default/files/Quantitative%20Human%20Rights%20Indicators.pdf>.

<sup>52</sup> See *supra* note 13, at 10.

**Table 5.** Correction of Ideological “Newspeak” in Human Rights Fulfillment

<i>Current Category Used by United Nations System</i>	<i>Specific Mechanisms within the Category</i>	<i>Corrected (“Translated”) Designation based on Actual Relation to Progress in Human Rights</i>
Structural Intervention	Enforceable Power Balance (Domestic)	Structural Change through Enforceable Social Contract
	<i>[Enforceable Power Balance (International)]*</i>	Global Structural Change through Enforceable International Law
	Signing of a U.N. Treaty	Paper Promise
	Passage of a Law	Paper Promise
	National Policy	Paper Promise
	Action Plan	Paper Promise
Process Activities	Allocation of Funds	Legislative Activity
	Creation of monitoring indicators	Monitoring Activity
	Public Awareness Campaigns	- (May not be relevant)
Outcomes	Economic Benefit	Social Welfare Measure
	Measures of Violations	Symptom Measure
	Change in Power Balance	Real Structural Change through Enforceable Power Balancing

\* This category is added to the table. The U.N. does not specifically mention it.

Although it seems like another cruel joke, the U.N. system has introduced another concept to its rights measures that is in complete contradiction to the idea of human rights and works to undermine them. To explain its lack of commitment to the human rights agenda of treaties, the U.N. system now offers a rationalization that the way to achieve rights is through a “progressive realization” in “developing countries.” Essentially, this means that the timeline for real achievements assures that they never occur. This concept of “progressive realization” claims, with no foundation in reality or in legal authority in treaties, that the achievement of “rights” depends on wealth, rather than on distributions of power.<sup>53</sup> This approach works to legitimize vast inequalities of power and wealth behind the curtain of so-called “resource constraints” so that the disparity of wealth can continue without any changes in relative power that would achieve actual rights. This concept is another fiction created by the U.N. system to protect power and legitimize abuses so long as there is some payoff to those who are disempowered. There is no direct relationship between a country’s overall wealth and its internal political equality. Indeed, developed countries are now experiencing a reversal in both economic and political equality. There is homogenization that occurs with cultural destruction and transition to a common technology, but it is a destruction of one form of equality and rights for another, not a “progressive realization.”

The detaching of the rights dialogue from a legal interest-balancing or social contract approach is also seen in the activities of the U.N. agency, UNIFEM.<sup>54</sup> The original treaties establish a goal of “gender equality” and “mainstreaming” rather than the promotion of a single gender. This fits with a concept of balancing of power and contracting between genders for the benefit of *both* genders that is the goal of international treaties. But that is not how these “rights” are now viewed in U.N. applications. The goal is now to promote benefits, rather than equity, and to deliver them to women, without considering the implications of the overall system.<sup>55</sup> Thus, both the goals and measures are distorted together.

### Why the International System Cannot Solve the Problem Itself

The confusion that the U.N. system has introduced into concepts and measurement of human rights, now also distorts the approaches of academics and activists. This is a result of features inherent in the U.N. system today as well as in global relations. As noted, some of the contradictions in the way the U.N. conceptualizes rights are built into the logic of the U.N. as an organization, without any direct accountability to the world’s cultures or its citizens. Even so, in drafting rights treaties, parties to the U.N. were aware of this contradiction, and were in fact trying to prevent the tragedies they knew were the result of internal repressions of minority cultures and individuals within them. Their goal was to build a system to hold these tendencies in check. However, it seems that they have failed. In fact, many changes in the international system since World War II have subverted many U.N. goals and replaced the post-World War II consensus with much of the same colonial agenda that led to World War II, and the need for establishing the U.N. system and its protections in the first place. The global system continues to be one of competing

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<sup>53</sup> *Id.* at 34.

<sup>54</sup> Note that UNIFEM, (now known as “U.N. Women”), works in one of the few rights areas (“rights of women”) found in international rights treaties.

<sup>55</sup> See David Lempert, *An Accountability Indicator for Gender Equality Projects of NGOs and International Organizations*, 2 JOURNAL OF HUMAN RIGHTS IN THE COMMONWEALTH 2 (2016).

empires as well as of new “neo-colonial” blocs in a system of globalization that has much of the same dependencies and centralized power of elites as before World War II.

As an organization of State parties, the U.N. system has a natural proclivity to represent international elites and their militaries, and to seek to maintain existing arrangements of power in nation-states without transferring any real power to cultural minorities or to citizens, in general. The approach of States and elites seeking to maintain their power is to control their minorities, not to empower them. Their concept of rights is something to be “bestowed,” not something that they would ordinarily seek to achieve in the interests of “progress” or humanity. Indeed, the history of European diplomacy is one of kings, emissaries, and generals, not a democratically based interaction of citizens.

There are three other social phenomena that seem to be affecting the international system today in how it treats rights. First, the major powers in the international system are empires. Thus, the approach to globalization that has reasserted itself in the international system is one of colonialism (neo-colonialism). This is largely a single system. Accordingly, its ideology remains one of “economic growth” through industrialization and assimilation of minority cultures and peoples into this single system.<sup>56</sup> The U.N. Development Programme, the World Bank and governments have colluded to generate a set of “basic needs” and “development goals” that push countries to sell their resources, assimilate their cultures into the global system, and accept foreign investments in new technologies in order to acquire quick cash to increase consumption of the poor and to call it an expansion of “rights.”

The one “human right” that seems to have gained the most attention is improving the status of women. This is indicative of the overall failure of the contemporary human rights system. The approach of promoting women’s rights as the single priority for human rights fits directly with corporate goals for labor exploitation and for industrializing cultures.<sup>57</sup> The Soviet Union used this same focus on women in the Muslim cultures of its empire, dating back to the 1930s, when it sought a strategy to quickly industrialize and assimilate them in a way that would break the local cultures.<sup>58</sup> The international system may now be doing the same.

Second, the end of the Cold War increased the participation of “Second World” countries of the former Soviet Russian Empire and China, and the citizens of their empires in the U.N. General Assembly and the staffs of its agencies. The traditions in these countries were largely authoritarian and not based on citizen oversight or “social contract.” Therefore, their concepts of “rights” were largely of “economic” transfers of “social benefits” to legitimize the government. This approach now increasingly permeates the international system in its focus on rights in a “convergence” to lower rather than higher standards of rights based on balancing of political power.<sup>59</sup>

<sup>56</sup> See IMMANUEL WALLERSTEIN, *AN HISTORICAL PERSPECTIVE: THE EMERGENCE OF THE NEW ECONOMIC ORDER. THE CAPITALIST WORLD ECONOMY* (1979).

<sup>57</sup> See BROOKS DUNCAN, *Every Woman for Himself: A Male Feminist Reconsiders*, in *ANTHROPOLOGY IN ACTION* 61-64 (Sept./Oct. 2011), <http://docserver.ingentaconnect.com/deliver/connect/berghahn/0967201x/v18n3/s7.pdf?expires=1329548817&id=67275992&titleid=75002101&accname=Guest+User&checksum=61639915ADDAA9FE1C0B742C1088CB63>.

<sup>58</sup> See GREGORY MASSELL, *THE SURROGATE PROLETARIAT: MOSLEM WOMEN AND REVOLUTIONARY STRATEGIES* (1974).

<sup>59</sup> See Brooks Duncan, *Convergence Theory Revisited: Kafkaesque Global Bureaucracies of Our Times: With an Example of a Tool for Measuring Whether Approaches to Accountability a Real or Sham*, 13 *SOCIAL EVOLUTION AND HISTORY* 1, 67-98 (Mar. 2014).

Third, the international system bureaucracy has now become a fixture of contemporary life. Additionally, this bureaucracy works to promote its own corporate interests in ways that create a conflict of interest with its actual legal mandate. Moreover, given certain sovereign immunities, it is also under very little oversight. The way it promotes itself is to look for ways to generate work and to handle increasing transfer of funds, while ingratiating itself with existing systems of power. Its corporate interest is to define rights in terms of economic benefits and to assign itself the tasks of managing these economic transfers. Its constituencies are other bureaucrats in member states who receive funds, as well as those who have an interest in serving as an intermediary of those funds, rather than confronting existing powers to push them to share their power and restructure their systems. The international bureaucrats have worked to justify their agenda by linking it with fundraising appeals like the Millennium Development Goals (MDGs) and Sustainable Development Goals (SDGs) which also now work to promote the interests of “growth” and “globalization” rather than the U.N. system’s actual legal agenda for development or rights.<sup>60</sup> They have also earned academic credibility from economists who redefine “development” transfers as “rights.”<sup>61</sup>

Part of the focus on “signing international treaties” (but not fulfilling them in any meaningful way) as a measure of “rights” may also have emerged because this furthers the self-interest of international rights bureaucrats. It is as if so-called rights professionals have now created a “treaty business” where they generate new treaties and then latch onto funds for promoting them in “awareness campaigns” and workshops. For example, some of this has happened with the recent declaration on “Human Rights Education” which many human rights organizations promoted and that they now use for fundraising appeals.<sup>62</sup>

By redefining human rights as a social policy rather than a legal power balance, the potential list of rights now becomes infinite as does the call for more treaties to promote them. What will prevent the “right to pickled herring” or to gefilte fish from being added to the list, along with television sets and automobiles in the “progressive realization” of rights? What will stop specific industries from promoting them to gain a share of the benefits?

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<sup>60</sup> See DAVID LEMPert, TESTING THE GLOBAL COMMUNITY’S SUSTAINABLE DEVELOPMENT GOALS (SDGs) AGAINST PROFESSIONAL STANDARDS AND INTERNATIONAL LAW (on file with author).

<sup>61</sup> See AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

<sup>62</sup> David Lempert, *A Human Rights Education Project Indicator for NGOs and International Organizations*, 3 INTERAMERICAN JOURNAL OF EDUCATION FOR DEMOCRACY 1 (2010).

## D. Existing Measurement Approaches and Their Limitations

The confusion that the U.N. system has created in mis-defining the international consensus and professional standards on human rights is also reflected in the existing measurement approaches both inside and outside the U.N. itself. Oftentimes, the idea of measurement and objectivity are challenged and an attempt at measurement has not even begun. There do not appear to be any structural indicators to fit the concept of enforceable rights through a social contract nor are there any outcome indicators measuring power balances. The three main general indicators in the field are measures of symptoms of abuse rather than the actual outcome goal of power balancing. Other general indicators of “democracy and governance” that include human rights categories do look at structures, but these are generally “conformity” indicators to measure the copying of certain existing models that are assumed to be “democratic” or protective of rights, without any real measures of whether they are in fulfillment of underlying rights principles. Most human rights indicators that exist today do measure single outcomes. Most of these are really social policy outcome indicators which are fit into the category of human rights, or measures of human rights violations and abuses.

### General Approaches to Measurement of Human Rights

Although the U.N. system recognizes that its 70 years of treaties on human rights create an obligation for measures to “monitor and report on the progress made towards the realization of the human rights set out in the core [of] international human rights,”<sup>63</sup> it was only recently that the U.N. began to even discuss indicators and what they should measure. Several authors within the U.N. or at the World Bank, have found very little in general on “human rights based approaches” to programming, or on specific areas.<sup>64</sup>

The few indicators that they have found are those of social policy that are really human development indicators, or “performance” indicators, on the transfer of benefits that are not the core of “rights.” Others have found some sociological approaches to equality that are easy to compile such as comparisons of genders,<sup>65</sup> agreements to sign treaties and reports on violations of rights.<sup>66</sup> The U.N. system sheepishly acknowledges that the existing measures essentially fall into the two categories of measurement of social benefits and measurement of rights violations, describing the emergence of these two tracks as a result of “historical reasons and, perhaps, for the

<sup>63</sup> See *supra* note 13, at 13.

<sup>64</sup> See K.A. BOLLEN, *Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984* in HUMAN RIGHTS AND STATISTICS (T.B. Jabine and R. Pierre Claude, eds., 1992); see also *Governance Indicators: A Users Guide*, UNITED NATIONS DEVELOPMENT PROGRAMME (2004), [http://gaportal.org/sites/default/files/undp\\_users\\_guide\\_online\\_version.pdf](http://gaportal.org/sites/default/files/undp_users_guide_online_version.pdf); see also Todd Landman, *Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users' Guide*, UNITED NATIONS DEVELOPMENT PROGRAMME OSLO GOVERNANCE CENTRE (2006); see also R. Malhotra and N. Fasel, QUANTITATIVE HUMAN RIGHTS INDICATORS: A SURVEY OF MAJOR INITIATIVE, NORDIC NETWORK SEMINAR IN HUMAN RIGHTS RESEARCH (Mar. 10-13, 2005), <http://www.gaportal.org/sites/default/files/Quantitative%20Human%20Rights%20Indicators.pdf>; see also Siobhán McInerney-Lankford, and Hans-Otto Sano, *Human Rights Indicators in Development – An Introduction*, WORLD BANK (2010).

<sup>65</sup> See UNCT [Sandra Pellagrom], *Performance Indicators for Gender Equality* (2008).

<sup>66</sup> See *supra* note 13, at 23.

sake of analytical convenience.”<sup>67</sup> They acknowledge that “[t]his has contributed to an artificial dichotomy that is neither desirable nor tenable in the face of the indivisibility and interdependence of all human rights.”<sup>68</sup>

In short, there is no measure of the overall outcome goals for rights categories such as political equality, social equality, improved oversight, citizen control of various categories of institutions, survival and health of cultures/communities in maintaining their diversity, and expansion of individual opportunity and freedoms. Nor are there measures of the specific structural social contract mechanisms that are essential to bringing about these outcomes. The focus remains on the individual rights themselves, as if each stated right is both a structure and an outcome goal. This confusion is directly reflected in how the U.N. system now looks for measures of “the enjoyment of rights by rights holders; in other words, capturing a few outcomes that could be related to the state of realization of human rights.”<sup>69</sup> Admittedly, the U.N. system does not know what this directive means, which explains why they end up with measures like “literacy rates” as indicators of human rights.

Meanwhile, the general indicators that have been developed have earned little respect or support from human rights activists. Many attempts to create indicators of rights and democracy, like those of Freedom House or others linked to the U.S. government, have justifiably been attacked for biases in seeking to promote U.S. political interests.<sup>70</sup> Given these biases, there has been a movement to eliminate measurements entirely, viewing attempts at measurement to be more harmful than good, and guaranteeing no standard or ability to “progress” at all. In the early 20<sup>th</sup> century, when the Russians ended their monarchy and established “Soviet” rule, their argument on measures was much the same as the one being used now, as voiced by legal scholar Pashukanis.<sup>71</sup> To eliminate injustices, the Russians sought to eliminate lawyers as well as the overall legal system, and replace it with mass mob rule, summary judgments and edicts. The argument was that law was subservient to power, and that eliminating power differences required eliminating the institutions that came with it. Today, the argument is that racism, slavery, patriarchy, imperialism, theft and indentured servitude were all perpetuated by a system of law, institutional measurement, and force of contract. Rather than measure equality and its sources, as well as use systems and measures to set new goals and corrective measures, there is an attack on the validity and ideology of measurement itself.

### The Three Leading Attempts at Political Rights Indicators

There are three indicators that deal directly with measuring clusters of rights: the CIRI Indicator, the Freedom House Indicator and the Humana Index that directly uses the ICCPR as the basis for constructing a measure. All of them appear to have the same underlying flaw of measuring individual trees (either symptoms of inequalities or appearance of legal institutions or promises) rather than looking at the overall forest (the overall balance of power and the ways they are guaranteed).

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 28.

<sup>70</sup> NOAM CHOMSKY AND EDWARD HERMAN, *THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM* (1979); *see also* TONY EVANS, *THE POLITICS OF HUMAN RIGHTS* (2001); *see also* SAVIC OBRAD, *THE POLITICS OF HUMAN RIGHTS* (2002).

<sup>71</sup> *See* EVGENII V. PASHUKANIS. *LAW AND MARXISM: A GENERAL THEORY*. (Barbara Einhorn, trans., 1978).

It is simple to understand why these kinds of measurements are flawed. Often now with a wink from U.N. agencies, contemporary political systems know how to create the appearance of rights protections and to create a facade of legality without substance in ways that meet the U.N.’s test of “progressive realization” and “policy commitments” to rights that are little more than public relations. Almost every country has signed rights declarations, has constitutions that enshrine these protections within them,<sup>72</sup> and has the institutional mechanisms that create the appearance of democracy. This includes elections and separation of powers. The problem is that there is a “deep structure” of how power really works, through economic, military and institutional and social linkages. Without examining this “deep structure” of power, the outer institutional frameworks are essentially meaningless.

Similarly, the measure of human rights violations may in fact be only a measure of the type of control system that a society uses, rather than a measure of its depth of control and suppression of rights. Police states do not need to use force if they can destroy dissent through more subtle means.<sup>73</sup> The Soviet Union of 1936, under Stalin and his Constitution, of 1956, the period of Sergei Khrushchev’s Secret Speech denouncing Stalin and of the “Khrushchev Thaw”, and 1976, the beginning of the Leonid Brezhnev era (and new, 1977 Constitution) were essentially the same system. However, violations were fewer over time because people were resigned to control.<sup>74</sup>

Another common flaw characterizes these indicators as those like the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs) of the international system. The measures start out with the assumption that the groups initiating the measurement represent the high point of civilization and offer a model for other societies to follow. The measuring countries are given the highest score or top rank. The assumption here is that civilization is already at a dead end and that “progress” simply means conformity with the leader. Thus, there is no vision for future improvement because there is no real measure of any real standard. See below for other examples used today

### **The Freedom House Indicator**

Though Freedom House has two indicators, one about “free” individuals and another on “press freedom,” the measures are limited to individual rights. Additionally, the measures are derived from conformity to the existence of certain institutions found in U.S. and Western societies. They do not look at deep structure or power balances.<sup>75</sup>

Freedom House is a U.S. government-funded, politically established organization dating back to 1941, whose ratings are now used by the Millennium Challenge Corporation as the basis for U.S. government interventions in weaker countries. Its indicator aggregates several sub-measures; combining, for example, sub-categories of “political rights” and “civil liberties” based on measures of structures and processes, without any direct measure of power imbalances or how

<sup>72</sup> Indeed, so did Stalin’s 1936 Constitution in the Soviet Union that he claimed was the most progressive of its era.

<sup>73</sup> See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1985).

<sup>74</sup> See ARYEH L. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE U.S.S.R.: A GUIDE TO THE SOVIET CONSTITUTIONS* (London: Methuen Publishing (1981)); see also Fainsod and Hough, *infra*.

<sup>75</sup> See *Freedom in the World*, FREEDOM HOUSE, <https://freedomhouse.org/report-types/freedom-world>; see also, *Methodology*, FREEDOM HOUSE (2006), [https://freedomhouse.org/report/nations-transit-2006/methodology?page=352&ana\\_page=330&year=2006](https://freedomhouse.org/report/nations-transit-2006/methodology?page=352&ana_page=330&year=2006).

the relative balances fit into culturally sustainable protections. Freedom House measures seven major categories: (1) electoral process; (2) civil society; (3) independent media; (4) national democratic governance; (5) local democratic governance; (6) judicial framework and independence; and (7) corruption.<sup>76</sup> It then provides a composite score of how “democratic” a country is overall.

### **Cingranelli-Richards (CIRI) Human Rights Data Project**

The CIRI Indicator mostly measures human rights violations, using annual data from the U.S. State Department and Amnesty International monitoring, making it more of a political fear index than an index of human rights itself.<sup>77</sup>

The index has tabulated data for 202 countries since 1981 and places them in categories of “Physical Integrity Rights” (symptoms of political repression such as torture, disappearance, and political imprisonment among others) and “Empowerment Rights,” which is really a list of government statements on its own restrictions, coming from the list of human rights treaty aspirations (freedom of speech, freedom of religion) as well as some other categories. There are also sociological measures of gender equality and the standard measure of institutional pluralism within government that is measured by the existence of an “independent” judiciary.<sup>78</sup>

### **United Nations High Commissioner for Human Rights (UNHCHR) Rights List**

This country ranking is essentially a measure of conformity with the specific list of aspirations in human rights treaties for individual rights and does not go deeper than this.

Charles Humana has compiled the rankings since 1985 with the goal of measuring international compliance with the 1966 ICCPR. Humana’s list includes 40 measures, among them: “democratic elections,” “freedom of speech,” “independence of courts,” and incidence of torture.<sup>79</sup>

Like the other indices, freedom of speech examines government repression but not at equality of access to media. Independence of courts is not a measure of citizen access to juries or equality of courts but only of institutional pluralism. Measures of electoral processes do not examine the ability to form or influence parties and legislation.

### **“Good Governance” or “Democracy” Indicators**

There are many more generalized indicators of “governance” and “democracy” than there are for human rights. Although these indicators overlap with rights indicators and include some rights measures, their goal is often to promote political agendas to fit countries into the global system rather than to promote rights structures or outcomes. They are not particularly relevant to

<sup>76</sup> See *Freedom in the World*, FREEDOM HOUSE, <https://freedomhouse.org/report-types/freedom-world>; see also, *Methodology*, FREEDOM HOUSE (2006), [https://freedomhouse.org/report/nations-transit-2006/methodology?page=352&ana\\_page=330&year=2006](https://freedomhouse.org/report/nations-transit-2006/methodology?page=352&ana_page=330&year=2006).

<sup>77</sup> See David Cingranelli, et al., *Cingranelli-Richards (CIRI) Human Rights Data Project* (2014), [www.humanrightsdata.com](http://www.humanrightsdata.com).

<sup>78</sup> Note that all three of the major rights measurement organizations seem to use the Freedom House indicator yet none measure the power of citizen juries and of citizen ability to make challenges and to win against institutional power in the legal system.

<sup>79</sup> See CHARLES HUMANA, *WORLD HUMAN RIGHTS GUIDE* (1992).

the measurement of rights. Nevertheless, they offer some context to the overall political pressures and blinders on indicators that deal with political systems. The indicators fall into two main categories: (1) general measures of democracy and governance that are either used by academics or by government agencies for setting policy, and (2) aid agency indicators to guide specific policy interventions.<sup>80</sup>

Most of the political science indicators of democracy or governance try to offer an overall country measure in one or a few dimensions, like the Freedom House or CIRI indicator, but they are not usable as measures of progress or regress on “rights.” By contrast, development organizations offer long checklists on dozens of project categories that are not standardized according to impacts on the goals of democracy. Overall, current indicators are really more like diagnostics measuring the existence of particular features of governance that might or might not have any significance in terms of the ends of democracy and that are not linked to those ends.

Political scientists have created at least nine established indicators that they use as a basis for regression analyses for country comparisons.<sup>81</sup> Almost all of these indicators generate aggregate measures (e.g., “competitiveness of participation”) that have no direct measurable link to power imbalances and rights. Political scientists, living and working in industrial settings, focus on “state” and political institutions and processes in industrial societies as a model. Like the three human rights indicators described above, the political science indicators of democracy and governance measure rights violations that are symptoms of inequalities (torture, imprisonment, shutting of newspapers) and offer lists of inputs (e.g., increased number of courthouses) that may address those symptoms and that lack a direct relation to underlying power imbalances and inequities. None offer an indicator that can be used for all types of societies, including traditional cultures or even ancient Greece and colonial America, where “democratic” institutions lacked the institutional features of contemporary State systems.

Among some of the better-known indicators of international organizations and political scientists described briefly, are those of three international organizations: (1) the World Bank, (2) USAID and (3) the European Union (EU).

### **World Bank’s Worldwide Governance Indicators**

The World Bank’s governance indicator completely avoids mention of “rights” since the Bank’s real “development” concern is “governance,” as defined in terms of ability to manage international loans in a stable way. The World Bank aggregates data from 30 organizations with measures including: “voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption.”<sup>82</sup> Many of the measures are perceptual, and they have a selective bias against small minorities and in favor of majority rule (tyranny of the majority). This is in opposition to the established principles of the international community for democracy as a balance of power that would protect cultural and individual rights.<sup>83</sup>

<sup>80</sup> See David Lempert, A ‘Democracy Building’ Development Project Indicator for NGOs and International Organizations, 11 GLOBAL JURIST 2 (2011).

<sup>81</sup> See Gerardo L. Munck and Jay Verkuilen, *Conceptualizing and Measuring Democracy: Evaluating Alternative Indices*, 35 COMPARATIVE POLITICAL STUDIES 1 (2002).

<sup>82</sup> See Daniel Kaufmann, et al., *Governance Matters VI: Aggregate and Individual Governance Indicators, 1996-2006*, THE WORLD BANK (2007).

<sup>83</sup> *Id.* at 30.

### **USAID Democracy and Governance Indicators**

USAID has a set of indicators for its Democracy and Governance programs that go beyond the Freedom House score and that are geared to measure “performance.”<sup>84</sup> USAID bureaucrats have compiled 200 pages of logistical frameworks (called logframes) that send every kind of democracy and governance project, including those in human rights, to a different sub-category. These include the “rule of law and respect for human rights,” “genuine and competitive political processes,” “politically active civil society” and “accountable and transparent government institutions.”<sup>85</sup> The measures they offer as outputs are often indistinguishable from inputs and have little validity, such as “[n]umber of new courts opened in rural and urban areas with concentrations of marginalized populations” as a measure of “equal access” to justice.<sup>86</sup> The implication of these measures is that the real goal of “democratization” is not to follow international rights principles but to industrialize societies and destroy their traditions in order to fulfill other USAID sub-goals that are presented simultaneously, such as: “Support a Market Based Economy.”<sup>87</sup>

### **European Union (European Commission (EC), European Initiative for Democracy and Human Rights (EIDHR), Council of Europe (CoE))**

The European Union has not progressed in constructing any indicators, though they held a conference in 2002 and have published some guidelines that are mostly in the form of diagnostics of problems to be addressed.<sup>88</sup>

Among those developed by political scientists are these four: (1) Bertelsmann Transformation Index, (2) Polity IV, (3) Polyarchy 1.2 and (4) the *Economist* magazine.

### **Bertelsmann Transformation Index**

This is an example of a governance index that measures goals of economic transformation (“governance for growth”) and of “political management of change on the way to a market based

<sup>84</sup> See *Handbook of Democracy and Governance Program Indicators* U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE (1998),

[http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacc390.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacc390.pdf).

<sup>85</sup> *Id.* at 17, 57, 115 and 151.

<sup>86</sup> *Id.* at 35.

<sup>87</sup> Although the wording “market based economy” has been disappearing from USAID documents, the approach has not changed. See MILJA KURKI, *DEMOCRATIC FUTURES: REVISIONING DEMOCRACY PROMOTION* at 135 (2013).

<sup>88</sup> See MEASURING DEMOCRACY AND GOOD GOVERNANCE, EUROPEAN COMMISSION CONFERENCE, (Jan. 21-23, 2002), <http://ec.europa.eu/eurostat/documents/46346/48072/cdg-munich-centre.pdf/458d8012-a24d-451e-8c88-184912870821>; see also, THE E.U.'S ROLE IN PROMOTING HUMAN RIGHTS AND DEMOCRATIZATION IN THIRD COUNTRIES, COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND EUROPEAN PARLIAMENT (May 8, 2001), <http://aei.pitt.edu/37812/>; see also HANDBOOK ON PROMOTING GOOD GOVERNANCE IN EC DEVELOPMENT AND COOPERATION, EUROPEAN COMMISSION EUROPEAN AID COOPERATION OFFICE, [http://ec.europa.eu/europeaid/handbook-promoting-good-governance-ec-development-and-co-operation\\_en](http://ec.europa.eu/europeaid/handbook-promoting-good-governance-ec-development-and-co-operation_en).

democracy” that are in direct odds with human rights goals.<sup>89</sup> The index looks at five subjective categories: “stateness,” “political participation,” “rule of law,” “stability of democratic institutions,” “political and social integration” – e.g. “political party system,” and “extent” to which “democratic institutions [are] capable of performing.”<sup>90</sup>

### **Polity IV**

This is a ranking index of countries, using a set of 21 points for “autocracy” and “democracy” combined measures. It focuses on the governing authority and its processes but not on power imbalances in typical stratification categories for rights protection like class, gender, ethnicity/religion/nationality.<sup>91</sup>

### **Polyarchy 1.2**

This data set offers only the process measures of “competitiveness and political participation.”<sup>92</sup>

### **The Economist**

The *Economist* magazine uses an “index of democracy” based on five categories. These categories include: (1) free and fair election process, (2) civil liberties, (3) functioning of government, (4) political participation and (5) political culture.<sup>93</sup> Additionally, the index has 60 questions including attempts to measure “capability of civil servants to implement policies” that are often unrelated to rights protections and could just as well be used to measure the efficiency of a dictatorship.<sup>94</sup>

## **E. Proposed Indicator: Process Measures by Area and Related Outcome Measures**

There is currently no prospect for the creation of a single indicator for the measurement of progress (or regress) in human rights, but it is possible now to identify the specific categories of power balances and social contract rights that should be measured and to note the kinds of measures that can be used (where they now exist) or invented.

Most of the measures (some 20+ potential measures) rely on measures of power balancing and influence (political science measures), sociological impacts (equity) and cultural sustainability (anthropology measures). While these social science fields have partly started to work towards

<sup>89</sup>See BERTELSMANN STIFTUNG, BERTELSMANN TRANSFORMATION INDEX 2006: POLITICAL MANAGEMENT IN INTERNATIONAL COMPARISON 10 (2006), [http://bti2006.bertelsmann-transformation-index.de/fileadmin/pdf/BTI\\_2006\\_Brosch\\_re\\_GB.pdf](http://bti2006.bertelsmann-transformation-index.de/fileadmin/pdf/BTI_2006_Brosch_re_GB.pdf).

<sup>90</sup> *Id.*

<sup>91</sup> See Monty Marshall et al., POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800-2006 (2006), <http://www.systemicpeace.org/polity/polity4.htm>.

<sup>92</sup> See T. Vanhanen, *A New Dataset for Measuring Democracy, 1810-1998*, 37 *Journal of Peace Research* 251-265 (2000).

<sup>93</sup> See Laza Kekic, *The Economist Intelligence Unit's Index of Democracy*, THE ECONOMIST (2007), [http://www.economist.com/media/pdf/DEMOCRACY\\_INDEX\\_2007\\_v3.pdf](http://www.economist.com/media/pdf/DEMOCRACY_INDEX_2007_v3.pdf).

<sup>94</sup> *Id.*

creating the measurements, they seem to have shown little interest to date in doing so. Though there may be practical problems in creating some of these measures and in updating them to reflect technological and social changes that influence power balances and oversight, these challenges appear to be easier to overcome than the ideological unwillingness to seek measurements.

### Categories of Measures and Consistency with Rights Approaches

In the absence of existing categories for appropriate measures of human rights, the approach here is to start with the international consensus on aspirations that forms the basis for “development” and “rights” (Table 4) and to then look for the various social contract power balancing categories necessary to achieve them. This appears to offer a useful guiding framework for existing and potential social science measures in some clear human rights categories.

Table 6 starts with the 13 categories I have found in international treaties to comprise a set of “universal development goals.” These goals all have human rights correlatives, as have been presented in Table 4. Here in Table 6, the human rights that fit the 13 categories can be presented in terms of the key elements of human rights: social contract mechanisms (for balances of power and asserting the groups to be protected, that are generally measured by political science) that are shown in the middle column, and outcome measures (generally measured by sociology or anthropology in terms of equality or sustainability) shown in the third column.

Note that the universal development goals were already divided into four levels: the individual level (analogous to individual rights in terms of opportunity but also including some protections for cultures/communities in the development of individuals as members of those cultures), the societal level (analogous to the power balancing of individuals), the cultural and community level goal of sustainability (the goal of cultural rights) and the global level (analogous to cultural and community rights). These four categories reflect the two levels of rights (individual and community) and differentiate between guarantees of opportunity for individuals and power balances in the social contract to protect individuals. The approach also widens the goal of rights to social contract in the international system and not just within states and lower levels of political power within states. Additionally, note that the different categorical goals of social equity and peace at the two different levels are really outcome goals, as equity and peace are outcomes rather than structures. Even though human rights treaties include those for “social and economic rights,” these treaties really present goals. By contrast, political rights, with the goal of achieving political equality, focus directly on structural social contract mechanisms for power balancing, pointing directly to the sources of power and the means of controlling them. It is political rights that are also the key to achieving social and economic rights and peace.

The structural social contract mechanisms for achieving political equality require citizen contractual rights (for individual equality) and cultural/community contractual rights, usually referred to as “federalism” (for cultural/community equality and protection). The areas that these rights work depend on the types of institutional power (military, police, economic and social network/social influence) that one finds in a society. This list of categories depends on these determinants of power. The table lists several of these areas: police and the national security state (here, considered as one, though they may be more than one), military, corporations, courts (decision-making), prosecutors, government administration, non-governmental organizations, and media. The social power is reflected in training in civics skills and governance.

It is also important to recognize that there are now sources of power that are outside and above existing nation states, meaning that social contracting for control over them (such as accountability of the United Nations, itself, the World Bank and other global financial institutions, and other types of international institutions and power) requires balances of power at a level above the nation state.

Note also that the increasing number of “rights” categories in the international system that are simply policy goals, such as governments meeting specific basic needs of individuals, are not included in this table. These “policy” goals are not the purpose of “rights.” They are outcomes that systems may choose if they have the resources to meet them but they are among an infinite number of policy priorities for spending. Earmarking spending at specific levels and priorities is not the goal of a rights system. The guiding principles of rights systems that are in the table are those of “sustainability” and “equal opportunity” and “equality.”

While this table does not yet have links to specific measures, it can be used itself as a diagnostic of governance systems to see whether or not they are meeting international objectives. I have used earlier versions of this approach as a diagnostic tool for evaluating international interventions in developing countries in the sector that has been called “democracy, governance and human rights.”

Note again, that the approach here focuses on power balances and not on “violations.” Existing indicators seem only able to measure “violations” of rights in terms of individual cases of abuse, but they do not focus on inequalities. This makes them easily subject to distortion and inflexible to deal with new technologies of control that create imbalances of power. For example, contemporary measures of oppression and control are entirely different from that of earlier times because they rely on psychological techniques of persuasion and control. There is less of a need for overt and violent forms, which are usually those measured today as “violations” of rights. The underlying power balance may convince the masses to avoid any form of opposition is avoided. This reduces the need for violent controls.<sup>95</sup> Contemporary controls in the national security state are described as a form of “inverted totalitarianism” of corporatism which is a gentler form of fascism different from the rabid nationalist totalitarianism of the German Nazi era or the Russian Stalinist era.<sup>96</sup> This progression occurred in the Soviet Union after the Stalinist era even though the same elites remained in place.<sup>97</sup>

Changes in technology and social organization suggest that the categories of measures may also need to be re-evaluated systematically. Not only does technology change but the social structures of small and large societies differ, with legal institutions, for example, not existing in traditional cultures.

Thomas Jefferson, the leader for American independence in the 18<sup>th</sup> century, and one of the signatories of the U.S. Constitution, claimed that the United States needed a revolution every generation as the means of forcing a dissolution of and renegotiation of the social contract.<sup>98</sup> He

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<sup>95</sup> See *supra* note 74.

<sup>96</sup> See Sheldon Wolin, *Illiberal Democracy*, THE NATION (May 19, 2003); see also Martin Gilens and Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 AM. POLI. SCI. REVIEW 564 (2016).

<sup>97</sup> See *supra* note 74.

<sup>98</sup> “[G]od forbid we should ever be 20 years without such a rebellion,” wrote Jefferson. “What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance .... The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.” See Thomas Jefferson letter to William Smith, Paris, November 13, 1787, U.S. Library of Congress exhibits, Available at: <https://www.loc.gov/exhibits/jefferson/105.html>.

recognized the changes in technologies that would change political balances and oversight, as it has occurred today particularly in military, surveillance and communications. Other factors that would distort and invalidate social contracts could include climate changes and disaster that would change balances of powers and resources, scarcity of specific resources, concentration of industry and changes in industries, and international events including war (and today, the emergence of international organizations and new forms of international power).

**Table 6.** Translating Categories for Human Rights Aspirations (“Universal Development Goals”) in U.N. Treaties into Measurable Human Rights Categories

<b>1. Individual Development Goals: Individual Rights</b>			
	<b>Overall Objectives</b>	<b>Corresponding Human Rights Structures (Social Contract)</b>	<b>Corresponding Human Rights Outcomes</b>
1.	<i>Individual Rights &amp; Based Individual Development</i>	[Below]	Equal Education and Access to Requisites for Equal Physical and Mental Development
2.	Physical (body) development:		
3.	Mental development:		
3.	<i>Community to Rights Based Individual Development</i>	Community and family control of education and socialization Contractual protection of future rights	Reinforcement of all other rights through education and socialization
3.	Spiritual (appreciation of natural world) development:	Contractual protection of individual child rights	Sustainability (Protection of Nature)
4.	Moral (appreciation of others as individuals) development:		Equal rights and due process
5.	Social (appreciation of community) development:		Community sustainability
6.	Cultural (appreciation of one’s identity) development:		Cultural Sustainability

## 2. Societal Level Development Goals

	<i>Overall Objectives</i>	<i>Corresponding Human Rights Structures (Social Contract)</i>	<i>Corresponding Human Rights Outcomes</i>
7.	Social equity/ Social progress/ Equal opportunity for individuals	[See Political Guarantees of Rights, Below]	Economic Equality; Equal Opportunity in Education, with elimination of intergenerational wealth transfers
8.	Political equity/ Equal rights for individuals:	Equal Access to Courts Equal Access to Media Equal Training in Civics Skills/ Governance Justice System Oversight Prosecutorial Oversight Police and National Security State Oversight Military Oversight Government Administration Oversight Corporate Institutions Oversight Other Non-Governmental Organization Oversight [All of these at both the nation-state and international levels]	Equal Rights/ Due Process Equal opportunity in Political Access and oversight;
9.	Peace/ Tolerance/ De-militarization for individuals:	[Same as Above]	[Same as Above]

## 3. Cultural/ Community Level Goals

	<i>Overall Objectives</i>	<i>Corresponding Human Rights Structures (Social Contract)</i>	<i>Corresponding Human Rights Outcomes</i>
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10.	Sustainability/ (sovereignty) of cultures:	[Political Rights of Federalism, Below]	Cultural Sustainability and Sovereignty; Federalism
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#### 4. Global Development Goals

	<i>Overall Objectives</i>	<i>Corresponding Human Rights Structures (Social Contract)</i>	<i>Corresponding Human Rights Outcomes</i>
11.	Social equity/ Social progress/ Equal opportunity of cultures:	[See Political Equity, Below]	Cultural and community sustainability and sovereignty
12.	Political equity/ Equal rights for cultures:	<i>Federalism and Self-Determination</i> Justice System Oversight/ Balancing Executive Power Oversight/ Balancing Legislative Power Oversight/ Balancing Military Oversight/ Balancing/ Self-Defense [All of these at both the nation-state and international levels]	Federalism and Self-Determination (Political equity, equal rights, but not homogenization and not equality of condition), within countries and internationally
13.	Peace/ Tolerance/ De-militarization for protection of cultures:	[Same as Above]	[Same as Above]

#### Types of Specific Measures

Given a list of specific categories for human rights, there should be a corresponding measure for each category. Some such measures already exist and it is at least possible to identify the type of tools that might be used to generate measures in the other categories where measures do not currently exist.

Table 7 takes the categorical information from Table 6 and translates it directly into specific areas of outcome measures. The table preserves the distinction between structural social contract measures that have the goal of political equality or equal opportunity at the individual or cultural/community level and those of outcome measures. The table preserves the levels of

individual and cultural rights and the distinction between political equality and opportunity. Overall, there are 21 rows corresponding to 16 outcomes of measures at the level of individual rights, and 5 at the level of cultural/community rights. Additionally, there are two general outcome measures: one for cultural sustainability at the level of culture/community and one, for general equality, at the level of the individual. Two general measures do exist, though the one at the individual level that currently exists (the measure of wealth distribution using either the Gini coefficient or Theil index) is just a proxy measure since it measures wealth, and not all dimensions of equality. However, the one at the cultural level, that of the “Red Book for Endangered Cultures,” is one that also exists in proxy (endangered languages) but is not widely used.<sup>99</sup>

While Table 7 identifies the areas of measures, most of these measures do not currently exist. Many social scientists will likely suggest that they are too difficult to develop, or if they can be developed, they would be more complex than suggested by Table 7.

Several of the indicators are for balances of power. Since the Gini coefficient and Theil index already exist for certain measurable variables, like wealth and income, it should be theoretically possible to find measures of political power. One area of power balance, for example, is military power of cultural groups to protect their resources. Military analysts routinely do this to determine their own vulnerabilities, and that such measures could be adopted for use in measuring the power of minority cultures and communities if they have not been used already. These measures may now exist in secret, used by state institutions for perpetuating inequalities in plans for warfare and social control. However, they may be possible to create using measures of power, if power can be converted to single units in the same way as income and wealth. Both the Gini coefficient and the Theil index show how far distributions of holdings of a resource are either inequitable or diverge from a random distribution. Because there is a history of modern arms treaties as well as cease fire agreements between militaries, that means that there is a basis for analyzing power differences and convertibility of different forms of power. Note again that the idea is to create measures of countervailing power itself, rather than just the existence of specific institutions that can be thwarted (like “separation of powers”) or measures of symptoms (like numbers of political detainees).

The literature on democratic theory and power does not yet appear to be so well developed, but there has been some attempt to demonstrate how different political resources have translated into power.<sup>100</sup>

Sociologists routinely examine social equality for various groups like women and minorities in terms of income. There should be mathematical methods for aggregating different group inequalities into a single measure using incomes, as well as to find similar measures for power.

Political scientists have already been measuring “dependency” through economic influence of trade flows that are unequal. There are also existing political science measures of “oligarchy” and “democracy” that measure influence over different spheres of political decision-making and influence. There seem to be measures of economic control over means of production or key infrastructure like energy and telecommunications that already suggest how “vulnerable” a system is to shock and that should translate into corollaries for distribution of power.

Measurement categories should generally work across cultures with similar technologies and social complexity. These balances are now generally universal, given that the models of contemporary states/societies are essentially that of a mixture of common elements but in different

<sup>99</sup> See DUNCAN, *supra* note 57.

<sup>100</sup> See ROBERT DAHL, WHO GOVERNS? (1961).

proportions. The “new industrial state” and its “mixed economies” simply offer different roles and boundaries for military, police, corporate power, security state and other kinds of institutions.<sup>101</sup>

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<sup>101</sup> See JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); see also CHARLES LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICO-ECONOMIC SYSTEMS* (1977).

**Table 7.** Sets of Indicators for Systematic Human Rights Achievement (Domestic, assuming no international interference)

<i>Area of Power Balancing</i>	<i>Structural Social Contract Mechanisms</i>	<i>Outcome Indicator</i>
<i>Individual Rights (16 total categories in two sub-areas)</i>	<i>Participatory Democracy and Oversight</i>	<i>[Gini Coefficient or Theil Index as a Proxy Measure; Political science measure of public influence on areas of decisions based on individual characteristics] [Exists]</i>
Equal Opportunity (General)/ Equal Starting Position (political capital) (8 categories)	Equal Education and Access to Requisites for Equal Physical and Mental Development, with elimination of intergenerational wealth transfers	Gini Coefficient or Theil Index on education, with modifications for cultural difference [Possible]
	Equal Education in Civic and Political/Participatory Skills	Sociological measure of participation and influence by background [Possible]
	Community and Family Control of education and socialization	[Needs to be invented]
	Contractual protection of individual child rights	[Needs to be invented]
	Contractual protection of future rights	National and community asset accounting [Possible]
	Equal Access to Courts	Sociological measure of participation and influence by background [Possible]
	Equal Rights	Sociological equity measures of incomes, controlled for cultural choice [Possible]
	Equal access to media/ Common Carrier	Sociological equity measures of media access [Possible]
Political Equality Categories (7 national categories, 1 international)	Control Over and Participation in all forms of institutional power	Composite Political Equity Indicator [Needs to be invented]

Justice System Oversight	Jury System with nullification power; Equal access to attorneys in civil and criminal cases	Sociological Equity Measures of Justice system at levels of access and decision-making [Needs to be invented]
Prosecutorial Oversight	Private Attorneys General; Grand Juries	[Needs to be invented]
Police and National Security State Oversight	Access to technology as a counter to state monopoly of power; Citizen oversight panels; with Free Press/equal access and Justice System Oversight and Contract Language on Internal Rights Protections	Police Power Equity Measures (Police) [Needs to be invented]
Military Oversight	Same as above	Military Power Equity Measures (Military) [Needs to be invented]
Government Administration Oversight	Same as above	[Needs to be invented]
Corporate Institutions Oversight	Same as above	[Needs to be invented]
Other Non-government organization oversight	Same as above	[Needs to be invented]
Individual oversight of international organizations	Due Process and Law Suits against International Organizations; Citizen oversight panels	[Needs to be invented]
<i>Cultures/Communities Rights (4 national categories, 1 international)</i>	<i>Federalism</i>	<i>Cultural Survival (Cultural Red Book Indicator) [a Cultural Sustainability Indicator]; Community Sustainability Indicator [Exists]</i>
Justice System Oversight	Cultural Court Balancing	Sociological measure of participation and influence by background [Possible]
Executive Power Oversight	Executive Balancing in Positions, Selection, Oversight	Sociological measure of participation and influence by background [Possible]

Legislative Power Oversight	Legislative Balancing in Positions, Selection, Oversight	Sociological measure of participation and influence by background [Possible]
Military Oversight	Balancing in Positions, Selection, Oversight; Access to military technology at the community/culture level as a counterbalance to centralized power	Military Power Equity Measures (Military) [Possible]
International System Categories	Minority Culture Power and Oversight in International Organizations	Sociological measure of participation and influence by background [Possible]

### Difficulties to Overcome

There are no perfect approaches to measures and this list is admittedly spotty. However, some of the measurement difficulties can be noted here.

In trying to measure the relative power of minority cultures, for example, there is an immediate question as to whether the measure should be one of “defense” of people and resources or balanced offense, and whether it is even possible to measure “security” without including calculations for risk, human preference for risk and ability to create a “rational” (rather than a paranoid or idiosyncratic) measure of risk.

Power itself may be difficult to standardize on single dimensions in the same way that wealth and income are difficult. Even where economic measures use a numerical standard (such as dollars), “value” is still a relative concept subject to changes over time, to original distributions, and to paradoxes of interactive impacts of different choices. In the past, countries created balances by holding valuable hostages (the King’s favorite daughter) and by creating interdependencies (intermarriage among the royal family). How are these networks and loyalties measured in terms of balances and threats?

Where technology has created concentrations of economic productivity and power as well as military power (such as in nuclear weapons), how does one calculate relative control and balance of this power? While not everyone can have access to private nuclear weapons, there may be ways of balancing access to the launch of existing weapons as deterrents to abuse of power. There may be no real balance of power in a nuclear and Orwellian communications technology control age of “full spectrum dominance,” unless the technologies of mass annihilation are outlawed or the control mechanisms are simultaneously in multiple hands.

Karl Marx’s belief, that industrial protection could be held in common by citizens all controlling the means of production through a “people’s” government, has never seemed to work. Individual proprietors with similar investments and technologies can compete and balance power but there may or may not actually be a way to balance control of a factory among a community. I have suggested various oversight schemes and many are still theorized, but until they are confirmed in practice, many of these measures of power are also theoretical. Even if the balance can be determined, there are questions of whether the measures themselves may still contain an

ideological predisposition to paradoxical solutions. Is it possible to establish equal power or a deterrent for an indigenous culture that still exists on stone tools? Would the establishment of a balance of power end up destroying the culture by encouraging them to sell their resources to buy weapons?<sup>102</sup>

There are also boundary problems. In measuring balance of power, the starting assumption is that within a nation-state, one can identify all of the actors and balance their power. But where there are foreign hegemonic influences and controls, the measure of power must start at two levels at the same time, and the different influences need to be separated at the two different levels. How can that be done?

Once these measures become an art rather than a science, they threaten to lose validity rather than to increase it, due to subjectivity, misperception and changing values. This is when the critics immediately throw up their hands and claim that measurement cannot be done and, therefore, should not be attempted.

Once the measurement begins to interject subjective judgments for weighting different kinds of institutions, it opens the door to the same kind of failures that are found in the CIRI and Humana index. The real value of the indicators is in redirecting the thinking so that it is strategic, rather than assuring that the measurements are exactly right. Simply by pointing towards balances of power and identifying the types of mechanisms and institutions that can be used in social contracts to change those balances is a step forward. Many of these mechanisms, like citizen inspection panels in business, private attorney generals, equal access to attorneys for civil suits, and the use of media as a common carrier are not even discussed in human rights literature today. Shifting the focus to mechanisms and social contract is itself a major and valuable change in the thinking that would not otherwise occur.

Measurements are always flawed. The biggest problem may not be the scientific difficulties of creating better measures than now exist. The problem may be an ideological one, such as getting political scientists and other social scientists to focus on the root causes of rights rather than on short term benefits or socially biased measures that work to exert a hegemonic influence, as those currently used today.

## F. Conclusion: Solutions

Progress depends on measures. The reluctance of those in the human rights field to seek measures that go to the root causes of inequalities and to the desired outcomes has undermined the ability to move forward in human rights.

While it is true that inventing and applying measures is not an easy task, the impediments to measures are ideological, not scientific. Several years ago, I worked to elaborate an outcome measure for cultural rights that could have a high impact in the international arena. I publicized it to colleagues in international human rights through publication in a major journal and then to colleagues in anthropology in the leading practicing anthropology journal. I also publicized the approach to colleagues on listserves and sought foundation funding to begin to use these measures. I then sought to translate the idea into a form of “certification” that would have a market mechanism to promote it, and published the idea again in an anthropology journal. Lastly, I have

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<sup>102</sup> See David Lempert and Nguyen Nhu Hue, *The Global Prisoners’ Dilemma of Unsustainability: Why Sustainable Development Cannot Be Achieved Without Resource Security and Eliminating the Legacies of Colonialism*, 7 SUSTAINABILITY: SCIENCE, PRACTICE AND POLICY 1 (2011).

presented the measure to major international rights organizations like AI. Despite this however, the measure remains only on paper but not in practice.

The existing indicators in human rights that are described in this article are those that promote the very ideologies in the international system today that oppose progress in human rights. These indicators serve to further hegemonic goals of countries seeking to expand their influence by patterning systems in other countries or, in the case of the U.N. system, promote elite interests and careers of international “development” bureaucrats. It would be costly for international rights NGOs to support the development of the indicators in this article, and it would also be costly to apply those that exist. Increasingly, their funding is also coming from governments and they rely on academics, whose funding and goals have similar government or corporate sources.

Law schools creating human rights programs and courses seem to focus only on lists of human rights and memorization of treaties, while supporting the ideology of the U.N. system. A university or think tank could easily set up a human rights unit that focuses on measures and applies them, like the International Red Book for cultures. Human rights institutes are burgeoning at universities today, although few seem interested in measures. Instead, their focuses are on philosophy and disputing the idea of measurement, itself.

The very profession that had the skills to measure cultural survival (anthropology) has turned its back on minority cultural survival to focus on narcissistic concerns like “identity” and of concerns of individual groups like women and gender minorities. The current approach is to assimilate minorities into existing systems of power rather than to measure general inequalities or to focus on structural mechanisms for power balancing and rights protections.

Many “legal studies” and “social justice” programs emerging in the United States do not even hire lawyers at all, despite their focus on human rights. Instead, they have written the concept of “social contract” and structural mechanisms out of their curriculums and replaced them with courses in advocacy, “social movements” and identity. Additionally, such programs have also replaced these concepts with courses on individual groups (women, gender minorities, minority ethnicities, racial minorities, the disabled, etc.) rather than on structural mechanisms, measures of inequality and legal enforcement.<sup>103</sup>

While all of these may include sociologists and political scientists, their focus is on economic inequality and assimilation as well as on theory, rather than on measures or mechanisms. It appears to be by design. Organizations like Amnesty International may now not only be driven by corporate and government donors, but may be co-dependent on symptoms for their funding. The goals of these organizations appear to run continual “campaigns” with no impact on the root causes.

Perhaps a study of this would conclude that theories on what is possible in achieving rights are correct in assuming that rights may be dependent on technologies and environment as a dependent variable, rather than something that can change through human choice. While rights organizations, international organizations and university programs all claim that they are promoting real change, none are able or willing to offer the measures. This suggests that the approach to human rights today really is no different than that of religious proselytizing, claiming the tools of social science and law, but applying neither.

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<sup>103</sup> If there is an underlying political reason for this, it may be to substitute “religious” invocation and advocacy for actual skills to lead to structural change, in a way that offers lip service without any real impact. Much of the funding in human rights, for “advocacy” and “awareness” seems to fall into the same category.

For those believing or seeking to prove otherwise, this article offers the basis for taking the next step: building and applying specific measures.