



Keeping Up with the Fashion: Human Rights and Global Public Goods

E.A. Andersen and B. Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights*, Brill, Leiden, 2007. ISBN 978-90-04-15507-7; xxviii + 520 pages; price: EUR 110.

Abstract

The strategic genius of some recent development discourses lies in their appropriation or re-appropriation of hegemonic ideas and practices. However, the choice of a conservative framework for progressive goals may mean that the compromise may be more than symbolic. The global public goods movement seeks to resuscitate earlier economic ideas about the economic utility of the public provision of certain goods but in this case at a supranational level. The book *Towards New Global Strategies: Public Goods and Human Rights* attempts to engage with the idea from a human rights perspective. While there are some notable contributions, much of the book founders on a failure to understand the different, and sometimes confused, strands of the global public goods thinking and properly engage with them from a human rights perspective. This article tries to tease out what appears to be the two different schools of thought of global public goods and the human rights questions that should be posed to them. Given the dominance of the economics discourse and the enduring nationalism in much international development cooperation, instrumental arguments for the utility of human rights and development should be cautiously welcomed but also carefully critiqued.

Keywords

Public goods, human rights, development

1. Introduction

Do development discourses come in three-piece suits? A *troika* of vest, jacket and trousers? One is tempted to envision the vest as the high profile economist with a new message, the United Nations (UN) as the jacket clothing the idea with respectability and the donors as the trousers to make sure the message does some walking. The meteoric rise of the *Millennium Development Goals* (MDGs) cannot be explained without the public advocacy of Jeffrey Sachs, the blessing of the former UN Secretary General and United Nations Development Programme (UNDP) and the strong support of bilateral and multilateral donors. The *legal empowerment* movement was initiated by Hernando de Soto on the premise that that economic development for the poor would follow fast upon the legal recognition of their informal assets – and Scandinavian donors stepped in to support a

Commission on the Legal Empowerment of the Poor within the UNDP.¹ Supported by a stellar academic cast, Inge Kaul at the UNDP has resuscitated the notion of *public goods* from the field of economics and has help transform it into a framework for addressing global problems through the provisioning of 'global public goods'.² One might even include Amartya Sen's role in chairing the Human Security Commission which gave the decade-old *human security* concept new international visibility.³

As development practitioners and critics sift through the new paradigms, the response of the human rights community is equally a game of catch-up. More critically, human rights scholars and practitioners seem forever torn between attraction and repulsion. The strategic genius of these new discourses lies in their appropriation or re-appropriation of hegemonic ideas and practices. To put it crudely, the theories of legal empowerment and global public goods borrow from economics, MDGs steal from new public management while human security tries to shift traditional notions of physical security towards a broader and more human-centred approach. The ideas from the New York-based UN institutions thus become 'sellable' to a broader audience. And they certainly seem to be an improvement on the neo-liberal versions offered down the road by the World Bank and International Monetary Fund in Washington. But the rub lies in the fact that the choice of a conservative discourse for progressive goals may mean that the compromise is more than symbolic.

For instance, the Millennium Development Goals have mobilised considerable attention in some Southern states and definitely amongst the international community in addressing poverty, and by extension the realisation of some aspects of economic and social rights. Some human rights advocates have warmed to the goals given their high profile and the fact that at least the focus is on poverty and not national self-interest.⁴ The MDGs have nonetheless been strongly criticised from a human rights perspective.⁵ States are generally only required to meet aggregate targets without any obligation to reduce poverty amongst the most

¹ H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, New York, 2000).

² See I. Kaul, I. Grunberg and M. Stein, *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press, New York, 1999) and I. Kaul, P. Conceição, K. Le Goulven and R. Mendoza (eds.), *Providing Global Public Goods: Managing Globalization* (Oxford University Press, New York, 2002).

³ See Commission on Human Security, *Human Security Now* (Commission on Human Security, New York, 2003).

⁴ See P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', *27 Human Rights Quarterly* (2005) p. 755.

⁵ See A. Saith, 'From Universal Values to Millennium Development Goals: Lost in Translation', *37 Development and Change* (2006) p. 1167; UN Officer of the High Commissioner for Human Rights, *Claiming the MDGs: A Human Rights Approach* (OHCHR, Geneva, 2008).

marginalised groups. Some goals backtrack on international standards by ignoring, for example, human rights duties to provide free primary education and access to secure tenure. Indigenous peoples groups, amongst others, have criticised the technocratic agenda that is insensitive to alternative views of development.⁶ Southern states and civil society groups were largely excluded from the formulation process, and the Millennium Declaration that birthed the Goals within a human rights framework is largely forgotten.

De Soto's proposals for legal empowerment of the poor can be welcomed in a similar spirit. They recognise that those living and working in the vast informal economy and settlements of the developing world are not criminal elements but rather active economic contributors who possess valuable assets.⁷ The Secretary-General of CIVICUS, an international civil society umbrella group, said of the De Soto initiated UN Commission: "While Hernando's work evokes mixed reactions among civil society activists, I strongly believe the work of this commission will benefit from the voice and participation of a broad spectrum of civil society. Hernando has been working on this issue since the 1980s, and his researchers have spent years studying the shadow economy." However, the simple prescription of formalisation by De Soto can worsen the situation and civil society played a marginal role in the Commission's work.⁸ By exposing the poor to market forces, people living in poverty may be more quickly deprived of their homes, assets and livelihoods than under informal or customary arrangements. Individual-based formalisation such as freehold title or individual leases may not be the preference of all or many indigenous peoples, rural communities or informal settlements. A lack of attention to human rights baseline standards such as protection from forced eviction, protection of women's rights and adequate participation of those being 'empowered' has thus led many formalisation projects to failure to achieve their goals in practice. In the report recently released in 2008, some of these concerns were addressed after an internal struggle amongst the Commission members.

⁶ See UN Permanent Forum on Indigenous Peoples, *Report on the fourth session* (16–27 May 2005), Economic and Social Council, UN Doc. E/C.19/2005/9; and S. Dammen, 'Indigenous Vulnerability and the Process Towards the Millennium Development goals – Will a Rights-Based Approach Help?', 14 *International Journal on Minority and Groups Rights* (2007) p. 489.

⁷ S. Patel, *Towards the Legal Empowerment of the Poor: Article Written in Response to Kumi's Article on the Commission on Legal Empowerment of the Poor*, July 2007, <www.undp.org/legalemPOWERMENT/docs/SheelaPatel_towards_LEP.doc>.

⁸ See E. Sjaastad and D. Bromley, 'The Prejudices of Property Rights: On Individualism, Specificity and Security in Property Regimes', 18:4 *Development Policy Review* (2000) p. 365; C. Nyamu-Musembi, *Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa*, IDS Working Paper, 2006; G. Payne, A. Duran-Lasserve and C. Rakodi, 'Urban Land Titling Programmes', in M. E. Brother and J.-A. Solberg (eds.), *Legal Empowerment – A Way Out of Poverty*, Norwegian Foreign Ministry, 2007, Issue 3, p. 11; and M. Langford, 'Beyond Formalisation: The Role of Civil Society in Reclaiming the Legal Empowerment Agenda', in M. E. Brother and J.-A. Solberg (eds.), *Legal Empowerment – A Way Out of Poverty*, Norwegian Foreign Ministry, 2007, Issue 4, p. 41.

The riposte to this gripe is that the human rights community is playing the same game. The ‘human rights approach to development’ has reached development buzzword status. While lacking a singular high priest, this approach has been promoted by the UN Commissioner for Human Rights, mainstreamed in UN agencies and occupies its share of development discourse and funding applications.

Ironically, it also attracts similar criticism from some members of the human rights community for straying too far. Decades of human rights law and practice have possibly been reduced to a few fuzzy principles like participation and empowerment that can be attached to any development endeavour. Indeed, this hints at the distinguishing feature of human rights. It was not purely conceived within a development or policy paradigm but emerges from the melange of the concrete struggles to make power accountable and the legal recognition of rights and obligations. Its contextual history and non-consequentialist legal and moral framework mean that human rights overlap with and speak to the development paradigm but are nonetheless separate. This is not to remove the human rights approach to development or human rights itself from the glare of criticism. Rather it is to say that one can approach any development theory, including the human rights approach, from an independent human rights perspective. And it is into this interface that we examine the global public goods discourse.

2. Global Public Goods

Global public goods as promoted by Inge Kaul have received less attention than the MDGs. This is partly explainable by the fact that it extends beyond the field of development proper to incorporate peace, environment, security, finance, etc., thus depriving itself of a well-organised and committed constituency. The idea nonetheless peppers statements on globalisation by some politicians, policy-makers and activists and has attained some operational prominence in the fields of international health, environment and, after the global impact of the US housing market sub-prime crisis, financial stability.⁹ The recent global food crisis around the rising cost of food is also likely to receive particular attention in the discourse: it is a global market failure (demand outstretching supply) and one can already find global public goods solutions being proposed such as global food banks, restrictions on international incentives for producing biofuels that have reduced land for food crops and seeking to rein in the falling US dollar or surging oil prices which contribute heavily to food inflation.

⁹ See for example Jorge Lacão, Secretary of State for the Presidency of the Counsel of Ministers, Portugal, keynote address, *Citizenship in an Enlarged Europe: The Contribution of Economic, Social and Cultural Rights*, 10–12 April 2008, New University of Lisbon.

With mixed success, *Towards New Global Strategies: Public Goods and Human Rights*, edited by Andersen and Lindsnæs, attempts to grapple with the implications of global public goods. The book emanated from a request by The Danish Ministry for Foreign Affairs to a national human rights centre to hold discussions on the utility of the global public goods approach. Despite the promise of title, human rights plays the minor part, and the book is more an introduction to global public goods and an exploration of its application to a staggering range of areas, with 18 specific chapters alone on peace and security, governance and rule of law, information and knowledge and education, selected economic and social rights, and trade and multinational corporations.¹⁰ As the publication emerges from the Danish context, and one recurrent theme is whether the concept of global public goods justifies a reorientation in Denmark's international development policy.

Following the tradition of Anglo-American economics, public goods can be simply described as those goods which are both non-rival and non-excludable. *Non-rivalry* refers to the fact that one person's consumption of the good does not deprive another of it – moonlight being a common example. *Non-excludability* means everybody can access this good – moonlight again is accessible to all although incarcerated persons may beg to differ. On the contrary, private goods are characterised by both rivalry and excludability. Consumption of a carton of milk deprives others of consuming it, and that carton is not publicly available for all. The approach is nuanced by pointing out that many public goods, in practice and possibly in their perfect form, are impure. They possess one or more features of a private good. A public good might thus be *exclusive* and restricted to a group of persons, for example merit-based criteria may limit access to higher education. Or a good might be *competitive* in that scarce financial resources restrict availability of the public good for all.

In Paul Samuelson's seminal but often forgotten 1954 essay on public goods,¹¹ he tried to push economists past what Inge Kaul's terms the 'technical' definition of public goods.¹² Public goods are not only those naturally occurring phenomenon such as air but those goods desired by all individuals but which the market cannot provide and which therefore require public provision.¹³ The market is

¹⁰ None of the nine questions put to chapter authors by the editors refer to human rights, see pp. xv–xvi. Even then, most authors neglect many of these questions in their analysis.

¹¹ P. Samuelson, 'The Pure Theory of Public Expenditure', *36 Review of Economics and Statistics* (1954) p. 387.

¹² I. Kaul and R. Mendoza, 'Advancing the Concept of Global Public Goods', in Kaul *et al.*, *Providing Global Public Goods*, *supra* note 2; and O. Morrissey, D. Velde and A. Hewitt, 'Defining International Public Goods: Conceptual Issues', in M. Ferroni and A. Mody (eds.), *International Public Goods: Incentives, Measurement and Financing* (Kluwer, The Hague, 2002).

¹³ Kaul and Mendoza, *ibid.*, introduces a third category of inadvertent public goods although the footnotes always point to inadvertent public evils without indicating the public good side of the coin. Perhaps such an example would be the discovery by a central bank of an extra million bars of gold in its cellar which can only be put to public use.

unlikely to adopt measures to prevent the spread of communicable diseases for example but only the medicines to treat them. The classic free-riders problem arises. The Parent of Child A is unlikely to pay for immunisation if they know that vaccination of Child B will eliminate the risk for Child A. Public intervention is therefore required to ensure their provision.

Moving to the global level, global public goods are thus those goods, as defined by Inge Kaul, “whose benefits extend to all countries, peoples and generations”. The typical list of such goods tends to include naturally occurring phenomenon such as moonlight to human interventions such as environment sustainability, peace and security multilateral trade and even respect for human rights or international human rights treaties.¹⁴

Selecting a good that is or should be *global* and *public* is a slippery task. In the standout chapter in *Towards New Global Strategies*, Bjørn Møller dissects the almost ubiquitous claim in global public goods literature that ‘peace’ is a public good.¹⁵ After an insightful introduction to public goods, international relations theories and the typologies and theories of war, he notes that peace can be understood in the negative sense (absence of war/violence) but also in the positive (the absence of oppression, extreme inequality, etc). The paradox is that attaining positive peace may require violating negative peace. Møller cites “the American and French revolutions in the 18th Century and continuing with the modern wars of liberation” and contemporary “humanitarian interventions” with military force. He is no fan of war, though, and Møller raises doubts as to whether ‘humanitarian intervention’ can be considered a ‘public good’: it being dependent on “whether they succeed in actually mitigating the humanitarian problems in question and whether the costs of doing so ... compare favourably with the gains” (p. 126). The waters are further muddied with the observation that controversy continues over whether the construction of nuclear weapons and military defence preparations contribute to “peace or the exact opposite”. Not a single shot was fired during the Cold War between the US and the USSR, although he notes the numerous proxy wars in Africa and beyond that claimed countless lives. Economic analysis of the so-called ‘peace dividend’ after the cessation of hostilities reveals that the economic benefits are very much contingent on the manner in which a country demilitarises.

If we dip into the growing literature on global public goods, one can discern two particular trends of how the concept is understood and practiced, which I will call the *positivist* and *constructivist* approaches. The positivist approach is concerned with identifying and supporting those public goods which are in the global self-interest; the constructivist approach claims that ‘public goods’ is the

¹⁴ *Ibid.*, p. 98.

¹⁵ *Ibid.*, and R. Mendez, ‘Peace as a Global Public Good’, in Kaul *et al.*, *Providing Global Public Goods*, *supra* note 2.

subject of social contestation and construction and that we require a more equitable process for defining and distributing public goods. Both emerge from Inge Kaul's work, but her audience does not sing from the same chorus sheet. This is clearly evident when opening the cover of Inge Kaul's first co-edited book. Eminent economists, politicians and activists praise her work for entirely different reasons.

3. Positivist School

The *positivist* approach seems principally concerned with strictly defining the 'global' in global public goods. In this school of thought, communicable disease control is a global public good since everyone in the world benefits even if the benefit from eradicating polio in Nigeria is of almost negligible benefit to the Canadian resident.¹⁶ Providing HIV/AIDS treatments is not a public good since it is only of benefit to those individuals who need treatment. However, some commentators do argue that the eradication of poverty could be a global public good if everyone derived a utility knowing from the fact,¹⁷ although it is a stretch.¹⁸

This essentially technical and residual approach is defended on the basis that the concept of global public goods will be deprived of any practical utility if it were extended to cover the tackling of every public evil manifested on the globe – a sentiment shared by Odegaard and Yigen in *Towards New Global Strategies* when they conclude that “[t]here is a danger, we think, that the concept may be diluted, and focus may become blurred” (p. 297). Moreover, the beauty of the global public goods approach, according to this positivist approach, is that it summons extra financial resources. Since providing these rigorously defined global public goods is in the 'self-interest' of all countries, programmes to provide them should be supported funds outside those allocated for international development. This would also extend, though, to assisting developing countries to undertake the necessary 'complementary' activities, for example building necessary health facilities in the case of addressing communicable disease. Lastly, the provision of such global public goods will *ipso facto* require some form of collective international coordination to avoid the free rider problem, although some point out, including Lindsnæs in this edited volume and Lisa Cook and Jeffrey Sachs in Kaul's first book,¹⁹ that delivery is often better at the regional level.

¹⁶ See R. Smith and L. MacKellar, 'Global Public Goods and the Global Health Agenda: Problems, Priorities and Potential', 3 *Globalization and Health* (2007).

¹⁷ Morrissey *et al.*, *supra* note 12.

¹⁸ See T. Nagel, *The Possibility of Altruism* (Princeton University Press, Princeton, 1970).

¹⁹ See L. Cook and J. Sachs, 'Regional Public Goods in International Assistance', in Kaul *et al.*, *Global Public Goods: International Cooperation*, *supra* note 2, p. 436.

This positivist approach is only manifest in one chapter of *Towards New Global Strategies*, where Hans-Otto Sano casts a keen eye over good governance, another common contender in the global public goods list. He carefully describes how the ‘good governance’ discourse emerged from the World Bank, and was enthusiastically taken up by donors, as a way to address democracy and corruption concerns in many developing countries without offending the non-political strictures of the World Bank constitution and the sensitivities of developing countries. However, he concludes that good governance is not a *global* public good since the “global effects (externalities) of poor governance are relatively small seen in relation to national effects”. He buttresses this conclusion by pointing to the relative lack of international regulation in the area, or attempts to forge any common standard of approach.

Corruption as a sub-set of good governance may be a better contender for a global public good. There are clear global incentives to free ride (e.g. Norwegian companies will be reluctant to refrain from bribing local officials if Australian companies are not similarly prevented from doing so). Yigen’s chapter in the book provides a perfunctory overview of corruption, though it lacks the precision and lucidity of Sano’s chapter or other writings on corruption and global public goods. Likewise, the emphasis in the health chapter traces an interesting history of public interventions including a strong focus on Denmark’s international contribution to tackling communicable diseases, but it does not take an overly rigorous approach even though it is strongly focused on communicable diseases.

One global public good that falls comfortably within this positivist approach is the environment, but it is inexplicably ignored in *Towards New Global Strategies*.²⁰ The environment headlines most standard lists of global public goods, and aspects such as climate change and air pollution are clearly global phenomena and ‘global evils’, and the free rider problem and lack of international coordination is acute. Destruction of a forest in Brazil or an increase in carbon emissions in the USA has global ramifications for climate change, although the burden is unevenly distributed and some countries may on balance obtain benefits from climate change. The consequences of climate change for the respect of human rights are equally severe, particularly for marginalised coastal and agricultural communities and entire small island states. Some initiatives to address climate change, such as biofuels and protection of forests through eviction of residents, paradoxically raise problematic questions for rights to foods, housing and livelihoods.

²⁰⁾ A chapter is devoted to access to freshwater, but it is mostly concerned with national distribution.

4. Constructivist School

The constructivist approach emphasises the ‘public’ in global public goods. One of Inge Kaul’s key conceptual contributions to the debate was to go beyond Samuelson’s point that ‘human-made’ public goods are necessary to maximise utility. She and Mendoza emphasise that both the present *availability* and *distribution* of public goods is a matter of *social construction* and *social contestation*.²¹ Whether a forest is a public good is the result of a choice by the authorities which is likely to have been heavily influenced by struggles between different perspectives and groups within society. Kaul eschews any pretence at being an independent umpire on this contestation. She and Mendoza willingly support both transparent and open contestation and contestation that leads to more equitable outcomes. This leads her to evaluate the current state of public goods from a triangular perspective of the ‘publicness’ of the consumption, decision-making and distribution of a public good. It is this policy-oriented approach that has attracted favour with those opposing or wanting to fine-tune globalisation since it provides a normative but conceptually appealing basis for progressive international and national responses. As George Soros says in the leaves of Kaul’s book: “In today’s global economy the production of private goods has taken precedence over the provision of public goods. Correcting this imbalance is a major policy challenge to which this book makes an important contribution”.

This embrace of the normative dimension of public goods returns the concept back to its non-economic and non-Anglo-American origins. In an original and well-informed contribution to the global public goods debate, Peter Wivel’s chapter in the opening section of *Towards New Global Strategies* provides a philosophical tour of the ‘public good’ in philosophical literature stretching back to Cicero. Most notable in the historical trail is Rousseau, who saw protection of human rights as only possible through the provision of a broad range of public goods, such as law, public finance, taxation and funding for equal access to education. Unfortunately, Wivel’s study abruptly ends in 1797 upon Burke’s death, and it would have been fascinating to at least see a treatment of 20th century philosophers. One might point to the echoes of Rousseau and Kant in debates between Kymlicka and Caren with Walzer over individualistic or communitarian construction of public goods and how closely citizenship should be tied to the social contract and the territory of the republican state.²²

²¹ Kaul and Mendoza, *supra* note 12.

²² M. Walzer, *Spheres of Justice. A Defence of Pluralism and Equality* (Basic Books, New York, 1983) ch. 2: Membership; J. Carens, ‘Migration and Morality: A Liberal Egalitarian Perspective’, in B. Barry and R. Goodin (eds.), *Free Movement* (Harvester Wheatsheaf, London, 1992) pp. 25–47; W. Kymlicka, *Contemporary Political Philosophy*, second edition (2002) ch. 7: Citizenship Theory, pp. 284–326.

This constructivist approach is emphasised by the editors Andersen and Lindsnæs, who in their joint opening chapter, at least, seem more attracted to this general notion of public goods rather than the potential for adding the global dimension. Many of the book's authors adopt the approach. For example, Boesen and Lauridsen do not define water as a public good on the basis that freshwater resources can be freely enjoyed by anyone. The reality is that water is a scarce good that flows upward to the highest market price. Rather they explicitly invoke both Samuelson's normative understanding of the concept and the recognition of water as a human right to argue that water constitutes a public good and must be made accessible to all. Odgaard and Yigen examine the right to land and right to work as possible global public goods, although the context for the examination is principally regional. The most useful part of the chapter is their careful analysis of the challenges of the increasing privatisation of land in Africa where poorer farmers, pastoralists and women have often been the victims of this loss of public goods. While communal land under customary law tends to be more of an impure good since it is limited in access, they make the link with the global dimension by pointing out that the World Bank, IMF and donors have pushed for liberalisation and privatisation of land and urge them to adopt more democratic approaches in shaping their support by ensuring that the voices of women and the poor are heard.

It is on this question of normatively defining what should be a public good that the book introduces the comparative human rights perspective. After a rudimentary chapter on human rights by Lindholt and Lindsnæs,²³ Lindsnæs in a subsequent chapter draws out the similarities of the two concepts. She refers to their mutual principles of universality, indivisibility and interdependence and their part actualisation through international and regional forms of cooperation. She questions, though, whether global public goods are similar in content to human rights since new sets of values are not "rooted in the human rights that states have agreed upon". The global public goods approach also offers no built-in system for monitoring and accountability.

However, no sooner has Lindsnæs drawn the line in the sand than she proceeds to leap over it. With echoes of Alston's suggested procedural definition of human rights (human rights are those defined by the General Assembly),²⁴ she postures that the General Assembly's broad goals contained in the Millennium Declaration constitute a good representation of minimum global demands. These include peace and security, human rights, democracy and good governance, development and protection of the environment, free trade, financial stability, telecommunications and protection of intellectual property. With a tabular comparison of human

²³ This chapter is somewhat formalistic and contains a number of errors.

²⁴ P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control', 78 *A.J.I.L.* (1984) p. 607.

rights with the broad Millennium Goals she then makes the remarkable statement that “[t]here is agreement between the Millennium Goals, the goals for public goods and human rights” (p. 78).

As the later chapter on education in the book shows, there may in fact be strong conflicts in content. Diego Bang traverses the right to education literature and standards to note that they embrace both the skill-making and socialisation dimensions of education. He claims that the public goods approach tends to ignore the latter, interestingly citing the example of the former Eastern bloc countries where universal education was provided but socialisation was limited to inculcation in Marxist-Leninist principles. He also implicitly points to the stronger legal backbone behind the human rights approach that international treaty obligations require provision of universal and free primary education. One wonders, though, whether Bang might have benefited from some greater cultural reflexivity and an equality rights perspective to protect or nuance his conclusions. A strong emphasis on socialisation in education can provide a good learning environment for students with learning difficulties or with disabilities. However, a lower emphasis on the academic aspects could have the paradoxical effect of perpetuating class and race differences. Students from wealthier families with greater social and educational capital are able to better complement their school education and advance more quickly within the university system and job market.

Lindnæs also examines some potential conflicts, such as responses to global financial instability which is rather pertinent in the current economic crisis. Some responses such as ‘user payment for elementary schooling’ would violate human rights although more could have been said on positive obligations such as the provision of the right to social security which could also have positive economic spin-offs through stimulation of the economy. It is these positive obligations that could have been explored a little more. Following Rousseau perhaps, the global public goods literature claims that not only are human rights global public goods, but public goods are needed for their realisation. Yet, human rights literature and legal jurisprudence have increasingly emphasised that there are positive obligations for all human rights, whether the right to life or the right to health and social security, for which states must be accountable. Brydensholt and Yigen in their chapter begin to lean in this direction when they critique recent rights-based approaches for information about and access to public services in some countries as very individual-oriented with a failure to address the state’s omission to provide an adequate level of service.

5. Human Rights?

In fashioning a robust human rights response to Kaul and her company, one might imagine that the following key issues should be in play: what are the

normative foundations for public goods, what is the process for determining them and how does one implement them? While *Towards New Global Strategies* does engage to a certain extent with the first question, it fails to address more deeply the normative and distributionalist approach proposed by Kaul. Kaul is rather vague on what she means by equity and distribution, and there is a rich and intense debate within global public goods,²⁵ philosophy²⁶ and human rights²⁷ literature on how we should understand it. The basic question being whether it is a minimum or adequate threshold, equality in opportunity or equality in outcomes or something in between.

This issue of equity is also relevant in different and competing global legal systems. In the chapter of the rule of law, for example, which is otherwise quite useful in analysing different concepts of the rule of law and making practical recommendations on alternative forms of justice, there is a question-bagging sentence that raises concerns over the protection of property rights. The authors worry that foreign investors have insecure rights in local courts but they do not address the very global fact that foreign investors have extraordinarily strong rights in bilateral investment treaties and arbitration systems. These rights far outweigh most people's housing and property rights under domestic and international human rights system and this contradiction is generating a heated debate and engagement between the two legal regimes. The chapter on trade in the book, however, is much better in addressing the various contradictions between the international trading system as both a global public good and a system that remains substantively and procedurally inequitable and violates a number of human rights.

Who should determine national and global public goods? Who should be involved, and what should characterise those decision-making mechanisms? As the editors Lindsnæs and Andersen note, the key outstanding question from Paul Samuelson's work on public goods is precisely how you determine them (pp. 32–33). His abstract theorem postulated that the well-organised state would be able to deliver public goods according to citizen preference. One of Kaul's collaborators, Desai, has argued that this can be expressed through representative democracy but that the preference of smaller and minority groups also needs to be captured. Kaul also makes a range of proposals for improving the model of

²⁵ See J. Rao, 'Equity in a Global Public Goods Framework', in Kaul *et al.*, *Global Public Goods: International Assistance*, *supra* note 2, p. 68.

²⁶ See V. Zanetti, 'Egalitarian Global Distributive Justice or Minimal Standard? Pogge's Position', in A. Føllesdal and T. Pogge, *Real World Justice* (Springer, Berlin, 2005) p. 199.

²⁷ See B. Porter, 'The Crisis of ESC Rights and Strategies for Addressing It', in J. Squires, M. Langford and B. Thiele (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre and University of NSW Press, Sydney, 2005) p. 48; and D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford University Press, 2007).

global participation where citizens, states, business and civil society cooperatively develop solutions. While Andersen's chapter on "International institutions for preserving peace and security" does address the participatory failure of the Security Council where permanent members can veto action, the book largely avoids the participatory question. From a human rights perspective, this is disappointing. Recognition of human rights has itself been the product of a long and often participatory struggle, and respect and fulfilment of human rights in practice calls for the local and international recognition of the voices of minority groups and the marginalised. We need to ask whether global public regimes for regulating corruption in the name of public goods will only concern itself with protecting donor funding and ensuring a level playing field for business, or will it also engage with the widespread looting of public land for profit to the direct detriment of the poor? Do international regimes for climate change or international financial stability bring the poor into the calculus, or do they risk depriving some people living in poverty and minorities and indigenous peoples of their rights in order to obtain global meta goals? How will these voices be heard? What answer do we have to Kaul's proposal?

Lastly, there is the matter of implementation of global public goods which the book gives greater attention to but slides over most of Kaul's proposals without comment. Lindsnæs questions whether multilateral institutions including the United Nations are best placed to deliver public goods. Kaul does not, however, accept the status quo, and she argues for a reconstitution of international institutions (for example issue-oriented UN agencies). She largely advocates a cooperative model where citizens, states, business and civil society cooperatively develop solutions. This liberalist model, according to Lindsnæs, "can without doubt lead to outstanding results, but in areas like peace and security, and health it remains doubtful whether non-obligating forms of organising such efforts, can endure the desired results". As foreshadowed above, she notes that regional cooperation in the form of the European Union has been one of the best means of securing this wide range of public goods through both regional and national coordination.

However, Lindnæs is unfair in characterising all of Inge Kaul's proposals as cooperative and liberalist. One of her innovative arguments for closing the so-called *jurisdictional gap* between national and international policy-making is that states should 'internalise externalities' – establishing 'national externality profiles' in order to determine their positive and negative contributions to the global commons. The idea has resonance with extra-territorial human rights obligations of states contained in a number of treaties, for instance, ensuring that one's soldiers do not torture, development aid does no harm and that private corporations operating abroad are properly regulated. Lindnæs takes up the idea in a sentence but then dismisses it on grounds of vagueness. *Towards New Global Strategies* does contain a chapter on regulating the behaviour of multinational corporations but the focus is rather narrow – it examines the conditions Danida

imposes on its supplying companies but not the potential for effective regulation of Danish companies operating abroad. Kaul's proposals to close the *incentive gap* (greater use of market mechanism to address global problems; higher prices for water, air and ocean fisheries and lower prices for technology; and the development of a new stream of international aid for global public goods) mostly fall within Lindnæs's cooperative and liberalist categorisation, but they deserved a proper and thoughtful response.

The ambition to systematically reflect on the global public goods, human rights and the practical implications is welcome, but the weakness of the book is that it does not give proper justice to neither global public goods nor human rights. Engaging with the global public goods discourse is unfortunately less simple than it seems, and Andersen and Lindnæs attempt to deflate the readers' expectations in the book's first five pages. They argue that the book is an "experiment", "an invitation to open discussion" and concede that all the chapter authors possibly lacked the necessary expertise, particularly in economics. One can sympathise with the few practitioners involved in the project and their chapters sometimes provide some startling insights – the opening pages of journalist Jerichow on the "The right to know" are an awkward but fun ride. The result is that chapters vary considerably in quality; few it appears were sent for formal or informal independent review, and few authors seemed to have read the main texts in the field. It is further disconcerting when editors and authors from the human rights field make statements that property is a human right without noting its exclusion from international human rights treaties, except in cases of racial discrimination, or that there is no global institution addressing unemployment without considering or evaluating the role of the International Labour Organization. This is further hindered by the decision to only rely on Danish authors. The book rises and falls on the ability of each author to master global public goods, human rights, a particular topic and all within an international perspective. This could have been a strength if the attempt was to critically look at Denmark's own provision, or lack thereof, of public goods, but this only attracted some attention.²⁸

The two editors do strive to maintain a scholarly and detached position and allow authors an opportunity to independently evaluate the importance of a public goods approach, and this permits a healthy heterogeneity in the book. But in the last two pages of their concluding remarks, the editors and Peter Andersen discover a sudden evangelical zeal for global public goods. They veer off into utopian overdrive with proposals for the world's national education ministries to come together to write a single curriculum (pp. 464–465). Interestingly, it is

²⁸) While some of the book's authors examine Denmark's decision to participate in the recent Iraq war and the Danish history of international health activism, other interesting topics would have been its strong social welfare state, notoriously strict migration laws, relationship with indigenous peoples in Greenland and the 'Danish cartoons' if publishing deadlines were flexible.

proposals such as these that Kaul seeks very much to discourage and where she draws line in the sand within her activist approach:

It is prudent to insist that the burden of proof be on those who advocate increased national policy harmonization or joint production at the international level. The reason lies in the tremendous diversity of conditions around the world. Increased provision of a global public good often requires all countries, even all people, to accept a change in global trends. But moving in the same direction is often best achieved through policy pluralism rather than standard approaches.²⁹

Towards New Global Strategies represents perhaps the only monograph to attempt to systematically address global public goods from a human rights perspective and is thus a welcome contribution. But the editors and contribution seem to be ‘catching up’ on the run, and the lack of Kaul’s ‘prudence’ in design and vision has robbed the book of being a seminal contribution. Nonetheless, one should join with the editors in encouraging others to join the debate.

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²⁹) Kaul and Mendoza, *supra* note 12, p. 103.