

Chapter 2

Understanding Human Rights and Social Policy

In the United States, the earliest identification of AIDS as a gay disease, a “gay cancer,” or a “gay plague” continued to dominate public perception and shape official responses long after the name “acquired immune deficiency syndrome” was adopted to replace the term “gay-related immunodeficiency disease.” Despite mounting evidence of heterosexual transmission, some religious leaders seized on the chance to identify HIV/AIDS with the gay community, arguing that the disease was God’s punishment for sin and that homosexuals should be tattooed or quarantined. In September 1985, 4 years after the disease appeared, President Reagan mentioned AIDS publicly for the first time at a press conference, adding to the confusion by implying that casual contact could transmit HIV. When asked if he would send his own children to school with a child who had AIDS, Reagan commented that although the medical evidence suggested this would not put them at risk, there was no unequivocal proof.

The combination of denial and panic that characterized the response in the United States was echoed around the world. Many African countries refused to pay attention to HIV/AIDS and deeply resented the fact that Western scientists viewed Africa as the origin of the disease. Chinese officials argued that as there were no homosexuals, drug users, or prostitutes within the People’s Republic, there was, therefore, no AIDS. In Germany, a federal judge declared that it might be necessary to tattoo and quarantine people carrying the virus. In the first decade of AIDS, 104 countries adopted restrictive AIDS-related laws. When the development of a test for HIV made it possible to identify carriers of the disease, such legislation soared. The epidemic also spawned a particular type of hate crime, in which those thought to be at high risk of contracting the disease and people living with AIDS were verbally and physically assaulted.

Elizabeth Fee & Manon Parry, 2008.

During the first few years of the appearance of the AIDS epidemic, the disease was publicly identified as belonging to US gay men and soon later to intravenous drug users. Responses to the disease were to marginalize and isolate those infected, deny the existence of the epidemic, and finger point. It is unlikely that the significant advances we have made in combating the spread and treatment of HIV/AIDS would have occurred if we had clung to the early perspectives of the disease that called for isolation and alienation of persons with HIV/AIDS. Early editions of the UNAIDS *Global report on the AIDS epidemic* were filled with

gloom and doom and have since given way to more promise, including historic declines in AIDS-related deaths and new HIV infections as well as unprecedented preventive and maintenance efforts in HIV-related activities in low- and middle-income countries (UNAIDS, 2013). By placing AIDS/HIV in the context of other social issues, our understanding of the factors related to vulnerability expanded and we were able to halt and more recently reverse the AIDS epidemic. We now share a global vision of zero new infections and AIDS-related deaths where people living with HIV/AIDS no longer experience discrimination (UNAIDS, 2013). The reframing of AIDS from its early days as a population-specific disease is largely due to the relentless efforts of the late Jonathan Mann.

Jonathan Mann was the first director of the Global AIDS Program at the World Health Organization (WHO) from 1986 to 1990. Mann helped the world understand that the biological and behavioral origins of AIDS were only part of the story and to fully address the disease and halt its spread, we had to understand how sociopolitical, economic, and cultural factors contributed to the disease. This went against conventional thinking at the time that rarely linked disease eradication with socioeconomic and political factors.

One of the first actions Mann took was to challenge the quarantine and exclusion of persons living with HIV/AIDS (PLWHA). By 1987, more than 80 % of countries had laws to control PLWHAs or people thought to be at risk of infection, such as the men who have sex with men and sex workers, and discrimination in housing, travel, health care, and employment was common (Patterson, 2009). Mann believed that discrimination would only drive the infected underground, making it harder to track the epidemic and treat people with the disease (Fee & Parry, 2008). Recognizing that social exclusion added vulnerability to HIV infection, Mann stressed that the violation of rights due to a person's race, gender, sexual orientation, education level, nationality, and/or income concurred with the political repression, unemployment, migration, cultural practices that devalue persons and limit their opportunities to live their lives to the fullest potential (Patterson, 2009). He saw information on prevention as an important component of limiting the spread of the disease.

Working with other activists and scholars in the 1990s, Mann framed HIV/AIDS from a rights-based approach arguing that health is a human right. As a human right, he noted the interdependence of health on other human rights (civil, socioeconomic, and cultural) and the basic principles underlying all human rights—inalienability, universal, indivisibility, interdependence, and nondiscrimination (Mann et al., 1999). He based his argument on the International Bill of Human Rights that has been signed by two-thirds of UN country members. The International Bill of Rights includes three documents: the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Political and Civil Rights (ICCPR). Article 25 of the UDHR declares: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in ... sickness disabil-

ity ... old age..." Article 12 of the ICESCR states: "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and identifies some of the measures the state should take "to achieve the full realization of this right."

The ICCPR refers to political and civil rights affecting public health and Article 26 of the ICCPR makes clear that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law" thus reinforcing that all health services, goods, and facilities must be provided to all without any discrimination. The right of persons to participate in public affairs and to equal access to public services is articulated in Article 25 of the ICPCR. Fusing civil and political rights with socioeconomic rights is a critical component of a rights-based approach. As noted by Stainton (2005), the key elements in shifting to a rights-based approach is in providing opportunities for people to articulate their claims; to identify, obtain, and manage supports necessary to actualize their claims; to have control over resources and in governance; or for decision making within relevant structures.

Using a rights-based frame, the causes of AIDS/HIV were understood to have biological, behavioral, social, political, and economic roots, and societal responses shifted from marginalization to enforceable, legal entitlements. By situating AIDS within a human rights frame, Mann was able to expose inequities in health systems across societies and the relationship between social inequalities and the presence of HIV/AIDS both within countries and across countries (Fee & Parry, 2008). Indeed, Mann and his colleagues were able to demonstrate the two-directional interdependence of human rights and health/well-being (Mann et al., 1999). Countries have the responsibility to work with citizens toward the realization of rights (making rights an entitlement) and are accountable to its citizens and global partners. Framing PLWHA as rights holders also reinforced their right to participate in AIDS policymaking. Looking at the success in the United States of the Gay Men's Health Crisis (GMHC) and the AIDS Coalition to Unleash Power (ACTUP) who used education about HIV prevention, captured media attention on AIDS, and the active involvement of PLWHA in influencing government policies, Mann incorporated these strategies into WHO global partnerships with bilateral donors, governments, and civil societies.

Shifting to a conceptualization of social issues from a rights-based frame can be daunting because we have a tendency to entrench ourselves in a particular perspective so deeply that we can easily and unknowingly come to see our perspective as unbiased even when it is colored by cultural norms and prejudices. By recasting social issues from a rights-based perspective, we go beyond cultural norms and embrace global normative standards. A rights-based approach often involves wide-ranging and synergistic efforts of diverse stakeholders including governments, solidarity among the international community, civil society, and scientific innovation because the roots of social issues are interdependent and expose the inequities within societies.

The purpose of this chapter is to help the reader reframe social issues from a rights-based perspective using the international and national instruments available. It helps readers move away from needs-based and charity-based conceptualizations of social issues and human needs to rights-based approaches. The chapter begins by reviewing the basic human rights instruments and then illustrates how to apply the basic principles of participation, accountability, nondiscrimination, and transparency to social issues. A discussion of the challenges that arise follows as well as the types of analyses that may be used.

2.1 International Human Rights Instruments

Familiarity with the international human rights instruments is essential to practice and may be one of the reasons the legal profession often leads to rights-based efforts. To practice from a rights-based approach, a practitioner must be familiar with the major international, regional, and domestic instruments that articulate modern human rights. It is also important to understand how these instruments evolved and why laws are structured differently across countries. A summary of the major instruments and mechanisms is offered below.

Modern human rights arose in response to the atrocities committed during World War II. The inhumanity exhibited made clear that protections existing at the time were inadequate to safeguard individuals and their rights from government violations. The Universal Declaration of Human Rights (UDHR), which is nonbinding, was unanimously accepted by the United Nations General Assembly on December 10, 1948. In the years to follow, the countries at the United Nations set out to create binding human rights treaties that defined the rights of humans with the force of law and with more specificity than the UDHR offered.

Declaration is a document stating standards or principles, but which is not legally binding

Treaty, convention, covenant, charter is legally binding agreement between two or more countries

Ratification is a formal process by which a country agrees to be bound by the terms of a treaty

Reservation is the exception that States make to a treaty (e.g., provisions within the treaty the government does not accept)

The human rights treaty process is usually initiated by legal and subject matter experts who participate in crafting a draft of a treaty at the United Nations. Representatives of interested countries will then negotiate the final terms or content of the treaty. The process can become lengthy if many countries join the drafting process and there are conflicting perspectives. The time it takes to develop an international human rights standard expressed in treaty form can vary widely. For example, it took less than 2 years for the UDHR to be written and 18 years for the United Nations to produce the covenants that spell out our political,

Table 2.1 Human rights in the International Bill of Rights

The International Bill of Rights
Universal Declaration of Human Rights
International Covenant on Civil and Political Rights
International Covenant on Social, Economic, and Cultural Rights
<ul style="list-style-type: none">• The right to equality and freedom from discrimination• The right to life, liberty, and personal security• Freedom from torture and degrading treatment• The right to equality before the law• The right to a fair trial• The right to privacy• Freedom of belief and religion• Freedom of opinion• Right of peaceful assembly and association• The right to participate in government• The right to self-determination• The right to social security• The right to work• The right to form trade unions and work under favorable conditions• The right to an adequate standard of living• The right to education• The right to health• The right to food and housing• The right to take part in cultural life• The right to benefit from scientific progress

civil, economic, social, and cultural rights. Recommendations may be offered from nongovernmental organizations during the process.

Once the final version is agreed upon, the treaty is opened for country ratification. Countries have different methods for acceding to or ratifying treaties. In the United States, the President first signs a treaty and then two-thirds of the US Senate must vote in favor of the treaty for it to be ratified. By ratifying a treaty, a country agrees to be legally bound by the terms of the treaty. Countries that ratify may object to certain parts of the treaty and express this by entering reservations to their ratification. In this way, a country agrees to uphold the treaty with noted exceptions or limitations. A country may enter a reservation because it conflicts with certain provisions or it is inconsistent with a country’s own constitution. Once a country ratifies a covenant, convention, or treaty, a country has responsibility to integrate and implement it into its own constitution and laws (Table 2.1).

The most significant components of the human rights statutory framework are the two covenants adopted as legal treaties in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although originally envisioned as a single, unified Covenant on Human Rights, a decision was taken in the back rooms of the UN to produce two separate standards, a “Political Covenant” and an “Economic Covenant.” Why two treaties when the purpose was to forge ahead in a unified vision? The explanation

often given is that while political and civil rights detailed in the ICCPR require immediate implementation, the implementation of social and economic rights is gradual or progressive and countries needed the time to establish systems for guaranteeing social and economic rights. However, this appears to be more of a post-facto justification, and most believe the decision to split the covenants was ideologically motivated.

The division of rights between the two covenants is artificial, reflecting the global ideological divide of the period. This was the time of the Cold War, colonialism was being dismantled and a new polarized division of power was being created that required allegiance to either the East or to the West. The two covenants came to represent the competing visions of the two super powers—the United States and its allies championing the individual rights manifest in the ICCPR; the Soviet Union and its allies championing the collective rights of the ICESCR. This split between political and civil from social and economic rights undermined the very core of a shared vision for human rights. It also subverted the integration of the principles of indivisibility and interdependence of human rights by establishing fundamentally different approaches to understanding and implementing the two sets of rights and simultaneously closed off international scrutiny and accountability. It was only after the collapse of the Soviet Union that a greater effort was made to integrate civil and political rights with economic, social, and cultural rights.

In many ways, the United States led the West in its pursuit of political and civil rights. The US Bill of Rights is often cited as one of the first public documents of modern human rights, Eleanor Roosevelt chaired the committee who wrote the UDHR, and the United States has committed billions of dollars in aid to expose and root out human rights abuses throughout the world. However, the United States has had an ambivalent relationship with international human rights law and has only ratified three of the major international human rights treaties: the ICCPR, the Convention against Torture (CAT), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). And the United States is one of only a handful of countries that has not ratified important treaties like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and is the only country not to ratify the Convention on the Rights of the Child (CRC). Nor has the United States signed regional documents upholding human rights in the Americas (Table 2.2).

This notable lack of ratification is known as U.S. exceptionalism in human rights policy. On the one hand, the United States has initiated and arguably demanded the compliance of human rights abroad—while on the other hand, it has repeatedly rejected the application of international standards for human rights in the United States. By refusing to ratify the interdependent multilateral human rights norms, the United States stands nearly alone among western democracies failing to offer its citizens the opportunities to seek remedies for internationally codified rights before either a domestic or international tribunal. Critics have noted the double-standard perpetuated by the United States who holds other

Table 2.2 Status of major human rights treaties in the United States

	UN Adoption	US Signature	US Ratification
International Convention on the Elimination of All Forms of Racial Discrimination	1965	4 Jan 1969	20 Nov 1994
International Covenant on Economic, Social and Cultural Rights	1966	5 Oct 1977	Not ratified
International Covenant on Civil and Political Rights	1966	5 Oct 1977	8 Jun 1992
Convention on the Elimination of All Forms of Discrimination against Women	1979	17 Jul 1980	Not ratified
Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment	1984	18 Apr 1988	21 Oct 1994
Convention on the Rights of the Child	1989	16 Feb 1995	Not ratified
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	1990	Not signed	Not ratified
Convention on the Rights of Persons with Disabilities	2006	2009	Not ratified
Convention for the Protection of All Persons from Enforced Disappearance	2006	Not signed	Not ratified

nations accountable to these international standards and laws while exempting itself (Hertel & Libal, 2011).

Although the ICCPR and ICESCR keep civil and political separate from socio-economic and cultural rights, subsequent human rights treaties adopted by the United Nations to address the situation of especially vulnerable populations reintegrated these different types of rights and created normative standards on rights as well as legal obligations on states to respect, protect, and implement human rights in their countries.

2.1.1 *Duty Bearers*

Governments have the primary responsibility for protecting and promoting human rights but businesses, civil society, and individuals are also responsible for ensuring human rights. According to the Preamble of the UDHR, “Every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”

When a government ratifies a human rights treaty, it assumes a legal obligation to respect, protect, and fulfill the rights contained in the treaty (see Table 2.3). Governments are obligated to both prevent human rights violations against people within their territories and to provide effective remedies for those whose rights are violated.

Table 2.3 Human rights and the roles of government

Respect	Protect	Fulfill
<p><i>Governments must not act in ways that deprive people of a right or interfere with persons exercising their rights</i></p> <p>For example, governments:</p> <ul style="list-style-type: none">• Can create constitutional guarantees of human rights• Cannot deprive certain communities or populations access to health care facilities or schools• Should not allow the abuse or a discrimination against persons with disabilities, children, women, or any other persons• Should ratify international human rights treaties	<p><i>Governments must prevent private actors from violating the human rights of others</i></p> <p>For example, governments:</p> <ul style="list-style-type: none">• Can enact and enforce laws prohibiting private companies from releasing hazardous chemicals that impair public health• Should prosecute perpetrators of human rights abuses, such as crimes of child abuse and neglect or discrimination against persons with disabilities• Can educate people about human rights and the importance of respecting the human rights of others	<p><i>Governments and other responsible parties must take positive action to facilitate the enjoyment of basic human rights through the establishment of political, economic, and social systems</i></p> <p>For example, governments:</p> <ul style="list-style-type: none">• Should provide free, high-quality public education• Can create a public defender system so that everyone has access to a lawyer• May ensure everyone has access to clean water and food by funding public assistance programs• Can launch a public education campaign on the right to vote

2.1.2 Regional Human Rights Instruments

In addition to international human rights instruments, there are three regional human rights mechanisms in force in Africa, the Americas, and Europe. Regional mechanisms (i.e., treaties, declarations, commissions, and courts) complement the UN human rights system and do not detract from the obligations that states have already undertaken by ratifying the core international human rights treaties. Regional mechanisms help countries realize human rights by promoting human rights regionally that in turn provide incentives for governments to engage in the promotion of human rights within their own territories; establishing regional mechanisms such as courts or treaties that may provide more culturally accepted and sensitive interpretations of human rights; and by helping implementation efforts in countries through regional commissions, special rapporteurs, and courts (Petersen, 2011). Regional mechanisms can also facilitate regional input to the development of international human rights standards and mechanisms and can help national governments address regional human rights concerns that cross national borders—for example, human rights concerns related to migration, transnational crime, and environmental disasters.

Currently, well-established regional human rights systems exist in Africa, the Americas, and Europe. The regional arrangements for protecting human rights in

Europe are extensive, involving the Council of Europe, the European Union, and the Organization for Security and Cooperation in Europe. Some of the most long-standing and developed of intergovernmental instruments are housed in the Council of Europe, and include the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, and intergovernmental mechanisms include the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Petersen, 2011).

In the Americas, regional human rights are the primary responsibility of the Organisation of American States. The main human rights instruments in the inter-American system are the 1948 American Declaration on the Rights and Duties of Man and the legally binding American Convention on Human Rights. The main mechanisms include the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Created by the African Union, the main regional human rights instrument in Africa is the 1981 African Charter on Human and Peoples' Rights, and the main mechanisms are the African Commission on Human and Peoples' Rights and the recently established African Court on Human and Peoples' Rights, to be merged with the African Court of Justice.

A regional mechanism does not currently exist for Asia.

Each of the regional mechanisms are subordinate to national human rights mechanisms but can issue binding decisions and reparations regarding human rights violations.

Rights must be protected by domestic legal systems according to the preamble of the UDHR, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." By signing an international treaty, States are obligated to incorporate expressed rights into their constitutions and domestic laws, and are responsible for violations of their treaty obligations even when not intentional.

Policy analysis undertaken from a rights-based approach should therefore situate the social issue by reviewing which international and regional treaties a country has ratified and assess the incorporation of the treaty or treaties into domestic law at all relevant levels of governance.

In addition to these legal provisions, comments and resolutions by UN bodies should be considered when conducting a policy analysis from a rights-based approach because they may contribute to international custom and in certain circumstances be regarded as having legal value (OHCHR, 2012). An example of this is the UDHR, which is not legally binding but is considered evidence of customary international law. Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties. Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation (Shaw, 2003).

The broad range of human rights instruments presents a challenge to ensure the application of the law to specific areas and to effectively coordinate the different

Table 2.4 Human rights treaty bodies

<i>Human Rights Committee</i> (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols
<i>Committee on Economic, Social and Cultural Rights</i> (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966)
<i>Committee on the Elimination of Racial Discrimination</i> (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965)
<i>Committee on the Elimination of Discrimination against Women</i> (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999)
<i>Committee against Torture</i> (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment (1984)
<i>Committee on the Rights of the Child</i> (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000)
<i>Committee on Migrant Workers</i> (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
<i>Committee on the Rights of Persons with Disabilities</i> (CRPD) monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006)
<i>Committee on Enforced Disappearances</i> (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006)

elements within an expanding system. Ten treaty committees were created to monitor the implementation of the nine core international human rights treaties. Each committee is composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms of 4 years by State parties. The treaty bodies meet in Geneva, Switzerland.

Each of the treaty bodies publishes its interpretation of the provisions of its respective human rights treaty in the form of “general comments” or “general recommendations.” These cover a wide range of subjects from the comprehensive interpretation of substantive provisions to general guidance on the information that should be submitted in State reports relating to specific articles of the treaties.

General comments have also dealt with wider, cross-cutting issues such as the role of national human rights institutions, the rights of persons with disabilities, violence against women, and the rights of minorities. Sometimes, issues arise that were not considered when the treaties were first written. For example, CEDAW, as adopted in 1979, specifically addresses discrimination against women yet omitted any provisions on violence against women. Two general recommendations were published by the CEDAW Committee in 1989 and 1992, Nos. 12 and 19, respectively, violence against women as a form of discrimination against women is explicitly cited (CEDAW Committee, 1989, 1992). In No. 19, the CEDAW Committee defined discrimination to include “gender-based violence, that is violence that is directed against a woman because she is a woman or that affects woman disproportionately ... physical, mental or sexual harm or suffering, threat of such acts, coercion or other deprivations of liberty” (para. 6). Likewise, while the ICESCR delineates the responsibility of state

parties not to discriminate on the basis of race, color, sex, language, political or other opinion, national or social origin, property, birth or other status, it is silent on discrimination on the basis of sexual preference or identification. It is in General Comment No. 20 of the UN Committee for Economic, Social and Cultural Rights that offers the term “other status” in the ICESCR to include “sexual orientation” and “gender identity,” thereby making them protected classes like race, religion, origin, and birth status. Not everyone agrees with this interpretation or that a Committee should have the right to reinterpret a treaty after it has been signed. For example, the African Group requested that sexual orientation and gender identity references to General Comments 19 and 20 issued by the Economic, Social and Cultural Rights Committee be deleted (Family Watch International, 2009).

Additionally, the United Nations General Assembly may pass resolutions affecting human rights that are generally nonbinding but can explain intention or provide guidance to members.

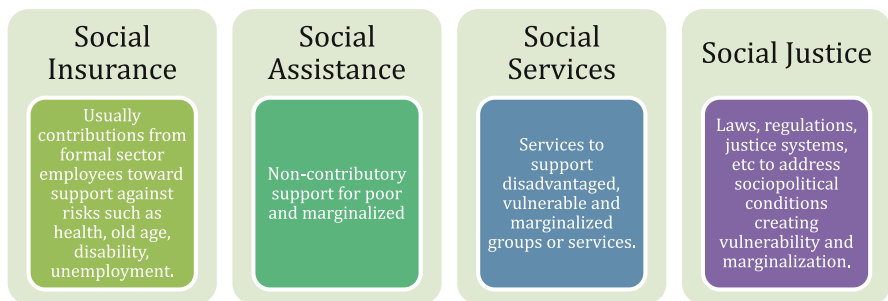
2.2 Grounding Social Policies in Legal and Institutional Frameworks

A rights-based approach to social policies should be solidly based in legal and institutional instruments within a country to insure policy stability and the recognition of beneficiaries as rights holders. Policies that are integrated into national action plans and other long- and short-term social policy strategies increase the likelihood that social protection will become available for all, and especially for the most disadvantaged and vulnerable groups. It also helps ensure that social protection measures are guarded from political manipulation and that they receive lasting commitment from state authorities, regardless of change of government leaders. According to the UNRISD, an adequate legal framework is one that includes:

- Detailed eligibility requirements for social protection programs;
- Mechanisms to ensure transparency and access to information about available programs;
- Defines the various roles and responsibilities of all those involved in implementing the programs at different levels of government;
- Identifies a clear institutional framework to enable rights holders to identify duty bearers in charge of specific responsibilities;
- Articulates long-term financial requirements, ensuring adequacy and predictability of benefits;
- Makes complaints and appeal mechanisms available and accessible; and
- Participation channels for all beneficiaries.

[General Comment 19](#) of the UN Committee on Economic, Social and Cultural Rights (2008) provides further discussion on the expectation of social policies and programs and human rights standards.

In addition to understanding the legal framework for a policy, it is also important to ground a particular policy, its programs, benefits, and services within the overall social protection scheme of a country. Social protection schemes are generally considered to have four basic components: social insurance (usually funded by contributions from formal sector employees toward support against risks such as health, old age, disability, unemployment), social assistance (noncontributory support for poor and marginalized sometimes referred to as social safety nets), social supports (services to support disadvantaged, vulnerable, and marginalized groups or services), and social justice (laws, regulations, justice systems to address sociopolitical conditions creating vulnerability and marginalization). This categorization reflects the comprehensiveness, diversity, and purpose of social protection efforts but falls short of helping us understand how social protection efforts may introduce or impede social change and the realization of rights.



It may be useful to reframe social policies with regard to their primary purpose and how they contribute to the realization of rights. Devereux and Sabates-Wheeler (2004) offer an example of rights-based framework to assess the ability of social protection efforts to socially transform a society by offering opportunities for socially vulnerable groups to participate in individual and economic growth. To be comprehensive, the cumulative efforts should offer all four components of the framework and as such it may be useful for an analysis to consider not only the policy or program but also how it fits in to the overarching scheme (Gatenio Gabel, 2014). The four main elements of this framework are:

- *Provision measures* to provide relief from deprivation, such as narrowly targeted safety nets for people facing livelihood shocks (e.g., food aid as emergency relief) and social assistance for the chronically poor (e.g., disability benefit, social pensions).
- *Preventive measures* to avert deprivation, including formal social insurance schemes (e.g., health insurance, unemployment benefits), informal risk-pooling mechanisms (e.g., savings clubs, burial societies), and diversification strategies to spread risk.
- *Promotive measures* to enhance incomes and capabilities in the short- and long-term (e.g., school feeding or public works with skill training).

- *Transformative measures* to address vulnerabilities arising from social inequity and exclusion (e.g., protecting minority ethnic groups against discrimination or sensitization campaigns on HIV and AIDS). Transformative measures address the power imbalances in society that create and sustain vulnerabilities within population groups and within households.

2.3 Conceptualizing Social Issues from a Human Rights Frame

The interrelatedness of human rights is key to conceptualizing social issues from a human rights framework. Rarely, in rights-based approaches can one right violation be isolated. Likewise, when we conceptualize developing social policies to promote the realization of rights, we can focus social protection efforts on the promotion of certain rights but need to be cognizant that efforts will likely affect a full array of rights. Rights-based efforts should not only consider the effects programs or policies may have on other social or economic rights, but should also consider the effects of policies or programs on political and civil rights. Our conventional needs- and charity-based methods typically neglect political and civil rights when analyzing social policies and programs.

The example of child marriage is used here to illustrate how a social issue is reframed from a rights-based approach. Child marriage occurs when at least one or both partners in a marriage is under the age of 18 years (this definition of child is used by the Convention on the Rights of the Child). Both girls and boys may be affected by child marriage, but the majority of child marriages occur between a girl who is under 18 years old and a male who is over 18 years of age. One-third of the world's girls are married before the age of 18 and one in nine are married before the age of 15 (ICRW, 2007). Research findings indicate that the consequences of girls marrying before they are the age of majority can be severe (United Nations Population Fund, 2012). Girls who marry before age 18 are more likely to experience abuse, violence, and exploitation than those who marry as adults. Bearing and delivering children prematurely may impair reproductive organs and the health of the young mother and her child(ren). An example of this is obstetric fistula, a condition that leaves two million females leaking urine or feces due to prolonged labor and injury to the birth canal and is especially common among physically immature girls (United Nations Children's Fund, 2009). Approximately 15 million females between the ages of 15 and 19 years give birth each year and girls under the age of 15 are five times more likely to die during pregnancy or childbirth than women in their twenties (United Nations Children's Fund, 2009). Children born to adolescent mothers are 60 % more likely to die than infants born to mothers over 19 years (United Nations Children's Fund, 2009). Girls who marry young typically leave school and are subject to isolation from family and friends leaving them unprepared for the psychosocial and emotional consequences they are forced to confront.

Young girl brides are more likely to be abused and be victims of domestic violence than women who marry when they are older (IPPF & FMRWG, 2006). For young brides, leaving an abusive home is often not seen as an option because of economic pressures and cultural expectations. Young brides who have left their marriage have been reported to suffer from social and economic stigma, punished or killed by close male kin for bringing shame upon the family, or left to fend for themselves with little legal recourse (IPPF, 2006).

Unlike traditional policy analyses that might frame child marriage as a social problem because it removes girls from school or that initiates a pattern of dependency, a rights-based approach first looks to international and national human rights instruments to frame this social issue. In this case, Article 16 of the UDHR states that all persons “of full age” have a right to “free and full consent” to a marriage implying that partners who are not fully mature may not be in a position to make a fully cognizant decision. Typically, the fathers of the bride and groom or an elder in the family arrange child marriages. CEDAW specifies in Article 16 that “the betrothal and marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age of marriage.” The CEDAW Committee General Recommendation 21 determines that 18 should be the minimum age for marriage for men and women.

Interestingly, the CRC does not explicitly address marriage although child marriage may be a violation of children’s other rights articulated in the CRC such as Articles 12 and 13 (the right to express one’s views), Articles 19, 34, 35, and 36 (the right to be protected from exploitation and abuse) and Article 24 (the right to be protected from harmful practices). Child marriage often curtails a child’s education and relocates girls to live in isolating and/or abusive situations that may violate related rights such as the right to education, information, to rest and leisure, to health, to protection against physical and mental violence and abuse, and from being separated from their parents against the child’s or parent’s will (see the CRC Articles 9, 17, 19, 20, 24, 28, 28, 29, 30, 31, and 32). The CRC General Comment 4 notes that all states are obligated to protect adolescents from all harmful traditional practices that are harmful to children’s health. The next step would be to consider if there were regional human rights instruments that address the social issue. For example, the African Charter on the Rights and Welfare of the Child (1990) prohibits marriage for persons under age 18 years and requires countries signing the charter to incorporate this into their laws.

It is critical to check which relevant international and regional human rights instruments a country has ratified. The Office of the United Nations High Commissioner for Human Rights maintains a worldwide database of the status of ratification of human rights instruments by country (www.ohchr.org). Another definitive source is the United Nations Treaty Section that maintains a register of multilateral treaties deposited with the Secretary-General (<http://untreaty.un.org>).

If a country has ratified the relevant international and regional human rights instruments, the country is obliged to integrate the content and spirit of the convention or treaty into national law, and the analysis that follows should capture how effectively this and the implementation of law has been. For example in

the case of child marriage, it would be important to identify national (and state) laws governing marriage with specific attention paid to gender bias, minimum age of marriage, forcible marriage and rape, and dissolution of marriage. Depending on the country, knowing if birth registration and marriage registration is compulsory may be relevant, as well as how effectively the law is enforced if one exists.

If a country has not ratified relevant international or regional documents, the analysis should consider: the country's reasons for not participating in international or regional normative standards; whether existing national laws violate or uphold the international and regional standards, and; whether rights addressed in the UDHR (that although nonbinding contributes to customary law) are relevant to the topic. These steps will help frame the social issue from a rights-based perspective, either as a violation of rights or identifying the less than full realization of relevant rights. One may further explore whether the country has made general or specific reservations to the international human rights instruments it has ratified with regard to gender, age, traditional law or religion; or if reservations have been made to the definition of a child in CRC.

Consideration must be given to issues that span across two or more international human rights covenants. For example, in the case of child marriage, there are strong linkages to children's and women's rights as presented in the CRC and CEDAW. Child marriage may also affect the realization of rights articulated in the other covenants such as CERD, CM, or the CRPD. Complementary areas across treaties should reinforce advocacy and evaluating areas of conflict will lead to careful and comprehensive consideration. Going back to child marriage as the example, comparing the CRC and CEDAW on rights relevant to child marriage would be a good place to begin. Both include articles addressing the right to health, education, nationality, access state resources, rest and leisure, and equal treatment regardless of gender. They highlight parental responsibility to raise children, the state obligation to provide child care facilities, and emphasize the importance of considering the best interests of the child in decision making. The covenants are explicit about eliminating the trafficking of girls and women, protecting girls and women from sexual exploitation, and recognizing the necessity of private and public partnership. Subject to interpretation, the CRC however can be seen to emphasize girlhood as a conduit to motherhood compared to the emphasis in CEDAW to see women as whole human beings who may or may not be mothers.

The next step is to contextualize the social issue by understanding the cause(s) underlying the issue, the consequences of the social issue, who and what contributes to its perpetuation, and who is affected by the social issue (stakeholders). In the example of child marriage, household poverty and discriminatory cultural practices are at the root of the practice. Girls are seen as economic burdens to families in some cultures because they are expected to leave their birth families when they marry and contribute to the welfare of their husband's family. This often occurs in cultures that attribute higher social, economic, and cultural status to males and tend to minimize the ability of women to participate in decisions affecting herself, her children, the family, and the community. Too often, women's livelihood and status

in society is entirely dependent on their marital status and/or male guardianship. Economic hardship of the household then might be the root cause; cultural factors may exacerbate and reinforce the continuation of child marriage.

At the heart of a rights-based approach is the creation of conditions for all individuals to engage in a participatory process that will ultimately expand their capabilities and freedoms respecting their dignity and those of others. Policies that expose inequities and impose solutions are not rights-based. Rights-based policies value both the process and outcomes, making sure to include affected populations in social policy outcomes as well as in the decision-making process. Cultural practices may conflict with the realization of human rights such as gender equality. When this occurs, the decisions should be left to the people to decide, provided those whose rights have historically been dismissed or violated have the opportunity to participate and affect the decision-making process. An unambiguous understanding of the beliefs and values of the people is important to inform policy decisions. Culture provides the contextual environment for human rights and ultimately facilitates the realization of human rights by allowing for ownership and debate of the issue.

The stakeholders in this issue will vary depending on the country and the cultural context but generally speaking they will include child brides and grooms; the fathers or male guardians responsible for negotiating marriages; mothers or female guardians who sometimes reinforce societal expectations or may take issue with the practice; other relatives who may act as gatekeepers for the family honor; and community practices that may dictate standards for bride prices or dowries dependent on age and status of the bride.

Following the identification of stakeholders, the ways in which each stakeholder benefits or loses from child marriage should be evaluated. Examples include economic gains and losses to families, the benefits and losses to the child bride or groom (education, physical or emotional abuse, labor division, securing a socioeconomic position within a society), and the benefits and losses to the community (social and economic development, reinforcing patriarchy and cultural practice, etc.). The duty bearers may include the parents, the husband, the in-laws, the community, the government, and possibly the media and other opinion makers who consciously shape public opinion on child marriage.

The next step is to consider how child marriage affects one or all four of the human rights principles of *participation, accountability, nondiscrimination, and equality* (P.A.N.E.). In the case of child marriage, the principles of *nondiscrimination and equality* are violated because it has a differential impact on women and men, girls and boys. Boys may also be forced into child marriages but the prevalence is much higher among girls. Many countries legally recognize the marriage of males at age 18 and females at age 16. Girls are more likely to suffer physically because they may be encumbered with heavy physical tasks that are damaging, forced to have sexual relations prematurely, and experience lifelong physical suffering from bearing children early and continuously. Young girls who marry older men are at a higher risk for physical and mental abuse, and are more likely to get sexually transmitted infections such as HIV/AIDS. As a result of marriage, girls

may forfeit their education (UNPF, 2012). The community and family may offer girls who marry young few options for recourse. The analysis could demonstrate the gender bias that is perpetuated by child marriage.

Another dimension to be considered in the analysis is who *participates* in and who is excluded from decisions affecting child marriage practices at the family, community, and legislative levels. One could analyze how marriage decisions are made and stem recommendations for changing the process and/or participants. Measuring participation in decision making can be daunting. For example, there is no standard method for measuring children's participation in society. A good place to begin is to review the legal provisions within a country allowing women and children to participate in decisions affecting their well-being, specifically around participation in marriage decisions. The analysis may include an evaluation of the children's minimum ages of consent; confidential mechanisms offered for women and children to express their own opinions, conscience and religion in accordance with evolving capacities; legal entitlements to be involved in decision-making processes affecting their lives and legal proceedings; and obligations to involve children in decisions affecting them and women more generally. If these mechanisms do exist, the analysis may explore the methods for making women and children aware of their legal rights and the mechanisms available to them including the process for children to exercise their rights. More generally, consideration should be given to opportunities available for women and children to influence local and national government legislation, policies, services, and resource allocations.

Accountability is closely related to access, a critical element in the human rights framework. In the event of a violation or denial of rights, a rights-based approach emphasizes the need to have available and appropriate means to seek and support redress, including invoking the right to remedy and to due process, and the right to information. The existence of mechanisms for redress should be included in an analysis as well as accessibility, availability, and affordability to these mechanisms. What structures and processes are in place for a child spouse to seek redress for rights violations in a marriage? Can a child present directly in court or must a representative be appointed for the child? Who and how is this representative appointed? What procedures are in place to assure the neutrality of the representative and safeguard the child from further repercussions? How are children made aware of the availability of such services? Are these processes transparent and if not, in what ways do they impede redress regarding child marriage?

Accountability also includes transparency. Transparency is a critical safeguard against corruption, exclusion, political favoritism, and an important means of facilitating access to and participation in rights realization. By not knowing the means available to influence policymaking, the resources that can be used and the information on an issue, the ability to claim one's rights is impeded. Policies and laws become vulnerable to those who interpret what can and cannot be done. Not only should legal, financial resources, and administrative processes be transparent and open to question, but they also should be available in a language and at a level that is understandable to rights holders. A child who wants out of a marriage or does not want to marry should be able to understand where they can go to access help, the

type of help available, and the options and consequences of one's choices. We all have the right to freedom of expression that includes the right to seek and receive information from the State (Sepúlveda & Nyst, 2012).

Policy recommendations flowing from this analysis should seek to address the violations or denial of rights identified in the first part of the analysis with consideration given to the stakeholders and their roles as duty bearers. The recommendations must identify the root cause of child marriage and responsibility for rectifying the rights violated by child marriage. If economic hardship is at the root of child marriage, the policy recommendations should consider alternative methods for securing household income that may reduce reliance on child marriage as an income source. In doing so, the recommendations should address how infringements of the human rights principles analyzed will be remedied by the proposed responses. Will laws be modified to address the discrimination revealed and unequal opportunities that result from the discriminatory practices? Will legislation be introduced to prohibit child marriage? What mechanisms will be introduced to enforce prohibition against child marriage? What will the response be to the likely resistance by some stakeholders? Do laws need to be introduced prohibiting gender-based violence and/or defining family violence? Do existing laws mandate minimum levels of education for children and do they need to be amended? What mechanisms are needed for redress to be accessible, available, and affordable to children who seek to end their marriages? If social protection programs are introduced to increase household livelihoods or human capital, the anticipated consequences on child marriage should be made clear and tied to the concerns identified by the analysis of the principles.

This case example yields information on the causes of child marriage and frames the issue in a way that calls for progressive responses that will further the realization of rights not just attend to the immediate causes to the problem. The approach utilized in this chapter relies on legal frames to identify specific and interrelated violations of rights. To develop policy recommendations that are responsive to the root causes requires a solid contextual understanding of the issue, the stakeholders involved and their perspectives, and a clear definition of the duty bearers. A deepened understanding of the social issue can be derived from analyses of how the issue compromises the four basic human rights principles: participation, accountability, nondiscrimination, and equality. By proposing policy recommendations that are responsive to the violations or denials of human rights principles, the recommendation should further the realization of rights.

It seems likely that the indicators needed for the proposed rights-based approach may not always be available and accessible, and their accuracy may be of question in some countries. This is the subject of the next chapter.

The rights-based approach to social policy analysis proposed here asks social workers to reinsert the value base that our profession was built upon by placing the furthering of human dignity and elimination of human suffering at the center of our practices. New solutions to old problems can only be achieved through innovative ways of understanding the social issues and consequent alternative approaches.

2.4 Suggested Exercise

Homelessness continues to be a national crisis in the United States, affecting 3.5 million people each year, including a rising number of families. In cities and towns around the country, homelessness is increasingly portrayed as a criminal activity. Nationwide, homeless people are targeted, arrested, and jailed under laws that criminalize homelessness by making it illegal for homeless persons to sit or stand in public spaces. The laws, designed to move visibly homeless people out of commercial and tourist districts or, increasingly, out of entire cities, are often justified as necessary public health and public safety measures. A review by the National Law Center on Homelessness recently found that over one-third of 187 US cities impose city-wide bans on public camping, 27 % of cities prohibit sleeping in particular public places, such as in public parks, 76 % of cities prohibit begging in particular public places, 65 % of cities have laws prohibiting loitering, loafing, and vagrancy in public places, 53 % of cities prohibit sitting or lying down in particular public places, 43 % of cities prohibit sleeping in vehicles, and 9 % of cities have laws prohibiting the sharing food with homeless people.¹ For most of homeless persons living in public spaces is the last option available to them. Mr. Smith's story reflects a common experience.

The Story of Lawrence Lee Smith

Smith became homeless after his degenerative joint disease made him no longer able to work in construction. He lived in a camper van for years until it was towed. He couldn't afford to retrieve it, leaving him with nowhere to reside but in public places in Boise, Idaho, due to frequent overcrowding of area homeless shelters. Mr. Smith was cited for illegal camping and was jailed for a total of 100 days. Due to the arrest, he lost his tent, his stove, and the fishing equipment he relied upon to live.

Criminalizing homelessness does nothing to address the underlying causes of homelessness and, instead, only worsens the problem. The arrest of homeless people is only a temporary intervention, as most are arrested and incarcerated for short periods of time thereafter returning to their communities, still with nowhere to live and bearing additional financial burdens such as legal fees that they cannot afford to pay. Their imprisonment adds additional barriers to obtaining critical public benefits, employment, or housing, thus further entrapping individuals within homelessness.

¹For more information, see National Law Center on Homelessness & Poverty and Los Angeles Community Action Network (2014). Racial Discrimination in Housing and Homelessness in the United States: A Report to the UN Committee on the Elimination of Racial Discrimination. Retrieved from http://www.nlchp.org/documents/CERD_Housing_Report_2014.

Here are some suggested steps for guiding a rights-based analysis of homelessness policy.

- Beginning with the UDHR and moving to binding international and regional human rights instruments, is housing a human right? Is there a right to housing in the United States (or in another country of interest)? Document your sources in human rights and national laws and discuss areas of ambiguity regarding housing as a right.
- What other rights allowing for persons to be homeless might violate? Are there laws in the country of interest that directly or indirectly prohibit homelessness? Homelessness is a state. Homeless people may spend more time sitting or sleeping on benches in public spaces than average citizens, should these activities be viewed as criminal? Does your community have laws against public camping, sleeping in public places, begging in particular public places, loitering, loafing, and vagrancy in public places, sitting or lying down in particular public places, sleeping in vehicles, and sharing food with homeless people? Are these laws in accordance with international human rights and national laws?
- What is the root cause of homelessness? In what ways does or does not the criminalization of homeless address the root causes?
- In what ways do current laws regarding public spaces facilitate the realization or violate human rights?
- Identify the stakeholders in homelessness policy. Who are the rights holders? Who are the duty bearers?

Analyze laws on homeless use of public space according to cross-cutting human rights principles of participation, accountability, nondiscrimination, and equality (P.A.N.E.).

- Participation.
Are rights holders and duty bearers given opportunities to be heard at every stage of the policymaking process regarding homeless policy? Are there groups who have been historically marginalized due to ethnicity, gender, language, or ability? How do rights holders participate in the policymaking process? In what ways are the voices of rights holders not included in the policymaking process? What are the challenges in including rights holders in the policymaking process, if any?
- Accountability.
As duty bearers, states hold the responsibility of implementing laws, policies, and programs that further the realization of human rights in the country.
 - Does the state make information available and accessible in a timely manner on the progress of its efforts to address homelessness and public use policy?
 - If rights holders feel their rights are violated, is the process to challenge the decision documented and without repercussions? Are accountability mechanisms in place with responsibility of implementation clear and open to input from all?

- Nondiscrimination and equality.

The State has the task of ensuring that all policies and practices relating to homelessness and use of public spaces are nondiscriminatory and that priority is given to protect the most vulnerable segments of the population. In what ways if any, is the policy discriminatory? Socially unjust? Consider, for example, that homeless persons of color have higher rates of being arrested and incarcerated than whites. The discriminatory impact of criminalization of homelessness was specifically pointed out by the Special Rapporteur on Racism during his 2008 visit to the United States, citing the example of Los Angeles' Skid Row.

2.4.1 In-Class Discussions

In Denmark and in other countries, homelessness is viewed as an alternative lifestyle. It is the responsibility of government to protect homeless persons from doing harm to themselves and others and the goal of public policies is to provide the supports needed for persons choosing to be homeless to live safely, rather than condemning their lifestyle choice. Is there a right to homelessness? What international, regional, and in-country laws support this? What do you think about public taxpayer dollars being spent on support a homeless lifestyle?

- Consider other stakeholders such as parents of young children who fear that a homeless person may carry disease or be unstable emotionally and thus are reluctant to bring their children to public parks. What policy responses would you recommend that account for the rights of the homeless and their use of public space? What are the rights of those who argue that homelessness infringes on their use and enjoyment of public spaces?
- What policy responses would you recommend that address the root causes of homelessness?

References

- CEDAW Committee. (1989). General recommendation No. 12—eighth session, 1989 violence against women.
- CEDAW Committee. (1992). General recommendation No. 19—eleventh session, 1992 violence against women.
- Family Watch International. (2009). Family policy brief: ICESCR Committee General Comment 20. www.familywatchinternational.org.
- Fee, E., & Parry, M. (2008). Jonathan Mann, HIV/AIDS, and human rights. *Journal of Public Health Policy*, 29(1), 54–71.
- Hertel, S., & Libal, K. (2011). *Human rights in the United States: Beyond exceptionalism*. Cambridge, UK: Cambridge University Press.
- Mann, J. M., Gruskin, S., Grodin, M. A., & Annas, G. J. (Eds.). (1999). *Health and human rights: A reader*. New York: Routledge.

- Patterson, A. S. (2009). AIDS/HIV. In D. P. Forsythe (Ed.), *Encyclopedia of human rights*. Oxford, UK: Oxford University Press.
- Petersen, C. (2011). Bridging the gap?: The role of regional and national human rights institutions in the Asia Pacific. *Asian-Pacific Law & Policy Journal*, 13(1), 174–209.
- Sepúlveda, M., & Nyst, C. (2012). *The human rights approach to social protection*. Finland: Ministry of Foreign Affairs.
- Shaw, M. N. (2003). *International Law* (5th ed.). Cambridge University Press.
- Stainton, T. (2005). Empowerment and the architecture of rights based social policy. *Journal of Intellectual Disabilities*, 9(4), 287–296.
- UNAIDS. (2013). Global report: UNAIDS report on the global AIDS epidemic 2013. Joint United Nations Programme on HIV/AIDS.
- United Nations Children's Fund. (2009). *The state of the world's children 2009: Maternal and newborn health*. UNICEF.
- United Nations Population Fund. (2012). *Marrying too young: End child marriage*. UNFPA. <http://www.unfpa.org/public/home/publications/pid/12166>.

A Rights-Based Approach to Social Policy Analysis

Gatenio Gabel, S.

2016, XXII, 85 p. 1 illus., Softcover

ISBN: 978-3-319-24410-5