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## Introduction

Gillian MacNaughton and Diane F. Frey

## I. INTRODUCTION

Today, almost half the global population lives in poverty, a denial of the fundamental rights to food, water, housing, education, health care, and decent work, among others. Despite the Millennium Development Goals, which focused global expertise, funding, and efforts from 2001 to 2015 on advancing human development, about 785 million people in the world are undernourished (FAO 2015). Moreover, in some regions of the world – notably sub-Saharan Africa and Western Asia – the number of malnourished people has increased since 2001 (FAO 2015). The International Labour Organization (ILO) (2015) reports that 201 million people are unemployed, 31 million more than before the 2008 global economic crisis, and the level of unemployment is expected to increase over the next four years. Moreover, 1.44 billion workers worldwide are in vulnerable employment (ILO 2015). One in fourteen workers lives in extreme poverty, and this is not expected to change by the end of the decade (ILO 2015). UNICEF and the World Health Organization (WHO) report that 663 million people in the world lack access to improved drinking water sources, and 2.4 billion lack access to improved sanitation facilities (UNICEF and WHO 2015). Every day 830 women die due to complications of pregnancy and childbirth – 303,000 women per year – and almost all of these deaths are preventable (WHO et al. 2015).

Before the turn of the millennium, many argued it was not possible, with the global resources available then, to lift everyone in the world out of poverty. That is simply no longer debatable. With the global resources in 2016, there is no practical reason for allowing the continued violation of the economic and social rights of almost 3 billion people. World Bank (2018) data indicates that the global Gross National Income (GNI) per capita (in purchasing power parity) is US\$ 16,161. In World Bank designations, this is the GNI per

capita of an upper middle-income country. Indeed, the *average* GNI per capita for upper middle-income countries is only slightly higher at US\$ 16,596. Included in this group of countries are Costa Rica (US\$ 15,780), Thailand (US\$ 16,100), Mexico (US\$ 17,760), and Serbia (US\$ 13,890), which is part of the EU (World Bank 2018). Many of these countries have high inequality and therefore high levels of poverty. But they are not poor countries. It is clear that we now have the resources to ensure that no one in the world lacks adequate food, water, housing, education, health care, or decent work, which are all economic and social rights guaranteed in international human rights law.

This book is about the rise of economic and social rights in the neoliberal era and the potential of these rights to counteract the adverse impacts of neoliberal policy on human well-being. Forty years ago, the International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force. Over the past four decades, there has been growing support globally for the recognition and implementation of economic and social rights. This emerging consensus is demonstrated by the flourishing people's movements for economic and social rights – for example, for the right to food in India, the right to health in South Africa, and the right to housing in the United States (Hertel 2015; Heywood 2009; Robinson 2015); by thousands of court cases that have extended economic and social benefits to rights-holders, for example, health, education, and social security benefits (Gauri and Brinks 2008; Langford 2008); and by the UN General Assembly's adoption of the Optional Protocol to the ICESCR in 2008, which created a complaints procedure that mirrors that instituted under the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 (ICCPR 1966, article 28). As of February 2018, there are 166 state parties to this international human rights treaty that enshrines the rights to food, water, housing, health, education, decent work, social security, an adequate standard of living, and the benefits of science.

Despite the apparent consensus on the obligation of states to respect, protect, and fulfill economic and social rights, there remain enormous obstacles – both ideological and political – to achieving these rights for all (Alston 2016, para. 4). Although the ICESCR requires state parties to take steps to progressively realize these rights (ICESCR 1966, article 2), many states appear to take steps that directly conflict with their obligations under the Covenant. For example, the adoption and implementation of patent laws that extend pharmaceutical corporations' monopolies over medicine production result in higher prices for medicines, thereby reducing access in apparent violation of the right to health (Forman and MacNaughton 2015; Pogge 2007). Nonetheless, state parties to the ICESCR continue to adopt more stringent patent laws via

multilateral and bilateral international trade agreements. Similarly, governments in many countries continually increase university tuition, which conflicts with the explicit obligation in ICESCR article 13 to progressively realize free higher education (Wills 2014). These are just two examples where state policies align with a neoliberal policy framework rather than obligations for economic and social rights. More broadly, the incompatibility of social and economic rights with the globally dominant neoliberal policy framework is widely documented in the literature (Alston 2017; Baxi 2012; Chapman 2016; A. Nolan 2014; M. Nolan 2013; O'Connell 2007; Schrecker 2011; Wills 2014; Wills and Warwick 2016).

Over the past forty years, neoliberalism has risen to become the dominant ideology and policymaking framework around the world. As Harvey (2005) explains, “There has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s” (2). This has involved privatization of public services, decreasing labor protection measures, and the withdrawal of the state in areas of social welfare. The global spread of neoliberalism has affected almost all countries, including the USA, the United Kingdom, China, the postcommunist countries of the former Soviet bloc, and even the (former) social democracies like Sweden and New Zealand. Moreover, international institutions, including the International Monetary Fund, the World Bank, and the World Trade Organization have imposed neoliberal orthodoxy for decades on developed, transitional, and developing countries. Proponents of neoliberalism also dominate in higher education, the media, and many state institutions. Harvey (2005) summarizes:

Neoliberalism has, in short, become hegemonic as a mode of discourse. It has pervasive effects on ways of thought to the point where it has become incorporated into the common-sense way many of us interpret, live in, and understand the world. (3)

Over this same forty-year period of neoliberal ascendancy, the majority of countries in the world have become parties to the ICESCR, which appears to require at least some redistribution of goods and opportunities to ensure the realization of economic and social rights for all (Craven 1995, 158). Moreover, the ICESCR, on its face, requires more than a *minimum* threshold of the rights, as economic and social rights are to be progressively realized to the *maximum* of available resources. The juxtaposition of these two ideologies and policy frameworks that have come into play over the past forty years – neoliberalism versus economic and social rights – raises many questions. How does each regime affect the understanding of the other and to what extent do they impact each other in their implementation (Moyn 2014; Nolan 2013)?

This volume focuses on these questions. The chapters investigate where, when, how, and under what conditions economic and social rights may be helpful in contesting neoliberal orthodoxies.

## II. NEOLIBERALISM

The term “neoliberalism” has been characterized as a “loose and shifting signifier” (Brown 2015, 20). It is widely used by social scientists to refer to an ideology and policy framework based on classical liberalism. “Liberalism” refers to the political philosophy developed in the seventeenth and eighteenth centuries by writers such as Hobbes, Locke, and Smith. “Neo” is an allusion to the revival of these ideas, in particular after World War II (Mudge 2008). Although there are many definitions of neoliberalism, they have in common one central principle: the primacy of individuals who, by acting in their own self-interest, maximize the freedom and well-being of all (Mudge 2008). Harvey (2005) defines neoliberalism as “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade” (2). This is market fundamentalism. M. Nolan (2014) explains market fundamentalism as “the belief that all areas of policy, politics, society, culture and knowledge, and not just economics, should succumb to and be ordered by the market logic” (1).

The current neoliberal era followed a Keynesian era, which began during the Depression and continued following World War II (Brown 2015, 21). In the Keynesian era, a class compromise between labor and capital was accepted as necessary to ensure domestic stability and peace. This compromise required states to focus on full employment and citizen welfare, including health care and education. To achieve these social ends, the legitimacy and authority of the state to intervene in the market was fully acknowledged (Harvey 2005). During the 1950s and 1960s, this Keynesian ideology and policy framework came to dominate Western Europe and North America (Chapman 2016). During this period, neoliberals, such as Friedrich von Hayek and Milton Friedman, cultivated a group of academics passionately committed to the principles of personal freedom, private property, and free markets. In 1947, they established the Mont Pelerin Society, which maintained in its founding statement that the political ideals of human *dignity* and individual *freedom* were the fundamental values of civilization (Harvey 2005). During the Keynesian era, this group fostered the ideology of neoliberalism among economists, preparing for opportunities to revive policies based on classical liberalism.

Neoliberalism can be explained as consisting of three key interconnected elements: (1) the ideology, (2) the role of the state, and (3) the policymaking framework. Neoliberal ideology has at its center the concepts of human dignity and freedom. For Hayak (1960), freedom means specifically individual or personal freedom, and thus, the absence of state coercion (58). In essence, freedom entails making one's own decisions without interference and being responsible for the consequences of these decisions. As Hayak (1960) explains, "A society that does not recognize that each individual has values of his own which he is entitled to follow can have no respect for the dignity of the individual and cannot really know freedom" (141). From this perspective, freedom and dignity are threatened by all forms of state intervention that substitute collective judgments for those of individuals (Harvey 2005).

Also key to neoliberalism is the understanding that markets, as impersonal mechanisms, are the best way to promote individual freedom, because they are not coercive (Hayak 1960, 50). For this reason, neoliberalism promotes markets to guide all human action, and market values substitute for all other ethical beliefs (Harvey 2005; M. Nolan 2014). Advocates of neoliberalism argue that market approaches are more efficient and cost-effective, because of the inherent competition, and hence can deliver social services more effectively than can the state (Haglund 2010). Moreover, the private sector can provide consumers with greater choice and therefore greater liberty, the central value of neoliberalism. Neoliberalism, therefore, "holds that social good will be maximized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market" (Harvey 2005, 3). As Chapman (2016) summarizes, "market-based approaches will be more efficient and cost effective and therefore ultimately benefit everyone" (81).

Also central to neoliberalism is the necessity of inequality to progress. Writing in 1960, Hayak stated, "The rapid economic advance that we have come to expect seems in a large measure to be the result of this inequality and to be impossible without it" (96). According to Hayak, "Even the poorest today owe their relative material well-being to the results of past inequality" (98). Overall, neoliberalism encompasses ideals of individual as opposed to societal welfare, market-based rather than state-directed organization of economic and social life, and private sector rather than state-led development of national industries. It emphasizes personal responsibility and competition rather than social solidarity, private property rather than collective commons, and socioeconomic inequality rather than redistribution. O'Connell (2011) sums it up this way:

Neo-liberalism, at least at a rhetorical level, posits a binary opposition between public power, the State, and private power embodied in "the market" – the

former is oppressive, inefficient and should be restrained and limited at all costs, the latter is the fount of individual freedom and wealth maximization and should be expanded into as many spheres of individual and collective life as possible. (535)

This is the ideological lens through which neoliberalism defines the role of the state.

While couched as an ideology of state restraint, the neoliberal state in fact holds a central and transformative role. Indeed, fostering neoliberal ideals and implementing market-based policy constitute the critical role of the neoliberal state. To ensure the proper functioning of markets, the state must establish legal structures that guarantee private property rights, and police and military forces that enforce these guarantees. In addition, the state must play an active role in developing and expanding markets wherever there are opportunities, especially in areas that were formerly in the public sphere, for example in the education, health care, transportation, and utilities sectors. Once markets are established, state force is necessary to prevent interference, ensure “continuous increases in productivity,” and “deliver higher standards of living to everyone” (Harvey 2005, 64). In this paradigm, there is no significant redistributive role for the state (Baxi 2012, 289). As Brown (2015) asserts, the “democratic state commitments to equality, liberty, inclusion and constitutionalism are now subordinate to the project of economic growth, competitive positioning and capital enhancement” (26). In short, the preneoliberal state is assumed to be oppressive, inefficient, and in need of severe restraint, while the neoliberal state unleashes market efficiency, ensuring greater individual freedom (O’Connell 2011, 535).

Although the ideology of neoliberalism was cultivated during the 1950s and 1960s in the United States and Europe, it was not until the 1970s that it gained primacy as a policymaking framework (Elson 2002). Augusto Pinochet, Margaret Thatcher, and then Ronald Reagan spearheaded sweeping reforms that defined the neoliberal policy package designed to promote unfettered competition in the private market. This included the privatization of public functions and enterprises such as public education, water systems, and prisons; deregulation of industries such as transportation and telecommunications; the dismantling of labor protections and union power; an attack on all forms of social solidarity that hindered business flexibility; reduction or elimination of welfare state commitments; reduction in corporate and individual taxation; the creation of a favorable investment climate to attract foreign investment; and the removal of discretion in fiscal and monetary policy (Elson 2002, 82; Harvey 2005, 23–5; Mudge 2008, 718; M. Nolan 2013, 176).

This market-centered policy framework was globalized by the International Monetary Fund, the World Bank, the World Trade Organization, the United States, and the European Union, by the imposition of conditionalities on loans and membership. By the 1990s, this “Washington Consensus” had been adopted throughout most of the world (Elson 2002, 81–2).

From its original status as a marginal set of intellectual convictions, neoliberalism has become *the* central organizing principle of economic and social life (Harvey 2005). As M. Nolan (2014) states, “Neoliberalism is now common-sense, and the application of market criteria to all aspects of social and political life is considered by many as inevitable, whatever the cost to individuals, institutions and entire economies and societies” (11). The dominance of neoliberalism and its internalization does not mean, however, that neoliberalism is static, monolithic, or unchanging (Brown 2015, 20; Cerny et al. 2005). As Hayak wrote in 1960, his intent was to create not specific policy but rather criteria to judge policy (51). Thus, while the principles of neoliberalism remain largely uncontested, neoliberalism is not simply a fixed substantive set of unmovable policies (Brown 2015, 21; Elson 2002, 82–3; Hayak 1960, 49). Policy contestations and significant policy innovations continue to unfold within the neoliberal playing field (Brown 2015, 21; Cerny et al. 2005). Indeed, scholars now refer to the “Post-Washington Consensus,” “post-neoliberalism,” or “late neoliberalism,” which has been characterized as incorporating “pro-poor” measures and civil society participation into policymaking, while maintaining the core market logic and values of individual freedom (Alviar Garcia 2013, 374; Wills 2014, 16). One of the dynamic areas in which neoliberalism has engaged with other streams of ideology has been with respect to human rights.

### III. THE INCOMPATIBILITY OF HUMAN RIGHTS AND NEOLIBERALISM

The modern human rights movement also began following World War II and has grown alongside neoliberalism. The international human rights legal framework came into being with the establishment of the United Nations in 1945. Article 1 of the UN Charter declares that the purposes of the organization are to maintain peace and security, promote friendly relations among countries, and encourage respect for human rights for all. The UN Charter does not enumerate these human rights, instead, in 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, which enshrines a full array of civil, political, economic, social, and cultural rights. In 1966, the UN General Assembly adopted two international human rights treaties to implement the Declaration – the ICCPR and the ICESCR. The Universal Declaration of Human Rights and the two Covenants form

the International Bill of Human Rights, which establishes an alternative to neoliberalism in terms of (1) ideology, (2) the role of the state, and (3) the policymaking framework.

The ideology of international human rights, as expressed in these instruments, is based upon the core ideas of freedom, equality, solidarity, and dignity (Glendon 2002, 227). Indeed, article 1 of the Universal Declaration of Human Rights states:

All human beings are born *free* and *equal in dignity* and rights. They are endowed with reason and conscience and should act toward one another in a spirit of *brotherhood*.

In this respect, the core human rights ideals differ from those of neoliberalism, which promotes individual freedom and dignity but is firmly against equality and solidarity.<sup>1</sup> The Universal Declaration details many freedoms, such as freedom of expression, freedom from torture, and freedom from hunger (articles 5, 19, and 25). It also encompasses, however, various equality rights, such as nondiscrimination and equal protection under the law (articles 2 and 7). Finally, the Declaration enshrines the right to solidarity in article 1 as “brotherhood” and article 28 as the right to “a social and international order” in which all the rights in the Declaration may be fully realized. Under the Declaration, as well as the Covenants, the realization of all the enumerated rights is necessary to protect human dignity (Morsink 1999). Significantly, the word “freedom” as used in the exposition of international human rights refers to freedom to exercise autonomy, rather than freedom from coercion. It therefore requires freedom of expression and religion but also freedom from hunger, illiteracy, and homelessness, which may actually require coercion in the form of redistribution. As Wills and Warwick (2016) explain, in a human rights framework “socioeconomic rights are regarded as *freedom enhancing* rather than freedom reducing” (8).

In addition, the holistic human rights paradigm differs from the neoliberal paradigm as it does not narrowly focus on individualism. Rather, the International Bill of Human Rights recognizes (1) individual rights, such as the right to life and the prohibition against slavery; (2) family rights, such as recognition of the family as the “fundamental group unit of society” and the right to a standard of living adequate for workers and their families;

<sup>1</sup> Neoliberalism supports the notion of equality before the law and recognizes that equality before the law necessarily implies inequalities in opportunities and outcomes. Such inequalities are, according to Hayek, necessary to the progress of civilization (see further in MacNaughton, Chapter 6 in this volume).



(3) collective rights, such as the right of trade unions to function freely and the right of ethnic, religious, and linguistic minorities to enjoy their own culture “in community with other members of their group,” (4) societal rights, such as the right to “the development of a system of schools” and the right to a government that represents the will of the people, and finally, (5) global rights to a social and international order to ensure the full realization of all these rights. In this respect, the human rights paradigm recognizes that individuals live in families, communities, societies, and a global order as well (Glendon 2002, 227).

As a result, the role of the state differs significantly in human rights and neoliberal paradigms. Under the International Bill of Human Rights, the state is the primary duty bearer for ensuring the enjoyment of human rights by all people in its jurisdiction. Thus, rather than a limited role of promoting the market, the state must play a central role of promoting and protecting the full range of human rights (UN Charter articles 55 and 56). More specifically, the state has the obligation to respect, protect, and fulfill human rights for all (Craven 1995). The obligation to *respect* means the State must not interfere with the exercise of rights by, for example, setting up roadblocks preventing access to hospitals or issuing gag orders preventing health professionals from disseminating health information. The obligation to *protect* means the state must protect people from human rights abuses by third parties by, for example, regulating the private sector to ensure safe food, housing, and medicines. Finally, the obligation to *fulfill* means the state must take positive action to ensure conditions, including, where necessary, providing goods and services, to guarantee that all people enjoy their human rights. Consequently, in the human rights paradigm, unlike the neoliberal paradigm, there is a significant redistributive role for the state. In sum, the state is not considered inherently oppressive or inefficient; rather, the state plays a crucial role in supporting the conditions necessary to realize human rights for all.

Just as the role of the state differs in human rights and neoliberal paradigms, their policymaking frameworks are in sharp contrast. Whereas the neoliberal policy framework is centered on the market, the human rights policy framework is centered on people. A people-centered policy package might include: (1) universal day care, education, health care, water and sanitation systems, (2) substantial state support for infrastructure, such as transportation and telecommunications, (3) strong labor protections for adequate wages, safe workplaces, and flourishing unions, (4) regulation of businesses to ensure they respect workers, consumers, and the environment, (5) progressive taxation based on ability to pay, and (6) broad participation of the people in decision-making on policies that will affect them. Additionally, a people-centered policy package

TABLE 1.1. *Comparison of neoliberalism and holistic human rights frameworks*

	Neoliberalism	International Bill of Human Rights
<b>Ideology</b>	<ul style="list-style-type: none"><li>• Dignity</li><li>• Freedom (from interference)</li><li>• Efficiency</li><li>• Self-interest/individualism</li><li>• Market-centered</li><li>• Commodities</li><li>• Consumers</li></ul>	<ul style="list-style-type: none"><li>• Dignity</li><li>• Freedom (to exercise autonomy)</li><li>• Equality</li><li>• Solidarity</li><li>• People-centered</li><li>• Legal and moral entitlements</li><li>• Rights holders</li></ul>
<b>Role of the state</b>	<ul style="list-style-type: none"><li>• Liberal state</li><li>• Protect liberty and property rights</li><li>• Ensure free markets</li><li>• Ensure free trade</li><li>• Promote and support private sector</li></ul>	<ul style="list-style-type: none"><li>• Social state</li><li>• Respect, protect, and fulfill all human rights</li><li>• Regulate markets</li><li>• Ensure redistribution</li><li>• Ensure provision of services and goods</li></ul>
<b>Policy framework</b>	<ul style="list-style-type: none"><li>• Promote competition</li><li>• Privatize</li><li>• Deregulate economy</li><li>• Dismantle labor protections</li><li>• Commodify welfare</li><li>• Reduce taxes</li><li>• Balance budgets</li><li>• Gender and minority neutral</li></ul>	<ul style="list-style-type: none"><li>• Promote solidarity</li><li>• Ensure participation</li><li>• Regulate economy</li><li>• Protect and promote labor rights</li><li>• Ensure universal social welfare</li><li>• Use maximum available resources to enhance the well-being of people</li><li>• Gender- and minority-sensitive</li></ul>

requires that governments carry out human rights impact assessments to predict the potential consequences for human rights of proposed policies and programs before adopting or implementing them. Crucially, a people-centered policy package puts people’s well-being before all else. It does not rely upon a trickle-down approach to the enjoyment of human rights.

The Committee on Economic, Social and Cultural Rights (CESCR) – responsible for monitoring progress in state implementation of the ICESCR – has stated that human rights does not demand any particular economic system (CESCR 1990, para. 8). Nonetheless, human rights requires that states use maximum available resources to progressively realize economic and social rights, an obligation that appears to conflict with neoliberal ideology and policy. Table 1.1 summarizes the key differences between the neoliberal paradigm and the holistic human rights paradigm enshrined in the International Bill of Human Rights.