

Auditing Economic Policy in the Light of Obligations on Economic and Social Rights

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Introduction

One of the things we have learned so far is that the realization of human rights, especially economic and social rights, requires resources as well as laws. The availability and use of resources is strongly influenced by the type of economic policies that States Parties implement. This paper considers how concerned citizens might audit economic policies from a human rights perspective, with a particular focus on economic and social rights. It draws on an ongoing project, directed by Radhika Balakrishnan, advised by Diane Elson, and funded by the Ford Foundation, on economic policy and economic and social rights in Mexico and the USA. The project brings together human rights experts and activists who are focussing on economic and social rights, and economists who are critical of the neo-liberal economic policies being pursued by so many governments and international economic policy institutions, such as the IMF and World Bank. (Amartya Sen has called these critical economists ‘non-conformist economists’, because they do not conform to the currently dominant forms of economic analysis and policy prescription). These economists share the concerns of the human rights community about poverty, deprivation and inequality; and draw on a range of other approaches to economic policy, including Keynesian, human development and feminist economics approaches. The project aims to audit key economic policies in the two countries in the light of human rights obligations, and the analysis produced by ‘non-conformist’ economists.

1. The Tension between Neoclassical Economics and Human Rights

We begin with the perspective of neoclassical economics (the economics that underpins neo-liberal economic policies). Neoclassical economics and human rights standards judge the operation of economies in very different ways, and there is some tension between them.¹ In neoclassical economics, economies are judged in terms of a utilitarian framework, in which the best policies are those that maximize benefits and minimize costs. The actions of governments are typically presumed to entail the imposition of costs, in terms of a loss of efficiency (measured in terms of outputs of goods and

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¹ D. Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW* (New York: UNIFEM, 2006), section 1.

services) compared with what could be achieved by competitive markets. In the jargon of neoclassical economics, government actions typically ‘distort’ the operation of economies, compared with the benchmark of a competitive market economy, assumed to be able to operate without any government intervention. Such actions can only be justified if there are benefits stemming from the action that outweigh its costs.

Here is an example of such logic applied to education:

To finance better-quality schooling for those who have the least educated parents, and who attend the worse schools, it may be necessary to raise taxes on other people. The basic economic insight that such taxation distorts incentives remains valid. Such policies should be implemented only to the extent that the (present) value of the long-run benefits of greater equity exceed the efficiency costs of funding them.²

Benefits and costs are typically measured using a money-metric. Education is typically valued in terms of additions to a person’s expected future lifetime earnings, placing a low value on education of people whose expected future lifetime earnings are low, and no value on people for whom such earnings are zero.

A very different logic is found in the human rights approach to education:

1. The States Parties to the present Covenant recognize the right of everyone to education.....
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all.....
 - (b) Secondary educationshall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education....³

The same tension can be found if we look at the economy as a whole. Neoclassical economics judges the benefits of economic policies in terms of maximizing the output of goods and services, as measured by the level and rate of growth of the country’s Gross Domestic Product (GDP). It is assumed that rapid economic growth will lift people out of poverty, and that private ownership and market competition are likely to be the best mechanisms for maximizing economic growth. (This belief is what underpins the advocacy of privatization of public enterprises and services, and liberalization of markets). If some people are left behind, or indeed made worse-off, by policies aimed at maximizing national output, then it is assumed that ‘winners’ can compensate ‘losers’, for instance via taxation and public expenditure (though these instruments must be used in a way that minimizes so-called ‘distortions’). This might be described as a strategy of ‘first maximize the size of the pie, then hope that it will be sliced up in such a way that nobody is made worse off’. Note that this approach is indifferent as to whether the losers are people who are already very rich, or very poor. Each is equally deserving of compensation. Nor does it pay much attention to the likelihood of compensation actually taking place. If the policy measures are expected to produce the maximum possible extra output, then that is enough for them to be judged ‘optimal’.

Not all economists share the assumptions or goals of neoclassical economics and the neo-liberal policies that derive from such economics. Progressive, non-conformist economists outside the mainstream challenge these views.⁴ Such economists argue that

² World Bank, *World Development Report 2006* (Washington DC: World Bank, 2006) at 22.

³ International Covenant on Economic, Social and Cultural Rights, Art. 13, para. 2

⁴ For more information on non-conformist economics, see www.open.ac.uk/socialsciences/hetecon and www.heterodoxeconomics.net and www.iaffe.org.

the policies of privatization and market liberalization advocated by neoclassical economists are not likely to maximize economic growth, much less reduce inequality. They point to the inherent riskiness and uncertainty of private enterprise and market competition; and argue that most successful cases of rapid economic growth have in fact been achieved with leadership from the state, to provide the appropriate incentives and infrastructure and security. They also question whether it is possible to separate production and distribution. The process of production produces 'winners' who tend to resist any redistribution of their gains to those who are 'losers'. The way in which the pie is produced constrains the way in which it can be sliced. Progressive economists urge attention to poverty and inequality in the design and implementation of policies to increase production, and not just as an afterthought in considering the distribution of production. The feminists and environmentalists among progressive economists urge attention to the non-market aspects of economies, and resist the application of the money-metric to all uses of resources. They challenge neoclassical concepts of efficiency as partial and faulty, because they fail to take into account unpaid work and natural resources. There are many potential intersections between the concerns of progressive economists and the concerns of human rights experts and advocates. However, the latter are very often unaware that not all economists are neoclassical economists, while the former tend to be unaware of the moral and legal standards provided by the human rights perspective, and the fact that states have human rights obligations.⁵

The human rights perspective uses as a standard the realization of the individual human rights set out in the Universal Declaration of Human Rights (UDHR). The treaties that stem from the UDHR set out the obligations of governments towards these rights. The obligations implied by international human rights instruments have been spelled out more fully through a number of mechanisms, including General Comments and General Recommendations issued from time to time by United Nations (UN) treaty monitoring bodies and by experts in international law, such as the groups of experts who produced the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

Particularly useful is the framework set out in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which differentiates three dimensions of obligations:

The obligation to *respect* requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus the right to housing is violated if the State engages in arbitrary forced evictions.

The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work.

The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

Each of these obligations contains elements of obligations of *conduct*, and obligations of *result*.⁶ The Maastricht Guidelines explain these obligations thus:

⁵ R. Balakrishnan, *Why MES with Human Rights? Integrating Macro Economic Strategies with Human Rights* (New York: Marymount Manhattan College, 2004).

⁶ See CESCR General Comment 3, The Nature of States Parties' Obligations, 1999.

The obligation of *conduct* requires action reasonably calculated to realize the enjoyment of a particular right. ...The obligation of *result* requires States to achieve specific targets to satisfy a detailed substantive standard.

States have accepted these obligations but they do not usually explicitly bear human rights in mind in the operation of their economic policies: human rights are typically seen as the responsibility of Ministries like the Justice Ministry, not of the Finance Ministry. However, at the UN World Conference on Human Rights in Vienna in 1993, governments did recognize that human rights are 'the first responsibility of governments'.⁷ If this is the case, what are the key human rights principles that could be used to provide a framework to audit how far economic policies are in fulfilment of this responsibility, with a particular focus on economic and social rights? Some ideas on this are presented in the next section.

The obligations of states extend beyond their own borders, as is made clear in the UN Charter, Articles 55 and 56. Obligations with respect to international development co-operation between governments are explicitly referred to in Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and underlined in specific provisions in Article 11 (right to an adequate standard of living). Articles 22 and 23 specifically refer to the need for international measures. In 1990 the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 3 explicitly stated that: 'international co-operation for development ... is an obligation of all States'. The UN High Commissioner for Human Rights has subsequently produced a number of reports on trade and investment clarifying that international trade and investment agreements must be consistent with the human rights obligations of States.⁸

Inter-governmental organizations are also bound by human rights norms and standards. UN organizations such as UNICEF, UNIFEM and WHO have organized much of their work in relation to ICRC, CEDAW,⁹ and the Right to Health, respectively. The international financial organizations, the International Monetary Fund (IMF) and the World Bank, have until recently paid little attention to human rights. The World Bank has recently recognized that:

The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Banks' mission.¹⁰

However, the Bank still favours a legalistic interpretation of what that means. The current General Counsel, Ana Palacio, puts it thus:

The Bank's analytical work can benefit from a systematic inclusion of human rights considerations and the broadened range of legal analysis these require. Areas such as governance or the legal empowerment of the poor are particularly relevant in this respect.¹¹

This approach does not take into account the possibility that the conditions attached to loans by the World Bank (and the IMF) may themselves be in breach of obligations.

⁷ Vienna Declaration, Part I, para. 1.

⁸ See for instance, Report E/CN.4/2002/54 which focuses on trade in agriculture and Report E/CN.4/Sub.2/2003/9 which focuses on investment.

⁹ United Nations Children's Fund (UNICEF); United Nations Development Fund for Women (UNIFEM); World Health Organization (WHO); International Committee of the Red Cross (ICRC); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

¹⁰ D. Robert, 'Legal Opinion on Human Rights and the Work of the World Bank', 2006 *Development Outreach*, October.

¹¹ A. Palacio, 'The Way Forward: Human Rights and the World Bank', 2006 *Development Outreach*, October.

2. Human Rights Principles Relevant to Auditing Economic Policy

States enjoy a margin of discretion in selecting the means to carry out their obligations. However, in discharging their obligations for the realization of economic and social rights, states must pay regard to the following key points: the requirement for progressive realization; the use of maximum available resources; the avoidance of retrogression; the satisfaction of minimum essential levels of economic and social rights; non-discrimination and equality; and participation, transparency and accountability. These principles can be used as a framework for auditing economic policy.

2.1 Progressive Realization

The ICESCR specifies that States Parties have the obligation of ‘achieving progressively the full realization of the rights recognized in the present Covenant’ ‘to the maximum of available resources’. This obligation does recognize that the resources at the disposition of a government are not unlimited, and that fulfilling economic and social rights will take time. At the same time, the concept of ‘progressive realization’ is not intended to take away all ‘meaningful content’ of a State’s obligation to realize economic, social and cultural rights.¹² Progressive realization imposes a ‘specific and continuing’¹³ or ‘constant and continuing’¹⁴ duty to move as ‘expeditiously and effectively as possible’¹⁵ towards full realization of rights. These steps toward full realization of rights must be ‘taken within a reasonably short time after the Covenant’s entry into force for the States concerned’ and such steps should be ‘deliberate, concrete and targeted as clearly as possible’ in order to meet the obligations of States.¹⁶

2.2 Maximum Available Resources

The definition of the ‘maximum available resources’ which the government should utilize for ‘progressive realization’ of human rights, has not yet been fully elaborated. CESCR made a statement in 2007 entitled ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant’. However, the statement did not define what constitutes ‘available resources’, beyond stating that it refers to ‘both the resources existing within a state as well as those available from the international community through international cooperation and assistance’.¹⁷

It seems reasonable to argue that ‘maximum available resources’ depends not only on the level of output of an economy, its rate of growth, and the level and growth of inflows of resources from other economies. It also depends on how the state mobilizes resources from the people living under its jurisdiction to fund its obligation to fulfil human rights. For instance, if a state generates very little revenue, it will be able to provide only limited public services. The key role of taxation has been noted by some of the UN Special Rapporteurs on human rights. For instance, the Special Rapporteur on the right to education has noted that ‘It is hard to imagine how any state would raise the revenue to finance health, education, water, and sanitation, or assistance for those too young or too old to work, were it not for taxation.’¹⁸ Another Special Rapporteur who

¹² CESCR, General Comment 3, para. 9

¹³ CESCR, General Comment 12, para. 44

¹⁴ CESCR, General Comment 15, para. 18

¹⁵ CESCR, General Comment 3, para. 9; CESCR, General Comment 12, para. 44; CESCR, General Comment 15, para. 18

¹⁶ CESCR, General Comment 3, para. 2; CESCR, General Comment 12, para. 43; CESCR, General Comment 14, para. 30; CESCR, General Comment 15, para. 17

¹⁷ E/C.12/2007/1

¹⁸ K. Tomasevski, ‘Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004’, (2005) 5 *Human Rights Law Review* 2 at 205-237

has commented on taxation is Philip Aston, Special Rapporteur on extrajudicial, summary or arbitrary executions. In a statement of the Human Rights Council in March 2007, he comments that in Guatemala

The reason the executive branch of the Guatemalan State has so little money to spend on the criminal justice system is that the Congress resist the imposition of all but the most perfunctory taxes. To put this in perspective, as a percentage of GDP, Guatemala's total tax revenue in 2005 was 9.6 per cent of GDP. By regional comparison, its percentage tax revenue is lower than that of Belize, Costa Rica, El Salvador, Honduras, or Nicaragua, and radically lower than that of the countries of South America.

Of course, the system of taxation must be organized so as to comply with human rights standards. Tomasevski notes that the European Court of Human Rights has legitimised the power of states to levy taxes, provided that judicial remedies exist to prevent taxation amounting to arbitrary confiscation. She further notes that '[t]he human rights jurisprudence regarding taxation has affirmed the principle of ability to contribute'.¹⁹ Taxation must also be non-discriminatory as between different social groups, such as women and men.

2.3 Non-Retrogression

There is a strong presumption that retrogressive measures on the part of a State are not permitted. An example of a potentially retrogressive measure would be cuts to expenditures on public services that are critical for realization of economic and social rights; or cuts to taxes that are critical for funding such services. If such retrogressive measures are deliberate, then the State has to show that they have been 'introduced after consideration of all alternatives and are fully justifiable by reference to totality of rights provided for in the Covenant and in context of the full use of the maximum of available resources'.²⁰ For example, cutting government spending on health and education, while not cutting expenditure on arms is likely to violate the principle of non-retrogression.

2.4 Minimum Essential Levels/Minimum Core Obligations

States that are parties to the ICESCR are also under a 'minimum core' obligation to ensure, at the very least, the satisfaction of 'minimum essential levels of each of the rights' in the ICESCR. This means that a state party in which any 'significant number' of persons is 'deprived of essential foodstuffs, of essential primary health care, etc. is prima facie failing to meet obligations' under the Covenant.²¹ The Committee on Economic, Social and Cultural Rights has clarified that this is a continuing obligation, requiring states with inadequate resources to strive to ensure enjoyment of rights.²² However, even in times of severe resource constraints, states must ensure that rights are fulfilled for vulnerable members of society.²³ The Committee on Economic, Social and Cultural Rights has begun to identify the content of the minimum core obligations with respect to the rights to food, education, health, and water though it has not specified this in quantitative terms.²⁴ The provision of minimum essential levels is an immediate obligation. This means that it is the duty of the state to prioritize the rights of the poorest and most vulnerable people. Nevertheless, this does not imply that states must adopt a very narrowly targeted approach, using special programmes that are only for the very

¹⁹ Ibid.

²⁰ CESCR, General Comment 3, para. 9; CESCR, General Comment 12, para. 45; CESCR, General Comment 14, para. 32; CESCR, General Comment 15, para. 19.

²¹ CESCR, General Comment 3, para. 10.

²² CESCR, General Comment 3, para. 11.

²³ CESCR, General Comment 3, para. 12; General Comment 12, para. 28; General Comment 14, para. 18.

²⁴ CESCR, General Comments Nos. 11, 13, 14 and 15 respectively.

poor. The Committee on Economic, Social and Cultural Rights has emphasized that ‘the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights’.²⁵ Several UN Special Rapporteurs have highlighted the importance of broad based systems as the best way to meet minimum core obligations.

2.5 Non-discrimination and Equality

A fundamental aspect of states’ human rights obligations is that of non-discrimination and equality. Article 2 of the UDHR states that: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The same language is used in Article 2 of the ICESCR.

Several human rights treaties specifically deal with non-discrimination in relation to particular categories of people. For instance, CEDAW prohibits discrimination against women in all its forms and obligates States to condemn this discrimination and take steps ‘by all appropriate means and without delay’ to pursue a policy of eliminating this discrimination (Article 2). Article 2 of CEDAW also sets out steps that a State party must take to eliminate this discrimination, including adopting appropriate legislative and other measures. Article 4(1) recognizes the legitimacy of ‘temporary special measures aimed at accelerating *de facto* equality between men and women’. It is clear that CEDAW not only means the absence of a discriminatory legal framework, but also means that policies must not be discriminatory in effect. CEDAW requires that states achieve both substantive and formal equality and recognizes that formal equality alone is insufficient for a state to meet its affirmative obligation to achieve substantive equality between men and women.²⁶

In the same vein Article 2 of the International Convention for the Elimination of All Forms of Racial Discrimination (CERD) requires that States Parties condemn racial discrimination and pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. The state is also obliged to take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures cannot maintain unequal or separate rights for different racial groups.²⁷ CERD further elaborates that in compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of economic social and cultural rights.²⁸

Less attention has been paid to the fact that that both UDHR and ICESCR specify ‘property’ among the grounds on which ‘distinction’ in the enjoyment of rights is not permitted. MacNaughton points out that it has been accepted that this refers to the wealth or poverty status of people, and that distinction on the basis of wealth or poverty very often overlaps with distinction on the basis of other statuses, such as race and ethnic origin.²⁹ Poor people are often disproportionately from particular status groups.

The Committee on Economic, Social and Cultural Rights has made it clear that the recognition that realization will be ‘progressive’ does not provide states with an excuse for the persistence of discrimination. States have an obligation to ‘guarantee’ that

²⁵ CESCR, General Comment 3, para 11.

²⁶ CEDAW, General Recommendation 25, para. 8.

²⁷ CERD, Art. 2, para. 2.

²⁸ CERD, Art. 5, para. E.

²⁹ G. MacNaughton, ‘Concepts of Equality in Law’, mimeo, 2007.

there will be no discrimination in the exercise of rights.³⁰ This means that non-discrimination must always be a priority in the progressive realization of economic, social and cultural rights and that any steps that a state takes to progressively realize such rights must be non-discriminatory in both policy and effect. Like provision of minimum essential levels, non-discrimination is an immediate obligation.

2.6 Accountability, Participation and Transparency

The importance of accountability and participation is emphasized in the Limburg Principles on the implementation of ICESCR. The Principles state that:

States Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

A concerted national effort to invoke the full participation of all sectors of society is, therefore indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

The Committee on Economic, Social and Cultural Rights has indicated that the right of individuals to participate must be an 'integral component' of any policy or practice that seeks to meet the State's obligation to ensure the equal right of men and women to the enjoyment of all human rights.³¹

In a statement on poverty and the ICESCR, the Committee has stated that: 'the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes.'³² It has also emphasized that: 'rights and obligation demand accountability...whatever the mechanisms of accountability, they must be accessible, transparent and effective'.³³

Accountability, participation and transparency require information. Article 19 of the Universal Declaration of Human Rights refers to the right to receive and impart information. This is further elaborated in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The Committee on Economic, Social and Cultural Rights has drawn attention to the significance of the right to information for economic and social rights.

3. Conducting a Human Rights Audit of Economic Policy in a Country, in Relation to Economic and Social Rights

In conducting an audit, we suggest the following stages:

- select the economic policies to be considered;
- identify which of the principles set out in the above section apply most directly to the selected policies;
- identify relevant indicators to assess how far obligations of conduct are being met;
- identify indicators of results in realizing economic and social rights, and use them to cross check indicators of conduct where appropriate.

³⁰ ICESCR, Article 2(2); CESCR, General Comment 3, para. 2; CESCR, General Comment 12, para. 43; CESCR, General Comment 14, para. 31; CESCR, General Comment 15, para 17

³¹ CESCR, General Comment 16, para. 37. See further General Comment 14, para. 54; General Comment 15, paras. 16(a) and 48.

³² United Nations, Committee on Economic, Social and Cultural Rights, 2001, para.12, UN Doc. E/C.12/2001/10.

³³ United Nations, Committee on Economic, Social and Cultural Rights, 2001, para. 14. UN Doc. E/C.12.2001/10

In the project from which this paper is drawn, the policies selected are public expenditure, taxation, fiscal and monetary policy (budget deficits/surpluses, interest and exchange rates etc.), international trade agreements, and regulation of non-state actors (using the case of pension reform). The use of these policy instruments affects the economy as whole, and has implications for all economic and social rights, though some specific policy instruments may have a more direct relation with some rights than others. In choosing policy instruments as our entry point, rather than the enjoyment of specific rights, we are in agreement with those who have argued that the assessment of states' compliance with obligations for economic and social rights should pay particular attention to obligations of conduct.³⁴

We draw a distinction between an audit and a study of policy impact. The latter purports to establish a causal link between economic policies and the degree of substantive enjoyment of economic and social rights ('results'). Impact studies require the use of quite complex mathematical models and econometric techniques, combined with assumptions about 'counter-factuals' (i.e. what would have happened if different economic policies had been used). The technical apparatus of studies that purport to examine impact often obscure the nature of the 'guesstimates' that have been made in constructing the 'counter-factuals'. Moreover, no impact study can definitely establish causation; it can only establish correlation and suggest plausible reasons for interpreting this as evidence of causation. An audit has a less ambitious aim: to examine how policy has been conducted - whether it has consisted of action 'reasonably calculated to realize the enjoyment of a particular right', selecting rights which might reasonably be thought to have a strong relation to the policy instrument. Such an audit can use both quantitative indicators and a qualitative examination of relevant legislation and policy processes. It is best conducted by a team that includes both human rights experts and activists and progressive economists and activists for economic justice.

Where appropriate, the analysis of conduct can be cross-checked with a quantitative and qualitative analysis of relevant 'results' for some relevant rights. The data on 'results' may reinforce or challenge the conclusions about the conduct of policy. For example, in considering public expenditure, we may examine whether public expenditure on health might be considered to be 'action reasonably calculated to realize' the right to health in a way that complies with obligations for non-discrimination and equality. If we find that public expenditure is very unequally distributed between different social groups, this suggests a *prime facie* case of failure to meet obligation of conduct. We can cross check this with data on the health status of different social groups (which measure some dimension of how far they enjoy particular levels of the right to health). If we find the health status of the group with the lowest share of expenditure is worse than those groups with higher shares of expenditure, this suggests that the government is indeed in violation of its obligations of conduct. But if the social group with the lowest share of public expenditure has the highest health status, then this suggests that the needs for public health services of this group are lower, and thus the government may be justified in the conduct of health expenditure. None of this implies that health expenditure is the only form of public expenditure that has an impact on the right to health, or that public expenditure is the only economic policy instrument that has an impact on the right to health. The enjoyment of the right to health is the outcome of numerous factors, and the audit does not seek to establish what those factors are. It has the more modest goal of investigating whether policy on public expenditure appears to be in compliance with obligations on the right to health.

³⁴ For example, K. Rowarth, 'Measuring Human Rights' (2001) 15 *Ethics and International Affairs* 1 at 111-132.

In choosing indicators and making judgments, it is important to be mindful of the need to take into account differences of context. As Rowarth points out, when examining compliance with obligations for progressive realization of economic and social rights, it is not appropriate to compare countries with different levels of wealth against the same set of 'results' using some absolute standard (e.g. full enrolment of all children in school).³⁵ Indicators should be chosen with this in mind, focussing on benchmarking with comparable countries; benchmarking in the same country over time; and benchmarking between different social groups in the same country.

In cross-checking conduct and results, it is relevant to pay attention, where appropriate, to qualitative indicators of the institutional system that links economic policy to enjoyment of economic and social rights. Is there a relatively secure link, such as is provided by a system of universal citizen entitlements to public provision, specified in legislation, possibly in the constitution? Or a less secure link, based on targeted entitlements, only available on a means-tested basis to the poorer groups? Or a reliance on families, communities, charities and churches to provide a minimum essential level of the rights? Are the institutional links different for different rights?

The empirical evidence across a wide range of countries suggests that the most effective way of reducing poverty is through 'targeting within universalism' in which there are strong universal entitlements, plus extra benefits directed to low income groups.³⁶

In conducting the audit, it is important to examine not only the conduct of the state in question, but also the extent to which it is enabled or constrained by international agreements on trade and finance with other governments, with international financial institutions, and with multinational corporations. Responsibility for any shortcomings may not rest entirely with the government in question, but may be shared with other bodies. This is more likely to be the case in poor, small countries than in rich and powerful ones, but even in the latter multinational corporations may share some of the responsibility.

A possible framework for an audit is now set out (owing to limitations in space it omits the issue of regulation of non-state actors). It is important to bear in mind that human rights obligations do not directly prescribe a particular mix of private and public action (as noted in paragraph 8 of the CESCR General Comment 3 on the nature of States Parties' obligations). But it is clear that they do require states to adopt that mix of public action, and incentives for and regulation of private action, that will best address both immediate obligations and progressive realization. Non-conformist economists have provided ample evidence that private enterprise and market forces cannot be relied upon to produce outcomes that satisfy the immediate obligations for non-discrimination and equality, and minimum core standards. To achieve this private enterprise and market forces need to be carefully regulated by the state and complemented by a substantial and well-functioning public sector. The realization of economic and social rights requires more than a minimalist state. Indeed, as the UN Special Rapporteur on the right to education has noted: 'The *raison d'être* of economic and social rights is to act as correctives to the free market'.³⁷ In providing this corrective, a state must, of course, also respect, protect, and fulfil civil and political rights.

³⁵ Ibid.

³⁶ T. Mkandawire, 'Targeting and Universalism in Poverty Reduction', in J.A. Ocampo, Jomo K.S. and S. Khan (eds), *Policy Matters: Economic and Social Policies to Sustain Equitable Development* (London: Zed Books Ltd, 2007)

³⁷ K. Tomasevski, Background Paper submitted by Special Rapporteur on the Right to Education, Committee on Economic, Social and Cultural Rights, 19th Session, E/C.12/1998/18, 1998.

3.1 Public Expenditure

Neo-liberal economists tend to believe that public expenditure displaces private expenditure, and are concerned that expansion of public expenditure will be inflationary and harm economic growth. They tend to believe that the costs outweigh the benefits. Progressive economists dispute this. They argue that public expenditure is complementary to, not competitive with, private expenditure; that it is not necessarily inflationary; and that it promotes economic growth. States have an obligation to use public expenditure in ways that respect, protect and fulfil human rights. Fulfilment of human rights is particularly likely to require public expenditure, given the riskiness of markets.

3.1.1 Progressive Realization and Non-retrogression

Obligation of conduct

The audit needs to establish whether a government is spending less or more than its peers; and whether it is increasing or decreasing the share of GDP that goes to public expenditure. Relevant quantitative indicators include: ratio of public expenditure to GDP, in comparison to countries with comparable GDP per capita; ratio of public expenditure to GDP over time; shares of health, education, social welfare etc. in public expenditure; in relation to comparable countries, and over time; and real per capita expenditure (total and for health, education, social welfare etc.) in relation to comparable countries, and over time. In addition, it would be pertinent to establish whether there are citizen entitlements to public services and income transfers.³⁸ Is their scope expanding or contracting over time? How easy is it to exercise them? What proportion of these entitlements are universal and what proportion is targeted to particular individuals or groups? What method of targeting is used (e.g. means testing, age, gender, self-selection)?

Obligation of result

An array of indicators of wellbeing outcomes is required, relating to specific rights, such as education, health, food and housing, with comparisons to other countries of similar per capita GDP, and taking into account changes over time.

Conclusion

Compliance with obligations is questionable if public expenditure is low compared to other similar countries and is falling over time, and if at the same time, well-being indicators are low and falling. Responsibility for non-compliance may be shared with other governments and international financial institutions if the latter are unreasonably constraining public expenditure. (Progressive economists argue that the IMF is currently putting inappropriate constraints on the public expenditure of some governments of some small, poor countries, as a condition for access to its funds).

3.1.2 Non-discrimination and Equality

Obligation of conduct

The audit needs to assess the distribution of expenditure between different social groups. In some cases equal shares will be an appropriate benchmark, but not always, as differences in needs, deprivations, and preferences must be taken into account.³⁹ It is also important to consider the distribution of entitlements: are entitlements limited to particular groups? (e.g. citizens or non citizens, employed and unemployed, social security for those who pay contributions into the system, discretionary social assistance for those who do not). How secure are the entitlements of different groups and what kinds of redress do different groups have?

³⁸ R. Balakrishnan, n. 5 above, at 21.

³⁹ D. Elson, n. 1 above, at 53.

Obligation of result

The audit should consider indicators of rights-related wellbeing outcomes of different groups in the population (disaggregating by race, gender, ethnicity, citizenship, location, and so on) to establish whether the gaps between groups are reducing or increasing over time.

Conclusion

Compliance with obligations is questionable if the shares of the most deprived groups are lower than the better-off groups, and their entitlements are less secure.

3.1.3 Minimum Core Obligations*Obligation of conduct*

To ensure it is meeting this obligation, a state should have in place an adequate system of setting benchmarks for and monitoring the enjoyment of minimum essential levels of economic and social rights (such as a suitably defined poverty line). There should also be a system providing entitlements to the minimum essential level of income, food, shelter etc.

Obligation of result

There should be no section of the population that is deprived of minimum essential levels of enjoyment of economic and social rights. Indicators are needed of the wellbeing of the most deprived people, and whether their numbers are increasing or decreasing: for instance, the proportion of the population below the poverty line, over time, and in relation to comparable countries.

Conclusion

Compliance with obligations is questionable if the poverty line is set too low and there is no well-functioning system of entitlements, and if the proportion of the population below the poverty line is high and rising.

3.1.4 Transparency, Accountability and Participation*Obligation of conduct*

Governments should publish information on public expenditure in a format that can be easily understood. There should be an effective financial audit process; legislative scrutiny of expenditure; and scope for democratic public participation in decision-making on public expenditure. The budget transparency index constructed by the International Budget Project is a relevant indicator.

Obligation of result

Citizens should be able to exercise their right to information about public expenditure, by requesting and obtaining specific information.

Conclusion

Compliance with obligations is questionable if information is hard to obtain or confusing; if financial audit and scrutiny mechanisms are weak; and if ordinary citizens have little scope for participation in decisions on public expenditure.

3.2 Taxation

Neoclassical economists consider that most ways of raising tax revenue create 'distortions' and introduce inefficiencies. The only tax that does not do so is a poll tax (a fixed sum paid for each person, irrespective of their circumstances, and regardless of differences in ability to pay). Progressive economists question this view of taxation, arguing that it uses an irrelevant benchmark - a market economy without any public services or infrastructure- and an excessively limited concept of efficiency. Adequate tax revenue needs to be raised to fund the expenditure required for realization of economic and social rights, though there is, of course, an obligation to raise it in ways that respect

human rights. Taxation is appropriately audited in relation to obligations of conduct, as results in achieving particular levels of enjoyment of economic and social rights are more closely linked to expenditure.

3.2.1 Maximum Available Resources

Obligation of conduct

The obligation is to introduce and implement tax laws and tax administration that are capable of generating sufficient revenue for the realization of economic and social rights, in ways that comply with human rights obligations. Relevant indicators include: ratio of tax revenue to GDP over time and in comparison to similar countries; and amount of tax revenue forgone, owing to tax concessions, holidays, loopholes etc.

Conclusion

Compliance with obligations is questionable if tax revenue levels are relatively low and falling over time. The responsibility for this may be shared with multinational corporations which take measures to avoid paying taxes, by transferring their profits to tax havens; and with international financial institutions that make reduction of taxes on imports a condition for loans in circumstances where it is difficult to replace the revenue thereby lost.⁴⁰

3.2.2 Non-discrimination and Equality

Obligation of conduct

The obligation is to ensure that tax laws and collection measures do not discriminate and that they affect different social groups equitably. Among the important quantitative indicators are the shares of tax revenue paid by different groups (people compared to corporations; rich compared to poor); and the incidence of taxation (the amount that people pay in taxes as a proportion of their income), on different social groups. Relevant qualitative evidence concerns the structure of tax laws and their implementation: for example, do the income tax laws discriminate on the basis of gender, sexual orientation, types of household, citizenship, or civil status?⁴¹ Are taxpayers of all social groups treated equally in the implementation of tax laws? Or are there tax loopholes that benefit the rich and enable them to move their resources overseas?⁴²

Conclusion

Compliance with obligations is questionable if a much bigger proportion of tax revenue is paid by people than by corporations; the incidence of tax is higher for poor people than for rich people; and patriarchal households pay less tax than egalitarian households.

3.2.3 Transparency, Accountability and Participation

Obligation of conduct

The obligation is to ensure that tax laws and administration are transparent and accountable, and opportunities are provided for broad participation in public discussion about appropriate tax policy. Relevant indicators would relate to the complexity of tax law (especially provision for offsetting expenses of various kinds against tax liability); the provision of accurate information on the incidence of taxation; the presence of independent oversight of the tax authorities; and the scope of consultation about changes in tax law.

Conclusion

Compliance with obligations is questionable if tax laws are extremely complex, with many loopholes; if governments fail to publish accurate information about tax incidence;

⁴⁰ R. Balakrishnan, n. 5 above, at 15, 28.

⁴¹ D. Elson, n. 1 above, at 77.

⁴² R. Balakrishnan, n. 5 above, at 31.

if there is no independent oversight of the tax authorities and changes in tax laws are unduly influenced by rich and powerful corporations.

3.3 Fiscal Policy and Monetary Policy

Fiscal policy (i.e. policy on the size of the budget deficit/surplus, and the extent of government borrowing) and monetary policy (i.e. policy on interest rates, regulation of the banking system, and exchange rates) impact on the economy as a whole by affecting levels of aggregate demand and the supply of money. The relation between aggregate demand and supply affects the level and quality of employment in an economy, the rate of inflation, and via the impact on both, the standard of living. Thus the macroeconomic aspects of fiscal and monetary policy have significant implications for the right to work and the right to an adequate standard of living.

A low official unemployment rate is not an adequate indicator of whether the right to work is being achieved. The rate of unemployment may be low, but available jobs may not generate sufficient wages to support adequate standards of living and may lack social protection. It is important to supplement unemployment rates with indicators of employment quality. 'Full employment' is best understood in qualitative as well as quantitative terms. It is important to realize that there is a trade-off between full employment and stable prices. No market economy has been able to generate full employment and economic growth, without some degree of inflation. The task is to avoid high and increasing rates of inflation, but attempts to bring inflation to very low levels will jeopardize job creation and economic growth. It is possible to protect the standard of living of poor people in the context of moderate inflation by regularly updating the minimum wage, welfare benefits and pensions, in line with rises in the cost of living, as measured by the retail price index.

Because fiscal and monetary policies entail different processes (with the former the responsibility of the Ministry of Finance, and the latter the responsibility of the Central Bank) we examine them separately with respect to obligations of conduct. However, to cross-check conduct with results, the same indicators of unemployment, decent work and adequate standards of living are appropriately used for both.

3.3.1 Fiscal Policy

Fiscal policy acts on aggregate levels of supply and demand, taking money out of the economy by levying taxes and other charges and putting money into the people's hands by way of public spending. If total expenditure is higher than total revenue, there is a budget deficit, which has to be financed by government borrowing or credit creation (an expansionary policy); if total expenditure is less than total revenue there is a budget surplus, and government debt can not only be serviced but also be reduced (a contractionary policy). Neoclassical economists tend to suggest that governments should aim to have balanced budgets (and if they have incurred high levels of debt through past budget deficits, they will need to maintain a budget surplus so as to generate savings to repay the debt). This is because neoclassical economists believe that market economies tend to produce full employment and low rates of inflation if left to themselves. Keynesian and other progressive economists challenge this. They believe that market economies have built in tendencies to private underinvestment in production, leading to a shortage of decent jobs. To sustain full employment, the lack of private investment in production needs to be offset by government investment, financed by government borrowing. So a deficit on the capital account of the budget is justified if it reflects government investment to increase assets and create decent jobs (which will in turn generate the revenue to pay the interest on the debt). Keynesians also consider that a deficit on the current account is justified in a downswing of the economic cycle, when it counteracts the danger of recession. This can be matched by a current account surplus in

an upswing, to counteract dangers of inflation. Thus fiscal policy with respect to the current account of the budget should be actively countercyclical, expansionary in the downswing and contractionary in the upswing. This will be more likely to generate full employment and low rates of inflation.⁴³

3.3.1.1 Progressive Realization and Non-retrogression

Obligation of conduct

The audit needs to consider how far full employment and improvements in the standard of living are objectives of fiscal policy. Is conduct constrained by rigid rules that hamper achievement of these objectives, such as requirements for the budget to be balanced each year or requirements for a primary surplus in the budget, so as to be able to reduce government debt? Such rules are likely to hamper progressive realization and lead to retrogression when there is a downturn in the economy. Or does the framework for fiscal policy allow government a margin of discretion to match fiscal policy with the state of the economic cycle and the investment and job creation needs of the country? A more flexible fiscal policy is less likely to hamper progressive realization, and less likely to entail retrogression. Comparisons over time and with similar countries are relevant.

3.3.1.2 Transparency and Accountability and Participation

Obligation of conduct

The audit needs to consider how far fiscal policy is presented as a social choice, open to democratic deliberation, and how far as a technocratic calculation that only those with PhDs in economics can perform. Any macroeconomic models used to guide policy should be publicly available and their underlying assumptions and objectives clearly articulated. Any fiscal policy conditions that are accepted in order to get loans from the IMF and the World Bank should be published. Accountability mechanisms should be available, including hearings in the legislature and through debate in the media and in universities. Fiscal policy should be open to public discussion, with consideration of a range of alternatives.

3.3.2 Monetary Policy

Monetary policy includes policy on interest rates, exchange rates, the supply of money in circulation, and regulation of the financial sector. Countries have, over the last decade, adopted monetary policies that focus on lowering inflation to historically low levels with little regard to the impact on poverty, employment, investment or economic growth. They have also liberalized financial markets, making it difficult to pursue monetary and fiscal policies that do not meet with the approval of private sector financial institutions. Neoclassical economists believe that giving priority to lowering inflation will promote economic growth in the long run by providing a more stable financial environment for private investment. They advocate inflation targets for Central Banks, but not employment targets. They also believe that liberalization of the financial sector will lead to more efficient allocation of finance. Keynesian economists believe that an emphasis on very low rates of inflation is more likely to discourage investment, because it requires high rates of interest; and this in turn will hamper job creation and limit improvements in the standard of living. They point out that in the 1950s and 1960s, Central Banks paid attention to employment and the standard of living, and not just to inflation.⁴⁴ Keynesian economists also believe that liberalization of financial markets is likely to increase the risk of financial crisis, with harmful effects on job creation and standards of living.

⁴³ D. Elson, n. 1 above, at 103-4.

⁴⁴ G. Epstein, *Alternatives to Inflation Targeting. Monetary Policy for Stable Growth: A Brief Research Summary*, (Amherst: Political Economy Research Institute, 2003).

3.3.2.1 Progressive Realization and Non-retrogression

Obligation of conduct

As before, the audit needs to consider how far monetary policy is presented as a social choice, open to democratic deliberation. The obligation to progressively realize the right to work and to an adequate standard of living implies that Central Banks should have regard to these objectives and not just to low rates of inflation. Due regard should be given to the risks of financial liberalization. Comparisons over time and with similar countries are relevant.

3.3.2.2 Transparency and Accountability and Participation

Obligation of conduct

Procedure for appointing the Governor of the Central Bank and other key decision-makers in the Bank (none of whom are elected) should be transparent. Public information should be made available about the rationale and underlying assumptions of any macroeconomic models used by the Central Bank. Mechanisms need to be in place to make the Central Bank accountable to the government and the legislature. Monetary policy should be open to review through debate in the media and in universities. Monetary policy should be open to public discussion, with consideration of a range of alternatives.

3.3.3 Fiscal and Monetary Policy

Obligation of result

The conduct of fiscal and monetary policy can be crosschecked against results for the rights to work and the right to an adequate standard of living.

Progressive Realization and Non-retrogression

A range of indicators is required of trends in employment, unemployment, real wages and availability of decent jobs etc.

Non Discrimination and Equality

The relevant indicators must be disaggregated by race, ethnicity, sex, and age.

Conclusion

Compliance with obligations is questionable if the goals of fiscal and monetary policy are purely financial, with financial targets, but no targets for job creation or improvements in standard of living; and if employment is deteriorating in terms of quantity, and/or quality, with an increasing number of jobs unable to sustain an adequate standard of living. Responsibility for non-compliance may be shared with other governments and international financial institutions, if the latter are constraining fiscal and monetary policy in ways that hamper job creation and improvements in standard of living.

3.4 Trade Agreements

Neoclassical economists argue that trade-liberalization will produce gains, in the shape of extra output, for all trading countries by stimulating their economies to be more efficient. Non-conformist economists doubt that trade liberalization will necessarily lead to overall gains: weaker less-developed economies may be damaged rather than stimulated. Neoclassical economists do recognize that not all groups within a country will gain; indeed some may lose (in particular, those groups producing goods that can be imported more cheaply following the trade agreement). In such a case, they argue that the gains should be redistributed from the winners to the losers, so as to ensure that no-one is worse off. In practice, if the winners are powerful, they may block any attempt to redistribute the gains within a country (e.g. if the benefits of trade go to better-off urban consumers who are able to buy cheaper imported food, urban consumers may block any attempt to tax them to compensate small farmers who lose their livelihood). A recent

development in trade agreements has been ‘side agreements’ relating to non-trade issues, such as labour rights, intellectual property rights, and government subsidies. In some cases, (e.g. Mexico and the North American Free Trade Agreement (NAFTA)) the side agreements have even led to constitutional amendments which have weakened the rights of poorer groups. These side agreements may deprive poorer countries, and especially poorer people within them, of many of the possibilities of making gains from trade.⁴⁵

3.4.1 Non-discrimination and Equality

A human rights perspective would situate the issue of compensation in the context of non-discrimination and equality: if trade liberalization worsens the position of those who are already suffering from discrimination and inequality, then measures should be taken to prevent this; but if it improves their position, then compensation for privileged losers is not required.

Obligation of conduct

In auditing this obligation it is important to investigate whether the government conducted impact assessments to determine who would be the likely winners and losers before concluding trade agreements. If the likely losers were groups already subject to discrimination and inequality, did the government ensure that the trade agreement was modified to protect them (e.g. by including in the agreement the ability to reintroduce import tariffs if livelihoods of discriminated groups are threatened by import surges or subsidized imports that are sold below cost)? Or failing modification of the trade agreement, did the government introduce other measures to compensate them for their losses?

Obligation of result

To assess this, indicators are required on the situation of disadvantaged social groups before and after the trade liberalization (employment, incomes, nutrition, health etc).

Conclusion

Compliance with obligations is questionable if the state failed to make an impact assessment, and failed to introduce safeguards or compensatory measures to protect discriminated groups from losses, and if the situation of such groups worsens after trade liberalization. Responsibility may be shared with powerful trading partners if the latter refused to include safeguards in the trade agreements and limited access to their own markets in ways that minimized any gains from trade.

3.4.2 Minimum Core Obligations/Minimum Essential Levels

Trade liberalization may jeopardize the ability of states to meet their minimum core obligations to guarantee minimum essential levels of economic and social rights. In examining this, it is important to focus on the risk introduced by trade liberalization. Here, we illustrate this principle with respect to food security, since food is the most important essential that is importable. In the short run agricultural trade liberalization may result in an increase in food imports, leading to greater availability and lower costs for food, while at the same time destroying local production as small farmers are unable to compete against imports. But dependence for essential food items makes countries vulnerable to changes of prices in the world market. If the price of imported food rises, poor people may be priced out of markets, and the government may have insufficient foreign currency to buy food on their behalf. The neoclassical economist would expect this to be temporary, as the rise in prices should stimulate local production once more. But the local farming system may have been destroyed, with farmers having migrated to the cities, and local farming infrastructure in disrepair. The changes induced by trade

⁴⁵ R. Balakrishnan, n. 5 above, at 14-19.

liberalization may not be reversible, and food security may be jeopardized in the long run.

Obligation of conduct

The obligation is to ensure that trade agreements do not undermine the capacity of governments to guarantee minimum essential levels of economic and social rights, especially the right to food. Has a risk assessment been made of any agricultural trade agreement? Are there any safeguards to prevent the destruction of local food production?

Obligation of result

To assess this data is required on the consumption of food of poor people, and their nutritional standards.

Conclusion

Compliance with the obligation is questionable if there are no safeguards and if food consumption and nutritional levels of poor people have deteriorated subsequent to the trade agreement. Responsibility may be shared with trading partners and multinational corporations, if they have hampered attempts put safeguards in the trade agreements and/or they have taken actions that have pushed up the price of food paid by poor people in the country.

4. Limits and Potential of a Human Rights Audit of Economic Policies

It is important to recognize that attention to human rights obligations does not provide the answers to all economic policy questions.⁴⁶ What such attention can help us do is to define the set of policies that are consistent with human rights obligations, and to rule out policies which are not consistent. In choosing among the policies which are consistent with human rights obligations, human rights analysis can also provide some guidance on sequencing of policies (attention to the most deprived should have priority) and on procedures (which must be transparent, participatory and accountable). But it cannot provide definitive answers to questions such as: should priority in investment in public services be given to the urban poorest people or the rural poorest people, bearing in mind that a given expenditure can reach more of the poorest urban people than the poorest rural people, because the latter are more spatially dispersed?

However, it is equally important to recognize that an economic analysis cannot provide a definitive answer either. Many abstractions and simplifications have to be made in order to produce economic analysis, and weight must be allocated to competing policy objectives. The abstractions, simplifications and weights used in non-conformist economics are different from those used in neoclassical economics. The former gives greater priority to equality and guarantee of an adequate standard of living for all. It pays more attention to the inherent uncertainty and inequality of market processes, and the significance of non-market domains of life. Because of this, the analysis produced by non-conformist, progressive economics is likely to be more congruent with human rights norms and standards. However, no matter how progressive the economic analysis, the information it produces does not eliminate the role of social and political judgment. Judgment among competing human rights-consistent policies should therefore not only be informed by a progressive economic analysis but also be reached through a participatory, transparent and accountable process. However, the first step is to conduct analysis on whether current economic policies are consistent with human rights obligations, and to work towards clarifying a set of human rights-consistent policies. The

⁴⁶ V. Gauri, 'Social Rights and Economics: Claims to Health Care and Education in Developing Countries', (2004) 32 *World Development* 3 at 465-477.

kind of audit we are proposing does not aim to identify the best possible set of policies to realize human rights. There are far too many uncertainties to be able to do that. Our aim is rather to move economic policy in a better direction by identifying which policies are least likely to be consistent with human rights obligations.