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THIRTEENTH ANNUAL GROTIUS LECTURE RESPONSE

AMARTYA SEN’S VISION FOR HUMAN RIGHTS – AND WHY HE NEEDS THE LAW

KIM LANE SCHEPPELE*

I would like to thank the American Society of International Law and the American University Washington College of Law for inviting me to be a commentator on the lecture of one of my heroes in the intellectual world: Amartya Sen. This year, the Annual Meeting of the American Society for International Law has a particularly appropriate Grotius Lecturer. While Professor Sen and Hugo Grotius part company on a number of specific issues, they share quite a lot as well.

Both Professor Sen and Hugo Grotius have ranged widely across intellectual fields. Professor Sen started as an economist and he now occupies a prominent place in political philosophy, public policy, and law. Hugo Grotius was trained first as a lawyer, but ranged widely over philosophy and religion. Their perspectives—over the tops and around the edges of disciplines, as it were—give their writings extraordinary influence and reach. Each is a public intellectual, to use a modern term, and each has combined a commitment to public life with the careful tending of the life of the mind.

Both men came of age in times of religious strife and this early experience profoundly shaped their work. Hugo Grotius’s early career fell at a time when Calvinists and Reformers came to blows in

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his native Holland, as a result of which he spent some time in jail for being on the wrong side of the conflict.¹ Marked by reaction against this intolerance, Grotius kept seeking some point of harmony in a religiously divided world. Professor Sen came of age in India during the bloody partition with Pakistan. He personally witnessed the way that religious strife fueled economic deprivation which led to violence and then to victimization. He, too, came face to face with religious conflict and became determined to transcend it. As he writes in his Nobel Prize autobiography, first-hand experience with the victims of the Muslim-Hindu conflict “made me aware of the dangers of narrowly defined identities.”²

Having seen first-hand how religious intolerance could be destructive, both Professor Sen and Hugo Grotius devoted substantial attention to the question of normativity and its philosophical grounding, hoping to find a way out of narrow sectarian justification into a realm of reason. They therefore both want to locate normativity in the connection between reasoned argument and its relationship to evidence. Grotius thought that normativity rested in the properties of actions—properties that could be discerned through “right reason.”³ Professor Sen argues that normativity rests in the degree of freedom that a person possesses, enabling her to concretely realize her capabilities.⁴ Which freedoms should be valued over others, Professor Sen tells us, depends on reasoned public debate that should be conducted through adopting the perspective of impartial objectivity⁵—different in practice but similar in function to Grotius’s

1. See Jon Miller, *Hugo Grotius*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 28, 2011), <http://plato.stanford.edu/archives/sum2009/entries/grotius/> (noting that Grotius was a reformer, also known as a “Remonstrant,” who was arrested after a “Contra-Remonstrant” coup by orthodox Calvinists).

2. Amartya Sen, *Autobiography*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/economics/laureates/1998/sen.html (last visited Oct. 14, 2011).

3. See Miller, *supra* note 2 (“The law of nature is a dictate of right reason “which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined.”).

4. See AMARTYA SEN, THE IDEA OF JUSTICE 231 (2009) [hereinafter SEN, IDEA OF JUSTICE] (“[I]ndividual advantage is judged in the capability approach by a person’s capability to do things he or she has reason to value.”)

5. See *id.* at 42 (“The reasoning that is sought in analyzing the requirements of justice will incorporate some basic demands of impartiality . . .”).

“right reason.” Both Professor Sen and Hugo Grotius therefore give pride of place to a well-constructed conception of reason in sorting out what normative commitments a community should defend. Normativity ultimately rests, in both cases, on the results of such reasoning rather than on mere processes through which the results are reached.⁶

Perhaps the most important similarity between the two, however, is that Grotius believed that rights consist of the means or powers of an individual to do something, as does Professor Sen.⁷ Rights for Grotius were properties of individuals that the individual determined whether and how to deploy.⁸ Grotius therefore identified rights with what Professor Sen has called the capabilities of persons. Of course, the early seventeenth century version of this idea is substantially different from the early twenty-first century version. In particular, Grotius, like Thomas Hobbes, believed that all individual rights could be given up in exchange for protection from a ruler,⁹ a view that Professor Sen would radically challenge. And Grotius, unlike Professor Sen, did not believe in the universality of rights, holding instead that some people were naturally inferior and so, for example, could be justly kept as slaves.¹⁰ It is nonetheless striking how close

6. See *id.* at 66-69 (basing an important critique of the work of John Rawls precisely on the point that Rawls is too concerned with procedure and institutions, and therefore fails to notice whether the results in the world are in fact better for the people involved.); see also Miller, *supra* note 2 (reflecting the different preoccupations of his time, Grotius believed that one could derive the basic rules of normativity from the observation of nature itself).

7. See Miller, *supra* note 2 (“When we say that no-and-so has the *right* to such-and-such, we usually mean that he has the *means* or *power* to do such and such This was Grotius’ view; though subsequently mediated by others, his contribution was essential.”); Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 328 (2004) (“By starting from the importance of freedoms as the appropriate human condition on which to concentrate, rather than on utilities (as Bentham did), we get a motivating reason not only for celebrating our own rights and liberties, but also for taking an interest in the significant freedoms of others. . . .”).

8. See Miller, *supra* note 2 (“[W]hereas medieval theorists tended to speak of ‘the right,’ Grotius and his successors stressed the powers and entitlements of the person who has rights.”).

9. See *id.* (explaining Grotius’s view that rights of individuals could be overridden by a ruler “[b]ecause sovereignty is ‘that power . . .’ whose actions are not subject to the legal control of another”).

10. See *id.* (detailing how Grotius maintained that individuals could sell their

Grotius comes to Professor Sen's views about rights as capabilities.

Finally, both Grotius and Professor Sen have a global vision. The American Society for International Law honors Grotius as the "father of international law" for his systematic work on the law of war, the theory of states, and the development of the view that the international arena can be characterized by the normative relationships among states. Today, our Grotius lecturer, Amartya Sen, is honored for his substantial contributions to a just world marked by the respect for, and the empowering of, individuals.

With that background, let us examine the ideas that Amartya Sen has brought to us today. He has given us a very rich conception of what it means to have human rights—a conception that is notable for focusing on those who are human rights' *key intended beneficiaries*, and on the status of *their* lives, rather than on the institutions, rules, and doctrines that are supposed to bring rights into being or provide for their maintenance. The focus on the *holders* of rights makes Professor Sen's contribution particularly moving, as the plight of the individual—one who has few opportunities and no means to carry out the scarce opportunities that she may have—should be at the center of our concern. But, as Professor Sen notes, legal and political theory often change the subject from the quality of lives of real persons to the characteristics of the rules, principles, and institutions that tee up political and legal decisions to be made about those lives.¹¹ Against this more formal view, Professor Sen argues that restriction of the space of freedom, through closing the windows and slamming the doors of opportunity, is a world-wide tragedy to which we all must attend. Human rights create new opportunities and provide the means through which people can have better lives. As Professor Sen reminds us, it is the potential for better lives that we must keep in view.

As he directs our attention towards those individuals whose rights are most fragile and imperfectly guaranteed, however, Professor Sen

liberty, just as they could their labor, and thus, slavery could exist in a just society).

11. See SEN, IDEA OF JUSTICE, *supra* note 5, at 66-74 (critiquing the work of John Rawls for placing attention on institutional structures and the logic of just rules over direct concern with the lives of disadvantaged people).

has a number of skeptical things to say about the role of law in the realization of rights. Since this is a room full of lawyers – and international lawyers at that – I will argue that the legal recognition and the law-based enforcement of human rights might be of more assistance to the urgent mission that Professor Sen has undertaken than he recognizes. Law cannot do everything, it is true, but law is more crucial to more aspects of the project of opening the world of opportunity to those who are downtrodden than Professor Sen has given law credit for.

In my comments, then, I will address the general skepticism that Professor Sen has shown for using law as a crucial tool in the struggle for human rights. Further, I will provide a defense of law as an important partner for his enterprise.

I.

According to Professor Sen, law is not the source of human rights and therefore human rights should not be defined narrowly in legal terms.¹² Moral obligations to promote and protect human rights must therefore go beyond the law. As a result, law cannot be a guide to moral obligations.

At one level, I agree with Professor Sen. Law is not the source of moral norms, and human rights are no different in this respect than any other subject of law. In fact, in every field of law, the normativity that sustains law comes from outside of law, which never reaches all the way out to embrace the full spectrum of normative concern. Domestic tort law does not exhaust our normative obligations to each other. Family law does not exhaust the normative obligations that exist among family members. Law is always partial with respect to the normative field that it inhabits. Law may trumpet the most important and shared elements of that common moral field, but law does not exhaust the moral sources that bring it into being.

12. See Amartya Sen, Grotius Lecture before the American University: The Global Status of Human Rights (Mar. 23, 2011), in 27 AM. U. INT'L. L. REV. 1, 4 (2011) [hereinafter Grotius Lecture] (“We need to see global human rights, I would argue, over a much bigger arena, of which legal motivation, actual legislation and judicial enforcement form only one part.”). In arguing this, he rejected the association that Bentham made between real law and real rights). *Id.* at 5-6.

Criminal law is perhaps the best example. Criminal law only picks out some of the offenses that violate the basic principles of a community. Like Professor Sen's example of the wife who has a right to be consulted in family decisions and who cannot (and who should not be able to) call upon law to enforce this right,¹³ the world outside criminal law is full of important principles that, when violated to the outrage of many, nonetheless should not be brought under criminal prohibition. For example, cheating on a university examination might get someone thrown out of a university, but it generally does not come with criminal sanctions. [KLS: As a colleague pointed out, this sounds like I approve the criminalization of these things, so I would like to omit these examples.] Criminal law only covers part of a general moral field.

The fact that any particular area of law fails to cover some actions that may justly deserve moral condemnation is not an argument against having law cover those morally wrong actions that are within its purview. Law does not have to cover the whole scope of moral outrage to nonetheless be normatively justified over the range that it does have. Law, therefore, can be an important device for ensuring the realization of moral norms even if it cannot, and should not, cover all moral norms. In fact, law may well be wise to be selective—which makes it no less important.

Unfortunately, Professor Sen concludes from his correct observation that normatively justifiable rights often exceed legal protection, which means that one might usefully fight for human rights by leaving law largely aside.¹⁴ But because the law does not underwrite moral obligations, it does not follow that law cannot therefore be a central pillar of support in realizing the moral obligations we do have. While Professor Sen acknowledges that law

13. *See id.* at 9 (discussing that women have a moral right, even in traditional male dominated societies, to take part in family decisions but noting that “coercive” or punitive legislation may be “too blunt” an instrument to ensure that husbands consult their wives in family decisions).

14. *See id.* at 9 (“Would it be reasonable to claim that if a human right is seen as important, then it must be ideal to legislate it into a precisely specified legal right? I will resist this proposal. For some rights, the ideal route may well not be legislation, but something else, such as recognition or agitation, or even public discussion and education, with the hope to changing the behavior of those who contribute to the violation of human rights.”).

may be helpful in some circumstances, one cannot help but be struck by the way he moves away from law as quickly as possible to show that human rights may develop perfectly well outside a legal framework.¹⁵ But he may be thinking too narrowly about what law might do to encourage this development.

To see why, let's take his example of the importance of consultation within a marriage, where it is important for husbands to recognize the moral right of a wife to be consulted in making key decisions about family matters. Professor Sen argues that this obligation does not spring from a legal duty, and enforcing this obligation at law would be useless and even counterproductive.¹⁶ One can easily imagine the nightmarish State that would eavesdrop on marriages and intervene in domestic arguments at the point where mutual respect lags. Law has its limits.

Even with its limitations, law is not irrelevant to this discussion. Perhaps the woman's moral right to be consulted by her husband is more likely to be realized in practice where there is *a broader web of legal obligations* that gives her legally protectable rights outside the context where her moral right exists. If a woman is given moral weight and social standing through having *legal* rights—to human dignity, bodily autonomy, property, and more—then her *moral* right to be consulted within a marriage may be more likely to be recognized. And that will be true even though it would be hard for the law to recognize her right to be consulted directly. Perhaps having equal employment opportunities or the right to vote—enforceable by law—would give her a sense that she is not defined completely by her marriage, and having these other legal entitlements would leverage her claim that she should be taken as an equal in the home. Laws about the marriage relationship itself may help to strengthen her moral right to consultation as well. Laws against domestic violence may give her physical protection when she asserts her moral rights within marriage. Laws that do not automatically give custody of the children to the husband in a

15. *See id.* at 8 (“It is easy to appreciate that if human rights are seen as powerful moral claims - indeed as ‘moral rights’ (to use Hart’s phrase) - then surely we have reason for some catholicity in considering different avenues for promoting these claims. Thus the ways and means of advancing the ethics of human rights need not be confined only to making new laws.”).

16. *Id.* at 9.

divorce may give her more power within the marriage to bargain for recognition of her claims. Laws that give her the right to leave her marriage may be crucial as well.

The obligation that underwrites a woman's moral right to be consulted stems from a basic principle of the basic moral equal worth of persons. And even though the principle may not originate with law, there are many ways that law can sustain a commitment to this principle. Would a woman be likely to be consulted by her husband absent a broader legal recognition of her value and equality? There are some respectful husbands who would consult in any event, regardless of whether the woman had a legally recognized right or not. But recalcitrant husbands may need pressure from multiple sides before they recognize women's moral rights to consultation. Even if there are no laws requiring consultation, laws ensuring a woman's equality outside marriage can empower a woman to ask that her moral rights within the marriage be respected. In fact, as Jeremy Waldron has noted, legal protections of basic rights may create the preconditions for people to take risks by entering marriages in the first place.¹⁷ If all parties have legal rights independent of marriage as well as equal legal rights to leave marriages, then relations within marriage may be more equal.

While I agree with Professor Sen that law is not the source of human rights, nor does it exhaust the limits of human rights, law can often contribute a great deal toward providing a context within which these non-legal rights may be respected in practice. Law, therefore, may be important in more ways than Professor Sen realizes. Law might provide moral support, so to speak, for moral obligations that go beyond the law.

II.

Professor Sen tells us that law deals in what Kant would call "perfect obligations"¹⁸ while human rights involve a great many

17. See Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 628-29 (1988) (positing that legal rights provide security and a basis for negotiation for married individuals when mutual affection wavers).

18. See Immanuel Kant, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* 39 (Thomas K. Abbott trans., 1949) (1785), available at <http://evans->

“imperfect obligations” that are harder for the law to regulate.¹⁹ As a result, law goes only part of the way toward ensuring the realization of human rights.

The difference between perfect and imperfect obligations can be seen in Professor Sen's example of torture. When a person has a right not to be tortured, this imposes a “perfect obligation” on another person not to engage in the prohibited conduct toward her – at all and ever. But the right not to be tortured also triggers “imperfect obligations” for others to do what they can to stop torture from occurring wherever and whenever it may arise. “Doing what one can” will depend on who particular people are and what their capabilities may be. Someone at the top of a ministry may be able to do more to prevent torture than can the fellow prisoner of the potential torture victim because the minister can give more effective orders and punish those who fail to follow them. Perhaps not all ministers can do this; those who serve in governments under which they would be executed for interfering with torture policy do not have this leeway. One needs a great deal of detailed information to work out what someone can be expected to do to realize imperfect obligations.

Specifying all of the features that might cause imperfect obligations to apply in a concrete situation will be a complex and detailed – and perhaps even hopeless – task. That is why Professor Sen believes that the law will never be able to regulate imperfect obligations very well. Because these obligations cannot be specified precisely enough in advance, the law may be too blunt an instrument for conveying the subtlety of complex moral situations.²⁰ Therefore, Professor Sen argues, law will always shortchange the power of human rights.

experientialism.freewebspace.com/kant_groundwork_metaphysics_morals01.htm (explaining that “perfect duties” are those obligations from which there can be no exceptions).

19. See Grotius Lecture, *supra* note 13, at 10-11.

20. See *id.* at 10 (“It is important to emphasize that the recognition of human rights is not an insistence that everyone everywhere must rise to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgement that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that.”). Sen implies that the law cannot be so subtle as to anticipate every situation that might bear on the imperative to act.

But here, too, law may be better than Professor Sen thinks at working out what imperfect obligations may require and pushing legal actors to attempt to realize as full a conception of human rights as they reasonably can. That is because law takes a great many more forms than a simple command to an individual to do or refrain from doing something. For example, while it may be tricky to define imperfect obligations of individuals because such positive obligations can quickly interfere with protected freedoms, it is less difficult to define imperfect obligations of states which themselves have no moral freedom to assert in response.²¹ In fact, state officials are quite legitimately restricted to act or refrain from acting in all sorts of ways that would be illegitimate if those same restrictions were put on ordinary individuals. States may be barred from discrimination in contexts where individuals are free to decide on whatever basis they like. For example, a state violates human rights when it enforces a ban on cross-racial or same-sex marriage, while an individual who chooses a mate based in part on the mate's race and sex cannot be accused of human-rights-violating discrimination. Alternatively, a state may be required to treat people as innocent until they are proven guilty in all public settings, while a mother choosing a nanny for her child does not morally have to reject unconfirmed rumors as a basis for her choice. Especially when it comes to enforcing complex imperfect obligations, states may be a better target for legal tutelage than individuals.

Nowhere is this more evident than with respect to social rights, rights for which Professor Sen has passionately argued in *The Idea of Justice* and elsewhere.²² While the United States is not known for its social rights at the federal constitutional level,²³ many other countries have embedded social rights in their domestic constitutions. How

21. See JEREMY WALDRON, *THE LAW* ch. 3 (1990) (discussing how state officials may come to have different and denser obligations to act in particular ways than might ordinary citizens).

22. See SEN, *IDEA OF JUSTICE*, *supra* note 5, at 379-84. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Amartya Sen, *Foreword* to PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS AND THE NEW WAR ON THE POOR*, at xi-xvii (2003).

23. Emily Zackin has shown in a prize-winning dissertation that social rights have had a long history in American state constitutions, however. Emily Zackin, *Positive Constitutional Rights in the United States* 3 (Nov., 2010) (Ph.D. dissertation, Princeton University).

have courts interpreted these constitutional rights? I've recently completed a survey of how domestic high courts have dealt with cases involving social rights and have come away pleasantly surprised at the creativity of courts in promoting realization of the imperfect obligations that social rights create.²⁴

The case law is wide-ranging and I cannot summarize most of it here, but suffice it to say that courts generally do *not* say that they have no power to interpret and enforce constitutional clauses in the area of rights to education, housing, minimum income, and health care on the grounds that these are human rights with too many imperfect obligations, although they are. In a few cases, most notably in Latin American high courts, judges actually provide as a remedy precisely what the petitioner seeks (particularly access to medical treatments or specific drugs where the national health service has rejected a doctor's request).²⁵ But more often, courts try to craft a less direct strategy that encourages the realization of imperfect obligations, a strategy that does not consist of bright-line rules, but instead develops contextual approaches that focus on requiring the state to do what it can to improve the lives of those whose rights are at stake.

In considering how to enforce social rights, for example, courts often say that a state may not deprive someone of a social right that she already possesses. As a result, a person who already has housing may not be thrown out into the streets when a state decides to take over the property that the person has occupied. Instead, in those cases, the state must provide alternative housing so as not to leave

24. See generally Kim Lane Scheppele, Address at the Annual Meeting of the Association of American Law Schools: Social Rights in Constitutional Courts — Strategies of Articulation and Strategies of Enforcement (Jan., 2009).

25. See, e.g., Florian F. Hoffmann & Fernando R. N. M. Bentes, *Accountability for Social and Economic Rights in Brazil*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 132-33 (Varun Gauri & Daniel M. Brinks eds., 2008) (recognizing a high level of success for individual Brazilian plaintiffs who bring claims for access to medical treatment or medicines); Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*, 22 *AM. U. INT'L L. REV.* 101, 111-15 (2006) (suggesting that Argentinian supreme court and lower court decisions promoted their own legitimacy and garnered public support by enforcing the right to life and the right to health care by requiring the national government to provide medical treatment to vulnerable people).

the individual worse off. The *Modderklip* case of the South African Supreme Court of Appeal²⁶ and the *Olga Tellis* case in India²⁷ provide variants of this approach. In such cases, the state develops new legal obligations to not make the situation of an individual any worse off, even if the state had no legal obligation to provide housing in the first place. Legal sanctions can attach to infringement of rights even if the underlying right could not be enforced as a first-order matter in domestic courts.

Alternatively, social rights can be used as interpretive guides to other constitutional provisions. Rather than enforce a social right directly, national courts sometimes read into the more directly enforceable bright-line rights some “overhang” from the social rights. So, for example, some state courts in Germany have found that the constitutional right to property includes “old-age pensions, health benefits, and unemployment compensation,” enabling people to invoke due-process guarantees if the state threatens to remove the benefits.²⁸ The 1995 social rights cases of the Hungarian Constitutional Court did something similar in establishing that people who had paid into a state pension and health care fund had property rights in the benefits that the funds were supposed to provide.²⁹ These rulings allow individuals to use the individual right

26. See *President of S. Afr. v. Modderklip Boerdery Ltd.* 2005 (5) SA 3 (CC) at 44-49 (S. Afr.) (holding that the national government has a constitutional obligation to ensure access to housing or land for the homeless).

27. *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. 51, para. 4.2 (India)(requiring the state to provide housing for pavement and slum dwellers who were recorded in a census and whose housing was demolished). The *Olga Tellis* case has been frequently misunderstood to have required a positive obligation of the state to provide housing directly for all those who were affected. But, as an article by Madhav Khosla shows, the Indian Supreme Court only required the actual resettlement of those who had been enumerated in the local census and who had been given prior promises of housing, while saying only that the government *should* rather than *must* resettle the rest. Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST. L. 739, 747 (2010).

28. See Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 311(1999) (“the goal of social justice can be viewed as one of the main themes of the new constitutions of the eastern states [that were unified with Western Germany at the end of the Cold War], and this goal is explicitly proclaimed in the preambles of four of the five new constitutions”). Quint explains the decisions of the new state constitutional courts in Germany, *id.* at 315-321).

29. See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX.

of property to enforce their claims to social benefits, a line of defense that ensures that affected individuals have a voice and a forum in court when state retrenchment occurs.

Finally, courts interpreting social rights provisions of domestic constitutions sometimes construct those social rights as goals that the state must show progress in realizing. In fact, domestic courts will even use the very language of the International Covenant on Economic, Social and Cultural Rights to create this framework, saying that a state must adopt certain policies to benefit the poor “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights.”³⁰ This approach permits courts to honor many of the contextual elements that Professor Sen identifies as being characteristic of imperfect obligations. For example, the South African Constitutional Court in the famous *Grootboom* case adopted this approach by instructing the state to create a program for the construction of housing for the poor as a way of dealing with the difficult issues raised by the 800 homeless people who had camped out on private land.³¹ The Supreme Court of Venezuela also took this approach when it told the state that it had to create a program for increasing the availability of drugs to fight HIV/AIDS.³² And the Indian Supreme Court in the *Gaurav Jain* case ordered the Indian state to provide for the “empowerment” of disadvantaged classes of people so that they

L. REV. 1921, 1946 (2004) (recognizing that because individuals had been required to pay into the state system and had been prevented from securing private benefits, the individuals had relied upon the state benefits and therefore the state could not eliminate those benefits without due notice); *see also* LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 323-24 (2000) (citing Alkotmánybíróság (AB) [Constitutional Court] June 30, 1995, 43/1995 (Hung.)) (finding that when individuals invested their income into the state social security system, the benefits of that system effectively became the individual's property and must be protected as such).

30. United Nations International Covenant on Economic, Social and Cultural Rights art. 2, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

31. *See* Republic of S. Afr. v. *Grootboom* 2001 (1) SA 46 (CC) at 67 para. 99 (S. Afr.) (holding that the South African Constitution requires the state to create and implement a program to ensure peoples' right to access of adequate housing).

32. Corte Suprema de Justicia [C.S.J.] [Supreme Court], July 15, 1999, Bermudez et al. v. Ministerio de Sanidad y Asistencia Social, Case No. 15.789, Decision No. 916 (Venez.).

could realize their social rights.³³ In each of these cases, courts examined the social context and determined that the state could do more than it was doing to make the lives of many poor people better. The court did not order a direct remedy for the individuals who brought the cases, but instead told the state that it was not doing enough and had to do more for the class of individuals whom the petitioners represented.

Most of the social rights cases either instruct states to set up systems to do better than they have been doing or prevent states from actively making a current situation worse. As a result, courts provide an ally for those who are disadvantaged because they can encourage the realization of certain sorts of imperfect obligations. In these cases, courts evaluate whether states are taking seriously their responsibilities to realize social rights, and, if not, then courts can push states to do better. This seems to be precisely the sort of legal enforcement of imperfect obligations that Professor Sen believes is impossible for law to accomplish.

The fact that many particular rights cast long shadows of imperfect obligations should not by itself be an argument against the use of law to bolster these protections. Courts know how to specify what states must do to realize their imperfect obligations – to do as much as they can, when they can. Courts can stay on top of these issues, monitoring state compliance with imperfect obligations and giving new pushes when the state fails. Law is far from useless in pushing states to realize their imperfect obligations.

There is much more to be said about this, but the creative approaches of domestic high courts in dealing with social rights cases might give Professor Sen some hope that law can be a partner in his enterprise. Courts do not just enforce specific—or perfect—obligations. Instead, many have been moving toward pressing states to achieve the realization of imperfect obligations as well.

III.

Professor Sen is a law skeptic because, while he believes that law

33. *Jain v. Union of India*, A.I.R. 1997 S.C. 3021 (India) (recognizing that social integration and economic empowerment are fundamental rights ensured by the Constitution and upheld by the Court and Government).

may be one effective route for protecting human rights, he also believes that law is not enough to guarantee their full realization.³⁴ As Professor Sen argues, *moral* obligations to defend human rights go above and beyond *legal* obligations.³⁵ But in arguing for this, he draws a sharp line between legal—that is, legislative—strategies and all others. He seems to believe that all law has to offer is bright-line rules.

But here too, Professor Sen might find that law can provide more support for the realization of rights than he thinks. If law were as narrow as Professor Sen believes—limited to legislation and formal legal enactment—then one can see his point. But the shadow of law spreads far beyond formal legality. It exists also outside the legal system in the world of organizations built by lawyers and in the politics that have grown up around a legal mentality. While narrow legal enforcement of legislatively or constitutionally created rights is one important aspect of what law can do to support human rights, a constitutional culture may spread far beyond narrow legality to create broader support for human rights, even when formal legality fails to do so.

A constitutional culture will create a culture of rights. One hopes this is true in the broader population, but it is very clearly true among lawyers. Throughout many countries, and ever since human rights appeared on the horizon of possibility, one sees the prominence of legally trained people in the ranks of human rights advocates. Many human rights organizations have been created and staffed by lawyers. Even though recent years have seen the rise of a new cadre of experts

34. See Grotius Lecture, *supra* note 12, at 9 (“For some rights, the ideal route may well not be legislation, but something else, such as recognition or agitation, or even public discussion and education, with the hope to change the behaviour of those who contribute to the violation of human rights.”).

35. See *id.* at 8 (“Providing inspiration for legislation is certainly *one* way in which the ethical force of human rights have been constructively deployed. . . . To acknowledge that such a connection exists is not the same thing as taking the relevance of human rights to lie *exclusively* in their playing an inspirational or justificatory role for actual legislation. It is important to see that the idea of human rights can be, and is – actually, used in several other ways. It is easy to appreciate that if human rights are seen as powerful moral claims – indeed as “moral rights” (to use Hart’s phrase) – then surely we have reason for some catholicity in considering different avenues for promoting these claims.”).

in human rights with other forms of training, lawyers still play an important role in most human rights organizations. For example, Human Rights Watch and Amnesty International are both organizations whose methods go beyond litigation and yet both have been prominently led by lawyers.³⁶ The International Commission of Jurists is an important transnational human rights group, run by lawyers and judges.³⁷ Lawyers are key players in the international debates over compliance with human rights norms. The human rights movement has not been led only by lawyers, but lawyers have been very important to the cause.³⁸

Why are lawyers so prominent in the fight for human rights? Research done by the working group led by Terence Halliday, Lucien Karpik, and Malcolm Feeley shows why.³⁹ In country after

36. See, e.g., *Human Rights First Charter*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/about-us/human-rights-first-charter/> (last visited Oct. 14, 2011) (observing that Human Rights First was formerly named the Lawyer's Committee for Human Rights); *Kenneth Roth*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/bios/kenneth-roth> (last visited Oct. 14, 2011) (noting that Kenneth Roth, the current executive director of Human Rights Watch, is a former U.S. federal prosecutor); *The Nobel Peace Prize 1977 – Amnesty International*, NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/peace/laureates/1977/amnesty-history.html (last visited Oct. 14, 2011) (stating that Amnesty International was founded in 1961 by Peter Benenson, a British lawyer).

37. See *Overview*, INT'L COMMISSION OF JURISTS, <http://www.icj.org/default.asp?nodeID=441&langage=1&myPage=Overview> (last visited Oct. 14, 2011) (“The International Commission of Jurists is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. What distinguishes the International Commission of Jurists (ICJ) is its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law. The ICJ provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.”).

38. But, as Lucien Karpik has pointed out, summarizing the case studies compiled for a book on the role of lawyers in autocratic political systems, lawyers are better at defending some rights more than others: “*Attorneys . . . mobilize themselves only for individual rights*. These rights include mainly freedom of speech, of thought, of assembly, security rights, property rights and the right to justice and due process of law. With some exceptions lawyers have not fought outside this universe.” Lucien Karpik, *Political Lawyers, in FIGHTING FOR POLITICAL FREEDOM* 463, 465 (Terence C. Halliday et al. eds., 2007) (emphasis in original).

39. See Terence C. Halliday & Lucien Karpik, *Politics Matter: a Comparative Theory of Lawyers in the Making of Political Liberalism, in*

country, and over centuries, legally trained people have fought for political liberalism, democracy, justice, rule of law, and human rights. Even in authoritarian regimes, those who have been trained in law are often central to domestic human rights struggles, often by creating and maintaining autonomous courts that may provide relief from the worst repression.⁴⁰ As Halliday, Karpik, and Feeley wrote:

It is well known that the foundations of [political liberalism] were laid down in the eighteenth and nineteenth centuries by European states and in North America. It is less well known that lawyers frequently marched at the vanguard of these movements toward political liberalism. Historical and sociological studies demonstrate that legal professions often were active builders of the institutions of liberal politics. In a variety of ways, legal professions sought the moderation of state power via judicial independence, the creation and mobilization of a politically engaged civil society, and the vesting of rights in subjects as citizens who would be protected by judiciaries.⁴¹

In addition to the case studies that Halliday, Karpik, and Feeley mobilized for their volumes that show how lawyers have often been crucial to establishing a government based on respect for rights, there are other examples.

In 1930s Hungary, for example, anti-Semitism became state policy and the professions were ordered to comply, but the professions split in their responses. When Law XV of 1938 explicitly limited to 20

LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM 56-60 (Terence C. Halliday & Lucien Karpik eds., 1997) (reviewing the historic role that lawyers in several European countries and the United States have played in securing civil and political rights, in substance and in procedure); Karpik, *supra* note 39, at 463-64 (discussing the roles that attorneys in the United Kingdom, France, Germany, and the United States have played in transforming authoritarian regimes with liberal states). *See generally* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM (Terence C. Halliday et al. eds., 2007) (examining the liberal role of lawyers in illiberal regimes).

40. *See* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 13-14 (Tom Ginsburg & Tamir Moustafa eds., 2008) (suggesting that the “legal complex” is essential to keeping the excesses of state power in check, and providing examples of where aspects of the “legal complex” may still be judicially effective in an authoritarian regime, including in Taiwan where a bar association was integral in resisting the KMT political party).

41. Terence C. Halliday et al., *The Legal Complex in Struggles for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM 1 (Terence C. Halliday et al. eds., 2007).

percent the percentage of Jews in the professions, the only member of the cabinet to quit in protest was the Minister of Justice.⁴² The mainline bar organizations simply refused to carry out the law. Instead, “the[se] measures . . . were discretely sabotaged for over three years.”⁴³ The bar openly protested the law, while “[e]very loophole in the legislation was turned into a means of evasion.”⁴⁴

Was this open resistance to mandatory discrimination simply a reflection of the fact that the educated elite in general resisted this policy? Hardly. In fact, the role of other highly educated professions makes it clear that education alone did not produce resistance to infringement of rights. The engineers association largely kept quiet, though engineers engaged in a silent mathematical protest. They kept their Jewish members on board by simply increasing the number of Christian clerical staff so that the 20 percent was calculated over a larger denominator.⁴⁵ The doctors, however, not only flocked in greater numbers to the overtly anti-Semitic professional association, but took matters into their own hands to disqualify many of their Jewish colleagues from practice. When Hungary entered World War II in 1941, the doctor’s association helpfully provided to the Ministry of Defense a list of all of the Jewish doctors who remained in practice so that they could be assigned to physical labor service.⁴⁶ Among these three highly educated groups in inter-war Hungary, only the lawyers stood out by publicly protesting the discriminatory measures. Only *legal* education created professionals who felt that it was their special responsibility to fight for rights.

Professor Sen rightly notes that the *moral* obligation to defend

42. See MÁRIA KOVÁCS, LIBERAL PROFESSIONS AND ILLIBERAL POLITICS: HUNGARY FROM THE HABSBURGS TO THE HOLOCAUST 103, 107 (1994) (citing the Minister of Justice’s resignation letter in which the Minister explains that the discriminatory laws sought to expropriate others’ wealth, rather than building Hungarian society through work).

43. *Id.* at 106.

44. *Id.* at 107-08.

45. See *id.* at 114-15 (stating that the new positions went to “arch-Christian” hires, but that they often did little more than collect a paycheck while the Jewish engineers handled the workload).

46. See *id.* at 119-20 (noting that an anti-Semitic, anti-welfare medical organization also infiltrated the Chamber of Doctors and systematically disqualified Jewish doctors, so that only 6 percent of the board remained Jewish, as required by law).

human rights goes beyond narrow *legal* obligations. But, empirically speaking, those who have been trained in law are more likely to take personal risks to fight for rights, even when the formal law pulls in a different direction. Formal law can, and in autocratic and discriminatory societies generally does, pull in directions that compromise rights. But lawyers have been able to tell the difference between law that infringes rights and law that bolsters rights. Where formal law orders rights violations, lawyers are often in the front lines of protest.

So, while law is not enough to provide a full and guaranteed defense of human rights, I would counsel Professor Sen to regard lawyers as some of his best allies in his fight.

CONCLUSIONS

Professor Sen's body of work on the importance of human rights should be an inspiration to all of us. His Grotius Lecture brings to an audience of international lawyers some of the key elements of his defense of human rights. In this lecture, we can see his abiding sense that we all are obligated to do what we can to improve the lives of the millions—even billions—of people for whom the promise of human rights has not yet been realized. In honor of this year's Grotius Lecture, we should all recommit ourselves to the fight for human rights. Judging from the sheer number of people in the room and the enthusiasm with which Professor Sen's lecture has been greeted, I can see the Professor Sen's words have had their intended effect.

My remarks are designed to ensure that Professor Sen realizes that a giant ballroom full of international lawyers is the most supportive audience he can imagine, and that law is a better ally in his life's work than he knows. I hope Professor Sen's appearance at the meetings of the American Society for International Law will convince him that he can count on international lawyers as his allies.