

Entrepreneurial rights as human rights

**Why economic rights must include
the human right to science and
the freedom to grow
through innovation**

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Why economic rights must include the human right to science and the freedom to grow through innovation

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ISBN: 978-0-9932932-2-1

Citation: Aerni, P. 2015. *Entrepreneurial Rights as Human Rights: Why Economic Rights Must Include the Human Right to Science and the Freedom to Grow Through Innovation*. Banson, Cambridge, UK.

Published by Banson, Cambridge, UK.

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Acknowledgements

This book is based on an intense exchange with the human rights lawyer Paula Custer and the economist Bettina Naef. Their contributions greatly improved the quality and scope of the book. I would also like to thank Julia Thorson and Helen de Mattos for their thorough proofreading of the manuscript. Finally, I am also very grateful for the valuable feedback on the draft versions provided by Professors Walter Kälin, Thomas Cottier, Calestous Juma and Francis Cheneval.

Summary

The contemporary human rights debate is mostly concerned with the protection of people affected by change that is beyond their control. But what about those who make use of their basic economic rights to facilitate economic and social change? Do these agents of change need protection and, if so, how do their activities relate to the current debate on human rights?

In this book, we illustrate the historical importance of innovative entrepreneurs as agents of change who indirectly contribute to a more humane world by enhancing access to basic human rights. However, entrepreneurial rights¹ tend to be neglected in economic and legal theory as well as in the global debate on human rights. We argue that this neglect has its roots in the implicit assumption that entrepreneurs must surely know how to help themselves and therefore do not require special attention from a human rights perspective. In fact, many believe that successful entrepreneurs should automatically come under suspicion of disrespecting the economic rights of their employees. The fact is, however, that those most vulnerable to human rights offences, especially in the developing world, are those who have failed to obtain formal employment and are therefore entrepreneurs by default. They are ‘necessity’ or ‘survival’ entrepreneurs who primarily sell their skills on a temporary basis and on extra-legal terms. Lack of opportunity often forces them to migrate and pursue a living under precarious and unprotected conditions elsewhere. They seek change because

1. The Commission on Legal Empowerment of the Poor (hosted by UNDP) applies the term ‘business rights’ to specify the rights of entrepreneurs (UNDP 2008: Ch 4). A research project of the University of Zurich’s Competence Centre for Human Rights has introduced the term ‘entrepreneurial rights’ as more suitable to the idea that human beings have rights as entrepreneurial individuals (cf. Human Rights, Entrepreneurial Rights, and Legal Empowerment of the Poor: <http://www.research-projects.uzh.ch/p19910.htm>).

the *status quo* does not allow them to make a living. Change may enable them to find an opportunity to grow through innovation, but it may also lead to failure, loss and misery. In this context, the entrepreneur who struggles to survive and the entrepreneur who 'made it' cannot be viewed separately because both types must be regarded as agents of change who start their venture in a precarious state. They are often outsiders who challenge the unquestioned entitlements of the insiders who represent and benefit from the *status quo*.

As outsiders, entrepreneurs are motivated by the prospect of betterment. If the institutional environment allows them to succeed, they facilitate economic change, which may lead to social empowerment and enhanced economic opportunities for other outsiders. Throughout history, these agents of change have proved to be enablers of autonomy- and welfare-enhancing human rights – even if this might just be a side effect of their main pursuit, which is to translate their innovative business idea into something productive and revenue-generating through hard work. This explains why the economic rights of entrepreneurs are either directly or indirectly recognised in national constitutions and by the United Nations Universal Declaration of Human Rights. The right to grow through innovation must, however, be more broadly understood as a bundle of rights designed to protect entrepreneurial outsiders who seek an opportunity to make use of scientific knowledge to create new products and services.

Acronyms and abbreviations

AMC	Advanced market commitment
CSR	Corporate social responsibility
FDI	Foreign direct investment
Gavi	The Vaccine Alliance
GDP	Gross domestic product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and communication technology
IFC	International Finance Corporation
IP	Intellectual property
IPR	Intellectual property rights
IT	Information technology
NIS	National innovation system
MDGs	Millennium Development Goals
MNCs	Multinational corporations
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
R&D	Research and development
REBSP	Right to enjoy the benefits of scientific progress and its applications
RGTI	Right to grow through innovation
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGPs	United Nations Guiding Principles on Business and Human Rights

Chapter 1

Introduction

Innovative entrepreneurs who find commercially viable solutions to certain challenges in existing markets – or who even succeed in creating entirely new markets – have been a force of sustainable economic change throughout the history of mankind (Schumpeter 1942; Landes *et al.* 2012). Thanks to their ability to convert new knowledge – the only non-scarce resource on this planet – into new and economically viable goods and services, they not only generate private gains but contribute to social welfare in the long run (Baumol 2004). After all, the mere production of new knowledge is fruitless unless an entrepreneur makes use of it to create value (Arthur 2009).

Entrepreneurs operate in an institutional environment that may either enhance or constrain their ability to make use of new knowledge with regard to a particular economic activity. According to the political economist and Nobel Prize winner Arthur Lewis, ‘entrepreneurs flourish best (a) if social institutions are such that men think that they are getting the fruit of their efforts (and are thus not being exploited), (b) if trade and specialization are possible (and economic relations are on an impersonal basis), and (c) if there is freedom to maneuver economically (thus enabling vertical social mobility)’ (Lewis 1955: 103).

Even though Lewis argued that such conditions are crucial for social and economic empowerment, he also admitted that change cannot last unless it becomes embedded and accepted within the traditional, but informal, institutions that imbue a sense of duty, responsibility and obligation as well as obedience to imparted norms and values. As times change, however, those duties, responsibilities and obligations may alter and expand in scope and scale and eventually lead to the establishment of formal institutions not designed for small homogenous communities but a larger heterogeneous society (Lewis 1955).

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The fact that economic change causes a shift in the regulation of rights and obligations from informal to formal institutions means that developing societies with weak government institutions and large informal economies may face completely different human rights challenges from those faced by well-governed affluent societies with strong government institutions and a high degree of integration into the formal global economy (Copp 1992).

This basic distinction was not made in the United Nations Universal Declaration of Human Rights (UDHR) in 1948. Its framers were mostly representatives of economically advanced countries with strong government institutions and a comparatively high degree of economic integration with the formal global economy prior to the Second World War. The focus was on the recognition of the rights and duties of sovereign states and the joint striving towards a common goal – the prevention of war (Urquhart 1990). However, a legitimate state that is able to exert its rights and duties effectively depends on a prosperous domestic economy that makes essential goods and services widely available, along with citizens who pay taxes for the provision of public goods and are actively involved in the framing of the national interest (Aerni 2006a).

The driving forces behind the creation of a prosperous economy are entrepreneurs who make use of new knowledge and opportunities to create markets with increasing returns (Warsh 2007). As long as they grow through investment in the continuous improvement of existing products and services and the creation of new ones, they generate employment and thus contribute to an economically empowered middle class that is able to express its political concerns. Such an emerging middle class wants a state that treats people equally before the law and is able to enforce the rule of law. Active citizens pursuing their daily business want to be protected by the state, but at the same time be able to defend their economic rights against the state, understood as their freedom to pursue happiness for themselves and their families (Frankel *et al.* 1992). In other words, a state that is dedicated to serving the interests of its

people requires economically active citizens who are able to publicly articulate their needs and interests.

There is no optimal degree of protection afforded by the state, or of economic rights granted by the state. Instead, there is generally a policy mix tailored to the particular economic circumstances of a country, one which enables its government to effectively supply the desired public goods (Hirschman 1992). This aspect has so far been neglected in economic as well as legal theory.

In this book, we argue that neither neoclassical economic theory nor the prevailing legal debate on human rights is able to capture the value of entrepreneurs as creators of public welfare and enablers of human rights, because they fail to understand the long-term impact of innovative entrepreneurship on human development (Aerni 2007a). Entrepreneurs who grow through innovation are drivers of the transition from an informal to a formal economy. This does not mean that informal institutions related to culture, religion and daily habits are substituted by formal institutions, but that they become complementary and compatible with each other rather than mutually exclusive and antagonistic (Rodríguez-Pose 2013).

The process from an informal to a formal economy must therefore be induced from the inside, because institutions imposed by outsiders lack embeddedness in local informal institutions and hence public legitimacy. It is thus an endogenous process, driven by empowered local agents of change who feel constrained by the stratified assignment of rights and obligations in their existing hierarchical traditional communities and are frustrated with the lack of economic opportunities within their static informal economy. As local entrepreneurs, they wish to operate under reliable formal institutions that protect their rights as economic agents by allowing them to increase trade with other communities, reduce uncertainty in daily business transactions and be assured that they will be treated as equals, independently of their social status. Such economic rights

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become especially important when trade moves from a personal to an impersonal exchange, and thus goes beyond the informally regulated transactions within a community. The current discussion on economic rights as human rights therefore needs to go beyond the protection of labour rights primarily designed for insiders rather than outsiders. While insiders benefit from the *status quo* and therefore resist change through innovation, outsiders are likely to enable such change, not primarily to upset existing traditional structures but because they have no choice. The failure to obtain formal employment that could make them insiders forces them to find opportunities for self-employment (Lever and Milbourne 2014). This search for self-employment may always remain precarious, but it can also result in opportunities to grow through innovation if the entrepreneur manages to attract investors to launch a commercially viable new product or service. A growth-oriented entrepreneur would then create future formal employment and contribute to the successful integration of other outsiders into a social system that better ensures formal social and economic protection.

The current book is divided into four main parts. Chapter 2 argues in favour of a comprehensive understanding of economic rights as essential human rights that include labour rights as well as property rights. Examples of the transition from informal to formal economies in Africa as well as the history of African Americans in the United States are used to illustrate how property rights are crucially linked to the human right to earn a living. These economic rights enable outsiders to participate in the formal economy and thus also benefit from its social institutions. Even though the right to earn a living is directly or indirectly found in many national constitutions, it is hardly ever associated with a human right in international treaties.

Chapter 3 revisits mainstream economics and highlights its failure to recognise the intrinsic motivation of entrepreneurs as well as the beneficial welfare

effects they create through the development and commercialisation of innovation. The failure in economics to understand the true nature of the entrepreneur has been addressed by the development economist Albert O. Hirschman, who pointed out that an entrepreneur is much more than an emotionally passive utility-maximising unit called *Homo economicus* (Hirschman 1992). Instead, he is an intrinsically motivated agent of change from the margins of society, an outsider challenging the privileges of insiders and creating space for other outsiders to become insiders. As such, the entrepreneur is a facilitator of enhanced access to human rights and thus also a force for moral development. The fact that entrepreneurs generate positive welfare effects through innovation has been demonstrated by Paul Romer, the father of New Growth Theory. In his theory he uses the formal language of neoclassical economics to prove that it is not perfect competition but monopolistic competition, driven by entrepreneurs who strive to attain a temporary monopoly through innovation, that creates not just profits for the entrepreneur himself but also for the public at large (Romer 1994). The chapter further illustrates this by means of concrete practical examples in business, science and public policy.

Chapter 4 looks at the human rights discussion from an international legal perspective, exploring the question of whether a right to grow through innovation can be derived from international law. In this context, we show that there is a right to benefit from scientific progress in the UDHR, but this right has never been linked to other institutionalised systems – such as the protection of material and non-material property rights – which are required to convert new knowledge into innovation. Even though Article 17 of the UDHR addresses the protection of property rights, and the second paragraph in Article 27 addresses the protection of intellectual property rights, the protection of these rights has never been taken seriously in a moral sense because it is associated with big business and national interest rather than with small innovative entrepreneurs.

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Finally, Chapter 5 discusses the current understanding of human rights and corporate decision making in the field of business ethics, and shows that the principles on corporate social responsibility established in the so-called Ruggie Framework once again associate economic rights with labour rights, while tending to neglect the role of entrepreneurial rights.

In the concluding part of the book, we discuss such alluring slogans as ‘putting profits before people’ or ‘the world is not for sale’, and assess their consequences in terms of protecting the rights of agents of change. These popular campaigns ignore the fact that ‘fat cats’ are not the only players in the world of business. In fact, the most vulnerable people in our society, the ‘necessity’ or ‘survival’ entrepreneurs in rural areas in developing countries, may depend most on profit-seeking because they have no access to rent-seeking (De Soto 2015). And they are tolerated and supported only for as long as they remain necessity entrepreneurs – microcredit schemes, for example, are generally considered acceptable. But as soon as they aim for more, namely to move from informal to formal business, and thus become growth-oriented entrepreneurs, they are liable to lose support from large aid agencies, non-governmental organisations and government agencies. After all, the people these institutions are supposed to serve if they want to stay in the aid market are not poor entrepreneurs in developing countries but customers, taxpayers and donors in developed countries (Aerni 2006a).

The book concludes that we need to move beyond the binary categories that catchy slogans such as the ones above suggest. We have to learn to live with the ambiguity of economic and technological change driven by entrepreneurs who often come from outside the protected socio-economic system. They may create problems and cause new risks while enriching themselves. But, ultimately, they are also the ones who create opportunities for the future, which in turn help to reduce risks, problems and inequalities.

Chapter 2

Economic rights as fundamental human rights

2.1 Enhancing economic rights by shifting from informal to formal rules of business

The Nobel Laureate Arthur Lewis associates economic change primarily with a shift in the mode of governance from informal institutions involving kinship structures, traditions and social norms, to formal institutions in the shape of rules and regulations that apply independently of status and tradition (Lewis 1955). Unlike the informal economy, which cannot expand much beyond the realm of the well-organised homogenous community, the formal economy is subject to a set of enforceable rules that regulate trade and investment beyond cultural and legal borders. As a consequence, the formal economy can grow beyond the neighbourhood. In the process, it decreases the transaction costs of doing business with foreigners and attracts more investment in expectation of a larger reach of potential customers (Aerni 2006b).

Even though a growing formal economy can lift many people out of poverty through employment and welfare programmes created through increased tax revenues, this transition process from the informal to the formal is often associated with moral decay and social disruption. People tend to be especially concerned about the disappearance of the personal relationships and social capital associated with the design and enforcement of informal community-based rules, and the requirement to follow the unfamiliar and anonymous rules of the formal economy (Meijerink *et al.* 2014). Even European societies that moved from the informal rule of customary law to the formal rule of law over the past two centuries tend to stick to the informal rules and duties of their particular community. At the same time, however, these societies

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learned to embrace formal rules when dealing with people beyond their private realm. In other words, they learned to live in two worlds: the world of social exchange and the world of economic exchange (Ariely 2008). The transition from an informal to a formal economy is nevertheless a bumpy road littered with conflict and failure, especially in developing countries and peripheral regions within industrialised countries, where formal rules are perceived as having been imposed from the outside. This applies to the industrial transformation in Europe in the 19th century as well as the profound structural changes taking place in emerging economies at the beginning of the 21st century (Aerni 2007a).

Nevertheless, it may be wrong and counterproductive to long for a pre-industrial system, when life was largely governed by the informal and hierarchical institutions that had evolved within communities. These homogenous communities are characterised by shared values and norms, but also a strict and rigid social hierarchy largely attributed to God's will and the divine order. Rights and duties are correspondingly defined by status and not by the mere fact of being human (Jacobs 1994). Young people in traditional societies who seek change may leave the community unless they are given the opportunity to become entrepreneurs and thus contribute to change through innovation. For that to happen, traditional societies must show some tolerance of trade and exchange with the outside world and must welcome investment from companies involved in the global economy, as long as they are allowed to set the terms. The alternative to this partial market integration is not autarky and autonomy, as many people in affluent societies believe, but more dependence on subsidies and donations designed to ensure that the traditional cultural practices are preserved. Yet a culture cannot be artificially kept alive through subsidies; it must be able to change and renew itself, otherwise the younger generations will simply leave because they want to take an active role in shaping society and the economy, and not just be passive recipients of charity (Aerni 2006a).

2.2 Lessons learned from African American history: economic rights as a precondition of political empowerment

Arthur Lewis was an economist from the Caribbean with African roots. His background made him aware of the fact that traditional norms and values can be very oppressive and result in cruel offences against human rights. The political scientist Robert Gooding-Williams, in turn, pointed out that excluding African Americans from formal business and active participation in civic institutions constituted an essential part of the informal norms and values of the white ruling class in the United States – long after the Civil War ended slavery in the mid-19th century (Gooding-Williams 2011). These informal institutions stood in direct opposition to the formal institutions created by the country's founding fathers. In the Virginia Declaration of Rights¹, for example, it is stated that men have a right to acquire property, which, if acquired, gave them a right to participate in the economy as well as a right to social protection (Sandefur 2010).

This right to acquire property had been denied to former slaves after the abolition of slavery because it was considered morally inappropriate for a white person to engage in trade or enter into contract with a black person. As a consequence, white people refrained from buying goods and services from black people in exchange for money – which would have enabled black people to acquire formal property. They feared this would violate the hierarchical values and norms of the community in which they were embedded, when informal duties and rights were still linked to status and did not apply to human beings of a different race. Former slaves were thus denied integration into the booming national economy of the United States. They remained outside the formal legal and economic system,

1. Article 1 in the Declaration states that 'all men are by nature equally free and independent, and have certain inherent rights of which...they cannot deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. This was again reiterated in the first paragraph of the US Declaration of Independence as 'we hold these truths to be self-evident, that all men are created equal, and are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness'.

which made them criminals by default and thus confirmed existing stereotypes (Appiah 2011a). Unfortunately, even the most influential and venerated leader of the black empowerment movement of the early 20th century, W.E.B. Du Bois, was primarily concerned with political rights as a condition for empowerment – rather than with economic rights. The lesson learned at the beginning of the 21st century, however, is that political empowerment without economic empowerment is not sustainable (Appiah 2011a; Gooding-Williams 2011).

2.3 Lessons learned from European history: the idea of equal human rights has its roots in the struggle for economic rights

A further confirmation that human rights should start with economic rights rather than political and civil rights can be found in the history of Europe itself. The feudal European concept was based on Roman law, in which the broader notion of rights was considered a by-product of the duties and rights attached to status. As individual and natural creatures, people had no rights as such. The radical concept of equal rights only became real when medieval merchants made it explicit in contractual law. The law recognised the right of individuals, no matter who they were and what kind of social status they had, to make contracts that they thought would help their particular commercial interest (Jacobs 1994). Hence the push for equal individual rights started with an emphasis on economic rather than political rights. The humanists of Renaissance Italy also saw a positive role for growth through innovative entrepreneurship in society because it liberates the entrepreneur from constraints and elevates him through ‘magnificence’ (Goldthwaite 2009). In turn, the innovation created by the entrepreneur helps others in their efforts to liberate themselves (Kessler 2008; Grafton 2010). This is a strong indication that the struggle for economic rights was based as much on egalitarian principles as it was on the struggle for political rights. It was driven by the desire to overcome the constraints of hierarchical law in order to be able to live a dignified life.

Increased economic rights in early Renaissance Italy therefore laid the foundations for economic empowerment and opportunities for upward mobility among

ordinary people on a scale never before witnessed in Europe (Goldthwaite 2009). It was a precondition for the emergence of the modern democratic state and a market-based economy.

2.4 Economic rights in national constitutions and international treaties: lack of consideration of outsiders

The protection of economic rights continues to be part of numerous democratic constitutions. It is embedded in the concept of *Berufswahlfreiheit* (freedom of trade, occupation and profession) in Germany and the equal protection clause of the 14th Amendment in the United States. The protection of economic rights is also found in the United Nations Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), derived from the UDHR. In accordance with the UDHR, the Preamble of the ICESCR recognises that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. But the realisation of these autonomy-protecting (political, cultural and civil) and welfare-promoting (economic and social) rights is contingent upon favourable circumstances. Very few of these rights could be implemented without state action involving the expenditure of resources. In a society with unfavourable circumstances, the state may nevertheless have a fallback duty, meaning that it is merely required to ensure procedural (rather than substantive) equality, giving each person a chance to reach an adequate standard of living through the freedom to engage in commerce, considered a requirement for both autonomy-protecting and welfare-promoting rights (Copp 1992). Consequently, the right of entrepreneurs to grow through innovation may be an important right in terms of procedural equality but not in terms of substantive equality.

Part I, Article 1, Paragraph 1 of the ICESCR states that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Yet when

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specifying economic rights in Part III, the Covenant almost exclusively focuses on the protection of labour rights while paying little attention to the economic rights of those who have freely chosen to become opportunity entrepreneurs, or have been unable to obtain employment in the formal economy and thus been forced to make a living as necessity entrepreneurs (Brewer and Gibson 2014). It is therefore not surprising that today's discussion on economic rights largely revolves around the protection of formally employed citizens. Migrants and other necessity entrepreneurs who are often forced to operate as outsiders in a semi- or extra-legal environment do not benefit from these economic rights. This is particularly true for those who sell their labour on a temporary basis (Lever and Milbourne 2014). They often do so with no formal employment contract and thus remain largely excluded from social protection. It is well documented that necessity or survival entrepreneurs in Sub-Saharan Africa, who either seek a meagre living in the informal sector of their own countries or migrate to more formal economies elsewhere, enjoy the least access to basic political and cultural rights because they cannot count on the protection of their economic rights (Lewis 1955; Aerni 2011; Berner *et al.* 2012). United Nations institutions, particularly the United Nations Development Programme (UNDP)², and academic institutions such as the University of Zurich³, have started to explore the importance of entrepreneurial rights for human development by focusing largely on the needs of survival entrepreneurs, those who are self-employed not because they wish to be but for lack of employment opportunities. In UN Resolution 67/202 (UN 2012a), the UN General Assembly explicitly recognises the contribution of entrepreneurship to sustainable development. As the international community works towards formulating a post-2015 development

2. UNDP looks at the Rights to Livelihood and Entrepreneurship (http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/legal_empowerment/focus_areas/rights_to_livelihoodentrepreneurship.html).

3. The University of Zurich is exploring Human Rights, Entrepreneurial Rights, and Legal Empowerment of the Poor in a project funded by the Swiss National Science Foundation (<http://www.research-projects.uzh.ch/p19910.htm>).

agenda (succeeding the Millennium Development Goals of 2000–2015), member states have recognised that the promotion of entrepreneurship can support the objectives of the recently established Sustainable Development Goals (SDGs). Yet, so far, the Open Working Group on SDGs, set up in 2013, has included the role of entrepreneurship only in an indirect way. The SDGs currently contain 17 goals and 184 targets. Under Goal 4 on education, Target 4.4 calls for an increase in the number of young people and adults who have relevant skills, including technical and vocational skills, for employment, decent jobs and entrepreneurship. Under Goal 8 on promoting economic growth, Target 8.3 calls for the promotion of development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation. A recent report of the United Nations Conference on Trade and Development to the Secretary-General (UNCTAD 2014) points out, however, that informal enterprises may not be conducive to sustainable development unless they are supported in their efforts to become formal businesses with property ownership rights and enhanced access to business services and finance (UNCTAD 2014).

This argument challenges the often-heard stereotype that entrepreneurs represent the capital employed to repress labour and the poor. Even though Thomas Piketty does not endorse such a stereotype in his book *Capital in the 21st Century*, he nevertheless reveals a reductionist and rather static understanding of capital, since he identifies it merely by what the rich declare as capital in their tax declaration (Piketty 2014). Much of that capital, however, is reinvested in the firm and in promising entrepreneurial talents. This reinvestment in talent can result in capital gains and dividends, but it also generates new jobs and economic growth and reduces poverty through social mobility. This also applies to the talented and skilled poor in developing countries. Their dream may be to get formal employment in a governmental or non-governmental organisation or to work for a successful global company. But if that dream does not come true due to nepotism and the stigma of poverty, they should nevertheless get a chance to build up a business on their own by

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using their own assets, such as their legal title to property, and through enhanced access to business services, training and investment.

Empirical research by the Lima-based Institute for Liberty and Democracy showed that even for the poorest people, their capital – the fixed assets they own – is more important than the salary they earn as a source of income. A survey conducted by the same institute sought to identify the main causes of self-immolation among young Arabs in 2010, which triggered the mass protests in the Middle East and finally led to what is popularly known as the Arab Spring. Interviews conducted with friends and relatives of the 63 people that committed this kind of suicide revealed that they were all entrepreneurs negatively affected by arbitrary expropriation, corrupt agencies in charge of approving business permits, and the denial of access to formal capital (De Soto 2015). Not one of these martyrs seems to have mentioned a lack of political and religious rights as a major source of grievance (De Soto 2015). All this reveals that the poor do not make a big distinction between labour and capital as Piketty assumes. Their fight is not against capital in the Marxist sense. Instead they fight for the right to have access to capital.

As informal necessity entrepreneurs with no access to the formal economy, young people in developing countries are forced to operate in an environment that offers little opportunity for growth (Amorós and Cristi 2011). They lack a lobby in the political and economic realm that would be prepared to fight for their rights. Often, they are in fact portrayed as potential criminals who undermine the norms and values of people with formal employment and formal citizenship (Braudel 2002: 262). After all, migrant entrepreneurs seeking employment and business opportunities abroad represent a potential threat to the high standards of labour protection and advanced rights of citizenship achieved in affluent countries (Lindbeck and Snower 1989). But, ultimately, the economic rights of the employed as well as those seeking employment depend on the presence of a strong and entrepreneurial private sector that generates formal employment and taxes to support an expansive welfare state (Olson 1984).

In some ways, the growing share of migrants today is similar to the situation of former slaves who, after the Civil War in the United States, migrated from the southern part of the country to the north to find ways to make a living in the absence of any enforcement mechanism protecting their economic rights. At the time, they also represented a threat to existing values and norms among the incumbent white society, and thus tended to cause moral outrage and fear rather than a sense of moral obligation to support them.

2.5 Insiders have a different understanding of human rights from that of outsiders

Scholars such as Arthur Lewis and, more recently, Calestous Juma (2013), have argued that economic and political rights cannot be wished into existence. Instead, they need institutions to come into being, and these institutions are the result not only of a history of struggle but also of political compromise. Today, many people in affluent countries have forgotten about the achievements of their predecessors, and tend to take their political and economic rights for granted while looking uncomprehendingly at less developed countries that are apparently unwilling to respect and enforce these rights (Hirschman 1992). This comparative static framing leads to the general perception that economic growth represents a threat to existing rights and entitlements, rather than an opportunity to enable a larger share of the global population to enjoy basic human rights thanks to economic empowerment (Schumpeter 1942).

Lewis and Juma argue that inclusive economic growth is a basic enabler of human rights, creating economic opportunities for those who cannot count on the protection of their economic and political rights (Lewis 1955; Juma 2011). However, institutional change is necessary to jump-start economic growth, and economic growth in turn is necessary to create acceptance of institutional change in society and to constrain the power of those stakeholders who favour the *status quo*. Change therefore reinforces itself cumulatively (Lewis 1955: 143). As a result, the economy moves from largely informal transactions within a well-

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defined socio-cultural space towards more formal rules that enable trade and investment across cultural and political boundaries. It is this process that eventually de-couples rights and obligations from status, creating a tax-paying and economically empowered middle class that makes better use of its political rights by articulating its interests through national politics. A politically empowered middle class is again a prerequisite for a stable democracy and helps enforce the protection of individual rights independently of status (Aerni 2006a).

Alas, Arthur Lewis' optimistic prediction that informal economies will increasingly become formal and thus enhance the share of formal employment did not come true, especially in those regions that are highly dependent on foreign aid, but also in affluent countries where the extensive legal protection of labour has made it very expensive for companies to formally hire new employees. As a consequence, the level of temporary employment is increasing (Beck 2000). The resulting trend of dividing the world into insiders and outsiders is a threat to the egalitarian approach that was first pursued by medieval merchants. Again, rights and duties are assigned based on status, and this status is increasingly taken for granted.

In Africa, the informal economy continues to expand due to lack of employment opportunities in the formal economy and the absence of a legal and economic environment that would enable informal business to move into the formal economy and thus become better connected to the knowledge and investment frontiers that would allow them to grow through innovation (Becker 2004; Benjamin and Mbaye 2012). Ironically, this development takes place at a time that aims to enhance the protection of human rights through improved access to basic goods and services, as illustrated by the aims of the Millennium Development Goals and Rio+20. Yet, since the focus of the foreign aid community is on global governance to improve political rights rather than the economic rights of entrepreneurs, efforts are unlikely to bridge the increasing divide between insiders and outsiders by fostering economic empowerment through entrepreneurship and innovation.

Chapter 3

Economic theory and human rights

3.1 Innovation and entrepreneurship for human welfare

According to Joseph Schumpeter (1942), market-based economies continuously evolve through ‘creative destruction’, a term he adopted from Marxist economic theory. This evolutionary process of destruction and creation of economic value is driven by entrepreneurs who seek, discover and exploit new opportunities in a particular context. They make use of new knowledge and opportunities to generate new markets that challenge the incumbents of existing markets (Schumpeter 1934). While entrepreneurial decisions and actions are shaped by their social environment, they also influence and transform this environment by creating and launching new products that meet a particular demand in society and shape new customs and modes of living (Arthur 2009).

Today’s global knowledge economy¹ provides major opportunities for innovative entrepreneurs to access and experiment with new knowledge, build new prototypes and seek investment to bring them to market. This emerging trend of democratised innovation may result in much more user-centred innovation processes, where users become local entrepreneurs who mobilise their networks and apply their tacit knowledge to innovatively tailor goods to the needs of local markets – markets that are not usually served by the large manufacturers that drive capital-intensive innovation processes (Hippel 2006).

1. The knowledge economy can be defined as ‘production and services based on knowledge-intensive activities that contribute to an accelerated pace of technical and scientific advance, as well as rapid obsolescence. The key component of a knowledge economy is a greater reliance on intellectual capabilities than on physical inputs or natural resources’ (Powell and Snellmann 2004).

The large manufacturers must still be part of the entrepreneurial ecosystem, however, since they are ultimately the important customers, business partners and investors of small innovative companies. Partnering with them also makes sense because small companies can benefit from the distribution channels and in-house expertise of large ones. Large companies, in turn, are interested in tapping the capacity to innovate of small ones (Austin and Leonard 2008).

This kind of user-centred innovation has great potential to empower not only educated users in wealthy societies but also poor people in developing countries where markets are underdeveloped. For resource-scarce but innovative leaders to come up with new or modified goods for marginalised groups, however, there must be a facilitating policy that enhances incentives to invest in people's education and supports their efforts to become entrepreneurs with access to networks, credit and know-how. The creation of incentives and structures to encourage innovative entrepreneurs to take the lead in seizing opportunities and thereby trigger a process of endogenous development is crucial (UN Millennium Project 2005).

3.1.1 Creating youth employment through policies that facilitate economic change

In developed countries, a supportive entrepreneurial infrastructure provides opportunities and incentives to start a venture and grow through innovation. The entrepreneurs who make use of this infrastructure do so not because they have failed to gain formal employment but because they are driven by the desire to be their own bosses and to help shape the future through innovation (Hippel 2006). In developing countries, on the other hand, the situation is often quite different: people become entrepreneurs because there are no other options to earn a living. At the same time, the informal institutional environment and the lack of entrepreneurial infrastructure may obstruct their success rather than encouraging them to innovate and employ people (de Soto 2015; Baumol *et al.* 2007; World Bank 2008).

The obstacles to creating a formal business that are faced by local entrepreneurs in developing countries may help explain why youth unemployment has become one of the biggest problems in developing countries, especially in Africa and the Middle East (ILO 2013).

It may also explain why Arthur Lewis's prediction (1955) that developing countries will eventually move from an agriculture-based economy characterised by informal transactions to an industry-based economy dominated by formal transactions did not come true in Africa in the 20th century but turned out to be correct for Asia. Unlike in Africa, many Asian governments became facilitators and not just regulators of economic change. They took advantage of the almost unlimited labour supply in rural areas to promote industrial development in urban settlements through the creation of Township and Village Enterprises (TVE) (Huang 2008). This urban-based growth created remittances and investment for rural areas, which then helped the people back home to build assets and private safety nets for the family at large. It is true that salaries and worker safety for migrants in Chinese cities are poor, and migrants everywhere are often unable to access the essential urban public goods and services that incumbent residents enjoy. However, once the unlimited labour supply is exhausted, according to the argument of Arthur Lewis, continuous economic growth will lead to increasing real wages and more rights for migrants (Lewis 1954; Lewis 1955; Becker 2004; Fields 2004).

The experience in Africa has so far turned out to be different. The informal economy there has not been shrinking but has actually expanded (ILO 2009). Since African governments have tended merely to strictly regulate rather than to facilitate technological and economic change (Juma and Serageldin 2007), largely following the advice of Western donor agencies, the formal labour markets have failed to generate enough jobs to absorb the growing, often unskilled workforce operating in the informal economy. Excessive regulation, lack of access to finance (apart from microcredit schemes set up by donors

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and large-scale loans through the International Finance Corporation (IFC) of the World Bank), a lack of business education and training, and high transaction costs for starting or running a business have all hindered informal enterprises in their efforts to enter the formal sector (Becker 2004; Baumol *et al.* 2007).

Some may argue that informal business better suits African culture and tradition. But unfortunately, informal transactions are very limited in their geographical reach and thus in their growth potential. They therefore generate less employment for the economy than formal enterprises that can grow beyond the realm of social exchange. Legal uncertainties as well as the lack of enforceable property rights imply considerable risk and prevent informal businesses from attracting investment and scaling up (De Soto 2000). Furthermore, high transaction costs prevent investment in the production of new goods and services and thus limit opportunities to grow through innovation. Proof of the difficult situation for doing formal business in Africa is the World Bank's recent *Doing Business Report* (World Bank 2013). In its ranking of favourable institutional conditions for doing business, only Rwanda (31) and South Africa (41) were ranked within the top 50 countries, whereas out of the 50 countries at the very bottom (139–189), 35 are in Africa. Even though some have made considerable progress, including Rwanda and Côte d'Ivoire, many have again fallen in the ranking due to civil strife and corruption, as has been the case for South Sudan, Libya and Angola.

Due to the resulting lack of capital as well as the limited access to relevant business knowledge and new technologies, people with a less privileged background are often in a position neither to innovate nor to scale their venture. This results in an increasing economic divide between people who are part of the formal economy (insiders) and able to advance and participate in economic progress, and those who are excluded from it (outsiders), and therefore trapped in a stagnating environment, dependent on support from the outside to solve environmental, social and economic problems (UN Millennium Project 2005).

3.1.2 Enhancing access to human rights by converting outsiders into insiders

The creation of an entrepreneurial infrastructure would help to convert outsiders, understood as entrepreneurs hindered by the formal economy, into insiders, understood as entrepreneurs integrated into the formal economy and thus able to access capital to invest in the development and commercialisation of new products and services. This would jump-start endogenous economic growth, creating welfare and social empowerment for those who were previously excluded. Unfortunately, the need to convert outsiders into insiders by promoting entrepreneurship and innovation is often neglected in international development assistance and strategies to alleviate poverty – and it is also not addressed in economic theory. Looking at the Millennium Development Goals (MDGs), for instance, the issue of entrepreneurship is only indirectly addressed in the last target of Goal 8 (Target 18), which sets down the objective to, ‘in cooperation with the private sector, make available the benefits of new technologies, especially information and communications technologies’ (UN Millennium Project 2006). It reflects the fact that current development policy strategies still start from the unquestioned baseline assumptions of neoclassical economics that ignore the beneficial welfare effects and other positive externalities produced through entrepreneurship and innovation (Aerni 2011).

3.2 The problem with the baseline assumptions of neoclassical economic theory

There is no scarcity of policy recommendations on how to fight poverty in developing countries and improve human rights, considering all the UN reports linked to the MDGs and beyond. However, most of the authors of these policy recommendations are economists who were trained during the Cold War era. According to the economist Albert O. Hirschman (Hirschman 1992), they have been taught that economic activities have nothing to do with morality but have only one single and predictable purpose, namely to maximise an exogenously generated individual utility. A government, for its part, would strive towards

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maximising social utility (based on the presumed existence of aggregated social preferences). Policy recommendations are then based on the assumption that there is a rational social planner able to detect aggregated social preferences and implement them accordingly through social planning (Hindriks and Miles 2013). However, since voting is unable to produce rational social choices, aggregated social preferences can only exist if ‘many wills’ are substituted by one ‘single will’, which would be incompatible with a free society (Boettke and Leeson 2002). Moreover, aggregated social preferences cannot claim to represent an exogenously given ‘public interest’ but are actually shaped endogenously by political interest groups (Buchanan and Tullock 1962).

The application of these inconsistent baseline assumptions of neoclassical welfare economics to public policy also has fatal consequences for the definition of economic rights as human rights. Since the activities of entrepreneurs are merely studied in instrumental and utilitarian terms, the theory is silent on the moral dimension of protecting the rights of entrepreneurs and on the need to support them in their efforts to enable change. Economists therefore often have no convincing answers when entrepreneurs are portrayed in the media as greedy agents of unwanted change seeking profits at the expense of the poor, political stability, national identity, food security and the environment. After all, the idea of a utility-maximising, egoistic and materialistic *Homo economicus* is very much in line with the ‘greedy capitalist’.

Resentment against entrepreneurs as agents of change has a long history. Starting from justified outrage at some cases in which short-term profits indeed resulted in costs to society and the environment, the sweeping regulatory response mostly ends up affecting small innovative entrepreneurs, rather than large opportunistic companies that move on to exploit loopholes elsewhere or otherwise benefit from costly regulation thanks to the resulting increasing barriers to market entry (Aerni 2011). Public hostility towards entrepreneurs as greedy agents of change may thus also lead to a decrease in investment in new

technologies that, though risky, could for example facilitate a global bioeconomy with less dependence on petroleum (EC 2012). It may also delay the fruits of the Schumpeterian process of technological change. This process often starts with an expensive, clumsy, risky and not very useful prototype with little market potential and ends up with a cheap, safe and very useful mass-market technology that leads to social empowerment and thus creates genuinely positive effects on public welfare (Schumpeter 1942). This insight can be gained from the history of science and technology (Hutchinson and Rachel 1971; Maddison 2007; Mazzucato 2013), but not from neoclassical economic theory because neoclassical economics is unable to capture the endogeneity of technological change in its full historical dimension.

3.2.1 Remembering the ‘doux commerce’ hypothesis

Albert O. Hirschmann was one of the most prominent critics of mainstream economics in the 20th century. In his historical analysis of the discourse on the role of commerce in society, he highlights the fact that the early philosophers of enlightenment recognised the positive role of commerce in human welfare. Montesquieu in *De l'esprit des lois* (1748) observed that wherever there is commerce, manners are gentle. Condorcet in *Esquisse d'un tableau historique des progrès de l'esprit humain* (1795), Thomas Paine in *Rights of Man* (1792), and later Durkheim in *De la vision du travail social* (1893) and Georg Simmel in *Soziologie* (1908), argued that commerce can also promote social virtues such as truthfulness in trade. And even though they all admitted directly or indirectly that commerce can produce moral hypocrisy, they ultimately saw it as the only alternative to violence.

This view of *doux commerce* (gentle commerce) was questioned during the age of industrialisation in Europe in the 19th century. Commerce was suddenly regarded as a force that undermines pre-capitalist and pre-industrial morality – considered protestant virtues by Max Weber – as the foundation for economic individualism (Hirschman 1992). This so-called ‘self-destruction hypothesis’ has

remained very popular until today. Jürgen Habermas's warning that economic thinking is increasingly colonising the life-worlds (*Lebenswelten*) of people or Fred Hirsch's thesis of the 'depleting moral legacy' of capitalism (Hirsch 1976) are very much in line with this reasoning – and it finds its confirmation in the understanding of the human being in mainstream economics as the amoral, personal utility-maximising *Homo economicus*. Hirschman argues that this crude reductionism of human nature served economics well in making the discipline more mathematical. A rational, omniscient and utility-maximising individual who is defined by means of exogenous material preferences can be easily formalised as a decision maker on the micro- and the macro-scale, and predictions on economic and political outcomes can be made accordingly. But with it, in their efforts to use the language of mathematics and emulate the exact sciences, economists sacrificed a proper understanding of human nature. There is also a big difference between economics and the natural sciences, because economics, in most cases, does not study reversible processes that can be reliably tested under highly controlled conditions in the laboratory but irreversible processes, as economic decisions take place in time and space (Diamond and Robinson 2010). History is therefore of crucial importance for the proper understanding of economic decisions. The history of humankind as well as individual human development should teach economists that the *doux-commerce* hypothesis is still valid because even though the peaceful life of commerce may produce some shallowness and sometimes undermine the public spirit of citizens, the individual pursuit of profit generates positive side-effects for society if these profits are invested in innovation and trade that eventually enhance human welfare. In other words, unlike war, commerce is not a zero-sum game in which the losing party is completely deprived of its rights and property while the winning party appropriates everything (Wright 2001).

Hirschman makes the following argument in this respect: 'Economists who wish the market well have been unable, or rather have tied their own hands and denied themselves the opportunity, to exploit the argument about the integrative

effect of markets' (Hirschman 1992: 123). After all, the baseline assumption that perfect competition is organised by utility-maximising human units represents the foundation for an ideal market. Under perfect competition there is no room for bargaining, negotiation, remonstrance or mutual adjustment, and the various operators that contract together need not enter into recurrent and continuing trust-based relationships. This tendency of markets to lead towards social integration over time is in fact often condemned by economists as 'collusion' or 'conspiracies against the public', as Adam Smith argued.

3.2.2 Monopolistic competition as a source of public welfare

Neoclassical economic theory explains the growth of an economy's output with the inputs of labour and capital. In a market of perfect competition, this leads to productivity increases since market players can only stay in the market if they are able to produce more output with less input. In this context, the adoption of technological innovation may increase efficiency by helping to produce more with less (Solow 1956). However, where does the production of new knowledge and its conversion into innovation come from? It is unlikely that knowledge is produced only in the public sector. There is overwhelming evidence that the private sector also invests significant amounts of money in research and development (R&D) in order to convert crude knowledge into commercially viable new products and services. But how can market players who compete in a market of perfect competition invest in R&D if they are unable to produce any surplus? After all, in a market of perfect competition, they always produce at the point where marginal revenues meet marginal costs and thus can only remain in business through cost-saving measures on the input side (Romer 1993).

The introduction of new goods and services and thus the creation of new markets can only take place if there is monopolistic competition, with market players seeking a temporary monopoly through innovation, allowing them to make a profit (a temporary rent) thanks to their temporary price-setting power. This rent makes it possible to reimburse the fixed costs required to develop and

commercialise the innovation while simultaneously investing in the subsequent improvement of the innovation (Romer 1994). This process of endogenous technological change (Romer 1990) explains why our global economy is characterised by the continuous introduction of new goods and services.

If an institutional environment encourages the production of new goods and services, and thus monopolistic competition, it generates increasing rather than decreasing returns (as is the case with commodities in perfect competition). Increasing returns contribute to human welfare in general and the creation of employment in particular. The factor input that makes all this possible is *knowledge*, understood as a non-rival but partially excludable good. Knowledge is the only non-scarce resource on the input side and its value even increases with greater use. If we look at the development of total factor productivity (TFP)² over the past century, it becomes evident that its rapid increase cannot merely be attributed to rising productivity in the use of land, labour and capital. TFP is not just a 'residual' that accounts for growth over time, as the neoclassical economist Solow (1956) assumed. Instead it turns out to be at least as important as the measured factor inputs (Jones and Romer 2009). While it is generally accepted that the spread and economic use of new knowledge significantly contribute to economic growth in developed countries in general and innovation clusters in particular, the contribution of knowledge to catch-up growth in developing countries is not as extensively investigated. Moses Abramovitz (1956) argued in his catch-up growth hypothesis that the ability to import and implement technology from the United States played a key role in Western Europe's economic growth after the end of the Second World War. However, as Jones and Romer (2009) noted, today's accelerating catch-up growth rates occurring simultaneously with large income differences across developing

2. Total factor productivity (TFP) is the portion of output not explained by the amount of inputs used in production. As such, its level is determined by how efficiently and intensively the inputs are utilised.

countries are more attributable to the effect of the information technology (IT) revolution (making knowledge more freely accessible), increasing investment in human capital and rising urbanisation rates. These trends allow developing countries in the 21st century with relatively high population growth rates to catch up much faster than ever before – provided that historically well-tested national institutions are in place that permit countries to take advantage of global economic and technological change and thus enable the economic empowerment of their people. Developing countries that adopt rules favourable to economic and technological change while ensuring that the inflow of goods, services, investments, knowledge and human capital leads to inclusive rather than exclusive growth, are able to significantly reduce inequality within their country by creating new employment opportunities and enabling outsiders who struggle in the domestic formal economy to become innovative entrepreneurs. Conversely, if a country decides to embrace rules that tend to discourage global knowledge exchange and foreign direct investment, and to prevent entrepreneurial outsiders in the domestic economy from challenging the established rent-seeking insiders, then the process of economic and technological change can quickly go into reverse and thus produce more inequality than in a previous period when catch-up growth was much slower (Romer 2010). The resulting economic divergence is a process that still puzzles neoclassical economists in the 21st century. They are unable to counter Piketty’s claim (Piketty 2014) that inequality is not an accident but rather a feature of capitalism, because their comparative static equilibrium models do not take into account the role of rules and their effect on the introduction of new goods and services. So their models continue to predict economic convergence with modest gains from trade – not divergence.

3.2.3 Population growth as an asset rather than a liability

The mobilisation of knowledge for development is also an essential factor in efforts to ensure access to welfare- and autonomy-enhancing human rights. Statistical evidence indicates that traditional inputs only account for half of the national differences in economic output per person (Jones and Romer 2009). It

suggests that the use of ideas³ – knowledge in the form of recipes, techniques, instructions and protocols that can be applied to develop new products – may indeed be the most important contributor to economic growth. The likelihood that ideas are used and productively applied in the economy increases if institutions are in place that encourage the adoption of new ideas. A precondition for the adoption of new ideas is the availability of human capital able to properly apply, adjust, improve and manage them. From this point of view, population growth may not be a liability but an asset because, if society invests properly in the education and skills of its members, increasing numbers of people are likely to adopt and even generate ideas (Boserup 1981). Since technological change is cumulative in nature (Arthur 2009), this leads not just to more opportunities for further growth and employment, forcing fewer people to migrate in search of a better life, but also to improved solutions to the environmental sustainability challenges of producing more with less, and greater access to welfare-enhancing human rights (Mallaby 2010).

3.2.4 Intellectual property rights (IPR) as an economic right

There are virtually unlimited possibilities for converting knowledge into new goods and technologies. The application of knowledge to economic development, however, requires knowledge to be a partially excludable good. This is especially true in the age of IT. While the production of new knowledge remains very costly owing to the expense of research and development (R&D), IT makes its replication very cheap (Romer 2010). A company that invests in the development of a new good or service must have reasonable certainty that it can eventually reimburse the high fixed costs spent on R&D by asking for a product price that is higher than the marginal cost of its production or by obtaining a licensing fee from competitors that also aim at commercialising the product or something derived from it. Other

3. 'Ideas' do not just include technologies and manufacturing processes but are also embodied in customers and institutions, i.e. in rules and norms. Hence, while an economy that does not invent new technologies may grow more slowly, one without proper rules will not even be able to make use of all the existing technologies (Mallaby 2010).

market players would thus need the creator's approval to sell the same product and compete. The partial excludability of knowledge provides a company with a temporary monopoly but does not save it from fierce monopolistic competition – if, for example, other companies try to innovate around it – and since the dependence on proprietary technologies owned by other companies is likely to increase, sharing technology (e.g. ensuring access through cooperation agreements or patent pooling) may become more important as a competitive strategy than excluding others from the use of a new technology. There is no doubt that IPR protection can be abused by large companies that seek to extend the scale and scope of the protection. Therefore mechanisms should be in place to ensure that IPR protection does not become an obstacle to innovation and access to essential goods and services but rather facilitates them (Cottier and Mavroidis 2003).

The protection of intellectual property rights must nevertheless be taken seriously as an economic right because, ultimately, it is the innovation-driven entrepreneur rather than the large company who is most dependent on this right in order to challenge the incumbents of an existing market or create a new market. Over time, IPR protection has anyway been eroded in many industries because, thanks to modern information and communication technology (ICT), it has become much easier to imitate and circumvent protection. Furthermore, the increasing amount of regulation designed to protect people from the potential risk of innovation has increased the cost and uncertainty for small innovative companies who quickly run out of liquidity if the approval of their innovation is delayed for political reasons. These delays again help the incumbents of industry because they serve as barriers to market entry and help increase industrial concentration (Aerni 2013b). Obtaining a patent confers no affirmative right to practise (Burk and Lemley 2009). As a consequence of the increasing cost and uncertainty of innovation, many companies decrease investment in the development of new products and services and instead prefer to pay out more dividends to shareholders and/or allocate profits to stock buy-backs, which represents a shift from value creation to value extraction (Lazonick 2014). All this comes at the expense

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of sustainable long-term growth and public welfare creation through private-sector investment in innovation.

High-value patents are often filed by small start-up companies rather than large corporations. For them, IPR protection is essential to attract investment and eventually disrupt an existing market or create a new market through ground-breaking innovation. It is their only asset and their only way to challenge the incumbents of industry. Finally, even very poor survival entrepreneurs can be innovative, mostly out of necessity. Their low-tech innovation can be protected through utility models⁴ in many countries by means of patent protection or industrial design (Suthersanen 2006). This helps them to invest more in the production of their innovative products and allows others in other regions to learn about the innovation and make use of it elsewhere – with the permission of the original innovator for a limited period of time (five to seven years). This has worked well in India's honeybee network⁵, which aims to produce economic change in rural areas through the adoption and tailoring of low-tech innovation⁶.

An enabling environment for the creation of ideas and their commercial use is therefore vital for economic development, but it is hardly ever recommended by policy experts trained in neoclassical economics. They see the main function of government in regulating rather than facilitating change. Neoclassical welfare economics implicitly assumes that economic activities produce negative externalities for society and the environment that have to be internalised through social and environmental regulation (Mazzucato 2013). Even though there is no doubt that economic and technological change produces negative externalities that have to be minimised, its positive effects should also be taken into account and encouraged by a government that facilitates change through the support of entrepreneurship and innovation.

4. http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm

5. <http://www.sristi.org/hbnew/>

6. http://www.oecd.org/sti/inno/Symposium_Innovation_Inclusive_Growth_Background.pdf

3.3 Examples illustrating how innovation and entrepreneurship boost access to welfare- and autonomy-enhancing human rights

3.3.1 *Scientific discovery: the case of IBM and exploitation of the GMR effect*

A good example of how innovation generates public welfare is the discovery of giant magnetoresistance (GMR), for which the physicists Peter Grünberg and Albert Fert received the Nobel Prize in 2007. Exploiting the GMR effect has ultimately enabled the computer industry to make hard disks smaller and simultaneously more powerful in terms of storage capacity. The German weekly magazine *Der Spiegel* asked Grünberg in an interview⁷ if the IBM corporation was paying him a fair price for his patent – discovery plus proving its industrial utility – when they bought it for roughly US\$ 1 million. After all, his technology is now found in almost every laptop on this planet. Grünberg responded that the amount he received from IBM was in fact quite generous for many reasons. First of all, there was no German company interested in making use of this new knowledge, whereas IBM was willing to generate value out of it. For that purpose the company had to invest an additional US\$ 1 billion to convert the crude new knowledge into a commercially viable product. Moreover, each laptop contains a couple of thousand patents, meaning that they could hardly afford to pay a million dollars for each one. Finally, we have to take into account that all these corporate investments in a consumer product that is easier to transport and increases storage capacity has not created such huge profits that it would be possible to reimburse the fixed costs of R&D and invest in further improvements, because the price of laptops did not increase but actually decreased. As a result, most of the benefits went to consumers who use laptops and smartphones, not to the corporations. This provides a good illustration of how the private sector can generate public welfare through innovation, but these welfare benefits do not show up in neoclassical welfare economics. At the same time, it needs to be taken into account that risky private-sector investment in innovation does

7. <http://www.spiegel.de/spiegel/print/d-53278232.html>

not take place if governments do not support such efforts with massive public investment in human capital formation as well as R&D (Mazzucato 2013).

3.3.2 Institutional innovation: the Orphan Drug Act and advanced market commitment

The Orphan Drug Act (ODA), passed in 1983 by the Congress of the United States and amended most recently in 2013, was designed to create a number of financial incentives for pharmaceutical companies to develop drugs for 'orphan' diseases – defined as neglected rare diseases. Without these incentives, according to the reasoning behind it, there would be no reasonable prospect for companies to recover the fixed costs invested in R&D for the development of the respective drug. In order to create the market for such drugs, the government offered companies (1) a swift and exclusive approval process for orphan drugs, (2) tax credits for clinical development, (3) orphan product grants, (4) exemption from marketing application fees, and (5) written recommendations for orphan drug development. All these measures are designed to ease the financial burden for the company and to offer an expedient regulatory approval process. The welfare impact of this legislation is impressive: even though the act has led to abuse in some cases, more than 2,000 products have obtained orphan drug designation with 352 drugs receiving FDA (US Food and Drug Administration) approval in 2009. Approximately 33 per cent of orphan drugs are oncology products, and at least 9 per cent of orphan drugs have reached blockbuster status with two-thirds having two or more designations. An additional 25 orphan drugs had sales exceeding US\$ 100 million in 2008 alone. Since 1983, at least 14 previously discontinued products have been recycled as orphan drugs (Wellman-Labadie and Zhou 2010).

The Orphan Drug Act has thus been an institutional innovation in the United States that facilitated investment in the development and marketing of products with a high public good – drugs treating rare diseases in developed countries. However, these facilitating policies do not address the lack of investment in

communicable diseases in poor tropical countries that kill a much higher number of people: malaria, tuberculosis and HIV kill more than 5 million people each year. Since private-sector R&D on these and other diseases is even more limited than in the case of orphan diseases in affluent countries, new instruments have to be designed to stimulate private-sector investment. One such instrument is an advanced market commitment (AMC). An AMC aims to encourage the development and production of vaccines tailored to the needs of developing countries – not just through increased direct R&D funding and public-private partnerships but also through the creation of a market that provides acceptable commercial returns.

The AMC has found its concrete application in the fight against pneumococcal disease, where it is designed to prompt the establishment of new production plants dedicated to pneumococcal vaccines. Over the long term, this will create a self-sustaining market at affordable prices for recipient countries. The currently existing pneumococcal vaccine is sold for more than US\$ 70 in industrialised countries, but thanks to the AMC, the long-term price for developing countries will be US\$ 3.50. In June 2008 the board of Gavi, the global Vaccine Alliance, confirmed its intent to provide US\$ 1.3 billion to support the purchase of pneumococcal vaccines by poor countries interested in buying them. Thanks to the pneumococcal AMC, children in more than 25 Gavi-eligible countries are being immunised against the main cause of pneumonia today (Gavi Secretariat 2014). This represents a massive improvement in the human right to a healthy life, not facilitated by a government or overseas development assistance but a proactive public-private sector alliance.

3.3.3 Reducing poverty through a national innovation system: the case of China

The importance of comprehensive government support for sustainable growth and empowerment is well illustrated in the case of China, where a modernisation push of the rural economy through the promotion of Township and Village

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Enterprises over the past 30 years enabled endogenous economic growth and led to a considerable wealth expansion in poor rural areas. The creation and growth of rural enterprises rapidly increased the contribution of agriculture to overall growth and raised farmers' incomes substantially. Food security also increased due to the sector's fast growth and the diversification of agricultural production. More remarkably, the country's poverty rate dropped from 31 per cent in 1978 to 9.5 per cent in 1990 and to 2.5 per cent in 2008. By unleashing the potential and meeting the needs of farming, China was not just able to substantially enhance domestic agricultural production and trade but also to modernise the overall rural economy. Moreover, the emergence of new private enterprises created a basis for entrepreneurial leadership as well as managerial and organisational capacity. For this to happen, however, it was necessary to implement a combination of comprehensive public policies and institutional reforms, adjusted to changing circumstances over time (Juma 2011). Most notably, China also reformed its national innovation systems⁸ with the aim of encouraging research activities and supporting collaborative innovation. The reform demonstrated the significance of simultaneously motivating research and education institutions, enhancing firms' capacities to innovate and promoting links between these actors. In implementing policy and programme reforms focused on the promotion of collective innovation among key players, China was able to increase research activity and raise the number of patents, publications and innovations in general (Juma 2011: 76ff). Despite the stalling of further necessary institutional reforms, especially farm ownership rights, and, until recently, the neglect of mounting environmental problems (Cao *et al.* 2013), China's experience demonstrates the potential of small enterprises to trigger broad economic and social progress in rural developing areas. Its success also illustrates that comprehensive public policies supporting both an innovative

8. An economy can be seen as a 'system of innovation', defined as a network of key actors in government, academia, business and civil society who interactively create and disseminate economically useful knowledge (Juma 2011: 51).

private sector and collective innovation activities across sectors may actually contribute more to alleviating poverty and generating sustainable growth than official development aid allegedly focusing exclusively on the social empowerment and human rights protection of the poor. In terms of political rights China may perform very poorly but, thanks to its facilitating policies, its government has greatly contributed to the enhancement of economic rights, and since economic empowerment is a precondition of political empowerment, major changes in political rights are likely to take place in the future.

3.3.4 Information technology as a tool of empowerment

Technological progress can directly facilitate economic development and human welfare, which is particularly striking in the case of ICT (Burri and Cottier 2012). Thanks to new ICT, knowledge is spread more rapidly and broadly, access to information and basic services is facilitated, and international networks are becoming more effective. Information and communication technology has been identified as an important tool of social empowerment: the diffusion of mobile technologies in developing regions has been extremely fast; it is estimated that ICT could be available to everyone within the next few years and contribute significantly to the achievement of international development targets. In fact, the world is experiencing a rapid democratisation of access to innovative information and communication channels, driven by the latest technology and lower barriers to entry (UNDP 2012; Juma 2011). This trend has been a significant facilitator of human development, enabling poor people to access information and services and to participate in the broader governance process, and helping them to leverage their resources and their knowledge to enter the market (UN Millennium Project 2005).

Information and communication technology also has the potential to empower local entrepreneurs and spur innovation that benefits local needs by connecting people to the skills and knowledge available in the global economy. In developed countries, the widespread diffusion of ICT thanks to declining costs has also

led to a democratisation of innovation: it has created a level playing field, allowing users greater participation in the innovation activities of manufacturers. New models of collaboration relying on open innovation networks are increasingly blurring the lines between consumers and users on the one hand, and producers and manufacturers on the other (Chesbrough and Kardon 2006). Given the rapid spread of ICT in developing countries, the same trend towards democratising innovation could be leveraged to empower local entrepreneurs. Through open online networks, they could be linked to experts possessing valuable knowledge and to manufacturers capable of exploiting opportunities for niche production. Information about the local context could thereby be connected with global generic information in order to produce new goods and services corresponding to local needs, raise incomes and create job opportunities. This collaboration with global experts and manufacturers could help innovative local entrepreneurs to overcome technical, financial and managerial obstacles, and thus assist them in adding value to their innovation and to scale up their business (Aerni and Rüegger 2012). In order to enable local entrepreneurs to engage in such an exchange, a proper institutional framework and appropriate financial mechanisms must be designed (Baumol *et al.* 2007).

3.4 Innovation and entrepreneurship and access to human rights

Much of the advancement in human well-being over the past century is not due to the welfare state but to technological change. Technology can be a disruptive force and a source of inequality in the early stage of commercial release, but eventually becomes a source of economic empowerment and political equality. Many international organisations recognise the positive role of new and improved technologies for human development and sustainable global change (UN Millennium Project 2005; UNCTAD 2007; World Bank 2008; UNDP 2012). Innovation benefits human welfare in two ways. First, it enables people to meet their basic needs even if their government fails to provide for them. Examples include the breakthroughs in user-friendly medical technologies and the provision of basic public health services as well as improved sustainability and

productivity through sustainable intensification in agriculture. All these improvements are also linked to advances in ICT that are mostly driven by private-sector activities. They have a direct impact on people's lives, not just on companies' profits. Furthermore, technology indirectly increases human development through its influence on economic growth and the creation of job opportunities (UN Millennium Project 2005).

Whether a state is able to address challenges like hunger and poverty and to kick off sustainable economic growth depends to a considerable extent on its awareness of the importance of building up scientific, technical and innovation capabilities in society. Science and technology cannot by themselves resolve challenges and lead to growth; instead, an integrated system to improve overall human welfare is needed (UN Millennium Project 2005; World Bank 2008). In this system, innovative firms and entrepreneurs that exploit the opportunities arising from the creation of knowledge and that tailor and disseminate technology in the economy are key to ensuring that the economy can actually reap the benefits of technological progress.

Many emerging economies have recognised the importance of investing in an innovative domestic private sector: only a strong local private sector can lead to increasing tax returns that thus enable the establishment of a social security system as well as an effective public health-care infrastructure (Becker 2004: 26). They have also realised that endogenous development and formal employment induce social empowerment by raising access to essential goods through a general increase in household revenues and improved state capacity to enforce human rights protection (Baumol *et al.* 2007; UNCTAD 2013).

Chapter 4

Is there an economic right to grow through innovation? The legal perspective

4.1 Introduction

As illustrated in the previous chapter, technological and economic change can enhance access to basic needs and create new opportunities for survival entrepreneurs in the informal economy to manage the transition into a more formal business in which they can grow through innovation. This process of endogenous economic development is strongly linked to the right to make use of new knowledge and to obtain the necessary financial and institutional support to convert it into innovative products and services that better meet the needs of the people. As such, technological innovation can be an enabler of autonomy- and welfare-enhancing human rights in the long run, provided that the state takes an active role in shaping and supporting an innovation economy.

So, does the international human rights framework protect agents of change who want to grow through innovation? Exploring some legal and historical sources suggests that such a right to the freedom to grow through innovation does indeed exist in the form of a bundle of rights that provides the foundation of prosperous liberal democracies and has subsequently been incorporated into the body of international human rights law.

An effective legal framework is nevertheless required to promote innovation as a driver of economic development and social empowerment on the national and global scale to lift people out of poverty and increase access to welfare- and autonomy-enhancing human rights.

The present chapter first examines whether international human rights law protects a right to the freedom to innovate for entrepreneurs. In this context, the right to enjoy the benefits of scientific progress may be an important starting point because access to knowledge is the basic ingredient for the creation of innovation in the form of a first prototype. But it is not sufficient for the creation of a new market, because an entrepreneur does not just need access to knowledge but also to finance and infrastructure. The freedom to innovate further builds on the right to security of property, the prohibition of discrimination based on race, gender or social status, and access to justice¹.

In a second part, the chapter argues that innovation must be understood as an effect of favourable institutional circumstances. What enables innovation is the presence of economic rights ensuring that entrepreneurs can make use of their creative minds and subsequently enjoy the freedom to grow through innovation. A right to grow through innovation (RTGI) must be understood as a negative right, namely as the freedom to make use of personal capacities to earn a living. It exists not as a single right but as a bundle of rights. The root of this bundle of equal rights to grow through innovation did not, however, emanate from hierarchical state law in which rights and duties were attached to social status, but from medieval merchant law, which insisted on equal rights to make contracts and thus participate in business. Liberal democracies such as the United States and Switzerland have then integrated the ideas of equal rights into their constitutions, not just to protect the vulnerable and marginalised, but also to make it easier for them to earn a living that helps them to become less vulnerable and less marginalised. In this context, a historical perspective illustrates that the poor who fought for their rights mainly sought the rights that allowed them and their offspring to enhance their economic opportunities. The case of medieval Florence in Renaissance Italy demonstrates how the poor were able to empower themselves through the freedom to innovate and how

1. Personal communication with Prof. Dr Walter Kälin, 19 November 2014.

the resulting innovation enabled access to welfare- and autonomy-enhancing human rights.

The last part of the chapter discusses what kinds of public policy would make the right to the freedom to innovate operational in practice by increasing the willingness of incumbent multinational firms to collaborate with, invest in and transfer technology to the local private sector, and to invest in developing new goods and services that would improve welfare for society at large. In this context, it will be argued that the Guiding Principles on Business and Human Rights for Implementing the UN ‘Protect, Respect and Remedy’ Framework (the Ruggie Framework) can provide a global standard for preventing and addressing the risk of adverse impacts on human rights resulting from business activity, but are not conducive to efforts to make business an enabler of the rights. In other words, the framework is focused on protecting insiders – those who are employed by multinationals or benefit from their taxes – but not outsiders, namely those who are not employed and often not even registered by the state. To make the framework more inclusive would probably require public awareness of the fact that companies can also become enablers of basic human and economic rights and a politically empowered middle class if they enhance opportunities for local entrepreneurs to grow through innovation.

4.2 The right to enjoy the benefits of scientific progress (REBSP)

The basic instruments of international human rights law – commonly referred to as the International Bill of Human Rights – include the legally non-binding United Nations Universal Declaration of Human Rights of 1948 (UDHR), as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), which both entered into force in 1976 and are legally binding to state parties. None of these instruments explicitly refers to innovation or entrepreneurship. We argue, however, that innovation defined as the application and diffusion of knowledge to enhance economic opportunities (Juma and Yee-Cheong 2005) has been

implicitly included in the UDHR (Article 27) and later in the ICESCR (Article 15). The relevant provisions of the UDHR and the ICESCR read as follows:

UDHR Article 27

- 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
- 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

ICESCR Article 15

- 1. The States Parties to the present Covenant recognize the right of everyone:*
 - a. To take part in cultural life;*
 - b. To enjoy the benefits of scientific progress and its applications;*
 - c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
- 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*
- 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.*

The right in the first paragraph (27(1) of the UDHR) has been referred to as ‘the right to science and culture’ or as ‘the right to enjoy the benefits of scientific

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progress' based on the wording of Article 15(1)(b) of the ICESCR, which builds on UDHR Article 27 (UN 2012b). The economic right of entrepreneurs to own non-material property (scientific, literary or artistic production) is indirectly acknowledged in the second paragraph (27(2)) of the UDHR. It finds its equivalent in 15(1)(c) of the ICESCR.

Both provisions have led a shadowy existence since their adoption and have only been brought to light in recent years by a handful of legal scholars (Abbott and Barrett 2012; Chapman 2009; De Schutter 2011; Donders 2011; Haugen 2008; Schabas 2007; Shaheed 2012; Friesen 2015). However, scholarship and discourse on the provisions have mostly focused on the first paragraph of the UDHR – 'the right to science and culture' (Article 27(1)) – and there is not even a common short name to refer to the right protected in the respective articles. Most scholars refer to it as the 'right to science' (Shaheed 2012; Plomer 2013) or as 'the right to enjoy the benefits of scientific progress' (Chapman 2009; De Schutter 2011; Friesen 2015; Abbott and Barrett 2012). In line with the majority of the literature consulted, we will employ the term 'right to enjoy the benefits of scientific progress' (hereinafter REBSP) when referring to ICESCR Article 15(1)(b), and the term 'right to science and culture' in referring to Article 27 or 15 more generally².

How did this right to science and culture find its way into two of the most important human rights instruments of international law, the UDHR and the ICESCR? Looking at the *travaux préparatoires* of the UDHR reveals a lot about the historical and political context in which the right to science and culture was

2. As noted by Farida Shaheed, the UN Special Rapporteur in the field of cultural rights, the REBSP should not be analysed in isolation from the right to culture, since both 'relate to the pursuit of knowledge and understanding and to human creativity in a constantly changing world' (2009: 4) and are thus strongly linked. The fact that both the right to culture and the right to science have been included in the same articles in the UDHR, as well as in the ICESCR, should not be ignored. Instead, the legal interpretation of the right to science should include both rights (Shaheed 2009).

enshrined. Although the *travaux préparatoires* of a treaty are subsidiary means of interpretation according to the Vienna Convention on the Law of Treaties (1969, Article 32), they provide a drafting history of UDHR Article 27 and thus offer interesting insights into its purpose and scope.

Since the UDHR, as opposed to the ICESCR, is not legally binding, and considering that ICESCR Article 15 builds on UDHR Article 27, the interpretation of the REBSP in application of the interpretational rules laid down in the Vienna Convention will be based primarily on the wording of ICESCR Article 15(1)(b).

4.2.1 The REBSP from a historical perspective

The UDHR, which was proclaimed by the UN General Assembly in 1948, must be understood in the broader context of the Second World War. It is generally seen as a universal project to respond to the atrocities committed by the belligerent parties and as an effort to reunite the international community (Shaver 2010: 135). It might not be evident at first glance why the drafters considered the right to freely participate in cultural life and to share in scientific advancement as essential to these aims. After all, the war had forcefully demonstrated how scientific knowledge could threaten humanity; the drafters of the UDHR had witnessed how breakthroughs in nuclear physics provided an instrument to destroy the lives of entire regional populations. In addition, racist Third Reich scientists had embraced pseudo-scientific theories to experiment with Jews in concentration camps and to breed an Aryan race (Longerich 2010). In that context, science was an issue at the time of the drafting period in a negative sense. Nevertheless, the wording of Article 27 can be seen as an attempt to counterbalance the general sense of abuse with a reminder that science can also be a tool of empowerment and a means to enhance the reach of human rights protection by making basic goods more widely accessible. Article 27 therefore reveals an understanding of science as inherently beneficial to humanity and as a good that should be accessible to and shared with everybody.

Why did John P. Humphrey, the Canadian jurist who prepared the main draft of the Declaration in 1947, include this provision in his earliest draft? The reasons are manifold. First, Humphrey relied heavily on a number of different materials, including the draft of the American Declaration of the Rights and Duties of Man³ that was being prepared by the Inter-American Judicial Committee. This draft included an explicit reference to the ‘rights to the benefits of science’ (Morsink 1999). Humphrey borrowed the concept and included it in the document he distributed to the Drafting Committee of the United Nations in June 1947. The wording of Article 27(1) was subsequently modified, but its essence remained widely uncontested (Morsink 1999). In that sense, despite the fact that the Inter-American draft was the only document linking science and human rights at the time, there seems to have been a broad consensus that adequate access to the benefits of scientific progress was a human right to be protected. While the human rights approach to science was new, the understanding of science, education and culture as drivers of peace was not. International cooperation in these fields was regarded as a means of unifying a divided international community. This understanding is clearly reflected in the creation of the United Nations Educational, Scientific and Cultural Organization – UNESCO – in 1945, a specialised UN agency aimed at contributing to peace by promoting international collaboration in these three fields⁴ (Shaver 2010: 154). If scientific research was conducted in the service of humanity, and if technologies were shared through international cooperation, science could play an important role in creating international stability. After all, as has been illustrated

3. The American Declaration of the Rights and Duties of Man was adopted by the International Conference of American States in Bogota in April 1948. It is available at <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> (last visited 31 March 2014).

4. The Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO) was signed by 37 countries on 16 November 1945 in the context of the United Nations Conference on an educational and cultural organization. For more information on the creation of UNESCO visit <http://www.unesco.org/new/en/unesco/about-us/who-we-are/history/> (last visited 31 March 2014).

in the previous chapter, the active use of new knowledge to create innovation may greatly improve access to goods and services that meet essential human needs. Humphrey, a staunch egalitarian, believed that everyone should have the right to benefit from scientific progress (Morsink 1999: 218). But UNESCO representatives who participated in the drafting process of the UDHR also played an important role by advocating the inclusion of the right to science in the declaration (Chapman 2009: 5). According to Morsink (1999: 218), who thoroughly analysed the *travaux préparatoires* of UDHR Article 27(1), the inclusion was welcomed by the committee without reservation. Consequently, UDHR Article 27(1) takes a stand based on the premise that every human being is entitled to *participate in* and *access* cultural life, as well as scientific advancement and its benefits. In addition to these two core elements, however, the drafters of the UDHR also included an element of protection in Article 27(2). Morsink notes that this second paragraph encountered much more opposition during the drafting process. The prevailing opinion of the Drafting Committee was that such a concept had no place in a human rights document (Morsink 1999: 219). After numerous negotiations and considerable persuasion, namely from the French delegation, the second paragraph was accepted and the concept of intellectual property found its way into the declaration (Morsink 1999: 222). It is important to note, however, that controversies over the apparent contradiction between the ‘access’ element and the ‘protection’ element have been the focus of attention of most scholars analysing both UDHR Article 27 and ICESCR Article 15. Although the text of the UDHR served as a foundation for the ICESCR, the intellectual property dimension was not transferred into the latter’s first draft. For the second time, a lively debate ensued over whether human rights should include intellectual property rights (IPR) protection; ultimately, the proponents of a pro-property-protection solution prevailed.

4.2.2 The wording of the REBSP

While the wording of ICESCR Article 15(1) is slightly different from that of the right to science and culture enshrined in UDHR Article 27(1), the essence is

the same. The fundamental additions made in the ICESCR are the last three paragraphs of Article 15, which include steps to be taken by state parties in order to guarantee full protection of the right to science and culture. No right can be protected, however, if its normative content is unclear. What is meant by the terms and concepts employed in Article 15(1)(b), namely ‘scientific progress’, ‘its applications’ and ‘the benefits’? The Covenant itself leaves readers in the dark, since none of these terms is defined. If the provisions of a covenant, or elements thereof, remain unclear, international law requires them to be analysed in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose (Article 31, Vienna Convention on the Law of Treaties of 1969). The historical perspective of the previous section has provided some indication of the objective and purpose of the right to science and culture. The task is now to analyse the wording of ICESCR Article 15(1)(b) accordingly and with due regard to the ordinary meaning of the terms in their context.

Science has been defined as a collective enterprise of researchers to advance fundamental knowledge about the world (Chapman 2009: 6). Unlike other types of knowledge, scientific research generates knowledge that is testable and refutable (Shaheed 2012: 8). ‘Scientific progress’ is thus to be understood as the collective production of scientific knowledge by researchers who build on each other’s findings following strict methodological criteria (Chapman 2009: 7). ICESCR Article 15(3) is aimed at guaranteeing scientists the freedom they need to generate the growth of scientific knowledge. However, its focus is not on scientists or science as such but on states to ensure that *everyone* should be able to enjoy the benefits of this growth in scientific knowledge.

As mentioned above, the *travaux préparatoires* clearly indicate that the drafters of the REBSP intended to enshrine a right that would make science and its applications accessible to all human beings, not only to a privileged elite of scientists. The normative content of the REBSP thus includes the right of

everyone to participate in and contribute to the development of scientific knowledge, be it as participants in decision making or even directly by engaging in scientific research (Chapman 2009: 9; Shaheed 2012: 9). But the REBSP also establishes a more passive right, since it entitles all human beings to access the fruits – or, in the wording of the provision, the benefits – of scientific progress. This right applies to all people, without discrimination and consequently independently of whether or not an individual has contributed to scientific research (Chapman 2009: 9; Shaheed 2012: 9).

Is the REBSP thus entirely about access to the fruits of scientific research? Clearly, the right encompasses the right to share in scientific progress as well as its methodologies and tools (Shaheed 2012: 8). But it also includes the entitlement of everybody to benefit from the ‘applications’ of scientific progress. In most of the literature consulted, the term ‘applications’ is interpreted as referring to technology (Chapman 2009; Schabas 2007; Shaheed 2012; Shaver 2010; Vitullo and Wyndham 2013). Accordingly, the REBSP may be interpreted as a human right to technical innovations such as electricity, renewable energies, agricultural technologies and ICT (Shaheed 2012: 9).

But how do these technical innovations come into being in the first place? In the previous chapter we showed that it is ultimately the private sector that converts scientific knowledge into new goods, services and technologies, provided that the government supports this endeavour by reducing the risks and uncertainties of investing in innovation and ensures an adequate enforcement of the protection of material and non-material property rights. In this context, the REBSP not only entitles everyone to benefit from scientific and technological innovation, it also protects entrepreneurs who wish to draw on the pool of scientific knowledge in order to *innovate*. To put it differently, we argue that ICESCR Article 15(1)(b) on the protection of intellectual property reflects the insight that the process of knowledge creation and innovation requires an IPR system that enables innovators to reimburse the fixed costs

spent on bringing innovation into being through investment in R&D. This part has clearly been neglected by scholars concerned with the REBSP.

4.3 The right to grow through innovation (RGTI)

A look at the understanding of science in the post-Second World War era reveals why the REBSP included two distinct aspects of science: *scientific progress* as a source of general knowledge and insight, and also its *applications* – the right to make commercial use of new scientific insights through the creation of innovation. By this time, a strict separation had been made between the *conceptualisation* of basic research to generate scientific knowledge on the one hand, and the *application* of this knowledge to innovate and solve practical problems on the other hand. While the first aimed at advancing fundamental knowledge about the world, it did not solve practical problems (Chapman 2009: 6f.). Ultimately, it was large-scale investment in the application of science by governments and the private sector that generated the technologies which would transform people’s autonomy- and welfare-enhancing rights. The distinction was not merely a conceptual one. It also entailed a very practical division of tasks between different actors. Chapman invokes the words of Vannevar Bush, science advisor to Presidents Roosevelt and Truman, to illustrate this partitioning of tasks. Bush, who greatly influenced US science policy, claimed that ‘[government] investments in basic research would build a general knowledge base while a scientifically trained labor force would facilitate applications of science to the development of technology and the solutions to practical problems’ (Chapman 2009: 7). Bush thus considered private actors to be in charge of the application of science, and therewith the transformation of fundamental scientific knowledge into technology. In other words, economic actors should be given incentives to invest in innovation through the prospect of partial ownership protection of their innovation. Even though they may draw from the pool of publicly available scientific knowledge to create profitable innovation, they also produce positive welfare effects in the sense that the innovation that ultimately contributes to improved problem solving would not

have come into existence all by itself. There must be a reasonable prospect of generating a profit to make use of knowledge by investing in innovation. In other words, knowledge is of no public value unless someone makes use of it. The economic right to make use of knowledge and grow through innovation does not just lead to improved public welfare, but also provides an opportunity for outsiders who do not possess insider privileges to find a market entry through innovation and thus jump-start a process of social empowerment (Aerni and Rüeegg 2012).

In view of Vannevar Bush's understanding of the role of private actors in applying science for human development, ICESCR Article 15 might not just be about the passive right to benefit from scientific progress, but also about the active right to make economic use of knowledge in order to grow through innovation. This right could be called the right to grow through innovation (RTGI).

While there is extensive literature with regard to the REBSP, there is hardly any literature on the RTGI, meaning the negative right not just to enjoy, but also to have the freedom to make active economic use of, scientific progress through the creation of innovation. The emphasis on the REBSP and the relative neglect of the RTGI in the global public debate on human rights is striking because new knowledge as such ultimately has no tangible value to humankind unless someone makes use of it; and this seems to be indirectly recognised in the UDHR as well as the ICESCR. The articles that matter in this context in the UDHR are Article 17 on the right to own property and Article 27(2) on the right to own intellectual property. These rights are necessary because material property serves as collateral to attract investment in innovation, and non-material (intellectual) property is necessary to generate revenues from innovation and cover the fixed costs required to develop and launch an innovation as well as to further invest in the improvement of the innovation. Moreover, the RTGI requires a legal environment that does not discriminate against the entrepreneur for being an outsider due to low social status, race or gender, that recognises him as a

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person before the law, that guarantees access to justice and that ensures personal security. All these basic human rights are entrenched in the UDHR (Articles 1, 2, 3, 5, 7, 8, 10, 13, 15) and they are a prerequisite for an entrepreneur to invest in innovation.

In other words, the RGTI must be understood as a bundle of rights that ensures the freedom to grow through innovation⁵.

4.3.1 The RGTI as an economic right

By stipulating the ‘right to the protection of the moral and material interests resulting from any scientific, literary or artistic production’, ICESCR Article 15(1)(c) and consequently Article 27(2) of the UDHR hint at the importance of the application of scientific knowledge. The right to make economic use of knowledge to create innovation is, however, not mentioned explicitly as a basic economic right.

The reason for this omission may be the fact that economic rights have primarily been interpreted as labour rights (mostly covered by Article 23 in the UDHR and Articles 6 and 7 in the ICESCR) in the global human rights debate.

As was pointed out earlier, the economic right to earn a living is well established in national constitutions in Europe, and in the United States it was derived to some extent from the experience of African Americans after the end of slavery in the mid-19th century (Sandefur 2010). Even though African Americans became free men after the abolition of slavery, they were still denied participation in the formal economy of the United States; slavery may have been banned but the norms and values of society did not change. Doing business with former slaves was seen as an infringement of the prevailing social norms among white citizenry. African Americans were therefore primarily concerned with the right to

5. Personal communication with Prof. Dr Walter Kälin, 19 November 2014.

participate in the formal American economy (Douglass 2003; Appiah 2011a). Only the right to acquire and trade property would allow them to build up an economic future for themselves and their children. Of course labour rights were also important, but in order to enjoy these rights they needed to be integrated in the formal economy in the first place. This insight was one of the justifications of the first national Civil Rights Act, enacted by US Congress in 1868, stating that all people 'shall have the same right...to make and enforce contracts', and to 'purchase' and 'sell...real and personal property' (Sandefur 2010: 4). Unlike Europe, the United States recognised at a very early stage the value of an enforceable IPR system from a social welfare point of view. According to Khan (2009), historical analysis reveals the democratising role of intellectual property mainly because secured property rights in patented inventions helped to create tradable assets, and this securitisation disproportionately benefited creative outsiders who were economically disadvantaged in society. Khan (2009: 314) thus concludes in her book that adequate IPR institutions are especially relevant today for countries aiming to lift the majority of their population from poverty.

4.3.2 The RGTI from a historical perspective

The insight that outsiders in society have an opportunity to improve their economic situation by becoming innovative entrepreneurs goes back to late medieval Europe. In the 12th and 13th centuries, the rise of local, regional and international trade in Europe created a first opportunity for creative but poor individuals to better their economic situation and thus escape their predestined low position in the social hierarchy. However, ancient hierarchical law tended to constrain them, since all ancient concepts of rights and duties were connected to status in the military, polity, government and religion. The idea that an individual could have rights and duties detached from social status did not exist, neither in formal nor in customary law (Jacobs 1994). Even Roman commercial law was available only to people whose duties required it. Merchants in medieval Europe who were involved in transboundary trade found the prevailing local hierarchical law inadequate and eventually decided to create their own

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internationally applicable contractual law. This merchant law stated that all individuals have an equal right to make contracts and to undertake commerce under the protection of civil law (Jacobs 1994: 38–39). Merchant law provided the emerging class of entrepreneurs with the institutions that helped to reduce transaction costs and institutional uncertainty in the face of hierarchical law that was making it difficult to do business independent of social status. Some may find it hard to conceive of merchant law as legitimate law because justice, law and equity are associated with functions performed by the state, not private actors (Pirie 2013). But there is also the recurrent and powerful idea that the law stands above the ruler. In hierarchical law, it may be the divine will from which the ruler draws his legitimacy to rule and set rules. But principles of equity and universality have always been discussed in the context of natural law or, more recently, human rights law. This type of law was meant to protect people from arbitrary power (Berman 1983). No matter if rule-making power is derived from God's will or an official election process, all citizens, including the ruling class, must be subject to the rule of law.

Especially for ordinary people in medieval times, who were mostly kept in serfdom by a religious or secular overlord, liberty meant being subject to law rather than the arbitrary will of the ruler (Southern 1953: 104–107). But in the absence of a law protecting people from the arbitrariness of the ruler, they would have to invent their own; and that is essentially what happened with the creation of merchant law. It consisted of standard formal instruments based on customary practices and mechanisms for the resolution of disputes, without the sanctions associated with state law. Instead, the contracts incorporated mechanisms of self-enforcement and self-execution. The resulting system allowed commerce to flourish through long-range, impersonal bargains. Today, we observe a similar trend in e-commerce, but since there is now a considerable body of formal international law that regulates transboundary problems and world trade – including UN conventions and World Trade Organization agreements – there is less need to resort to merchant law. In order to give uniformity to

e-commerce law around the world, the Model Law on Electronic Commerce (1985 with 2006 amendments) of the United Nations Commission on International Trade Law (UNCITRAL) incorporates guidance for countries on how to enact it (UN 2008b)⁶.

The case of Renaissance Florence

The right to grow through innovation (RTGI) may thus have its roots in the initiatives of medieval entrepreneurs who felt constrained by the existing hierarchical law that failed to recognise equal individual rights. But, apart from the emergence of merchant law, entrepreneurs were also committed to facilitating change in society at large. After all, the ordinary human being was no longer considered to be a wretched and doomed sinner who would hopefully find some peace in the afterlife, but an active member of society who could better his personal situation as well as his environment by making active use of new knowledge and participating in commerce (Parks 2006).

The first manifestation of this new spirit has its roots in early Renaissance Italy. According to Richard Goldthwaite (2009), the causes and consequences of the Ciompi revolt in 1378 in Florence illustrate this change of attitude very well. The revolt was led by wool workers who fought the upper-class guild regime. In their brief rule over Florence, they managed to create new guilds that better represented their interests in politics. In 1382, however, the major guilds re-established their power over government and liquidated the new guilds entirely. Yet as much as this revolt was later framed as a class conflict, the workers in the textile manufacturing industry of Florence, especially those who worked in areas that required a high level of skill and specialisation, were more interested in economic empowerment by securing access to capital than in merely stripping the capital-owning class of its assets and redistributing them. They took advantage of the comparatively flexible employment system to become

6. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

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entrepreneurs themselves and formed legally binding business partnerships with one another. These associations assured a certain continuity of employment and enabled them to diversify into other business areas, to share financial risk and to meet joint commitments towards contractors. It also allowed them to own the tools of their trade, and whatever they could not afford to purchase they could rent. Partners generally sealed their accord in a formal contract and they usually kept accounts documenting their operations. This made it possible to defend themselves in court against arbitrary allegations by more powerful and influential competitors. As artisan-entrepreneurs they were also concerned with succession planning, and they had a great interest in enhancing the number of schools and the quality and formality of apprenticeship programmes to ensure that their offspring would be able to take over the business or at least be employed in a trade that required high skills. The resulting continuous economic empowerment of outsider entrepreneurs took place at the expense of a weakening of the traditional guilds – the insiders. The power to set standards and prices as well as to settle disputes was eventually transferred from the guilds to the communal government (1415 Compilation of Communal Legislation, Tribunal of the Mercanzia) (Goldthwaite 2009). The economic empowerment of skilled entrepreneurs with low social status in Florence was possible because they were willing to fight for their right to grow through innovation.

These entrepreneurs were not, however, driven by a material utility-maximising function, but by the new virtues of Renaissance Florence. Their enterprising spirit was driven by curiosity, a commitment to self-improvement and a concern for the community at large. They had the confidence to achieve something for themselves and their community by making use of their potential. With this mindset and the courage to try to do things in a different way, they began to transform Florentine culture, business, education and society (Aerni 2011). Last but not least, this transformation was possible because of a collaborative rather than a confrontational spirit between the established elite of Florence and the rising entrepreneurial middle class. For example, the powerful

Medicis actively supported and awarded promising talents in all crafts and they pursued an industrial policy that responded to the need for new skills, trades, investment and knowledge in the innovation-driven Florentine economy and culture (Parks 2006).

The spirit of the US Constitution and the meaning of intellectual property

America's founders had a similar respect for entrepreneurial virtues and were aware of the positive welfare effects that agents of change can create for society at large. Thomas Jefferson's first principle of association was to 'guarantee to everyone the free exercise of his industry and the fruits acquired by it' (Bergh 2003). James Madison's argument against rent-seeking monopolies – awarding permanent and exclusive rights to extract rents – also makes the case for protecting the rights of outsiders against the privileges of insiders. But at the same time, Madison recognised the value of intellectual property rights as temporary exclusive rights that allow entrepreneurial outsiders to grow through innovation and thus challenge established rent-seeking insiders. He expressed it in a letter to Thomas Jefferson as follows:

With regard to monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? (Hutchinson and Rachel 1971).

This view eventually led to Article 1, Section 8, Clause 8 in the US Constitution:

The Congress shall have Power To...promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries....

This clause shows that American institutions were designed to ensure that rewards accrued to the deserving rather than to class, patronage and privilege (Khan 2009). Alexis de Tocqueville (1835) as well as Thomas Jefferson (1900) noted in their writings that the American people recognised and celebrated

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the contribution of inventors and innovators of all classes because they were perceived as forces of social and economic empowerment. After all, they enable underprivileged outsiders to seize an economic opportunity to grow through innovation.

In analogy to the emphasis on equal rights entrenched in merchant law in medieval times and the natural law tradition, James Madison drafted the Bill of Rights – the first ten Amendments of the US Constitution – because he believed that there are certain inalienable ‘natural’ rights that should not be revocable at the will of a ruling party or a political majority, otherwise the individual is no longer free (George 1999). Governments exist to protect individual rights and cannot legitimately use their coercive powers to violate those rights without good reason. One of these rights is the right of citizens to make free use of their faculties and a free choice of occupation, which would not only constitute their property in the general sense of the word but also the means to acquire property (Rakove 2006). This right to earn a living goes back even further – to the Magna Carta and the common law tradition in England: England’s Chief Justice Sir Edward Coke argued in 1614 that the English legal tradition protects the right of any man to use any trade to maintain himself and his family (Sandefur 2010).

The spirit of the Swiss Constitution and the importance of making use of freedom

Today, many of these rights are entrenched in most of the constitutions of modern democracies. Chapter 1 on Inalienable Rights (*Grundrechte*) in the Swiss Federal Constitution includes the right to own private property (Article 26) and the right to freely choose an occupation as well as to freely pursue a private economic enterprise (Article 27). This corresponds to the spirit of the Preamble to the Constitution, which argues that only those who use their freedom remain free, and that the strength of a people is measured by the well-being of its weakest members. With regard to the weakest members, it is appropriate to distinguish between those who are or have become weak by nature (children, disabled

people, the elderly) and those who are weak because they lack economic opportunities to escape from poverty and misery. The latter are generally understood as those who are deprived of economic rights, whether these are labour rights or the right to own material and non-material property. Apart from protecting those who are weak by nature, the objective of this part of the preamble can be interpreted as enabling outsiders to make economic use of their faculties through a better integration into the education and vocational training system and the formal economy. Further instruments to empower the people articulated in the Swiss Constitution are (a) the protection from arbitrary government decisions to curtail the rights of outsiders in favour of an expansion of the privileges of well-connected insiders (Article 5: All activities of the state are based on and limited by law) and (b) to grow through innovation (Article 64: The Confederation shall promote scientific research and innovation).

The framers of the Swiss Constitution were well aware of the power of the private sector to contribute to societal welfare. In Article 94, the Constitution states that the Confederation and the Cantons shall abide by the principle of economic freedom by safeguarding the interests of the Swiss economy as a whole and, together with the private sector, shall contribute to the welfare and economic security of the population.

4.3.3 Business can generate positive externalities

The fact that the RGTI is implicitly present in some of the most liberal democratic constitutions indicates that there is, or rather was, a widespread awareness that innovative entrepreneurs and their growth-oriented businesses can contribute to increasing access to autonomy- and welfare-enhancing human rights.

While the responsibilities of business with regard to the protection of human rights have been the focus of advocacy groups and legal scholars concerned with the human rights debate, the rights and duties of small entrepreneurs are often ignored. As pointed out in the first chapter, most of these entrepreneurs,

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especially if they are located in the informal sector in developing countries, are survival entrepreneurs. They include daily labourers, small-scale farmers and small shop owners who are not formally registered and therefore do not attract investment from the formal sector. Survival entrepreneurs are most vulnerable when it comes to hunger and malnutrition but are barely reached by aid, business and government support because they often live in informal settlements in marginal areas that are largely ruled by local customary law and exist outside the formal legal system.

Some of these informal entrepreneurs may want to expand their business activities by becoming part of the formal economy of their region. But for that purpose, they need to attract investment, which often includes knowledge transfer and capacity development, rather than donations designed to alleviate immediate poverty. Incumbent firms, particularly multinational corporations (MNCs), could contribute to realising their human right to grow through innovation by sharing their tacit knowledge, fostering technology transfer and becoming customers of these small local entrepreneurs.

Looking at the current UN framework on businesses' responsibilities with regard to human rights, also known as the Ruggie Framework (UN 2010), one notices that it does not recognize any potential for private companies to promote or even directly protect the human right to grow through innovation, even though positive incentives to do so may provide a basis for MNCs to contribute to enhancing the opportunities for entrepreneurs to make better use of knowledge in order to grow through innovation, and thus foster economic growth by making their knowledge available.

Chapter 5

Business and human rights: the gap in the Ruggie Framework

5.1 Introduction

The growing reach and impact of business at national and international levels in past decades has fuelled a vigorous debate on the responsibilities of private actors, particularly multinational corporations (MNCs), with regard to human rights. Yet despite growing attention being paid to corporate social and environmental responsibilities in the past 20 years, the current structure of international law is still such that the principal rights and duties reside with states, not private companies (Ruggie 2013: 27). Business enterprises do not constitute subjects of international public law. By consequence, they are not bound by international human rights covenants, which only deploy direct legal effects on states (Ruggie 2013: 41). Efforts to clarify the obligations of companies with regard to human rights under international law have been made at the United Nations and other international and regional fora since the 1970s (Ruggie 2013: 90).

Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights were approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2003, but they failed to gain legal standing. Instead, Professor John G. Ruggie was appointed as the UN Secretary-General's first Special Representative on human rights and business.

A number of soft-law instruments were then developed, which came to include the United Nations 'Protect, Respect and Remedy' Framework and a set of guiding principles for its implementation, which were endorsed by the UN Human Rights Council in 2011 (UN 2011). Drafted by John Ruggie in his position

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as Special Representative, this framework and its guiding principles are broadly known as the Ruggie Framework¹.

In this chapter we discuss the development of the Ruggie Framework and then question some of its baseline assumptions. We argue that business should not just be framed as a potential offender against human rights that must be reined in by means of standards. As we discussed before, the idea of equal human rights may have part of its origin in medieval merchant law, and the private sector has played an important role throughout history as an enabler of human rights. Consequently, the Ruggie Framework may have to be expanded to take into account the positive role that business can play as an enabler of human rights.

5.2 The debate on business and human rights

At the World Economic Forum in 1999, UN Secretary-General Kofi Annan proposed a ‘global compact of shared values and principles’ between the private sector and the United Nations. Annan’s initiative successfully led to the creation of the UN Global Compact, which unites several thousand companies around the globe, voluntarily committing themselves to the UN goals by upholding ten principles covering issues of human rights, labour, the environment and anti-corruption². The Global Compact is praised for engaging a diverse mix of stakeholders in learning and capacity building within the human rights field. At the same time, it has been criticised by human rights advocates for inadequately monitoring participants’ performance and for potentially allowing corporations to gain public relations benefits for being associated with the United Nations while maintaining questionable business practices (Jerbie 2009: 304–305).

Against this backdrop, the UN Sub-Commission on the Promotion and Protection of Human Rights attempted in the early 2000s to specify the responsibilities

1. See <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

2. See <https://www.unglobalcompact.org/index.html>

and obligations of the private sector by developing its own Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN 2003a). However, the attempt to impose binding obligations on companies under international human rights law failed because of strong resistance from the private sector (Jerbie 2009: 305). Although the UN Commission on Human Rights declined to adopt this draft document, it requested the UN Secretary-General to appoint a Special Representative³ with the goal of developing a framework that would clarify the roles and responsibilities of states, companies and other social actors in the area of business and human rights, and provide a foundation on which thinking and action could be built over time. In 2008, Special Representative John Ruggie presented the 'Protect, Respect and Remedy' Framework that was subsequently unanimously approved by the Human Rights Council (UN 2008a). It is fair to say that the adoption of the Ruggie Framework constitutes the most important recent development with regard to the human rights responsibilities of business on the international scene.

5.2.1 The 'Protect, Respect and Remedy' Framework

John Ruggie's Framework is essentially built on three pillars. The first reaffirms the state duty to protect against human rights abuses committed by third parties, including business, through appropriate policies, regulation and adjudication. The second pillar lays down the corporate responsibility to respect human rights. As the term 'responsibility' chosen by Ruggie indicates, the Framework reaffirms that, at least on the international level, there is no legal obligation on private companies to respect human rights. Rather, the Special Representative observed that a widely recognised and well-established norm exists under which companies are expected to act with due diligence in order to avoid infringing the human rights of others (Ruggie 2013: 95). The third pillar recognises the need for accessible and effective grievance mechanisms in case of alleged breaches of human rights standards (UN 2008a).

3. Special Representative on human rights and transnational corporations and other business enterprises.

After approval of the Framework by the UN Human Rights Council in 2008, Ruggie's mandate was extended to include development of recommendations on how to implement it. In 2011, the Special Representative issued the Guiding Principles on Business and Human Rights, commonly abbreviated as UNGPs (UN 2011), which were endorsed by the UN Human Rights Council later that year (UN 2011). Based on the three pillars elaborated in the Framework, the UNGPs basically formulate tangible principles and guidelines that apply to all states and all business enterprises (UN 2011). Just like the Framework, they have a soft-law character and consequently do not create new obligations under international law.

5.2.2 Applying the Framework to the REBSP

According to Guiding Principle 12, the responsibility of business to respect human rights refers to internationally recognised human rights, which include the set of rights expressed in the International Bill of Human Rights (UN 2011: 13). The due diligence of business to 'do no harm' thus applies to the right to enjoy the benefits of scientific progress and its applications (REBSP). As discussed in Chapter 4, the REBSP essentially protects the right of everyone to access and enjoy scientific knowledge and technologies. The UNGPs thus require that business enterprises avoid causing or contributing to an adverse impact on the right of everyone to access scientific knowledge and technologies. By consequence, companies should refrain from depriving people of access to scientific knowledge and technologies. Some would even argue that the acquisition and exercise of strong intellectual property rights violates – or adversely impacts, to adopt the language of the UNGPs – the REBSP. Notably, what is commonly referred to as 'biopiracy'⁴ is denounced as going against the responsibility of business to respect human rights (Geneva Academy

4. The term 'biopiracy' describes the process by which traditional indigenous knowledge of a specific use of crops or plants is appropriated by third parties and put under the protection of patents, with the consequence that relevant local communities are deprived of the ability to freely use the crop or plants the way they did before.

2015). The responsibility of business to take affirmative steps to correct business activities that adversely impact human rights as proposed by Ruggie would thus require adopting measures allowing knowledge to be freely accessible. Such an affirmative action would, however, go beyond the idea of the ‘Protect, Respect and Remedy’ Framework. The next section will touch upon new approaches taken by scholars aimed at including the responsibility of business to take affirmative action.

5.2.3 Incumbent firms as agents and instruments of the right to innovate

Both the ‘Protect, Respect and Remedy’ Framework and the UNGPs have received wide support not only from states, but also from civil society and the private sector (UN 2011: 4). Given their broad acceptance by most stakeholders, the UNGPs provide good common ground for further discussing the scope of businesses’ human rights responsibilities. However, many argue for a more active role for corporations with regard to human rights. Indeed, Ruggie’s Framework represents the lowest common denominator and thus refrains from going out on a limb. The UN Draft Norms mentioned earlier were much more daring. Not only were they meant to be legally binding for private economic actors, they also built on the idea that the increased power of companies should be used *actively* to promote human rights⁵. The preamble of the Draft Norms asserted that companies ‘have the capacity to foster economic well-being, technological improvement and wealth, as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business and operations’ (UN 2003b). Despite the UNGPs’ rejection of such positive

5. The first paragraph of the Draft Norms, entitled General Obligations, recognised that the primary responsibility to ‘promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law’ lies with the state. It also stated that ‘within their respective spheres of activity and influence, transnational corporations and other business enterprises have *the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect* human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups’ (emphasis added).

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responsibilities among private actors, the approach adopted in the Draft Norms is still very popular, if not to say prevalent, in business and human rights theory and practice (Wood 2012: 167).

The experience with the UN Draft Norms (UN 2003b) has proved that attempts to declare companies as subjects of international law, in a similar fashion to states, have little support in the international community. As a consequence, the voices calling for binding rules for companies under international public law have diminished among legal scholars. Yet several proposals to conceptualise a more active role for private actors with regard to human rights, even without legally binding rules, have been made since the approval of the Ruggie Framework. The present section will touch upon two approaches that focus on different mechanisms, but are interlinked and mutually supportive. The first approach argues that, due to their position in the global economy, MNCs are expected to raise human rights issues with governments and promote the realisation of human rights. In this strand, MNCs are thus seen as agents of human rights promotion. The second approach is focused on the externalities that MNCs generate in the regions where they act. It is argued that MNCs can serve as instruments for a more human-rights conscious globalisation. In the following paragraphs, we will first present the two approaches, then will make the case for companies as both agents *and* instruments of the human right to innovation.

The first approach relates to the growing authority of private actors as well as their ability to influence states in a way that is conducive to the realisation of human rights. It is based on the observation that within today's globalised world, the power of states is diminishing while private companies – especially MNCs – are increasingly engaged in domains that were traditionally seen as governmental. In some cases, especially in regions of the world where governmental structures are weak, MNCs are becoming providers of public goods such as health, education and even social security (Scherer and Palazzo 2011: 899). One can argue that, due to their growing authority, companies are

expected to assume a political role and to positively influence the realisation of the fundamental principles of today's global values, such as the protection of human rights (Aguirre 2004; Kobrin 2009; Scherer and Palazzo 2011; Wettstein 2010). Consequently, the responsibilities of businesses would go much further than just 'doing no harm'. Private actors are expected to raise the issue of human rights with governments and to exert pressure on other actors who may be violating human rights in territories where they are active. Wettstein, for instance, takes up the example of the criticism directed at corporate sponsors of the 2008 Olympic Games hosted by China (Wettstein 2010: 33). The companies were not accused of committing human rights violations themselves, but were criticised for sponsoring a sports event in a country where the government committed systematic human rights abuses. Wettstein and others refer to this constellation as 'silent complicity' (Wettstein 2010: 36). Aguirre (2004: 61ff) mentions another case, namely the allegations against Shell for its activities in Nigeria during the mid-1990s, which culminated in the alleged complicity of Shell in extrajudicial killings, for which a lawsuit was filed in the United States in 2002⁶. The involvement of Shell in this region is very complex and will not be discussed in detail here. What is essential for the present purpose are the conditions that ultimately led to the escalation of the conflict. Aguirre claims that it would have been Shell's responsibility to make use of its highly influential position in Nigeria in the mid-1990s to promote the realisation of economic, social and cultural rights – to which the REBSP belongs – and thus prevent the deterioration of living conditions in the region. He argues that if Shell had respected the human rights of the population, and also put pressure on the authorities to protect rights such as the right to food, self-determination, education and health, the political turmoil could have been prevented (Aguirre 2004: 63ff). In other words, it is not only the allegedly direct complicity of Shell

6. For more information on the lawsuits that were filed against Shell see for instance the 'case profiles' compiled by the Business and Human Rights Resource Centre: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria> (last visited 31 March 2014).

in killings that should be of interest from a human rights perspective, but also its responsibilities and abilities to promote human rights. This argument is reinforced by the fact that MNCs often generate enormous profits from natural or human resources. MNCs, it is argued, should use their power and reinvest a share of these profits in local economies and communities (Aguirre 2004: 63).

The second approach picked up here – advocating a more active role for private companies – is an extension of the one discussed above. De Schutter (2005) argues that MNCs, which are key players in globalisation, should be transformed into ‘instruments for a more humane kind of globalization, one which not only respects the full set of internationally recognized human rights, but which also ensures that they will be further realized’ (De Schutter 2005: 404). He argues that the impact of foreign direct investment (FDI) on the human rights of the concerned population, for instance, has for too long been examined only at a micro-level, meaning that analyses are often restricted to the immediate consequences for human rights of a particular investment or project. According to De Schutter, analyses of FDI on the basis of human rights should go further than that and move to the macro-level. Thus, the externalities generated by the presence of MNCs should be channelled to deploy a positive effect on human rights. If this can be achieved, MNCs may serve as important instruments for the realisation of human rights (De Schutter 2005).

5.3 Misunderstandings and gaps in the current debate on human rights and business

Ruggie’s ‘Protect, Respect and Remedy’ Framework and its guiding principles, as well as the debate on the positive responsibilities of MNCs, are essentially about what companies should do, besides business, to become responsible corporate citizens. As a consequence, the field of corporate social responsibility (CSR) has largely focused on the normative role of MNCs, not just to do no harm but to actively lobby for the protection of human rights in countries where the government is unable or unwilling to do so.

The view that MNCs should respect and protect human rights, enable potential victims of human rights offences in business to seek remedy, and lobby for enforceable human rights with countries that tend to neglect them, is laudable. But there are three essential aspects that are being ignored.

1. In the current debate on business and human rights, large multinational business entities are generally portrayed as a threat to human rights unless they become subject to public international law. The problem with this view is that a company that operates in the formal global economy can hardly have an interest in making profits by offending the human rights of the stakeholders on which its business ultimately depends. Moreover, thanks to the implementation of many international treaties on labour rights and the environment, even poor developing countries have strict public regulations designed to sanction abuse committed by foreign direct investors. Of course, public regulation is not effective if there is a lack of institutions able to enforce such regulation. Yet thanks to additional international private standards and increased global public scrutiny designed to detect and shame abuses carried out by MNCs, the reputational damage for a company that commits human rights offences can be enormous. However, this scrutiny often does not apply to domestic firms that are less exposed to global monitoring and have fewer means available to comply with strict human rights standards. The lack of willingness to uphold human rights standards can often be observed in domestic companies that have privileged access to policy decision makers and thus make their revenues primarily as rent-seekers (benefiting from market protection) rather than profit-seekers (investing in innovation). They are insiders who align themselves with the elite and thus ensure impunity for themselves should they offend human rights. Growth-oriented entrepreneurs, however, who seek change through innovation and create new markets with increasing returns, are critically monitored by the insiders, the established companies and the ruling party, which all

benefit from the *status quo*. For innovative companies that lack access to rent-seeking and therefore must invest in innovation to create profitable new markets that meet an unmet demand or better serve the needs of customers, abusing human rights would be self-defeating, not only because they are more closely monitored than the rent-seeking insiders but also because offending the rights of business partners, employees and clients can hardly be called a successful business strategy in a highly uncertain market.

2. As we pointed out earlier, the idea of equal human rights that should be respected and protected by all stakeholders has its roots not in ancient public hierarchical law but medieval merchant law. Since the Second World War, international commercial law has become even more important due to a renewed increase in world trade. It plays a vital role in the contemporary global trading system. However, customary commercial law (*Lex mercatoria*), which is mainly based on trust and general principles that respect essential human rights (primarily focusing on negative or freedom rights), continues to play an important role in international arbitration (Lando 1985). It ensures that those who feel wronged by a state have the possibility to seek legal remedies by resorting to litigation. So it is misleading to assume that international commercial law simply contains no reference to the principles of respect, protect and remedy. The insight that it is in the self-interest of entrepreneurs to respect human rights has been pointed out by Jane Jacobs in her book *Systems of Survival* (Jacobs 1994). She argued that there are two syndromes of morality: the guardian syndrome and the commercial syndrome. While the guardian syndrome is characterised by the avoidance of trading/bargaining, a preference for cooperation (often also collusion), the use of force to ensure norm compliance, adherence to traditional values, respect of hierarchy, loyalty, exclusivity and honour, the commercial syndrome is linked to the avoidance of

force, a preference for competition based on self-improvement, cooperation through voluntary agreement (contractual agreement), honesty, openness towards strangers, financial responsibility, inventiveness and novelty, and dissent for the sake of the task. She argues that while government and civil society must usually follow the guardian syndrome to fulfill their constructive role in society, science and business must primarily follow the commercial syndrome in order to bring the greatest social benefit as agents of change that create value for themselves as well as for society at large. Both syndromes are important for the proper moral functioning of society, as long as they do not switch places, with the commercial syndrome dominating in places where the guardian syndrome should prevail and *vice versa*. The Ruggie Framework and the UNGPs, as well as the literature on CSR, do not make this distinction but implicitly assume that there is just one moral syndrome, namely the guardian syndrome. Imposing a guardian syndrome (a normative framework for the proper enforcement of human rights) where the commercial syndrome should guide moral judgement (based on the virtues of the entrepreneur) is unlikely to deliver results that are desirable from a societal point of view. In fact it could undermine an entrepreneur's efforts to commercialise innovation that might entail certain risks and be based on partial excludability (IP protection) but also generate welfare- and autonomy-enhancing human rights in the long run. Instead, the focus will be on complying with expensive standards and on public relations to communicate the alleged commitment to enforcing guardian morality. Apart from the risk of merely ending in moral hypocrisy, the increasing costs of compliance with standards may also lead to industrial concentration and less innovation (Aerni 2013a). For example, the current trend of MNCs to increase their stock-market value through share buy-backs at the expense of genuine investment in innovation and thus the renewal of the global economy (Lazonick 2014) is not opposed to the principles of the UN Global Compact in any way, even though its long-

term consequences may have a significant negative impact on social welfare and the sustainable management of natural resources.

- 3** Investing in innovation, which companies only do if they have a reasonable prospect of reimbursing the fixed costs spent on R&D, is regarded with suspicion in the Ruggie Framework, since it might represent a potential obstacle to the REBSP. After all, an intellectual property rights (IPR) system that grants a temporary exclusive right to commercialise an innovation represents a potential obstacle to accessing technology and may be opposed to the ideal of perfect competition. However, as we illustrated in the previous chapters, this assumption ignores the fact that innovation needs somehow to come into being in the first place, otherwise the access question simply becomes irrelevant. Even if the current IPR system may provide insufficient incentives to invest in genuine innovation, the alternative to an enforceable IPR protection system is not free access but more likely trade secrets. So there may be less rather than more sharing in the absence of an IPR system. Moreover, there are currently widespread efforts to reconcile the need to reward innovation with the desire to make such innovation accessible and thus useful in addressing the management of public goods (Overwalle 2009; Hippel 2006). The emotional debate on biopiracy ignores such trends. It implies that bioprospecting by MNCs in developing countries represents a stealing of knowledge for the purpose of generating profits (Geneva Academy 2015; BD 2014). However, this view ignores the fact that a company may have to invest millions of dollars in R&D to convert the chemical compound found in a particular ecosystem into a viable commercial product in the form of a new drug or a new crop. As the IBM case study in Chapter 3 illustrated, a company may have to invest substantially in R&D to convert a patent into a commercially viable product, and sometimes the welfare gains go to society at large rather than to the company in the form of profits, because fierce competition limits the price-setting power of the

company. A company must have a prospect of earning a profit, otherwise it will not invest in a risky innovation – and if there is no investment there will also be none of the potentially beneficial welfare effects that might result from the existence of this innovation. These welfare effects can manifest themselves in the form of a new product or service that is able to better meet a human need or in the form of a benefit-sharing mechanism that obliges the company to return a particular share of the profit to the local communities that were custodians of the natural resources from which the essential ingredient of the innovation was extracted (in the case of bioprospecting). The fair and equitable sharing of the benefits arising from the utilisation of genetic resources is one of the three objectives of the Convention on Biological Diversity (CBD) and the main purpose of the Nagoya Protocol on Access and Benefit Sharing. But this mechanism has hardly been used so far due to its burdensome nature. So much emphasis is placed on national sovereignty over genetic resources and the concern that companies might try to steal it, that revenues from bioprospecting are not generated in the first place. This is the opposite result of what developing countries originally expected from the deal with developed countries that ultimately led to the CBD. Developing countries agreed to protect their natural resources in return for access to technology that would allow them to make more effective use of those resources. Articles 18 and 19 in the CBD, for example, insisted on the transfer of biotechnology. This transfer never took place, not because of IPR, but because of the prohibitive biosafety regulations that have been exported from developed to developing countries thanks to the Cartagena Protocol on Biosafety to the CBD. The Protocol was meant to protect biodiversity, but instead addressed European concerns over the potential risks of the production of and trade in genetically modified organisms (GMOs). According to the former director of the CBD, Calestous Juma, this hijacking of the original purpose of the Convention explains to some extent why so little has been achieved in terms of international protection

of biodiversity and why there was never a genuine commitment to technology transfer (Stöcklin 2015; Aerni *et al.* 2015).

The question of how existing or potential IP protection systems can be harnessed to appropriately value and facilitate innovation and creativity for open innovation and development in developing countries (Beer *et al.* 2014) is not addressed in the Ruggie Framework and the current CSR literature, because it would require admitting that entrepreneurs who create innovation might also contribute to social welfare and enhanced access to human rights. Welfare creation through low-tech innovation in developing countries has been stimulated by the use of ‘petty patents’. Such patents for low-tech innovation allow the poor who innovate out of necessity to become aware that their innovation may have value for others and might become a source of additional income for themselves. If they are granted a temporary exclusive right for their low-tech innovation, they may be able to attract investment and thus be in a position to produce more of their innovation for other communities challenged by similar problems that the respective innovation is able to address. But it is also important to recognise that innovations that require a high amount of R&D expenditure, but which would also produce large beneficial welfare effects, do not just emerge out of nowhere. They are a product of deliberate private and public support systems that help them to move from the lab to the marketplace. This requires an entrepreneurial infrastructure consisting of basic business services, access to finance, technology development agencies to improve the technologies, and institutions that protect ownership and guarantee the safe use of innovation. In other words, innovation is essential for meeting basic needs – and building infrastructure is essential for innovation⁷. These institutions have not been updated due to the low importance assigned to innovation as a source of poverty reduction and social empowerment, but also because of the interests of incumbents in business and politics that benefit from the *status quo* (Juma 2011). It is clear

7. <http://steps-centre.org/newmanifesto/round-table-events/list-of-all-the-roundtables/>

that growth through imitation is very important for developing countries that lack the capacity and infrastructure to develop their own cutting-edge science-based innovation, but there is ample space for imitation even if these countries are members of the World Trade Organization and thus the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Angelini *et al.* 2010; Taubman *et al.* 2012). Moreover, it is also a fact that as major innovations become part of an economy's backdrop (with expired IP protection in most cases), further growth in that economy can and should be spurred by the activities of individuals seeking to imitate and subtly vary existing innovations (Beer *et al.* 2014: 41).

According to research conducted by the United Nations Industrial Development Organization (UNIDO 2006), stronger IPR protection can ultimately reap rewards in terms of greater domestic innovation and increased technology diffusion in developing countries with sufficient capacity to innovate. Yet it has little impact on innovation and diffusion in developing countries without such capacity, and may impose additional costs. Consequently, countries at different stages of development might have to use the flexibilities in the TRIPS Agreement to maximise net benefits for their development (Gervais 2007; Taubman *et al.* 2012). Unfortunately, the wide-ranging possibilities for developing countries to access innovation via TRIPS and to benefit from new collaborative licensing models is hardly explored by human rights advocates because of the general assumption that IP protection hinders rather than facilitates access to knowledge (Taubman *et al.* 2012; Juma 2011).

Chapter 6

Conclusions

The economy as defined by Joseph Schumpeter is an evolutionary process driven by entrepreneurs who seek, discover and exploit new opportunities in their particular natural, technological and social environment. The result of these efforts is innovation that generates increasing returns, not just for the entrepreneur himself but for society at large. At the same time, enabling entrepreneurs to grow through innovation and eventually challenge the incumbents of highly regulated established markets has been the engine of social and economic empowerment throughout history. The economic right to have the freedom to grow through innovation should therefore be considered a basic economic right that eventually becomes an enabler not just of welfare- and autonomy-enhancing rights but also of basic political and cultural rights. Allowing people to make use of their skills and start a successful business that generates employment is directly or indirectly recognised as a basic economic right in common law and civil law (free use of faculties, free choice of occupation), but these entrepreneurial rights are hardly ever associated with basic human rights. One reason for this may be the fact that economic rights in the human rights discussion are associated with labour rights rather than the right to earn a living.

In this book, we argue that there are three main reasons why the freedom of entrepreneurs to grow through innovation tends to be ignored in economic theory as well as in the discussion on human rights.

First of all, neoclassical economic theory and the policies derived from it tend to ignore the beneficial effects on public welfare produced by entrepreneurs. These effects come into being when an entrepreneur invests in innovation and thus generates new goods and services that help to better address human

needs. As such, innovation can contribute to welfare- and autonomy-enhancing human rights. Often, however, entrepreneurs lack the capacity, the means, the institutional setting and the infrastructure to become successful innovators. It therefore takes support from the public and the private sector to make innovation flourish. Yet the role the public sector plays as a facilitator of sustainable change through innovation is not addressed in neoclassical economics (Mazzucato 2013; Warsh 2007). Consequently, the link between an innovation-driven entrepreneur and an increase in access to human rights is not addressed in economics.

Second, human rights, as they are legally defined by the Universal Declaration on Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), are primarily associated with the rights of workers, not entrepreneurs. In fact, entrepreneurs who have grown through innovation and eventually established multinational corporations (MNCs), are framed as potential threats to the protection of human rights rather than as possible enablers of human rights. The ten principles of the UN Global Compact and the three pillars of the Ruggie Framework (protect, respect, remedy) illustrate this well. By looking at history, however, we are able to show that the private sector has been a force for social empowerment and an advocate of equal human rights rather than a human rights offender. According to Jane Jacobs, it was merchant law in Renaissance Italy that respected and protected equal human rights rather than hierarchical state law (Jacobs 1994). The insight that commerce can also improve mutual respect for equal human rights was also observed by Montesquieu and many sociologists and anthropologists in the 19th and 20th centuries. However, economists and human rights lawyers have not necessarily shared this perspective, for they have rarely attempted to understand the virtues of an innovative entrepreneur who is seldom driven exclusively by material interests, as a significant amount of literature is able to document (Hirschman 1992). More recent literature on corporate social responsibility dwelling on the 'positive responsibilities' of MNCs recognises that

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such companies can play a positive role as lobbyists for human rights within a country (De Schutter 2008; Scherer and Palazzo 2011). But that view does not address the potential of such companies to enhance access to human rights by collaborating with local firms in their efforts to make goods and services that better meet the needs of local people.

Third, in affluent societies, public acceptance of protecting the rights of innovative entrepreneurs is low, since they are not perceived to be vulnerable and thus in danger of losing dignity. This is a great misunderstanding, however, since there are two types of entrepreneur: the ‘opportunity’ entrepreneur who requires an institutional setting in order to invest in innovation, and the ‘necessity’ or ‘survival’ entrepreneur, mostly found in low-income countries, who has failed to find formal employment and therefore needs to scratch a living by trading his skills and assets in the informal sector. The latter is found in much larger numbers than the former and struggles to lead a life with dignity, and even the former often starts out in a precarious state, with many never leaving this state because they fail to succeed in business. What the opportunity and survival entrepreneurs have in common is that they are outsiders who seek to make a living based on their business ideas and skills instead of relying on privileged access to public resources – which they often do not have in the first place – and the rents derived from this access. This is also the basic difference between the entrepreneur who does not make an effort or is unable to innovate, and thus relies on rents rather than profits, and the one who innovates successfully. The latter, of course, needs a favourable institutional and technological environment that reduces the risks of innovation and increases the chances of successful commercialisation, which may then also contribute to future human welfare. This is because innovation generates increasing returns that lead, among other things, to more formal employment, higher tax revenues and better products and services that address a certain demand in society. By contrast, an entrepreneur who does not have to innovate often finds himself in a protected market that allows him to extract a rent. Yet the lack of innovation will eventually have

a negative impact on the enablement of enhanced access to human rights. Therefore it is of paramount importance that entrepreneurs who are forced to innovate because they cannot rely on a protected insider market are supported by their governments, and also by large MNCs, in their efforts to increase their capacity to innovate and start a successful and growth-oriented business in the formal sector. This does not just lead to individual economic empowerment but also lifts many other people out of poverty through endogenous development that enhances formal employment and tax revenues. And enabling people to escape poverty is the best way to enhance their access to basic human rights.

Strengthening the economic rights – including the freedom to innovate – of opportunity and survival entrepreneurs alike will thus be key to improving human rights for those who are not employed, and it is at the root of the political and cultural empowerment necessary for enhancing the dignity of and respect for outsiders in society. Yet this insight cannot be derived from current baseline assumptions in economic theory, nor from the current legal debate on human rights, and nor from the Ruggie Framework. Striving for enhanced access to basic human rights may therefore require a more interdisciplinary perspective and a general reframing of the global debate on human rights.

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Entrepreneurial rights as human rights

The contemporary human rights debate is mostly concerned with the protection of people affected by change that is beyond their control. But what about those who make use of their basic economic rights to facilitate economic and social change? Do these agents of change need protection and, if so, how do their activities relate to the current debate on human rights?

In this book, the historical importance of innovative entrepreneurs as agents of change who indirectly contribute to a more humane world by enhancing access to basic human rights is illustrated. However, entrepreneurial rights tend to be neglected in economic and legal theory as well as in the global debate on human rights. Philipp Aerni argues that this neglect has its roots in the implicit assumption that entrepreneurs must surely know how to help themselves and therefore do not require special attention from a human rights perspective. The fact is, however, that those most vulnerable to human rights offences, especially in the developing world, are those who have failed to obtain formal employment and are therefore self-employed by default.

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CHF22.50 / £15.00