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**The Right to Development in Comparative Law:
The Pressing Need for National Implementation**

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The right to development in comparative law: The pressing need for national implementation

Bertrand G. Ramcharan*

Abstract

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully be realized.”¹

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.²

“The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development as a universal and inalienable right and an integral part of fundamental human rights.”³

“The goal of development is the improvement of human well-being and the quality of life. This involves the eradication of poverty, the fulfillment of basic needs of all people, and the protection of all human rights and fundamental freedoms, including the right to development. It requires that governments apply active social and environmental policies and that they promote and protect all human rights and fundamental freedoms on the basis of democratic and widely participatory institutions.”⁴

“The concentrated target of implementation (of the right to development) should be alleviation of the mass poverty and the plight of vulnerable peoples.”⁵

“In order to explore and exploit the potential of the right to development, it is necessary to locate it within the domain of national politics and constitutions. It is surprising that almost no attempt has been made at this approach.”⁶

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Introduction

The right to development is simultaneously of great importance to the suffering masses of the world and a subject of great controversy. A great African jurist, then Chief Justice of Senegal, Keba Mbaye, first advocated the concept in 1972 in a lecture at the International Institute of Human Rights in Strasbourg, France.⁷ The African Charter on Human and Peoples' Rights, which Judge Mbaye heavily influenced, then inserted it for the first time in a human rights convention. Article 22 of the Charter stated:

'1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

'2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'⁸

The UN Declaration on the Right to Development (1987) would follow up by affirming in its Article 1(1) that:

“the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully be realized.”

One could also include as definitional elements Article 8, which provided that:

(1) 'States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.'

The World Conference on Human Rights (1993) reaffirmed the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.⁹

Notwithstanding the inclusion of the right to development in the African Charter, the African Commission on Human and Peoples' Rights has paid virtually no attention to it nor has NEPAD's Peer Review Mechanism.¹⁰ . None of the other regional human rights bodies has followed up on the right to development: the Arab Commission on Human Rights, Inter-American Commission on Human Rights or the European Commission (now Court) on Human Rights. The ASEAN Commission has only just come into existence.

In the Organization of African Unity, now the African Union, there has hardly been any attention to the implementation of the right to development as such. Although NEPAD's activities cover some areas that would fall among the elements of the right to development, it has neither followed up on the right as such nor has there been any attention to the right to development as such in any of the regional organizations of the third world: ASEAN, CARICOM, ECOWAS, the League of Arab States, and the OAS. They do, however, have declarations, conventions, and some activities in the area of economic, social and cultural rights that would correspond to elements of the right to development.

The UN regional economic and social commissions have not considered the right to development as such but have some activities that would correspond to elements of the right. Some of these commissions may consider the right too controversial to give express attention to it.

At the UN, Member States make ringing affirmations of support of the right to development but practically none of them has followed up by recognizing the right in their national legal orders. In this study we shall look at the cases of India, Brazil and South Africa. We shall find lofty declarations of support for the right to development but no follow-up in their national legal orders. The Courts of India and South Africa have made important jurisprudential statements on the implementation of economic, social and cultural rights but have not touched on the right to development as such.

We shall argue in this study that the strategic value of the declaration of the right to development should be reflected in the national legal order of every Member State and in the activities of regional economic and social organizations. International action is vital, but it must build on, and complement, national and regional action. For the most part, so far, international action has been largely hollow.

Most of the action has taken place in the former UN Commission on Human Rights, now the Human Rights Council and in the UN General Assembly. However, the main focus has been on the international dimensions of the right to development rather than the national or regional dimensions. When a former UN Independent Expert on the Right to Development indicated in 1998-99 that he intended to focus on the national dimensions of the right to development he was advised by the Group of 77 developing countries to concentrate on the international dimensions and the favoured idea of developing countries is to work for the drafting and adoption of an international convention that would provide for transfers or resources from developed to developing countries. This is stoutly resisted by the latter, as could be seen at the Copenhagen conference on climate change in December, 2009.

In the midst of all of this, the suffering masses of the world still need to benefit from the right to development and need to know what they can expect, in the first instance, from their own governments. It will be recalled that the African Charter pointedly provided that States shall have the duty, individually and collectively, to ensure the exercise of the right to development. Likewise, the UN Declaration provided that States should undertake, at the national level, all necessary measures for the realization of the right to

development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.'

There is thus a solid core content to the right to development at the national level that calls for the following:

- Recognition of the right to development in the national legal order
- Taking all necessary measures to implement the right to development
- Formulation of national development policies in the spirit of the UN declaration
- Popular participation
- Equality of access
- Appropriate economic and social reforms
- Eradicating social injustice
- Halting violations of human rights
- The role of women in the development process
- Acting on the core content of basic economic and social rights
- Fair distribution of income.

The primary aim of this study of the right to development in comparative law and practice is to help clarify the legal content of the right to development, with particular emphasis on the national dimensions of this right. In chapter one below we will look at the right to development in international law. Chapter two discusses the right in national law, while chapter three discusses regional dimensions. Chapter four discusses recent work on legal empowerment of the poor, while the final chapter discusses the very relevant issue of public interest litigation. The concluding chapter argues for the establishment of a World Court of Human Rights which would be given competence, *inter alia*, to pronounce on petitions claiming breaches of the right to development inside countries.

Chapter I

International Law

This chapter examines the journey of the idea of development as a human right, starting with the UN Charter, then proceeds to the International Covenant on Economic, Social and Cultural Rights, the UN Declaration on the Right to Development (1986), the Millennium Development Goals (MDGs), and on-going efforts for the 'implementation' of the right to development.

UN Charter

The link between development and human rights has been prominent ever since the establishment of the United Nations. Article 55 of the United Nations Charter set out the interdependence and interrelatedness of peace, development and human rights:

With a view to create the creation of conditions which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems, and international cultural and educational cooperation;
- c. universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The importance of development for human rights, and the need to integrate human rights in the development process have been emphasized ever since and there is nowadays much discussion of rights-based approaches to development as well as the role of human rights in poverty reduction strategies. But while related to, these are not the same as the right to development and we need to examine the pith and substance of the idea in view of the emphasis, but differing interpretations, given to it by developing and developed countries.

Differing interpretations and the proposal for an international convention on the right to development.

The differing interpretations and approaches could be seen as recently as 2007 in the debates within the framework of the UN Human Rights Council. That year a Working Group on the Right to Development met for its eighth annual session to consider how to take forward the implementation of the right. As is recorded in the report of the Working Group,¹¹ the Group of African states underscored the centrality of the right to development in the framework of promoting and protecting human rights and its importance in relation to the mandate of the UN Human Rights Council (HRC). The Group of African States considered that only a comprehensive approach including equitable international trade rules and response to energy, raw materials and debt burden issues could reduce the growing gap between developing and developed

countries. In a framework of fighting poverty, the Group of African States called for international cooperation without conditionality and advocated the elaboration of an international convention on the right to development.¹² As we shall see later, this is a contested idea at the United Nations.

The countries belonging to the Non-Aligned Movement (NAM) emphasized the importance and centrality of the right to development in the mandate of the HRC and complained that, since the adoption of the Declaration on the Right to Development twenty years ago, very little had been shown in terms of implementation of this right by the international community. In the current globalization context, the NAM underscored the lack of autonomy of developing countries as regards decision-making to formulate development policies suitable to their realities: unfair trade rules and practices that restricted market access and allowed for export subsidies; a decrease in and failure to comply with commitments to official development assistance and transfer of technology and heavy debt burdens, as factors of permanent 'decapitalization' of developing countries. Elaborating on the right to development, the NAM reaffirmed the duty of states to cooperate for the creation of conditions conducive to realizing the right to development. It called for cooperation that was not subject to conditionality and was not treated as charity.¹³

The European Union and associated countries, for their part, reaffirmed their 'firm commitment to the realization of the right to development and underscored the primary responsibility of states for the promotion and protection of all human rights, including the right to development; their responsibility to create internal conditions favourable to their development, and to cooperate at an international level in eliminating obstacles to development'.¹⁴

As could be seen from the foregoing, the developing countries emphasised the international dimensions of the right to development and have been firmly opposed to discussing the national dimensions. The developed countries, on the other hand, emphasised the internal dimensions and saw international cooperation as related to it. This difference could be seen in the outcome of the deliberations of the Working Group that year, whose report called for the elaboration and implementation of a comprehensive and coherent set of standards. The developing countries have been advocating the drafting and adoption of a convention on the right to development. The report of the Working Group explained that these standards 'could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement.' This was diplomatic language for a convention.

The Non-Aligned Movement made this clear in an explanation recorded in Annex III to the report: "The Non-Aligned Movement interprets the phrase 'international legal standard of a binding nature' contained in paragraph 52 of the conclusions and recommendations to mean 'internationally legally binding convention.'" ¹⁵ Canada recorded its opposition to this: Canada "does not believe it is appropriate for the Working Group or high-level task force to consider the development of a legally binding instrument."¹⁶ The European Union and Australia made similar reservations.¹⁷

It remains to be seen whether the developing countries majority at the United Nations will press for the drafting and adoption of an international convention on the right to development; what will be included in such an instrument; to what extent it will be broadly supported and how it will interpret the right to development. In the meantime, we are left to examine what could be considered the elements of the right to development as already spelled out in consensual international practice, namely practice that has a wide degree of international support. The International Covenant on Economic, Social and Cultural Rights, which has been accepted as binding well over 150 States, the 1986 Declaration on the Right to Development, and the recent Millennium Development Goals are documents that suggest themselves for examination.

The International Covenant on Economic, Social and Cultural Rights

An examination of the substantive articles of the Covenant shows the concept of development performing six roles. First, development comes closest to being recognized as a right in Article 11 of the Covenant, which refers to the right of everyone to an adequate standard of living 'and to the continuous improvement of living conditions'. The Covenant follows a deliberate scheme in which many articles define the right recognized and then proceed to indicate the steps to be taken, nationally and internationally, with a view to promoting the realization of an element of the right of everyone to an adequate standard of living.

Second, development is cast, in some instances, as a derivative of a recognized right. This is the case for example, in Article 1 of the Covenant, dealing with the right to self-determination. After stating that all peoples have the right to self-determination, the article proceeds to add that by 'virtue of that right' they fully pursue their economic, social and cultural development.

Third, development is in some instances cast in the role of a goal to be pursued in going about the realization of a right recognized in the Covenant. One may see this, for example, in Article 15 on the right to take part in cultural life. This article specifies that the steps to be taken by the States Parties to the Covenant shall include "the development and the diffusion of science and culture'. Another example is Article 13, paragraph 2(e), which includes, among the steps to be taken to implement the right of everyone to education, 'the development of a system of schools at all levels.'

Fourth, in some instances, development is cast in the role of a guide in the implementation of a right recognized in the Covenant. For example, Article 12 on the right to the enjoyment of the highest attainable standard of physical and mental conditions requires States Parties to take steps 'for the healthy development of the child'. Likewise, Article 13, after recognizing the right of everyone to education, adds that 'education shall be directed to the full development of the human personality'. (One might have thought that this element, namely the 'full development of the human personality' should have featured explicitly in the core definition of the right to development contained in the Declaration adopted by the United Nations General Assembly in 1986.

Fifth, the concept of development also finds itself in the Covenant as a means for enabling the realization of rights recognized in the Covenant. One sees this for example in Article 6, which recognizes the right to work and then specifies that the steps to be taken by the State Party to achieve full realization of this right should include 'policies and techniques to achieve steady economic, social and cultural development'. One also sees this in Article 11, paragraph 2 (a) which refers to the need for developing or reforming agrarian systems in such a way so as to achieve the most efficient development and utilization of natural resources.'

Sixth, and finally, one sees the concept of development being employed as a factor which may be taken into account in determining the extent of the obligations of a State Party to guarantee economic rights recognized in the Covenants to non-nationals.

The above mentioned instances of the utilization of the concept of development indicate that the drafters of the Covenant definitely had at the forefront of their minds development issues when drafting the Covenant. However, they did not consider it necessary, at that stage, to include expressly the right to development. This has now been done in the Declaration on the right to development and at the World Conference on Human Rights (1993).

The Declaration on the Right to Development

Article 9 of the United Nations Declaration on the Right to Development adopted by the General Assembly (GA) in 1986, states that all the aspects of the right to development set forth in the Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.¹⁸ Is an 'aspect' the same as an 'element of the definition' of a right? The content of the Declaration may help to answer this question. The nearest that the Declaration comes to providing a definition of the right to development is in Article 1(1) which states that: "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully be realized." One could possibly include as definitional elements also Article 8, which provided that:

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

The remaining articles of the Declaration proceed to make a number of statements that serve different purposes. There are collateral statements such as the one in Article 6 (2) that all human rights and fundamental freedoms are indivisible and interdependent. It

identifies the subjects and beneficiaries of the right to development in Article 1 (1), which refers to the right to development as one by virtue of which 'every person and all peoples are entitled (...)'. Article 2(1) specifies that the human person is the central subject of development and should be the active participant and beneficiary of the right to development. Paragraph 3 of the same article adds that states have the right and the duty to formulate appropriate national development policies. The possible subjects and beneficiaries are therefore the individual, the state, all Peoples.

The declaration states what the right to development implies. Article 1 paragraph 2 states that the right to development implies the full realization of the right of peoples to self-determination (as was seen above, development is cast, in Article 1 of ICESCR as a derivative of the right to self-determination). It indicates what the right to development requires. This is mentioned in places such as Article 3 (2) which states that the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among states. Article 4 (2) adds that sustained action is required to promote more rapid development of developing countries. As a complement, effective international co-operation is also essential.

The declaration indicates responsibilities. Article 2(2) states that all human beings have a responsibility for development. Article 3 (1) adds that states have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development. It also indicates duties of the subjects and beneficiaries of the right to development, namely: in Article 2 (2) that individuals should promote and protect an appropriate political, social and economic order for development; Article 2(3): states have the right and duty to formulate appropriate national development policies; Article 3(3): states have the duty to cooperate with each other in ensuring development and eliminating obstacles to development; Article 4: states have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development. Sustained action is required to promote more rapid development of developing countries. Effective international co-operation is essential: Article 5: states shall take resolute steps to eliminate massive and flagrant violations of human rights; Article 6: All states should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms; states should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights; Article 7: All states should promote the establishment, maintenance and strengthening of international peace and security; Article 8: states should undertake, at the national level, all necessary measures for the realization of the right to development. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights; Article 10: Steps should be taken to ensure the full exercise and progressive enhancement of the right to development.

Although all of the above mentioned "aspects" are contained in a document entitled "Declaration on the Right to Development", they surely cannot all be part of the definition of the right to development. The elements that seem to be new, the normative statements that appear to have been added to the prior stock of human rights norms

are in Article 1, paragraph 1, which rests on the notions of participation in, contribution to and enjoyment of development. The Declaration adds or consolidates a specific new right. ('The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'). This is the first time that such an explicit statement has been made in an authoritative international instrument.

The Declaration insists that development has to be of such a nature that 'all human rights and fundamental freedoms can be fully realized.' This point is further emphasized in Articles 5 and 6. In other words, when there is gross violation of human rights and fundamental freedoms, development is vitiated.

The Declaration insists on the indivisibility and interdependence of all human rights. It urges full respect for principles of international law and calls upon all states to promote the establishment, maintenance and strengthening of international peace and security. These are essentially statements about inter-relationships and inter-linkages. The right to development cannot therefore be considered to be what some claim that it is: namely a 'synthesis right' encompassing, englobing and subsuming other rights. Peace, disarmament, respect for human rights and fundamental freedoms are required for development to take place. They are not, however, miraculously subsumed in an overarching right, 'the right to development'.

Development is conceptually employed in the Declaration in the following senses: more narrowly in the legal sense of a right (Article 1 (1)); broadly as a goal; relatively as a guide; and practically as a means. The first sense (a new right) represents an advance upon the ICESCR which does not contain a specific affirmation of the right to development although there may be some traces of the notion in the Covenant. The Declaration on the right to development and the International Covenant also cover very much similar ground in calling for national and international measures for the realization of economic, social and cultural rights.

The Millennium Declaration and Development Goals

In successive policy documents the United Nations has sought to set development goals and pursue development strategies for tackling the massive economic and social problems, particularly extreme poverty, facing two thirds of the world's population. The Millennium Declaration is the latest example of such a policy document.

In the Millennium Declaration adopted on 8 September 2000, United Nations Heads of State and Government reaffirmed their commitment to the Purposes and Principles of the United Nations Charter and expressed their determination to establish a just and lasting peace all over the world. They believed that the central challenge was to ensure that globalization became a positive force for all the world's peoples. They considered certain fundamental values to be essential to international relations in the twenty first century including freedom, equality, solidarity, tolerance, respect for nature and shared responsibility.

They declared their intention to spare no effort to free the peoples of the United Nations from the scourge of war, whether within or between states. They resolved to strengthen the rule of law in international as well as in national affairs and to make the United Nations more effective in maintaining peace and security. They solemnly declared that they would spare no effort “to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty”. They resolved in particular to halve by the year 2015 the proportions of the world’s people whose income was less than one dollar a day as well as the same proportion of people from hunger. Further, they resolved, by the same date, to halve the proportion of people unable to reach or to afford safe drinking water. They also committed themselves, to ensure that children everywhere, boys and girls alike, would be able to complete a full course of primary schooling. Similar goals were set in relation to the reduction of maternal mortality, tackling HIV/AIDS and malaria, and to improving the lives of slum-dwellers.

The Heads of State and Government declared their solemn intention to protect the vulnerable and to protect and assist children and civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies. They undertook to spare no efforts to make the United Nations a more effective instrument for pursuing the fight for development for all the peoples of the world; the fight against poverty, ignorance and disease; the fight against injustice; the fight against terror and crime; and the fight against the degradation and destruction of “our common home”.

The Heads of State and Government undertook specific commitments in respect of human rights, democracy and good governance. They resolved to strengthen the capacity of all their countries to implement the principles of democracy and respect for human rights, including minority rights. They also resolved to eliminate all forms of violence against women, to take measures for the protection of the human rights of migrants, migrant workers and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater tolerance in all societies.

The Heads of State and Government further resolved to strengthen cooperation between the United Nations and national parliaments and to give greater opportunities to the private sector, NGOs and civil society to contribute to the realization of United Nations goals and programs. They requested the GA to review the progress made in implementing the provisions of their declaration and asked the Secretary-General “to issue periodic reports” for consideration by the General Assembly and as a basis for further action”.¹⁹

The Millennium Development Goals (MDGs) were derived from the Millennium Declaration. Most of the goals and targets were set to be achieved by the year 2015 on the basis of the global situation during the 1990s. During that decade a number of global conferences had taken place and the main objectives of the development agenda had been defined. The MDGs laid down eight goals to be achieved by the year 2015. Goal 8 called for a global partnership for development with the following targets: addressing the special needs of the least developed countries, landlocked countries and small island developing states; developing further an open, rule based, predictable, non-discriminatory trading and financial system; dealing comprehensively with

developing countries debt; in cooperation with developing countries; developing and implementing strategies for decent and productive work for youth; in cooperation with pharmaceutical companies; providing access to affordable essential drugs in developing countries; in cooperation with the private sector, making available the benefits of new technologies, especially information and communications to developing countries.

The MDGs are based more on partnership and cooperation rather than on right but they have been invoked by the developing countries in support of the implementation of the right to development, particularly the alleviation of extreme poverty.

The concept of preventable poverty, in our submission, requires that in and for all countries there be monitoring of situations of extreme poverty and national strategies to tackle them. Regional and international assistance should be targeted to such situations as a matter of priority. There are national, regional and international bodies that can help identify such situations and call for action to redress them. The Committee on Economic, Social and Cultural Rights can take the lead on this. The Human Rights Council's Special Rapporteur on Extreme Poverty can do likewise. United Nations Development Program, the World Bank and regional development banks or institutions can also play a part. It surely must be fair to expect priority attention to be devoted to the alleviation of extreme poverty as issues of prevention, protection and justice. Regional prevention mechanisms can also play their part.

Conclusion

The preceding chapter has shown the emphasis given since the establishment of the United Nations to the pursuit of development and to the implementation of economic, social and cultural rights alongside civil and political rights. It is acknowledged that development is needed for the full flowering of human rights – as much as human rights are necessary for the full flowering of development.

The GA and the World Conference on Human Rights have declared the existence of a right to development and development is widely accepted as a human right, even if differing interpretations are given to it. Even so, the emergence of the idea of the right to development has not been free of controversy and to this day there are those who would contend that development is not a human right. This raises profound questions of the meaning of a human right. If one takes the legalistic view that a human right, to qualify, as such, must be legally enforceable, then development may not qualify as a human right everywhere. But if one takes the view of Amartya Sen that rights form part of social ethics, are situated within the process of public reasoning and may inspire legislation if not already part of it, then surely the concept of the right to development is sound.

The international community assembled at the World Conference on Human Rights in Vienna in 1993 and considered development so important as to confirm it by consensus as a human right. This should have removed any doubt as to the status of development as a human right. The task ahead is one of implementation, beginning with the implementation of the right to development at the national level.²⁰

Professor Oscar Schachter, one of the greatest international lawyers of the twentieth century, writing in 1992 on the implementation of the right to development, argued that the concentrated target of implementation should be alleviation of the mass poverty and the plight of vulnerable peoples. “In the state of the world today”, he submitted, “mass poverty and deprivation require international action in more massive and sustained way than ever before.”²¹

Chapter II

National Law and Policy

Introduction

Developing countries face many problems in meeting the aspirations of their people for decent life chances and for the satisfaction of basic human needs. History, composition, structure, resources, and the regional and international economic environment all have a bearing on this. So does the quality of governance and the level of confidence in government.

The rights-based approach to development can be helpful. The International Covenant on Economic, Social and Cultural Rights calls for Governments to pursue policies and strategies that can ensure satisfaction of basic needs to food, health, shelter and education. This can be a healthy way for the society to monitor itself and to strive for the equitable advancement of its people.²²

It would also be helpful to introduce into the national public policy discourse the frame of the right to development. There are sufficiently concrete elements to do this. As already pointed out in the Introduction to this study, Article 1 of the UN Declaration on the Right to Development (1987) states that the right to development is an inalienable human rights by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully be realized. Article 8 adds that States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, among other things, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.

Furthermore, effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating social injustice. States should also encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights. Violations of human rights shall be halted.

Article 2, paragraph 3 of the Declaration provides that States have the right and the duty to formulate appropriate national development policies. Article 4, paragraph 2 adds that sustained action is required to promote more rapid development of developing countries.

If one were to strive for the implementation of the right to development nationally it would require one to have in view the following features of the right to development in national law and policy.

Incorporating the Right to Development in National law

Incorporating the right to development in national law would call for action on the following issues:

- **Recognition of the right to development in the national legal order**

The right to development as such should be recognized in the national legal order. This is an important political, legal, and philosophical commitment. As far as we know, few countries recognize such a right, although there are many national constitutional provisions that have objectives similar to the right to development. It would still be a positive step forward to enshrine the right to development in the national legal order of every UN Member State.

- **Taking all necessary measures**

These include legislative, political, economic, social, judicial, quasi-judicial, promotional and protecting measures. It would be constructive for Governments to publish periodically policy papers on efforts underway to implement the right to development.

- **Formulation of national development policies**

The Government must make a reliable and objective survey of the development needs of the population as a whole. Governments and political parties usually tell us that they know what the needs of the people are. Yet, it would be preferable that there be periodic objective surveys of the needs of the people.

The survey of development needs should pay special attention to the situation of remote, marginalized or historically disadvantaged communities.

- **Popular participation**

There should be popular participation in the conduct of the surveys mentioned above and in the formulation and implementation of development policies.

- **Equality of access**

Based on the survey, the national development plan should be rights-based. A minimum core content should be given to each of the rights in the Economic and Social Covenant and these should be made justiciable before the courts.²³

- **Appropriate economic and social reforms**

Development surveys such as we have suggested above would provide pointers in the direction of economic and social reforms.

- **Eradicating Social Injustice**

Appropriate economic and social reforms should be carried out urgently with a view of eradicating social injustice. The issue of equity in the treatment of women would seem deserving of special attention.

- **Halting Violations of Human Rights**

Communities which consider that their right to development is not being adequately addressed or is being violated should have access to adequate means of recourse, including recourse to the National Human Rights Association and the Supreme Court.

- **Role of Women in the Development Process**

An urgent study could be commissioned on the perspectives of women about the development process and women should have a major say in the formulation and implementation of development plans.

- **Core content of basic economic and social rights**

In respect of each of the rights contained in the Economic and Social Covenant, Government should issue a policy paper say, once every five years, on what their objectives are and how they intend to monitor implementation. This policy paper could be debated in Parliament and its advice sought on the refinement of the policies.

- **Fair distribution of income**

There should be a way of monitoring the distribution of income across the board in the country so that the society can take stock of itself and respond to instances of inequities. This is an element of the right to a process of development, which we discuss next.

The Right to Development as the Right to a Process of Development

A UN Independent Expert on the Right to Development, Mr. Arjun Sengupta, in a series of reports to the then UN Commission on Human Rights, argued that the right to development was, *inter alia*, the right to a process of development. In different reports, he distinguished between the right to development, human development, human rights and development and the human rights approach to development. He insisted that the human rights approach to development was not the same as realizing the right to development - even though at times he himself seemed to use these terms

interchangeably. But his idea of the right to development as the right to a process of development is an important one and bears exploration.

In a report dated 27 July 1999 he submitted, basing himself on the language of the UN declaration on the right to development, that “the right to development is that human right by virtue of which ‘every human person and all peoples’ are entitled to ‘participate in, contribute to and enjoy’ that process of development.”²⁴ Striving to give content to the right to development as a process he argued, that

“(I)t is basically centered around the concept of equity and justice, with the majority of the population who are currently poor and deprived to be brought upwards in their living standards and capacity to improve their position. It also implies that the well-being of ‘the entire population’ is to be improved. The concept of well being in that context extends well beyond the conventional notions of economic growth to the expansion of opportunities and capabilities to enjoy those opportunities.”²⁵

In a report to the UN General Assembly on 17 August 2000, he returned to the theme of the right to development as the right to a process and submitted that “It is only a process of development in which all human rights and fundamental freedoms can be fully realized which can be the entitlement of every human person as universal human right.”²⁶ He added that the process of development was one which, according to the language of the UN declaration, would seek “the constant improvement of the well being of the entire population and of all individuals, on the basis of their actions, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.” Furthermore, realizing the right to development would ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income as well as appropriate economic and social reforms and the eradication of all social injustices. Women should have an active role in the development process. He again re-iterated that the concept of a process of development was rooted in the realization of the principles of equity and social justice.²⁷

As he had done in his 1999 report he again insisted in his 2000 report to the General Assembly, that “one of the benefits of using a human rights approach to development is that it focuses attention on those who lag behind others in enjoying their rights and requires that positive actions be taken on their behalf.”²⁸ One may note that he was using a human rights approach to development interchangeably with the right to development.

The Independent Expert emphasized that poverty reduction was the most important contribution that could be made to the improvement of equity and justice. The right to development, viewed as a right to a process, would require looking at the elements that contribute to the dynamics of sustained poverty reduction and human development. GDP, education and health, the three basic variables in the human development indices would also be the three most important variables for the sustained reduction of poverty and realization of the right to development as a process of development.²⁹ The right to

development, he continued, was the right to a process that expands the capabilities or freedom of individuals to improve their well being and to realize what they value.³⁰

In other reports the Independent Expert provided additional elements on the content of the right to development as a process. He noted that the primary responsibility for implementing the right to development belonged to the nation-state. In order to fulfill these obligations all levels of government and public sector organizations must coordinate their actions.³¹ National actions should be aimed at the implementation of each of the constituent rights of the right to development individually as well as in combination with each other and as a part of the development process. A right to development approach in a development program would be concerned with the most efficient provision of goods and services and changes in the institutions and social arrangements to realize a set of targeted objectives as human rights, identified as expansion of capabilities and freedoms. It would be concerned with the increase of both the availability of, and the access to, those goods and services. It would entail a program aimed at the eradication of poverty. The principle of equality would be essential to any program aimed at implementing the right to development. The principle of non-discrimination was fundamental. Preventive measures would be crucial. Measures to bring up those who lagged behind should be accorded priority. Legislative and constitutional changes would be required. The role of women must be highlighted and NGOs could play a role in the realization in the right to development at the national level.

The Independent Expert, a macro-economist, made a valiant effort, in good faith, to give content to the notion of the right to development as a process of development. It is not readily apparent that he succeeded but, nevertheless, his advocacy of the concept of the right to development as a process was important and each country would indeed need to demonstrate that it had in place a process of development that conformed to the requirements of the UN Declaration. In the Caribbean region, Prof. Clive Thomas, a leading economist and development author gave a superb indication of how, in his view, this could be done.

National Development Policy³²

Professor Clive Thomas, of the Universities of the West Indies and Guyana, discussing the Caribbean region, provided a magisterial statement of his approach to development policy that provides an eloquent perspective of what would be needed to make the right to development a reality. Even if others were to disagree with some details of his statement, they would need to provide their own policy approach. Professor Thomas considered eight points critical:

In the first instance, and in direct contrast to what prevails, development requires a system of ownership, control and production oriented towards satisfying the basic needs of the masses. By the masses is simply meant all those who are poor and who do not have any power in society derived from property, wealth, religion, caste, expertise or other sources not widely shared, including political party affiliation.

In other words, production aimed at providing for the basic needs of the masses, in the first instance, implies a systematic, conscious, deliberate and planned attack on poverty. Eliminating poverty should not be treated merely as a possible or desirable consequence of production, which is what happens when profit is the main determinant of output. The basic needs of the masses are either personal (food, clothing, housing) or public/collective (health, sanitation, education, culture, recreation) or seen differently, both material (food, clothing, housing) and non-material (health, education).

Secondly, there can only be real development if these basic needs are satisfied through planned and effective implementation of the right to work. This implies not only that all those who want jobs have them, but that they also have (i) the right to a job without coercion as to place and type of work (given their particular skills); (ii) a framework of industrial relations that permits free collective bargaining and effective (as distinct from nominal) representation within bargaining units; (iii) a work process that allows for effective worker involvement and control; (iv) health protection and guaranteed education and training for the tasks they are engaged in; and (v) an end to discrimination based on sex, colour, ethnicity, age or physical disability. The objective is to situate work within a process of self-realisation, so that for West Indians work is both an end in itself and a means of development.

Third, the material conditions of life should be reproduced within a self-reliant and endogenous pattern of growth. This is in fact the only sustainable pattern of growth given the particular historical formation of underdevelopment. Fourth, development also implies that work, politics and social organizations are based on democratising power in society and on the effective (as opposed to nominal) exercise of fundamental rights, such as those to free expression and organisation, respect of an individual's privacy and the abolition of repression and torture. The democratisation of power also implies the democratisation of all the decision-making structures of society, from the level of the workplace and community right through to central government. An equitable distribution of wealth and income, equitable access to the use and management of society's resources and equitable access to information are necessary requirements for achieving this objective.

Fifth, development also implies preserving the stability of the environment and putting an end to the degradation of society. This is a simple and straightforward point which merely seeks to situate a country's development within the context of an unequivocal acceptance of our universal responsibility to protect the environment and sustain life.

Sixth, it is important to recognise that because of the polarity between the state and private sector, the state would have to play an important part in development, but only within the context of a participatory political process in which the ordinary person as a citizen, producer and consumer of wealth was enhanced. To achieve this, the economic process would have to be based on workers having strong organisational and representational roles in their places of work.

Seventh, a realistic approach to development must begin by recognising the stark reality of the hostile environment created by living in imperialism's backyard. And

eighth, the chosen path of development cannot realistically be separated from the outside world.³³

Thus far in this chapter we have discussed the elements of the right to development that should be included in national law, the right to development as the right to a process and national development policies needed to take forward the implementation of the right to development. We turn next to a key concept in international human rights law, the duty to ensure the enjoyment of basic rights, which would be applicable as a matter of principle to the national implementation of the right to development.

The Pursuit of Development in National Law and Practice

Notwithstanding their championship of the right to development internationally, few, if any, countries follow up by seeking to implement it nationally. In numerous statements before UN fora, India, South Africa and Brazil, for example, have repeatedly pledged their support for the right to development. South Africa, in its written statement of commitment upon seeking membership of the UN Human Rights Council in 2006 expressly reaffirmed its support for the right to development. Nevertheless, as we shall see below, there has been little follow-up action on the right to development as such in the national legal order, even if there are impressive efforts for development. There are parts of their development policies that would come within the frame of the right to development and the judiciaries of India and South Africa have provided some important statements on the implementation of economic, social and cultural rights. The South African Constitutional Court has been particularly impressive in this area..

India

Justice A.S. Annand, Chairperson of the National Human Rights Commission of India and former Chief Justice of that country, addressed the UN Human Rights Council on the 'Right to Development' during its first session, on 27 June, 2006. The Indian Commission, he explained, had taken the view that the right to development was inherent in the right to a life with dignity under Article 21 of the Indian Constitution, which is an enforceable right.

Elaborating on this, he explained that for a programme of poverty eradication one had to look at a number of indices together, and a right to development approach would imply considering improvement in each of the indices through schemes that had to be implemented following the rights approach, where the beneficiaries were empowered to participate in the decision-making and executing the different schemes, transparently and accountably and sharing the benefits equitably.

Non-discrimination, he noted, was central to the implementation of the right to development. Another important factor having a bearing on the development debate was the issue of corruption, as a violator of human rights. Good governance was not possible unless it was free from corruption. He added:

“It would be in the fitness of things that we aim at ensuring distributive justice in the national as well as the global context. To achieve that, there has to be a paradigm shift from Human Development as seen merely in terms of economic growth, to Human Development as a basic human right.”

The universality of human rights, he continued, with focus on human dignity and concern for accountability, made them uniquely appropriate for re-shaping development cooperation, fostering good governance and combating discrimination, disease and despair with the ultimate aim of reaching the goal of achieving ‘human rights for all’.³⁴

In the last chapter of this work we shall discuss the public interest jurisprudence of the Indian courts, which seeks to uphold basic economic and social rights for the poor and the disadvantaged. In the following pages, however, we look at the role of the Indian Planning Commission which also seeks to advance implementation of these rights and elements of the right to development.

The Indian Planning Commission has worked for economic and social justice in India, and in effect for the implementation of the right to development, for the past sixty years. In the spirit of advancing economic and social justice and human rights, the latest, the eleventh five year plan of India’s Planning Commission aims at:

- Rapid growth (at 9 per cent per annum) that can reduce poverty and create employment opportunities;
- Access to essential services in health and education especially for the poor.
- Equality of opportunity;
- Empowerment through education and skill development;
- Employment opportunities underpinned by the National Rural Employment Guarantee;
- Environmental sustainability;
- Recognition of women’s agency; and
- Good governance.

The goal of access to essential services in health and education, especially for the poor, is worthy of some elaboration. The thinking of the Indian Planning Commission is that access to basic facilities such as health, education, clean drinking water, etc , impacts directly on welfare in the short-run while in the longer-run it determines economic opportunities for the future. Since access to these services for the mass of the population depends not only upon their income levels but upon the delivery of these services through publicly funded systems, the Eleventh Plan envisages a major expansion in the supply of these services. It hopes that the high growth being targeted over the plan period will help in providing ample resources to fund these programmes by way of higher tax revenues that would become available and a larger borrowing capability.

The Planning Commission, the supreme planning body in India, was set up in March, 1950 by a Resolution of the Central Government. It is not a statutory or constitutional body. It was placed outside of the conventional Ministries and departments with a view to preventing it from falling into a rut and to facilitate development of supra-

departmental views. The Commission format was intended to provide flexibility in response to emerging needs and to build up a brains trust for development.

Its functions from the outset were five-fold:

- Formulation of five-year plans for the most effective and balanced utilisation of the country's resources;
- Working out priorities in the plan;
- Assessment of national resources and devising ways and means of augmenting them;
- Determination of the best machinery to secure the successful implementation of the plan;
- Periodic evaluation of the progress of the plan with a view to suggesting adjustments if necessary.

The composition and structure of the Commission have evolved since its establishment some sixty years ago. More recently the Commission has consisted of a full-time Deputy Chairman and eight other full-time members. The day to day work of the Commission is in the hands of the Deputy Chairman, who has the rank of a Cabinet Minister, while the other full-time Members have the rank of Ministers of State (equivalent to a junior minister). The Chair of the Commission is the Prime Minister who, however, only participates from time to time on matters of special importance. Different Ministers have, from time to time, served as part time ex officio Members. There are those who have criticised the membership of the Prime Minister and the Ministers. The Deputy Chairman, who is also Minister of Planning, is invited to attend all Cabinet meetings and when necessary other members also attend the meetings of the Cabinet or its Committees.

The Planning Commission is an advisory body to the Government. It may take the initiative in suggesting new policies and programmes and in coordinating those originating from other agencies of government. To support the Planning Commission there is also a small Ministry of Planning. We shall not go into details of its composition here. There is a Minister of State in this Ministry whose main task is to act as spokesman of the Commission and to be answerable to Parliament for the Commission's work.

The main work of the Planning Commission is organized through Divisions which include a General Planning Division responsible for a comprehensive study of the country as a whole and whose work and conclusions are prerequisites for studies relating to individual sectors. Special Planning Divisions are concerned with the study of particular sectors of social and economic development. Other Divisions include those on educational health and family welfare; labour, employment and manpower; rural development; village and small industries; rural energy; and development policy; and backward classes.³⁵

Professor Arvind Panagariya in a recent book, *India: The Emerging Giant*, discusses the issues of poverty, inequality and economic reforms. He traces India's efforts with varying degrees of success to help alleviate poverty and to reduce inequality. These are

issues at the heart of implementation of the right to development. Professor Panagariya submits that poverty alleviation strategies are more important than strategies for the redistribution of wealth so as to tackle the phenomenon of inequality.³⁶

South Africa

As we saw in the preceding section, the Indian Human Rights Commission considers that the right to development is an inherent part of an enforceable right in the Indian constitution protecting human dignity. We are not aware of a similar statement in South Africa. However, Article 10 of the South African constitution, which is a part of its Bill of Rights, states that everyone has inherent dignity and the right to have their dignity respected and protected. Article 11 adds that everyone has the right to life.

The South African Constitutional Court has had occasion to pronounce on dignity and life-related issues on different occasions and three of its judgments are of direct relevance to the subject-matter of our discussion. In *Government of RSA v. Grootboom & Others*³⁷ the Constitutional Court noted that the Constitution obliged the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health care, sufficient food and water, and social security to those unable to support themselves and their dependents. All the rights in the Bill of Rights were interrelated and mutually supporting. Human dignity, freedom and equality are denied to those without food, clothing or shelter. The State must also foster conditions that enable citizens to gain access to land on an equitable basis. However, this does not oblige the state to go beyond the available resources or to realize these rights immediately. Nevertheless, the state must give effect to these rights and in appropriate circumstances the courts can and must enforce these obligations. *The question is always whether the measures taken by the state to realize the rights afforded by section 26 are reasonable.*

In *Soobramoney v. Minister of Health*, the Constitutional Court had held that the State had a duty to show that it had a system in place for the allocation of limited health resources in a manner that was reasonable.³⁸ In *Minister of Health & Others v. Treatment Action Campaign and Others*, the Constitutional Court similarly held that the State must act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 of the constitution on a progressive basis.³⁹

Beyond its constitutional and legal arrangements, South Africa has an innovative institution of social dialogue that plays an important role in nation-building and development. The National Economic Development and Labour Council (NEDLAC) was established in law through the National Economic Development and Labour Council Act, Act 36 of 1994. It has a unique role and status in the promotion of national cohesion in South Africa.

As apartheid was ending and the new, democratically elected government was taking over in 1994, South Africans realised that their society had deep divisions and fault lines, that labour relations had been catastrophic in the past and that trade policy had to be drastically re-oriented. They would, they concluded, have to institutionalise

cooperation for a new South Africa. Institutionalised social dialogue was needed to help undo the damaging legacies of apartheid and address the challenges of economic performance, more especially with reference to growth, job creation and poverty.

Professor Raymond Parsons of the University of Pretoria, an authority on NEDLAC, has noted that “NEDLAC was intended to provide the socio-economic dimension of the reconciliation and nation-building to which President Mandela was strongly committed” South Africans therefore decided on the establishment of NEDLAC as the vehicle by which government, labour, business and community organizations would seek to cooperate, through problem solving and negotiations, on economic, labour and development issues and related challenges facing the country.

NEDLAC conducts its works in four broad areas, covering: (i) public finance and monetary policy; (ii) labour market policy; trade and industrial policy; (iv) development policy. It has a Development Chamber, a Labour Market Chamber, a Trade and Industry Chamber, and a Public Finance and Monetary Policy Chamber. Government departments, organized labour, and organized business participate in all four chambers. Community-based organizations have a legal right to participate in the Development Chamber but in practice also participate in the other three chambers. There is an annual summit of partners, an executive council, and a management committee.

Upon commencing its work in 1995 NEDLAC set itself five objectives that shaped its agenda in the next decade and a half. These were to: (1) Promote economic growth, participation in economic decision-making and social equity, (2) Seek policy to reach consensus and conclude agreements on social and economic policy (3) Consider all proposed labour legislation relating to labour market policy before it was introduced into Parliament. (4) Consider all significant changes to social and economic policy before it was implemented or introduced into Parliament. (5) Promote the formulation of coordinated policy on social and economic issues. From the outset it was acknowledged that in order for the negotiation process in NEDLAC to succeed it was crucial to place the emphasis on securing agreement. Every effort would be made to negotiate agreed policies.

NEDLAC was conceived as an agreement-making body rather than an advisory one. Nevertheless, it was recognized by all participants that the NEDLAC process was not supposed to be a substitute for Parliament. Whilst agreements could be reached between the social partners, such agreements, to be binding, required Parliamentary debate and adoption. It is of crucial importance, however, that the search for agreement took place within NEDLAC, where the social partners were present.

An external review of the NEDLAC process between 1995 and 2006, conducted by Professor Edward Webster of the University of Witwatersrand, concluded that NEDLAC had deepened democracy by creating new labour market institutions that had included constituencies previously excluded from the policy-making process. In the process of building these institutions a remarkable generation of social entrepreneurs had developed networks of trust. The NEDLAC had provided an opportunity for the four constituencies of organised business, government, organised labour and the organised community, to shape the content, sequence and pace of a range of economic and

social policies before they were debated in Parliament. This had improved the quality of decisions, built political bases of support for the reform strategy and channelled political conflicts within democratic institutions.

South Africa, Professor Webster underlined, had chosen in 1994 the policy option of consultation and negotiation beyond the parliamentary actors. This policy process of drawing non-state interest groups into policy formulation and governance had played a central role in promoting good policy practices. As the ILO has noted, “The best solutions arise through social dialogue in its many forms and levels, from national tripartite consultations and cooperation to plant-level collective bargaining. Engaging in dialogue, the social partners also fortify democratic governance, building vigorous and resilient labour market institutions that contribute to long-term social and economic stability and peace.”

Professor Webster made the following assessment: “NEDLAC’s major achievement in the first 11 years of South Africa’s democracy is its cost-effective contribution to the sustainability of the reform process. This has deepened democracy, created new labour market institutions and contributed to long-term economic and social reform.”

Brazil

Brazil is the fifth-largest country in the world and the ninth-largest economy. Brazil faces many social challenges, of which the most significant are the inequities in the distribution of income, low educational attainments, poor health and limits to the decision-making participation of its citizens.⁴⁰ The *Brazilian Agenda 21* was signed in July, 2002 by then President Fernando Henrique Cardoso in preparation for the World Summit on Sustainable Development.

A Commission of Policies for Sustainable Development and the of the National Agenda 21 (CPDS) coordinated by the Ministry of the Environment and comprising 10 members evenly distributed between the civil society and the government worked on the creation of the Brazilian Agenda 21 since 1997 in response to the 1992 Rio Conference. Six central themes were selected as a basis for the initial consultation process including: sustainable agriculture, sustainable cities, infrastructure and regional integration, natural resources management, reduction of social inequalities and science and technology for sustainable development.

The objectives of Brazil Agenda 21 included:

The economy of savings in the society of knowledge. Priority actions under this objective included sustainable production and consumption against the waste culture; information and knowledge for sustainable development.

Social inclusion for a solidarity society. Priority action under this objective included permanent education for work and life; promotion of health and prevention of diseases; social inclusion and income distribution; universalisation of environmental sanitation to protect the environment and health.

Strategy for the urban and rural sustainability. Priority action under this objective included the sustainable development of rural Brazil and the promotion of sustainable agriculture.

Strategic natural resources: water, biodiversity and forests. Priority action under this objective included preserving the quantity and improving the quality of the water in the hydrographic basins.

Governability and ethics for the promotion of sustainability. Priority actions under this objective included the promotion of civic culture and new identities in the communication society.

In a recent book on *Brazil as an Economic Superpower?* Marcelo Neri writes about Brazil as an equitable opportunity society and more particularly about income policies, income distribution and the distribution of opportunities in Brazil. He reports that during the period from 1992 to 2006, there was a fall in poverty levels in Brazil despite the meager growth observed. Brazil reached the first UN Millennium development goal in this period, as the portion of its population earning less than \$1 per day fell 60 per cent. The poorest income segments have experienced growth rates on a par with those in China since the beginning of the present decade. In the period 2001 to 2006 inequality was in decline. The fall of inequality observed in this five year period reflected a combination of labour market improvements seen by low-skilled workers, including increases in educational attainment and the adoption of increasingly targeted official income policies. Brazil, he notes, has come to appreciate the importance of macroeconomic fundamentals for achieving lasting stability and “it must now learn to appreciate the fact that a sustained decrease in inequality depends on other fundamentals, such as the equality of opportunities represented by the access to stocks of productive assets such as health and education and of physical assets and their impact on work decisions and outcomes.”⁴¹

What we see here is Brazil instituting and implementing deliberate policies aimed reducing poverty and inequality, two key tenets of the right to development. As we saw above in the cases of India and South Africa, there is, here as well, no mention of the right to development as such. This is something that should change for all countries, especially developing countries, in the future. There is need for legal innovation, of which Professor Paul Collier gives some good examples.

The Need for Legal Innovations

In his book, *The Bottom Billion. Why the Poorest Countries are Failing and What Can be Done About it*,⁴² Professor Paul Collier argues for new “laws and charters” to cover the following areas:

- A Charter for National Resource Revenues
- A Charter for Democracy
- A Charter for Budget Transparency
- A Charter for Post Conflict Situations
- A Charter for Investment.⁴³

The need for these charters is to help make sure that the society is organized to act for the common good and also to rule out the temptations of corruption. Professor Collier sees these charters being developed internationally to begin with but there is no reason why a society in good faith pursuit of the right to development should not go ahead with the elaboration of its own charters on these vital issues.

There are other areas where particular legal attention would be needed and we discuss some of these in the following sections of this chapter.

The Duty to Ensure the Enjoyment of Basic Rights

In the Velasquez Rodriguez Case (1988), the Inter-American Court of Human Rights⁴⁴ dealt with Article I(1) of the Inter-American Convention on Human Rights which reads as follows: '1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination ...' The Court commented that in effect, this article charges the State Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.

The Court went on to clarify the meaning of the obligation 'to ensure'. The obligation of the State Party, it held, is to ensure the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

The State is obligated, the Court continued, to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acted in such a way that the violation went unpunished and the victim's full enjoyment of such rights was not restored as soon as possible, the State had failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same was true when the State allowed private persons or groups to act freely and with impunity to the detriment of the rights recognized in the Convention.⁴⁵

In certain circumstances, the Court recognized, it might be difficult to investigate acts that violated an individual's rights. The duty to investigate, like the duty to prevent, was not breached merely because the investigation did not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that

depended upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This was true regardless of what agent was eventually found responsible for the violation. Where the acts of private parties that violated the Convention were not seriously investigated, those parties were aided in a sense by the government, thereby making the State responsible on the international plain.⁴⁶

The principles upheld in the Velasquez-Rodriguez case should guide the implementation of the right to development nationally.

We discuss next the issue of equality, highlighted in the UN declaration on the right to development.

Equality

Equality is a key element of the right to development and a normative provision in every human rights instrument, international or regional. In this section we look at the elucidation of this great principle in the jurisprudence and practice of the leading supervisory bodies, beginning with the Human Rights Committee.

A. General Comment 18/37 of the Human Rights Committee (Equality and Non-Discrimination)

In General Comment 18/37 of 9 November 1989, the Human Rights Committee provided useful guidance on the provisions of the International Covenant on Civil and Political Rights dealing with equality and non-discrimination. The Committee noted that the Covenant neither defined the term 'discrimination' nor indicated what constituted discrimination. It noted, however, that article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provided that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

While the conventions referred to dealt only with cases of discrimination on specific grounds, the Human Rights Committee believed that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. However, the enjoyment of rights and freedoms on an equal footing does not mean identical

treatment in every instance. The Committee also pointed out that the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.

In an important clarification, the Human Rights Committee expressed the view that Article 26 of the Covenant does not merely duplicate the guarantee already provided in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States Parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State Party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.⁴⁷

Finally, the Human Rights Committee observed that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁴⁸

B. General Comment 4/13 of the Human Rights Committee (Gender equality)

The Human Rights Committee, in General Comment 4/13, of 28 July 1991, provided important guidance on the international law of human rights regarding gender equality, and specifically under Article 2(1), 3, and 26 of the International Covenant on Civil and Political Rights. Importantly, the Committee began with the observation that these articles require not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence more information has generally been required regarding the role of women in practice with a view to ascertaining what measures in addition to purely legislative measures of protection have been or are being taken to give effect to the precise and positive obligations under Article 3 and to ascertain what progress is being made or what factors or difficulties are being met in this regard. However, the positive obligation undertaken by States Parties may itself have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant. It mentioned as an example the degree to which immigration laws which distinguish between a male and a female citizen may or may not adversely affect the scope of the right of the women to marriage to non-citizens or to hold public office.

The Human Rights Committee advised that that it might assist States Parties if special attention were given to a review by specially appointed bodies or institutions of laws or measures which inherently draw a distinction between men and women in so far as those laws or measures adversely affect the rights provided for in the Covenant. The Committee also considered that it might help the States Parties in implementing this obligation if more use could be made of existing means of international cooperation with a view to exchanging experience and organizing assistance in solving the practical problems connected with ensuring of equal rights for men and women.⁴⁹

C. General Comment No. 16 of the Committee on Economic, Social and Cultural Rights

In General Comment No. 16 that dealt with the equal right to the enjoyment of all economic, social and cultural rights of men and women. The Committee on Economic, Social and Cultural Rights affirmed that the enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandated both *de facto* and *de jure* equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts. Formal equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.⁵⁰

The principle of non-discrimination, the Committee continued, is the corollary of the principle of equality. It prohibits differential treatment of a person or group of persons based on his/her particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status, such as age, ethnicity, disability, marital, refugee or migrant status. Discrimination against women was 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, Social, cultural, civil or any other field', as defined in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.⁵¹

The Committee discussed the obligation to respect as follows:

The obligation to respect requires States parties to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of economic, social and cultural rights. Respecting the right obliges States parties not to adopt and to repeal laws and rescind policies, administrative measures and programmes that do not conform with the right protected by article 3. In particular, it is incumbent upon States parties to take into account the effect of apparently gender neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.⁵²

Turning to the obligation to protect, the Committee stated the following:

The obligation to protect requires State parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes and stereotyped roles for men and women. States parties' obligation to protect under article 3 of ICESCR includes, *inter alia* the respect and adoption of constitutional and legislative provisions on the equal right of men and women to enjoy all human

rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination and to prevent third parties from interfering directly or indirectly with the enjoyment of this right; the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.

States parties have an obligation to monitor and regulate the conduct of non-State actors to ensure that they do not violate the equal right of men and women to enjoy economic, social and cultural rights. This obligation applies, for example, in cases where public services have been partially or fully privatized.⁵³

As regards the obligation to fulfil, the Committee commented:

The obligation to fulfil requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include:

- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes.
- To establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women.
- To develop monitoring mechanisms to ensure that the implementation of laws and policies aimed at promoting the equal enjoyment of economic, social and cultural rights by men and women do not have unintended adverse effects on disadvantaged or marginalized individuals or groups, particularly women and girls.
- To design and implement policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits and gender-specific allocation of resources.
- To conduct human rights education and training programmes for judges and public officials.
- To conduct awareness-raising and training programmes on equality for workers involved in the realization of economic, social and cultural rights at the grass-roots level.
- To integrate, in formal and non-formal education, the principle of the equal rights of men and women to the enjoyment of economic, social and cultural rights, and to promote equal participation of men and women, boys and girls, in schools and other education programmes.
- To promote equal representation of men and women in public office and decision-making bodies.
- To promote equal participation of men and women in development planning, decision-making and in the benefits of development and all programmes related to the realization of economic, social and cultural rights.⁵⁴

The UN Independent Expert on the right to development, as we saw earlier in this chapter, emphasized the importance of poverty reduction strategies as part of the right to development process, and also highlighted the issue of prevention. In the next section we discuss the issue of preventable poverty.

Preventable poverty

A Swiss panel that prepared an Agenda for Human Rights on the occasion of the 60th anniversary of the Universal Declaration of Human Rights advocated the concept of preventable poverty, namely, identifying those parts of the population whose plight could be alleviated using the resources already available to the State and acting to alleviate or head off their poverty.⁵⁵ This concept should find reflection in the national legal order and policy of every country.

The acclaimed Indian Nobel economics laureate, Amartya Sen, an economist, philosopher and public thinker, who wrote the much-cited work, *Development as Freedom*, has just published another powerful book, the *Idea of Justice (2009)*, in which he argues that instead of approaching the issue of justice from the traditional perspective of a social contract and of being concerned with identifying what perfectly just social and institutional arrangements might be, one should concentrate instead on preventing and reducing injustices in society as a concrete way of rendering justice.

In Sen's approach, principles of justice are defined in terms of the lives and freedoms of the people involved. The focus on actual lives in the assessment of justice has implications for the nature and reach of the idea of justice. A realization-focused perspective emphasises the importance of the *prevention* of manifest injustice in the world, rather than seeking the perfectly just.

Sen insists on the role of public reasoning and discussions in establishing what can make societies less unjust. He assesses democracy in terms of public reasoning and offers a view of democracy as 'government by discussion'. Democracy has to be judged, he writes, not just by the institutions that formally exist but by the extent to which different voices from diverse sections of the people can actually be heard.

The Committee on Economic, Social and Cultural Rights, a body established by the ECOSOC and operating under the International Covenant on Economic, Social and Cultural Rights adopted a statement on poverty in 2001 in which it noted that sometimes poverty arises when people have no access to existing resources because of who they are, what they believe, or where they live. Discrimination may thus cause poverty, just as poverty may cause discrimination.⁵⁶

The scheme of the United Nations Charter and of the International Covenant on Economic, Social and Cultural Rights is that Governments should use their own resources to maximum effect in meeting the needs of their people, that there should be no discrimination in the allocation of resources, and that Governments should cooperate for mutual benefit in the realization of the rights stated in the Charter, the UDHR, and the International Covenant. Nowadays there is understandable emphasis on the implementation of the right to development, on how globalization impacts on the

ability to governments to fulfill their human rights obligations, and on the adverse effects of an inequitable international economic order. These are all deserving issues but they do not gainsay the obligation of a government to meet the basic needs of the people, especially those in extreme poverty.

Goal 1 of the MDGs targeted the eradication of extreme poverty and hunger, specifically the halving by 2015 of people whose income was less than \$1 a day and the halving by 2015 of people who suffered from hunger. The UN reported in 2006 that chronic hunger – measured by the proportion of people lacking the food needed to meet their daily needs had declined in the developing countries, but progress overall was not fast enough and an estimated 824 million people in the developing world were affected by chronic hunger in 2003.⁵⁷

Violations of Economic, Social and Cultural Rights

In a series of general comments, the Committee on Economic, Social and Cultural Rights has expounded on the duty to respect, protect and to fulfill particular rights in the Covenant on Economic, Social and Cultural Rights and on violations of these obligations. In General Comment No. 14, for example, dealing with the right to the highest attainable standard of health, the Committee reaffirmed what it had stated in General Comment No. 3, that States parties had a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights contained in the Covenant, including essential primary health care. The Committee proceeded to deal with violations of the obligations to respect, to protect and to fulfill in the following terms:

- **Violations of the obligation to respect**

Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality.

- **Violations of the obligation to protect**

Violations of the obligation to protect follow from the failure to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties.

- **Violations of the obligation to fulfill**

Violations of the obligation to fulfill occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health.⁵⁸

The violations approach should also be made applicable to the national implementation of the right to development. National human rights commissions can make a contribution here. So can the courts. In the final chapter of this study we advocate the establishment of a world court on the right to development.

Conclusion

It is at the national level that the right to development must take on meaning and practical application. International cooperation and assistance are important. But even with them, action must still take place nationally. In this chapter we have sought to indicate concrete areas where national action is needed and is indeed obligatory if the right to development is to count for the peoples of the world. In the next chapter we look at the regional dimensions of the right to development.

Chapter III

Regional Law and Practice

Introduction

As we noted in the introduction to this essay, it was a great African jurist, then Chief Justice of Senegal, Keba Mbaye, who first advocated the concept of the right to development in 1972 in a lecture at the International Institute of Human Rights in Strasbourg, France. Under his influence, the African Charter on Human and Peoples' Rights then inserted it for the first time in a human rights convention. Article 22 of the Charter stated:

'1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

'2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'⁵⁹

As we have mentioned earlier in this study, the right to development has not received such specific inclusion in other regional human rights instruments even though it would be possible to argue that regional economic associations are based on an essential rationale of advancing the implementation of the right to development. The New Partnership for African Development (NEPAD) is a noteworthy example of this.

Regional organizations have a crucial role to play in the implementation of the right to development. Regional organizations should take the implementation of the right to development as their starting point. They should periodically review the status of the right to development in each Member country and the adequacy of measures being taken to implement this right.

Regional organizations should identify problems related to the right to development that can be tackled through regional cooperation. They should take a particular interest in contributing to halting violations of human rights. They should help define the minimum core content of basic economic, social and cultural rights. (See on this the Caribbean Social Charter). They should monitor the content of national reports under the Universal Periodic Review process inside the UN Human Rights Council with a view to monitoring the implementation of the right to development.

These are new approaches to tackling the development problem. While the United Nations strives for the implementation of the Millennium Development Goals and for the achievement of international conditions conducive to the global implementation of the right to development, each country, each region, has to do its utmost to implement the right to development using available resources efficiently and equitably.

NEPAD as an institution has sought to pursue innovative approaches to the advancement of development, even if has not expressly invoked the right to development. In the following section we look at NEPAD's development policies.

I. NEPAD

NEPAD is an initiative that typifies regional efforts to advance implementation of the right to development. It was designed to address the current challenges facing the African continent. Issues such as the escalating poverty levels, underdevelopment and the continued marginalization of Africa needed a new radical intervention, spearheaded by African leaders to develop a new vision that would guarantee Africa's renewal.⁶⁰

NEPAD'S primary objectives are:

- To eradicate poverty;
- To place African countries, both individually and collectively, on a path of sustainable growth and development;
- To halt the marginalization of Africa in the globalization process and enhance its full and beneficial integration into the global economy;
- To accelerate the empowerment of women.

The principles of NEPAD are the following:

- Good governance as a basic requirement for peace, security and sustainable political and socio-economic development;
- African ownership and leadership, as well as broad and deep participation by all sectors of society;
- Anchoring the development of Africa on its resources and resourcefulness of its people;
- Partnership between and amongst African peoples;
- Acceleration of regional and continental integration;
- Building the competitiveness of African countries and the continent;
- Forging a new partnership that changes the unequal relationship between Africa and the developed world; and
- Ensuring that all Partnerships with NEPAD are linked to the Millennium Development Goals (MDG) and other agreed development goals and targets.

The immediate desired outcomes of NEPAD are the following:

- Africa becomes more effective in conflict prevention and establishment of enduring peace on the continent;
- Africa adopts and implements principles of democracy and good political, economic and corporate governance, and the protection of human rights becomes further entrenched in every African country;
- Africa develops and implements effective poverty eradication programmes and accelerates the pace of achieving set African development goals, particularly human development.⁶¹

II. The African Peer Review Mechanism

In March 2003, the NEPAD Heads of State and Government Implementation Committee meeting at Abuja, Nigeria, adopted a memorandum of understanding on the African Peer Review Mechanism (APRM). The Implementation Committee also adopted a set of objective standards, criteria and indicators for the APRM. The Implementation Committee established a Secretariat for the APRM and appointed a seven-person panel of eminent persons to oversee the conduct of the APRM process and ensure its integrity.

The APRM process is based on a “self-assessment” questionnaire developed by the APR Secretariat, divided into four sections: democracy and political governance, economic governance and management, corporate governance and socio-economic development. The APRM Base Document adopted at the AU summit in Durban in 2002 provided for four types of review: 1. Base review, which is carried out within eighteen months of a country becoming member of the APRM. 2. Periodic Review, which is carried out every two to four years. 3. Requested review: Any country can request an additional review for its own reasons. 4. Crisis review: Early signs of impending political or economic crisis would be sufficient cause to institute a review.

The APRM Panel of Eminent Persons consists of persons of high moral stature and demonstrated commitment to the ideals of Pan-Africanism with expertise in the areas of political governance, macro-economic management, public financial management and corporate governance. Its composition should also reflect a regional, gender and cultural balance. Each country to be reviewed is assigned to one of the seven eminent persons, who consider and review reports and make recommendations to the APR Forum.

Each participating country is required to have a National coordinating structure to conduct broad-based and all-inclusive consultation of key stakeholders in the public and private sectors. When the Panel conducts a review of a country an APR country Review Team is appointed by the Panel and they are constituted for the period of the country review visit. Their composition is carefully designed to enable an integrated, balanced, technically competent and professional assessment of the reviewed country. The APR Focal point is a national mechanism set up by a participating country in order to play a communication and coordination role.

The review process has a preliminary phase during which a support mission seeks to ensure a common understanding of the philosophy, rules and processes of the APRM and to help countries that need support with aspects of the national processes. Stage one is a preparatory stage in which the country in question has to answer a detailed questionnaire for the purposes of self-assessment. The APRM Secretariat, for its part, makes a background study of the country’s governance and development. This is shared with the country concerned and other partner institutions. After the self-assessment is made the country is expected to issue a draft Programme of Action. After the questionnaire and the Programme of Action have been submitted to the APR Secretariat it draws up an Issues Paper on matters that need a more in-depth assessment.

In Stage Two, the review team visits the country and carries out the widest possible range of consultations with the government officials, political parties, parliamentarians and representatives of civil society organizations. In Stage Three, a draft report is compiled. This report is based on the findings of the review team during their visit, the background research of the APR Secretariat and the Issues paper prepared by the Secretariat. The draft report is then discussed with the government concerned. In Stage four, the review team's report and the final Programme of Action compiled by the Government is sent to the APR Secretariat and the APR Panel. Then the report is submitted to the APR Forum of participating heads of state and government for consideration and formulation of actions deemed necessary. Peer pressure may be applied at this stage, if necessary.

In stage five, the report should be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament, the African Commission on Human and Peoples' Rights, the Peace and Security Council (PSC), and the Economic, Social and Cultural Council of the African Union. The report becomes publicly available at this point.

After the review has been completed as outlined above, the subject country is expected to implement its Programme of Action. Foreign donors are expected to support the implementation of the plan of action. After a review is concluded, a periodic review should be undertaken every two to four years.⁶²

III. A Policy Framework

The following policy framework for regional organizations in implementing the right to development would seem a reasonable one:

- Regional organizations should take the implementation of the right to development as their starting point.
- Regional organizations should periodically review the status of the right to development in each Member country and the adequacy of measures being taken to implement this right.
- Regional organizations should identify problems related to the right to development that can be tackled through regional cooperation.
- Regional organizations should take a particular interest in contributing to halting violations of human rights.
- Regional organizations should help define the minimum core content of basic economic, social and cultural rights. (Caribbean Social Charter).
- Regional organizations should monitor the content of national reports under the UPR with a view to monitoring the implementation of the right to development.

Conclusion

Regional organizations have a crucial role to play in the implementation of the right to development. NEPAD is basically an initiative devoted to implementation of the right to development in Africa. Other regional economic and social organizations should adopt

and pursue a specific right to development approach that would help galvanize efforts for the development of the poor peoples of the world.

Chapter IV

Legal empowerment of the poor

Introduction

In the preceding chapters we discussed elements of the right to development internationally, nationally and regionally. In this chapter we turn to one of the key requirements for the implementation of the right to development for the world's poor, namely the legal empowerment of the poor. In the final chapter we shall discuss a related approach, namely public interest jurisprudence in favour of the poor and the disadvantaged. We begin by reviewing the recommendations of the Commission on Legal Empowerment of the Poor.⁶³

I. Commission on Legal Empowerment of the Poor (2008)

The Commission found that in too many countries the laws, institutions and policies governing economic, social and political affairs deny a large part of society the chance to participate on equal terms. The rules of the game are unfair. This is not only morally unacceptable; it stunts economic development and can readily undermine stability and security. The outcomes of governance, the cumulative effect of policies and institutions on peoples' lives will only change if the processes of governance are fundamentally changed.

The Commission's assessment is that poverty is man-made, by action and inaction, and a failure of public policies and of markets. Most poor people do not live under the shelter of the law but far from the law's protection and the opportunities it affords. Where the law works for everyone, it defines and enforces the rights and obligations of all. This allows people to interact with one another in an atmosphere that is certain and predictable. Thus the rule of law is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish and prosperity can be built.

The Commission understands legal empowerment to be a process of systemic change through which the poor and excluded become able to use the law, the legal system and legal services to protect and advance their rights and interests as citizens and economic actors. The Commission recognized that:

“The elements of legal empowerment are grounded in the spirit and letter of international human rights law, and particularly in Article 1 of the Universal Declaration of Human Rights, which declares, ‘All human beings are born free and equal in dignity and rights’ ”⁶⁴

The Commission emphasized that democracy was an indispensable means, a just end. It emphasized that legal empowerment of the poor can only be realized through systemic change aimed at unlocking the civic and economic potential of the poor. It put forward four pillars of legal empowerment of the poor: access to justice and the rule of law, property rights, labour rights, and business rights. In their convergence and through their synergy, legal empowerment of the poor can be achieved.

First pillar: Access to Justice and the Rule of Law

In the presentation of the Commission, Legal empowerment of the poor is impossible when, *de jure* or *de facto* poor people are denied access to a well functioning justice system. Legal empowerment measures in this domain must:

- Ensure that everyone has the fundamental right to legal identity and is registered at birth;
- Repeal or modify laws and regulations that are biased against the rights, interests, and livelihoods of poor people;
- Facilitate the creation of state and civil society organizations and coalitions, including paralegals who work in the interest of the excluded;
- Establish a legitimate state monopoly on the means of coercion through, for example, effective and impartial policing;
- Make the formal judicial system, land administration systems and relevant public institutions more accessible by recognizing and integrating customary and informal legal procedures with which the poor are already familiar.

The Commission, as will be seen from the above, paints with a broad brush and one is still left with the challenge of concrete action to facilitate access to justice and the rule of law.

Second pillar: Property Rights

As presented by the Commission, a fully functioning property system is composed of four building blocks: a system of rules that defines the bundle of rights and obligations between people and assets reflecting the multiplicity and diversity of property systems around the world; a system of governance; a functioning market for the exchange of assets and an instrument of social policy. Legal empowerment measures in this domain must:

- Promote efficient governance of individual and collective property in order to integrate the extralegal economy into the formal economy and ensure it remains easily accessible to all citizens;
- Ensure that all property recognized in each nation is legally enforceable by law and that all owners have access to the same rights and standards;
- Create a functioning market for the exchange of assets that is accessible, transparent and accountable;
- Broaden the availability of property rights, including tenure security, through social and other public policies, such as access to housing, low interest loans, and the distribution of state aid;
- Promote an inclusive property-rights system that will automatically recognize real and immovable property bought by men as the co-property of their wives or common law partners.

Again, the Commission paints with a broad brush.

Third Pillar: Labour Rights

The Commission calls for fulfillment of the ILO's Fundamental Principles and Rights at Work and the Decent Work agenda. It recommended the following strategy to provide protection and opportunity to workers in the informal economy:

- Respect, promote and realize freedom of association so that the identity, voice, and representation of the working poor can be strengthened in the social and political dialogue about reform and its design;
- Improve the quality of labour regulation and the functioning of labour market institutions, thereby creating synergy between the protection and productivity of the poor;
- Ensure effective enforcement of a minimum package of labour rights for workers and enterprises in the informal economy that upholds and goes beyond the Declaration of Fundamental Principles and Rights at Work;
- Increase access to employment opportunities in the growing and more inclusive market economy;
- Expand social protection for poor workers in the event of economic shocks and structural changes;
- Promote measures and guarantee access to medical care, health insurance and pensions;
- Ensure that legal empowerment drives gender equality, thus meeting the commitments under ILO standards that actively promote the elimination of discrimination and equality of opportunity for, and treatment of women, who have emerged as a major force in poverty reduction in poor communities.

Broad brush strokes thus continued in the Commission's recommendations.

Fourth Pillar: Business Rights

The Commission held it to be self-evident that the poor are entitled to rights not only when working for others, but also in developing their own businesses. Legal empowerment measures in this domain must:

- Guarantee basic business rights, including the right to vend, to have a work, a work space and to have access to necessary infrastructure and services (shelter, electricity, water and sanitation);
- Strengthen effective economic governance that makes it easy and affordable to set up and operate a business, to access markets and to exit a business if necessary;
- Expand the definition of 'legal person' to include legal liability of companies that allow owners to separate their business and personal assets, thus enabling prudent risk-taking;
- Promote inclusive financial services that offer entrepreneurs in the developing world what many of their counterparts elsewhere take for granted :- savings, credit, insurance, pensions and other tools for risk management;
- Expand access to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets and help them comply with regulations

and requirements that support backward and forward linkages between larger and smaller firms.

Here also, the Commission maintains a broad brush approach.

Assessment

The recommendations of the Commission are laudatory and help to draw attention to the need to act to strengthen legal empowerment of the poor. However, it would be fair to say that they did not build on concrete earlier recommendations of the International Commission of Jurists on the provision of legal services to the poor, of the International Labour Organization supervisory bodies, or of the human rights treaty bodies, especially the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. After one has read the Commission's recommendations one then still has to turn to the concrete norms and recommendations of the international human rights treaty regime in order to take forward the process of strengthening legal empowerment of the poor. The recommendations of the International Commission of Jurists provide a good point of departure.

II. The Rule of Law and the Empowerment of the Poor

Ever since its inception, the International Commission of Jurists has elaborated a series of principles that provided guidance on the practical meaning of the rule of law. These included the following:

(a) Essential requirements of a Society Under the Rule of Law:

- The legislative power must be effectively exercised by an appropriate organ that is freely elected by the citizens. The laws and other legal measures taken by the legislative cannot be abolished or restricted by a governmental measure.
- The Rule of Law can only reach its highest expression and fullest realization under representative government. By representative government is meant a government deriving its power and authority from the people, which power and authority are exercised through representatives freely chosen and responsible to them. Free periodic elections are therefore important to representative government.

(b) The Legislature and the Rule of Law

- The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of the human being as an individual. This dignity requires not only the recognition of his or her civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of her or his personality. Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.

(c) The Executive and the Rule of Law

- In general, the acts of the executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the courts.
- It will further the Rule of Law if the executive is required to formulate its reasons when reaching its decisions of a judicial or administrative character and affecting the rights of individuals and at the request of a party concerned to communicate them to him.

(d) The Criminal Process and the Rule of Law

- It is always important that the definition and interpretation of the law should be as certain as possible and this is of particular importance in the case of the criminal law, where the citizen's life or liberty may be at stake.

(e) The Judiciary and the Rule of Law

- An independent judiciary is an indispensable requisite of a free society under the Rule of Law.

(f) The Legal Profession and the Rule of Law

- It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs. But it is recognized that there may be general supervision by the courts and that there may be regulations governing the admission to and pursuit of the legal profession.
- Lawyers should refuse to collaborate with any authority in any action which violates the Rule of Law. Lawyers should endeavour to promote knowledge of and to inspire respect for the Rule of Law and an appreciation by all people of their rights under the law.

(g) Economic and Social Development:

- It is essential to economic and social development to overcome inequality arising from birth or wealth and discrimination.

The Role of the Courts and of Law Enforcement Agencies

The Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly on 13 December, 1985⁶⁵ called for the independence of the judiciary to be guaranteed by the State and enshrined in the Constitution or law of the country. The Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly on 17 December, 1979⁶⁶ states that law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

III. General Comment No. 25 of the Human Rights Committee (1996)

General Comment No. 25 of the Human Rights Committee dealt with the issues of participation in public affairs and the right to vote. Recalling that Article 25 of the International Covenant on Civil and Political Rights recognized and protected the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. The Committee commented that whatever form of constitution or government is in force, the Covenant required States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. The Committee stated: "Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant."⁶⁷

It added that any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. The exercise of these rights by citizens may not be suspended except on grounds which are established by law and which are objective and reasonable.

IV. General Comment No. 12 of the Human Rights Committee

In its General Comment No. 12 on the right to self determination, the Human Rights Committee stated: 'The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.' Other provisions of the Covenant include, particularly, Article 25. 'Every citizen shall have the right and the opportunity....(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.'

The jurisprudence of the Human Right Committee, which supervises the implementation of the Covenant and considers cases brought before it under its Optional Protocol, is that the provisions of article 1 of the Covenant, on the right to self-determination, while not covered by the individual petitions procedure under the Optional Protocol, 'may be relevant in the implementation of other rights protected by the Covenant' (Case No, 547/1991, Apirana Mahuika et al. v. New Zealand). In case No. 932/2000, (Marie-Helene Gillot et al. v. France), the Human Rights Committee stated:

'Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.'⁶⁸

In this case, which concerned New Caledonia, the Human Rights Committee used the standard of 'reasonable criteria' in judging electoral arrangements under Article 25 in the light of Article 1:

"The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to Article 1 of the Covenant,..'

In this case, participation in the referendum had been limited to persons 'concerned' by the future of New Caledonia who had proven sufficiently strong ties to that territory.

V. Democracy and Human Rights

Article 21 of the Universal Declaration of Human Rights proclaimed that the will of the people shall be the basis of the authority of government. This will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 of the International Covenant on Civil and Political Rights states that everyone shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his or her country.

Provisions on democracy and the rule of law are likewise to be found in the Inter-American Convention on Human Rights, the African Charter on Human and Peoples Rights and the European Convention on Human Rights and Fundamental Freedoms, which calls for an effective political democracy.

In the case of *Zdanoka v. Latvia*, the European Court of Human Rights captured the relationship between democracy and human rights superbly:

"Democracy constitutes a fundamental element of the 'European public order'. That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights. The Preamble goes on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. This common heritage consists in the underlying values of the conventions: thus, the Court has pointed out on many occasions that the Convention was in fact designed to maintain and promote the ideals and values of a democratic society. In other

words, democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”⁶⁹

The Universal Declaration on Democracy adopted without a vote by the Inter-Parliamentary Council of the Inter-Parliamentary Union (IPU) in Cairo on 16 December, 1997 affirmed:

‘5. A state of democracy ensures that the processes by which power is acceded to, wielded and alternates allow for free political competition and are the product of open, free and non-discriminatory participation by the people, exercised in accordance with the rule of law, in both letter and spirit.

6. Democracy is inseparable from the rights set forth in the international instruments...

7. Democracy is founded on the primacy of the rule of law and the exercise of human rights. In a democratic State, no one is above the law and all are equal before the law.

The Inter-American Commission on Human Rights, early on, underlined that the right to take part in the government and participate in honest, periodic, free elections by secret ballot was of fundamental importance for safeguarding the human rights dealt with in the Inter-American instruments on human rights. The reason for this lay in the fact that, as historical experience had shown, governments derived from the will of the people, expressed in free elections, were those that provided the soundest guarantee that the basic human rights will be observed and protected.⁷⁰

The right to political participation, the Commission has noted, left room for a wide variety of forms of government; there were many constitutional alternatives as regards the degree of centralization of the powers of the state or the election and attributes of the organs responsible for the exercise of those powers. However, a democratic framework was an essential element for the establishment of a political society where human values could be fully realized. The right to political participation made possible the right to organize parties and political associations, which through open discussion and ideological struggle, could improve the social level and economic circumstances of the masses and prevent a monopoly of power by any one group or individual. At the same time, it could be said that democracy was a unifying link among the nations of the American Hemisphere.⁷¹

The Commission has noted that the American States had reaffirmed in the Charter of the Organization of American States (OAS) that one of the guiding principles upon which their solidarity was based required that the political organization of those States be based on the effective exercise of representative democracy. Other international instruments on human rights, such as the Pact of San Jose of Costa Rica, had recognized the right of every citizen to take part in the conduct of public affairs, to vote and to be elected in genuine periodic elections, which shall be by universal equal suffrage and by secret ballot that guaranteed the free expression of the will of the voters. At the same time, the General Assembly of the OAS, at its Tenth Regular Session, had reiterated to its Member States that had not yet done so to re-establish or perfect the democratic system of government in which the exercise of power derived

from the legitimate and free expression of the will of the people, in accordance with the particular characteristics and circumstances of each country.

For its part, the Commission has maintained that within the alternative forms of government that constitutional law recognized, the framework of a democratic regime should be the fundamental structure for the full exercise of human rights. In this context, governments had, in the face of political rights and the right to political participation, the obligation to permit and guarantee the organization of all political parties and other associations, unless they were constituted to violate human rights; open debate of the principal themes of socioeconomic development; the celebration of general and free elections with all the necessary guarantees so that the results represented the popular will. As demonstrated by historical experience, the denial of political rights or the alteration of the popular will might lead to a situation of violence.⁷² A political system in the Americas organized on the basis of the effective exercise of representative democracy was one of the principles enshrined in the Charter of the OAS that had the most direct relationship with the observance of human rights.⁷³

VI. The Content of Democracy

On 16 September 1997, the Council of the Inter-Parliamentary Union, meeting in Cairo, adopted a Universal Declaration on Democracy in which it expressed its conviction that the strengthening of the democratization process and representative institutions would greatly contribute to the achievement of peace and development in the world. The Universal Declaration contained principles of democracy, the elements of democratic government and the international dimension of democracy.

On the principles of democracy the Declaration stated that democracy is a universally recognized ideal as well as a goal, which is based on common values held by peoples throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views, and in the interest of the polity.

Democracy, the declaration continued, is both an ideal to be pursued and a mode of government to be applied according to modalities which reflect the diversity of experiences and cultural particularities without derogating from internationally recognized principles, norms and standards. It is thus a constantly perfected and is always in a perfect state or condition whose progress will depend upon a variety of political, social, economic and cultural factors.

As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, to foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquility, as well as to create a climate that is favorable for international peace. As a form of government, democracy is the best way of achieving these objectives; it is also the only political system that has the capacity for self-correction.

The achievement of democracy presupposed a genuine partnership between men and women in the conduct of the affairs of society in which they work in equality and complementarity, drawing mutual enrichment from their differences.

A state of democracy ensured that the processes by which power is acceded to, wielded and alternates allow for free political competition and are the product of open, free and non-discriminatory participation by the people, exercised in accordance with the rule of law, in both letter and spirit.

Democracy was inseparable from international human rights. Those rights must therefore be applied effectively and their proper exercise must be matched with individual and collective responsibilities. Democracy was founded on the primacy of the law and the exercise of human rights. In a democratic state, no one is above the law and all are equal before the law. Peace and economic, social and cultural development were both conditions for and fruits of democracy. There was thus interdependence between peace, development, respect for and observance of the rule of law and human rights.

On the elements and exercise of democratic government, the declaration added that democracy was based on the existence of well-structured and well-functioning institutions, as well as on a body of standards and rules and on the will of society as a whole, fully conversant with its rights and responsibilities. It was for democratic institutions to mediate tensions and maintain equilibrium between the competing claims of diversity and uniformity, individuality and collectivity, in order to enhance social cohesion and solidarity.

Furthermore, democracy was founded on the right of everyone to take part in the management of public affairs; it therefore requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action.

The key element in the exercise of democracy was the holding of free and fair elections at regular intervals enabling the people's will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organize political parties and carry out political activities. Party organization, activities, finances, funding and ethics must be properly regulated in an impartial manner in order to ensure the integrity of the democratic processes.

It was an essential function of the state to ensure the enjoyment of civil, cultural, economic, political and social rights to its citizens. Democracy thus goes hand in hand with an effective, honest and transparent government, freely chosen and accountable for its management of public affairs.

Public accountability, which was essential to democracy, applied to all those who held public authority, whether elected or non-elected and to all bodies of public authority without exception. Accountability entails a public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms.

Public life as a whole must be stamped by a sense of ethics and by transparency and appropriate norms and procedures must be established to uphold them. Individual participation in democratic processes and public life at all levels must be regulated fairly and impartially and must avoid any discrimination, as well as the risk of intimidation by state and non-state actors.

Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded. In order for these institutions and mechanisms to fully ensure respect for the rules, improve the fairness of the processes and redress injustices, there must be access by all to administrative and judicial remedies on the basis of equality as well as respect for administrative and judicial decisions both by the organs of the state, representatives of public authority and by each member of society.

While the existence of an active civil society was an essential element of democracy, the capacity and willingness of individuals to participate in democratic processes and make governance choices could not be taken for granted. It was therefore necessary to develop conditions conducive to the genuine exercise of participatory rights, while also eliminating obstacles that prevent, hinder or inhibit this exercise. It was therefore indispensable to ensure the permanent enhancement of, *inter alia*, equality, transparency and education and to remove obstacles such as ignorance, intolerance, apathy, the lack of genuine choices and alternatives and the absence of measures designed to redress imbalances or discrimination of social, cultural, religious and racial nature, or for reasons of gender.

A sustained state of democracy thus required a democratic climate and culture constantly nurtured and reinforced by education and other vehicles of culture and information. Hence, a democratic society must be committed to education in the broadest sense of the term and more particularly civic education and the shaping of a responsible citizenry.

Democratic process were fostered by a favourable economic environment; therefore, in its overall effort for development, society must be committed to satisfying the basic economic needs of the most disadvantaged, thus ensuring full integration in the democratic process. The state of democracy presupposed freedom of opinion and expression; this right implies freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The institutions and processes of democracy must accommodate the participation of all people in homogenous as well as heterogeneous societies in order to safeguard diversity, pluralism and the right to be different in a climate of tolerance. Democratic institutions and processes must also foster decentralized local and regional government

and administration, which is a right and a necessity, and which makes it possible to broaden the base of public participation.⁷⁴

VII. Democracy and Freedom of Association in the Jurisprudence of ILO Supervisory Bodies

In a chapter in a book in honour of the highly regarded late Nicolas Valticos, Karen Curtis of the Norms and Standards Department of the ILO traced the jurisprudence and practice of ILO supervisory bodies on democracy and freedom of association. She wrote:

“Over more than half a century, the ILO supervisory bodies have examined numerous cases where freely chosen, independent workers’ organizations became dynamic agents for change in the political, social and economic life of countries where the bedrock of democracy, and often the accompanying civil liberties had been not been ensured.

...

Indeed, no one would hesitate to say that freedom of association is by definition contrary to the model of single party rule and totalitarianism. So, in countries where representative political parties cannot develop, it has often been observed that workers’ organizations have become the channel for expressing public discontent and the sole organized form of representation, whether lawful or not. While a democratic system is a necessary prerequisite for the full respect of trade union rights, trade unions may nevertheless take their liberties in hand, demand respect for basic rights and become catalysts for an overall political transformation to democracy.”⁷⁵

She traced the jurisprudence and practice of ILO supervisory bodies in respect of Cuba, China, Myanmar, Poland, South Africa, Sudan, , Swaziland and Zimbabwe. The ILO Committee of Experts on the Application of Conventions and Recommendations, dealing with the situation in Cuba, had held that a system in which a single party and a single central trade union organization existed and where the statutes of such an organization established the objective of following the policy of the Party was likely to lead to excessive interference in trade union independence and the election of trade union leaders was incompatible with ILO standards.⁷⁶

The ILO Fact-Finding and Conciliation Commission on Freedom of Association had held that ‘in the land of *apartheid*, many liberties counted as normal in a democratic society were diminished or lost altogether’⁷⁷ The Committee on Freedom of Association, dealing with the situation in Zimbabwe, has held that freedom of association by definition means that everyone has the right to think differently, to hope for other policy options and to make those hopes known in a peaceful and a law-abiding manner. Trade union activities cannot be restricted solely to occupational matters since government policies and choices are generally bound to have an impact on workers.⁷⁸

ILO supervisory bodies criticized a Decree in Swaziland that banned all political parties, restricted constitutional freedoms and imposed substantial restrictions on the right of organizations to hold meetings and demonstrations, thereby suppressing trade union

rights.⁷⁹ Dealing with Chinese restrictions on attempts by workers to form workers' organizations independent from the monopolistic officially backed unions, the Committee on Freedom of Association, in 2002, held:

'On a more general note, and giving full consideration to the context of transition described by the Government and its determination to achieve simultaneous development in economic and social fields, the Committee considers that it is precisely within this context that the only durable solution to the apparently increasing social conflict experienced in the country is through full respect for the right of workers to establish organizations of their own choosing by ensuring, in particular, the effective possibility of forming, in a climate of full security, organizations independent both of those which exist already and of any political party... The Committee strongly believes that the development of free and independent organizations and negotiation with all those involved in social dialogue is indispensable to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation. Indeed, a balanced economic and social development requires the existence of strong and independent organizations which can participate in the process of development.'⁸⁰

Dealing with the situation in Myanmar, the Committee of Experts on the Application of Conventions and Recommendations stated the following in its Report for 2008:

"The Committee recalls once again that respect for civil liberties is essential for the exercise of freedom of association and that workers and employers should be able to exercise their freedom of association rights in a climate of complete freedom and security, free from violence and threats and that a climate of violence, in which murders and disappearances of trade union leaders go unpunished, constitutes an extremely serious obstacle to the exercise of trade union rights and that such acts require severe measures to be taken by the authorities. The authorities should not seize on legitimate trade union activities as a pretext for arbitrary arrest or detention.

...

The Committee...requests the Government to communicate any steps taken towards the adoption of the Constitution and provide the text of the fundamental principles for the drawing up of the Constitution as well as any further relevant draft laws, orders, or instructions made to guarantee freedom of association so that it may examine their conformity with the provisions of the Convention. Finally, the Committee requests the Government to indicate the manner in which the elements of civil society were involved in the adoption of the fundamental principles."⁸¹

VIII. The Jurisprudence and Practice of Other Treaty Bodies

In human rights treaty case law we find important expressions of the links between democracy and human rights. We saw the important pronouncement of the European Court in the Zdanoka case at the beginning of this chapter. In the Handyside Case, the European Court of Human Rights considered as characteristics of a democratic society

the notions of pluralism, tolerance and broad-mindedness. In the *Klass* case the Court considered that one of the fundamental principles of a democracy is the rule of law. Justice is best served by constitutional democracy under the rule of law.

The Human Rights Committee has held that the principle of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.⁸² The European Court of Human Rights has held that measures affecting fundamental rights must be subject to some form of adversarial proceedings before an independent and competent tribunal if they are to be considered valid.⁸³

The Human Rights Committee, in Case No. 1134/2002 (*Garji-Dinka v. Cameroon*), invoked the standard of objectivity and reasonableness. The Committee observed that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds established by law that were objective and reasonable, and reiterated that persons who were deprived of their liberty but who had not been convicted should not be excluded from exercising the right to vote.

In the case of *Peter Chiko Bwalya v. Zambia*, the Human Rights Committee held that a violation of Article 25 of the Covenant had been committed when the author had been prevented from participating in a general election campaign as well as from preparing his candidacy for his party.⁸⁴ In the case of *Touron v. Uruguay*, a person had been convicted of subversive association and barred from taking part in the conduct of public affairs and from being elected for public office for a period of 15 years. The Human Rights Committee held that article 25 of the Covenant permitted only reasonable restrictions and found that the 15-year ban was not reasonable.⁸⁵

In the case of *Marshall v. Canada*, the Human Rights Committee stated the following:

“It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a)”⁸⁶

Conclusion

The Commission on the Legal Empowerment of the Poor operated at a level of great generality. The legal empowerment of the poor requires attention in much greater detail to practical issues of democracy, the rule of law and popular participation in governance. It also requires attention to the efforts of the Committee on Economic,

Social and Cultural Rights to give minimum content to each of the rights in the Covenant and to press forward with their realization. Innovative judicial approaches can also help, as we shall see in the next chapter on public interest jurisprudence.

Chapter V

Public interest litigation

Introduction

Developing countries face great challenges in assuring economic and social justice to their people. Having emerged out of a colonial experience, they must strive for nation-building while tackling poverty, dealing with their ethnic make-up and having to navigate in the turbulent waters of globalization and an international economic system that favours the strong and is unkind to the weak. The problems are many while the resources are scarce – whichever government is in power.

In such a situation the country has to be ever scrutinizing itself, asking itself the question : how can it better meet the needs of its people using the resources it has at its disposal? How can it help to prevent and reduce injustices? How can it be fair to the different parts of its population? In a case before the South African Constitutional Court, one Mr Soobramooney had been provided with dialysis treatment but this treatment was cut off because the few dialysis machines available had to be shared with other needy patients. Mr Soobramooney petitioned for relief on grounds of protection of his right to life. The Constitutional Court held that the duty of the Government, in the circumstances, was to have in place a fair system for the allocation of scarce resources – which the government did have in place. Tough though it was, it denied the petition of Mr Soobramooney. In such a case the Court acted as an arbiter of fairness. The government could only provide what its means could support but, in doing so, it must be fair.

I. Public Interest Litigation

This principle of fairness towards the poor and the needy is at the heart of the concept of public interest litigation, sometimes also referred to as social action litigation, whose traces may be found in the USA but which has seen pronounced expression in India. In this essay we raise for consideration whether the Courts of developing countries should embark on a course towards public interest litigation and thereby make a new contribution to the cause of justice of their needy people.

First, let us touch on the issue whether the Courts can take this initiative on their own. There is no doubt that they can. Judges of the Indian Supreme Court first admitted the public interest litigation in the 1970s because they felt that the Courts must be in a position to respond to the plight of the poorest and most disadvantaged sectors of the Indian population. The highest court of Guyana, the Guyana Court of Appeal has, since its establishment, clearly laid down the principle that it would develop a jurisprudence tailored to the circumstances of Guyana, drawing upon the historic Commonwealth jurisprudence as well as upon international and comparative jurisprudence. We documented this in our book on the Guyana Court of Appeal.⁸⁷ There is no doubt in our mind that our Courts can develop public interest jurisprudence in favour of the poor and the disadvantaged in our midst.

The concept of public interest litigation was initiated by Krishna Iyer J. in 1976. Its full scope was elaborated by Bhagwati J in S.P. Gupta vs. Union of India, 1982. Public interest litigation is an exception to the traditional rule of locus standi, according to which only those directly affected could approach the court. Under the public interest jurisprudence any member of the public having sufficient interest can maintain an action for judgment and seek redress for public injury.

II. The Practice of the Indian Supreme Court

According to the guidelines of the Indian Supreme Court, any member of the public having sufficient interest may maintain an action or petition by way of PIL if:

- There is a personal injury or injury to a disadvantaged section of the population for whom access to the legal justice system is difficult.
- The person bringing the action has sufficient interest to maintain an action of public injury.
- The injury must have arisen because of breach of public duty or violation of the Constitution or of the law.
- It must seek enforcement of such public duty and observance of constitutional law or legal provisions.

Public interest litigation has become a process for the enforcement of public duties enjoined by law for amelioration of the downtrodden and helpless victims. The judiciary could take cognizance of a simple letter or newspaper article as a petition. It is invoked when access to reasonable life – to live with dignity – is threatened. Public interest litigation has proved to be an instrument of social justice.

PIL has been used to order minimum wages for poor workers, abolish bonded labour and child labour, ensure proper working conditions for labourers, uphold the right to education and to proper health and sanitary services, protect the rights of prisoners, pavement and slum dwellers, order inspection of hospitals, mines, prisons, women and children homes, stop harassments and exploitation, punish those found guilty of dowry deaths and police excesses, control environmental pollution and labour from hazardous occupation and arrange for proper compensation.

Different sections of people such as the dalits, tribals, landless labourers and others, who have suffered from economic exploitation and different sorts of social indignities, have been the beneficiaries of PIL. The Supreme Court has hauled up certain States of the Union for their failure to prepare lists of families below the poverty line, who were to be given food at lower rates and for their indifference to stop deaths due to hunger.

Where needed, the Court initiates fact-finding by its own instrumentalities. One method by which the Court gathers facts is by the appointment of commissioners. The Court has appointed district judges, journalists, lawyers, mental health professionals, civil servants and expert bodies as commissioners.

Conclusion

It can be seen from the above that dramatic opportunities for expanding justice for the poor and disadvantaged can be tapped by the courts in developing countries. In order to set such a process in motion our legal practitioners could bring appropriate cases before the courts. Or the courts themselves, taking notice of materials in the press and the media could open cases, initiative inquiries and make orders for the rendering of justice to our needy people. This would open a new chapter in nation-building in developing countries and in placing the stamp of modern justice on them.

Conclusion

Towards a world court on the right to development

We would conclude this study by putting forward a radical proposal for the establishment of a world court on the right to development. This, we think, would rivet international, regional and international attention on implementation of the right to development.

An international panel assembled by the Swiss Government on the occasion of the 60th anniversary of the Universal Declaration of Human Rights in 2008, which prepared an Agenda for Human Rights, advocated the establishment of a World Court of Human Rights as an institution alongside the UN Human Rights Council.⁸⁸ The Panel did not go into details of the functions of the World Court on Human Rights, but some scholars advocate that the World Court should be assigned the function of considering petitions concerning violations of human rights submitted under the various UN human rights treaties.

A group of experts met at the Berkeley Law School on 9 and 10 November, 2009 to discuss the idea of the establishment of a World Court on Human Rights. At that workshop it was noted that the fate of millions of people world-wide is blighted by undemocratic or incompetent government. And it was argued that it would be timely to raise for discussion the question whether a future World Court on Human Rights might be given the competence to receive and pronounce upon petitions from individuals and groups that a government is in breach of its obligations to implement the right to development nationally. It is only a body like a World Court that can perform such a function. None of the existing UN or other international agencies can do so because they are deliberative political bodies given to much political rhetoric.

As a policy framework it would be eminently reasonable that:

- A World Court on Human Rights should focus on right to life, survival and protection issues facing humankind.
- The World Court should serve as a partner institution to, and complement, the UN Human Rights Council, the International Criminal Court, international and regional human rights treaty bodies.
- The World Court should be available to Governments, peoples, groups and organizations seeking urgent preventive measures against threatened or unfolding gross violations of human rights.
- Governments, peoples, groups and individuals should be able to bring before the World Court and seek relief from it with respect to situations where there is an alleged consistent pattern of gross violations of human rights.
- The World Court should be vested with competence to give advisory opinions at the request of Governments, the UNGA, the UNSC, ECOSOC and the UN Human Rights Council.
- The World Court could be modelled after the International Court of Justice, building in features of the African, European and Inter-American Court of Human Rights.

- The World Court should be vested with competence to initiate inquiries and make findings under a Public Interest window.
- The World Court should be given the competence to hear complaints from within countries that the right to development is not being respected inside the country.

Annexure

Declaration on the Right to Development

A/RES/41/128

4 December 1986

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,
Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of

any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, *apartheid*, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, *inter alia*, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from *apartheid*, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the

development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

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³⁰ Ibid., para. 22. In this same paragraph the Independent Expert stated that “the process must be distinguished from the outcomes of the process.” In the preceding footnote he had written that “the human rights approach to development is not the same thing as realizing the right to development.” In paragraph 24 of his report he stated that “the right to development at as whole will also have to be realized in a rights-based manner that is transparent accountable, participatory and non-discriminatory as well as equitable and just.

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