Human Rights and Social Development

Toward Democratization and Social Justice

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Acronyms

ANC	African National Congress
APHR-FT	Asia Pacific Human Rights NGOs Facilitating Team
ASEAN	Association of South-East Asian Nations
CSCE	Conference on Security and Cooperation in Europe (now OSCE)
EC	European Community (now EU)
EU	European Union (formerly EC)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMF	International Monetary Fund
NGO	non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organisation for Security and Co-operation in Europe (formerly CSCE)
UK	United Kingdom
UN	United Nations
UNCHS	United Nations Centre for Human Settlements (Habitat)
UNDP	United Nations Development Programme
UNRISD	United Nations Research Institute for Social Development

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Summary/Résumé/Resumen

Summary

This paper aims to assess progress toward the objectives of the Copenhagen Declaration on Social Development (referred to as "the Declaration") and Programme of Action by using a human rights strategy. The Declaration seeks to make human rights the framework for policies to achieve the goals of the World Summit for Social Development, held in Copenhagen in 1995. This strategy assumes that the norms and machinery of human rights would inform decisions on development policies. It also assumes that rights would empower social and economic groups hitherto excluded from or disadvantaged in development and entitlements. In particular, it assumes that human rights norms that require and support democracy would provide the basis of political and social stability, and that social and economic rights would eliminate the worst consequences of poverty.

Yash Ghai begins by showing the relevance of human rights to the goals and strategy of the Declaration. In order to explore the potential for change through the norms and machinery of rights, he describes the salient elements of the system or "regime" of rights—the philosophical foundations, principles and norms of human rights, and the machinery for their enforcement—as well as the different kinds of rights that now constitute the international regime and the connections between them. He then discusses the degree of consensus on human rights, pointing to various criticisms of such rights, which affect their ability to serve as a consensual framework for policies. The provisions in international and national norms that support democracy are analysed, paying special attention to those that define the rights of minorities, since ethnic conflicts—or what pass for ethnic conflicts—have been a principal source of political and social instability, and of great oppression and suffering. Ghai also discusses provisions that aim to promote social justice, as well as how and to what extent democracy and social justice have been implemented in recent years, particularly since the Social Summit. In order to do this, he examines the nature and implications of globalization, which has a profound effect on both the relevance and prospects of democracy and social justice.

The author concludes that, although human rights provide a suitable framework for the goals of the Declaration, and there is considerable merit in using it, little progress has been made in the realization of rights that are central to the agenda of the Declaration. There has been more progress in democratization than in social justice, but even there the progress is strictly limited because there is no international consensus on the importance of rights. There are varying understandings of human rights, and there is no great commitment to this ideal on the part of governments. Even Western governments, which claim to be the foremost champions of human rights, attach greater importance to their national interests than to the realization of human rights. The achievement of global justice necessitates a massive transfer of financial and other resources internationally, from richer to poorer countries, and domestically, from richer to poorer classes. There simply is not the will at either level for these redistributions. On the contrary, the processes of globalization accentuate the disparities between the rich and poor, globally and nationally.

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Résumé

Cette étude vise à évaluer les progrès en vue des objectifs de la Déclaration de Copenhague relative au développement social (qu'on appellera ici la "Déclaration") et du Programme d'action en utilisant une stratégie axée sur les droits de l'homme. La Déclaration cherche à faire des droits de l'homme le cadre de politiques destinées à atteindre les objectifs du Sommet mondial pour le développement social, qui s'était tenu à Copenhague en 1995. Cette stratégie suppose que les normes et le mécanisme des droits de l'homme seraient une source d'informations quant à la prise de décisions en matière de politiques du développement. Elle présume également que les droits rendraient autonomes des groupes sociaux et économiques jusque là exclus ou désavantagés sur le plan du développement et des prérogatives. Elle implique tout particulièrement que les normes en matière de droits de l'homme qui nécessitent et soutiennent la démocratie seraient le fondement de la stabilité politique et sociale et que les droits sociaux et économiques éliminent les pires conséquences de la pauvreté.

Yash Ghai commence par montrer la pertinence des droits de l'homme aux objectifs et à la stratégie de la Déclaration. Afin d'explorer les possibilités de changement par le biais et le mécanisme des droits, il décrit les éléments saillants du système ou "régime" des droits—fondements philosophiques, principes et normes des droits de l'homme et mécanisme pour les faire respecter—ainsi que les différents types de droits qui constituent à présent le régime international, tout comme leurs interconnexions. Il évoque ensuite le degré de consensus autour des droits de l'homme, présentant les diverses critiques relatives à de tels droits, qui affectent leur capacité de servir de cadre consensuel pour des politiques. Les dispositions au sein des normes nationales et internationales qui soutiennent la démocratie sont analysées, et une attention particulière est portée à celles qui définissent les droits des minorités, puisque les conflits ethniques—ou ce qui passe pour des conflits ethniques—ont constitué une source principale d'instabilité sociale et politique, ainsi que de grande oppression et de souffrances. Yash Ghai examine également les clauses qui visent à promouvoir la justice sociale, ainsi que la manière et la mesure dans laquelle la démocratie et la justice sociale ont été mises en œuvre au cours des dernières années, en particulier depuis le Sommet social. Pour ce faire, il examine la nature et les implications de la mondialisation, qui a un effet considérable tant sur la pertinence que sur les perspectives de démocratie et de justice sociale.

L'auteur conclut que, bien que les droits de l'homme fournissent un cadre approprié pour les objectifs de la Déclaration, et qu'il y ait un grand mérite à utiliser ce cadre, rares sont les progrès qui ont été accomplis dans la réalisation des droits qui sont essentiels à l'ordre du jour de la Déclaration. On note davantage de progrès sur le plan de la démocratisation que sur celui de la justice sociale, mais même dans ce domaine, le progrès est strictement limité car aucun consensus international ne règne en ce qui concerne l'importance des droits. Il existe diverses

interprétations des droits de l'homme, et l'engagement des gouvernements envers reste très superficiel. Même les gouvernements occidentaux, qui affirment être les principaux champions en matière de droits de l'homme, accordent plus d'importance à leurs intérêts nationaux qu'à la réalisation des droits de la personne. L'obtention d'une justice internationale nécessite un transfert massif, sur le plan international, de ressources financières et autres des pays les plus riches à ceux les plus pauvres et, sur le plan interne, des classes les plus riches aux classes les plus pauvres. La volonté n'existe tout simplement pas à ces deux niveaux pour de telles redistributions. Au contraire, les processus de mondialisation accentuent les disparités entre riches et pauvres, tant sur le plan international que national.

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Resumen

El propósito de estas páginas es evaluar los progresos realizados para la consecución de los objetivos de la Declaración de Copenhague sobre Desarrollo Social (a la que se refiere como "la Declaración") y el Programa de Acción, desplegando una estrategia de derechos humanos. En la Declaración se intenta lograr que los derechos humanos sean el marco para que las políticas alcancen los objetivos de la Cumbre mundial para el desarrollo social, celebrada en Copenhague en 1995. Esta estrategia supone que las normas y el mecanismo de los derechos humanos informarían de las decisiones adoptadas sobre políticas de desarrollo. Supone igualmente que los derechos habilitarían a los grupos sociales y económicos hasta ahora marginados o desfavorecidos en materia de desarrollo y derechos. Supone en particular que las normas de los derechos humanos que exigen y apoyan la democracia proporcionarían la base de la estabilidad política y social, y que los derechos sociales y económicos pondrían fin a las peores consecuencias de la pobreza.

Yash Ghai empieza mostrando la importancia de los derechos humanos para los objetivos y la estrategia de la Declaración. A fin de examinar las posibilidades de cambio a través de las normas y el mecanismo de derechos, describe los elementos más destacados del sistema o "régimen" de derechos—los fundamentos filosóficos, principios y normas de los derechos humanos, y el mecanismo para su aplicación—así como los diferentes tipos de derechos que actualmente constituyen el régimen internacional y las conexiones entre los mismos. A continuación aborda el grado de acuerdo en materia de derechos humanos, señalando diversas críticas a dichos derechos, que afectan su capacidad de servir como marco de consenso para las políticas. Se analizan las disposiciones contenidas en las normas nacionales e internacionales que apoyan la democracia, prestando especial atención a las que definen los derechos de las minorías, puesto que los conflictos étnicos—o los que se consideran conflictos étnicos—han sido la principal fuente de inestabilidad política y social, y de gran opresión y sufrimiento. Ghai trata igualmente las disposiciones encaminadas a fomentar la justicia social, así como el modo y la medida en que la democracia y la justicia social se han aplicado en los últimos años,

particularmente desde la Cumbre Social. A tal efecto, examina la naturaleza y las consecuencias de la mundialización, que han tenido graves consecuencias tanto en la importancia como en las perspectivas de la democracia y la justicia social.

El autor concluye que, aunque los derechos humanos proporcionan un marco apropiado para los objetivos de la Declaración, y su utilización es digna de mérito, apenas se ha progresado en lo concerniente a la consecución de los derechos fundamentales para el programa de la Declaración. Se han realizado más progresos en la democratización que en la justicia social, pero, incluso en este caso, el progreso está estrictamente limitado al no haber un acuerdo internacional sobre la importancia de los derechos. Existen diversos acuerdos en materia de derechos humanos y los gobiernos no se comprometen seriamente con respecto a este ideal. Los gobiernos de Occidente, que presumen ser los más ávidos defensores de los derechos humanos, conceden más importancia a sus intereses nacionales que a la consecución de los derechos humanos. Para lograr la justicia social, es imperativo llevar a cabo una transferencia masiva de recursos financieros y de otro tipo, de las clases más ricas a las más pobres. Simplemente falta voluntad a cualquiera de estos niveles para llevar a cabo estas redistribuciones. Por el contrario, los procesos de mundialización acentúan las diferencias entre ricos y pobres, tanto a nivel nacional como mundial.

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I. The Relevance of Human Rights to the Copenhagen Declaration on Social Development and Programme of Action

The Copenhagen Declaration on Social Development recognizes the urgent need to "address profound social problems, especially poverty, unemployment and social exclusion, that affect every country" and sets as the task of the governments to "address both their underlying and structural causes and their distressing consequences in order to reduce uncertainty and insecurity in the life of people" (para. 2). It adopts a broad view of social development, as meeting the "material and spiritual needs of individuals, their families and the communities in which they live" (para. 3). This can only be achieved through "social and people-centred sustainable development" (para. 4). As an aspect of sustainable development, there is a commitment to the protection of the environment. Social development is inextricably connected with economic development, for some of its primary goals—the eradication of poverty, unemployment and social exclusion—depend on it. The Declaration identifies a number of factors that have prevented the goals of social development from being achieved: chronic hunger, malnutrition, illicit drug trade, organized crime, corruption, foreign occupation, armed conflicts, illicit arms trafficking, terrorism, intolerance, xenophobia and incitement to racial, ethnic, religious and other hatreds.

Many of these factors are connected with the violation of human rights. It is therefore not surprising that the Declaration places considerable emphasis on human rights and democracy in order to achieve these goals. Indeed—more than any other international declaration, with the exception of the Declaration on the Right to Development (1986)—the Declaration places human rights at the centre of development. It states, for example, that "democracy and transparent and accountable governance and administration in all sectors of society are indispensable foundations for the realization of social and people-centred sustainable development" (para. 4). At another point it refers to the acknowledgement "that social and economic development cannot be secured in a sustainable way without the full participation of women and that equality and equity between women and men is a priority for the international community and as such must be at the centre of economic and social development" (para. 7).

The Declaration places particular emphasis on the eradication of poverty, and this is perhaps its closest connection with human rights. Poverty is the greatest cause of the denial of human rights. It is obvious that poor people enjoy a disproportionately small measure of economic rights such as education, health and shelter. However, they are equally unable to exercise civil and political rights, which would require not only an understanding of the dynamics of society and access to public institutions, but also confidence in themselves. They are for the most part unable to use the legal process to vindicate their human and legal rights. Nothing destroys confidence so much as poverty. Poverty also compels people into the violation of the rights of others, particularly of their own children and women. Child labour is essential to the survival of millions of families throughout the Third World and, increasingly, so is prostitution. Bonded labour is a direct result of poverty, and its exploitation by the well off. Poverty produces massive inequalities, and the subordination of some groups to others in circumstances that deny them their basic dignity.

The first of the principles and goals enunciated in the Declaration, and a central theme of the Programme of Action, is a commitment to "a political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and co-operation, and full respect for the various religious and cultural backgrounds of people" (para. 25). More specifically, governments have agreed to "promote democracy, human dignity, social justice and solidarity at the national, regional and international levels; ensure tolerance, non-violence, pluralism and non-discrimination, with full respect for diversity within and among nations" (para. 26(f)). They have undertaken to "promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all, including the right to development, and to ensure that disadvantaged and vulnerable persons and groups are included in social development" (paras. 26(j) and (i)). Particular mention is made of "the right of self-determination of all peoples, in particular of peoples under colonial or other forms of alien domination or foreign occupation" (para. 26(k)) and support for indigenous people in their pursuit of economic and social development, "with full respect for their identity, traditions, forms of social organization and cultural values" (para. 26(m)). Without trying to exhaust the references to human rights in the Declaration, the last paragraph of the first Commitment is worth quoting: "We will … reaffirm and promote all human rights, which are universal, indivisible, interdependent and interrelated, including the right to development as a universal and inalienable right and an integral part of fundamental human development, and strive to ensure that they are respected, protected and observed" (Commitment 1(n)).

Several points about these formulations are worth noting. First, the importance of the language of rights. Repeated references to them might indicate a broad international consensus on human rights and freedoms and attest to the moral and political force of the idea of human rights—or at least of its rhetoric. In recent decades the idea of respect for human rights seems to have become a driving force in international and regional policies and conduct, as in the intervention of the United Nations in the restoration of rights and democracy in Bosnia and Herzegovina, Cambodia, East Timor, Haiti and Nicaragua; or in the more specific regional mediations and interventions by the Organisation for Security and Co-operation in Europe (OSCE, called the Conference on Security and Cooperation in Europe, or CSCE, until 1995). Extensive references to democracy and human rights in the Declaration are evidence of the desire, if perhaps not necessarily the feasibility, of using human rights as a framework for sustainable development and solving other ailments of humankind. All of this enthusiasm and commitment to human rights must be taken with some caution, for the international human rights movement has been distinguished more by rhetoric than practice. Human rights are understood differently in different places, and the apparent consensus on rights conceals profound differences on, and even conflicts over, values and goals.

Second, the frequent invocation of rights in the different contexts in the Declaration attests to the enlarged scope of the concept and content of human rights. "Rights" have travelled a long distance from their origins in the emerging liberal economic orders of Europe and the United States since the seventeenth century, when the focus was on civil and political rights as the

means to restrict the power of the government and enhance that of economic entrepreneurs. Their philosophical foundations have broadened, fed by various political and intellectual traditions. A large and diverse number of groups and interests have advanced their claims in the language of rights. The first additions to the classical liberal category of rights were economic, social and cultural rights. Since then specialized instruments have dealt with the claims and rights of vulnerable groups, such as women, children, refugees, migrants, indigenous peoples and people with disabilities. More broadly, but also ambiguously, there is the right to development, and notions of the preservation of the environment are being woven into the regime of rights (where they appear as such in several national constitutions). There is now a rich menu of rights, perhaps too rich as some complain, and the rights do not appear to be seamless. The regime of rights guarantees democracy and participation, and the accommodation of diversity. A fundamental assumption of contemporary human rights is social justice, and thus the alleviation of poverty, which is a primary concern of the Declaration. Social justice has also promoted the idea of equity as between men and women, between groups, and between generations. There is a considerable widening of the range of entitlements of citizens and others, transforming people from supplicants into citizens. The broadening of human rights has focused attention on the state not merely as facilitator but also as provider. The logic of social, economic and cultural rights is positive obligations of the state, necessitating an active role, to ensure basic needs of people, and thus their dignity.

It is not surprising that these developments in the concept and scope of human rights have produced controversy. Behind the seeming consensus on the formulations in the Declaration on rights and democracy lurk several disagreements (see the following section). How far the apparent disagreements reflect genuine differences of values is hard to say, for there is considerable hypocrisy and posturing in the position of governments. Human rights have become one of the frameworks for international relations, and the debates about them have become highly politicized. Having said that, it is possible to identify differences in approaches to human rights, and to their contents. These differences have been a major obstacle to a genuine consensus and the feasibility of consistent and effective international action to promote and protect human rights. The challenge to human rights of the Declaration is to achieve coherence of rights, founded on common values and understandings as to their purpose.

There are considerable advantages in using the human rights framework for social development. Despite the controversies that have prevented unified action on human rights, they seem to attract broad international support and few governments publicly condemn their values. The language of rights has the capacity to evoke a response and to provide moral and legal justification for certain forms of action. The ideology of, and claims based on, human rights have become increasingly effective ways to pressure governments and the international community. The regime of rights provides a basis for international or regional action and justifies the imposition of sanctions and, in extreme cases, humanitarian intervention.

Human rights standards can also compensate for the weakness of international political institutions and machinery. In contradistinction to the growth of the idea and substance of

rights in national systems—where they followed the establishment of the apparatus of the state—in the international system rights have developed with remarkable speed and are well ahead of the development of political institutions. However, that does not mean there is not sufficient authority or mechanism for their international enforcement.

The framework of rights is feasible because rights are now being defined in detailed terms and there are numerous decisions of courts and other tribunals that have elaborated the parameters of rights and their implications. They are no longer abstract formulations. Moreover, as mentioned above, the regime of rights is now complex and multilayered, dealing with different kinds of claims and interests. It speaks to a variety of concerns, and provides doctrines as well as mechanisms for striking a balance between different claims.

Rights are a way to mobilize and empower the disadvantaged, and in many parts of the world this is their principal function. The language of rights makes people conscious of both their oppression and the possibility of change. "Rights" have been extraordinarily effective as a basis of networking in and across states and have demonstrated the possibility of international solidarity, particularly for women and indigenous peoples. Many non-governmental organizations (NGOs) justify their existence by the need to promote rights and it is the regime of rights that has enabled them to perform their promotional and investigative role, which has generally proved more effective than internal state mechanisms for accountability. It would be fair to say that the human rights regime has sustained civil society in its confrontation with the state.

Even more fundamentally, the regime of rights is crucial because it speaks in the language of entitlements. Poverty is not just a matter of a deprived economic situation; it is defined and sustained, on the part of the poor, by a sense of helplessness and dependence, and by a lack of opportunities, self-confidence and self-respect. It is increasingly being recognized that poverty can only be eradicated if the poor are given a greater share in decisions about programmes of poverty alleviation and their implementation. The language of rights makes it clear that the poor are not the subject of charity or benevolence, but are entitled to a decent standard of living and that civil and political rights are the vehicles for their participation and empowerment.

The effectiveness of the rights regime is, however, diminished by the fact that not all of them have been integrated into the international economic or financial systems, which are market oriented and primarily protect the interests of capitalists. Many types of rights are not favoured by the capitalist system. Historically only those rights have been upheld that support the interests of the dominant classes—thus civil and political rights were propounded by a bourgeoisie coming into power. Today's economic and social rights speak to the claims of the oppressed and the powerless, and the chances of their fulfilment are slim. Developments in human rights have been at the level of rhetoric and to some extent the establishment of institutions, but they have not led to the redistribution of resources or to building the economic base that favours economic justice. Although norms of the human rights regime represent a serious challenge to the international market system, and an alternative vision, the material forces of the international market system are more powerful than the moral claims and rhetoric of human rights.

One further point needs to be made to establish the context for a rights-oriented strategy: it concerns "globalization". The Declaration correctly identifies the contradictory nature of globalization, on one hand opening up possibilities of increased economic growth, and on the other foreclosing options central to the Copenhagen aspirations, such as those of income redistribution, alleviation of poverty, employment opportunities and equity. It states that "the global transformations of the world economy are profoundly changing the parameters of social development in all countries. The challenge is how to manage these processes and threats so as to enhance their benefits and mitigate their negative effects upon people" (para. 14). There are grave doubts as to whether this challenge can be met successfully. The inherent tendency of economic globalization is to diminish democracy and to privilege market-oriented rights, reducing the importance and feasibility of social and solidarity rights (Ghai, 1999). It is impossible to discuss the salience of the human rights strategy for the Copenhagen social development envisioned in Copenhagen without taking on board the impact of globalization and the redistributions of power that it has produced.

II. The Human Rights System

In order to explore the potential of the human rights framework to achieve social development, it is necessary to briefly describe the human rights system. The essential components of the system are ideology, substantive rights, functions, beneficiaries, actors, institutions, procedures and the levels at which it operates. The human rights system is rich in texts, rhetoric and institutions, but it is lacking in material resources to make rights effective. States place interests such as national security or economy, and the cultivation of international relations, above human rights. Popular consciousness of rights is often dulled by ethnic conflicts or the burden of "traditional" values and authority. The scope of substantive rights has already been discussed in the previous section, and so here I shall concentrate on other elements of the system.

Ideology

Surprisingly, there is no great consensus on the ideology of rights. There is substantial agreement that the purpose of human rights is to protect human dignity, but there are different views on the source of that dignity. The principal difference lies between those who seek a religious basis for that dignity, and those who seek a secular basis. There is a widespread perception that the origins of the concept of human rights lie in Western, individualist or liberal philosophy—and for that reason some in the East argue that it is alien to their own cultures. Even in the West there is criticism of the individualistic bias of human rights. There are also historical and pragmatic explanations for rights—the former consisting of an analysis of the growth of classes and their relationship to the state, and the latter justifying rights in terms of fairness, stability and peace. These differences bear on the acceptance and realization of rights, but perhaps their importance has diminished with the elaboration of rights under the auspices of the United Nations. It has been possible to reach broad agreement on the scope and substance of rights, and the key international instruments have been ratified by a large number of countries adhering to differing religions and cultural traditions. As mentioned above, the ideology of human rights is one of the most powerful forces today—largely at the level of

rhetoric, but also as justification for action, particularly the collective interventions by the international community in oppressive states. The ideology of rights—and the acceptance that the international community has the overriding responsibility for their protection—has been invoked to justify limits on state sovereignty, a cornerstone of the international system (although, as discussed later, this claim is by no means uncontested).

Levels: International, regional and national

The national, regional and international levels constitute the global system of rights. Historically, the concept and practice of human rights developed in national systems. Before the establishment of the United Nations, a number of states provided for the protection of rights in their constitutions. The League of Nations and the International Labour Organization facilitated the internationalization of specific rights of workers and minorities, but it is only since the existence of the United Nations that there has been an exponential growth in international human rights law. The United Nations Charter committed its members to the promotion and protection of human rights. The United Nations marked its entry into this area in 1948 by adopting the Universal Declaration of Human Rights—since then many conventions have been negotiated and ratified by member states.

The growth of conventions and institutions at the international level was paralleled by the establishment of the European Convention of Human Rights, providing the first instance of the protection of rights at the regional level. The Convention is enforced by the European Court of Human Rights. Since then, regional systems of human rights have been established for Africa and the Americas, though there are differences in the scope of rights and the method of enforcement. Another "regional" system has developed in recent years under the auspices of the OSCE, in which Canada and the United States also participate—so far the progress has been in developing norms and in the method of persuasion. There are many advantages in having regional systems: for instance, they take the load off the international system, and bring the pressure of friendly, neighbouring states to bear on offending states. Equally important, they represent the consensus of the states as to the standards of government behaviour acceptable in the region. Perhaps the absence of regional systems in Asia and Pacific-Australasia is due to the lack of this regional consensus. Consequently, regional systems are uneven, with Europe's being the best integrated and certainly the most effective.

The third level is the national. It is the most important level for giving legal effect to human rights norms, which is done by guarantees in the constitutions and laws, and by giving effect to international or regional treaties. It is also the most important level for the enforcement of rights; most violations of rights are dealt with, at least in the first instance, in national courts or other human rights institutions. It is at this level that the key struggle for human rights is conducted—and the resistance to it waged.

The different levels are being integrated through a regime of treaties that are effective at the national level but supervised at the regional or international level, and through the respect paid by national governments and judiciaries to elaborations of rights by regional or international

tribunals. Nevertheless, there is a division of labour between these levels as regards the different functions of the human rights system, to which I now turn.

Functions

One of the most important functions is *developing a consensus* on rights and interests to be protected. This is often done by interest groups—women, minorities, migrants, corporations and so on. In recent years NGOs have played an important role in lobbying for the recognition of particular interests—many norms on indigenous peoples, minorities and protection against torture owe their origin to the efforts of NGOs. Sometimes regional or international conferences have also performed this role.

Once there is a substantial consensus, the *task of norm setting* can be undertaken. This involves the elaboration of treaties or legislation and has historically been the role of national governments and legislatures. However, in recent years the international system has played a crucial role. The United Nations has provided the forum for negotiating treaties on human rights. By its nature, norm setting is the responsibility of official bodies, but NGOs have also played a significant role in developing treaties or legislation.

The *promotion of respect for rights* consists of various activities—including information on and education about human rights, and support for the institutions that uphold them. This function is the responsibility of official and non-official bodies. In many countries official human rights commissions have a special responsibility for the propagation of rights. In more authoritarian states, the primary responsibility is discharged by NGOs and social groups, including trade unions.

Closely connected to the respect for rights is *mobilization* of groups on the basis of rights. Claims of rights have constituted forms of protest and challenges to authority. In so far as one function of rights is the empowerment of vulnerable groups, mobilization is crucial and, since the aim of mobilization is to organize social groups and challenge authorities, human rights defenders are often harassed or even oppressed. Human rights also provide the basis for *networking*, nationally and internationally. Indigenous peoples and women have been particularly successful in networking, which is almost always the preoccupation of non-official bodies.

Protecting rights is the primary responsibility of the state—which together with other official bodies is generally bound to respect human rights—and most legal actions are directed at the state's violations of rights. Protecting rights takes various forms, ensuring that:

- there is law and order in which people can enjoy their rights;
- the police and army are trained in human rights norms, and respect and uphold people's rights;
- institutions in the front line of securing rights, like the judiciary and human rights commissions, are independent and adequately resourced; and
- there are effective sanctions against those who violate the rights of others.

The United Nations has played a limited role in protecting rights. The principal UN agency for this purpose—formerly the United Nations Centre for Human Rights, now incorporated into the

Office of the United Nations High Commissioner for Human Rights (OHCHR)—has had very limited resources, and had a low profile until the appointment of the current Human Rights Commissioner, Mary Robinson. Unlike other UN agencies, it had no field offices until recently—it now has over 20, supervising the protection of rights and offering technical assistance.

The task that receives most attention is *enforcing rights*, most typically through the judicial process. In recent years other institutions, such as ombudsmen, and human rights or equality commissions, have been established for the protection of human rights. These institutions tend to follow less adversarial procedures than courts, and offer mediation and reconciliation. Access to these bodies is also easier, cheaper and more informal than it is to courts, and they tend to be multifunctional, with information and education being a primary responsibility. However, courts remain the final arbiters of violations, and the ultimate authorities for the interpretations of human rights provisions. Therefore the interpretation of judges and legal practitioners, who have a key role in access to the courts, and a well functioning legal system are indispensable for an effective system of enforcement of rights.

The primary institutions for the enforcement of rights are national, but in countries that are part of a regional system of human rights, regional commissions or courts can play an important, supplementary role. The role of the European Court of Human Rights is crucial in that it makes the final interpretations of the European Convention, which are binding on national governments and courts. The international system plays little role in the enforcement of rights. The first steps in international enforcement have been taken with the establishment of tribunals for war crimes in Rwanda and the former Yugoslavia, and with the imminent establishment of the permanent international tribunal as agreed in Rome three years ago.

The international system has an important, or, more accurately, a potentially important, role in the supervision of the protection and enforcement of rights. This supervision takes two forms: one is primarily political and is the responsibility of the OHCHR and the mechanisms associated with it, such as special rapporteurs for countries including Afghanistan and Cambodia, or on themes such as extrajudicial killings, disappearances and violence against women. The other form of supervision is more "judicial", the task being performed by specialist, independent bodies set up under human rights treaties.

Most major treaties provide for periodic reports to these bodies; this is the principal means of supervising a state's performance of its treaty obligations. But some treaties also provide for a complaints mechanism, either at the insistence of another state (not surprisingly, this is hardly ever used) or of a person who alleges that his or her rights have been violated (this procedure normally applies only to states that accept a special protocol for this purpose). Even when there is a complaints procedure, the decision of the body is not strictly enforceable, although it provides a valuable opportunity for the body to elaborate the provisions of the treaty and explain the scope of rights protected by it—and the permissible derogations. This has been a particularly valuable aspect of the work of the United Nations Human Rights Committee, set up under the International Covenant on Civil and Political Rights (ICCPR). However, the

potential of the supervisory role of the international system has yet to be realized. Until now meagre resources have been provided to the United Nations and the treaty bodies, many of whom can only meet once or twice a year for a fortnight or so and have inadequate secretariat support and virtually no follow-up machinery. This state of affairs is ample evidence of the low priority accorded to human rights by the international community, as is the fact that the international supervisory system is highly fragmented, incoherent and largely ineffective.

Supervision is also exercised at the regional level for states that are members of regional systems, and also at the national level. Some national human rights commissions may be required to produce an annual report—but more often this task is performed by national and international NGOs. Of the latter, Amnesty International and Human Rights Watch are well known. It is also worth mentioning that the United States Department of State produces an annual report on the state of human rights in other countries—which is an important aspect of its foreign policy.

Actors and institutions

The preceding subsections have given some account of the actors and institutions that form part of the human rights system. Here it is sufficient to recapitulate that actors exist at various levels and include official and unofficial bodies. There has been considerable emphasis on strengthening national institutions for the protection of rights since the World Conference on Human Rights, held in Vienna in 1993. The OHCHR has played an important role in the promotion of human rights commissions. As discussed in the upcoming subsection on Democratization: The record, considerable foreign assistance has been given for the strengthening of judicial and legal institutions.

A significant set of actors are "civil society" institutions, which operate nationally and internationally. The framework of human rights has provided a powerful basis for their growth and networking, and they have played an important role in popular mobilization and aggregating demand. In authoritarian states, they have kept alive the demand for democratization, and brought violations of rights to world attention. They are an important lobby for the protection of human rights, and play a significant supervisory role. They were once seen as "troublemakers" by governments and international agencies, but now enjoy considerable legitimacy in official circles, and are accepted as an indispensable partner in the pursuit of human rights.

Beneficiaries of rights

The beneficiaries of rights are human beings. However, most legal systems extend "human" rights to corporations and other entities—at least to the extent that they are capable of exercising them (there are critics who complain that to extend human rights to corporations is an abuse of the concept). It used to be that rights were traditionally restricted to citizens, and many constitutions still so restrict their scope. International instruments are ambiguous; they speak as if rights belong to "everyone", with only the political rights being restricted to citizens, but they do not seem capable of enforcing the wider view of entitlement to rights. However, an increasing number of states extend non-political rights to all residents, although some still discriminate against immigrants in civil, economic and social rights. In a globalizing world, the

restriction of rights to citizens, especially when citizenship is conceived of in narrow racial or ethnic terms, is a serious limitation on people's exercise of rights.

So long as rights were attached to citizenship, there was a notion of a uniform set of rights (and obligations). After the international covenants on civil and political, and on economic, social and cultural rights were adopted, available to "everyone", the international community turned its attention to specific groups of people. Conventions for the protection of vulnerable groups—racial minorities, women, children, indigenous peoples and migrant workers—were adopted. For the most part (with the partial exception of the convention for indigenous peoples), they reiterate the rights that these groups allegedly already enjoy under the two Covenants, but provide a basis for affirmative action, special policies and protective institutions, and networking. These developments were in some cases presaged in national systems—for example, India, which adopted special constitutional protection of historically disadvantaged minorities.

The concern with vulnerable groups, particularly minorities, has promoted the concept of group rights. In the classical traditions of human rights, only individuals had rights; those who adhere to this approach are uncomfortable with rights of groups and newfangled ideas such as the right to development. But the notion of group rights has assumed a particular importance in multi-ethnic societies, where it has in some cases become the organizing matrix of society, as discussed in section IV.

Internationalization of human rights and state sovereignty

From the perspective of the Declaration and the prospects of international action, the degree of *internationalization of human rights* is a significant factor. The expression "internationalization of human rights" refers to the process whereby human rights are encapsulated in international instruments, most of which have become binding on signatory states. The process encompasses the elaboration of human rights, binding states to respect and enforce these rights, and setting up an international system of supervision and enforcement of the obligations of states in respect of human rights. Internationalization of rights also refers to the norms by which states conduct their relations with other states and which international organizations must follow in their work, and it is deemed to have established a new international morality. Because international human rights have been established in what passes for a consensual process, it is often assumed that they are universally valid, as opposed to, for example, democracy, where it is conceded that there is no uniform, universal form. The result is that states may be more willing to intervene to promote or protect rights than to support democracy or criticize political systems that look authoritarian.

The process has resulted in the translation into international instruments of human rights originally developed in national systems and adopted in several state constitutions. The inscription of these rights in international instruments has expanded the scope of the operation of human rights, bringing an important change in the character and purpose of international law and making individuals and their rights its central concern. The manner in which a state treated its citizens used to be regarded as an internal affair; it was no business of other states or international organizations. The concept of state sovereignty provided a shield for states against

external intervention and even external comment. State sovereignty and non-intervention in the domestic affairs of a state are still the cornerstone of the international order under the United Nations Charter. But the notion of what is domestic has changed under the Charter's imperative to promote and protect human rights. International instruments have placed special responsibilities on the state with regard to minorities and indigenous peoples, and other vulnerable communities or groups. This change in international law has been reinforced by international and regional instruments, which have placed obligations on states to respect human rights and to account to the international community for the performance of this responsibility. A number of institutions and procedures have been established since the United Nations was founded to address the question of the violation of human rights by a state. The right of states, regional organizations and the international community to criticize states that violate the human rights of their nationals is increasingly recognized. The eruption of civil wars, often centring on ethnic conflicts, has increased the involvement of the international community in the affairs of states; this involvement is most dramatically manifested in *humanitarian intervention*, but also takes the form of mediation and conciliation, strengthening national capacity for the promotion of and respect for human rights, monitoring the observance of treaty obligations, and imposing sanctions. The lack of immunity for heads of state for torture and similar crimes, and the establishment of an international criminal court, reinforces this trend.

However, it is important to note that this qualification on state sovereignty is not universally accepted. A number of states, among them those that have been victims of imperialism, argue that state sovereignty—and a strong state—is essential for the protection of the rights of citizens. Foremost among the proponents of this view is China. Sometimes this pragmatic argument is combined with a doctrinal view of state sovereignty, drawing its inspiration from pre-UN days. Russia has, for example, tried to fend off criticism of its conduct in unleashing a brutal war on the Chechens on the grounds that what it does to its own citizens is its own business, squarely within its sovereignty. The Association of South-East Asian Nations (ASEAN) refused to condemn Indonesia for the atrocities that its troops perpetrated in East Timor. The resistance of states to the notion that human rights anywhere is a matter of international concern, justifying international action, is a serious impediment to the enforcement of human rights. It prevents speedy remedial action by or through the United Nations Security Council. Sanctions or interventions follow only upon brutal repression of groups, resulting in great loss of life. An international consensus on the grounds and modalities for intervention is necessary to prevent extreme violations of human rights. Hesitation about a forthright commitment to the role of the international community in the enjoyment of rights, particularly humanitarian intervention, is no doubt induced by anxieties about the hegemonic power of some states, and the fear that interventions will be selective to serve the interests of powerful countries like the United States.

The human rights industry

Despite the complex structure of the human rights system, those involved in the propagation and promotion of human rights form a small group. At the unofficial level, there are a handful of international (that is, Western) NGOs that dominate the scene, enjoy a favoured status with the United Nations and receive most of the media publicity. National NGOs are frequently de-

pendent on them as interlocutors for fundraising and for guidance on tactics and organization. There are also a small number of Western foundations that sustain this movement—and thus exercise a disproportionate influence on the orientation and even the possibility of the human rights movement—and a small number of official international, regional and national organizations with human rights mandates. There is a considerable circulation of personnel between these NGOs, foundations and organizations, and a strong bonding.

The term "human rights industry" is often used, pejoratively, to refer to the self-interest of the aforementioned groups and the way they organize the production, dissemination and implementation of rights. It suggests that their primary commitment is to their own organizations and their dominance of the system, not the protection of rights (Baxi, 1999). There is no need to buy into all of this cynicism, but there is little doubt that the human rights movement has become highly bureaucratized, hierarchical, even narrow (Cox, 2000). The industry having become highly legalistic due to the proliferation of rights, and the mushrooming of the jurisprudence of courts, tribunals and committees, the leadership has passed to lawyers, who for the most part are less concerned with mobilizing mass social movements around rights than with advocacy and lobbying. The framework of human rights will serve the agenda of the Social Summit only if it is carried to the people, if they believe that their own oppression is clearly linked to the violation of rights, and if they are organized to claim their rights and to base their agenda and organization on them. It is ironic that the people in whose name the legitimacy of rights is claimed are for the most part isolated from participation in human rights movements.

III. Differences and Controversies over Human Rights

Early differences surrounded the relative claims of civil/political and economic/social rights, and led to their bifurcation and separation into two covenants. The water that has since flowed under the bridge has done little to dilute the opposition of the United States to economic and social rights. At the same time, many governments in Africa and Asia justify their resistance to civil and political rights on the grounds that they are less important and urgent than economic and social rights. The separation does little to strengthen arguments for the indivisibility of rights and freedoms, or for the equal attention of the world community to them. It laid the foundation for continuing controversy about priorities, sequence and legitimacy of rights. Since then other controversies have come to the fore.

Communitarian challenge to rights

The statement in the Declaration (Commitment I (n)), which proclaims rights as "universal, indivisible, interdependent and interrelated", is now the official United Nations view of human rights. Powerful cultural and intellectual arguments have been marshalled against this proposition. The very approach, which gives primacy to human rights, is being contested. Various government leaders in Africa and Asia claim that the traditions of their societies place, and have always placed, special importance on duties, as opposed to the Western preoccupation with rights. The same emphasis, it is said, is explicit in all the world's major religious and spiritual beliefs. Variations of this argument are espoused by communitarians in Western countries; they favour social

organization and engagement on the basis of responsibilities, not rights—to which some communitarians attribute many ills of contemporary society. The argument that rights promote individualism, selfishness and litigiousness, and undermine the cohesion of the community, brings these two groups together (as is evident in their partnership to promote the Universal Declaration of Human Responsibilities to counterbalance the Universal Declaration of Human Rights). Although these groups seriously misunderstand the nature and dynamics of rights, which are increasingly concerned with peace and justice, and underrate the extent to which the regime of rights incorporates notions of responsibility and the collective good (ICHRP, 1999), their opposition to human rights can undermine the goals reflected by human rights.

Cultural relativist challenge to human rights: "Asian values"

Closely connected to this approach is an even more formidable objection to the idea of universal human rights—the objection of cultural relativism. The essence of this argument is that human rights are based on culture and, since cultural values vary, there cannot be any universal human rights. A version of this approach that has received a great deal of public attention is what has been called "Asian values". The strongest proponents of this approach are a few leaders in Southeast Asia, who argue that the values of Asian, particularly Confucian, culture have provided political stability and economic development, and that these values are oriented to the community. They claim that Asian values emphasize harmony, unlike the confrontation that arises from the exercise of rights. These leaders were able to persuade Asian governments—assembled in Bangkok in April 1993 prior to the World Conference on Human Rights in Vienna—to endorse a declaration that is often taken to represent the Asian view of rights, although it did not support all doctrines connected with Asian values.

Once one gets past the ritualistic homage to human rights, there are four major purposes of the 1993 declaration made in Bangkok[1] encompassed by the overarching objective of placing the question of rights within an international relations framework:

- *To emphasize the rights of states.* It reaffirms "the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states" and the importance of the right to development, which the proponents of Asian values see as premised on the sovereignty of states.
- *To condemn practices associated with the West and the imbalance in the world system.* The references to colonialism and apartheid (in an age when there are few formal colonies) are clearly directed at the West. Asian states such as China, Indonesia or Myanmar (formerly Burma), with colonies or other forms of foreign occupation, are fully absolved of any wrongdoing. The 1993 declaration deplores "Any attempt to use human rights as a conditionality for extending development assistance" (para. 4) or as "an instrument of political pressure" (para. 5). The West is also targeted indirectly for creating an unjust international economic order and, presumably, poverty, which are the primary causes of the violation of rights (preamble and paras. 18 and 19).
- *To establish that the state is the appropriate framework for the definition and enforcement of rights.* The clearest statement appears in paragraph 9, which recognizes that "states have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms", and that

[1] The Bangkok Declaration is available at www.rwgmechanism.com/asia.html. It is also given as appendix 1 in James T.H. Tang, **Human Rights and International Relations in the Asia-Pacific Region**, Pinter, London, 1994.

"remedies must be sought and provided primarily through such mechanisms and procedures".

- *To establish a framework for the analysis of rights themselves.* On one hand, it suggests that, all the talk of universality and indivisibility notwithstanding, rights are to be understood in the context of national or regional particularities and various historical, cultural and religious backgrounds, and condemns the "imposition of incompatible standards". On the other hand, it draws attention to the contribution Asian states can make to the World Conference "with their diverse and rich cultures and traditions" (para. 8). Second (ignoring the logic of the previous point), it hints at the priority of economic development for the enjoyment of rights, and states that "economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights" (preamble).

There is little evidence that Asian economic success (such as it is) is due to family or community structures or to any other aspect of Asian values. Instead it is the resources and structures of the state (and their misappropriation) that have played a decisive role in private accumulation and production. Those of us who live in the more economically successful parts of Asia are not struck by the cohesion of the community, or by the care that the community or family provides, or by benevolent governments, or by a public disdain for democracy. Instead we notice the displacement of the community by the pretensions and practices of the state. Far from promoting reconciliation and consensus, the state punishes its critics, suppresses the freedom of expression—without which dialogue is not possible—and relies on armed forces rather than persuasion (and some leaders are rather "un-Confucianistly" litigious!). The doctrine of Asian values thrives on the perception of those who are perched on the higher reaches of the state and the market.

The 1993 NGO Declaration on Human Rights may be contrasted with a statement issued at the same time by Asian NGOs in Bangkok, which was subsequently elaborated in the Asian Human Rights Charter.[2] First, the NGOs emphasize the international provenance of rights and contend that, since rights are universal in concern and value, they override national sovereignty. They state: "We are entitled to join hands in solidarity to protect human rights worldwide. … International solidarity transcends the national order, to refute claims of State sovereignty and non-interference in the internal affairs of State" (APHR-FT, 1993:Challenges, No. 4). Second, the NGOs believe in the universality and indivisibility of rights. This conclusion is drawn partly from their views on the purpose of rights—the promotion of human and humane development and peace. Development should be informed by rights and democracy so as to ensure "a harmonious relationship between humanity and the natural environment" (APHR-FT, 1993:Challenges, No. 5). NGOs strongly support democratization at national and international levels, and favour a broad meaning of self-determination in the national context. For this and other reasons, they deplore the "increasing militarization through the region", which is incompatible with peace and human rights. Like the states, the NGOs see a relationship between rights and culture, but they see cultures enriching our experiences and understanding of rights, producing a cosmopolitan and hence truly universal view of rights, rather than retreating behind the barricades of relativism.

[2] **Our Common Humanity: Asian Human Rights Charter—A Peoples' Charter**, was adopted in 1998 by the Asian Human Rights Commission. The document is available at www.ahrchk.net/charter/final_content.html.

They see the empowerment of people as a function of rights, particularly the vulnerable groups, including indigenous peoples, whose right to self-determination has been systematically denied; women; children, whose welfare should be "a paramount concern of every state, regardless of considerations of state capacity and security" (APHR-FT, 1993:Challenges, No. 13); internally displaced people and refugees, whose rights are violated "as a direct result of militarization and armed conflict" (APHR-FT, 1993:Challenges, No. 15); and peasants and workers, who all too often "endure the worst cases of human rights abuses in the region" (APHR-FT, 1993:Challenges, No. 14).

The "fundamentalist" challenge

Religion occupies an ambiguous position in relation to human rights. Some people claim that it constitutes the foundation of rights and that without the religious notion of the sacredness of the individual, there cannot be a concept of inalienable human rights (Stackhouse, 1998). Others, preferring a secular and humanistic justification for rights, attribute the violation of rights to religious beliefs—and indeed there is much historical evidence that religions have acquiesced to or justified slavery, massacres, intolerance and other forms of oppression (Henkin, 1998). In contemporary times, a fundamental challenge to human rights comes from fundamentalists of all kinds, who deny the equality of all human beings and support many practices that violate principles, norms and procedures of human rights. This is most obvious in the case of Muslim "fundamentalists", who have based the organization and laws of their states on "Islamic" principles. A number of Muslim states, which have ratified international human rights conventions, have entered blanket reservations that subordinate these conventions to religious teachings. However, a number of Islamic scholars (particularly Abdullahi An-Na'im) and Islamic organizations (such as the Sisters in Islam) have used religious texts for interpretations that make Islam compatible with human rights, and have employed that compatibility to mobilize support for human rights. But it is at the ideological level that religions have posed the major challenge to human rights. Like cultural relativism, religion juxtaposes an alternative normative framework for the organization of society and authority.

Cultural and religious relativism rules out both common action and the criticism of the mores and practices of a society by reference to standards external to the society; and hence the project of universal rights. This approach has a static and unjustified view of culture and ignores the commonality between and the interaction of cultures. It misunderstands the purpose of contemporary human rights, which it conceives of as the ideology underpinning privilege and hierarchy instead of promoting change. But it does respond to a sense on the part of many people in poorer regions of the world of an economic and intellectual hegemony of stronger states, and of their own marginalization. It is essential to engage with rather than dismiss cultural and religious relativism if human rights are to provide a common framework of interaction and policy, even though many more people in poorer countries are attracted to the egalitarian and redistributive dimensions of human rights, on which the Copenhagen Declaration builds its programme of action.

Identity politics

The United Nations version of human rights as universal and indivisible has come under attack from what has been called "identity politics". Identity politics are an attack on what is assumed to be the mores of the dominant group in society, masquerading as the universal. The attack has come from ethnic as well as social minorities, such as women and homosexuals. Women point to many aspects of the regime of rights that merely reflect patriarchy and the interests of men, and homosexuals argue that many of the "values" of society are grounded in a particular view of sexuality that ignores their own orientation. The recognition of differences of this kind is not necessarily a challenge to the orthodox view of human rights, and indeed the rights of women and homosexuals can be, and in many jurisdictions have been, accommodated within that view. However, there is one version of the recognition of difference that does not sit so comfortably with that orthodox view, and it has to some extent inspired international conventions on the rights of indigenous peoples (see below). It has also gained some currency in Canada and is particularly associated with the writings of Kymlicka (1989) and Taylor (1994).

Their arguments start from the premise of the autonomy and authenticity of the individual under liberal theory. Liberalism regards the individual as the centre of society. There are two aspects of individualism that seem to deny special measures for minorities. The first is the equality of all individuals, or at least of all citizens, who must be equal bearers of rights and obligations under the law or, at least in the public sphere, must meet as equals. The second aspect is that, in order for the individual to find his or her authenticity and exercise his or her autonomy, the public sphere should be "neutral" in terms of values, culture and religion. Kymlicka and Taylor challenge the conclusion that is drawn from the liberal premise of the centrality of the individual. They argue that individuals do not develop their values or identity in isolation from others, but in association with them. Taylor contrasts the ideal of equality with the politics of difference, based on the modern notion of identity:

> With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognise is the unique identity of this or that individual or group, their distinctiveness from every one else. The idea is that it is precisely this distinctiveness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of identity (Taylor, 1994:38).

Kymlicka considers that culture is absolutely essential to the feeling of belonging and participation, and that is the most important of all bearings that a person needs to negotiate his or her way through life. He says, "Cultural membership affects our very sense of personal identity and capacity" (Kymlicka, 1989:175). The authenticity of one's culture cannot be replaced by other cultures, even if one is given the opportunity to learn its language and medium.

The broader position taken by Kymlicka has been influential and controversial. He regards culture as the most important defining feature of a community; he assumes a consensus within the community on the values of the community; he regards culture as unchanging; and he seems to believe in conflicts between cultures. In all these assumptions he is wrong. There are serious implications of recognizing the isolation of communities and entrenching their cultures

in this way. What justifies discrimination against other cultures that are implicit in this approach? How do we define culture? Can we say that the cultures of Hindus and Muslims are different and antagonistic, when so many customs, habits and much of history unite them, and give them a common identity? Nor does Kymlicka's model acknowledge multiple identities that are so characteristic of the contemporary period. It would seem better to build on this overlapping of identities and values than to foster separation and antagonism, which are the inevitable result of Kymlicka's approach (except when a community is truly vulnerable to external forces, and has a particularly distinctive culture, as with indigenous and hill peoples).

Indivisible and interdependent?

Nor can it be said that rights are indivisible and interdependent, except as a rhetorical device. As the scope of rights and freedoms has expanded, the tensions and even contradictions between different sets of rights—or at least the tensions surrounding the achievement thereof—have become obvious. These tensions do not arise only between civil and political rights, on one hand, and economic, social and cultural rights, such as between the right to private property and the right to education or shelter, on the other. They also arise within each set of rights, for example the tension between the freedom of expression and the protection against hate speech or incitement to war. Nor must we ignore the varying interests, national and corporate, that are served by different rights. There is no agreement among scholars on the effect of civil and political rights on economic development, or vice versa. This has cast doubt on the interdependence of the two sets of rights. A simplistic or high-minded approach that ignores these tensions and contradictions is unlikely to produce an effective policy on human rights that has the capacity to reconcile the various goals of social development.

Search for consensus

Such agreement as there is has been secured through a variety of compromises. Sometimes it is done by putting together seemingly incompatible claims and propositions. A version of this strategy appears in the Declaration where the commitment to human rights is bracketed with "full respect for the various religious and ethical values and cultural backgrounds of people" (para. 25). Another strategy is to pair the traditional bundle of rights with the right to development. This strategy was endorsed at the 1993 World Conference on Human Rights, where the West withdrew its objections to the "right to development" in return for the acceptance by Asian states of the hallowed formula of "universal, indivisible, and interdependent". At an earlier stage, the right to self-determination played a similar role in the rapprochement of liberal rights and decolonization. It now plays a somewhat different role, as the foundation for democracy. The right to development, which can also be central to the Copenhagen aspirations, is still problematic, conceptually and practically. Attempts to reconcile different approaches and interests have been made by scholars, who emphasize the common values of different cultures and religions, and attempt a synthesis where values differ (An-Na'im, 1992; Santos, 1995; Taylor, 1999). It is clear that, despite the formulations in the Declaration and these efforts, there is no effective consensus on human rights and democracy that can be counted on to underpin the strategy of the Declaration.

IV. Democracy

The right to democracy: The legal foundations

One of the great achievements of the United Nations in the field of human rights was to bring colonial empires to an end. The primary foundation for its work was the principle of self-determination. Both the Covenants contain the right of all peoples to self-determination by "virtue of which ... they freely determine their political status and freely pursue their economic, social and cultural development". Despite this broad promise, self-determination did not lead to democracy; it protected against foreign, but not domestic, tyranny. Once colonial rule ended, state sovereignty trumped democracy. However, in recent years self-determination has been revived as a principle for the internal organization of a state based on the right of a people to choose their form of government and to elect and participate in it. Self-determination has been linked to article 25 of the ICCPR. This article guarantees all citizens, without discrimination, three kinds of rights that are important for the Copenhagen agenda: (i) "the right and the opportunity" to "take part in the conduct of public affairs, directly or through freely chosen representatives"; (ii) "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 electors"; and (iii) "to have access, on general terms of equality, to public service in [their] country". The basis of this right was stated more forthrightly in the Universal Declaration of Human Rights: "the will of the people shall be the basis of the authority of governments" (art. 21(3)). The ICCPR also contains a number of rights that are essential to democratic politics, such as freedom of expression (art. 19), the right of assembly (art. 21), the right of association (art. 22), freedom of belief and conscience (art. 18), and the protection of the rule of law (arts. 9, 14, 15 and 16).

Article 25 was not always considered the basis of democracy (Steiner, 1988). The word democracy itself is not used. There is no reference to pluralism, which is deemed to be an essential attribute of democracy (as it emerges from the decisions of the European Court of Human Rights and conventions and declarations of the OSCE). It has been argued that elections under single party systems could satisfy the requirements of the article. In any case, even free elections should not be equated with democracy, which also includes notions of continuing accountability, the rule of law and respect for human rights, especially those of minorities. However, with the collapse of the Soviet Union it has been possible to read a broader meaning into the article. But it needs to be emphasized that, while today's interpretation favours the broader view (Franck, 1992), it does not justify intervention by the international community to enforce democracy on a recalcitrant state (van Boven, 1992:134–136). Regional and bilateral sanctions can be imposed if a state's conduct in denying democracy is strongly disapproved of (for example, the reason given by the United States for trade sanctions against Cuba, the Council of Europe's suspension of Greek membership when under the colonels, and the suspension of aid by individual European countries to Kenya and other African states). In combination with regional declarations, it has also been used to require a degree of democratization as a precondition of the membership of an organization (it is well known that membership in the European Union (EU) was an incentive to democratization in Spain and Eastern Europe). One may compare this approach with that in Asia, where ASEAN clearly

repudiated democracy as a criterion of membership when it welcomed Myanmar and Viet Nam to its ranks.

Rights of minorities to political participation

The orientation toward democracy has been reinforced by the favourable development of the rights of minorities—from the low point of the ICCPR, which only grudgingly recognized the (possible) existence of linguistic, religious and cultural minorities and imposed no positive obligations on the state toward them (art. 27). When the United Nations began work on an international regime of rights, it emphasized individual rights and carefully avoided giving rights, particularly political rights, to groups. There are trends now, however, toward a greater recognition of cultural and ethnic bases of autonomy. Article 27 of the ICCPR, until recently the principal United Nations provision on minorities, was drafted to exclude collective rights and was narrowly interpreted. However, in recent years the United Nations Human Rights Committee (which supervises the implementation of the ICCPR) has interpreted the article in a more positive way, using it to develop "collective rights of minorities", including a measure of autonomy, and some positive obligations on the states (Akerman, 1997). In a series of decisions, the Committee has interpreted the article as a basis for collective rights (*Kitok v Sweden* (1988) 96 ILR 637: No. 197/1985), as a basis for the preservation of the culture and way of life of a minority group (*Omanyak and Lubicon Lake Band v Canada* (1990) 96 ILR: No. 67/1984), and as a basis for protecting and developing traditional ways of life (*Linsman v Finland* (1995) 115 ILR 300: No. 671/1995). Efforts have also been made by that Committee and others to interpret the right to self-determination to mean, where relevant, internal autonomy rather than secession. This broader approach is reflected in the United Nations Declaration on the Rights of Minorities adopted by the General Assembly in 1992. Unlike the ICCPR, it places positive obligations on the state to protect the identity of minorities and encourage "conditions for the promotion of that identity" (art. 1). The Declaration states that "persons belonging to minorities have the right to participate effectively … in public life" and the "right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live" (art. 2). It does not go so far as to require autonomy for minorities, but it lays the foundation for it by recognizing community rights and the importance of identity.

Several initiatives have been taken in Europe, through the OSCE, the Council of Europe and the EU to promote the concept of autonomy and the right of minorities to political participation, although its impact is so far restricted to Europe. This is manifested both in formal declarations and, where appropriate, interventions to solve ethnic conflicts in Europe (such as in the Dayton Accord on Bosnia and Herzegovina or the Rambouillet proposals for Kosovo). Article 35 of the Declaration on the Human Dimension of the CSCE recognizes "appropriate local or autonomous administrations" … "as one of the possible means" for the promotion of the "ethnic, cultural, linguistic and religious identity of certain minorities" (1990). The principal instrument of the Council of Europe is the Framework Convention for the Protection of National Minorities (1994), which protects various rights of minorities, obliges the state to facilitate the enjoyment of these rights, and recognizes many rights of "identity". It obliges state parties to "create the conditions necessary for the effective participation of persons belonging to national minorities in

cultural, social and economic life and in public affairs, in particular those affecting them" (art. 15). There is no proclamation of a right to autonomy, but the exercise of some of these rights implies a measure of autonomy. The Declaration and statements of principle by the Council of Europe, although not strictly binding, have been used by the OSCE High Commissioner for Minorities and other mediating bodies as a basis for compromise between contending forces, and have thus influenced practice, in which autonomy has been a key factor (particularly in the Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1999, issued by the OSCE High Commissioner).

The European Community (EC), now EU, has also used conformity with the Declaration as a precondition for the recognition of new states in Europe. The ability of existing states (which is relatively unregulated by international law) to confer recognition on entities, especially break-away states, can be a powerful weapon to influence their constitutional structure. When various republics were breaking away from the Federal Republic of Yugoslavia and the Soviet Union split up, the EC issued a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991), although it was not applied in all cases. Among the conditions a candidate had to satisfy before it would be recognized was that its constitution contain "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE". Entities requesting recognition were asked to submit evidence that their constitutions conformed to the guidelines and recognition was granted only if the evidence satisfied an EC constitutional tribunal set up for this. Similar principles have been used for admission to the Council of Europe and the EU.

The greater involvement of the United Nations or consortia of states in the settlement of internal conflicts has also helped to develop the concept of self-determination as implying autonomy in appropriate circumstances, such as in Bosnia, Eastern Europe and Kosovo. However, the birth of new states, following the collapse of the communist order in the Soviet Union, Eastern Europe and the Balkans, has removed some taboo against secession, and the international community seems to be inching toward some consensus that extreme oppression of a group may justify secession. This position has served to strengthen the internal aspect of self-determination, for a state can defeat the claim of separation if it can demonstrate that it respects political and cultural rights of minorities. A further, and far-reaching, gloss has been placed on this doctrine by the Canadian Supreme Court, which decided in 1999 that Quebec had no right under either the Canadian Constitution or international law to unilateral secession, but that if Quebec were to decide on secession through a referendum, Ottawa and provinces would have to negotiate with Quebec on future constitutional arrangements (*Reference re Secession of Quebec* (1998) 2 SCR 21).

Such a view of self-determination has some support in certain national constitutions, indicating no more than a trend at this stage. Often constitutional provisions for autonomy are adopted during periods of social and political transformation, when an autocratic regime is overthrown (when there is considerable legitimacy for autonomy), or a crisis is reached in minority-majority

conflicts, or there is intense international pressure (in which case legitimacy is granted rather grudgingly). Propelled by these factors, a number of constitutions now recognize some entitlement to self-government, such as the Philippines in relation to two provinces, one for indigenous peoples and the other for a religious minority; Spain, which guarantees autonomy to three regions and invites others to negotiate with the centre for autonomy; Papua New Guinea, which authorizes provinces to negotiate with the central government for substantial devolution of power; Fiji, which recognizes the right of indigenous peoples to their own administration at the local level; and recently Ethiopia, which gives its "nations, nationalities, and peoples" the right to seek wide-ranging powers as states within a federation and guarantees them even the right to secession. In the wake of the break up of the Soviet Union, the Russian Constitution of 1993 provides for extensive autonomy to its constituent parts, whether republics or autonomous areas. The Chinese Constitution entrenches the rights of ethnic minorities to substantial self-government, although in practice the dominance of the Communist Party negates their autonomy. In other instances, the constitution may authorize, but not require, the establishment of autonomous areas, with China again an interesting example (art. 31), in order to provide a constitutional basis for "One Country Two Systems" (for the reunification of Hong Kong, Macau and Taiwan Province of China).

Indigenous peoples

The International Labour Organization (ILO) Indigenous and Tribal Peoples Convention (ILO No. 169), adopted in 1989, represented a reversal of paternalistic and assimilationist approach followed in the 1957 Indigenous and Tribal Populations Convention (ILO No. 107). Convention No. 169 recognizes the "aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live". It notes that their cultural and religious values, institutions and forms of traditional social control are to be preserved (art. 4). The system of land ownership and the rules for the transmission of land rights are to be protected (arts. 14 and 17). The Draft United Nations Declaration on the Rights of Indigenous Peoples (submitted by the United Nations Sub-Commission on Minorities, in August 1994) goes even further and proclaims their right to self-determination, under which they may "freely determine their political status and freely pursue their economic, social and cultural development" (art. 3). The principle of self-determination gives them the "right to autonomy or self-government in matters relating to their internal and local affairs", which include social, cultural and economic activities, and the right to control the entry of non-members (art. 31). It recognizes their "collective rights" (art. 7) and the right to maintain and strengthen their distinct political, economic, social and cultural characteristics (art. 4). These ideas have already formed the basis of negotiations between indigenous peoples and the states in which they live, giving recognition not only to their land rights (as in Australia and New Zealand), but also to forms of autonomy (as in Canada), although African and Asian governments deny the existence of indigenous peoples in their states and the instruments have had little impact there. Indigenous peoples, particularly in North America, also base their claims on other legal bases: (i) their "inherent sovereignty", which predates colonization and (ii) treaties with incoming powers (for what has been called "treaty federalism").

The United Nations and the international community have shown a concern for the fate of vulnerable communities that was not envisaged in the United Nations Charter. Then the preoccupation was with decolonization, as reflected in the establishment of the Trusteeship Council. Once a major UN department, its role has diminished. It has been suggested that the change in the emphasis of the United Nations should be registered by transforming the Trusteeship Council into a Council on Diversity, Representation and Governance, with major responsibility for minorities and indigenous peoples (see Marks, 1999:313–314).

Democratization: The record

There is no doubt that more countries enjoy democracy now than, say, a decade ago (although there is no perceptible progress since the Social Summit, and in many cases there is backsliding, as in Pakistan). A number of Eastern and Northern European countries turned to constitutional democracy after the collapse of communism, with considerable assistance from Western Europe and the United States. South Africa achieved a miraculous transition to democracy and a regime of rights; Mozambique put both civil war and authoritarianism behind it; and the largest African state, Nigeria, saw the end of a particularly obnoxious military regime. Northern Ireland is having an uncertain transition to peace, stability and power sharing. Even the United Kingdom, with a long and cherished tradition of parliamentary supremacy, has devolved significant power to Scotland and Wales, and has adopted a Bill of Rights. Fiji overcame a military regime and its racist successor to achieve a constitution strong on political stability, power sharing, rights and social justice.[3] But in general the picture is less rosy in Africa, Asia and Latin America and, even when there are elections, there is no particular commitment to pluralism, rights, transparency or accountability. Governments are headed by powerful presidents with few limitations on their power. Constitutional limits on the number of terms that a person may be head of government are ignored or repealed (for example, in Namibia and Peru). Restrictions continue on rights, often spuriously in the name of national security or public order. What is particularly depressing is that China, the only permanent member of the Security Council from Asia, Africa and Latin America, has neither democracy nor respect for rights—and is a vigorous defender of its authoritarianism. Another member of the Security Council, Russia, has wreaked terrible suffering on the Chechens, committing gross violations of fundamental rights with impunity.

There has been great progress in civil and political rights at the level of constitutions and laws—no modern constitution is without an elaborate bill of rights, there are increasing numbers of institutions for the promotion and protection of rights; judicial bodies have developed new doctrines and jurisprudence to strengthen rights; and there are many more meetings on rights, regionally and internationally. But experience also shows that democracy, in the narrow sense of elections and the operation of parliamentary institutions, does not ensure respect for human rights. It also often coexists with corruption, the lack of accountability and the persecution of minorities.

[3] Despite the 2000 coup, I still take the view that the 1997 Constitution of Fiji, while not perfect, was a very good basis for social justice and ethnic harmony, and its acceptance a triumph of common sense. In the ultimate analysis, of course, what matters is those who have to operate the Constitution. As I write this, counting is just finishing in an election that unfortunately suggests a country polarized between the two main communities, and politicians unwilling to operate the Constitution in the spirit in which it was drafted and accepted.

In the area of ethnic difference—traditionally the source of great conflict, instability and oppression—there has been some progress. As discussed above, concepts and rules have emerged or are emerging that recognize group identity and confer collective and political rights on minorities. Several ethnic and other civil wars have been brought to an end through negotiated settlements, although many continue and cause great suffering to numerous peoples. Indeed it must be acknowledged that ethnic conflict, or what passes for ethnic conflict, is still the greatest cause of the violation of rights, political instability and oppression.

External assistance for democracy and rights

It is not my purpose to draw a balance sheet of democratization. The Copenhagen Declaration on Social Development is directed importantly to international assistance and co-operation toward its goals, and I want to focus on these efforts for democratization. The end of the Cold War, which to an extent freed major powers from the "need" to buttress their client states and to destabilize "unfriendly" states, encouraged the West to invoke the international democracy norms outlined above to mount a democratization campaign. The propping up of dictators became an embarrassment to them, and the people they had oppressed for so long felt emboldened to demand democracy and accountability. It would be wrong, however, to assume that the foreign policy interests of major powers took second place to democracy and human rights; even today foreign interests dominate their policies. Assistance has also come from private foundations and international (Western) NGOs, as well as from associations of states, such as the EU, and lately from the United Nations and other international organizations. Only a handful of states are involved in these efforts—the most active being Denmark, the Netherlands, Sweden, the United Kingdom and the United States.

External involvement has taken several forms—ranging from pressure and sanctions ("conditionalities") on, or incentives to, recalcitrant dictators; encouragement and support to democratic forces, particularly NGOs; to technical assistance and equipment. To a large extent, the forms of assistance have reflected the West's experience with democracy. The development or invigoration of civil society has been a major aim, to raise public awareness of rights and entitlements, to raise a sense of responsibility, and to strengthen the capacity of civil society to put pressure on governments to adhere to public morality. Typical forms of assistance to civil society are the establishment or granting of support to NGOs, particularly women's groups; the provision of assistance to professional groups, such as the legal profession and human rights organizations (including those that promote access to the legal system); the strengthening of the media as a vehicle for public debate; and the promotion of freedom of expression and scrutiny of government. A key role is envisaged for NGOs in the strategy of establishing or mobilizing civil society.

When a government decides to democratize, it is offered assistance (in the form of funds, equipment and expertise) to frame a national constitution—consistent with a state's prerogative to devise its own constitution (although complaints have been made of overenthusiastic consultants, especially those from the United States operating in Eastern Europe). These states have been encouraged to follow a participatory form of constitution making. Most new constitutions contain guarantees of human rights (including for minorities), provide for independent insti-

tutions (including the judiciary, ombudsmen, auditor-general and electoral commissions), and many other features of constitutionalism. Several constitutions provide for the diffusion of power, in the form of devolution or decentralization.

International assistance has focused particularly on the holding of elections, less so on the electoral system itself (a substantial part of the very considerable sums that the United Nations spent on the transition in Cambodia was devoted to holding national elections). Many official and private groups, local as well as international, are recruited or offer to act as election monitors to ensure the fairness of the process. For a while, democratization was equated to holding elections. It is now being recognized that, while free and periodic elections are a necessary ingredient of democracy, they are far from being sufficient. So assistance has been provided for the strengthening of institutions, particularly those of accountability, including the legislature. Bilateral and multilateral assistance has been forthcoming for human rights commissions and similar bodies. Major programmes have been undertaken with the help of foreign aid to modernize and strengthen the legal system. This assistance has taken the form of rebuilding courts, especially in states where they were destroyed in civil war; computerizing court facilities; training judges and legal practitioners; promoting the professional association of lawyers; upgrading legal libraries; making legislation and law reports easily available; legal aid; and reform of law and procedure. This approach is motivated by the belief that the rule of law is central to the exercise of democracy, control of corruption and other abuses of power, and the protection of rights.

Fragmented assistance for human rights and democracy

The current system of assisting democratization and the protection of rights is fragmented. A considerable number of programmes have been undertaken by the Organisation for Economic Co-operation and Development (OECD) countries, principally on a bilateral basis; there is some co-ordination through the EU mechanisms. The efforts of international bodies are even more uncoordinated and lacking in direction. The principal economic institutions, the International Monetary Fund (IMF) and the World Bank, have until recently claimed to be non-political and thus desisted from aiding progressive political initiatives—while at the same time supporting other kinds of capitalist-oriented, political policies. Their recent concern with good governance is connected less with democratic reform than with providing legal and economic conditions for opening markets to foreign capital. United Nations Secretary-General Kofi Annan has taken some lead in centring UN work on human rights. The OHCHR has provided some co-ordination, with the present High Commissioner attempting to play a leading role in the promotion of rights. Of the UN agencies, the United Nations Development Programme (UNDP) has made the clearest commitment to "mainstreaming" human rights in its programmes. The more specialized agencies have reviewed their policies to reflect greater engagement with human rights, but the results so far are unimpressive.

Assessment of external assistance to democratization

It is too early to pronounce a verdict on external assistance to democratization since these efforts are beginning to be evaluated to determine what methods and institutions work, but some tentative conclusions can be stated. Perhaps the most important point is that external

assistance can play only a facilitative role. It can use aid conditionalities to put pressure on the national government, but unless there is overwhelming local demand for democracy backed by effective institutions and popular mobilization, these external pressures are unlikely to yield lasting progress. Rights and democracy have to be struggled for. One reason that South Africa is off to such promising start is that the struggle for democracy was the people's struggle, and the politicization of civil society enables the electorate to put pressure on the government to honour the commitment to democracy and fairness. Foreign governments and international organizations cannot really play a significant role in persuading reluctant presidents to democratize—that task has to be left to the people.

Within the scope of assistance that foreign donors can provide, the record is mixed. NGOs, which are the primary engine for change in the face of official resistance, have generally failed, or often have not tried, to mobilize the people. They are essentially lobbying groups, without a mass base of their own, and are excessively dependent on external donors for funding. Thus strategies and projects that appeal to external donors are taken up by the NGOs, often without critical evaluation of their usefulness or effectiveness in the national context. They are accountable to foreign donors as part of their contractual relationship with them and therefore lay themselves open to the charge of being instruments of foreign governments. It has become fashionable to criticize NGOs for the self-interest of their staff, but there is no doubt that NGOs have made valuable contributions and attracted competent and dedicated people, and there is clearly a role for them as human rights watchdogs. However, it does mean that the mobilization functions tend to be ignored. Nor do foreign governments keep faith with NGOs. They are more interested in working with governments, and if they have a chance to do so, tend to shift funds away from NGOs. Indeed an astute government can greatly weaken support for NGOs, and the NGOs themselves, by seeming to espouse human rights and democracy.

The limitations of elections for democratization have already been commented on. The broadening of aid to overcome the limitations of elections has had an impact, but not enough to significantly deepen democracy. The media, even where responsible and professional, have not always had the expected results. One example is the press in Kenya, which has been very critical of the president, alleging the most serious corruption and violations of rights, but it does not seem to have embarrassed him or eroded his support among those who have traditionally voted for him—basically his ethnic vote. The same can be said about the press in Cambodia.

Reform of the legal system has also had mixed results. The process may have increased the professionalism of the system, but not access to courts and lawyers. Traditional systems of dispute resolution have been downgraded and, while these are not without their own problems, they did provide easy access to the system, the system was understood by the people, and for the most part accepted by them. Professionalization increases the costs of the system of justice; affects different groups' access unequally, particularly favouring corporations that are able to hire the best lawyers; increases the time lag between the filing and hearing of cases; and makes the system alien and intimidating to most people. Legal reform has tended to focus on changes that favour the market mechanism and the integration of the national economy into the global

(such as individualization of property, expansion of the scope of intellectual property rights and the "rationalization" of law relating to economic transaction), which frequently affects poorer sections of the population adversely.

The context of efforts to promote democratization determines their orientation. The collapse of communism was welcomed as a triumph of liberal democracy. But many more saw it as the triumph of the market. It is not easy to distinguish support for democracy from support for markets in the efforts of individual or collective Western states to promote rights and democracy abroad. Indeed, it can be said that the support for markets is stronger; the rationale for that support is more powerfully presented than for democracy. The IMF and the World Bank have hijacked democracy and rights through the advocacy of the narrower concept of "governance", which is at the bottom of the charter of political and legal institutions for capitalism. In this way, political rights of participation and accountability are not only subordinated to the market, but are actually undermined.

Another weakness of the external support for democratization has been inadequate attention to reinforcing strengthening of economic and social rights. Democracy is often justified by the benefits it brings to the people, through political stability and economic development. Unless people see economic advantages for themselves, their enthusiasm for democracy is likely to wane; economic betterment is what confers legitimacy on a democratic order. External assistance is, of course, provided for health, water, agricultural development and so on, but it is not clearly tied to individual or group entitlements, and is often not enough to improve the lives of most people. Experience has shown that with democratization there is no automatic change for the better in the economy.

Donor-recipient relationships are always difficult, but they are particularly sensitive in the context of assistance for democracy and human rights. They involve an element of pressure, if not direct coercion, at least the coercion that comes from the recipient's knowledge that other forms of assistance by the donor may be at stake if overtures on democratization are not accepted. In some cases, of course, human rights conditionalities have been imposed by the donors. The evidence suggests that donors who provide assistance across a range of areas are more effective in influencing the recipient's human rights and democracy policies than those who tend to focus principally on rights and democracy. Assistance in this area touches on many points that are closely connected to a state's "sovereignty", the election and operation of government, the workings of the legislature, judicial reforms and modernization of the legal system. It also involves the donor's engagement with and assistance to, and sometimes management of, civil society. Moreover, it is all too easy for the recipient to dismiss rights and democracy as "foreign" ideas, and to feel or feign particular irritation at the disregard of its own cultural, historical and political traditions. This active and extensive engagement of donors in the politics of the recipient state is likely to cause great tensions, and therefore the extent and modalities of external engagement need to be handled with great care and delicacy, but also firmness when appropriate.

What makes for success or failure?

In summary, external assistance can play a useful, but supplementary, role in promoting democracy and respect for rights. It can strengthen the status and resources of civil organizations and state bodies committed to democratization and rights. But the role that external assistance can play is limited and contingent on a firm commitment of the people or government, or both, to democracy and rights. In the end, the establishment and deepening of democracy depends on the people and government of a state; it has to be endogenously driven to be sure of lasting success.

Case studies

But what determines the success of indigenous efforts? There is no easy answer to this question, although a few national experiences provide clues. For examples of the protection of rights, I compare South Africa (a success story) with Cambodia and Kenya (not success stories). For democracy, I examine the experience of Papua New Guinea and, for the resolution of ethnic conflict, I compare Fiji with Sri Lanka.

Promoting rights: South Africa

In the relatively short period since the demise of apartheid, South Africa has established a reputation for being a constitutional democracy in which rights are respected and protected. Its Constitution contains an extensive Bill of Rights and a number of institutions whose primary role is the promotion and protection of rights. By all accounts, the Bill of Rights and the institutions function, unlike the experience of so many countries where they exist merely on paper.

A number of factors may account for the South African success. Foremost is the long struggle against imperialism, apartheid and social injustice—central to which was the protection of rights. This struggle, during which many people lost their lives, engaged a large number of people and organizations. The leading political group, the African National Congress (ANC), a non-racial organization from its beginning, made a commitment to the protection of human rights in the 1950s. Unlike other parts of Africa, the struggle in South Africa was primarily for human rights and social justice, not merely against foreign rule. It has enhanced public consciousness of and commitment to rights—especially those of equality and being treated with dignity—and led to the growth of a trade union movement that saw in racial discrimination the roots of oppression. A number of human rights and other NGOs participated in the struggle and the result was a strong civil society with the capacity to demand accountability and the protection of rights.

Important members of the ANC leadership were familiar with international norms of human rights and democracy; many of them were lawyers who had tried to use the apartheid legal system to advance the cause of rights. They were thus in a position to manage the transition to the new political order consistently with respect for rights.

Another important factor in the protection of human rights is the way in which the Bill of Rights was negotiated. The white South Africans in the Nationalist Party who organized apartheid did not have much respect for human rights, but saw the potential for the protection of minorities, particularly of their property, in a Bill of Rights. But it was clear that the ANC and

the Nationalist Party had quite different concepts and expectations of a Bill of Rights—the latter seeing it as maintaining the economic status quo and the former as an instrument for true equality and social justice, emphasizing economic and social rights. These different approaches meant that there were intense negotiations on the shape and scope of the Bill of Rights, which, through a balance between property and social rights, became a principal instrument for reconciling ethnic and political claims (including those of traditional leaders who wanted to entrench customary laws and African women who resisted them). Once agreement was reached, however, it represented a principled compromise between the two groups, who realized that they had to accept the Bill of Rights as a package.

The constitutional arrangements for the implementation and enforcement of the Bill of Rights have helped the realization of rights. The judicial approach is supplemented by other forms of access, such as the South African Human Rights Commission and the Gender Commission for Equality, which have a proactive role. The judicial system itself was strengthened by the establishment of a constitutional court, as a way to dilute the apartheid-appointed judiciary. Ironically, the regime of rights now benefits from the perverse legality of apartheid, under which laws and judiciary were instrumental, building a functional legal system. It also benefits from a number of civil society organizations, nurtured in the crucible of apartheid, which facilitate access to the legal system. The implementation of rights has also been facilitated from the participatory way in which the government has undertaken to fulfil constitutional mandates for social justice.

Although the circumstances in Cambodia and Kenya were distinct, certain similarities can be identified. In Kenya the nationalist struggle was not about rights, but about overthrowing foreign rulers. Hardly any nationalist leaders were familiar with the concept of rights. The Bill of Rights was inserted into the Constitution at the insistence of the colonial power and white settlers; there was very little discussion of its contents. The Bill of Rights was thus doubly resented, for being imposed and for being designed to protect previously privileged minorities. The new political leaders were only too happy to inherit the draconian powers of the colonial system; the only initiative they took was to repeal laws that discriminated against indigenous Kenyans. Kenya rapidly became a one-party state, and the political balances in the constitutional order, which facilitated the protection of rights, were removed.

Operating within a legal system with no effective restrictions on the power of the government, neither the judiciary nor the legal profession were familiar with the notion of a fundamental law or justiciable human rights. The colonial judiciary, most of which continued into the independence period, generally had a pro-government attitude, and used narrow and technical interpretations of the Bill of Rights to justify infringements of rights. Unlike the South African Bill of Rights, Kenya's is full of exceptions and derogations—the courts have relied more on these than on the rights. The legal profession had not been active in support of rights during the excesses of colonial rule and had little experience of using the judicial process for accountability. The one group that had both the incentive to enforce rights and the legal resources to do so, the Asian minority, found the legal process not entirely satisfactory, and adopted an alternative strategy—of corruption and bribery.

Nor did the ordinary public have much of an idea about human rights. If the motive for the struggle for independence had been the removal of foreign rulers, post-independence politics came to be based on ethnicity. And it is common experience that, when people become embroiled in ethnic politics, respect for human rights diminishes, for acts are judged less by their respect for human rights than by considerations of ethnic solidarity—not merely acquiescing in violations of the rights of other communities, but positively glorying in them (as the recent experiences in the Balkans also demonstrate).

The Paris Accords for Cambodia—the legal foundation for the massive international intervention in and assistance to Cambodia for democratization and economic rehabilitation—placed considerable emphasis on the protection of rights. This was inscribed in the Paris Accords as a precondition for the approval of the constitution to be adopted by the Constituent Assembly after the United Nations conducted general elections. Not only does the Constitution contain comprehensive guarantees of rights, but Cambodia has also ratified several international human rights conventions. Despite these formal guarantees of human rights, the situation is far from satisfactory. There are numerous violations of rights, often instigated by high officials, for which there is no effective redress. There was little understanding among government leaders in office during the long turbulent period before the Paris Accords, of the implications of rights for policy or administration. Human rights were imposed, and they were accepted without an awareness of their significance. It is said that after HM Norodom Sihanouk, King of Cambodia, had signed a raft of international treaties placed before him for ratification, he told UN officials that he would be happy to sign some more if they wanted him to do so! It is therefore not surprising that the fact of being in power still seems to provide the justification for any acts of the government.

Having been cowed by years of arbitrary and tyrannical rule, people are not comfortable with the notion of legal or political challenge to authority. The concept of rights is too abstract for them; this is not the form in which fairness has been ensured in their traditions. Despite the success with which human rights NGOs have grown since the Paris Accords, and the educational work they have undertaken, they are relatively ineffective in curbing violations. They lobby for human rights, but they are not mass organizations, and eschew politics, which is left to parties that were implicated in the old regime. Moreover, there are no effective institutions the NGOs can take their complaints to. The Cambodian Human Rights Commission is a parliamentary body and has few powers of intervention, while the legal system has not yet recovered from the ravages of earlier authoritarian rule. The judiciary is neither independent nor competent, unaware of many rules of due process. The legal profession was wiped out during years of genocidal rule; the newly trained lawyers are more interested in lucrative commercial practice than in defending human rights.

As with the Kenya experience, we learn from Cambodia that it is not enough to adopt constitutional guarantees of human rights, especially under external pressure. There is neither an understanding nor a sense of ownership of rights. They are not adjusted to local circumstances. The government has to be committed to rights. The people have to value and struggle for them. There have to be institutions to receive and investigate complaints of violations. There has to be

an effective, functioning legal system, with the judiciary and legal profession committed to the protection of rights.

Resolving ethnic conflict: Fiji

Fiji became independent in 1970, with a Constitution that included a Bill of Rights and parliamentary democracy that was adapted to its ethnically mixed population. There were separate electoral rolls and seats for the indigenous Fijians, Indo-Fijians and "others" (white and Chinese settlers, and people of mixed race). There was also a set of seats, racially designated, for which people of all races voted—this was a concession to non-racial voting, which was intended to expand and in time replace racial seats. But the government was formed by the majority party or a coalition, and in practice resulted in the one major community, the indigenous Fijians, remaining in power from independence until 1987. In that year a new party, the Fiji Labour Party, with a multiracial support base, won the elections in alliance with the leading Indo-Fijian Party. A senior army officer, General Rabuka, led a coup against the new government, relying on the army, which was almost entirely composed of indigenous Fijians. In 1990 the military promulgated a constitution that strongly entrenched indigenous Fijian political domination, discriminating against other communities. It also took away many rights that citizens had enjoyed previously and armed the executive with wide powers to disregard such rights as the constitution contained.

The result was a significant emigration of Indo-Fijians, including many professionals. The economy suffered greatly and relations between the two major communities deteriorated. Under internal and external pressures, the government agreed to a review of the constitution, and after protracted negotiations between the government and the opposition, the terms of reference for the review, emphasizing ethnic harmony and national unity, were agreed to in 1994. It was considered necessary to vest the responsibility for the review in a commission headed by a distinguished outsider (Sir Paul Reeves, a former Governor General of New Zealand) and consisting of one nominee each of the government and the opposition. The commission reported in 1996, recommending major changes to the 1990 constitution, in an attempt to move the country toward non-racial politics, and to provide for a secure protection of rights. After the report was debated nationally, it was considered by an all-parliamentary committee, in which a surprising consensus emerged on most, but not all, recommendations of the commission. It was agreed to move toward non-racial electorates, but on a more gradual basis than in the recommendations of the commission. One significant change was to agree, against the advice of the commission, on a system of power sharing, whereby any party with more than 10 per cent of legislative seats would be entitled to proportionate representation in the Cabinet. In May 1999, when the first elections were held under the new Constitution, the Fiji Labour Party emerged as the largest single party, and its leader, an Indo-Fijian, became prime minister.

The new constitution seems to have changed the basis of politics, though perhaps only temporarily. The 1999 elections were contested between coalitions of multi-ethnic parties. Ethnic tensions declined significantly and there was particular emphasis on human rights, instead of ethnicity. The government consisted of leaders of all major groups and its ability to

tackle difficult policies, closely connected with competing ethnic interests and claims, was better than that of any previous government.

What accounted for this success was that some key leaders of different communities had a change of heart, and resolved to move away from racial politics. The terms of reference (Fiji Constitution Review Commission, 1996:754–755) reflected this resolve, at a time when ethnic tensions were high. The decision to have a relatively independent commission make recommendations, provided the constitution makers with a set of carefully deliberated proposals, arrived at after a sympathetic consideration of the hopes and anxieties of all the communities. The process of making the Constitution was not entirely healing, but it engaged a number of civil society institutions (women's groups, churches, academic associations and other NGOs) in formulating their own proposals and lobbying for non-racial solutions. The constitution was carefully crafted to achieve specific results—the electoral laws to ensure that the leaders of each community had to broaden their electoral appeal beyond their own community; and power sharing that meant that each community would be represented in the government. These outcomes were facilitated by the refusal of each community to resort to violence, and instead to concentrate on peaceful negotiations, however frustrating they sometimes became. There is a profound respect among the people of Fiji for their own culture and the culture of other communities, so that there is no demonization of others. Religion threatened at one point to become a deeply divisive factor, but a change in the leadership of the largest Christian sect averted a crisis. Leaders also responded to gentle pressure from friendly foreign states to reconcile their differences and adopt a democratic constitution.

Nevertheless, despite this auspicious start, the Constitution and the new government lasted for exactly a year, being overthrown in May 2000 by a combination of indigenous politicians and businessmen with the assistance of sections of the army. Attacks on the government were racially motivated. The whole justification for the coup was the protection of indigenous rights, although these were fully guaranteed in the constitution. Politics once again threatened to become racially polarized. But the difference between the 1987 coups and the 2000 coup was in the response of civil society, and in the resilience of multi-ethnic parties and alliances. The challenge to coup makers in 2000 came from all ethnic groups, even if large sections of the indigenous population supported them. The challenge focused on issues of human rights and democracy, and on the inability of multi-ethnic societies to solve problems without tolerance and consultation. Support for the 1997 Constitution, as a fair settlement of complex issues and a framework for ethnic co-existence, came from many sections of society, even the military. The values of the 1997 Constitution were thus reaffirmed at the same time the government was overthrown. Thus all was not lost with the coup, as was the case in 1987.

The other lesson of the coup was the selfishness and self-interest of politicians. The coup was plotted by politicians who had been ousted from power in the 1999 elections, and who refused to accept the verdict of the people. They managed to create disquiet and anxiety about the electoral result among indigenous Fijians by appealing to ethnic fears and by a massive misrepresentation of the contents and orientation of the Constitution. As in so many other parts of

the world, it is leaders who foment ethnic hatred, for purely instrumental political reasons. Multi-ethnic societies need leaders with vision and tolerance, and a commitment to inclusive policies and procedures.

The relative success of Fiji in dealing with its ethnic conflict may briefly be contrasted with the continuing failure in Sri Lanka, which has been overburdened with the distortions of its history, in which the demonization of the Tamil minority by certain leaders of the majority community, the Sinhala, has played a major role. Unlike Fiji, religion has been largely a negative factor. The leaders of both major communities have, with certain honourable exceptions, eschewed the path of reconciliation, preferring instead to foment ethnic hatred. Few have displayed the courage necessary to find peaceful solutions. The resort to force, both by the majority and the minority communities, has deeply embittered them and made a compromise exceedingly difficult. Sri Lanka has more civil society organizations than Fiji working for reconciliation and peaceful solutions, but in the context of deliberately engineered ethnic hatred and armed conflict, their influence is limited. The nature of minority demands is also more complicated than in Fiji, where state sovereignty or territorial unity was not an issue; in Sri Lanka the conflict has now taken such a turn that independence, or at least a very substantial autonomy, for the northern Tamil areas cannot be ruled out of negotiations. The reluctance, until recently, to accept foreign intervention as facilitators or mediators, has also made a settlement difficult.

Democratization: Papua New Guinea

Papua New Guinea was an Australian colony until 1975 when it became independent. The independence Constitution was prepared by local politicians through a highly participatory process. However, it was not easy to engage the people in meaningful discussions on constitutional options, for what was on offer seemed to differ fundamentally from traditional systems of authority and rule. But the Constitution did enjoy considerable legitimacy, for it was seen to be the handiwork of local politicians and communities. The Constitution aimed to create a democratic and participatory parliamentary system, and for this purpose provided fair and regular elections administered by an independent electoral commission. Constitution makers relied greatly on the political process—but also incorporated a Bill of Rights and a Code of Conduct to control and regulate the exercise of public power and the business activities of politicians and civil servants. Several independent institutions of supervision and accountability were established, such as the judiciary, an independent prosecutorial office and the ombudsman. The country had little experience of democracy under colonial rule, and the Constitution was particularly ambitious in setting out an agenda for democracy and the rule of law. It contained most of the norms and institutions of a liberal political system.

The record of democracy and the rule of law has been mixed. Elections have been held regularly, and governments have changed frequently and peaceably, either through votes of no confidence or following general elections. But the Constitution of Papua New Guinea has failed to infuse values of participation, the moral exercise of power, and concern with the social and economic rights of people, and has failed dismally to curb corruption despite the leadership code. However, institutions of control and supervision have worked reasonably well. The judiciary is both competent and honest, the public prosecution system has not lent itself to

politically motivated trials, and the ombudsman's office has been diligent and sometimes effective. But the efficiency of these bodies has been adversely affected by the gradual reduction in the resources made available to them, despite a constitutional provision that obliges the government to ensure adequate resources. In general, the public accountability of the government, individual ministers and the bureaucracy remains low.

The experience of Papua New Guinea is instructive in trying to understand the potential of democratization, and in particular the role of constitutions in the process. It is hard, in many ways, to improve on the constitution as an instrument of liberal and rights-oriented rule. The general conclusion is that, while a constitution can be effective in setting up institutions, it is, by itself, of limited utility in inculcating values and norms. Nor does it necessarily ensure accountability of government. It is exceedingly hard to develop an honest vocation of politics. The mechanisms and processes of the Constitution can be mobilized by or through institutions it sets up, but there is a limit to what can be achieved in this way. What is fundamental in breathing life into a constitution is public opinion, the levels of tolerance of civil society and its willingness and ability to demand accountability from and to discipline state and political authorities. Papua New Guinea was particularly unfortunate in its underdeveloped civil society, due to the existence of many small ethnic groups that colonial rule or economy had done little to integrate into a larger community. Clan affiliations superseded concern with national equity or personal integrity, so that many a politician returned to office after serving a sentence for a criminal offence, including fraud and corruption. For the same reasons, the impact of free and critical media, which have exposed many abuses of office, is severely limited (an experience shared with many other states). Although in many ways the state was and remains weak, it is still the most effective organization in the country; and it is also the principal site of accumulation and patronage. In many countries, politics is largely about access to the state and its resources; and therefore accountability is resisted and, due to the weakness of civil society, hard to establish. Whether building constitutional orders on traditional systems of values and authorities can overcome the disparity between private and public conceptions of morality and honesty remains the major unexplored area of constitutional and democratization studies. Such is the intellectual hegemony of Western liberal theory and institutions.

V. Social Justice: Economic, Social and Cultural Rights

The legal foundations

In adopting the framework of human rights, the Copenhagen Declaration, in conformity with United Nations orthodoxy, places equal importance on all human rights. But realistically, it is economic and social rights that are essential to the Copenhagen agenda. Civil and political rights are undoubtedly important in organizing demands for greater equity, and in themselves for facilitating an open and accountable society. But the evidence that these rights also lead to economic and social development is not conclusive. So economic and social rights that directly provide housing, food, education and clothing are crucial. Unfortunately, economic and social rights are so far the Cinderella of rights; they are attacked, conceptually, for lacking the qualifications to be called rights, as the beneficiaries and providers are not easily identified, and

even when identified the legal process cannot enforce rights. They are also attacked politically, as increasing state power, and interfering with the autonomy, and assets, of individuals. Thus in so far as economic and social rights are central to the achievement of the Copenhagen agenda, considerable research and lobbying will be necessary to transform these rights into clear and enforceable targets and standards. This will require some intellectual ingenuity and political will, but that it can be done is clear from countries, such as Sri Lanka, that have been able to provide many of these rights despite a relatively poor economy.

The United Nations Charter committed its members to promote "higher standards of living, full employment, and conditions of economic and social progress and development" and "solutions of international economic, social, health and related problems, and international cultural and educational co-operation" (art. 55). The Universal Declaration of Human Rights contains a number of economic, social and cultural rights: the right to social security, and economic, social and cultural rights indispensable for the individual's dignity and the free development of the individual's personality (art. 22); the right to work, free choice of employment, just and favourable conditions of work and protection against unemployment, including the right to join trade unions (art. 23); the right to rest and leisure (art. 24); the right to a standard of living adequate for family health and well-being, including food, clothing, housing, medical care and necessary social services (art. 25); the right to education (art. 26); and the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits (art. 27). These rights formed the core of the ICESCR, but the formulation is too broad to provide sufficient guidance on implementation and the machinery for implementation and supervision is much weaker than for the ICCPR, typified by the omission of any complaints procedure. These rights also find their way into conventions for the protection of women, children, indigenous peoples and migrant workers, and form one of the core components of the Declaration on the Right to Development in the following expression (art. 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 shall be carried out with a view to eradicating all social injustices.

Several national constitutions require or urge the state to provide similar services, although for the most part they are mandatory only for disadvantaged groups. India and South Africa are two outstanding examples, where the obligations on the state are based on the moral and political recognition of past injustices to particular ethnic or social groups. The recent Fiji Constitution (1997) imposes a legal obligation on the government to institute schemes for preferential policies for poorer communities and groups. Several other countries such as Australia, Canada, Malaysia and the United States, as well as Northern Ireland, also have preferential policies. However, these policies have not always helped the really disadvantaged— the resources having been appropriated by the better-off in the various communities, and used for political and

patronage purposes. In any case, the resources allocated for these policies are too limited to make a major impact on poverty.

The record

These provisions have not been used to provide assistance for economic, social and cultural rights in the post-Cold War era in the way political rights in the ICCPR were seized on to promote democracy. A 1998 UNDP report notes that "fifty years after the adoption of the Universal Declaration of Human Rights, one third of the developing world's people are enslaved by a poverty so complete that it denies them fundamental human rights. ... Nearly 12 million children die each year before their fifth birthday. More than 800 million people go hungry" (UNDP, 1998:3). It also notes that 30 per cent of all children under five are malnourished and that 38 per cent of all adult women are illiterate (UNDP, 1998:10). Another report (UNCHS, 1996) observes that nearly 100 million people are homeless, and the number of those without adequate housing exceeds one billion.

It is often claimed that economic, social and cultural rights are different from other rights in that they are not justiciable and cannot be enforced in courts. State obligations under the ICESCR or national constitutions are not enforceable rights of the people. Moreover, because the ICESCR commits member states to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means" (art. 2), some national courts have taken the view that the Covenant is not directly applicable in their states but requires national legislation (for the situation in Japan, for example, see Iwasawa, 1998:56–61; see also Craven, 1993, for other states where the Covenant applies directly). However, the United Nations Committee on Economic, Social and Cultural Rights has declared that at least some rights in the Covenant were intended for and are capable of immediate and direct application (Iwasawa, 1998:59–60).

Most arguments advanced about the difficulties of making social and economic rights enforceable are not persuasive (for a succinct analysis, see Craven, 1995:7–16), nor is it productive to think of rights only in terms of judicial enforcement. It is more valuable to focus on the obligations of states; as has been pointed out, a state's obligation in relation to all categories of rights may be seen as involving different types of obligations that can be fulfilled variously by positive action, by refraining from acting, or by creating an environment in which rights can be achieved (Byrnes and Connors, 1996:711). There is no reason why the beneficiaries of these rights should not be involved in the planning and implementing of programmes for achieving the rights, or why their access to the appropriate institutions responsible for implementing rights should not be guaranteed.

The fact is that the non-enforceability of economic and social rights springs from the low regard in which these rights are held by dominant national and international groups. Philip Alston (1994) has pointed to the low priority given to these rights and the limited resources devoted to their implementation. He says that "denials of the most fundamental economic and social rights

continue on a massive scale that affects hundreds of millions of people" (Alston, 1994) and offers various explanations for the neglect of economic, social and cultural rights:

> Preeminent among them was the impact of the Cold War and of the ideological struggles between communism and capitalism. This factor changed what was a rational and balanced debate between 1944 and 1947 (culminating in the adoption of the Universal Declaration) into a struggle that encouraged the taking of extreme positions and prevented objective consideration of the key issues raised by the concept of economic and social rights (Alston, 1994:152).

Another reason is that the implementation of these rights requires skills and expertise that are alien to "what has been termed the normative-judicial model of human rights implementation. … The result is that the human rights lawyers, the diplomatic representatives, the secretariat officials and the NGO representatives who have come to dominate human rights discussions will feel distinctively ill at ease and ill-equipped to deal with many of the most pressing issues arising from a concern with economic, social and cultural rights" (Alston, 1994:152–153). Finally, "the proposition that minimum core economic and social rights ought to be accorded to every individual is still automatically made subject by decision makers to an economic calculus that will often culminate in various economically compelling reasons as to why such rights simply *cannot* be recognised" (Alston, 1994:153). Little attempt has been made to establish criteria for measuring the success of the "progressive implementation" of these rights.

However, in recent years increasing attention has been paid to economic and social rights—as a result of a series of world conferences such as those on women, children and social development. The 1973 Human Rights Conference endorsed the right to development. The current United Nations Secretary-General, Kofi Annan, has tried to make human rights a core concern of the United Nations and its agencies, which has stimulated thinking about the means of mainstreaming human rights into development. The High Commissioner for Human Rights has entered into agreements with UNDP and other agencies to promote human rights in their work. The World Food Summit of 1996, convened by the Food and Agriculture Organization of the United Nations, noted the appallingly low standards of nutrition of millions of people, particularly children and women, and the terrible consequences of malnutrition and hunger, observing that the problem was not so much the lack of food as the access to it. The governments of the world pledged themselves to achieving food security for all and—as an immediate objective—to reducing the number of undernourished people to half the 1996 level by 2015. The OECD has a commitment, together with member states, to reduce the level of poverty by half by 2015.

A number of recent national constitutions have incorporated social and economic rights. National courts had already begun to develop jurisprudence facilitating litigation on these rights. Important impetus to their realization was given with the establishment of the United Nations Committee on Economic, Social and Cultural Rights in 1986, which has done valuable work to clarify and elaborate the provisions of the Covenant, and is developing a system of

reporting and supervision (Craven, 1995). A number of NGOs have been formed to promote these rights.

Courts are now more willing to read ICESCR-type rights into the more justiciable provisions of the ICCPR-type rights. Thus the Indian courts have given a wide definition to the right to life. In one case the Indian Supreme Court held that the right to life "includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings" (per J. Bhagwati, in *Francis Coralie Mullin v Union of India*, AIR 1981 SC 746). In another case the Supreme Court explicitly used Directive Principles of State Policy (technically non-justiciable) to interpret the scope of the right to life (*Bandhua Mukhti Morcha v Union of India*, AIR 1984 SC 802), giving it a broad meaning to include protection of health, provision of education, and just and humane conditions of work. A recent Indian Supreme Court decision has declared that the right to life guarantees access to medical services, especially in an emergency. The Court said that the state cannot ignore its constitutional obligation to provide adequate medical services to preserve human life on account of financial constraints, which it must take into account in allocating funds for medical services (*Paschim Banga Khet Mazdoor Samity v West Bengal*, AIR 1996 SC 2426). The Bangladesh Supreme Court has decided that the right to life is not limited to the protection of life and limb necessary for the full enjoyment of life, but also includes, among other things, the protection of the health and normal longevity of ordinary human beings (*Mohiuddin Farooque v Bangladesh*, 17 BLD (AD) 1997). Despite these bold moves, the judiciary is neither particularly qualified nor willing to establish entitlements to economic and social benefits (see, for Canada, *Clark v Peterborough Utilities Commission* (1995) 24 OR 3d. 7 (Ontario) and for New Zealand, *Lawson v Housing New Zealand* (1996) 2 NZLR 474), and, particularly in Bangladesh or India, unable to enforce judgments that do recognize social and economic rights.

The right to non-discrimination has also provided the basis for the enforcement of social and economic rights. The Canadian Supreme Court has declared that hospitals that run government schemes for health care are in breach of section 15 of the Charter of Rights if they do not provide sign interpreters for deaf patients, for lack of de facto equality (*Eldridge v AG of British Columbia* (1997) 3 BHRC 137). The Court said that the "principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field" (p. 166b). The Court reiterated its earlier view that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15 " (p. 166e). The United Nations Human Rights Committee has declared that the rights to equality under the ICCPR extend to all rights guaranteed in the ICESCR (*Broeks v The Netherlands*, Case No. 172/1984, views adopted on 9 April 1987).

National jurisprudence on economic and social rights will, in conjunction with the General Comments of the United Nations Committee on Economic, Social and Cultural Rights, help to

establish or refine details of these rights, which in both the Covenant and national laws tend to be rather general. Hopefully this clarification and standard setting will increase pressure on governments and international organizations to implement these rights. It is partly with this view that the Committee has undertaken interpretations of key social rights; it has so far issued guidelines on the rights to housing and food, and is well advanced on the guidelines on education. In 1991 it provided an explanation of what constituted the right to adequate housing as guaranteed in article 11(1) of the Covenant (General Comment No. 4). The Committee defined the right to housing as not only having a roof over one's head, but also the right to live in security, peace and dignity. It then outlined the following features of the right:

(i) legal security of tenure;
(ii) availability of services, materials, facilities and infrastructure (for example, access to water, sanitation, light and cooking facilities);
(iii) affordability (so that, for example, the percentage of housing-related costs is commensurate with income levels);
(iv) habitability (that is, providing the occupants with adequate space and protecting them from cold, damp, heat, rain, etc.);
(v) accessibility (for example, to the needy, elderly, etc.);
(vi) location (so that housing is close to place of work, schools, etc.); and
(vii) cultural adequacy (so that housing design, etc., reflects the cultural traditions of the occupants).

In 1999 in Comment No. 12, the Committee issued its guidelines on the right to food, which, it said, is not merely "a minimum package of calories, proteins and other specific nutrients". It defined the right to adequate food as consisting of the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture; and the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.

The Committee also provided useful guidance on the obligations of states for the provision of social and economic rights, and the ways in which these obligations may be discharged (see particularly its General Comments No. 3(1990), 4(1991) and 12(1999)). The state of country's development is not an excuse for not providing these rights; a state must do what it can within its means, and must justify any lack of priority given to its legal obligations. It must also adopt appropriate development strategies for the different sectors to which these rights pertain. Measures can be legislative, administrative or facilitative, and may include a mix of public and private initiatives. Similarly, remedies can be judicial as well as administrative. An essential step toward progressive implementation is monitoring, with reference to standards and benchmarks. The Committee has also drawn attention to the role of the international community helping states without adequate resources to ensure that their basic needs are met; this role is stipulated in article 56 of the United Nations Charter and article 23 of the Covenant.

These initiatives and developments augur well for the realization of social and economic rights. However, it must be recognized that the dominant economic force of our times—globalization—runs counter to them and will probably undermine them. It is therefore important, in concluding this section, to turn to the nature of globalization and to its impact on these rights.

Globalization

Globalization is a compendium of ideas, practices, institutions, directions of change and ideologies. Some of these diminish rights, others promote them, and some do both simultaneously: for example, the Internet and other forms of technology provide more opportunities for both freedom of expression and access to information, and uncover new possibilities for networking, but, at the same time, they greatly increase the influence of corporations and the opportunities for hate speech, pornography and sexual trafficking. That makes it particularly difficult to distinguish between the positive and negative consequences of globalization for rights. However, even though they are intertwined, it may be possible to distinguish the economic processes of globalization from the more political and social processes. This paper focuses on the negative consequences for rights, which I believe are dominant, but it would be unwise to ignore the positive potential of globalization, as mentioned above.

The economic processes are connected with the development of national market economies and their integration globally on market principles. The market system is driven by the search for profits, which replace older values of reciprocity and social solidarity by the morality of profits. In order to increase profits, more and more objects, which previously were communal or in other ways inalienable, are brought within the domain of the market as commodities. Historically, this has had the effect of converting commons into private property and breaking up the cohesion of communities. This is all too evident in areas where the market frontier has moved in recent decades, such as in Africa and Asia: migration to cities, the anomie of urban life, the collapse of the extended family, and the replacement of sentiment by money as the basis for human motivation. Throughout history, societies have tried to combat or moderate the natural consequences of the market. The development of trade unions and their politics and the democratization of the state have provided a counterbalance to the predatory tendencies of the market. In the West, the balance between the market and democratic politics produced the welfare state.

Global capitalism is relatively unfettered by regulations. On the contrary, it enjoys the support of powerful capitalist states, most notably of course the United States and the member countries of the EU. A number of international economic institutions—especially the IMF, the World Bank and the World Trade Organization—share and reinforce the ideology of global capitalism. These states and institutions have taken it upon themselves to create the political and legal conditions for the global market they favour: removal of barriers to international trade and services, the movement of capital, the global protection of property rights, the privatization of state companies, the deregulation of business activities and the phasing out of welfare services.

All these developments have diminished the capacity of states to provide essential social services to the people. The effects of structural adjustment policies in Africa and the South Pacific, imposed by the IMF and the World Bank, have been little short of disastrous; they have reduced the access of all but the most privileged groups to education, health and nutrition (UNRISD, 1995). Even in Europe, where the welfare state was born, there have been severe cutbacks (Esping-Andersen, 1996). In East Asia, where welfare was often provided by commercial corporations, benefits have been phased out allegedly because of the corporations'

inability to compete in the international economy if they have to absorb the costs of welfare (Goodman and Peng, 1996).

Several of the negative social and political consequences of globalization are to do with its asymmetries. The obvious asymmetry is that between capital and labour—the former may move freely, but not the latter. It is therefore possible for capitalists to move, or threaten to move, their enterprises as a way to negotiate economic concessions from the host state, or to negotiate with workers for low wages and non-unionization. Labour is at a considerable disadvantage in what is clearly an unequal situation. Likewise, capital is entitled to national treatment wherever it chooses to go, but not migrant workers, who are subject to considerable legal and practical discrimination in host countries (Ghai, 1997; Woodiwiss, 1998). Global capital relies increasingly on part-time or informal forms of labour, which means that workers have little security of employment, and that wages and rates of unionization are low. The result is also that the workforce consists increasingly of women who are more prepared, able or compelled to accept these terms.

To a significant extent, several states are also becoming captives of global capitalism. They dare not impose high taxes for fear of scaring away foreign as well as domestic capital. In some countries there has been little attempt to enforce industrial safety standards for the same reason. In free economic zones that many countries have established to attract foreign capital, large portions of the national legal and fiscal systems are suspended. States that wish to engage with the international economic system—and few think that they can afford *not* to—have to accept complex legal and administrative regimes, granting extensive rights to foreign capital and prohibiting discrimination to support domestic entrepreneurs. The result is that these states are unable to provide basic welfare services to their people. China's experience is a good illustration of what happens to social and economic rights when the market becomes the dominant matrix of economy. Despite its general economic backwardness, China used to ensure its people equal and decent standards of education, health and shelter. With the spread of market practices and ideology, these services are being phased out, and becoming commodities that must be purchased on the market. The result is that basic needs are beyond the capacity of millions of people (UNDP, 1997 and 2000). South Africa is finding that, despite pressures from the historically disadvantaged groups for the satisfaction of basic needs—and the constitutional requirements to do so—its social policies are effectively governed by its commitment to engage fully with the international economic system.

Globalization and human rights

The effects of globalization enable us to gain fresh insights into the nature of rights. Certain kinds of rights are important for globalization—property, association, independent judiciary and the rule of law. But globalization does not conceive of social and economic rights—it thinks in terms of social and economic benefits as outcomes of markets, not as any kind of preconditions. It points to various weaknesses of the regime of rights: in an age of mass migrations many rights are restricted to citizens; the human rights regime provides no redress against the violation of rights by non-state institutions, despite the overwhelming power of transnational corporations to determine our life chances; and the basic framework for the protection and enforce-

ment of rights is still the state, while the obligations to protect human rights are international. The international system is vigorous in elaborating norms, but lacks the jurisdictional basis and often the political will to enforce them. However, most states lack resources to protect human rights, especially economic and social rights. Globalization has sharpened the distinction between civil and political rights, which it needs, and economic, social and cultural rights, which threaten its dominance. Clearly, rhetoric (human rights) is less powerful than material forces (global capitalism).

VI. Conclusion and Recommendations

Analysis

The World Summit for Social Development adopted a human rights framework as part of its strategy to eradicate poverty. The observance of human rights facilitates peaceful co-existence and consequently social and political stability. A democratic society is predicated on respect for human rights. This much is generally recognized. Somewhat more controversial is the third proposition underlying the Social Summit strategy—that a society that wants to achieve social justice also has to implement social and economic rights. There is a powerful school of thought that argues that social justice is the outcome of the market economic system, and not a contrivance of the state. This school of thought, associated with globalization and the hegemony of the United States, is a principal obstacle to the implementation of social justice. But there are other obstacles too.

Although human rights norms covering key areas of human existence have been negotiated through international collaboration, the machinery for their enforcement at the international level is rudimentary and grossly under-resourced. In most states as well, the system for the enforcement of rights is highly inadequate. Even though a majority of states (among them most Western states) profess a primary commitment to human rights, in practice their governments do not wish to encumber their diplomatic relations with the inconvenience of holding other governments accountable for human rights violations—the more so if their own economy might suffer from demanding such accountability. For the most part, the so-called human rights and governance conditionalities are little more than blackmail to force states to develop and open their markets to outside investors. At home, many governments are reluctant to rule by the logic of human rights, and their police and security forces are often implicated in serious violations of rights. Despite the ideology and rhetoric of human rights, human rights activists are looked upon as troublemakers and subjected to harassment and persecution. The truth is that human rights too often threaten powerful vested interests.

Recommendations

If human rights are to become the framework for social development, fundamental reforms in and strengthening of the human rights regime are necessary. The first and the hardest is to accept the implications of the universality of human rights. The concept of universality has been discussed largely in terms of the relevance of a common core of human rights to all societies. But it also has another dimension—the responsibility of the world community to ensure that all

people, wherever they might be, are guaranteed their rights. Similarly, the concept of the interdependence or indivisibility of rights has to be placed in the context of global responsibility for the promotion of rights. The West has insisted on the indivisibility of rights because it is suspicious of many governments that have argued that civil and political rights should be postponed until there is a higher level of economic development. (It should be noted that governments holding this view do not necessarily accept the imperative of social and economic rights—they talk of development, not entitlements of their people.) If the West is serious about the indivisibility of rights, then it is obliged to ensure that sufficient funds are transferred to poorer countries for the satisfaction of the basic needs of their people. However, it has so far refused to accept the logic of this position, and has shown a marked reluctance to engage in serious negotiations on the implementation of the Declaration on the Right to Development; foreign aid has fallen to 0.22 per cent of gross national product, despite the formula agreed to long ago of 0.77 per cent.

In order to make human rights the framework for social and economic policies, it is necessary to build a genuine international consensus on their value and importance—which is hard to do. The more concrete the issues—such as child labour, environment, terms of international trade, intellectual property rights—where rights really matter, the more differences seem to divide West and the rest. Many international differences are played out in the language of rights; paradoxically this delegitimizes rights, as was the case in Kosovo and East Timor—intervention became possible only when President Clinton criticized Indonesia. Both the West and the East are guilty of double standards. Consensus requires both intellectual effort in uncovering values that unite different religions and cultural traditions, and a willingness to incorporate values that have animated non-Western societies in the international regime of rights. It also requires political will, which is harder to establish for reasons already discussed.

Mainstreaming human rights in development, which should be a special responsibility of multilateral financial and development institutions, in conjunction with state policies and initiatives, is a prerequisite of the Copenhagen Programme of Action. Mainstreaming means that the elimination of poverty should be the principal aim of development projects and, before a project is undertaken, there should be a study of human rights implications. United Nations agencies have shown some interest in mainstreaming human rights, but it is the Bretton Woods institutions, which wield greater economic clout, that need to be persuaded of the value of social and economic rights. Consideration should be given to establishing a "world development fund for social and economic rights", to be financed directly from tax revenues worldwide on specified luxury products.

Social and economic rights must be given the priority that has been denied them. Considerable research and imagination are needed to provide the practical underpinnings of economic and social rights, the modalities for enforcement, and standards and benchmarks for monitoring progress. This will require more funding for this enterprise, the establishment of networks and, above all, the commitment of governments.

Together with regional organizations, the United Nations must devote more resources to human rights work—more human rights experts should be trained and recruited, more human rights missions should be organized, and more field offices of the OHCHR should be established. The international machinery for the supervision of the observance of human rights should be strengthened. All states should sign protocols that give their nationals the right of direct access to international committees and tribunals—this aspect of their work has proved more fruitful than periodic reports by governments.

Furthermore, the United Nations and other international organizations should increase their capacity for dealing with civil conflicts and wars, which today are a major source of suffering and oppression. This suggests the need for better protection of minorities, and a mechanism for swift response to mass violations of rights.

The regime of human rights should be extended to cover the policies and conduct of large private economic corporations. They have power without responsibility. The human rights of millions of people depend on the policies of these corporations.

Neither the state nor the international system is likely to support the struggles of the oppressed—which are essentially attacks on the present state and international systems. Therefore the revolutionary potential of rights is likely to remain dormant for the foreseeable future. Popular support for human rights will not be secured so long as poverty is not seen as a concern of the rights regime. But this in turn will not happen until the concept of rights is used to mobilize society to demand greater equity. Unless there are pressures from civil society, in both the rich and the poor countries, for social justice and respect for human dignity, little progress will be made. A major weakness of the human rights movement has been the inability to involve the masses as subjects rather than objects of rights. In this lies the most fundamental challenge to human rights scholars and activists. The agenda of the World Summit for Social Development has little prospect for success unless there is this transformation in the regime of rights.

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