THE DOMESTIC DIMENSION OF THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

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ABSTRACT

Material and human poverty plagues approximately two-thirds of humankind, mostly citizens of the Third World, at the dawn of the new millennium. There are two dimensions to the problem: at the international level, the rigidities of the international system complicate the struggle of Third World States to eradicate or, at least, to reduce poverty; at the domestic level, the adoption of development policies that privilege economic growth over human welfare creates wealth and privilege for the few and poverty and misery for the many.

This thesis focuses on the domestic dimension of the problem through an examination of the United Nations General Assembly Declaration on the Right to Development. The provisions of the Declaration are analyzed in light of the interface of poverty, human rights and development. The central argument is that poverty is a direct consequence of the discount of human rights in the development process. The thesis challenges the conventional wisdom that human rights and development are competing concerns, and critically examines some of the props regularly employed by Third World leaders to bolster that wisdom, such as cultural relativism and resource constraints.

The thesis proposes a conceptualization of development as a comprehensive and ongoing process of societal improvement (rather than just an economic growth target, important though that is in the process) which is predicated on respect for all of human rights. Such a process must be people-centred, participatory, inclusive/non-discriminatory, and sustainable. The thesis suggests that, given the entrenched nature of poverty in the Third World and the increasingly difficult international context of development in the new millennium, a convergence of domestic and international political will is required to effect this reorientation.

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CHAPTER ONE

INTRODUCTION

Several great social issues have occupied and tasked the minds of scholars and thinkers of various disciplines in this century. From the threat to peace, manifested in two World Wars, to the threat of nuclear annihilation, to the challenge of poverty, the best minds have joined forces, sometimes with astounding success, to find solutions. The threat to peaceful coexistence among nations has been largely temporized by the emergence of supranational conciliatory institutions, such as the United Nations, and the realities of global interdependence. The end of the Cold War has also meant substantial attenuation of the danger of nuclear annihilation. However, the one virulent threat to the survival of three-quarters of the human population, which seems to be defying solution, is poverty - widespread poverty.

According to the United Nations Development Programme's Human Development Report 1997, over two billion people, about two-thirds of the world's population, lived in abject poverty. This group subsisted on an income of less than $1 a day, was chronically malnourished, illiterate, had little or no access to safe drinking water, sanitation or health care, and lived in squalid structures built of impermanent

materials. But this picture represents only the material aspect of poverty. The human aspect of poverty connotes a denial of choices and opportunities for living a tolerable life, and an absence of dignity, confidence and self-respect. As this situation deteriorates, with more joining the already swollen ranks of the poor daily through political turmoils and social instability, additional pressures brought to bear through authoritarian systems of governance as well as neo-liberal economic policies seem to complicate the problem.

Clearly, this situation is a veritable blight on the otherwise outstanding achievements of humankind in the 20th century. Although the worst forms of poverty seem localized to Third World countries, many ramifications of the situation are transnational in character. For example, studies have linked certain forms of ecological degradation in the Third World to poverty. In addition, some of the wars which have erupted from fights over diminishing resources, such as farm and graze lands, or rebellion against oppressive governments, have spilled millions of refugees onto the international arena. This represents a new threat to international security. As a result, no part of the world is really immune from the effects of poverty.

The quest for solution must begin with an effort to understand the character of the problem. It is only with such understanding that rational guidance can be provided to

policy-makers on the questions that must be tackled in programmes of poverty reduction or eradication. But, contrary to the considerable academic interest shown in many disciplines, especially in the social sciences, very few academic lawyers have shown interest in this area of inquiry. Legal commentaries have focused largely on the international aspects of poverty, many of them in relation to the advocacy by Third World countries in the 1970s for a New International Economic Order [NIEO]. In some ways, the declaration on the right to development builds on the NIEO initiative, but none of the enthusiasm which that initiative generated among legal commentators has accompanied the right to development. Indeed, the right has been largely ignored in academic circles.

This study aims to begin the process of filling the gap thus created. It focuses on the domestic dimension of the right to development in international law. The right to development was enunciated in a declaration of the United Nations General Assembly on December 4, 1986. In the words of the declaration, the right to development is "an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Whereas the international dimension of the right to

development relates to issues of international co-operation to reduce the rigidities of the international system in order to make for the meaningful participation of Third World States, the domestic dimension of the right relates to the social, economic and political conditions of these States which have produced widespread poverty and frustrated or obstructed its amelioration. An examination of the domestic dimension of the right to development, therefore, involves inquiring into the development policies of Third World countries, how these policies impact upon human rights, the structures of administration, and the prospects for bringing about a change in the institutions which produce wealth for the few and poverty and immiseration for the many.

Chapter Two of this thesis provides an overview of poverty and development as well as their interface with human rights. The idea that human rights and development cannot be pursued simultaneously dominates the thinking of most development planners in the Third World. The logical consequence of this has been a prioritization in development philosophy which privileges economic growth over human welfare, on the assumption that the attainment of the former would result in benefits that would automatically "trickle down" to generate the latter. This idea is a mere fantasy as numerous studies have shown: the benefits of economic growth do not get diffused automatically through society; the

likelihood of those benefits being captured by powerful elite groups for selfish ends are real. As such, political controls – the participation of the entire populace in the decisions by which the destiny of their society is determined – are necessary in every development activity. Development ought also to be correctly seen as a multi-dimensional process which includes, but is not limited to, economic development. As well, regardless of the best efforts of a State to craft development policies that aim to eradicate poverty, the increasing resource inadequacy of Third World States implies that the impact of the emergent international context of development can be decisive of the outcome. That context of diminishing access to global markets for the exports of many Third World countries, coupled with the quasi-isolationist policies of the rich countries and the growth in the number of needy countries, presupposes more difficult circumstances in which development will be undertaken in the new millennium.

The right to development prescribes a more comprehensive and human-centred approach to development, as opposed to the growth-driven philosophy which has enjoyed unquestioned ascendancy in contemporary Third World development circles. The implications of this alternative paradigm are examined in Chapter Three. Economic growth is very important in this paradigm, but there is no reason to

consider it as the most important element of development. Other elements which must enjoy a pride of place in development activity are participation, inclusivity or non-discrimination, and sustainability. These concepts together form the nucleus of the people-centred approach to development. "Participation" mandates the active involvement of the masses of the people in the decisions and processes that impact for good or ill on their welfare; "inclusivity" makes discrimination against women and other vulnerable groups the very antithesis of development; and "sustainability" incorporates the need to prevent harm to the planet in the process of meeting present needs so as not to mortgage the right of future generations of humanity to meet their own needs. The implications of these mandates for all development actors - governments, international development agencies, private donors, individuals, and groups are significant.

The juridical integrity of the declaration on the right to development is analyzed in Chapter Four. In spite of its adoption by an overwhelming majority of the UN General Assembly, and the repeated affirmation of the right to development in all the five World Conferences held since 1986, many academic commentators express views that seem to put the legal validity of the right to question. The reality, however, is that the right to development is neither rhetoric nor "hard" international law. It is at this stage "soft"

international law. But it is no derogation to say that a piece of law is "soft"; in terms of effect, there is no difference of significance in the modern world between hard and soft laws. The clearer the legal position of the right to development actors, the less room there will be for debate about the mandate of the declaration and the obligations that it imposes.

Chapter Five considers the right to development in perspective of non-Western cultures. The debate about human rights has often pitted Third World ruling elites against Western scholars on the applicability or appropriateness of human rights in the Third World. The debate ignores the many commonalities which cohabitation of this planet and the march of history has forged among the nations and peoples of the world. In the context of the struggle against poverty, human rights and human dignity are coterminous. All societies and cultures have a concept of human dignity, and the struggle to ensure this ought to be the common denominator for all.

In Chapter Six of the thesis, issues regarding the domestic realization of the right to development are considered. The cornerstone of the approach which the declaration on the right to development prescribes is interrogated. The conceptualization of the stake which the poor have in the struggle to eradicate poverty as a right centralizes the legal process in the struggle. This converts

an essentially political issue into a legal one. Making a resort to courts the major formula for fighting poverty has the potential to marginalize the same people who have been marginalized, sometimes through the legal order, in the decision-making processes that determine their destiny. Experience teaches that rights are a currency of uncertain value in the hands of the possessor; their precise content and reach depend on the judicial interpretation permissible by the status quo. Thus, legalization of the poverty issue is a poor substitute for its politicization. However, to the extent possible, rights can be useful for the purposes of political mobilization. It is this window of mobilization which progressive lawyers and all those who sympathise with the poor must exploit to set in motion a political struggle for the eradication of poverty.

The final chapter ties together the major themes of the study by way of a final reflection on the domestic dimension of the right to development. The "either/or" mentality which sets up human welfare as a competing concern with development is counterproductive and can be rightly blamed for the prevalence of poverty in the Third World. Authoritarian systems have been built on this mentality with devastating consequences for the dignity of the human person. Human rights can be promoted through development by a careful balancing of the need for development and human welfare.

The methodology that informs this study is eclectic and interdisciplinary. The analysis draws freely on articulations in political science, history, philosophy, anthropology, economics, sociology and public administration, both to identify and to illuminate the issues analyzed. Needless to say, it is impossible to productively analyze the questions that converge in the discourse of poverty and development only within the strait-jacket of law. On the other hand, the wide-ranging nature of the issues means that only certain aspects can be effectively covered in this study.

CHAPTER TWO

THE THIRD WORLD: POVERTY, HUMAN RIGHTS, AND DEVELOPMENT

1. INTRODUCTION

On December 4, 1986, the United Nations General Assembly passed a resolution containing a Declaration on the Right to Development[1] This resolution, sponsored by Third World members of the General Assembly, is the culmination of an alternative articulation about the theory and practice of development which has been taking shape in international development discourse since the early 1970s. Preceding Third World initiatives at the United Nations seemed to lay the sole responsibility for the poverty of the Third World mostly on what was perceived to be the predatory economic tactics of the developed nations. The Declaration departs substantially from the largely adversarial rhetoric of earlier initiatives,[2]

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[1] United Nations General Assembly, <u>Declaration on the Right to Development</u>, UN GAOR, 41st Session, Resolutions and Decisions, Agenda Item 101, at pp. 3-6, 9th plenary meeting, 4 December, 1986. [UN Doc. A/Res/41/128]. The Resolution was passed with 146 votes in favour, 1 against, and 8 abstentions. Three members - Albania, Dominica, and Vanuatu - were absent.

[2] For example, the UN General Assembly Resolution 3201-S.VI of 9 May, 1974, containing a Declaration on the Establishment of a New International Economic Order

reaffirming instead the duty of developed nations to assist and co-operate with Third World nations in the latter's effort to tackle the problem of poverty. Perhaps, what is unique about the Declaration is the duty that it imposes on Third World nations themselves to ensure that their domestic development policies create the right conditions for development through the mobilization and empowerment of their citizens in the development process. This domestic dimension of the right to development is at once a recognition of the fact that basic human rights are often violated in the process of development and an emphasis on the need for these rights to be respected as a basis for genuine development.

The objective of this chapter is to provide a general backdrop to the analysis of the domestic dimension of the right to development. It begins by defining the concepts of poverty and development, to show how these concepts relate to human rights. It also provides a description of the

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(NIEO), and Resolution 3202-S.VI of 16 May, 1974, containing a Programme of Action on the establishment of a NIEO. The Charter of Economic Rights and Duties of States (Resolution 3281-XXIX adopted by the General Assembly on 12 December, 1974), reduced the rather loose formulations of the first two instruments to precise legal language. Blaming the parlous economic conditions of Third World countries principally on the control exercised on the natural resources of these countries by multinational concerns, the Charter recognizes the right of the countries, _inter alia_ to expropriate or nationalize foreign property, subject only to payment of "appropriate compensation" : ss 187, 188, 202. This aroused intense opposition among Western nations.

enormity of poverty in the Third World, and adopts a working definition of "development" to foreground the description of challenges which poverty poses to Third World nations. Next, the chapter examines the conventional explanations for poverty, and analyzes the current and prospective impact of the new international context of development on the struggle against poverty in the Third World. The Chapter concludes with intimations of what the Declaration implies for the domestic development policies of Third World States.

2. THE MEANING OF DEVELOPMENT

The word "development" is almost synonymous with the notion of progress - a process of change from a given state of affairs to a more desirable one. Thus conceptualized, the idea of development encapsulates an ideal with which individuals, nations and societies can readily identify. To be a developed society is to attain to that level of progress which, in the language of the times, corresponds to "the good society". However, the seeming consensus on the desirability of development masks fundamental disagreements regarding its basic parameters. How do we measure development? Is development only an economic concept, or are social and political factors legitimate indicators in the measurement of development? What weight can be accorded each of these factors in the calculus of development? Answers to these questions are as varied as the changing views of development over the years.

In view of the centrality of the concept of development to this study, it is necessary to examine some of these views for the purpose of extracting a working definition.

2.1. DEVELOPMENT AS ECONOMIC PROSPERITY

One way of thinking about development is that it means economic prosperity, that is, a rise in the material living standards of people as measured by the Gross National Product (GNP). According to the World Bank[3], the GNP is "the total domestic and foreign output claimed by residents of a country" in a given year. The GNP per capita is the average income of each member of the population from both domestic and foreign sources. A high GNP per capita, therefore, according to this view, means development: great material prosperity and little, if any, poverty.

There are many problems with this view of development. As an indication only of <u>average</u> income, the GNP is incapable of revealing the full extent of economic well-being nor the true incidence of poverty in a country. In the first place, the GNP does not give an indication of income distribution. Thus, where there is marked income inequality, as it is often the case in the Third World, the massive income of a wealthy few may give the appearance of average income

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[3] World Bank, <u>World Development Report 1980</u> (Oxford: Oxford University Press, 1980) 11.

that neither corresponds to the size of wealth enjoyed by these few nor the low standards of living which the majority endure. In the second place, market valuation of national production (which is the basis for the calculation of GNP per capita) means that the value is expressed in internationally convertible currency, such as the US dollar. However, it is well known that variations exist in terms cf local prices among nations; to that extent, the GNP per capita fails to provide reliable guide to the relative strength of purchasing power among the populations of different countries. For example, in most Third World countries, prices of foodstuff, clothing, and accomodation are lower than international prices. As such, the dollar value of wages for persons classified as low-income earners in the Third World might fail to reveal the real purchasing power of this category of people.

Finally, economic well-being as measured by the GNP tends to underestimate "subsistence and collective goods" while overvaluing "the commercialized, the individualized and the organized".[4] A large part of what can be valued as national production in some countries is never valued as such because the producers consume it by way of direct entitlement.

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[4] Thomas, A., and Potter, D., "Development, Capitalism and the Nation State" in Allen, T., and Thomas, A., eds., _Poverty and Development in the 1990s_ (Oxford: Oxford University Press, 1992) 118.

Peasants and petty commodity producers are among this category of producers. It can be argued that a potential market value can be put on such production where it is of concrete items. But it is impossible to put a monetary value on the culture-based gratuitous services which members of most communities in Africa, for example, render each other at times of need. These communities are said to operate an "economy of affection"[5], which presumably lies outside the quantitative boundaries of the formal economy. Next to this phenomenon can also be considered the increasing informalization of the economies of most countries of the Third World.[6] An enormous amount of goods and services are produced, and incomes earned from their exchange, in these countries by producers who operate entirely

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[5] See Hyden, G., <u>No Shortcuts to Progress: African Development Management in Perspective</u> (Berkeley & Los Angeles: University of California Press, 1983), 8 - 22 for an excellent description and analysis of the operation of this "economy" in Africa.

[6] The International labour Office (ILO) estimated in 1991, for example, that about 60% of the African urban labour force is engaged in the informal sector: see <u>The Dilemma of the Informal Sector: Report of the Director-General</u> (Addis Ababa: ILO/JASPA, 1991). See also, Gibbon, P., and Bangura, Y., "Introduction" in Gibbon, P., Bangura Y., and Ofstad, A., <u>Authoritarianism, Democracy and Adjustment: The Politics of Economic Reform in Africa</u> (Uppsala, Sweden: The Scandinavian Institute of African Studies, 1992) 7 at 18; Mustafa, A.R., "Structural Adjustment and Multiple Modes of Social Livelihood in Nigeria", ibid., 189.

outside the formal economy.[7] Informalization of the economy, by its nature, distorts the overall account of a country's national income, precisely because it yields little or no statistics.

2.2. DEVELOPMENT AS ECONOMIC GROWTH

Development is also sometimes defined as a self-sustaining increase in the size of an economy. The size of an economy is measured by its Gross Domestic Product (GDP), that is, "the total final output of goods and services"[8] produced by the economy. A country is said to achieve economic growth when it is able to save (and not consume) a proportion of its GDP for further investment, thus to enable net addition to the capital stock.[9]

Economic growth is not synonymous with economic

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[7] See, for example, Wield, D., "Unemployment and Making a Living" in Allen, T., and Thomas, A., eds., supra, note 4, 55 at 64: "Much economic activity in developed countries cannot easily be counted - that in the 'hidden economy' of of second jobs, cash payment for work to avoid tax and so on. In the Third World, the very nature of much work as being outside 'formal' wage work makes it difficult to count."

[8] World Bank, supra. note 3.

[9] The most influential proponent of this view was the American economic historian, Walt W. Rostow. See Rostow, W.W., The Stages of Economic Growth, A Non- Communist Manifesto (London: Cambridge University Press, 1960).

development. While the former refers simply to increasing investment and returns, the latter refers to "raising the productive capacities of societies, in terms of their technologies (more efficient tools and machines), technical cultures (knowledge of nature, research and capacity to develop improved technologies), and the physical, technical and organizational capacities and skills of those engaged in production...raising the productivity of labour...to produce a greater quantity and a more diverse range of goods and services."[10] It is obvious that economic growth is, therefore, only an aspect, albeit a very important one, of economic development.

A fundamental assumption of the definition of development as economic growth is that savings and investment are a necessary condition for development. This is true, but it is questionable if such a condition, without more, is sufficient for development. The disappointing outcome of decades of experimentation with this economic theory in most of the Third World suggests that economic growth requires much more than savings and investment, or for that matter, foreign aid, which is said to be required to make up for shortfalls in savings. It seems necessary to the effective conversion of

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[10] Bernstein, H., "Development" in Thomas, A., and Bernstein, H., eds. The 'Third World' and 'Development' (Milton Keynes: The Open University, 1983) 59

capital to higher levels of output that the economy and society must be structurally, attitudinally and institutionally receptive to the high degree of sophistication which the process entails.[11] The absence of such preparedness in Third World societies may begin to explain the failure of this theory of development in these societies.

A look at how a proportion of national output or surplus can be appropriated or saved for the purpose of investment reveals yet another shortcoming of this definition of development. Savings, as indicated above, are the product of forgone consumption. But which members of the society must forgo consumption? The economic growth model of development does not address the issue of equity regarding the burden of growth. Considerations of equity are said to impede economic growth: they must, therefore, abide the attainment of a high rate of growth. Meanwhile, so the theory goes, citizens must be willing to engage in a trade-off of their consumption habits, liberty and equality for economic growth. This trade-off, it is argued, would be cancelled out by the benefits of growth - better standard of living, employment, rising incomes - which would trickle down to the lower segments of the

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[11] See, for a similar view, Todaro, M.P., <u>Economic Development in the Third World</u>, 2nd ed., (New York and London: Longman, 1977) 61.

society.[12] Thus, at the stage of economic take-off into self-sustaining growth, it seems that the burden of growth must fall on the majority of citizens, to enable the State or capitalist entrepreneurs to put their resources to the maximum productive use.

Economic growth may be a necessary condition for the reduction of poverty. It is questionable, however, if economic growth necessarily leads to reduction of poverty; whether or not one may lead to the other would seem to depend on policy. Experience has shown, as in the case of Brazil in the early 1970s[13], that in societies which exhibit sharp social, political and economic cleavages, inequities permitted in the initial periods of economic growth tend to perpetuate themselves. This is not to downplay the difficulty inherent in seeking to achieve growth with equity. Equitable spread of investment in all directions at the early stages of economic growth may, by greatly diluting the impact of the investment, scuttle the entire project. The important point, though, is

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[12] See, for example, Enke, S. Economics for Development (Englewood Cliffs, N.J.: Prentice Hall, 1963), 181, and Morris, B.R., Economic Growth for Development (New York: Pitman Publishing, 1967) 306.

[13] See, for example, Fields, G., "Who Benefits from Economic Development? A Reexamination of Brazilian Growth in the 1960s" American Economic Review 67, 570 (1977), Hewlett, S.A., The Cruel Dilemmas of Development: Twentieth Century Brazil (New York: Basic Books, 1980), and World Bank, World Development Report 1981 (New York: Oxford University Press, 1981), Table 5.

that granted the inevitability of inequities, there is need for institutions and processes of political control, even at this stage, if the development potential of economic growth is to be realized in the long run.

2.3. DEVELOPMENT AS MODERNIZATION

Yet another way of thinking about development is that it means modernization. In so doing, the reference point, in a world dominated by the advanced capitalist economies, is the Western industrial society. It is a view of development which holds up the Western society as the ideal to which all other societies wishing to achieve development must aspire. Obviously, this means much more than economic development. Modernization implies economic development predicated on industrialization.

Historically, industrialization has been described as a process of total transformation of "social structure, of ownership and economic power in society; as well as a change of scale". It is a "process by which production in the industrial sector becomes increasingly important compared with agricultural production; more fundamentally, a general change towards the use of advanced technology and a complex division of labour in production with associated changes in social

structure and organization".[14] Under such a process, therefore, fundamental changes must occur in the social, political and economic structure of the society. For example, peasant and subsistence farming must evolve towards commercial agriculture; there must be a transition from manual labour to the use of mechanical or electrical power; labour must become commoditized, and market for goods produced using the manufacturing process must be based on a network of exchange relations; and there must be increasing urbanization, drawing farm and village settlers towards the urban centres.

Modernization involves what sociologists refer to as "structural differentiation", that is, a movement of society from amorphousness to specialized and autonomous social units. It also involves "integration", in which the state, laws and institutions must evolve to give expression to the transformations described above.[15]

By assuming the timelessness and transferability of the European model, this view fails to pay regard to the cultural, ecological, technical and financial constraints which basically obstruct development in the Third World. The

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[14] Thomas, A., and Potter, D., in Allen, T., and Thomas, A., eds., supra. note 4, 119.

[15] See Smelser, N.J., "Toward a Theory of Modernization" in Smelser, N.J., ed., Essays in Sociological Explanation (Englewood Cliffs, N.J.: Prentice Hall, 1968) 126-127, and Eisenstadt, S., Modernization: Protest and Change (Englewood Cliffs, N.J.: Prentice Hall, 1966) 1.

disastrous failure of the "modernization" project attests to
the harm which unrealistic generalizations can cause to
development planning in the Third World. According to one
commentator, this paradigm of development and its
contraptions, "has probably destroyed more self-confidence,
motivation, traditional knowledge, and valuable regulatory
mechanisms and has wasted more ecological resources and wealth
than it has created prosperity, employment and education,
social and economic initiative, competence, social and
ecological protection, and hope for independent, humane, and
durable development".[16]

2.4. DEVELOPMENT AS THE SATISFACTION OF HUMAN NEEDS

Development may also be understood from the
perspective, not of productivity alone, but of the use to
which production is put. Thus, according to Dudley Seers, the
pertinent questions to ask about a country's development must
be:

What has been happening to poverty? What has been
happening to unemployment? What has been happening to
inequality? If all three of these have become less severe,
then without doubt this has been a period of development
for the country concerned. If one or two of these central

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[16] Hauchler, I., "Crisis and Reorientation in Development
Policy" in Belous, R., and Cavanagh, S.M., New Views on
North-South Relations and Foreign Assistance (Washington,
D.C.: National Planning Association, 1994) 36.

problems have been growing worse, especially if all three
have, it would be strange to call the result 'development'
...

This definition challenges the emphasis which the
economic definitions place on productivity and growth as ends
in themselves. The elimination of poverty and satisfaction of
other human needs, according to this definition, are the real
ends which productivity and growth must serve.

There are various strands of this form of thinking
about development. One of them, for example, conceptualizes
"poverty" broadly to include exclusion from full participation
in human society. Dennis Goulet typifies this approach.
According to him, poverty is

> ... a sense of personal and societal impotence in the
> face of disease and death, of confusion and ignorance as
> one gropes to understand change, of servility towards men
> whose decisions govern the course of events, of
> hopelessness before hunger and catastrophe...[17]

Thus conceptualized, the elimination of poverty
would entail not only the satisfaction of material needs, but
also   "processes   of   enrichment,   empowerment   and
participation".[18]   Beyond   the   accumulation   of   wealth,
commentators of this school argue, human beings may also want

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[17] Goulet, D., The Cruel Choice: A New Concept in the Theory
of Development (New York: Atheneum, 1971) 23. See also,
Freire, P., Pedagogy of the Oppressed (London: Penguin,
1972).

[18] Edwards, M., "The Irrelevance of Development Studies"
Third World Quarterly 11 (1), January, 119-20 (1989).

to be active and free participants in the affairs of their communities, live long and healthy lives, acquire knowledge, and "enjoy the simple pleasures of life in a clean physical environment and value the peace of mind that comes from security in their homes, in their jobs and in their society".[19]

Concerns arising out of the seeming lack of sufficient attention to cultural factors, as well as the role of women in development, has led to the analysis of development in terms of these issues.[20] As well, the need to safeguard the environment has become an important issue in development discourse. Here the argument is that genuine, and therefore <u>sustainable</u>, development is the ability to meet the needs of the present without compromising the ability of

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[19] UNDP, <u>Human Development Report 1994</u> (New York: Oxford University Press, 1994) 15.

[20] The literature on gender issues in development is vast. But see Pearson, R., "Gender Matters in Development" in Allen, T., and Thomas, A., eds. supra note 4, 291; Buvinic, M. et al. eds., <u>Women and Poverty in the Third World</u> (Baltimore, MD: Johns Hopkins University, 1983), and Momsen, J.H., <u>Women and Development in the Third World</u> (London: Routledge, 1991). The UN declared a Decade for the Advancement of Women in 1976-85, preceded by the International Women's Year, 1975. Also, the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) came into force in 1981, having been adopted by the UN General Assembly in 1979. On cultural issues in development, Worsley, P., <u>The Three Worlds</u> (London: Weidenfeld and Nicholson, 1984) provides an excellent analysis. See also, Allen, T., "Taking Culture Seriously" in Allen, T., and Thomas, A., supra, note 4, 331.

future generations to meet their own needs.[21]

2.5. A WORKING DEFINITION

The variety of definitions examined above underscore the multi-faceted nature of development. This also explains the difficulty in attempting to fashion a comprehensive definition. Indeed, in view of the richness and importance of the various themes that converge in the development discourse of the 21st Century, it is probably bootless to insist on such a definition. Nevertheless, it is possible to distil from these themes the essential attributes of development which will serve as a guide to understanding the sense in which the term is used in this study.

Development then can be understood as a dynamic process of experiment and innovation aimed at achieving material prosperity, the enhancement of basic human capabilities and freedoms, and the improvement and preservation of the ability to meet future needs. The dynamism of development underscores the evolving nature of human needs

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[21] See World Commission on Environment and Development (WCED), _Our Common Future_ (Oxford: Oxford University Press, 1987) (The Brundtland Report). See also Timberlake, L., and Thomas, L., _When the Bough Breaks: Our Children, Our Environment_ (London: Earthscan, 1990); Jackson, B., _Poverty and the Planet: A Question of Survival_ (London: Penguin, 1990); and Redclift, M., _Sustainable Development: Constraints and Opportunities_ (London: Methuen, 1987).

at every stage of a society's history. Today, however, for citizens of the Third World the overriding need is for material and emotional security and for the basic requirements of decent existence as human beings - food security, shelter, health and sanitation, opportunities and choices for living a tolerable life. Previous development effort in the Third World concentrated on economic growth and neglected the equally important aspect of human development. In this study, the central argument is that human development deserves equal attention.

3. INSIDE THE THIRD WORLD: THE ANATOMY OF POVERTY AND VULNERABILITY

According to the United Nations Development Programme's <u>Human Development Report 1994</u>[22], 1.3 billion inhabitants of the Third World lived in absolute poverty in 1992. ("Absolute poverty" refers to that condition under which a human being is unable to meet specified minimum needs, such as a nutritionally adequate diet and other essential non-food requirements. It has been defined by the World Bank as "a condition of life so characterized by malnutrition, illiteracy and disease as to be beneath any reasonable definition of

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[22] supra, note 19. The figures and statistics on Third World poverty which follow are based on this Report.

human decency"[23]). These people had little access to safe drinking water or to sanitation, and were mostly illiterate. Only very few had access to health care, most were malnourished, and lived in squalid structures built of impermanent materials.

In the Third World, 52% of pregnant women are anaemic, and of the children born alive, 12.2 million die before the age of five. 80 million of those who survive never attend primary school, while 900 million of them remain illiterate at the age of fifteen. These latter figures represent only but a general impression about educational deprivation; they do not describe, for example, the quality of education which those who are lucky to attend school receive.

Life expectancy at birth for a child born in the Third World is sixty-three years, dropping to about fifty among the poorest of this category, referred to as the "least developed countries" (LDCs). For the countries of Sub-saharan Africa, who occupy the bottom of the scale, the statistic is grimmer still; life expectancy stands at only forty-six, compared to seventy-eight for the developed industrialized countries. Longevity depends greatly on good health, which, in turn, depends on adequate dietary standards. The average daily calorie supply per capita in he Third World in 1988-90 was

[23] World Bank, <u>World Development Report 1990</u> (Oxford: Oxford University Press, 1990) 24.

2,480 (2,070 for the LDCs), as against 2,500 which nutrition experts suggest as basic to good health. According to Clifford and Osmond,[24]

> ...nutritional deficiency is serious not only because it lowers resistance to disease, and permits a high incidence in poor countries of, for example, kwashiokor; malnutrition can also cause severe brain damage to young children. It has been calculated that the brain reaches 90 per cent of its normal structural development in the first four years of life, and it is known that during this critical period the brain is highly vulnerable to nutritional deficiencies; such deficiencies can cause as much as 25 per cent impairment of normal mental ability, and a deterioration of only 10 per cent is enough seriously to handicap productive life.

Nutritional deficiency, poor health, poor education, and the low productivity which all of these engender are closely associated with low income. Statistics suggest that enough food is produced in the world to adequately feed the entire population. However, although food production is said to have, on the average, increased by 18% in the 1980s, 240 million people go hungry daily in Sub-saharan Africa, while in South Asia 30% of babies are born underweight - indicating their mothers' inadequate access to food during gestation. The problem is poor distribution, and, what is more crucial, a lack of purchasing power among the hungry of the Third World. Low income and low productivity thus create and reinforce each

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[24] Clifford, J., and Osmond, G., World Development Handbook 1971, cited in Donaldson, P., Worlds Apart: The Development Gap and What it Means (Harmondsworth, Middlesex: Penguin Books, 1986) 40.

other in what is sometimes described as a "vicious cycle of poverty".

The indications of productivity, to the extent that they can be relied upon, confirm the enormity of ravages wrought in the Third World by the vicious cycle of poverty. In 1991, real GDP per capita stood at US 2,730 dollars (880 for LDCs), while GNP per capita was US 880 dollars (240 for LDCs). The GDP and GNP totals stood at US 3,100 billion (80 billion for LDCs) and US 3,410 billion (110 for LDCs) dollars respectively. Compare these figures with the industrial countries' GDP total of US 17,000 billion, GNP total of 18,140 billion as well as their per capita output and income of US 14,860 and 14,920 dollars respectively, and the profile of material deprivation in the Third World should emerge in bold relief.

But material deprivation is only a part of the problems that beleaguer the Third World. Another major problem is the prevalence of non-democratic governments in most of the countries, and the violation of human rights associated with authoritarianism. Most of these countries have only recently won their independence from colonial powers. Colonialism left a legacy of authoritarianism, use of force, and statism in the new states. That accounts in part for the rapidity with which nearly all the formally democratic regimes left behind by the departing colonialists, for example, in Africa, were replaced

by non-democratic structures.

There has been a noticeable shift in the 1980s and 1990s in most parts of the Third World towards democratization. In Asia, Pakistan, Bangladesh, Mongolia, South Korea, Taiwan, and the Philippines, all began moving in a democratic direction during 1980-90. However, there still exist in this region, semi- or partial democracies, such as those in Sri Lanka, Papua New Guinea, Thailand, Nepal and Malaysia. In Africa, a similar trend emerged, with multi-party elections in Benin, Cote d'Ivoire, Namibia, Ghana, Gabon, Botswana, Malawi, Zambia, Tanzania, and Senegal. Latin American states were not left out as Argentina, Ecuador, Chile, Guatemala, Bolivia, peru, El Salvador, Uruguay, Brazil, and Mexico, all adopted some form of political liberalization.

In spite of these developments and their potential to enhance human freedom, it is well to note that democratization does not necessarily mean at this point the empowerment of the majority of the citizens of the Third World to control their destiny. National demoratic state forms may serve to conceal the class character of the power structure, just as voting in elections does not in any way mean genuine political participation or local empowerment.

In most of the Third World, political power still typically resides with close-knit elite groups, which also control economic power, to the detriment of the majority.

Through oppressive government policies and laws, a majority of the citizens are systematically disenfranchised and alienated from the processes and institutions that shape their lives.[25]

Government policies typically tend to deepen and aggravate the gap between the haves and the have-nots. For example, agricultural development programmes in many of the countries in the Third World have tended to produce new classes of wealthy capitalist farmers while turning the peasants into landless labourers.[26] In some countries, laws are

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[25] See de Soto, H., The Other Path: The Invisible Revolution in the Third World (New York: Harper and Row, 1989), for details on how the state, through routine and arbitrary intervention, denies the poor or ill-connected access to the economy in Latin America. In rural Asia, the same result has been achieved by the Indonesian government through nationalization of forests, minerals and lands (through the Forestry Basic Act, the Basic Mining Act, and the Agrarian Basic Act): see, e.g., "Consolidation of Power in the Forestry Industry" in Environesia, Vol.4, No.2, April/August, 1990 (newsletter of Friends of the Earth, Indonesia). In Africa, the Land Use Act in Nigeria completes the picture: see, e.g., Francis, P., " 'For the Use and Common Benefit of All Nigerians': Consequences of the 1978 Land Nationalization", Africa, 54(3), 5 (1984). The United nations acknowledged the exclusionary effect of unchecked state intervention in the Third World in its Human Development Report 1991 (Oxford: Oxford University Press, 1991) thus: "Citizens use political influence to get access to government services. Politicians ensure that government resources are directed toward their supporters. And public officials exploit their official positions for personal reward."

[26] See, for example, Hayter, T., The Creation of World Poverty (London: Pluto Press & Third World First, 1983) 90-92. See also, Palmer-Jones, R., "Irrigation and the Politics of AgriculturalDevelopment in Nigeria" in Watts, M., ed., State, Oil and Agriculture in Nigeria (Berkeley:

promulgated sanctioning the expropriation of land from peasants for "development purposes" for little or no compensation. There is also a clear urban-bias in development policies, such that the rural areas, where about 70% of the Third World's poor reside are often deprived of social amenities, such as schools, hospitals, potable water, and electricity.

Oppression and disenfranchisement sometimes take the form of discrimination against a segment of society, such as women. In many parts of Africa, for example, women head households. Women also produce an estimated 50-60% of food on the continent. In some countries, the population of women outstrips that of men. Yet, there are laws in operation in these parts that deny women access to credit, and to land - the most important productive resource.[27]

For all their non-democratic style, Third World governments hardly encounter effective challenges to their position from their oppressed populations. Poverty deprives

University of California Press, 1987) 145; Watts, M., Silent Violence: Food, Famine and Peasantry in Northern Nigeria (Berkeley: University of California Press, 1983).

[27] See, for example, Howard, R., Human Rights in Commonwealth Africa (Totowa, NJ: Rowman and Littlefield, 1986), Chapter 8 - "Women's Rights", and Hafkin, N.J., and Bay, E.G., eds., Women in Africa (Stanford: Stanford University Press, 1976).

the masses of the means with which to confront the
institutions that are responsible for their condition.
Occasionally, there is infighting among the various groups
that constitute the ruling class, and one group, such as the
military, might gain the upper hand, but this seldom changes
the configuration, and the style of exercise, of power.
Opponents are often clamped into detention without trial, some
simply disappear without trace, while others are tortured,
killed, or hounded into exile.

Ironically, the massive abuse and violation of human
rights perpetrated by governing elites in the Third World is
often justified by the perpetrators as necessary to
consolidate state power to carry out "development" programmes.
Owing to the peculiar historical circumstances of the Third
World, the new states are routinely looked upon as the only
instruments with the required resources to begin to tackle the
monumental problems of underdevelopment. These states, having
come into being, not by a process of social evolution[28], but
by the contrivance of former colonial powers, lack a base in
popular support. This means that, for legitimacy, the
developmental state has only its own record of economic

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[28] The advanced industrial countries of the West are said to
have originated in social evolution : See, e.g. Poggi,
G., The Development of the Modern State: A Sociological
Introduction (Stanford: Stanford University Press, 1978).

development to depend on.[29] Unfortunately, the pursuit of economic development at all cost has meant the enthronement of statist and developmentalist policies that serve mainly to alienate, dispossess, and further impoverish the very populations that should be the beneficiaries of development.

Governments in the Third World are a heavily bureaucratized machinery. Decisions and policies that directly affect the population are often shrouded in secrecy, most often labelled as "TOP SECRET" in the records, while those bureaucrats who feel the pangs of conscience justify their complicity by the provisions of government regulations. The most popular of these in the bureaucracies of the former English-speaking colonial dependencies are the so-called General Orders (GO) of the Civil Service. Official Secrets legislation exist in some of these countries, enabling governments to tighten their control of information.

Development in the Third World, for the reasons given, is not a participatory process. Instead, it is something that states and their governments "do" to the people. What passes for development planning is a "top-down" and centralized strategy in which the opinion of the supposed

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[29] See, for a similar view, Whitaker, C.S., " Doctrines of Development and Precepts of the State: The World Bank and the Fifth Iteration of the African Case" in Sklar, R.L., and Whitaker, C.S., African Politics and the Problems of Development (Boulder, CO.: Lynne Rienner Publishers, 1991), Chapter 17, 333.

beneficiaries count for little. Development, especially of the "modernization" variety, involves deliberate intervention in the lives of people - the alteration of their physical and social environments as a way of changing attitudes and behaviour - basic rights are often compromised by development actors who are unaccountable to the people. International Development Agencies (IDAs), such as the World Bank, large private foundations, specialized agencies of the United Nations, and multinational corporations, who collaborate with governments to do development, are equally malfeasant.[30]

The major vehicle by which goverments and IDAs seek to effect socio-economic transformation in the Third World, especially in the rural areas, is the "project". The most common projects are agricultural, since the bulk of the population consists of rural dwellers who derive their livelihood from subsistence farming. Studies have suggested that complex motives underlie the establishment of these projects. Development actors, these studies find, employ tactics ranging from cajolery to bribery and outright use of force to create and impose projects on communities. In terms of their actual social, economic and cultural effects, most of the projects have brought upon not a few communities a harvest

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[30] See, among the burgeoning literature on the harmful effects of aid to the Third World, Adams, P., and Solomon, L., In the Name of Progress, 2nd. edn. (Toronto: Energy Probe Research Foundation, 1991).

of bitter experiences and untold hardship.[31]

Projects to construct large-scale dams frequently produce significant displacement of people from their land. The displaced people lose the status and security which the land provides, and they are seldom afforded any official process to register their protests or to have an independent assessment of the wisdom or legality of the project. Large-scale irrigation projects also do cause a lot of collateral damage to life in the target communities. They sometimes restrict access of the local people to water resources, trigger an extraordinary increase in water-borne or water-related diseases, and render waste huge areas of hitherto irrigated lands as a result of soil deterioration. Finally, large-scale commercial farming projects often press rural farmers into cash-crop production, alter their food systems, convert them into dependent wage-workers, and ultimately destroy the land and its ecosystem through intensive cultivation, deforestation (and consequent erosion), and declining soil fertility.

Perhaps some of these harms could be mitigated or even averted completely if the affected communities were

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[31] See, for example, Cernia, M.M., <u>Social Issues in Involuntary Resettlement Processes</u> (Washington, D.C.: World Bank, 1987); Cernia, M.M., <u>Internal Refugees and Development-Caused Population Displacement</u>, Development Discussion Paper No.345 (Boston, Mass.: Harvard Institute for International Development, 1990).

involved in the planning, implementation, and monitoring of these projects.[32] Compensation for all harms inflicted on communities is difficult to compute, but the problem is further compounded by the powerlessness of victims to enforce their claims, whatever may be the "fair compensation" determined by development officials.

All told, therefore, the prevailing condition of the Third World, speaking in aggregate terms, is one of poverty in all its ramifications. However, the 1980s and early 1990s have witnessed historic changes in global patterns of economic development. These changes have balkanized the group of countries hitherto referred to as the "Third World" into new categories of winners and losers in the international economic order. For example, the Newly Industrialized Countries (NICs)

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[32] See, for a similar view, Chambers, R., Poverty and Livelihoods: Whose Reality Counts?, Institute of Development Studies Discussion Paper No.347, prepared for the Stockholm Roundtable on Global Change, 22-24 July, 1994, and commissioned by the UNDP (Brighton, UK: Institute of Development Studies, 1995). The overview of research results on sustainable livelihoods in various parts of the Third World suggests that the poor of these countries, who invariably depend directly on the land for their survival, do possess better ideas on the management of the land and its resources than the "development experts" who hardly ever involve the latter in the planning and implementation of development projects. The domination of the state structure by urban elites with a bias against grassroot participation in decision-making and implementation at all levels is part of the "weakness" of Third World states described by Gunnar Myrdal: see his Asian Drama: An Inquiry into the Poverty of Nations, 3 vols. (New York: Pantheon, 1968).

of East Asia bid fair to join the ranks of the developed world in the no distant future, so impressive has been their rate of economic growth. On the other hand, Sub-Saharan Africa and other parts of the continent have experienced absolute economic decline, and future prospects appear gloomy. The collapse of communism has also swelled the ranks of the Third World, as Eastern Europe and the former Soviet republics attempt to rebuild their economies and societies. In between these extremes are the countries of Latin America, other parts of Asia, and the Middle East, who have achieved varying degrees of success in repositioning themselves favourably in the new global dynamics. The implications of this differentiation for development will be considered shortly.

4. EXPLANATIONS FOR POVERTY: DEVELOPMENT MODELS, STRUCTURAL PECULIARITIES, AND THE INTERNATIONAL ECONOMIC ORDER

There is a basic consensus among economists that poverty in the Third World is product of a serious discrepancy between consumption and production, which, in turn, is caused by low technology. The assumption is that high technology produces a society with a high level of specialization and exchange, engendering high productivity and eliminating the discrepancy. Beyond this, however, there is a qualitative disagreement on how poverty may be explained, and what policy

prescriptions may be appropriate to solve the problem.

There are, broadly speaking, two strands of thought on the causes of poverty: the neo-classical and the structural.

4.1. THE NEO-CLASSICAL SCHOOL[33]

Neo-classical economic theory attributes poverty in the Third World to a lack of an appropriate mix of the fundamentals for economic take-off and self-sustaining growth, namely, population, natural resources, technology, and capital formation. The absence of these fundamentals, the theory goes, limits opportunities for the emergence of capitalist investors, or for profitable investment. Limited opportunities for capitalist investors and profitable investment preclude a rise in productive capacity. Persistent poverty is the result of low productive capacity.

For the neo-classicists, the solution to the problem of poverty is simple. Countries of the Third World can improve their productive capacity by creating conditions favourable to

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[33] What follows is the writer's synthesis of the writings of eminent Neo-classicists, in particular, Rostow, W.W., The Stages of Economic Growth: A Non-Communist Manifesto (London: Cambridge University Press, 1960); Lewis, W.A., The Theory of Economic Growth (Homewood, Ill.: Richard D. Irwin, 1955); Brenner, Y.S., Theories of Economic Development and Growth (New York and Washington: Praeger Publishers, 1966); and Hirschman, A.O., The Strategy of Economic Development (New Haven: Yale University Press, 1958).

private enterprise. The idea is that as private investors infuse the economy with much-needed capital, profitable returns would lead to greater savings and further investment, and the consequent prosperity would "trickle down" to the rest of the population in the form of employment, rising wages, and higher living standards.

The optimistic assumptions of this simple formula were predicated on the success of the post-Second World War economic reconstruction effort in Europe. Science and new technology, which were put to such horrifying use during the war, now seemed to hold expanded opportunities for combating poverty and many other problems that beset the world. The resuscitation of the Western European economies appeared to have vindicated the Keynesian[34] argument that, in times of depression, increased public spending was key to containing and neutralizing unemployment and industrial overcapacity.

Numerous studies demonstrated the relationship between economic growth and the social and economic transformation that had taken place in the developed

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[34] Keynesian economics is that branch of Western macroeconomic theory, developed by Lord John Maynard Keynes in the 1930s, to explain the cause of economic depression and the unemployment of that period. The theory attributes depression to insufficient aggregate demand, and prescribes the solution to be government expenditure to raise aggregate demand, which, in turn, should create jobs by activating idle and/or underutilized resources: see Todaro, supra, note 11, at 536.

countries. This transformation included the redistribution of income to benefit the poor, industrial diversification, and high standards of living. These studies also demonstrated that economic growth and political democracy were part of the same process of development.[35] As living standards rose, human preoccupation tended to shift away from existential problems to questions associated with the enhancement of the human possibilities; the satisfaction of this craving through education and political participation produces an informed and articulate populace which would force government to explain and justify its actions and decisions.

The neo-classical formula was not about explaining the past - how poverty arose in the Third World - but about improving the present and the future. Most Third World countries were colonies, but now they had achieved independence; times had changed, and it was up to them to seize the opportunities available under the new dispensation. For the leaders of the emergent African and Asian countries, the upbeat mood of the era was infectious. Development - the alleviation of poverty - and the speed with which it was brought about, was crucial to their political power and

[35] See, for example, Lipset, S.M., "Some Social Requisites for Democracy: Economic Development and Political Legitimacy" American Political Science Review, 53, no.1, 69, 75 (1959); Moore Jr, B., The Social Origins of Dictatorship and Democracy (London: Allen Lane, 1967).

support. Even the leaders of the older Latin American countries of Brazil, Argentina, and Venezuela, also shared this optimism.

Unfortunately, however, these forecasts failed to materialize. When superimposed on the economic and social heritage of the new countries, the neo-classical formula soon proved ineffective in the struggle against poverty. Rapid population growth, for example, made significant progress in the provision of education and health programmes seem like only a drop of water in the ocean. Furthermore, there existed in these countries sharp social cleavages which seemed to distort the overall results of economic growth: some groups benefitted from growth, but others did not. The result was that even though some economic growth occurred, millions remained unaffected by its impact. Besides, the pace of growth was too slow to meet the exigencies. Compared to the rate of growth in the developed countries, it proved insignificant, and the gap between the new countries and the latter continued to widen.

This less-than-satisfactory performance of the neo-classical paradigm compelled a change of attitude on the part of Third World countries. Optimism was soon replaced by growing pessimism, fueled largely by what was perceived as the inconsistencies and weaknesses of this model. To the leading development strategists of the time, the United States

symbolized the Great Society, the model of development which Third World countries must seek to copy. However, a combination of events which occurred in the 1960s raised doubts about the viability of the model. First, the Vietnam War. The US failed to win the war inspite of its technological superiority. Second, the assassination of the Kennedy brothers. This brought in its wake the disappointing awareness to many that even in the Great Society democracy was not immune from instability. Finally, the race riots in several US cities. This exposed the enormity of poverty and inequality in the midst of plenty. The upshot of these events was a recurring question: if this model contained such flaws, what were its chances of availing the Third World?

The decisive factor for skeptics, however, was the economic turmoil triggered by the sudden and sharp increases in the price of crude oil by the Organization of Petroleum Exporting Countries (OPEC) in 1973/74. The oil crisis occurred in tandem with dramatic increases in real interest rates, pushing economic development programmes in parts of the Third World - especially the non-oil producing States - into steep reversals from which they never quite recovered. The situation was further compounded by the crash of commodity prices in the same period. Rising interest rates and declining terms of trade was the combination that led most of the Third World to the debt crisis that currently defines their development

capabilities. All of this served to aggravate the doubts regarding the viability of the neo-classical model, as the goal of development slipped further beyond the reach of most Third World countries.

4.2. THE STRUCTURALIST SCHOOL[36]

Amid growing disenchantment with the neo-classical model, academic writers began to take a second look at marxist and neo-marxist interpretations of underdevelopment in the Third World. This shift in interest, which reached critical mass at the turn of the 1960s, was popularized in the writings of Andre Gunder Frank and Paul Baran. The theory of "the development of underdevelopment" which these writers put forward was a direct attack on the neo-classical perspective on the causes of poverty.

Rather than take the past as given and focusing on the present, as neo-classicists hold, the structuralist approach of Frank and Baran adopted an historical explanation to the understanding of existing realities. This approach held

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[36] What follows is the writer's synthesis of the writings of Frank, A.G., "The Development of Underdevelopment", Monthly Review, 18, no.4 (1966); Baran, P., The Political Economy of Growth (New York: Monthly Review Press, 1957); Amin, S., Accumulation on a World Scale: A Critique of the Theory of Underdevelopment (New York: Monthly Review Press, 1974); and Arighiri, E., Unequal Exchange: An Essay on the Imperialism of Trade (New York: Monthly Review Press, 1972).

that, contrary to the neo-classical assumption that poverty was the inevitable lot of the traditional societies, these societies were reasonably self-sufficient before their contact with world capitalism. Poverty followed the absorption of these societies into a world economy in which surplus extracted from them financed the development of Europe. In other words, capitalism and the "modernizing" mission which was associated with its penetration of the Third World were not aimed at solving problems of poverty, but to cause them.

The structuralist analysis of poverty begins with certain basic propositions about the state, societal institutions and the creation of wealth in society. The creation of wealth and the allocative decisions that go with it, are both determined in any particular society by the mode of interaction existing in that society. Institutions (defined as repetitive patterns of behaviour) shape modes of interaction. For this reason, the analysis proceeds, in every society, the class or group that controls political or economic power tends to ensure that the institutions of that society operate in the interests of that group or class.

At the international level, structuralists explain the poverty of nations by the historical evolution of a highly unequal power relationship between the poor and the rich countries within the international capitalist system. The direct outcome of this relationship was an international

division of labour in which the poor countries provide the raw materials for the industries of the rich. While industrialization has produced wealth for the latter, however, the production of raw materials for meagre and fluctuating returns in the international market has only produced poverty for the former.

Colonialism bequeathed a dualistic economy and society to Third World countries. In a typical third world country, the dualistic economy consists of an export enclave and a hinterland. The export enclave exists to produce raw materials for export. It is a sophisticated economy, operated by and for the benefit of foreign firms, their local partners, associates and friends. The bulk of the profit or surplus from the export trade is repatriated overseas in the form of profits, dividends, interest, and remitted expatriate salary and allowances. The hinterland, on the other hand, consists of the masses of peasants, who barely eke out a living by subsistence farming, using rudimentary technology. The conditions of life in the hinterland are unremitting, bereft of the attributes of modern civilization, and unable to support the material needs of the population. The hinterland serves as a labour reserve for the export enclave; backed by state power, the export enclave induces and coerces the peasants to work in it for starvation wages.

In each Third World country, there is a small group

- consisting of entrepreneurs, landlords, senior bureaucrats, public officials, trade union leaders - which enjoys high income, social status, political power and prestige. The principal interest of this group lies in perpetuating the international capitalist system by which their privileges are assured. To this end, this elite ruling class serves, and is rewarded by, special interest power groups, such as multinational corporations, and international donor agencies. The activities of this group inhibit reforms that might benefit the wider population.

The structuralist paradigm takes the increasing divergences in income and standards of living between the urban elites and the rural-dwelling peasants, and between the Third World and the developed nations, as a chronic phenomenon, not amenable to correction by a mere tinkering with the status quo. Therefore, it advocates a replacement of existing structures and institutions with new internally-generated strategies of development. For example, structuralists blame the institutions that permit foreign investors to repatriate investable surpluses, rather than reinvest in the host countries, for the low capital formation in these countries. When strategic investment decisions are allowed to be made by local and foreign investors, the decisions would only serve to enhance the power and privilege of these investors to the impoverishment of the masses.

At the international level, structuralists maintain
that, owing to their weak position in the international
economy as primary producers, it is impracticable for Third
World countries to replicate the development strategy of the
now industrially advanced countries. To begin to address the
problem of poverty, therefore, these countries must break
their dependence on external demand for commodities, turning
inwards instead to create their own supply-side dynamic by
expanding their domestic industrial sectors. At the domestic
level, disengagement must be accompanied by policies aimed at
containing the power and influence of foreign investors and
their local appendages. This entails democratization of
political power and national assertion of control over the
commanding heights of the economy, such as banking,
exploration for and exploitation of minerals, industries, and
commerce. The long-term objective of the democratic government
must be to transform the basic property relations, capture and
reinvest economic surpluses, and generally restructure the
economy to increasingly provide productive employment
opportunities for the masses of the population.

The structural approach was met with a barrage of
criticisms.[37] It was pointed out that contrary to the bleak

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[37] See, e.g., Warren, B., "Imperialism and Capitalist
Industrialisation", New Left Review 81 (1973); Weeks,
J., and Dore, E., "International Exchange and the Causes
of Backwardness", Latin American Perspectives, Vol. 6,

portrayal of the results of capitalist penetration, some countries infact benefitted from the relationship of dependence which they maintained with the colonizing powers. Canada, Australia, New Zealand, some Latin American countries - notably Brazil, Argentina, and Uruguay, before the Second World War - were cited as examples. In the other colonies, the benefit was not as obvious, but even then, whether the people became poorer was a contestable point. What this contrast suggested, therefore, was that poverty was not an automatic or inevitable consequence of dependency. Much depended on the variable nature of the incorporation of these colonies into the world economy. In the process of incorporation of the colonies, factors such as the indigenous population numbers, ownership structures, and the kinds of products produced for the world market were critical in the creation of wealth or the perpetuation of poverty.[38]

Where the European colonizers were outnumbered by the indigenous population, as in Africa and Asia, they could not put their experience and techniques to use in, for example, developing commercial agriculture. By contrast, the

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62 (Spring, 1977); Brenner, R., "The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism", New Left Review, No. 104, 25 (July-August, 1977).

[38] See, for an elaboration of the arguments pro and con, Foster-Carter, A., "The Mode of Production Debate" New Left Review, No. 107, 47 (January-February, 1978).

indigenous populations of the dominions of Canada and Australia were pushed out as a result of some fairly intense wars in the early days, paving the way for development through modernization of ways of life by the settlers. Also, the relatively low population at the time the settlers arrived in the dominions meant that key productive resources, such as land, were abundant. This was not the case in the heavily populated colonies of Africa and Asia. In these areas, Europeans tried to develop agriculture by confiscating lands, and establishing large plantations and estates in which the local population laboured for starvation wages. While smallholder agriculture tends to produce wealthy individual farmers and rapid development, large slave estates and plantations has only tended to produce rural stagnation and poverty.

The nature of the product cultivated or the mineral extracted from the colonies also enhanced or retarded the prospects for development in the colonies. Temperate agricultural products, and some tropical products such as cocoa and coffee, require extensive transport networks and tended to create multiplier effects conducive to rapid development. On the other hand, a great many tropical products - palm oil, kernels, nuts, sisal etc - are not cost-effective in terms of processing, and the secondary effects of their production are minimal. The extraction of minerals was more

lucrative, but it provided few jobs and concentrated wealth in the hands of a few in the export enclaves. Foreign companies monopolized the extractive industry, and paid very low wages. The production of export crops was also carried out on plantations, which in some places used slave labour. The effect of this was the emergence of economic enclaves. Thus, while the production of some products generated the propitious environment for development, that of others only deepened inequality and worsened the conditions of poverty.

These factors do not completely explain the multifarious patterns of change that have occurred for better or for worse in the Third World, critics contend, but they do provide a better way to understanding the situation than does the dependency theory. Recently, Alan Gilbert[39] argued that even though dependency seems to make development harder, it does not preclude it. The crucial factors, according to him, are: 1/ the ability of dependent countries to adapt to or to avoid the problems of dependency, and 2/ the nature of the dependency. Some countries are better able than others to sidetrack the constraints associated with dependency, and to convert the advantages to positive development. Among the group of developed countries today are such countries as

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[39] Gilbert, A., An Unequal World: The Links between Rich and Poor Nations, 2nd ed. (Scarborough, Ontario: Nelson Canada, 1992).

Canada, Denmark, Switzerland, and the Netherlands, which are all dependent on more powerful neighbours. In addition, Canada and Denmark are not essentially manufacturing nations; they are more appropriately classified as primary producers. Yet, these countries benefit from high levels of per capita income. Other small countries that have benefitted from dependence on more developed countries include South Korea, Hong Kong, Singapore, and Taiwan.

On the nature of dependency, Gilbert argued that oil-producing countries definitely have an advantage, despite the fact of their dependent primary-producing status in the world economy, over other countries of similar status which produce exports of limited world demand, in the matter of escaping from the constraints of dependence. These latter countries seem to be trapped in the system. But if the ability of the former countries to embark on their own development path is constrained by dependence, there is no inevitability about that outcome.[40]

4.3. SUMMARY AND EVALUATION

The continuing debate about the causes of poverty in the Third World and the varying policy prescriptions underline

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[40] See, for contrary arguments, Frank, A.G., "Dependence is Dead, Long Live Dependence and the Class Struggle: A Reply to Critiques", _Latin American Perspectives_, Vol.1, 86 (Spring, 1974).

the complexity of the subject. It is unlikely that any single paradigm can adequately explain poverty. Nevertheless, the debate has markedly enlightened ways of thinking about development. Most people no longer consider poverty to be entirely a function of internal factors alone; there is increasing realization that it is the outcome of the internal impact of incorporation into the global economy. As well, few would argue today that capitalist penetration of Third World countries, and the relationship of dependence which has resulted from that, necessarily engendered poverty; much would seem to depend on the nature of the penetration and the kind of dependency which resulted.

Still, questions remain about the sustainability of the neo-classical model of development, and, more fundamentally, about its ability to redeem the Third World from deepening poverty. The exponential trends in resource and nature consumption which characterize this model are bringing its methods into disrepute. Concerns are being expressed that Western individualism, and its bias for increasing consumerism and mobility, is undermining nonmaterial values essential to the survival of society and global responsibility, is ecologically damaging, and may be approaching economic limits.[41]

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[41] See WCED, (The Brundtland Report), supra, note 21. See also, Latouche, S., In the Wake of the Affluent Society:

The global economy falls ever shorter of the goal of providing stable, efficient, and fair conditions for all. Gross distortions of the competitive mechanism prevail, and the system appears incapable of correcting them. Protectionism by the industrialized countries, strategic alliances in the areas of research, production and marketing, as well as oligopolies in such key sectors as transport, communications, and trade, effectively prevent free access to world markets. Multinational corporations bring to bear, with devastating effect on less endowed participants in the market, the advantages which their ownership of extensive resources confer, crowding these participants out, counteracting locational advantages, and distorting prices. These rigidities, and the escalating indebtedness which they spawn, do not bode well for the development aspirations of Third World countries. Indeed, some commentators conclude that for the foreseeable future most developing countries will have no chance of catching up with the developed countries and asserting themselves internationally.[42]

Today, after more than three decades of

An Exploration of Post-Development (London: Zed Books Ltd, 1993); Goldsmith, E., et al, The Future of Progress (Berkeley, Calif.: The International Society for Ecology and Culture, 1992); and Elliot, J., An Introduction to Sustainable Development (London: Routledge, 1994).

[42] For example, Gilbert, A., supra, note 39, 58-59.

experimentation with the neo-classical model, there are more

hungry, sick, and vulnerable people in the Third World than in

the days before political independence.[43] In general, trying

to find a country that has successfully broken through the

mold of poverty by applying the neo-classical formula entails

difficulty. As Giovanni Arrighi[44] noted recently, whatever else

has changed within the group of high income states in over a

century and a half, none of these states has left the group,

and Japan is the only new member. Whether the NICs, often

represented as vindication of the formula[45], can sustain their

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[43] See World Bank, World Development Report 1990: Poverty
(New York: Oxford University Press, 1990): the gap
between the Third World and the industrialized countries
is growing rather than decreasing. The Report used the
per capita GDP differential to illustrate this point.
Using data for 86 Third World countries, the UNDP
compared the average income of these countries in 1960
and 1990 with those of the industrialized countries
during the same period. The results: in 1960, the average
income of a Third World country was 17% of the
industrialized world avreage; in 1990 this had declined
to 15%. Only 26 of the 86 countries showed a relative
increase in income, while some recorded precipitous
decline. Only four states - Barbados, Cyprus, Saudi
Arabia, and Oman - exceeded 50% of the average per capita
income for industrialized countries.

[44] Arrighi, G., "World Income Inequalities and the Future
of Socialism" New Left Review 189 (September-October,
1991).

[45] See, for example, Belassa, B., The Newly Industrializing
Countries in the World Economy (New York: Pergamon Press,
1981); McCord, W., The Dawn of the Pacific Century:
Implications for Three Worlds of Development (New
Brunswick: Transaction Books, 1991); and Porter, M., The
Competitive Advantage of Nations (London: Macmillan,
1990).

momentum of economic growth, and whether their example can be generalized for other members of the Third World, remains to be seen.

The celebration of the "East Asian Miracle"[46] in development literature often manages to minimize the fact that the East Asian economic success actually challenges neoliberalism.[47] Sometimes the four East Asian countries are referred to as the "dragons" that have slain the scourge of poverty by sheer dint of hard work and a conscientious implementation of the neo-classical economic blueprint.[48] Yet, the evidence indicates that, apart from Hong Kong, the other states have played a far more protectionist and interventionist role in their economies than the liberal economic development model would accomodate. They have, among other things, manipulated interest rates and credit channels in order to achieve export success. This export-oriented industrialization is often conflated with free trade in most

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[46] World Bank, The East Asian Miracle: Economic Growth and Public Policy (New York: Oxford University Press, 1993).

[47] See, for example, Thatcher, M., "The Triumph of Trade" Far Eastern Economic Review 23 (September, 1993).

[48] See ibid., and Schlosstein, S., Asia's New Little Dragons: The Dynamic Emergence of Indonesia, Thailand and Malaysia (Chicago: Contemporary Books, 1991).

of the literature.[49]

Secondly, there is a tendency to ignore the significance of historical factors in the development of these countries. But, as some historical accounts indicate, the East Asian countries share a common cultural heritage in Confucianism, from which emanates an emphasis on high education levels, and a highly motivated population, giving rise to a strong state and an effective bureaucracy.[50] In addition, South Korea and Taiwan had colonial links with Japan; these links with a rapidly rising power, had important consequences for development after the Second World War.[51]

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[49] For a good collection of analyses of the role of the state in the East Asian economic development experiment, see Henderson, J., and Applebaum, R.P., eds. State and Development in the Asian Pacific Rim (Newbury Park: Sage, 1992).

[50] See Kahn, H., "The Confucian Ethic and Economic Growth" in Seligson, M.A., ed. The Gap between Rich and Poor: Contending Perspectives on the Political Economy of Development (Boulder: Westview Press, 1984) 78, and Hofheinz Jr., R., and Calder, K.E., The Eastasia Edge (New York: Harper and Row, 1982).

[51] See Eckert, C.J., Offspring of Empire: The Koch'ang Kims and the Colonial Origins of Korean Capitalism 1876-1945 (Seattle, WA: University of Washington Press, 1990). See also Menzel, U., "The Newly Industrializing Countries of East Asia: Imperialist Continuity or a Case of Catching Up?" in Mommsen, W.J., and Osterhammel, J., eds. Imperialism and After: Continuities and Discontinuities (London: Allen and Unwin, 1986), and Cumings, B., " The Legacy of Japanese Colonialism in Korea" in Myers, R.H., and Peattie, M.R., eds., The Japanese Colonial Empire 1895-1945 (Princeton, NJ: Princeton University Press, 1984).

Finally, after 1945, East Asia was a major Cold War arena. The Superpower rivalry in Korea ensured a steady flow of US economic and military aid to South Korea and Taiwan, as well as privileged access to the North American market at a time of rising demand. Many other Third World countries, because of their relatively less strategic role in the Cold War security policy of the US, were not accorded such privileges.

The option of disengagement or "delinking" from the global market, after the collapse of the communist project and its policy of socialist internationalism, is not a real one for Third World countries either. The toned-down variant of the option, recently suggested by Samir Amin, departs very little from that which has been extensively experimented with thus far with negligible success. According to Amin, Third World countries might take advantage of the differentiated and pluralistic character of the global political economy of the 21st Century to construct for themselves new potential trajectories of development combining some degree of integration into the global market with socialist priorities, emphasizing demoratic control over national destiny.[52]

While the communist project lasted, however, only China and Cuba achieved a measure of success with this option. Of course, the enormous size of China marked it apart as a

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[52] Amin, S., Delinking (London: Zed Press, 1990).

special case. For a long time it managed to produce its own food, technology and manufactures, and to forge a distinct society - an attitude to the rest of the world that has only recently been significantly revised. But other smaller countries, such as Kampuchea, Burma (now known as Myanmar), Nyerere's Tanzania and Allende's Chile, had greater limitations. Available statistics on Cuba indicate that there was an improvement in the living standards of the population, even though the country remained a monocultural economy, depending on sugar.[53] It is doubtful, however, if these two countries would have achieved much without Soviet subsidy.

Nevertheless, the experience of China and Cuba offer some useful lessons in development strategy that cannot be ignored. Given the severity of the impact of external policies on their economies, Third World countries have little choice than to effect major domestic structural changes as a fundamental step in what is unarguably a tortuous journey ahead. Ultimately, it is only a combination of this and the international political will to ease the strictures and rigidities of the global market that might offer these countries a window of opportunity to overcome poverty.

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[53] See, for example, Brundenius, C., "Growth with Equity: The Cuban Experience" World Development 9, 1083-1096 (1981).

5. THE NEW INTERNATIONAL CONTEXT OF DEVELOPMENT

As we pointed out earlier, the Third World is no longer a homogeneous collection of countries bound together by a common heritage of poverty. The international scene has undergone dramatic changes in the past decade, with profound implications and consequences for the context of development within which the countries of the Third World must operate in the 21st Century. While it may be true, as some commentators insist,[54] that these changes are only a continuation of earlier trends, there is undoubtedly much that is new and remarkable in the direction which the changes have taken and the differential regional effects which they have on development possibilities.[55]

5.1. OVERVIEW OF NEW TRENDS, OPPORTUNITIES AND CHALLENGES

One of the major changes in the global economy in the decade of the 1980s is the globalization of production and trade. This was made possible by rapid advances in technology

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[54] For example, most World-Systems theorists. For illustration, see Chase-Dunn, C., Global Formation: Structures of the World-Economy (Oxford: Basil Blackwell, 1989), and Wallerstein, I., Geopolitics and Geoculture: Essays on the Changing World-System (Cambridge: Cambridge University Press, 1991).

[55] An excellent articulation and analysis of these changes is contained in Stallings, B., ed., Global Change, Regional Response (Cambridge: Cambridge University Press, 1995).

which have, in turn, revolutionized communications and the organization of economic activity across the globe. Technological innovation in the areas of materials science, biotechnology, and microelectronics, for example, has greatly facilitated the transition from mass production to flexible specialization.[56] Together with improvement in transport and communications, this development has made it possible for multinationals to spread production around the globe. They can produce a range of components on one side of the globe and assemble them on another.

Increasing flexibility in the movement of capital and personnel means that these corporations can take advantage of low wage rates in one region, government incentives in another, and perhaps lax environmental controls elsewhere. International conglomerates offering producer services in accounting, hotel management, insurance, transport and communications, have sprung up as well to support the new trend in production and trade.

Globalization represents opportunities as well as daunting obstacles to Third World countries. While

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[56] See Kaplinsky, R., "From Mass Production to Flexible Specialization: A Case Study of Microeconomic Change in a Semi-industrial Economy" World Development 22, 3 (1994); Hirst, P., and Zeitlin, J., "Flexible Specialization versus Post-Fordism: Theory, Evidence and Policy Implications" Economy and Society 20, 1 (February, 1991); and Piore, M.J., and Sabel, C.F., The Second Industrial Divide (New York: Basic Books, 1984).

opportunities have opened somewhat for some of these countries to engage in low-value-added production, the chances of their breaking into high-value-added production in the long run seem to have been considerably narrowed by the increased level of integration. But, while the accent remains on technological innovation, low-value-added production cannot take a country very far.

For the same reason, those countries that export only raw or semi-processed materials will face serious difficulties as demand for this kind of input collapses to a minimal level. Furthermore, access to markets under the new dispensation and the ability of a country to rise in the production hierarchy both seem to depend on the manner of the country's participation in the global economy. The prospects of success as independent producer and trader are becoming very limited. Of course, the difficulties are less in the case of primary exports with established markets. The crude oil market may, in fact, expand to include Eastern Europe. But countries that wish to concentrate on manufactured exports face two serious challenges: keeping up with advances in technology, and breaking through protectionist barriers. Brazil's experience with US protectionism in the steel and footwear industries exemplifies this point.[57]

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[57] See Gereffi, G., and Korzeniewicz, M., "Commodity Chains and Footwear Exports in the Semiperiphery" in Martin, W.,

On the other hand, as the East Asian economies demonstrate, belonging to a trade and production network might mean the difference between success and failure.[58] One commentator has described the result of the differing approaches which have come to characterize the participation of Third World countries in the global market thus:

> Some [T]hird [W]orld firms have themselves become significant foreign investors (the East Asian NICs), while the majority cannot even sell in their domestic markets without high levels of protection (Africa, South Asia, and much of Latin America). As these levels of protection decline, the situation of the latter group becomes even more precarious.[59]

A second major development on the international scene is the collapse of communism and the end of the Cold War. The US-Soviet rivalry during the Cold War had spilled over into the Third World, creating satellite states who used political loyalty to gain access to the economic and military

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ed., _Semiperipheral States in the World-Economy_ (Westport, Conn.: Greenwood Press, 1990) 45.

[58] See Oman, C., _Globalisation and Regionalisation: The Challenge for Developing Countries_ (Paris: Organization for Economic Cooperation and Development (OECD), 1994), and Gereffi, G., "Global Production Systems and Third World Development" in Stallings, B., ed., supra, note 55, 100.

[59] Stallings, B., "Introduction" in Stallings, B., ed., ibid., 10.

resources of the rivals. With the end of the Cold War, a major source of assistance dried up for those countries that relied on the Soviet Union for economic support as well as an alternative model of development. These countries have all moderated their positions and embraced free enterprise, with the exception of Cuba and North Korea (where significant concessions have nevertheless been made).[60]

Opinions are divided on what the implications of this development are within the US sphere of influence. Some commentators see lessened US interest in its former "client states" insofar as that interest was meant to shore up support against the advance of communism. Others suggest that the end of the Cold War opens the way for the unchecked intervention of the US in all corners of the globe. This possibility cannot be ruled out. However, given the current budget and trade deficits of the US economy and the increasing quasi-isolationist demand of the populace for domestic use of available resources, it is unlikely that such will in fact be the case anytime soon. Two things are clear, however. First, declining US economic power will mean a reduction of aid to the Third World. Second, of the available resources, more will be directed towards the economic rejuvenation of the Eastern

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[60] See Halliday, F., _From Kabul to Managua: Soviet-American Relations in the 1980s_ (New York: Pantheon Books, 1989).

European countries.[61]

The end of the Cold War has also brought into sharp focus competition among capitalist powers which had been temporized by the US-Soviet rivalry. For about two decades after the Second World War, the US dominated the capitalist world by dint of its economic power and technological superiority. US multinationals were instrumental in the post-war economic reconstruction of Europe, and the two rising capitalist powers - West Germany and Japan - had been obliged to rely on US nuclear capability for their defence needs. In most of the Third World, the quality of US exports and the generosity of its aid guaranteed it a position of influence.

But with the recovery in the 1970s of Europe and Japan from the war, differences became noticeable in the way that the details of the capitalist philosophy were approached in the US and in the other countries, especially Japan. Japanese and European brands of capitalism appeared to be more dynamic in terms of growth and productivity. Important differences have been identified at the end of the Cold War between the US and Japanese brands in the areas of savings and

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[61] See, for a similar view, Chege, M., "Remembering Africa" Foreign Affairs 71, 1, 146 (1991-92). See also, Lowenthal, A., "Rediscovering Latin America" Foreign Affairs 69, 4, 27 (1990), and generally, Rizopoulos, N.X., ed., Sea-Changes: American Foreign Policy in a World Transformed (New York: Council on Foreign Relations Books, 1990).

investment, the relationships between public and private sectors and between capital and labour, as well as views about equality and national security.[62]

As the move towards regionalism gathers momentum in Europe, North America, and Asia, the differences between models of capitalism will have profound impact on the development chances of Third World countries. Some countries will gain from their association with the most dynamic of the industrial economies, while the sluggishness of the less dynamic will rob off on the other countries. For example, East and South-East Asia are already benefitting from Japanese investment and finance. South Asia expects to benefit from a similar association with Japan, just as other Latin American countries hope to, like Mexico, (and later Chile), be incorporated into the US market.

It is not at all clear that the US economy will generate in a hemispheric American bloc the kind of dynamism which the Japanese economy has generated in the East Asian economies. Most of the countries in the American hemisphere

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[62] See Thurow, L., Head to Head: The Coming Battle among Japan, Europe, and America (New York: Morrow, 1992); Hart, J., Rival Capitalists: International Competitiveness in the United States, Japan, and Western Europe (Ithaca, NY.: Cornell University Press, 1992), and Garten, J., A Cold Peace: America, Japan, Germany, and the Struggle for Supremacy (New York: Times Books, 1992).

may even be left out of the regionalization process.[63] Nevertheless, it seems inevitable that in the coming years, given the privileges - access to market, technology, and finance - which regionalization bestows on weaker members, all of those economies that are or will be among the incorporated will fare better than their counterparts, which may be further marginalized by this trend.

Another trend which will have a major impact on the development possibilities of the new era is the emergence of new patterns of development finance. Asian countries have come to rely mainly on Direct Foreign Investment (DFI), Latin American countries, Portfolio Investment (PI), and African countries, Grants and Concessional Loans (GCLs). According to

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[63] It is perhaps in realization of this possibility that some South American countries have begun a process of trade liberalization among themselves that may develop shortly into a trading bloc. The embryo trading bloc called Mercosur, or the Southern Common Market, comprises Argentina, Brazil, Uruguay, and Paraguay. Chile became an associate member of the group in June, 1996, and Bolivia and Venezuela are about to become members. The Mercosur membership is reported to have 200 million consumers, with $800 billion in gross domestic product, and over $63 billion in total exports. In the five years since the pact creating the bloc was signed (the pact became official on January 1, 1995), trade within the bloc is said to have increased from $4 billion to $14.4 billion. The ultimate aim of the bloc is to metamorphose into a South American Free Trade Area (SAFTA): See Serrill, M.S., "Keep It in the Neighborhood. Forget NAFTA - South America is busy building its own powerful trading bloc, called Mercosur" Time magazine, 34-35, August 26, 1996.

Barbara Stallings[64], the DFI possesses distinct advantages over the other two forms of finance. It guarantees access to markets and technology, and instigates only minimal exchange rate volatility. GCLs are given under very generous terms of amortization, but are available only to the poorest of countries who often lack the capacity to put them to effective use. The implications of these variations for economic growth are obvious.

Associated with the shifting patterns of finance is the role of "conditionality" in the determination of development policies and strategies in those countries that are compelled by rising levels of debt to seek loans from international financial institutions, such as the World Bank and the International Monetary Fund. These loans are conditional upon the borrowers' introducing neo-liberal economic policies of macroeconomic stabilization, deregulation and privatization of public services, liberalization of trade, and the promotion of foreign investment. To these, bilateral donors have recently added environmental and political conditions. Even though private investors seem to provide more capital flows in the 1990s than the international financial

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[64] Stallings, B., supra, note 55, at 11. See also Stallings, B., "The Role of Foreign Capital in Economic Development" in Gereffi, G., and Wyman, D.L., eds., Manufacturing Miracles: Paths of Industrialization in Latin America and East Asia (Princeton, NJ: Princeton University, 1990) 55.

institutions, there has been no attenuation of the economic policy requirement for creditworthiness.

The socio-economic and political effects of these laissez-faire policies have left many a State in Africa and Latin America too weak to perform even basic functions. By contrast, the success thus far achieved with the Japanese model of capitalism in East Asia was based on active state intervention, and an export-oriented but import-protected economic policy.

Finally, as earlier indicated, there is a wave of democratization currently sweeping through the Third World.[65] Most of these countries have been ruled for decades by authoritarian governments, whose lack of accountability, corruption, and abuse of human rights, amidst the unabating poverty of their populations, provide the backdrop to the current trend. Insofar as the processes of democratization have been initiated by governments that have hitherto resisted internal popular yearnings for democracy, the current dramatic turn is viewed by some critics as only a response meant to

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[65] See, for a good analysis of this trend, Diamond, L., and Plattner, M.F., eds., The Global Resurgence of Democracy (Baltimore: The Johns Hopkins University Press, 1993). See also, Huntington, S., The Third Wave: Democratization in the Late Twentieth Century (Norman, OK.: University of Oklahoma Press, 1991). Cf. Ihonvbere, J.O., "Where is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy" Africa Today 43, 4, 343 (October-December, 1996).

formally satisfy the increasing requirement of political
conditionality by international lenders and donors. Such a
view does contain some truth, but it is inadequate to explain
the upsurge of pro-democracy initiatives at the grassroot,
national, and international levels in various parts of the
Third World. The democratic openings that have occurred are no
longer isolated instances; they have become a trend in the
1990s, with most countries having elected governments.

The upshot of this is that a large number of Third
World countries are today confronted with the challenge of
dual transition: to consolidate fragile democratic openings,
and to simultaneously pursue painful economic reforms.[66]
Historically, the latter preceded the former; rising incomes
are usually accompanied by demands for political
representation and social justice. Examples of successful dual
transitions in recent history hardly spring up to mind. The
example of Spain under the regime of General Francisco Franco
in the 1970s, which is sometimes cited, is not apposite; at
the time of political reforms in the mid-1970s, Spain had a
fairly sound economic foundation, compared to the situation in
the Third World today. Whether these countries will succeed
where others failed, there is no doubt that the dual challenge

[66] See Nelson, J.M., "Democratic Reform, Economic Growth,
and Poverty Reduction: Linkages and Tension in
Developing Nations", in Belous, R., and Cavanagh, S.M.,
eds., supra, note 16.

which the combination of political and economic reforms represents will make development that much harder to pursue in the new era.

5.2. REGIONAL RESPONSES, POLICY CHOICE AND DEVELOPMENT OUTCOMES

The above analysis provides an overview of the new context of development. The responses which these global trends and changes have elicited vary across regions, leading to differential impact on development policies and outcomes.

The ascendancy of neo-liberal or "market-oriented" economic policies across the world is one of the major impacts of the global changes. These policies have compelled Third World countries to deregulate their economies and to deemphasize the role of the state in economic development. African and Latin American countries accordingly stripped the State of its capacity to provide infrastructure, subsidies, training, and other functions, and welcomed all kinds of investment. In consequence, the State in these countries has suffered a basic incapacitation which has been exacerbated by the escalating burden of debt.

On the other hand, for the East Asian countries, an open economy has only meant being export-oriented, not necessarily being open to imports. Liberalization has been selective, and the State has retained a supervisory as well as

a collaborative role with the private sector in dealing with the changes. Africa and Latin America follow the US brand of capitalism, the Asian countries, the highly successful Japanese model.

The East and South-East Asian countries were also incorporated into the production and trade networks of Japan, ensuring for them privileged access to technology, market, and capital. This helped the Asian economies to grow rapidly and to take advantage of the economic synergy which relationship with their neighbours provided. Latin American and African countries, by contrast, became increasingly dependent on US patronage and on the international financial institutions for capital, thus losing their control over economic decision-making.

The results of these differing responses have been reflected in the different development outcomes. The Asian economies are growing very rapidly, with average per capita GDP in excess of $8,000 (more than the average for some European countries). In Latin America, economic growth has been sluggish and volatile.[67] Access to international finance has been unsteady, turning negative in the 1980s as a result of the debt crisis, and only now beginning to regain stability. Growth seems to have resumed, albeit proceeding

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[67] See Lowenthal, A., and Treverton, G., eds., Latin America in a New World (Boulder, Colo.: Westview Press, 1994).

very slowly in the region, but the monetary crisis provoked by the Mexican devaluation of the Peso in 1994-95 illustrates the volatility of the growth.

Sub-Saharan Africa occupies the other extreme[68]; per capita GDP stood at about $300 in 1994, and has been declining for two decades. This region had access to concessional finance, but weakened state structures and deteriorating social and political institutions precluded its effective utilization. These outcomes support the conclusion that the Japanese model is more conducive to rapid growth and equity, and that the US model, on the other hand, is yet to prove that it can produce sustained or equitable growth.

One telling difference between the two models, for example, is the contrasting premium they each place on human capital in the growth process. The Japanese model has emphasized increasing the skill of workers through education and vocational training. Of course, there are important links between education and the incorporation of new technology, a

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[68] See Brown, M.B., and Tiffin, P., Short Changed: Africa and World Trade (London: Pluto Press, 1992); Callaghy, T., and Ravenhill, J., eds., Hemmed In: Responses to Africa's Economic Decline (New York: Columbia University, 1992); Chege, M., "Sub-Saharan Africa: Underdevelopment's Last Stand" in Stallings, B., ed., supra, note 55, 309; Davidson, B., "Two Decades of Decline: A Burden for the Future" in Moroney, S., ed., Africa (New York: Fact on File Publications, 1989) 669, and World Bank, Adjustment in Africa: Reforms, Results, and the Road Ahead (New York: Oxford University Press, 1994).

rise in levels of productivity and income and a reduction of inequality. The US model has emphasized cheap labour instead, and instigated a steep reduction in public investment.

5.3. SUMMARY AND THE FUTURE SCENARIO

The end of the Cold War and cessation of US-Soviet rivalry, globalization of production and trade, new patterns of international finance, competition among capitalist powers, and the global ascendancy of neo-liberal values - these, collectively, constitute the new international context of development. They provide the opportunities and challenges which define policy choice and outcomes for the Third World in the new era. However, the new structure, superimposed as it were on a regional grid, is refracting international forces in various ways, producing differential impacts across regions. East and South-East Asian countries have benefitted the most from their association with a rising capitalist power, Japan; Latin America's growth, on the other hand, has been slow, corresponding to the sluggish economic performance, during this period, of the Western hemisphere where it is located and with which it has the strongest connection; African countries are the most disadvantaged of all, encumbered as they are with economic stagnation and decaying political and economic institutions.

Based on the new international trends, some

projections can be made into the future. There is a strong probability that East Asia will attain a level of growth equal to that of the smaller European countries, and that South-East Asia would catch up with or even overtake the Latin American countries in growth. Assuming that the rate of growth in these Asian subregions continue, the component countries are likely to join Japan as major actors in the Asian region. Already the combined investments of the NICs as a group outstrips Japan's in the Association of South East Asian Nations (ASEAN), and trade flows are roughly equal. The dynamic economic space which these actors, acting in tandem, create in Asia will set in motion a set of changes that might incorporate other parts of Asia - China, Indochina, India, the Phillipines, Mongolia, Pakistan, Sri Lanka, and Bangladesh - especially if these countries continue with their economic and political reforms.

A second possibility is that more Latin American countries will be drawn ever closer in economic ties to the US. Mexico is already a member of the North American Free Trade Area (NAFTA). Chile's neo-liberal economic reforms continue apace in anticipation of admission into the NAFTA. Some central American and Carribean nations hope to benefit in some form from their trade links with the enlarged NAFTA membership. It is not clear, however, how many Latin American countries will eventually qualify for admission into the NAFTA. Much will depend on how successful these countries

emerge from the economic and political reforms currently underway.

The prognosis for other parts of the Third World is not encouraging. A large section will be isolated and further marginalized. Sub-Saharan Africa will certainly be worsted by Central and Eastern Europe in the competition for the European Union's economic and technical assistance.[69] The ongoing economic reconstruction of Central and Eastern Europe spearheaded by the European Union (EU) will culminate in the incorporation of these parts into the EU by the turn of the millenium.[70] But other parts of Asia, the Middle East, and Latin America may join Sub-Saharan Africa as "underdevelopment's last stand".

One possible saving grace for the countries destined for increased poverty is the renewed interest of Japan in the international arena. Japan's insistence on the recognition of

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[69] The Lome IV trade and aid agreement linking Europe and former colonies in Africa, the Caribbean, and the Pacific will end shortly amid fears that it may not be renewed: see The Toronto Star, Tuesday, July 2, 1996, D11. For details of the Lome Convention, see Ravenhill, J., Collective Clientelism: The Lome Convention and North-South Relations (New York: Columbia University Press, 1985).

[70] It is estimated that the value of trade diverted from Europe's Third World partners as a result of the emergence of the single European Market will exceed that created within Europe: see Davenport, M., and Page, S., Europe: 1992 and the Developing World (London: Overseas Development Institute, 1991), 7.

the success which its development strategy has achieved in
the NICs led to a UN study that adds an important dimension to
the debate on the appropriate models of development for the
Third World.[71] In addition, most Third World countries,
conscious of the looming crisis, have become more aggressive
in seeking out investments and economic ties, outside their
regional locations, with individual members of the
industrialized world. Should these developments succeed in
mediating the coming crisis, the probability is that only a
few countries, especially those in Latin America, are well
positioned to take advantage of better international
circumstances in the medium run.[72] The rest will have to wait

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[71] World Bank, supra, note 44. See also, Conway, P., and
Greene, J., "Is Africa Different?" World Development 12,
12 (1993); Williamson, J., "Democracy and the 'Washington
Consensus'" World Development 21, 8 (1993); Lindauer, D.,
and Roemer, M., eds., Asia and Africa: Legacies and
Opportunities in Development (San Francisco:
International Center for Economic Growth, 1994), and
Naya, S., and McCleery, R., Relevance of Asian
Development Experiences to African Problems, Occasional
Paper no.39 (San Francisco: International Center for
Economic Growth, 1994).

[72] For example, under Generalized System of Preferences
agreed upon at the Uruguay Round of GATT, Africa stands
to benefit least because its major exports - raw
materials and beverages - already face low barriers
under the Lome Agreement, and it has not diversified
enough into commodities which are slated for enhanced
trade liberalization. On the other hand, the larger and
richer Latin American countries, such as Brazil,
Argentina, and Chile, stand to benefit from increased
liberalization of commodity trade, while the East Asian
NICs are well placed to take advantage of the abolition
of the Multifibre Arrangement: see Page, S., et al.,

longer.

5.4. THE END OF THE THIRD WORLD?

The "Third World" began in the 1950s as a political coalition of newly independent states which were reluctant to take sides in the Cold War conflict between the West (First World) and the East (Second World). The members of the coalition were motivated by common economic problems, a desire to restructure the international economic order so as to accomodate the developmental needs of the new states, and a commitment to navigate a developmental path outside the liberal capitalism of the West and the state socialism of the East. The term "Third World" in development literature is also a central organizing concept, an all encompassing category, which denotes the inferiority of governments, economies, and societies of Africa, Asia, and Latin America in comparison to those of the First World.[73] The term is used in both senses in this study.

But as shown above, in the past decade the coalitions and antagonisms of the recent past have shifted

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The GATT Uruguay Round: Effects on Developing Countries (London: Overseas Development Institute, 1991).

[73] See, for the history and uses of the term "Third World", Ahmad, A., In Theory: Classes, Nations, Literatures (London: Verso, 1992). See also, Wolf-Phillips, L., "Why 'Third World'?: Origin, Definition, and Usage" Third World Quarterly, 9 (4), 612 (1987).

ground, and, in consequence, structures premised on their stability are crumbling. The end of the Cold War, by the forces which it has unleashed on the international arena, has polarized the Third World and is widening the North-South gap. Clearly, the original Third World agenda has been pulverized by these forces; and the continued use of the term, either as a concept or a political idea, has, therefore, come under increasing interrogation.[74]

Francis Fukuyama, for example, interpretes the triumph of liberalism over communism, as the beginnings of a global transformation - "the end point of mankind's ideological evolution" - amounting to the "end of history".[75] Some commentators bemoan the conceptual difficulty with using the term "Third world" in the face of a seeming lack of commonality of interest among the erstwhile "homogenous" members of the Group of 77.[76] Others simply refer to the notion of a Third World in the 1990s as at best little more than an

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[74] See, for example, Manor, J., ed., Rethinking Third World Politics (London: Longman, 1991); Galli, R., ed., Rethinking the Third World (New York: Crane Russack, 1992); and Randall, V., "Third World: Rejected or Rediscovered?" Third World Quarterly, 13 (4), 730 (1992).

[75] Fukuyama, F., "The End of History?" The National Interest 16 (8), 1, 3-4 (1989). See also Fukuyama, F., The End of History and the Last Man (London: Hamish Hamilton, 1991).

[76] See, for example, Ahmad, A., supra, note 70; See also Berger, M.T., "The End of the Third World?", Third World Quarterly, 15 (2), 257 (1994).

irrelevance and at worst an absurdity. The implication of these claims is that the global order is currently in a state of transition: the old order has given way, but it is yet to be completely replaced by a new order. These comments further underscore the point that new strategies and concepts are required for the protection and promotion of the world's poorer nations, just as new concepts are needed for understanding and explaining North-South relations, because traditional frameworks are no longer adequate.

Yet, prognostications about the end of history or the Third World, based on the universalizing trends of the new world order, appear premature at this stage, not least because capitalism has yet to prove its capability to globally diffuse prosperity. Incomes are rising in some states of the Third World, but the general picture is still one of widening gap between rich and poor. There is evidence that the market-driven philosophy of development is aiding the "internationalization" of class structure, as ruling elites become globally integrated. Over the past decade, the debt crisis, the generalized economic recession, and IMF-prescribed structural adjustment programmes in the Third World have all pushed in the direction of concentration of income, high rates of unemployment, and widespread urban and rural poverty.

The East Asian countries, have attained impressive economic growth, but they have yet to turn this into a

foundation for human development. In some of these countries, economic growth has been achieved at tremendous social costs. Reports abound of political repression, of the violation of workers' rights, of children who are forced to abandon school to work in factories at very low wages, and of young women forced into prostitution in order to make a living. To what extent, and for how long the trade-off between human rights and economic development may be justified will probably depend on the actual challenges that these countries have had to confront in the process of their economic development. However, unless the sacrifice of human rights is understood as only a distasteful accomodation, economic growth may infact deepen the poverty of the majority in Asia. Therefore, there is a sense in which it may be correct to say that for years to come poverty will continue to be the tie that binds a majority of Third World citizens.

But the era of inter-bloc confrontation is undoubtedly over; in the fundamental issues and complexities that the new order raises - peace, economic growth, poverty, the fate of the "global commons" or the common heritage of mankind - in all of these, interdependence and co-operation are privileged over confrontation. These issues straddle the North-South divide, and they do offer Third World countries an opportunity to exert influence on the direction of development in the coming years. According to Ravenhill

> The changing global agenda... offers a growing number of
> issues on which there are mutual interests between North
> and South and on which the co-operation of Southern
> countries will be necessary if the industrialized
> countries are to attain their goals. For individual
> Southern countries there will be opportunities to engage
> in strategies of issue linkage (between, for example,
> debt, environmental and market access questions) to
> improve their bargaining position with the industrialized
> countries.[77]

Already there are signs that this, indeed, will be
the form in which Third World concerns will be articulated and
nurtured in the future.[78]

6. CONCLUSION

This chapter has provided a general picture of the

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[77] Ravenhill, J., "The North-South Balance of Power",
International Affairs, 66 (4), 731 (1990).

[78] For a very illuminating discussion of this development,
see Williams, M., "Re-articulating the Third World
Coalition: the Role of the Environmental Agenda", Third
World Quarterly, 14 (1), 7 (1993). Debt-for-Nature swaps,
those transactions whereby environmental organizations
exchange debt owed by countries of the Third World for
conservation measures in these countries, might be one
strategy for addressing the debt crisis, provided the
concerns about intrusion on sovereign rights raised by
these countries are adequately addressed: see Buchheit,
M., "Alternative Techniques in Sovereign Debt
Restructuring", U. Ill. L. Rev. 371 (1988); Gibson, S.,
and Curtis, B., "A Debt-for-Nature Blueprint", 28 Colum.
J. Transnat'l L., 331 (1990), and Alagiri, P., "Give Us
Sovereignty or Give Us Debt: Debtor Countries' Perspective
on Debt-for-Nature Swaps", 41 The Am. U.L.R., 485 (1992).

nature of poverty in the Third World, the depth of the problem, and the context within which the domestic transformation envisaged under the Declaration on the right to development will play out. Central to that transformation will necessarily be a broader conceptualization of "development" to transcend economic growth to include the sum total of the social, political and cultural well-being of human beings. The clear implication of this is that all human rights must be respected through development processes.

The 1980 Brandt Report foreshadowed the central message of the Declaration by noting that development ought no longer to be viewed as a simple question of "passage from poor to rich" or transition from "traditional rural economy to urban (economy)", but as a process involving "a profound transformation of the entire economic and social structure", encompassing "not only the idea of economic betterment but also of greater human dignity, security, justice, and equity".[79]

Recent development discourse, as well as multilateral regional and international initiatives,[80]

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[79] Brandt, W., et al., North-South: A Programme for Survival (The Brandt Report) (London: Pan Books, 1980) at 9-10.

[80] See, for example, Chambers, R., Rural Development: Putting the Last First (London: Longman, 1983); Cernia, M., ed., Putting People First (Oxford: Oxford University Press, 1985); and Friedmann, J., Empowerment: The Politics of Alternative Development (Cambridge, Mass.: Blackwell

emphasize the need to centralize human rights in the development process. In so doing, they are redefining the terms and nuances of the development discourse of the 21st Century to include notions of participation and empowerment of the poor in and through the processes which shape their lives.

Publishers, 1992). See, for multilateral or regional initiatives in this area, e.g., the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, reprinted in 21 ILM 59 (1982), the African Charter for Popular Participation in Development, UN Doc. E/ECA/CM.16/ (1990), and the Lome IV convention of the EEC and 69 African, Caribbean, and Pacific countries.

CHAPTER THREE

THE RIGHT TO DEVELOPMENT: EVOLUTION, CONTENT AND SIGNIFICANCE

1. INTRODUCTION

This chapter will examine the origins, meaning and significance of the right to development. Although the issues which the UN Declaration on the Right to Development[1] (hereinafter "the declaration") addresses - namely poverty, abuse or violation of human rights, and the need to democratize the processes of development in the Third World- appear to be self-evident, the need to examine the legitimacy of the right in the context of human rights, and to explore its implications for development actors is not preempted. One reason for such a need is that the right to development is recent in origin, having been proclaimed by the General Assembly of the United Nations only in 1986. Secondly, in many areas, its provisions overlap with those of older, more recognized human rights instruments. Thirdly, compared to the Universal Declaration of Human Rights, the proclamation of the right to development was neither preceded with much fanfare, nor has it been received in influential development or academic circles with much enthusiasm. Indeed, for the most

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[1] UN GAOR, 41st Session, Resolutions and Decisions, Agenda Item 101, at 3-6, 9th Plenary Meeting, UN Doc. A/Res./41/128, December 4, 1986.

part, the right is ignored in official development discourse. In consequence, knowledge of the existence of the right even in the Third World where its impact is likely to be most felt, and among development actors locally and internationally is very limited. Finally, among those who are aware of the right to development, an understanding of its precise meaning and implications is made difficult by the poor drafting of the declaration. The central message of the declaration appears to have been obscured by generalities and platitudes.

What is the human "right to development" ? Why and how did it come to be proclaimed at the United Nations General Assembly? What are the source(s) of the right or how does the right relate to other human rights? What are the implications of the right for governments, International Development Agencies (IDAs), various specialized agencies of the United Nations, and Non-Governmental Organizations (NGOs), who are all involved with development in the Third World? These are the questions that will be examined in this chapter.

2. SOURCES AND HISTORY OF THE RIGHT TO DEVELOPMENT

The sources and history of the HRD will be examined in four parts: general intellectual origins of the right to development, the right to development in the context of the UN Charter, the right to development in the context of international human rights law, and the progression of the

right through the UN system.

2.1. INTELLECTUAL ORIGINS

The intellectual environment in which the idea of a right to development can be said to have germinated probably began to take shape after the Second World War. Some evidence points to the existence of some international concern, prior to this period, about poverty and the need to recognize the right of all human beings to pursue their material well-being in conditions of dignity and equality.[2] However, it was the Universal Declaration of Human Rights (UDHR) in 1948[3] that provided the elaborate intellectual scaffolding in which "development" and human rights became explicitly linked.

The human right to self-determination, first recognized under the UDHR, spoke directly to the conditions of colonized peoples.[4] The very ideology of colonialism was

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[2] For example, the 1944 Declaration of Philadelphia stated: "all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity": see Annex to the Constitution of the International Labour Organization, Principle II(a).

[3] Universal Declaration of Human Rights, UNGA Res. 217, UN GAOR, 3rd Session, Res. pt. 1, at 71, UN Doc. A/810, of December 10, 1948.

[4] See the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV) of December 14, 1960.

incompatible with human rights or a life of dignity, being suppressive of the capacity of colonized peoples to express themselves politically, socially, economically, or culturally. The right to self-determination thus legitimized the struggle of these peoples to shed the chains of colonial bondage, and for empowerment to pursue their well-being or development without the meddlesome interference of foreign imperial powers. This was arguably the first international linkage of the idea of development with human rights.[5]

Another significant event was the granting of independence to many colonial territories, especially those in Africa, in the late 1950s and early 1960s. Ghana, Nigeria, Uganda, Zaire, the Congo, Cameroon, The Gambia, Mali, and Ivory Coast (now Cote d'Ivoire) are some of the countries that emerged on the international scene during this period. As these territories became independent, their participation in various international fori - an incident of their new status as independent nations - provided them with an opportunity to collaborate with older, even if similarly poor, members of the international community, such as India, Brazil, Mexico, and the Philipines, to instigate a shift of focus in these fori

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[5] This is clear from the preamble to the UDHR: "...
the continued existence of colonialism prevents the
development of international economic co-operation,
impedes the social, cultural and economic development of
dependent peoples..."

from mere decolonization to an interrogation of the adequacy of formal independence.

The first United Nations Conference on Trade and Development (UNCTAD I) in 1964 was one such forum. At this Conference, the newly independent states argued that sovereign equality, such as independence purported to confer on them, was meaningless in the context of a grossly inequitable distribution of global economic resources and opportunities. This position has been basically maintained at successive UNCTADs, with shifting emphasis on trade regulation, technical and financial assistance, and transfer of technology.[6] As well, at the rounds of the General Agreements on Tariffs and Trade (GATT), the 'new states' have continued to argue for greater market access and stabilization of earnings from the international market in commodities.[7]

Generally, as the decade of the 1960s ended, the increasing menace of poverty in the Third World convinced many

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[6] See, e.g., Rothstein, R.L., Global Bargaining: UNCTAD and the Quest for a New International Economic Order (Princeton: Princeton University Press,1979), and Makarczyk, J., Principles of a New International Economic Order (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1988), 45-70.

[7] More detailed account of the exertions of Third World countries toward a more equitable international system can be found in Krasner, S., Structural Conflict (Berkeley: University of California Press, 1985). See also, Mayall, J., Nationalism and International Society (Cambridge: Cambridge University press, 1990), and Halliday, F., Cold War, Third World (London: Abacus, 1989).

of the need for a restructuring of the global economic order.

Academics, jurists and other commentators began to argue for

a new international law and to urge an equitable sharing of

the world's resources.[8] George Dunne's book, The Right to

Development[9], which first appeared in 1974, was basically a

moral argument for international co-operation in the

alleviation of poverty in the Third World. According to Dunne,

the purpose of the book was to "induce in Americans, and

especially Americans who hold to the Judeo-Christian religious

tradition, a greater awareness of the gravity of the problem

of underdevelopment in what is commonly called the Third World

and to awaken in them a serious sense of moral

responsibility".[10] Although its basic argument was thus framed

in moralistic terms, this book illustrated the trend of

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[8] See, e.g., Schachter, O., Sharing the World's Resources
(New York: Columbia University Press, 1977), and
Bedjaoui, M., Towards a New International Economic Order
(Paris: UNESCO, 1979); Singh, J.S., A New International
Economic Order: Towards a Fair Redistribution of the
World's Resources (New York: Praeger, 1977); and
Timbergen, J., et al., Reshaping the International Order:
A Report to the Club of Rome (New York: Dutton, 1976).

[9] Dunne, G.H., The Right to Development (New York: Paulist
Press, 1974).

[10] ibid., at 5. See also, Domenach, J.-M., "Our Moral
Involvement in Development", in UN Centre for Economic
and Social Information, The Case for Development (New
York: Praeger Publishers, 1973), 131, and Pearson, L.B.,
et al, Partners in Development: Report of the Commission
on International Development (New York: Praeger
Publishers, 1969).

intellectual thought that was beginning to take hold.

The argument for structural change in the international economic order was predicated on a belief on the part of the makers in some form of moral entitlement of the poor to some of the wealth and prosperity which the relatively well-off members of the international community enjoy. The declaration of the UN General Assembly on the establishment of a New International Economic Order (NIEO) in May, 1974[11], the accompanying Programme of Action[12], and the Charter of Economic Rights and Duties of States[13], are good examples of the new form of thinking.

The NIEO was a set of demands and principles put together by Third World countries to peacefully challenge the international system on various counts. Economically, the NIEO aimed to alter the international balance of wealth; politically, it expressed a desire on the part of the Third World to democratize global power configuration; and culturally, it symbolized an attempt by Third World countries to reassert their traditional identities amidst the relentless

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[11] UNGA Res. 3201-S.VI, 9 May, 1974, containing the Declaration on the Establishment of a new International Economic Order, UNGAOR, 6th Special Session, Supplement 1 (A/9559).

[12] UNGA Res. 3202-S.VI, 16 May, 1974, containing the Programme of Action on the Establishment of a New International Economic Order.

[13] UNGA Res.3281 (XXIX), 12 December, 1974.

onslaught of foreign values.[14]As it turned out, however, the grand vision articulated in the movement for the NIEO achieved very little practical results, owing partly to dissension within the movement but mostly to the opposition of many Western nations - opposition directed mostly at the method of the NIEO, as opposed to its substance[15] - but it did thrust before the collective conscience of the world the plight of Third World countries in the international system. It was not a mere coincidence that in 1975, the Dag Hammarskjold Foundation,[16] an influential development think-tank, openly advocated a restructuring of the world economic order and international co-operation in accordance with more just and equitable principles.

The struggle for a NIEO was waged on the international plane. But many, including scholars of the Third World, could not ignore the internal socio-economic and

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[14] See, e.g., Varges, G.S., The New International Economic Order Legal Debate (Frankfurt am Main: Peter Lang, 1983), 4-6.

[15] Gabe Shawn Varges expresses a similar opinion: "It is key to remember... that the NIEO is a prescription. It is a prescription by the South for the problem of development. The North ...is not in disagreement about the problem, but about the NIEO being the obligatory prescription for it": Varges, G.S., supra, Note 12, at 74.

[16] In What Now: Another Development, The 1975 Dag Hammarskjold Report on Development and International Co-operation (Uppsala: The Dag Hammarskjold Foundation, 1975).

political factors in the Third World which often create and reproduce poverty for the majority of the population. These scholars argued that international restructuring of the economic order would achieve nothing if it was not accompanied by structural reforms within the Third World itself. In an influential book published in 1976, Mahbub ul Haq,[17] a World Bank official, for example, argued for a drastic restructuring of political and economic power relationships in the Third World if development was to benefit the vast majority of the population. He also argued for a reorientation of development strategies from the satisfaction of market demand to that of basic human needs. Development, ul Haq suggested, should be built around people rather than the other way round. This suggestion constituted a direct challenge to the developmentalist philosophy of modernization - a challenge that was to be posed more acutely later in the Declaration on the Right to Development.

The UDHR, decolonization, the quest for economic empowerment by the newly independent states, their struggle for a NIEO, and the increasing realization that internal factors within the Third World itself aggravated poverty - all of these provided the intellectual context in which the right to development was proposed in the seventies. Keba M'Baye,

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[17] Haq, M. ul, The Poverty Curtain: Choices for the Third World (New York: Columbia University Press, 1976).

Senegalese jurist and former judge of the International Court
of Justice, first proposed the right to development in a
lecture which he delivered in 1972.[18]

It is, perhaps, significant that M'Baye's
articulation of the right to development coincided with
adverse climatic conditions and famine in the Sahel region
(from whence M'Baye hailed) and parts of Southern Africa.
Desertification and prolonged drought cost millions of lives
in Africa in the early seventies as large acres of land lay
parched and agriculturally useless. Africans were not only
vulnerable to the untamed forces of nature which aggravated
their material deprivation, but they were also ruled by
autocratic regimes which violated and abused human rights in
the name of "development". M'Baye spoke of the right to
development in terms of the right of all human beings to a
life of freedom and dignity. Other scholars, notably Karel
Vasak, Director of the International Institute of Human
Rights, Strasbourg, France, and Legal Adviser to UNESCO, took
up the task of grounding the right to development in the
theory of human rights.

Vasak classified human rights into three categories

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[18] M'Baye, K., "Le Droit au Developpement comme un Droit de
L'homme", 5 <u>Revue des Droits de L'homme/Human Rights
Journal</u>, 503 (1972). M'Baye delivered the lecture at the
International Institute of Human Rights, Strasbourg,
France.

or "generations", placing the right to development among the "third generation".[19] The first generation of human rights, according to this classification, comprises of civil and political rights, which derive their philosophical justification from the human need for liberty; the second generation is anchored on equality, and it comprises of economic, social and cultural rights; the third generation is based on the solidarity of mankind, and it comprises the right to development, to peace, and to the common heritage of mankind.

2.2. THE RIGHT TO DEVELOPMENT AND THE UN CHARTER

When the United Nations Organization was founded in 1945, the founders identified four great tasks which would form the cornerstones of its Charter: the promotion of (a) peace (b) development, and (c) human rights, through (d) international law. There is increasing understanding that these four elements of the Charter are intertwined. Lasting

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[19] See Vasak, K., "A 30-Year Struggle - The Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights", UNESCO Courier 29 (November, 1977). See also, Flinterman, C., "Three Generations of Human Rights", in Berting, J., et al, eds., Human Rights in a Pluralist World (London: Roosevelt Study Center, 1990), 75, Marks, S.P., "Emerging Human Rights: A New Generation for the 1980s?" Rutgers Law Review 33, 435, (1981), and Alston, P., "A Third Generation of Human Rights: Progressive Development or Obfuscation of International Human Rights Law?" Netherlands International Law Review, 29, 307 (1982).

peace can only be built upon respect for the human rights of all people; development is indispensable to the progressive realization of human rights; human rights provide universal standards of accountability for all development activity; and international law is the vehicle through which all of these can be achieved.[20]

While many can readily understand the linkages between peace, development and human rights, the role of international law in that synergy probably requires explaining. The realization of the first three objectives requires international co-operation and agreement. International law is important in the process because its major goals include the encouragement of co-operation and the forging of international consensus. By establishing multilateral norms, standards, and treaties, and by narrowing through consensus-building and compromise the scope for disparate policy strategies, international law helps to imbue the formulation, design, and execution, of policy with coherence in concrete and meaningful ways. As well, by encouraging certain actions and prohibiting others, accepting and recommending certain principles but rejecting others,

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[20] See the Forward to a Harvard Law School symposium entitled "The United Nations: Challenges of Law and Development" (held to commemorate the UN's 50th anniversary) by the UN Secretary-General, Boutros Boutros-Ghali, in Harvard Journal of International Law, Vol. 36, 267-272 (1995).

providing a framework for negotiation and agreement on practical measures to implement a common approach to problems, international law is, in the words of the UN Secretary-General, "both a vehicle for development co-operation and a mechanism for action".[21]

It is no surprise, therefore, that the right to development received its first international legal affirmation in a declaration of the UN General Assembly. Article 55 of the UN Charter imposes a clear legal obligation on the UN to promote "higher standards of living, full employment, and conditions of economic and social progress and development". The Charter also enjoins all member states, UN institutions and intergovernmental agencies to work together in furtherance of "development" and "human rights". In various articles of the Charter, these two objectives are set out in tandem: "development" and "human rights" are complementary, not competing, concerns; therefore, the pursuit of development must be "harmonized with, indeed reinforced by, the promotion of universal rights".[22]

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[21] ibid., 269.

[22] Paul, James C.N., "The United Nations and the Creation of an International Law of Development" Harvard International Law Journal, Vol.36, No.2, 307 at 312 (1995).

2.3. THE RIGHT TO DEVELOPMENT AND INTERNATIONAL HUMAN RIGHTS LAW

The right to development is implied in the provisions of the UDHR, the International Covenant on Civil and Political Rights (ICCPR)[23], and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[24]. These three instruments are sometimes referred to as the International Bill of Human Rights (IBHR). Article 22 of the UDHR, for example provides:

> Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. (emphasis supplied)

The ICESCR substantially repeats the above provision.[25] In addition, State Parties are enjoined to "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the

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[23] International Covenant on Civil and Political Rights, opened for signature 16 December, 1966, and entered into force on 23 March, 1976, 999 UNTS 171, 6 ILM 368.

[24] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December, 1966, and entered into force on 3 January, 1976, 993 UNTS 3.

[25] Article 2.1., ICESCR.

...covenant".[26] The ICCPR also provides protections from discrimination, and arbitrary acts by governments or private persons. These provisions are designed to allow individuals access to participation in governance and other common endeavours, and they are based on the recognition that the promotion and protection of human rights are the "foundation of justice and peace in the world".[27]

Of significance also are the conventions and recommendations of the International Labour Organization (ILO), and other specialized agencies of the UN, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), which have greatly elaborated the content of the IBHR. The ILO's work on labour standards and the right of workers to organize themselves is particularly relevant to participation in the design, implementation and evaluation of development activity, and also the emancipation of the human personality and the unfettering of her creative genius.[28] Women's rights receive direct attention in the

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[26] Article 3, ICESCR.

[27] Preambles to the ICCPR and the ICESCR.

[28] See, e.g., ILO Convention 98 (on the right to organize and to bargain collectively), done on 1 July, 1951, and entered into force on 18 July, 1951; ILO Convention 111 of 25 june 1958, which entered into force on 15 June, 1960 (on discrimination in employment and occupation); and ILO Convention 141 of 23 June, 1975 (on the right of rural workers to organize), which came into force on 24

Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, as well as the Convention concerning Discrimination in respect of Employment and Occupation, which were adopted by the ILO in 1951 and 1958 respectively. Similarly, the UNESCO adopted the Convention against Discrimination in Education in 1960. The General Assembly of the UN adopted the Convention on the Political Rights of Women in 1952[29], and the Convention on the Elimination of All Forms of Discrimination against Women[30] (CEDAW) in 1979.

What is remarkable about these instruments from the point of view of the right to development is their focus on the processes of development as the means to the "progressive realization" of the rights that they enunciate. There is implied in these instruments the realization that development is a process which involves the input and the betterment of all human beings, without discrimination on the basis of sex, colour, language, religion, or suchlike criteria.

The right to development ties together the various strands of protections, and the premium which the gamut of

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November, 1977.

[29] GA Res. 640 (VII), 7 UN GAOR Supp. (No.20) at 27, UN Doc. A/2361 (1952).

[30] GA Res. 34 UN GAOR Supp. (NO.46) at 193, UN Doc. A/34/46 (1980).

human rights law places on the importance of the human being, as opposed to things, in the development process. It builds on the foundation so elaborately provided by international human rights law.

2.4. PROGRESSION OF THE RIGHT TO DEVELOPMENT THROUGH THE UN SYSTEM

If one is interested in tracing the metamorphosis of the right to development through the UN system, an obvious starting point might be the Declaration of Philadelphia, adopted by the ILO in May, 1944, which stated that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual freedom and dignity, in conditions of economic security and equal opportunity". All subsequent instruments - including the UN Charter and the IBHR - adopted the language of this Declaration. Even though the UN sometimes wavered, the underlying concern for the human person in the process of development survived, to ultimately be accorded a pride of place in the Declaration on the Right to Development. The UN's first Development Decade, for example, clearly identified "development" with only "economic growth", for it was aimed at accelerating "progress towards self-sustaining growth of the economy of the individual nations and their social advancement so as to attain in each underdeveloped country a substantial

increase in the rate of growth...taking as the objective a minimum annual rate of growth of aggregate national income of 5 percent at the end of the decade."[31]

By the end of the '60s, however, there was a return to concern with the human aspect of development. Two resolutions of the General Assembly set the tone for the shift in focus manifested in the second UN Development Decade. These are the Proclamation of Teheran (done at the International Conference on Human Rights held in Teheran, Iran, 1968)[32], and the Declaration on Social Progress and Development, adopted by the General Assembly in 1969.[33] While the former document linked respect for human rights to economic development and urged the international community to co-operate in accelerating the second for the benefit of the first, the latter proclaimed that "social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice ".[34] In the General Assembly's resolution[35]

[31] See UNGA Res. 1710 (XVI) of 19 December, 1961, on a programme for international co-operation for the first UN Development Decade.

[32] Done on 13 May, 1968. See United Nations, A Compilation of International Instruments, Vol. 1 (First Part) (New York and Geneva: UN, 1994). (ST/HR/Rev.5(Vol.1/Part 1; Sales No.E.94.XIV.1 Vol.1, Part 1).

[33] UNGA Res.2542 (XXIV) of 11 December, 1969.

[34] ibid., Article 2.

launching the Second Development Decade, therefore, states

pledged individually and collectively to

pursue policies designed to create a more just economic and social order in which equality of opportunities should be as much a prerogative of nations as of individuals within a nation.

As a result of the interest which the predicament of the Third World as well as its claims had generated within and outside of the UN system, the UN Commission on Human Rights (UNCHR) adopted a resolution in 1977[36], asking the Secretary-General to study the international dimensions of the right to development as a human right. The Secretary-general's report was presented on January 2, 1979.[37] A second study[38], on the regional and national dimensions of the right, was subsequently completed and presented by the Secretary-General at the 37th session of the Commission on Human Rights (UNCHR) on November 13, 1980. After much debate and speculations on

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[35] UNGA Res. 2626 (XXIV) of December 12, 1970, para.12

[36] CHR/Res./4 (XXXIII) of 21 February, 1977, para.4.

[37] Presented on 2 January, 1979, the Secretary-General's Report was entitled The International Dimensions of the Right to Development as a Human Right in relation with other Human Rights based on International Co-operation, including the Right to Peace, taking into account the Requirements of the New International Economic order and the Fundamental Human Needs (UN Doc. E/CN.4/1334).

[38] This was entitled The Regional and National Dimensions of the Right to Development as a Human Right (UN Doc.E/CN.4/1421).

the nature and jurisprudential basis of the right, the General Assembly adopted a resolution, by a vote of 146 - 1, containing a Declaration on the Right to Development on December 4, 1986.

The controversy surrounding the right to development did not end after the right was recognized at the UN. In response to this controversy, the UNCHR set up a Working Group of Governmental Experts[39] to further study the right and to make recommendations for its implementation. After three unsuccessful annual sessions, the UNCHR invited[40] the Secretary-General to convene a Global Consultation[41], and this was done in January 1990. The Consultation involved representatives of the United Nations system and its specialized agencies, regional inter-governmental organizations and interested non-governmental organizations, including those active in development and human rights. The objective was "to focus on the fundamental questions posed by the implementation of the Declaration, the criteria which might be used to identify progress, and possible mechanisms for evaluating such progress".[42] The work of these two

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[39] See UN Doc. E/CN.4/1989/10 (1989).

[40] See CHR/Res. 1989/45

[41] See infra, Note 42.

[42] ibid. See also Barsh, R.L., "The Right to Development as a Human Right: Results of the Global Consultation" Human

bodies[43], and that of the second Working Group set up by the UNCHR in 1993[44], have helped to illuminate and clarify some of the conceptual difficulties which have impeded the proper appreciation of the right to development.

3. THE NEED FOR A RIGHT TO DEVELOPMENT

The need for a right to development has arisen from the development failures of the Third World. Some of these failures are attributable to the inherent shortcomings and limitations of the growth-centred approach to development, while others arise from pathologies associated with development administration.

3.1. THE SHORTCOMINGS AND LIMITATIONS OF GROWTH-CENTRED DEVELOPMENT

As we showed in the previous chapter, the growth-centred approach to development has many shortcomings and limitations. The central argument for economic growth is that, since growth means increase in production and sales, an

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Rights Quarterly, Vol.13, 332 (1991).

[43] See, e.g., the Secretary-general's report on the Global Consultation, The Realization of the Right to Development (New York: United Nations, 1991).

[44] See, e.g., UNCHR, Fifty-Second Session, Item 6 of the Provisional Agenda, QUESTION OF THE REALIZATION OF THE RIGHT TO DEVELOPMENT, Report of the Working Group on the Right to Development on its Fourth Session (Geneva, 15-26 May 1995) UN Doc. E/CN.4/1996/10, 25 August 1995.

increase in the overall volume of output therefore means increased national wealth and better living standards. This argument assumes that the benefit of growth automatically trickles down to the poor. However, in the Third World, economic growth has failed to benefit the poor; instead, intranational dualism within the Third World has created small centres of power and wealth, leaving the periphery in abject poverty. Countless studies and statistics show that uneven development and inequality remain persistent after over three decades of growth-centred development. A fair conclusion from this is that the diffusion of wealth in society, contrary to conventional economic wisdom, is not automatic; the poor, unless they have a say in the distribution of wealth, would be excluded from the benefits of economic growth and wealth.

Secondly, assuming that wealth indeed trickles down to solve the problems of the poor majority in the Third World, at the current rate of growth of GNP per capita, estimated at about 1.6% per annum, it would take at least 210 years for the poorest one billion of the world's people to reach half the level of living standards in the rich countries.[45] According to Robert McNamara,[46] ex-president of the World Bank, even if

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[45] See Trainer, T., <u>Towards a Sustainable Economy - The Need for a Fundamental Change</u> (Sydney and Oxford: Envirobook/ Jon Carpenter Publishing, 1996), 61.

[46] Robert MacNamara, quoted in Thompson, W.R., ed., <u>Contending Approaches to World Systems Analysis</u> (London:

the growth rate of the poor countries doubled, only seven countries would probably close the gap with the rich nations in 100 years, and only nine would attain the current level of the rich nations in 1,000 years! Clearly, this is unacceptable, given the availability of the resources needed to solve the problem of poverty in a relatively short time.

Thirdly, the growth-centred vision of development assumes that there are no limits to growth, and that endless growth is possible and necessary for progress. The reality, however, is that both the resources of the earth as well as its capacity to continue to sustain life are finite.[47] Evidence shows that the privileging of economic growth over human needs lies at the root of the mass deprivation and social conflict that currently plague the Third World. Additionally, serious environmental problems, resulting from reckless depletion of natural resources, industrial pollution and ecological despoliation, are becoming a concern at the global level. This puts a question mark on the necessity or desirability of continuing with this model of development in the Third World.

All of these failures are to be expected when the fate of human beings and of the earth is surrendered entirely

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Sage, 1983), 29.

[47] See, e.g., Meadows, D.H., et al, The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind (New York: Universe Books, 1974).

to the governance of market forces. However, markets do fail, and seldom are they capable of correcting themselves without human intervention. Far from alleviating poverty, the rule of the market has aggravated it, not only by its exclusion of the poor and the vulnerable, but also by its ordination of wealth as the ultimate value and a corresponding discount of other important values, such as culture, affection, community, compassion, upon which the human society thrives. The struggle against poverty, and for genuine human development, as opposed to the development of things, will be lost unless development is placed under a rule of law. The right to development is predicated on the need to make development serve the human interest, to make development inclusive, and to make development sustainable.

3.2. PATHOLOGIES OF DEVELOPMENT ADMIMNISTRATION

In many commentaries on development and human rights, there is a considerable amount of abstraction, borne of an unwillingness to take the accumulated lessons of years of "doing development" in the Third World seriously.[48] It is impossible to fully appreciate the connection between human rights and development by focusing only on "development" as an

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[48] Some of these commentaries are reviewed in Alston, P., "Making Space for New Human Rights: The Case of the Right to Development" 1 Harvard Human Rights Yearbook 3 (1988).

intellectual and ideological concept, for in that respect, what frequently emerges from analysis is a mostly benign picture of an enterprise geared towards the emancipation of people from the tyranny of their physical and social environments. The abstract theorizing that usually stems from this incomplete picture of development allows eggregious violations of human rights, in the name of development, to be explained away as "social costs", inevitable "externalities", or "collateral losses", for which no one ought to be held responsible. In fact, though, "development" is a stark reality, not an abstraction, for the inhabitants of the Third World - a reality that includes mass displacement and evictions, diseases, impoverishment, expropriation, and other forms of immiseration.[49] It is this reality of development that underscores the need for a right to development.[50]

Development, especially of the "modernization"

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[49] The harmful effects of "aid" to the Third World is extensively documented: see, e.g., Adams, P., and Solomon, L., In the Name of Progress, 2nd edn., (Toronto: Energy Probe Research Foundation, 1991), and Hayter, T., The Creation of World Poverty (London: Pluto Press and Third World First, 1983); Paul, J.C.N., infra, Note 50; and Tomasevski, K., Human Rights Violations and Development Aid: From Politics Towards Policy (Human Rights Unit Occasional Paper) (London: Commonwealth Secretariat, 1990).

[50] See, on the necessity for a right to development, Rich, R., "The Right to Development: A Right of peoples", in Crawford, J., ed., The Rights of Peoples (Oxford; Clarendon Press, 1988), 39, at 53. See, further, the sources cited in infra, Notes 49 and 50.

variety - which has dominated Third World development efforts for the past few decades - implies a planned intervention by the state in the lives of people. Such intervention is usually carried out on a "target" population, to alter its patterns of behaviour and attitudes, by altering its physical and social environments.[51] Intervention involves a complex array of activities carried on by a large international development industry, the major actors in which include the World Bank, regional development banks, large private foundations, specialized agencies of the UN, transnational corporations, ministries and parastatals in the Third World, and bilateral aid agencies. The vehicle of choice by which most interventions are effected, especially in the rural areas, is what is often referred to in development circles as the "project". Since agriculture is the mainstay of the rural-dwelling majority, most projects are necessarily agricultural.

In spite of claims to the contrary, the lessons of the past decades show that development is not a participatory process, but rather a top-down activity in which the opinions of supposed beneficiaries count for little in terms of design, implementation, monitoring and evaluation of development

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[51] For a discussion of this approach, favoured by the major development agencies, especially the World Bank, see Paul, J.C.N., "International Development Agencies, Human Rights and Humane Development Projects", Denver Journal of International Law and Policy, Vol.17(1), 67 (1988).

activity. Projects are usually products of collaboration between governments and International Development Agencies (IDAs). For most Africans, for example, the popular meaning of development would probably coincide with what governments and IDAs "do" to the people, rather than something in which the people have a say or a stake. Indeed, studies have suggested that complex motives underlie the establishment of development projects.[52] Development actors have been found to employ tactics ranging from cajolery to bribery to outright use of force to create and impose projects on communities.[53] In terms of their actual social, economic and cultural effects, some projects have brought upon not a few communities a harvest of bitter experiences and untold hardship.[54]

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[52] See, e.g., Bernal, V., "Coercion and Incentives in African Agricultural Development: Insights from the Sudanese Experience" African Studies Review, Vol.31, 89 (1988).

[53] See, e.g., Adams, W.M., "Rural Protest, Land Policy and the Planning Process on the Bakalori Project, Nigeria" Africa 58(3), 315 (1988), for a fairly detailed account of how the Bakalori Irrigation project was created by the Nigerian government in collaboration with the World Bank and imposed on the Bakalori community in North-Western Nigeria in the late seventies/early eighties.

[54] See the World Bank's Environmental Assessment Sourcebook 3 Vols. (New York: World Bank, 1991) containing a survey of potential social and environmental impacts of Bank-funded projects. See also, Cernia, M., ed., Putting People First: Sociological Variables in Rural Development,2nd edn., (New York: Oxford University Press, 1991); ibid., Internal refugees and Development-Caused population Displacement, Development Discussion Paper No.345 (Boston, Mass.: Harvard Institute for

Different kinds of projects inflict different forms,
and risks, of harm, which are legally cognizable, i.e., the
harm is proximately caused or the risk of it is accentuated by
the projects. Illustrative examples[55] include:

(a) <u>Large-scale Dam projects</u>: These frequently produce
significant displacement of people from their lands. The
displaced people lose the status and security which
ownership of land provides, and they are seldom afforded
official processes through which to register their
objections or to make independent assessment of the wisdom
or legality of these kinds of project.

(b) <u>Large-scale Irrigation projects</u>: These sometimes restrict
access of the local community to water resources, trigger
extraordinary increases in water-borne and water- related
diseases - such as bilharzia, dysentery, and cholera - and

International Development, 1990); Shenton, B., and Watts,
M., "Capitalism and Hunger in Northern Nigeria" <u>Review of
African Political Economy</u>, Vol. 15, 53 (1979);
Palmer-Jones, R., "Irrigation and the Politics of
Agricultural Development in Nigeria", in Watts, M., ed.,
<u>State, Oil, and Agriculture in Nigeria</u> (Berkeley:
University of California Press, 1987), 145; and Plater,
Z.J.B., "Damming the Third World: Multilateral
Development banks, Environmental Diseconomies, and
International Reform Pressures on the Lending Process"
<u>Denver Journal of International Law and Policy</u>, 17(1),
121 (1988).

[55] These illustrations are drawn from the sources cited
ibid., and from Paul, J.C.N., "The Human Right to
Development: Its Meaning and Significance", <u>Third World
Legal Studies</u>, 17, at 22-28 (1992).

render waste huge areas of hitherto irrigated lands owing to silting and salinization. Large irrigation projects also disrupt social systems. As the World Bank admits

"[S]ocial disruption is inevitable in large irrigation projects covering vast areas. (Most) [l]ocal people (are) dislocated...(and those) remaining will have to change their land use practices and agricultural patterns...those moving into the area will have to adapt to new conditions ...conflicting demands on water resources and inequalities in distribution easily occur (under the new dispensation), altering the distribution of wealth."[56]

(c) Commercial Farming projects: These often involve the pressing of subsistence farming communities into cash crop production. The change to cash crop production (of, e.g, cotton, cocoa, coffee, groundnuts, and palm produce) necessarily involves a change in farming methods and techniques which are fraught with risks for the farmer, his/her family, and the community. Formerly independent farmers become dependent on government susbsidies and credit to secure inputs such as fertilizers, herbicides, fungicides, and various forms of insecticides. They have little control over their output, still less over the marketing of same, and this implies a lack of control over

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[56] World Bank, supra, Note 49, 95.

income. Some farmers wind up in debt, lose their land holdings, and become wage labourers. Food systems change dramatically as resources usually directed to food production are diverted into cash cropping. In some cases, the intensive cultivation required in cash cropping allows very little fallowing, with severe consequences for soil fertility. In West Africa, for example, intensive cotton production has been associated with deforestation, erosion, and declining soil fertility.[57]

(d) Rural Development projects: These are ostensibly designed to revolutionize agricultural production through the introduction of new farming techniques and the provision of rural infrastructure, such as roads, water, storage facilities, and other amenities, to assist the smallholders. However, the non-participatory nature of these projects has often created a situation in which the wealthy get the benefits while the poor and vulnerable members of the community suffer all the social costs of projects. For example, land expropriated from peasants usually end up as plots allocated to influential members of the community, businessmen, high government officials and politicians, who, as absentee farmers, employ landless

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[57] ibid, 20.

peasants as wage labourers on these farms.[58] As well, lack of participation in the design of rural development projects frequently means the exclusion and exploitation of women, with the accentuated risk of poverty for women-headed households.

(e) <u>Resource-extraction and Tourism projects</u>: Timbering, mining, and the citing of associated industries devastate rural ecology, disrupt complex land rights, and sometimes deprive whole communities of their economic, social and cultural moorings. Oil exploration and exploitation, for example, create risks of hunger and loss of income from destruction of land resources owing to oil spillage. Logging degrades the environment, while tourism often impacts quite negatively on local cultures. The increase in child prostitution and child labour in some parts of Asia has been linked to the growth of the tourism industry. Similarly, the intensification of oil extraction in the Niger delta area of Nigeria has been associated with displacement of local populations, environmental despoliation, population shifts, and land-grabbing.

These examples are hardly exhaustive of the forms and risks of harm that may flow from development activity.

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[58] See, e.g., Watts, M., <u>Silent Violence: Food, Famine and Peasantry in Northern Nigeria</u> (Berkeley: University of California Press, 1983).

While some risks and harms - such as landlessness and outbreak of diseases - are easily identifiable, and probably more amenable to remedial measures, others - such as loss of communal spirit, of power to control one's affairs, and of self-reliance - are more subtle and difficult to quantify and compensate for.

Compensation for all harms inflicted on communities is difficult to compute, but the problem is further compounded by the powerlessness of development-affected victims to enforce their claims, whatever may be the "fair compensation" determined by development officials. In a majority of cases, development actors engineer and perpetuate such powerlessness through their control of information, and the collaboration of government in the form of expropriatory legislation and lax regulation.[59]

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[59] The plight of the Ogonis who occupy some of the oil-producing part of South-Eastern Nigeria offers a good example. The land which has sustained the Ogonis (population ca. 500,000) for ages has been rendered mostly uninhabitable through oil spillage and other unethical exploratory practices by a multinational oil corporation. Accounts of the situation show that compensation for pollution of farmlands and rivers, and for destruction of the social and economic mainstays of the community is often a matter of dispute between the community and the oil corporation. In these disputes, the oil corporation often deploys a battery of lawyers and experts against hapless and mostly inarticulate villagers. Sometimes, the oil corporation evokes its considerable political clout to pay only very little compensation or to evade compensation altogether. Government security forces have been implicated in the acts of terror which have been visited on the community

International human rights law recognizes and protects those interests that are harmed or threatened by development activity. Thus, if the risk of harm is known, or verifiable through diligent investigation, or, what is but another way of stating the same principle, if the risk or harm can be averted through the exercise of reasonable care, then the exacerbation of the risk or infliction of the harm becomes a violation of human rights. The IBHR, which is binding on all development actors, provides that under no circumstances may a people be deprived of its means of subsistence. It also provides that all people have a right to food, to good health, to an adequate standard of living, and to culture. Displacement and the instigation of hunger and disease in rural communities by development actors violate these basic rights. Similarly, women's right to equality in the development process is violated when development projects are anchored on political exclusion and discrimination against women in regard to access to resources and opportunities. Such

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in the wake of its resistance to what it has described as "genocide". See, e.g., Hutchful, E., "Oil Companies and Environmental pollution in Nigeria ", in Ake, C., ed., A Political Economy of Nigeria (New York: Longman, 1985) 113-140; AfricaWatch, Vol.5, No.9, 21 (June, 1993); Time magazine, April 24, 1995, at 53; The Toronto Star, Friday, April 7, 1995, at A21; Greenpeace, Shell-shocked: The Environmental and Social Costs of Living with Shell in Nigeria (London: Greenpeace, 1994); and Saro-Wiwa, K., Genocide in Nigeria: The Ogoni Tragedy (Port Harcourt, Nigeria: Saros International Publishers, 1992).

discrimination is prohibited under the CEDAW.

Maladministration of development and all the pathologies associated with it - corruption, discrimination or indifference, lack of transparency, due process and accountability, ignorance of or insensitivity to human rights - will not cease to occur unless development actors fully disclose project plans so as to allow open debate and review by the target population. Participation helps to generate knowledge necessary to an appreciation of the risks and harms inherent in or associated with particular activities, and of steps required to mitigate the risk or to check the harm. Development actors can facilitate this by helping target populations to understand, assert, and secure their rights. The right to development converts these desirable objectives into legal obligations.

4. CONTENT AND MEANING OF THE DECLARATION ON THE RIGHT TO DEVELOPMENT

The UN Declaration on the Right to Development is not a model of clarity. Many quite different propositions seem to have been indigestibly combined in the Declaration. The grant of "rights" to states (Articles 2 and 3) to enable them to demand "a new international economic order", for example, is a problematic proposition in a human rights document. Similarly, there is a demand for concerted action against

apartheid, racism, foreign interference with the sovereignty of states, domination, aggression, threats of war (Article 5), and for states to promote disarmament, establish, maintain and strengthen international peace and security, and ensure a judicious use of the peace dividend (Article 7). The Declaration is also replete with platitudes and vague abstractions, probably borne of an unsuccessful attempt at reiterating too many earlier General Assembly resolutions relating to human rights and the conditions that make derogation from them possible. These shortcomings undoubtedly detract from the pungency of the Declaration. But the central message of the Declaration - the need to protect, respect and promote human rights through the development process - is clear, particularly when the provisions are disaggregated and read against the background of past development disasters or experiences.

Development thinking and practice is still largely dominated by developmentalist philosophy. In fact, the widespread imposition of neo-liberal economic policies through Structural Adjustment Programmes (SAPs) and other multilaeral trade frameworks, such as the World Trade Organization, threatens to entrench this dominance. However, an alternative, people-centred, philosophy has been making gradual inroads into mainstream development thinking and strategizing in recent years. The people-centred approach rejects

developmentalism, that is, the kind of development philosophy which privileges economic growth per se over the welfare and improvement of human beings, be such discount of the human element temporary or for the long-term. A consensus is beginning to emerge regarding the core elements of the new development strategy. Broadly speaking, four elements of this approach are identifiable.

The first element is **people-centredness**[60]: development must be designed to promote human welfare, dignity, and capacities, through measures which aim, as a matter of priority, to provide the basic needs of people for food, shelter, health, education, and material well-being. The second element is **participation**[61]: development must enable and empower people to actively take part in the processes that shape their lives. The third element is **inclusivity**[62]:

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[60] See, e.g., Gran, G., Development by People: Citizen Construction of a Just World (New York: Praeger Publishers, 1983); Korten, C.K., and Klauss, R., eds., People-Centred Development: Contributions Toward Theory and Planning Frameworks (West Hartford, Conn.: Kumarian Press, 1984); and Oakley, P., et al, eds., Projects with People: The Practice of participation in Rural Development (Geneva: ILO, 1991).

[61] See, e.g., Oakley, P., et al, eds., ibid.; Chambers, R., Rural Development: Putting the Last First (London: Longman, 1983); Lineberry, W.P., ed., Assessing Participatory Development: Rhetoric versus Reality (Boulder, Colo.: Westview Press, 1989); and Friedmann, J., Empowerment: The politics of Alternative Development (Cambridge, Mass.: Blackwell Publishers, 1992).

development must not be discriminatory; it must be designed to promote, encourage, and accomodate the interests of vulnerable groups, such as children, and historically disadvantaged groups, such as women, ethnic or cultural minorities, and rural-dwellers. Finally, **sustainability**[63]: development must be designed to conserve and promote respect for the environment as the common heritage of mankind, such that it meets today's needs without jeopardizing the chances of future generations to meet their own needs.

The Declaration attempts to capture and embody these new elements, albeit inelegantly. What follows is an attempt to piece the message together.

(a) **On the definition of "development"**: Development is defined in the Declaration as "a comprehensive economic, social, cultural and political process, which aims at the constant

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[62] See, e.g., UN Population Fund, Investing in Women: The Focus of the '90s (New York; UNFPA, 1990). Among the indicators of development used by the UNDP is the new "Gender Empowerment Measure" (GEM), and the "Gender-related Development Index" (GDI), both of which measure the economic and political emancipation of women in the development process: see the UNDP, Human Development Report 1997 (New York: Oxford University Press, 1997), 146-154.

[63] See, e.g., WCED, Our Common Future (Oxford: Oxford University Press, 1987) (The Brundtland Report); Jackson, B., Poverty and the Planet: A Question of Survival (London: Penguin, 1990); and Timberlake, L., and Thomas, L., When the Bough Breaks: Our Children, Our Environment (London: Earthscan, 1990).

improvement of the well-being of the entire population and of all individuals" (Preamble). Development is also conceptualized as a process "in which all human rights and fundamental freedoms can be fully realized" (Article 1(1)). This can be contrasted with a developmentalist conceptualization which, as noted above, privileges economic growth over human welfare.

(b) **On the purpose and quality of development**: The Declaration identifies the human person as "the central subject of development" (Preamble), and the "main participant and beneficiary of the right to development" (Article 2(1)). Development must thus be people-centred. Secondly, development must be participatory: every human person and all peoples are entitled to "active, free and meaningful participation in development" (Preamble), and may "contribute to, and enjoy economic, social, cultural and political development" (Article 1(1)). Finally, development must be inclusive and not discriminatory: every person and all people are entitled to enjoy rights through the development process "without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; in particular, all are entitled to "fair distribution of benefits resulting from" development activity (Preamble and Article 6).

(c) **On the nature of the right to development**: The right to development is an "inalienable human right" of "every human person" and "all peoples" (Article 1) to pursue "their economic, social, cultural and political development" (Preamble). The right to development is more properly appreciated as a composite right, comprising the following specific rights: i. **right of participation** (referred to above); ii.**right to fair distribution of the benefits of development** (referred to above); iii. **right to self-determination** "by virtue of which (people) have the right freely to determine their political status and to pursue their economic, social and cultural development", and to exercise sovereignty over "all their natural wealth and resources" (Preamble and Article 1(2)); and iv. **right against trade-offs**: "... all human rights and fundamental freedoms are indivisible and interdependent", and as such, "equal attention" must be given to all of them, because "the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms" (Preamble).

(d) **On the responsibility of states and individuals**: "All human beings have a responsibility for development, individually and collectively" and they should, therefore, "promote and protect an appropriate political, social and

economic order for development" (Article 2(2)). States, however, have the primary responsibility, individually and collectively, to create enabling environments for development in conditions of freedom, equality and justice (Articles 2(3), 3(1) and 8(1)). At the national level, states have a duty to "formulate approriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals" (Article 2(3)), and to co-operate with other states to "eliminate obstacles to development" resulting from failure to observe human rights (Articles 3(3) and 6(3)). At the international level, all states are enjoined collectively to "take steps" and to formulate international development policies which facilitate "the full realization of the right to development" (Article 4).

(e) **On the responsibility of other development actors**: All development actors are obligated to observe human rights through the development process as articulated in the Declaration, and this obligation is co-extensive with their obligation under the UN Charter and the International Bill of Rights (Article 9(2))

(f) **On the centrality of "participation" in development activity**: The Declaration emphasizes "active , free and

meaningful participation in development" (Articles 1 (1) and 2(3)) for all human beings "as an important factor in development and in the full realization of all human rights" (Article 8(2)).

Thus understood, the right to development does not purport to enunciate any totally new right, nor does it lay any completely new obligations on states and individuals. The right which the Declaration embodies is one that already exists in international law, even if they have been up until now ignored by development actors. The right to development is **the right of all people affected by development processes to demand respect for and promotion of existing human rights through the process of development.**[64] The results of the Global Consultation[65] support this interpretation. For example, the report identifies three categories of development-affected people: women, indigenous people, and the extremely poor.

With regard to women, the report notes that in spite of "the recognition of equal rights for women in international instruments, they are often undermined by culturally sanctioned (sic) inequalities between men and women or through actions involving short-term gains at the expense of long-term freedom and equity" and that "development projects that

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[64] Adapted from Paul, J.C.N., supra, Note 50, at 33.

[65] Supra, Note 41.

disregard, threaten or undermine women rather than contribute to their advancement violate their human rights".[66] Of indigenous people, the report notes that "(F)orced development has deprived them of their human rights, in particular the right to life and the right to their own means of subsistence, two of the most fundamental of all rights. Indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base - land and resources, and they are almost never the beneficiaries."[67]

The report's observation with regard to the extremely poor is equally to the point. "Experience with the extremely poor in developing and developed countries" the report notes, "(demonstrate) clearly that extreme poverty involves a denial of the totality of human rights - civil and political, as well as economic, social and cultural. Freedom, without respect for economic, social and cultural rights is an illusion; poverty by endangering all individual rights prevents people from assuming not only their duties as individuals, but also their collective duties as citizen, parent, worker and elector."[68]

But, if the right to development only reaffirms the

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[66] ibid., 31.

[67] ibid., 33.

[68] ibid., 34.

existence of, and the need to promote, long-recognized human rights, it might be argued, then it adds precious little to human rights jurisprudence. On the other hand, it might be further argued, recognition of the right to development will directly challenge the international consensus that existing human rights guarantees are adequate - a consensus which took over two decades to build. If existing human rights are somehow deficient, or are not being sufficiently respected or promoted, it might be suggested that, rather than a new right, additional protocols can be appended to the existing ones, or reporting and monitoring procedures can be refined and tightened up.[69] It is important to assess the need for the right to development in terms of these actual and potential objections or criticisms.

Although there is suitable emphasis in the IBHR on the interdependence and indivisibility of all human rights, in reality civil and political rights have always enjoyed priority of attention among human rights advocates, and monitoring and evaluating bodies. Amnesty International, for example, regularly publishes reports on abuse or denial of civil and political rights in all parts of the world, but it

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[69] See a summary of some of these actual and anticipated objections in Alston, P., "The Right to Development at the International Level", in Dupuy, R.-J., ed., The Right to Development at the International Level (The Netherlands: Sijthoff & Noordhoff, 1979), 99-114, at 106-110.

ignores progress or lack of it in the realization of social,
economic and cultural rights. This practice may be justified,
arguably, on the disparate wordings of the two covenants on
human rights - ICESCR and the ICCPR. While the latter imposes
definite legally binding obligations on states and other
members of the international community to respect and promote
the rights that it enunciates, derogation from those rights
only permissible in times of emergency, and even then only "in
order to protect national security, public order, public
health or morals", the former is formulated in deliberately
loose, indefinite, promotional or programmatic language. For
example, the obligation on State Parties to "take steps"
toward the realization of such important development-related
rights as the right to food, clothing, shelter, medical care,
employment, participation in the cultural life of one's
community, and to adequate standard of living, is subject to
the organization and resources of each state. One might argue
that this condition, in and of itself, does not absolve State
Parties of the duty to genuinely work toward the realization
of these rights, but there is no denying that the absence of
mandatory language makes the task of fashioning objective and
consistent evaluative criteria much more difficult, and
furnishes the wrong signal for rogue states to ignore their
obligations under the ICESCR.

The programmatic language of the ICESCR may have

been a concession to the argument that economic, social and cultural rights are either too vague to be protected, cast too enormous a responsibility on states who may wish to implement them, and are simply beyond the capability of poor states regardless of their best efforts.[70] Whatever the merits of this argument, they have played a huge role in the violation and abuse of human rights which the ideology of developmentalism has fostered over the years.[71] Because the violation and abuse of human rights through the development process has traditionally been considered as necessary for economic growth (the benefits of which should later "trickle down" to the poor, compensating them for the trade-off of their rights), they have not been treated and reported as what they are. This situation exists, not for lack of consensus on, or inadequacy of, currently recognized human rights. It exists because developmentalist philosophy has long dominated the discourse

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[70] See, e.g., Cranston, M., What are Human Rights? (London: The Bodley Head, 1977), and Donnelly, J., "The Right to Development: How Not to Link Human Rights and Development", in Welch, Jr., C.E., and Meltzer, R.I., eds., Human Rights and Development in Africa (Albany: State University of New York, 1984) 271.

[71] See, e.g., Asante, S.K.B., "Nation-Building and Human Rights in Emergent Africa" Cornell International Law Journal, 2, 72 (Spring, 1969); Alston, P., "Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy", in ICJ, Development, Human Rights and the Rule of Law (Toronto: Pergamon Press, 1981), 31; and Howard, R.E., "The 'Full-Belly' Thesis: Should Economic Rights take Priority over Civil and Political Rights?", Human Rights Quarterly, 5, 4 (1983).

about human rights and development, and impeded the structural analysis of the two, which is necessary to an appreciation of their interconnection.[72] As such, neither additional protocols nor a refinement of existing human rights monitoring and evaluating mechanisms is likely to solve the problem of the discount of economic, social and cultural rights in the present human rights system. For this reason, a Declaration specifically urging a structural change in the way that human rights are understood, protected and promoted, is hardly redundant.

The United Nations Development Programme's (UNDP's) innovative annual Human Development Report (began in 1990) is a similar attempt to challenge the dominance of developmentalism in the human rights system. In this report, the UNDP measures "development" by the criterion of human condition in all countries. The elements of this criterion include health, nutrition, education, and employment, and

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[72] See, for an excellent discussion of the dislocation of the development-human rights nexus by developmentalist philosophy in Africa, and the untoward result of same on governance, Ake, C., Democracy and Development in Africa (Washington, D.C.: The Brookings Institution, 1996). Unfortunately, there is much lip service in development circles regarding the need to keep and strengthen the connection between human rights and development, as witness the recent celebration of economic growth in East Asia by the World Bank, in the face of increasing signs of authoritarianism in the region: World Bank, The East Asian Miracle: Economic Growth and Public Policy (New York: Oxford University Press, 1993)

recently, gender empowerment - relating specifically to the social, political and economic emancipation and engagement of women in the development process. The lower the score of the human condition, the higher the index of human misery; the score determines a country's place on the global hierarchy of development. The purpose of this method of reporting is to encourage structural analysis of "development" by portraying the progress of countries toward the realization of economic, social and cultural rights in both material and non-material terms.

The conclusion that the Declaration, being a reaffirmation of already recognized human rights, adds nothing new to existing human rights jurisprudence, would appear hasty in light of the potential implications of the right to development for development actors. After the initial confusion over the meaning of the right, it is safe to say that today a clearer perception is beginning to emerge from influential commentaries[73] and the work of some of the

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[73] See the following: Chowdhury, S.R., et al, eds., The Right to Development in International Law (Dordrecht: Martinus Nijhoff Publishers, 1992); Dupuy, R.-J., ed., supra, Note 59; Bedjaoui, M., "The Right to Development", in Bedjaoui, M., ed., International Law: Achievements and Prospects (Dordrecht: Martinus Nijhoff Publishers, 1991), 1177; Paul, J.C.N., supra, Notes 44 and 48; the work of Non-Governmental and Inter-Governmental Organizations, such as the International Centre for Law in Development (ICLD). Recently, the ICLD, through its very able Secretary and President respectively, James C.N. Paul and Clarence J. Dias, produced a "Draft Charter to Secure

specialized agencies of the UN, such as the UNCHR,the ILO and

the UNDP. Of special significance also is the work of the

Working Group on the Right to Development (WGRD). Established

in 1993 by the UNCHR[74], initially for a period of three years,

the WGRD was mandated to (i) identify obstacles to the

implementation and realization of the Declaration on the Right

to Development, on the basis of information furnished by

member states and other appropriate sources, and (ii)

recommend ways and means towards the realization of the right

to development by all states.

Pursuant to this mandate, the Secretary-General had

requested member Governments, UN specialized agencies,

intergovernmental and non-governmental organizations to

contribute to the work of the WGRD. There is a clear

Human Rights in Development Processes and to set out the
Human Rights Obligations of Development Agencies". This
draft document, which sets out procedures and standards
for the promotion and protection of human rights through
the processes of development, tremendously illuminates
the purpose and meaning of the right to development;
Kunig, P., "The "inner" Dimension of the Right to
Development: Considerations concerning the Responsibility
of Developing Countries", Law and State, 36, 46 (1987);
and Kooijmans, P.H., "Human Rights: Universal Panacea?
Some Reflections on the so-called Human Rights of the
Third Generation" Netherlands International Law Review
315 (1990).

[74] By CHR/Res. 1993/22 of March 4, 1993, paragraph 10. See
also UN Doc. E/CN.4/AC.45/1994/2 of April 7, 1994,
containing Report of the Secretary General submitted in
accordance with Commission on Human Rights Resolution
1993/22.

structural approach to human rights in the replies received by the WGRD from these bodies. The UN Population Fund, for example, attributed the major difficulty in realizing the right to development to "contextual obstacles", one of which was "[P]re-eminence, reflected in the priorities of national development plans, of the quantitative, of profit and economic profitability, over the qualitative objectives of development".[75] The League of Arab States blamed external debt burdens, and recommended that these burdens be attenuated through cancellation, rescheduling, or abolition of interest rates on loans.[76] The Organization for Economic Co-operation and Development identified crisis of governance as the main obstacle to development. It recommended democratization as a basis for legitimacy of government.[77] These are only a few illustrative examples of the context-driven way in which human rights issues are now being analyzed. They suggest a departure from the abstraction of traditional analysis to the concreteness of structures which inhibit or impede the realization of human rights.

The implications of the right to development can be appreciated at the levels both of beneficiaries and of

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[75] ibid., 26.

[76] ibid, 35-36.

[77] ibid., 36-39.

development actors. Those identified as "beneficiaries" of development - those whose ways of life are the target of change through development activity - are entitled to exercise rights of participation in the processes by which change is effected in their lives and destinies. Rights of participation are actually an aggregation of a number of interrelated rights which have been guaranteed by the IBHR as well as other international legal instruments and repeatedly recognized as essential to the processes of development. They are essential because it is through the exercise of these rights that entitlement to or enjoyment of other rights can be asserted or secured.

However, "participation" is an ambiguous concept.[78] If it has been used in certain contexts to justify manipulative behaviour, such as the use of free local labour on development projects, it has also served as the basis for forging consensus, for power-sharing, and for ensuring "due process" - accountability, social equity, and the compatibility of objectives and output with perceived needs - in other situations. Moreover, the concept may refer to a wide range of activities - debating, voting, protesting and so on - which may be necessary at the initiation, implementation,

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[78] See, e.g., Midgley, J., Community Participation, Social Development and the State (London: Methuen, 1986); Ghai, D., Participatory Development: Some perspectives from Grassroots Experiences (Geneva: UNRISD, 1988).

monitoring, or evaluation of a project. For participation to be meaningful, therefore, the enabling rights must vary according to the demands of the situation. "The more a particular group's basic interests are especially affected by a proposed development activity", writes James Paul, "the more they must be capacitated and empowered to identify, assert, and protect their interests in relation to that activity".[79]

For beneficiaries of development activity, therefore, rights of participation would include, but are not limited to, the right to be notified about a project proposal, to seek and gather pertinent information from officials of government or other development agencies, such as enable intelligent cost-benefit analysis of the project, the right to form self-managed associations and to engage in collective activities such as strikes or demonstrations, freedom of communication, access to the media, to officials and agencies, and to redress and accountability-imposing mechanisms or institutions, such as courts, to legal resources. These rights and freedoms are regularly denied, frustrated, or manipulated by development officials and agencies. But they are crucial to the empowerment of usually uninformed, vulnerable and

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[79] Paul, J.C.N., supra, Note 50, 81.

historically excluded groups.[80]

There are numerous international instruments which guarantee the rights of women, migrant workers, children, and indigenous peoples, for example. It is only through the exercise of rights of participation in development processes that the rights guaranteed can be given concrete expression. These groups must now be allowed to freely form associations for purposes of collaborating with domestic or international organizations in order to influence development policies, to dramatize their concerns, institute legal action, voice their demands or objections to anti-participatory practices, or to seek protections from the impact of harmful policies or projects.

For development actors, the implications of the right to development are equally weighty. States must now endeavour to create what has been recently referred to as "enabling environments"[81], that is, development processes which

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[80] See, for a similar view, Paul, J.C.N., "Participatory Approaches to Human Rights in Sub-Saharan Africa", in An-Na'im, A.A., and Deng, F.M., eds., Human Rights in Africa: Cross-Cultural Perspectives (Washington, D.C.: The Brookings Institution, 1990), 213-239.

[81] See, e.g., the "Copenhagen Declaration", adopted by the World Summit for Social Development, Copenhagen, Denmark, 6-12 March, 1995, especially Commitment 1, which states that Member States commit themselves to the creation of an "enabling economic, political, social, cultural and legal environment that will enable people to achieve social development".

aim to ensure the rule of law, democracy, and the existence of rules and processes that institutionalize transparency and accountability in decision-making and implementation. Human welfare must be the central evaluative criterion in all development policies. The creation of enabling environments would obviously involve constitutional and legislative reforms. States are also required to co-operate with each other in this task.

Other development actors must now place human rights at the centre of their activities. They must develop detailed internal rules which emphasize clearly the promotion and protection of human rights, and the steps which their officials must take towards facilitating the participation of potentially development-affected groups. When the World Bank advances loans for the construction of large-scale dams, for example, its personnel must not only ensure respect for the rights of local farmers and fisherfolk whose means of livelihood might be adversely affected by the project, but must actively encourage the participation of women, eschew worker exploitation and avoid the use of child labour. When transnational corporations embark on extraction of mineral or other resources, they must do so with complete regard for the social, economic, and cultural well-being of the local communities. They must guard against foisting foreign lifestyles and tastes on these communities, forcibly

displacing or dislocating them from their traditional abodes without prompt, fair and adequate compensation.

Finally, the structural approach of the right to development implies that treaty-monitoring bodies must broaden and deepen their terms of reference when reporting on the implementation of human rights treaties. It will no longer be sufficient, for example, for the Committee on the Rights of the Child (CROC) to recommend the abolition of child labour without an analysis of the social and economic conditions which force children into work. A similar approach will inform the work of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee against Torture, and all other similar bodies at the UN.

Against the backdrop of what we have described above as the "reality" of development, the foregoing analysis demonstrates that, despite its poor drafting, the HRD is grounded on the concrete experiences and lessons of decades of development activity in the Third World.

5. CONCLUSION

The Declaration on the Right to Development rests on the foundation of human rights jurisprudence developed through this century. It represents an explicit fusion of civil and political rights and economic, social, and cultural rights. The interdependence of these rights has often been emphasized

in human rights discourse, but in practice, governments have never been held to the same standards of accountability for economic and social rights as they have been for civil and political rights. The declaration raises both forms of human rights to an equal pedestal, underscoring the relationship between poverty and the violation of human rights. In spite of its poor drafting, this central message of the Declaration is extractable through careful analysis.

CHAPTER FOUR

THE LEGAL STATUS OF THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

1. INTRODUCTION

This chapter examines the legal status of the right to development in international law. Although the right is founded on several international human rights principles,[1] its precise legal status remains controversial.[2] The Declaration on the Right to Development was adopted in a resolution of the UN General Assembly.[3] But Article 38 of the Statute of the

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[1] See Chapter Two, passim.

[2] See, for example, Rich, R.Y, "The Right to Development as an Emerging Human Right", Virginia Journal of International Law, Vol.23, 287 (1983); Marks, S.P., "Emerging Human Rights: A New Generation for the 1980s?", Rutgers Law Review Vol.33, 435 (1981); and Alston, P., "A Third Generation of Human Rights: Progressive Development or Obfuscation of International Human Rights Law?", Netherlands International Law Review Vol.29, 307 (1982). Compare, Donnelly, J., "The Right to Development: How Not to Link Human Rights and Development", in Welch, Jr., C.E., and Meltzer, R.I., eds., Human Rights and Development in Africa (Albany: State University of New York, 1984), 271; and Brownlie, I., "The Rights of Peoples in Modern International Law", in Crawford, J., ed., The Rights of Peoples (Oxford: Clarendon Press, 1988), 1, 12-16.

[3] United Nations General Assembly, Declaration on the Right to Development, UNGAOR, 41st Session, Resolutions and Decision, Agenda Item 101, at 3-6, 9th plenary meeting, 4 December, 1988, UN Doc. A/Res./41/128.

International Court of Justice,[4] which identifies the sources of international law - international custom, international conventions, general principles of law, judicial decisions, and the teachings of publicists - does not recognize resolutions of the General Assembly as one of these sources. This raises a *prima facie* question about the legal status of the right. Can a norm of international law be created outside of the traditional sources? What amount of legal weight does a resolution of the UN General Assembly command or deserve?

These legal questions will be considered against the backdrop of another overarching, but not so legal, question: what is the role of international law in the dynamics of international relations? Should international law assume an instrumental role among nations, helping them to achieve certain common goals, or must it remain within its essentially individualistic cast, only helping states to peacefully interact?

The chapter commences with a contextual synopsis of the "metamorphosis" of international law from a law of coexistence to a law of co-operation, and the effort of Third World countries, emboldened by this perceived progression, to use the United Nations system to create a new international law of development. It then evaluates the right to development

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[4] Statute of the International Court of Justice (ICJ), article 38, 59 STAT. 1055, T.S. No.993, 3 *Bevans* 1179.

using several traditionally accepted evaluatory criteria of international norm creation. It concludes with a suggestion that at the present stage the right to development is best understood as "soft" law, representing neither the "rhetoric" that its opponents think it is, nor the hard piece of international law that some of its protagonists proclaim it to be.

The clearer this legal position is to all who engage in development activities in the Third World, the less debatable will be the obligations laid down under the right to development, and perhaps, the less difficult the task of implementation.

2. ESTABLISHING THE CONTEXT: FROM THE LAW OF CO-EXISTENCE TO THE LAW OF CO-OPERATION: INTERNATIONAL LAW IN AN UNEQUAL WORLD

Under classical international law, States enjoyed wide-ranging freedom of action.[5] As subjects of the international community, States were free to take whatever measures they deemed fit regarding their internal political organization, foreign policy, and international commerce. No

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[5] See, for example, Cassese, A., International Law in A Divided World (Oxford: Clarendon Press, 1986), 22-26; Nussbaum, A., A Concise History of the Law of Nations, 2nd edn.,(New York: Hawthorn Books, 1962), and Northedge, F.S., and Grieve, M.J., A Hundred Years of International Relations (New York: Praeger, 1971).

law required a State to choose a particular form of political organization; if it chose to have a monarchy instead of a government composed of elected representatives, it was entirely its own business, and the rest of the world had no say in the matter. Similarly, a State had the unfettered freedom to enter international agreements with partners and upon terms of its own choice, or not to enter any such agreements at all. In addition, the legal order allowed a State to use force in furtherance of its interests; it could go to war to vindicate a right that it considered violated by another state, or resort to other forcible measures against another state if it found such an action politically or economically expedient.[6] A State violated no imperative rule if it agreed with other subjects to extinguish itself, or to cede part of its territory to another subject, or to merge its territory with that of another State. In the field of international commerce, it was "open to any State, without

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[6] Article 2 of the Hague Convention for the Pacific Settlement of International Disputes seemed to have proclaimed the right of States to use force as much as they wished: "In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers". Similarly, the Spanish Regulations on Land Warfare (1882) permitted as a "just cause of war", "the defence of the general interests of the State or of its essential rights" (emphasis supplied). See also Bull, H., The Anarchical Society: A Study of Order in World Politics (New York: New York: Columbia University Press, 1977), 24-27, and Cassese, ibid., 22-26.

violating a legal rule, except in so far as it may be bound by commercial treaty, to take any measures which it may think fit . . . "[7] And even where States agreed to submit their legal disputes to arbitration, the principle of party autonomy took precedence over the demands of justice, for a State could exclude from arbitration all disputes affecting what it defined to be its "vital interests".[8]

Such was the nature of freedom allowed under classical international law. In practice, however, this freedom was never absolute. Social and economic considerations and the inherent checks and balances of power politics managed to dilute and derogate from the freedom. But the essential attitude underlying international relations remained one of laissez faire. The situation could not be otherwise in a world community where there was no State or group of States capable of wielding permanent control over all other states so as to prescribe a set of basic standards of behaviour. Fundamentally, therefore, international law was only negative regulation; States were free to act autonomously subject to one limitation - that they did not by their actions trespass

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[7] Fischer Williams, J., Aspects of Modern International Law (New York: Oxford University Press, 1939), 108-109.

[8] See Brierly, J.L., "International Law: Its Actual Part in World Affairs", in The Basis of Obligation in International Law (Oxford: Oxford University Press, 1958), 310.

on the freedom of other States.

Since the First World War, the freedom of States has come under increasing attrition from three principal developments. First, States have assumed various obligations under international treaties, binding them to obey several rules and conform to a variety of standards of behaviour. These obligations have in effect reduced the capacity for autonomous action, both locally and internationally. Many of these treaties regulate commerce, diplomatic, military and technical ties, as well as civil and political behaviour of States vis-a-vis their citizens. It can be argued that in theory States retain the freedom to renounce treaties if they were inclined so to do; in practice, such an action entails substantial costs that States cannot take lightly.

Secondly, important restrictions on the right of States to use force have been effected since 1919. In that year, the Covenant of the League of Nations restricted the power of some States to wage war. In 1928, the Paris Pact extended the restriction to a larger group of States. The UN Charter imposed more sweeping restrictions in 1945 by prohibiting the use or threat of military force by State Parties. Unfortunately, however, these restrictions lack teeth owing to lax enforcement mechanisms.

Thirdly, the emergence of peremptory norms of international law - called *jus cogens* - in the 1960s radically

reduced the power of states to decide the terms of their international agreements. <u>Jus cogens</u> are those general principles, based on custom, which have greater legal force than other rules and apply to all international agreements irrespective of the intention of State Parties. Agreements concluded in violation of <u>jus cogens</u> are void. However, no specific international machinery has been set up to enforce these rules.

Clearly, therefore, in spite of these impressive normative advances, the autonomy enjoyed by States under classical international law has not been significantly diminished. Not much has changed in the essentially individualistic and consensual nature of international relations.[9] A strict regime of restrictions was not what the Great Powers intended when they established these normative rules. International law, to them, was meant to protect and legitimize their interests, by reducing inter-State conflicts, and facilitating peaceful co-existence.

2.1. THE UN CHARTER AND THE "METAMORPHOSIS" OF INTERNATIONAL LAW

A significant change in the above picture occurred

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[9] See Cassese, A., supra, note 5, 30-32.

with the adoption of the UN Charter[10] in 1945. The Charter, for the first time, laid down a set of fundamental principles to govern the action of all the members of the UN, and established the main goals of international institutions. This change was demanded by the desire of the world community to establish the conditions for peace and justice after the upheaval of the Second World War. Article 55 of the Charter stipulated that member States of the UN must endeavour, either individually or together with other States, to co-operate with the UN to solve international and domestic problems in the area of human rights, and in economic and social areas as well. Article 56 pointedly obliged member States to take "joint and separate action" to realize the purposes enunciated in Article 55.

The accession of many Asian and African countries to independence shortly after the Second World War thrust the issue of international co-operation to greater prominence. These countries relied on the Charter to make demands for economic and other forms of assistance from the developed world.[11] But this was vigorously resisted by Western States,

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[10] United Nations Charter, opened for signature, June 26, 1945, 59 STAT. 1031, T.S. No.993, 3 Bevans 1153.

[11] See, for example, Anand, R., New States and International Law (New Delhi: Vikas Press, 1972); Falk, R., "The new States and the International Legal Order" Recueil des Cours, Vol.118, 7 (1966 II), and Kay, D., The New Nations in the United Nations: 1960-1967 (New York: Columbia

in spite of their acceptance of the principle of co-operation. A reason for the failure of these demands to achieve traction within the UN was that the Charter did not specify how States should co-operate, and in what form, to solve the problems of the international community. This was probably deliberate, as specification of the duty to co-operate would have meant an encroachment on the sovereignty of States. Secondly, a principle of co-operation, from a practical perspective, seemed bound to be tenuous in comparison to, for example, the principle of co-existence. The latter is a _sine qua non_ for the survival of the world community and the orderly conduct of international relations; by contrast, minimal or no co-operation by States does not necessarily imply any present threat or danger to the world community. Of course, given the state of the world, it is in the interest of States to assist and co-operate with other international subjects. Such co-operation invariably produces benefits for all the contracting parties, and this can be a major incentive. However, the seemingly one-way kind of co-operation demanded by the new member States of the UN, where the interest of the donor or grantor States was not necessarily served, stood little chance of being taken seriously by the addressees of that demand.[12]

University Press, 1970), passim.

[12] See Cassese, A., supra, note 5, 87.

In consequence of the opposition of developed nations, and its own inherent weakness, the principle of co-operation did not prove to be the effective legal tool which the new States needed to extract economic and other assistance from the developed States in aid of their struggle against poverty. This further underscored the point that the metamorphosis of international law from a law of coexistence to a law of co-operation was not complete; States retain the bulk of their freedom, so that it is safe to say that sovereignty (or the consent of States) remains the cornerstone of international relations.[13]

2.2. THE STRUGGLE FOR A NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

If the interpretation of "co-operation" under the UN Charter by the developed nations differed from that of the emergent States (which came to be known as the Third World), this did not deter the latter from pressing for economic concessions from the former. In 1974, at the Sixth Special

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[13] See Gross, L., "The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order", American Journal of International Law, Vol.65, 253, 318: "[I]t must not be overlooked, however, that consent to the law is still a crucial requirement, and while it may appeal to a progressive audience to urge the court to abandon the "sovereign state" oriented approach in favor of a "community" oriented approach, the time has not yet come for so radical a reorientation."

Session of the UN General Assembly, Third World nations sponsored two documents which were subsequently adopted as resolutions. One of the resolutions was entitled "Declaration on the Establishment of a New International Economic Order",[14] and the second, "Programme of Action on the Establishment of a New International Economic Order".[15] Both documents, based, according to their proponents, on the international duty of co-operation as laid down by the UN Charter, called for a radical reconfiguration of the international economic system to allow for preferential economic treatment to the Third World nations. Another resolution, the Charter of Economic Rights and Duties of States,[16] was adopted by the UN General Assembly in the same year, supplementing and codifying the concepts set out in the two earlier resolutions.

The movement for a NIEO was product of several years of effort by Third World nations to use the UN system to challenge the existing economic system which they considered not only inequitable but inimical to their developmental interests and goals. They had succeeded in sponsoring through the UN system a number of initiatives favourable to their

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[14] UNGA Res.3201 (S-VI), 29 UNGAOR Supp. (No.1), 3, UN Doc. A/9559 (1974).

[15] UNGA Res. 3202 (S-VI) 29 UNGAOR Supp. (No.1), 5, UN Doc. A/9559 (1974).

[16] UNGA Res. 3281, 29 UNGAOR Supp. (No.30), 50, UN Doc. A/9631 (1974).

economic and political interests.[17] But by the mid-1960s, the growing disparity between the rich and poor nations[18] had given rise to the perception among the latter that the international economic system was structured to perpetuate their poverty.[19]

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[17] For example, the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514, UNGAOR Supp. (No.16), 66, UN Doc. A/4684 (1960); Declaration of a United Nations Development Decade, UNGA Res. 1710, 16 UNGAOR Supp. (No.17), 17, UN Doc. A/5100 (1961); Resolution on Permanent Sovereignty over Natural Resources, UNGA Res. 1803, 17 UNGAOR Supp. (No.17), 15, UN Doc. A/5217 (1962). Other initiatives include sponsorship of the decision to convene the first United Nations Conference on Trade and Development (UNCTAD) in 1962 (UNGA Res.1785, 17 UNGAOR Supp. (No.17), 14, UN Doc. A/5217 (1962)), the decision to establish UNCTAD as a permanent organ of the UN General Assembly (UNGA Res.1995, 19 UNGAOR Supp. (No.15), 1, UN Doc. A/5815 (1964), and the decision by the contracting parties to the General Agreement on Tariffs and Trade (GATT) to amend the Agreement to modify their commitment to pure trade liberalization and allow preferential treatment to less developed countries (see Protocol Amending the general Agreement on Tariffs and Trade (GATT), 572 UNTS 320 (1965)).

[18] See, for example, Mansfield, E., Principles of Macroeconomics, 2nd edn., (New York: Norton, 1977), 512-521; Johnson, H., Economic Policies Towards Less Developed Countries (New Haven, Conn.: Yale University Press, 1967); and Ghosh, P., ed., New International Economic Order: A Third World Perspective (Westport, Conn.: Greenwood Press, 1984), passim.

[19] The NIEO Declaration states, for example, that "It has proved impossible (for Third World nations) to achieve an even and balanced development. . . under the existing international economic order. . . (which) perpetuates inequality." In his opening speech at the UN General Assembly's Sixth Special Session where the NIEO resolutions were sponsored, President Boumedienne of Algeria stated that the present economic order "constitutes the major obstacle standing in the way of any hope of development and progress for all the

They instituted a campaign aimed at restructuring not only the international economic system, but also the law on which the system rested.[20] As we pointed out in Chapter Two, the choice of the UN as the most advantageous forum in which to carry out the campaign was based on several considerations.

First, the UN was the most accessible forum in which these nations could ventilate their frustrations and displeasure with the existing international system.[21] Secondly, the growing number of newly independent States conferred a numerical superiority which enabled these States to control the agendas and voting patterns of many of the organs of the UN that dealt with international economic issues – the General Assembly, the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Economic and

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countries of the Third World" because, according to him, "(the system) thrives by virtue of a process which continually impoverishes the poor and enriches the rich".

[20] See, for example, Asante, S.K.B., "Traditional Concepts versus Development Imperatives in Transnational Investment Law", in Dupuy, R.-J., ed., The Right to Development at the International Level (Alphen aan den Rijn: Sijthoff and Noordhof, 1979), 352; Varges, G.S., The New International Economic Order Legal Debate (Frankfurt au Main: Peter Lang, 1983), 4-6; and Hossain, K., ed., Legal Aspects of the New International Economic Order (London: Frances Pinter Ltd., 1980).

[21] See McWhinney, E., The World Court and the Contemporary Law-Making Process (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), 132, and Adede, A., "International Law From a Common Law Perspective", Boston University Law Review, Vol. 60, 46, 49 (1980).

Social Council (ECOSOC).[22] Thirdly, aside from Articles 55 and 56 of the UN Charter, the Preamble to the Charter seemed to provide direct support for the effort of the poor nations to attain economic development. The Preamble states that State Parties will endeavour "to promote social progress and better standards of life...(and in this regard will) employ international machinery for the promotion of economic and social advancement of all peoples." Finally, the Third World nations used the UN forum because they believed that the UN possessed, at least, a limited law-making capacity.[23]

Since the NIEO was formally announced in 1974, Third World nations have attempted to systematically implement the broad principles set out in the resolutions. They have sponsored the drafting of a wide range of instruments proposing changes in the international legal regime.[24] Some of the instruments incorporating NIEO principles include the Law

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[22] McWhinney, ibid., 132.

[23] See Anand, supra, note 11, 74.

[24] See Langley, B., "The Third World: Towards a Definition", Boston College Third World Law Journal, Vol.2, 22 (1981); Horn, N., "Normative Problems of a New International Economic Order" Journal of World Trade Law, Vol.16, 338 (1982); Weston, B.H., "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth", American Journal of International Law, Vol.75, 437 (1981), and Sarin, M.L., "The Asian-African States and the Development of International Law", in Dupuy, R.-J., ed., The Future of International Law in a Multicultural World (The Hague: Martinus Nijhoff, 1984), 117.

of the Sea Treaty,[25] and the Agreement Governing the Activities
of States on the Moon and Other Celestial Bodies.[26] Many of the
developed nations are, however, opposed to the adoption of
multilateral treaties which incorporate NIEO principles. The
United States, for example, refused to sign the Law of the Sea
(LOS) Treaty for this reason.[27] The LOS treaty included
provisions aimed at regulating the mining of the deep sea-bed,
such that the unapropriated resources of the sea would be
preserved as the "Common Heritage of Mankind".[28] The position
of the developed nations remains that subscription to the
principles contained in the NIEO documents should be

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[25] United Nations law of the Sea Treaty, December 10, 1982,
UN Doc. A/CONF.62/122, reprinted in International Legal
Materials, Vol.22, 1261 (1983).

[26] Agreement Governing the Activities of States on the Moon
and Other Celestial Bodies, opened for signature
December 18, 1979, UN Doc. A/34/664 (1979); adopted by
the UN general Assembly in UNGA Res. 34/68, 34 UNGAOR
Supp. (No.46), 77, UN Doc. A/34/46 (1979).

[27] See United Nations Law of the Sea Treaty, December 10,
1982, UN Doc. A//CONF.62/122, reprinted in International
Legal Materials, Vol.22, 1261 (1983).

[28] See, for example, MacRae, G., "Customary International
Law and the United Nations Law of the Sea Treaty",
California Western International Law Journal, Vol.13, 181
(1983); Nanda, V., "A Parting of the Waves", World View,
Vol.25, 11 (1982), and Adede, A., "The System for
Exploitation of the "Common Heritage of Mankind" at the
Caracas Conference", American Journal of International
Law, Vol.69, 31 (1975)

voluntary, and the documents should be non-binding.[29]

Although Third World nations initially adopted the position that the NIEO documents must be adopted as treaties and conventions,[30] this strategy seems to have been abandoned because most developed nations have consistently demonstrated an unwillingness to bestow legal force on instruments that seek to implement NIEO principles.[31] Third World nations, on the other hand, have also, rather inconsistently, demonstrated impatience with the traditional and formal law-making procedures, such as treaties,[32] because of the latter's long periods of gestation.[33] They have, instead, adopted the position that the General Assembly of the UN has "quasi-

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[29] See, for example, Schwartz, N., "Are the OECD and UNCTAD Codes Legally Binding?", International Lawyer, Vol.11, 529,532: "it has been the view of the United States that under the United Nations Charter the General Assembly may discuss and make recommendations, but it is not a law-making body and its resolutions, no matter how solemnly expressed or characterized, nor how often repeated, do not make law or have binding effect". Compare Lillich, R., "Economic Coercion and the NIEO: A Second Look at First Impressions", Virginia Journal of International Law, Vol.16, 233, 237 (1976).

[30] See Timberg, M., "The UNCTAD International Code on the Transfer of Technology: Current Status", International Business Lawyer, Vol.11, 61 (1983).

[31] See MacRae, supra, note 28.

[32] See Horn, supra, note 24, 347.

[33] See Gross, L., "The International Court of Justice: Consideration of requirements for Enhancing Its Role in the International Legal Order", American Journal of International Law, Vol.65, 253, 318 (1971).

legislative" powers.[34] Their argument is that under certain

conditions, resolutions of the General Assembly can create

international law. Developed nations deny the General Assembly

a law-making capacity, and insist that its resolutions are

merely recommendatory and non-binding.[35]

2.3. A CONTINUATION OF THE STRUGGLE: THE RIGHT TO DEVELOPMENT

The declaration on the right to development[36] shares

many things in common with the NIEO documents.[37] In trying to

establish its own basis, the declaration on the right to

development refers to "the purposes and principles of the

Charter of the United Nations relating to the achievement of

international co-operation in solving international problems

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[34] See generally, Falk, R., "On the Quasi-Legislative
Competence of the General Assembly", American Journal of
International law, Vol.60, 782 (1966).

[35] See, for example, Fatouros, A.A, "On the Implementation
of Codes of Conduct: An Analysis of Future Experience",
American University law Review, Vol.30, 941, 981 (1981):
"The position of developed nations, including the United
States, is that. . . international codes of conduct can
only consist of voluntary guidelines." See also Stanley,
F., International Codes of Conduct for MNCs: A Skeptical
View of the Process", American University Law Review, 973
(1981).

[36] Declaration on the Right to Development, supra, note 3.

[37] See, for example, Bedjaoui, M., "Some Unorthodox
Reflections on the "Right to Development"", in Snyder,
F., and Slinn, P., ed., infra, note 123, 87.

of an economic, social, cultural or humanitarian nature...".[38]

Article 3(3) of the declaration further states that "States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development... States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all states...". All the articles of the declaration dealing with the international dimension of the right to development explicitly and implicitly refer to the international duty of co-operation. Not surprisingly, the declaration was perceived by the developed nations as another attempt by Third World nations to extract economic aid from them.[39]

The codification of the right to development and its adoption in the form of a resolution at the UN General Assembly typifies the preference of Third World nations for creating a new international law through the United Nations

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[38] Preamble

[39] See the position adopted by the US, West Germany, the UK, and Japan at the global consultation on the right to development when the report of the consultation was considered at the Commission on Human Rights, infra, 169. See also, Alston, P., "The Right to Development at the International Level", in Dupuy, R.-J., ed., supra, note 20, 99; and Bedjaoui, M., "The Right to development", in Bedjaoui, M., ed., International Law: Achievements and Prospects (Dordrecht: Martinus Nijhoff Publishers, 1991), 1177.

system. Whatever the merits of this approach, however, it has not put to rest questions regarding the juridical status of the right. The developed nations' antipathy to this strategy was reflected in the voting pattern at the General Assembly when the resolution was adopted. All Third World member States, and a handful of developed States, voted overwhelmingly in favour, while a substantial number of developed States either abstained or voted against the resolution.[40]

3. THE JURIDICAL STATUS OF THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

Given that the consent of States remains the determinative criterion of international law, the juridical status of the right to development must depend on whether States have shown a willingness to be bound by the UN resolution declaring the existence of the right. But consent need not be explicit; it can be inferred from written instruments as well as from State practice. Written instruments, such as multilateral or bilateral treaties, express binding obligations, and State practice affords an insight into the thinking of States regarding international obligations. In seeking to determine the consent of States,

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[40] See the Declaration, supra, note 3, for the voting record.

"[W]hat is sought for", writes Brierly, "is a general recognition among states of a certain practice as obligatory. . . This test of general recognition is necessarily a vague one. . ." [41] We shall presently evaluate the evidence of State consent from both the explicit and implicit sources.

The starting point for a discussion of the existence of the right to development in international law is the resolution of the UN General Assembly which purports to create the right. The question that will be examined in that connection is whether a resolution of the UN General Assembly can validly create international law.

3.1. THE NORM-CREATING CAPACITY OF UN GENERAL ASSEMBLY RESOLUTIONS

A resolution may be defined as an expression of the collective opinion of an organization on a topic which it has previously deliberated upon. Resolutions are usually in writing, and they represent the culmination of an organization's decision-making process.[42] Within the UN system, there are various forms of resolutions. Some resolutions are directed at UN organs and activities; others seek to implement

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[41] Brierly, J.L., The Law of Nations: An Introduction to the International Law of Peace, 6th edn. (New York: Oxford University Press, 1963), 61.

[42] see Castaneda, infra.

certain provisions of the UN Charter; and yet others declare, affirm, or recognize existing but nascent customary international law. Another category of resolutions are those that purport to enunciate, for the first time, and in abstract form, a rule or rules of international law. The last element of the first category, and the second category, of resolutions purport to <u>create</u> international law.

Opinions are divided on the question of whether the UN General Assembly resolutions can create international law. It is a question that has pitted scholars against each other since 1945 when the UN was founded.[43] One school of thought, sometimes referred to as the "progressive" school, argues that resolutions may create international law. Another school, often referred to as the "traditional" school, denies that resolutions may have legal significance.[44] These schools of thought represent the respective positions of the Third World and the developed nations. Third World nations, historically,

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[43] See, for a historical account of the controversy, see Sloan, F.B., "The Binding Force of a Recommendation of the General Assembly of the United Nations", <u>British Yearbook of International Law</u>, Vol.25, 1 (1948); Higgins, R., "The Development of International Law by the Political Organs of the United Nations", infra, note 83 ; Asamoah, O.Y., <u>The Legal Significance of the Declarations of the General Assembly of the United Nations</u> (The Hague: Martinus Nijhoff, 1966); Castaneda, J.G., <u>Legal Effects of United Nations Resolutions</u> (New York: Columbia University Press, 1969).

[44] See Asamoah, ibid., 434-436.

attribute a law-creating capacity to the UN General Assembly resolutions, while developed nations adopt the more traditional approach that resolutions are merely recommendatory and do not create legally binding obligations. The validity of these arguments bear closer scrutiny.

The traditionalists argue, firstly, that resolutions of the UN General Assembly cannot create international law because the General Assembly itself possesses no formal legislative powers. The drafters of the UN Charter clearly withheld such powers from the General Assembly, and Articles 10-14 of the Charter only grants it the power to make "recommendations".[45] It is doubtful, however, if formal legislative capacity is important to the process of law-creation in international law. That process is generally vague and flexible. The Universal Declaration of Human Rights,[46] for example, is a resolution of the General Assembly which has clearly created international law, in spite of the provisions

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[45] See supra, note 43, and the authorities cited.

[46] Universal Declaration of Human Rights, UNGA Res. 217, UN Doc. A/810 (1948). Other resolutions recognized as having created international law include Declaration on the Granting of Independence to Colonial Countries and Peoples, supra, note 15, Resolution on Permanent Sovereignty over natural Resources, ibid., Declaration on Elimination of Discrimination Against Women, UNGA Res. 2263, 22 UNGAOR Supp. (No.16) 1, UN Doc. A/6555 (1967). See Sohn, L.B., "The Shaping of International Law", Georgia Journal of International and Comparative Law, Vol.8, 13 (1978).

of the UN Charter. The process by which resolutions create law more closely resembles the creation of custom than it does a legislative process.[47] Thus, the General Assembly's lack of formal legislative powers are irrelevant to its legislative competence.

A second traditional argument is that Article 38 of the Statute of the International Court of Justice (ICJ) does not list General Assembly resolutions as a source of international law. The sources listed include international custom, conventions, general principles of law, judicial decisions, and teachings of renowned publicists. Since general Assembly resolutions are not part of the list of sources of international law, so the argument goes, they cannot create international law.[48] The problem with this argument is that the distinction which Article 38 draws between legal instruments (e.g., a treaty and a resolution), held up against the practice of States, is arbitrary. The basis of obligation in

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[47] See Falk, supra, note 34, and Friedmann, W., _The Changing Structure of International Law_ (New York: Columbia University Press, 1964), 370: "[I]nternational law still lacks the organization and machinery of municipal law, the principles and processes of change in international law are far more elastic and complex than in the municipal systems, which have a generally well-articulated division of functions and powers between legislative, executive and judicial organs."

[48] See, for example, Guradze, M., "Are Human Rights Resolutions of the United Nations General Assembly Law-Making?" _Human Rights Journal_, Vol.4, 456 (1971).

international law is whether a particular instrument which purports to impose the obligation is generally accepted and actually relied upon in real cases and/or disputes. In other words, the legal validity of an instrument is a matter to be determined in accordance with empirical evidence[49] as opposed to the instrument's formal characterization.[50] Furthermore, it may be argued that Article 38 is not exclusive in terms; it does not preclude the existence of other sources of international law. For example, in its advisory opinion on Namibia[51] in 1971, the ICJ did a searching analysis of relevant

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[49] See Schachter, O., "The Twilight Existence of Nonbinding International Agreements", The American Journal of International Law, Vol. 71, 296, 300: "The crucial point is not the legal status of the resolutions themselves, but the degree to which they influence the conduct and attitude of States toward acceptance or rejection of a particular rule of international law crystallized through the process of multilateral diplomacy. . . The conclusion that a nonbinding agreement does not give rise to legal responsibility is not an analytical proposition (i.e., it does not simply follow from the definition of a nonbinding agreement). It is an empirical conclusion based on State practice."

[50] See Baxter, R.R., "International Law in Her 'Infinite Variety'", International and Comparative Law Quarterly, Vol.29, 549, 561 (1980): "Provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while, on the other hand, instruments of lesser dignity may influence or control the conduct of States and individuals to a certain degree, even though their norms are not technically binding."

[51] ICJ Reports, 15, et seq. (1971)

UN resolutions.[52] Similarly, the Court accorded considerable weight to these resolutions in Western Sahara case in 1975.[53]

A third argument of the traditionalists is that resolutions ought to be excluded from the legal realm because they reflect only political as opposed to legal considerations.[54] Third World-sponsored resolutions, according to this argument, represent only political challenges to the existing international order, and members of the General Assembly vote for these resolutions in response to political, not legal, considerations. Therefore, when States vote for these resolutions, they often "do not mean"[55] to be legally bound by them. This argument ignores the fact that in the creation of law, either at the international or national level, there is a dynamic interplay of law and politics.[56] International law reflects international politics, and voting

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[52] See Higgins, R., "The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?", International and Comparative Law Quarterly, Vol.21, 270 (1972).

[53] ICJ Reports, 12, 31-33 (1975).

[54] See, for example, Schwebel, S.M., "The Effects of Resolutions of the General Assembly on Customary International Law", Proceedings of the American Society of International Law, Vol.73, 302 (1979), and Arangio-Ruiz, G., "Normative Role of the United Nations and the Declaration of Principles of Friendly Relations" Recueil des Cours, Vol.137, 431 (1972).

[55] Arangio-Ruiz, ibid.

[56] See Asamoah, supra, note, 43.

patterns in the General Assembly do reflect the perceived national interests of member States. While it is correct that some resolutions are probably not accompanied by an expectation among those that voted for them that they will create international law, others are definitely accompanied by such an expectation. It is precisely to negate an expectation of legal effect that States opposed to a resolution would usually enter a reservation against the resolution. Where a resolution is accompanied by the expectation of an overwhelming number of States (including those on whom obligations are imposed) that it will have legal effect, it will be difficult to deny the legal effect of such a resolution.

Finally, it is argued that the recognition of resolutions as part of international law would blur the distinction traditionally drawn between obligatory norms of international law and the non-binding norms.[57] Normative confusion would be the result of a watering down of international rules with "near rules", it is argued, because then it would be impossible to differentiate between the two.

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[57] See, for example, Weil, P., "Towards Relative Normativity in International Law?", The American Journal of International Law, Vol.77, 413; Brownlie, I, "The Rights of Peoples in Modern International Law", in Crawford, J., ed., supra, note 2, 12-16, and ibid., "The Methodological Problems of International Law and Development", Journal of African Law, Vol.26(1), 8 (1982).

However, such a confusion, if it exists, is not new. In all legal systems, legally binding rules co-exist with rules that are only morally and politically persuasive.[58] In international law, there is currently a difficulty in distinguishing between a new customary norm and the tendency toward the creation of one, yet no one doubts the validity of custom as a source of international law. Thus, the spectre of confusion which is often raised by opponents of resolution-created law may be exaggerated.

The progressive school, on the other hand, has advanced a number of reasons why resolutions ought to be recognized as a source of international law. One of those reasons is that the rate of changes in international relations is so rapid in modern times that the traditional mode of legislation in international law is unable to keep pace and respond adequately.[59] Among the changes are decolonization, which has within four decades enlarged the number of States from fifty-one in 1945 to over a hundred and eighty in the

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[58] See, for example, Edelman, M., The Symbolic Uses of Politics (Urbana, Illinois: University of Illinois Press, 1962); Gusfeld, I., Symbolic Crusade (Urbana, Illinois: University of Illinois Press, 1970), and Gibson, L., "Subsidiarity: The Implications for Consumer Policy", Journal of Consumer Policy, Vol.16, 323, 335, 337 (1993).

[59] See, for example, Friedmann, supra, note 47, 137; see also, Sen, S., United Nations in Economic Development - Need for a New Strategy (Dobbs Ferry, NY: Oceana Publications, 1969).

1990s; rapid worldwide population explosion; the technological revolution and rapid scientific breakthroughs. The consequence of these changes is increasing interdependence, constituting the world society into a "global village". The conjunction of interests and problems which interdependence generates makes it necessary for the global community to pay close attention to developments in all corners of the world.

Solving the complex international problems that have arisen, such as environmental pollution, the proliferation of nuclear weapons, ecological despoliation, the fate of the global commons, widespread poverty, and population explosion, requires concerted international effort. National solutions are inadequate in this context, and so is the slow process of traditional international legislation in the face of dramatic developments. The preference for treaties, instead of custom, does not adequately address the problem, either. Bilateral treaties only imply the co-operation of two countries, while multilateral treaties suffer from long periods of negotiation, consent, and formal acceptance by State Parties.[60] Another source of international legislation is the International Court of Justice (ICJ). But only a few States submit to the ICJ's jurisdiction, and Third World nations are particularly

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[60] See Horn, N., "Normative Problems of a New International Economic Order", Journal of World Trade Law, Vol.16, 338, 347;

reluctant to deal with the ICJ because it is considered too conservative and insensitive[61] to the changing requirements of the modern times.[62] Consequently, another source capable of rapid response to transnational problems through the promulgation of new rules is needed, and the General Assembly of the UN is considered to be the viable alternative by virtue of its international composition.

Another reason for ascribing legislative capacity to the General Assembly is that, being the most representative body of the global community of States, the General Assembly is the most appropriate forum in which to formulate solutions to transnational problems. Today, UN membership is practically universal.[63] Member States possess relevant information on particular problems, and their positions on issues are most easily ascertainable during the formulation of new

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[61] See Sohn, L.B., supra., note 46, 12.

[62] See, for example, Sen, S., supra, note 59, 2: "Freedom from want need no longer remain a remote ideal. Modern science has brought it within man's reach. Mass poverty, for ages regarded as inevitable by mankind, has lost its traditional justification in this scientific age. . . And finally, the knowledge about the new knowledge is spreading fast all over the globe, with the message of hope implicit in it for the developing countries; and this in turn has created a new restlessness verging on revolt against their present conditions which are no longer looked upon as immutable."

[63] See Asamoah, O., supra, note 43, 2, and Higgins, R., ibid., 4-5.

international rules on these issues.[64] Furthermore, the UN has a large body of experts which makes the formulation of new international law a relatively easy task.[65] Finally, the UN General Assembly has, in fact, demonstrated its ability to respond quickly to transnational problems in the past. It was two General Assembly resolutions, in 1964[66] and 1971[67] respectively, adopted in response to technological advancement, that for the first time opened up the outer space and the deep sea-bed for exploitation. These resolutions led to the "creation of new international law applicable to all States"[68] within a short period of time.

Finally, there is an increasing tendency in the international community to rely on the legal effects of General Assembly resolutions in actual disputes. Many of the States which deny that General Assembly resolutions have norm-creating capacity have in certain circumstances acknowledged

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[64] Sohn, supra, note 46.

[65] ibid.

[66] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Res. 1962, 18 UNGAOR Supp. (No.15), 15-16, UN Doc. A/5515 (1964).

[67] Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil, UNGA Res. 2479, 27 UNGAOR Supp. (No.28) 24-25, UN Doc. A/8028 (1971).

[68] Sohn, supra, note 44, 16.

that same quality in these resolutions.[69] For example, in 1980, the United States, in spite of its opposition to the proposition that resolutions of the UN General Assembly may create international law, relied on the UDHR to argue before the ICJ that its diplomatic and consular staff, who were held hostage by the Iranian government, were entitled to minimum standards of conduct toward prisoners.[70] In 1981, the US Second Circuit Court of Appeals also expressly acknowledged that a breach of international law, namely, the prohibition against torture, was also breach of US domestic law, because "[T]his prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights...the General Assembly has declared that the Charter precepts embodied in the Universal Declaration constitute basic principles of international law."[71]

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[69] See Schachter, O., "The Evolving Law of International Development", Columbia Journal of Transnational Law, Vol.15, 1, 4 (1982). See also, Note, "Custom and General Principles as Sources of International Law in American Federal Courts", Columbia Law Review, Vol.82, 751 (1982).

[70] In the Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), ICJ 3 (1980). Other US Federal Court decisions which support the view that General Assembly resolutions may contain binding rules of international law include Roderiquez-Fernandez v. Wilkerson, 654 F.2d 1382 (10th Cir. 1981); Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980), affirmed in part, 651 F.2d 96 (2d. Cir. 1981), and Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), affirmed on other grounds sub.nom.

[71] In Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980).

States have also relied on General Assembly
resolutions in arguing their cases before international
tribunals. In The Texaco Overseas Petroleum Co. and California
Asiatic Oil Co. v. Government of the Libyan Arab Republic,[72]
Libya relied on a number of UN General Assembly resolutions to
argue that under international law it was not bound to pay
compensation for the nationalization of the two oil companies;
the issue of compensation was a matter to be determined
according to domestic law, and its domestic law did not
require any compensation for the nationalization of the oil
companies' assets. The arbitrator, in evaluating Libya's
argument, concluded as follows:[73]

> Refusal to recognize any legal validity of United Nations
> Resolutions must, however, be qualified according to the
> various texts enacted by the United Nations. These are
> very different and have varying legal value, but it is
> impossible to deny that the United Nations' activities
> have had a significant influence on the content of
> contemporary international law.

The arbitrator then enumerated a number of requirements which
General Assembly resolutions must meet in order to create
international law.[74] He concluded that the resolutions relied

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[72] Reprinted in International Legal Materials, Vol.17, 1
(1978).

[73] ibid., 27.

[74] ibid.

upon by Libya did not meet those requirements,[75] and therefore, that they fail to support Libya's case.[76]

In evaluating the above arguments, it appears that the argument against is not as persuasive as the argument for the recognition of UN General Assembly resolutions as norm-creating. The traditionalist argument fails to take cognizance of the exigencies and complexities of the modern world, and is based on apprehensions which, weighed in light of the transnational problems that currently compel the concerted attention of the world community, as well as the actualities of the international legal process, are unjustified. On the other hand, the continuing vitality and legitimacy of the principle of State sovereignty in contemporary international law suggest that the adoption of a resolution does not preempt the need to ascertain the position and/or disposition of States in relation to the resolution. Both exercises (adoption of a resolution and verifying the attitude of States to it) are not necessarily mutually exclusive. On the contrary, it is by cumulative evaluation of the evidence yielded by the fact of a resolution and the attitude of States toward it that a legitimate conclusion can be drawn.

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[75] ibid., 28-31.

[76] ibid., 37.

3.2. THE LEGAL EFFECT OF NORM-CREATING RESOLUTIONS

Assuming that certain resolutions may have legal significance, then the question that arises is: what is the nature of a resolution's legal significance? There is a considerable difference of opinion on this issue as well. Broadly speaking, three main positions can be identified in the international legal literature.

One position is that resolutions of the UN General Assembly are binding immediately upon adoption.[77] This presupposes that the General Assembly possesses general legislative competence. However, this view lacks support among traditional and progressive scholars alike,[78] and it is neither grounded in theory nor in empirical evidence. Theoretically, the General Assembly has no formal legislative competence, even though its resolutions, as we argue, may create law. The process of norm-creation by resolutions is not a legislative one; therefore, the view that the General Assembly can legislate or enact a law, as it were, is theoretically

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[77] See, for example, Higgins, R., supra, note 43, 5.

[78] See, for example, Garibaldi, O.M., "The legal Status of General Assembly Resolutions: Some Conceptual Observations", Proceedings of the American Society of International Law, Vol.73, 324, 325-326 (1979); Castaneda, supra, note 41, 5; and Elias, T.O., "Modern Sources of International Law", in Friedmann, W., et al, eds., Transnational Law in a Changing Society - Essays in Honor of Philip C. Jessup (New York: Columbia University Press, 1972), 71.

absurd.[79] Nor can the view be supported on empirical grounds. If General Assembly resolutions are obligatory once adopted, then it follows that all resolutions are part of international law. Clearly, this is not the case, because a large number of resolutions have no legal significance whatever, and some only acquire such significance after a long period of time. For example, the UDHR was not considered to be legally binding on member States of the UN at the time of its adoption;[80] it only acquired a binding character with time. Whether a resolution will have legal effect seems to depend on a complex, interlocking set of factors. As one commentator has noted: "[I]t is evident that no single conclusion can be made concerning the legal status or binding force of every resolution. On the contrary the effect of a resolution must vary with the circumstances peculiar to each resolution."[81]

A second position is that the legal effect of resolutions derives from customary international law of which resolutions are "evidence". The argument here is that resolutions per se are not the source of legal obligations, but the nascent international custom which the resolutions

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[79] Garibaldi, ibid., 325.

[80] See Lauterpacht, H., "The Universal Declaration of Human Rights", British Yearbook of International Law, Vol.25, 354, 356 (1948).

[81] Sloan, supra, note 43, 3. See also Castaneda, supra, note 43, 4.

codify, develop or clarify.[82] While this may be correct, the view that resolutions only evidence pre-existing custom is not applicable in all situations. The view overlooks the fact that some resolutions have actually created "new international law applicable to all States". In this category are the Declaration of Legal principles on Outer Space and the Declaration of Principles on the Sea-Bed. Many of the principles set out in these resolutions are truly revolutionary. In this regard, therefore, these resolutions are not mere evidence of custom, but are themselves the source of the rules that they enunciate.[83]

Yet a third position is that certain resolutions are a new source of international law. Proponents of this view hold that resolutions can create international law if they meet certain criteria, closely related to those necessary for the creation of customary international law, namely usage or State practice and opinio juris.[84] State practice is the sum

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[82] See, for example, Arangio-Ruiz, supra, note 54, and Bleicher, S.A.,"The Legal Significance of Re-Citation of General Assembly Resolutions", The American Journal of International Law, Vol.63, 444, 448 (1969).

[83] See Higgins, R., "The Development of International Law by the Political Organs of the United Nations", Proceedings of the American Society of International Law, Vol.59, 117 (1965).

[84] See Garibaldi, supra, note 78, 325; Asamoah, O., supra, note 43, 7; and Joyner, C.C., "UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation", California

total of the positive or negative actions of a State over a period of time in relation to a resolution.[85] *Opinio juris*, on the other hand, is the State's belief that it is obligated to act in a particular manner.[86] Positive State practice, accompanied by *opinio juris*, provide evidence of State consent to be legally bound.[87] The view under discussion posits that where a resolution meets the criteria described above, it creates law, but where the resolution formulates new norms, and it is adopted with an overwhelming majority with an intent that it shall be legally binding, such a resolution should be considered a source of international law.

Although many international legal scholars have adopted this position, it is not at all clear from the commentaries what specific criteria a proposed rule must satisfy to become part of international law. Schwartz,[88] for example, states:

Western International Law Journal, Vol.11, 445, 458 (1981).

[85] See Kunz, J.L.,"The Nature of Customary International Law", *The American Journal of International Law*, Vol.47, 662, 666 (1953).

[86] ibid.

[87] See Cheng, "United Nations Resolutions on Outer Space: "Instant" Customary International Law", *Indian Journal of International Law*, Vol.5, 23 (1965). See also, D'Amato, A.A.,"On Consensus", *Canadian Yearbook of International Law*, Vol.8, 104, 111 (1970).

[88] Schwartz, supra, note 29, 532.

[T]he conditions which a General Assembly resolution must meet in order to express a consensus of the world community and be a source of customary international law are that (1) structurally it have a generality of language and (2) a declaratory format, (3) that it be adopted overwhelmingly with the support of all major powers and groups, and (4) that there be some pattern of support for the resolution after its adoption.

On the other hand, Schachter[89] denies that any "general formula or single principle exists" for determining the legal effect of resolutions. For him, that determination must be done on a case-by-case basis, taking into consideration all the circumstances of a particular resolution. Garibaldi[90] seems to agree, for, according to him, "it is not the resolution that bears a certain relation to the binding norm, but the whole situation, including the circumstances of voting and the intentions of the actors." Thus, in addition to the factors listed by Schwartz, the negotiating history of a resolution will be relevant to a determination of the resolution's legal effect. While, for Asamoah,[91] "[a]n important element in the determination of the value of an Assembly resolution is the intention to formulate legal propositions or norms", Falk[92] believes that the

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[89] Schachter, O., "The Evolving Law...", supra, note 69, 5.

[90] Garibaldi, supra, note 78, 327.

[91] Asamoah, supra, note 43, 73.

[92] Falk, supra, note 34, 786.

resolution must "be carefully analyzed to see whether it formulates specific duties to be discharged by specific actors." Schachter,[93] D'Amato[94] and Marks[95] doubt the relevance of language and form to a resolution's legal value, and Lauterpacht[96] does not seem to lay much store by universal acceptance.

The upshot of all this is that the framework for the analysis of the legal effect of resolutions is controversial and vague. The only definite thing that can be said about the framework is that, to be considered legally effective, a resolution must meet a set of complex, sometimes interlocking, requirements. Those requirements, as can be distilled from the literature, include the following: precision of language

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[93] Schachter, supra, note 49, 298: "If one were to apply strict requirements of definiteness and specificity to all treaties, many would have all or most of their provisions considered as without legal effects."

[94] D'Amato, supra, note 87, 106-107: "The Universal Declaration of Human Rights of 1948 was not considered as law when it was adopted and is still at best precatory."

[95] Marks, supra note 2, 451 (1981): Many human rights already recognized for several decades fall short of (the generally stipulated criteria). The proclamation of these rights nevertheless increased the likelihood that they would be translated into law and practice."

[96] Lauterpacht, H., The Development of International Law by the International Court (New York: Praeger, 1958), 191: "[I]f universal acceptance alone is the hallmark of the existence of arule of international law, how many rules of international law can there be said to be in effective existence?"

regarding the legal nature of the resolution, support for the resolution, expectation that the resolution shall be legally binding, and implementation and/or reliance upon the resolution. Although emphasis on each of the requirements varies with individual commentators and with analysis of specific resolutions, there is no doubt that, taken cumulatively, these requirements point to the need to situate the analysis within a familiar framework - one which recognizes the importance of State consent as verifiable through State practice and opinio juris. The advantage of this approach is that it avoids the conceptual pitfalls already identified with the first two views, and it is, therefore, the most likely to produce results that accord with the theory and practice of contemporary international law.

3.3. THE DECLARATION ON THE RIGHT TO DEVELOPMENT: AN EVALUATION OF THE EVIDENCE

Like the NIEO resolutions, the declaration on the right to development has been fiercely criticised by certain commentators. One of these commentators declared that "there are no solid grounds for claiming that there is a legal right to development..."[97] On the other hand, defenders of the right

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[97] Donnelly, J., "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development", California Western International Law Journal, Vol.15, 473, 477 (1985). See also, Donnelly, "The Theology of the Right to Development", ibid., 519.

insist that "as a general proposition in terms of international human rights law, the existence of a right to development is a _fait accompli._"[98] To evaluate these assertions, it is necessary to hold the declaration on the right to development up against the criteria for norm-creation in international law.

3.3.1. THE DEGREE OF SUPPORT FOR THE DECLARATION

There is a broad support among international legal scholars that a resolution does not become part of international law (i.e. by creating instant custom), unless it is adopted by a "consensus" of the members of the General Assembly. A "consensus" means a general agreement of the members of the Assembly.[99] Adoption of a resolution by consensus is an important indicator of the degree of support for the general principles embodied in the resolution. The consensus may also provide good evidence of _opinio juris._

But there is no rule about what constitutes a

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[98] Alston, P., "Development and the Rule of Law: Prevention versus Cure as a Human Right Strategy", in International Commission of Jurists, _Development, Human Rights and the Rule of Law_ (Toronto: Pergamon Press, 1981), 106. See also Alston, "The Shortcomings of a "Garfield the Cat" Approach to the Right to Development", _California Western International Law Journal_, Vol.15, 510 (1985) (hereinafter, "Shortcomings"); and Brietzke, P.H., "Consorting with the Chameleon, or Realizing the Right to Development", ibid., 560.

[99] See D'Amato, supra, note 87, 104.

consensus for the purpose of a particular resolution. Some commentators have suggested that a consensus exists only when the resolution is adopted "overwhelmingly, that is with almost complete unanimity".[100] The requirement of overwhelming support or near-unanimity does appear to mean more than a simple voting majority. However, it is patently unreasonable to expect that such a requirement must be met in all circumstances. As Lauterpacht[101] has rightly observed, "(i)f universal acceptance alone is the hallmark of the existence of a rule of international law, how many rules of international law can there be said to be in effective existence?" Thus, it is necessary to examine, not only the numerical strength, but also the quality of consensus.

The quality of consensus refers to the weight which may be accorded to the respective interests of the members of the General Assembly in the subject matter of a resolution. Obviously, in relation to certain resolutions, the votes of some States carry more weight than others. For example, the Declaration on Permanent Sovereignty was adopted by an overwhelming majority of the General Assembly in 1973.[102] This

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[100] Wright, Q.,"Custom as a Basis for International Law in the Post War World", Texas International Law Forum, Vol.2, 47, 158.

[101] Lauterpacht, supra, note 96, 191.

[102] Resolution on Permanent Sovereignty over Natural Resources, GA Res.3171, 28 UNGAOR Supp. (No.30), 52, UN

was a NIEO resolution, purporting to restructure international economic relations. But in the Texaco Overseas Oil Co. case, the arbitrator declared that the resolution did not meet the requirement of consensus because the industrialized countries, whose interests were most impacted by the resolution, either abstained or voted against the resolution.[103] On the other hand, the arbitrator further declared, an earlier resolution, the Resolution on Permanent Sovereignty, 1962,[104] met the requirement because it was "assented to by a great many States representing...all economic systems."[105] Conversely, the negative vote or abstention of a State which has no real interest in the contents of a resolution would carry only minimal weight, insufficient to destroy a consensus on the resolution. Where one State's vital interest is involved, however, the lone dissent of such a State may be fatal to a consensus.[106] For example, as one of the few States capable of reaching and exploiting outer space, the interest of the United States will be directly affected by a resolution on the use or exploitation of outer space. There will be no consensus

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Doc. A/9400 (1973).

[103] Texaco Overseas Oil Co., supra, note 72, 29.

[104] UNGA Res. 1803, 17 UNGAOR Supp. (No.17), 14, UN Doc. A/5217 (1962).

[105] supra, note 72, 28.

[106] See D'Amato, supra, note 87, 117.

on such a resolution even if the US alone dissented. Such instances where lone dissent destroys consensus are, however, rare and far between.

The declaration on the right to development was adopted by an overwhelming majority of the General Assembly.[107] The final tally was 146 for the declaration, 8 abstentions, and 1 against. All Third World members and a substantial number of industrialized States voted in favour of the declaration. Among the industrialized States who voted in support were Canada, France, Italy, Norway, Belgium, the USSR, Spain, Austria, Ireland, Greece, Luxembourg and the Netherlands. However, Denmark, Federal Republic of Germany, Finland, Iceland, Israel, Japan, Sweden and UK, abstained. Only the United States voted against the declaration.

If the sheer weight of support for the declaration in the UN General Assembly were the sole indicator of consensus, then there is no question that the declaration passes the test under consideration. But it is clear that the declaration's appeal for co-operation, which is the bedrock of the international dimension of the right to development, is directed at developed nations. As we have noted above, the crucial test of international law remains the consent of States. If, therefore, a large number of developed nations

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[107] Declaration on the right to development, supra, note 3.

either declined to vote for the declaration or voted against it, that would be an important factor to be considered in determining whether or not they wish to be bound by the declaration. But abstentions do not necessarily amount to a negative vote. Indeed, States that abstain from voting are nevertheless considered to be bound by resolutions, all things being equal, on grounds of acquiescence and tacit consent.[108] If all eight abstaining States are regarded as having tacitly consented to the principles set out in the declaration, that leaves only the US as having cast a negative vote.

It is submitted that the lone negative vote of the US is not sufficient to vitiate the consensus on the right to development. The declaration calls for co-operation among States in order to actualize the aspirations of Third World nations for a democratization of the processes of development. The negative vote of the United States would warrant exceptional consideration if the co-operation called for would, to the exclusion of the rest of the world, seriously impact the vital national interests of the United States. But that is not the case; the scourge of poverty and the dangers that it poses to global peace, the environment, and the destiny of humankind, affect the global community as a whole.

In the matter of aid to the Third World, the

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[108] See D'Amato, supra, note 87, 105.

interest of a donor nation may warrant special consideration in the formulation of an international norm relating to the matter if (a) the nation spends, at least, 0.7% of its Gross National Product (the benchmark set by the UN) on foreign aid, and (b) on a cost-benefit analysis, derives substantially little or no benefit from its generosity. On both parameters, the US does not merit special consideration. Once known for its generosity to "developing countries" after the Second World War, the US has since reduced its foreign aid to the barest minimum. US aid to the Third World has declined steadily since the 1960s, consuming only a tiny proportion of the national budget,[109] and in recent times, this proportion has tended to decrease even further. At the same time, the benefits of foreign aid to the US have far outweighed the

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[109] See United States Agency for International Development (USAID), Why Foreign Aid?, available online at http:// www.info.usaid.gov/about/y4naid.html: "Most polls indicate that Americans think that foreign assistance programs are the single largest item in the federal budget and make up close to 20 per cent of total government spending. The reality is far different. Economic and humanitarian assistance abroad makes up less than one-half of 1 per cent of the federal budget." Infact, according to this report, Japan has a larger foreign assistance programme than the United States, and France and the Netherlands combined give almost as much foreign assistance as the US. As well, among the OECD member nations (which includes the US), the European Union (EU) is the second largest donor of concessional aid, after the International Development Association (IDA) of the World Bank Group: see OECD, Development Co-operation Review of the EU, available online at http:// www.oecd. org/dac/af /AREC-FR/pdf .

costs.[110] Although, as leader of the free world, the US owes a moral duty to assist poor States in the struggle against poverty and its undesirable spin-offs, such as authoritarianism and abuse or denial of human rights, this is in reality a duty which it shares with other industrialized States.[111] Thus, absent a special interest, a fair conclusion

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[110] Consider the following: current US foreign aid budget as a percentage of GDP is .117 per cent, the lowest aid budget in fifty years; in terms of GNP, the US provides the least foreign assistance of any major industrialized nation; US foreign assistance programs are at the lowest levels, in real dollar terms, than they have been in fifty years; the US economic and development assistance budget is currently 20% less than the last year of President George Bush's administration (1988-1992); in constant 1994 dollars, the current US foreign aid budget is nearly 50% less than it was in 1946, and is currently the lowest in US foreign aid history; on the other hand, the US economy has reaped huge pay-offs from its economic aid and assistance programme: close to 80% of USAID's grants and contracts go directly to American firms and non-governmental organizations; aid has played a major role in the opening up of export markets for US goods and services, with salutary effects on the domestic economy; for example, between 1990 and 1995, exports to developing and transition countries increased by $98.7 billion, a growth that supported roughly 1.9 million jobs in the US: see USAID, Why Foreign Aid, ibid.

[111] In 1956, the US accounted for almost 63% of all foreign assistance in the world. By 1993, however, other donors had come to shoulder a major portion of the foreign assistance effort, with the US accounting for about 17% of the total of Official Development Assistance (ODA): see The Future of Foreign Aid, Statement of J. Brian Atwood, USAID Administrator, to the US House of Representatives Committee on International Relations, 1997, available online at http://www. sas.upenn.edu /africa . This statement was made in response to Bill FY 1996, which proposed to cut foreign aid even further.

is that the negative vote of the US is not fatal to the consensus on the declaration. It can even be argued, further, on purely democratic principles, that the majority position on the declaration, given the votes of such big donors as Canada, France, Norway, and the Netherlands in favour, should prevail, as the voting in the General Assembly was free and fair.

3.3.2. LANGUAGE AND FORM OF THE DECLARATION

According to Joyner,[112] "resolutions, particularly those of a declaratory nature, posit more emphatically the consensus of 'world opinion' on an issue." This opinion is representative of those of many legal commentators who believe that law-creating resolutions must be solemn in their expressions, in consonance with the importance of the function which such resolutions serve - the declaration of legal principles.[113] In this connection, the language and format of the resolution are important factors to consider. The language may be general[114] or specific,[115] but it must forcefully convey the intention to create legal obligation, and clearly define

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[112] Joyner, supra, note 84, 464.

[113] See, for example, Castaneda, supra, note 43, 165-196.

[114] See Schwartz, supra, note 29, 533

[115] See Falk, supra, note 34, 786

the legal character of the obligation.[116] Some writers state
that the words of the resolution must be imperious and direct,
not precatory and indefinite. For example, the resolution must
use such words as "shall" instead of "should",[117] and where the
intention is to create rights and duties, such intention must
appear clearly on the face of the resolution through its
language.[118] Cases of precatorily-worded resolutions acquiring
legal force in the future are, however, by no means unknown.
The UDHR is the best known example of such resolutions.
Furthermore, the title of the resolution may be a pointer to
the nature of the resolution. For example, the Charter of
Economic Rights and Duties of States immediately conveys on
its face an intention to create legal effect.

The resolution embodying the right to development is
titled "Declaration on the Right to Development". Its preamble

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[116] See Schachter, supra, note 69, 298.

[117] See Bleicher, supra, note 82, 470-471.

[118] This is said to be the main distinction between the
Charter of Economic Rights and Duties of States and the
other NIEO documents. See, for example, Cassese, supra,
note 5, 365. Distinguishing the Charter from the other
documents, he states: "While these two texts contain
loose formulations and were drafted in the form of
general guidelines and objectives and did not claim to
impose a set of binding standards of action, the Charter
of Economic Rights and Duties of States. . . was couched
in a language more akin to international legislation.
This, as well as the fact that its provisions were more
specific than those of the two previous instruments, led
to a split in the General Assembly."

recites many relevant provisions of earlier resolutions of the UN, such as the UDHR, and the right to self-determination, both of which are now part of international law. The recitation of these principles of international law is intended to confer legitimacy on the principles which the declaration enunciates.[119] In terms of language, however, the imperious tone of some of the articles is watered down by the somewhat precatory, even supplicatory, tone of the other articles. For example, whereas the declaration states in robust terms that "[T]he right to development is an inalienable right...of...every human person and all peoples" (Article 1), "States have the right and the duty to formulate appropriate national development policies..." (Article 2), "States shall take resolute steps to eliminate the massive and flagrant violations of...human rights..." (Article 5), much of the force of these provisions is lost through such supine expressions as "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and

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[119] See Lillich, supra, note 29. Cf Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States", International Lawyer , Vol.9, 591, 597 (1975): " Under the United Nations Charter the General Assembly may discuss and make recommendations, but it is not a lawmaking body and its resolutions, no matter how solemnly expressed or characterized, nor how often repeated, do not make law or have binding effect."

cultural rights", "All States should co-operate with a view to promoting, encouraging and strengthening universal respect for...all human rights..." (Article 6), "States should encourage popular participation...", (Article 8), and "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development..." (Article 10).

As well, the claim-character of the right to development is not clearly articulated in the declaration. In law, rights and duties are correlates.[120] With only a few exceptions, it is trite that there can be no right without a duty and vice versa. However, attempting to identify the right to development, who bears the right and who owes the duty, entails considerable difficulty.[121] Only with a judicious amount of intellectual craftsmanship is some understanding

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[120] See Hohfeld, W.N., Fundamental Legal Conceptions as Applied in Judicial Reasoning, (Cook, W.W., ed.)(New Haven, Conn.: Yale University Press, 1964).

[121] Philip Alston, for example, acknowledges this difficulty: "[T]he legal analyses which have purported to establish the existence of a right to development in international law have, for the most part, been awfully weak. Indeed, as one of the academic commentators who (have) been involved in trying to develop the legal foundations of the right, I must plead guilty to not having done a particularly good job.": Alston, P., "Shortcomings", supra., note 98, 514. See also, Paul, James, C.N., infra, 246: "The preparation of the Declaration (on the right to development) appears to have been marred by unedifying inputs. . . the resulting text is rather uninspiring; some of it is sloppy, larded with UN-type platitudes, vague abstractions and contentious code words."

finally emerging of the claim-character of the right to development.[122] Still, questions remain as to whether law, notorious for anchoring and defending the status quo, is the proper medium for addressing a subject such as "development", with its connotations of "change" and "progress".[123]

The combination of loose, fuzzy language and poor draftsmanship, in spite of a suitable title, substantially weakens the chances of the declaration's meeting the language-and-format criterion of law-creation. This does not mean, however, that the declaration may not acquire legal force in the future as its intent and focus become clearer through scholarly exposition.

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[122] The works of James C.N. Paul are especially significant in this regard. See, for example, Paul, James, C.N., "The Human Right to Development: Its Meaning and Significance", The John Marshall Law Review, Vol.25, 235 (1992). See also the reports of the various Working Groups on the Right to Development, available online at http//www.unhchr.ch/html .

[123] Jack Donnelly refers to the association of law with development as an "instrumental fallacy" because, as he argues, no one has a "right" to be developed: see Donnelly, J., "The "Right to Development": How Not to Link Human Rights and Development", supra, note 2, 267. See also Chemillier-Gendreau, M., "Relations Between the Ideology of Development and Development Law", in Snyder, F., and Slinn, P., International Law of Development: Comparative Perspectives (Abingdon: Professional Books, 1987), 57-65. The relationship of law and development is considered in Chapter Six of this thesis.

3.3.3. EXPECTATION OF LEGAL EFFECT

The legal effect to be accorded a resolution will also depend on the expectation of the States adopting the resolution that it shall create a new legal norm or change an existing rule of international law. Such an expectation interlocks with the other conditions because the satisfaction of the other conditions will necessarily provide evidence that a norm of international law is expected to be created by the resolution. The expectation may not be instant upon adoption of a resolution, but it may arise over a period of time. To determine whether the requisite expectation of legal effect exists regarding a resolution, many factors are relevant. According to Schachter:[124]

> An interesting and rather subtle factor in the process of assessing the legal significance of a resolution is the temporal element: the link between past and future. At any given moment we must evaluate conduct and attitudes by empirical reference. In that sense, we are always looking backward (even if not far back) to obtain relevant evidence. At the same time our principal objective is not to describe the past but to determine the future effect of the collective declaration. More precisely, we are concerned with the expectations of governments (and other decision-makers) as to the requirements of future conduct by them and others. To ascertain such expectations, we must look to all the significant factors. We cannot assume that legal precedent or principle will always be followed, whatever the past behaviours and attitudes. We need to take into account all conditioning - political, economic, psychological, etc. - that are likely to influence the

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[124] Schachter, supra, note 49, 6.

responses of governments to the new declaration.

Thus, factors such as the voting record of the resolution, which was considered above, and the negotiating history or <u>travaux preparatoires</u> of the resolution are important to the determination. Some writers maintain that the negotiating history of a resolution affords better evidence of the expectations of the subscribing States, because, as it is sometimes argued,[125] even where there exists a consensus on a resolution, that may not reflect the true feelings of the members of the General Assembly. Such a situation, sometimes referred to as "fake consensus", may arise where States which are in the minority on certain issues merely vote along with the majority for fear of the political costs that their objecting might entail.[126] It appears, therefore, that where States merely acquiesce to a resolution, in contradiction of their opposing stance at the stage of negotiation, this will not be sufficient to meet the requirement of expectation. If the acquiescing States enter reservations, that will further support the absence of expectation on their part.

In addition to the circumstances surrounding the

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[125] See, for example, the <u>1978 Digest of US Practice of International Law</u>, 9-11.

[126] See Skelton, Jr., J.W., "UNCTAD's Draft Code of Conduct on the Transfer of Technology: A Critique", <u>Vanderbilt Journal of International Law</u>, Vol.14, 381, 389.

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adoption of the resolution, it is also necessary to consider the responses of the subscribing States after adoption, and the positions taken by them in other situations. The evidentiary value of <u>opinio juris</u> depends not so much on what is said or done in an international forum as on what is done in the real world. Thus, a resolution may be so contrary to actual practice and expectations that it would have to be regarded as a pious hope (or cynical hypocrisy) rather than as evidence of an accepted legal obligation.[127]

The first explicit mention of the right to development in a UN resolution was in 1977 when the Commission on Human Rights adopted Resolution 4 (XXX-III),[128] which recommended to the Economic and Social Council that the Secretary-General be invited to undertake a study on the international dimensions of the right to development and to present the study to the Commission at its Thirty-Fifth session. Thereafter, a resolution of the General Assembly[129]

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[127] See Asamoah, supra, note 41, 74. He states that a resolution must pay regard to what is "generally acceptable or realistically possible." See also Schachter, "The Evolving Law of International Development", supra, note 69, 6: "[A]n unrealistic manipulation of majorities may be of no value whatsoever."

[128] Commission on Human Rights, Report on the Thirty-Third Session, 62 UN ESCOR Supp. (NO.6), UN Doc. E/5927 (1978).

[129] Declaration on the Preparation of Societies for Life in Peace, UNGA Res. 33/73 (1978).

and of UNESCO[130] respectively recognized the right to development. But neither of these resolutions, the two subsequent reports of the Secretary-General,[131] nor the declaration on the right to development was preceded by substantial debate. This makes it difficult to ascertain the positions of the developed States at the stage of "negotiation" for the right. The only indication available of their positions is the vote count. But the voting record is not conclusively dispositive of the issue of expectations. It may be helpful to inquire into how developed States have responded to resolutions similar to the one on the right to development.

As already noted, the proclamation of the right to development is in many ways a continuation of the movement for a NIEO. The right to development has been justified by precisely the same reasons that were proferred for the clamour for a NIEO, and the declaration on the right makes specific reference to the need for a NIEO. Additionally, the declaration, like the other NIEO documents, calls on the industrialized nations to treat poor countries preferentially. However, a majority of the industrialized nations have

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[130] Declaration on Race and Racial Prejudice, adopted on 27 November, 1978, UNESCO Res. 41/78, UN Doc. SD/160 (1978).

[131] UN Doc. E/CN.4/1334 (1979), and UN Doc. E/CN.4/1421 (1980).

consistently demonstrated their antipathy to the movement for a NIEO, and have either opposed or denied legal effect to multilateral treaties and other international documents containing provisions which seek to implement NIEO principles. Examples of such documents include the Law of the Sea Treaty,[132] the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,[133] and international codes of conduct. Yet, in the face of such opposition, if the conduct of the developed nations on the issue of preferential treatment is taken as an indicator of State practice, there is considerable evidence to support a conclusion that these nations do in fact concede that poor countries deserve to be assisted or otherwise treated affirmatively.

The provision of Official Development Assistance (ODA), first begun unilaterally by the United States in 1949, and soon followed by other Western countries,[134] is one area in which the opposition of the industrialized nations to NIEO documents does not square with state practice. Development assistance is now a widespread practice among these nations, even though there is no obligation in that regard in positive

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[132] UN Doc. A/CONF.62/122, December 10, 1982.

[133] UNGA Res. 34/68, 34 UNGAOR Supp. (No.46), 77, UN Doc. A/34/46 (1979).

[134] See Report of the Independent Commission on International Development, North-South: A Programme for Survival (Cambridge, Mass.: MIT Press, 1980), 38.

law. Some countries have unilaterally raised their commitment to the level of a national objective. The threshold of 0.7% of GNP which the UN set as target for ODA has not always been met by all of the countries,[135] but they do strive to meet it.[136] Indeed, the domestic laws of several developed nations do impose an obligation on these nations to provide ODA.[137]

Another significant departure by the developed nations from the rigid opposition sometimes demonstrated against NIEO principles is evident in the practice of international financial institutions, such as the World Bank and the International Monetary Fund (IMF). The practice of these institutions demonstrates their recognition of inequality among States and an attempt to reflect this recognition in differential distribution of aid. One of the objectives of the World Bank is to encourage the "development

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[135] UNGA Res. 2626, 25 UNGAOR Supp. (No.16), 13, UN Doc. A/8028 (1970). The US and Switzerland were opposed to this target.

[136] The Nordic Countries have accepted this target, with the exception of Finland. In 1997, Finland's ODA/GNP ratio was 0.33%; its target for the year 2000 is 0.4%; according to a cabinet Decision-in-Principle of September 1996, Finland hopes ultimately to meet the 0.7% target as other Nordic countries: see OECD, Development Co-operation Review of Finland - Summary and Conclusions, available online at oecd.org/dac/pdf/ARFI-FR.pdf .

[137] See, for example, Rehof, L.A., and Gulmann, C., eds., Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries (Dordrecht: Martinus Nijhoff, 1989).

of productive facilities and resources in less developed countries".[138] A majority of World Bank loans are made to Third World countries,[139] and until the economic crisis in Russia and some of the NICs of South-East Asia, the same was true of the IMF.[140] These loans are often extended for long-term development projects at concessionary rates. In addition, both the IMF and the World Bank maintain special funds and financing facilities for developing countries as a special group.

In the area of international trade, the disadvantaged position of Third World nations has also been acknowledged by the developed world through bilateral and multilateral concessions and compensatory measures. The General Agreement on Tariffs and Trade (GATT),[141] for example, was initially based on the principle of sovereign equality of States. Thus, the focus of GATT was the elimination of

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[138] Articles of Agreement of the International Bank for Reconstruction and Development, Art.1, Para.1, 60 Stat. 1440, TIAS, 2 UNTS, 134.

[139] See, for example, IMF, World Economic Outlook (May 1997) (Washington, D.C.: IMF, 1997), 15-39.

[140] For example, in November, 1997, South Korea applied for a loan of US $60 billion from the IMF. Up to that point, Thailand, Indonesia and the Philippines had borrowed a total of US $48 billion: See The Toronto Star, November 21, 1997.

[141] 61 STAT. 5 TIAS No.1700, 55 UNTS 194 (1947), as amended by TIAS No.1890 (1948).

discrimination, reduction of tariffs and other barriers to trade, and reciprocity of concessions.[142] However, it soon became clear, with the arrival of the then newly-independent States after the Second World War, that substantial inequality existed between the developed nations and the new States. The GATT framework was made to respond to this situation by an agreement renouncing reciprocity and by granting preferences to the poor States. Such preferences were legitimized through a waiver of the obligations arising under the MFN clause[143] for the developed nations.[144] The United Nations Conference on

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[142] See, Dam, K.W., The GATT: Law and International Economic Organization (Chicago: Chicago University Press, 1970), passim.

[143] See Report on the Most-Favoured-Nation Clause, Yearbook of International Law Commission Part 1, 26 (1978), UN Doc. A/CN.4/SER.A/1978.

[144] See GATT, Basic Instruments and Selected Documents, 12th Supplement, 21st Session, (1964), 48. The waiver of the MFN clause paved the way for the emergence of several development co-operation arrangements between developed nations and the Third World countries. One of such arrangements is the Lome Convention, which brings together 15 EU member States and 70 countries of Africa, the Caribbean, and the Pacific (ACP States) in a preferential trade and development relationship. The Lome Convention is at its fourth stage, with Lome IV ending in the year 2000. See Ravenhill, J., Collective Clientelism: The Lome Conventions and North-South Relations (New York: Columbia University Press, 1985); Grilli, E., The EU and the Developing Countries (Cambridge: Cambridge University Press, 1993); and Arts, K., and Byron, J., "The Mid-Term Review of the Lome IV Convention: Heralding the Future?", Third World Quarterly, Vol.18, No.1, 73 (1997). The EU maintains similar arrangements with Asia, Latin America, and Mediterranean countries (ALA-MED States), and with the

Trade and Development (UNCTAD) has also shown an inclination to extend concessions to Third World member States as a special group, although the effort of these States at this forum to transform their demands for transfer of technology into legal rights has met with vigorous opposition from the developed nations.[145]

Whether the right to development will eventually come to enjoy broad-based support of the developed nations so as to give rise to an expectation that the declaration proclaiming it shall have legal effect is difficult to say from the available evidence of State practice. That it purports to bestow a "right" may excite the hostility of developed nations, just as has been the case with the other NIEO documents before the declaration on the right to development. On the other hand, the evidence considered above shows that developed nations do recognize the special status of Third World States as a disadvantaged group, and do endeavour to assist them in their struggle against poverty.

Phare and Tacis countries (PT States). Japan also has similar arrangement with the Association of Southeast Asian Nations (ASEAN States).

[145] See, for example, UNCTAD Res. 89(IV), 4 UNCTAD (Agenda Item 12), 1, UN Doc. TD/183 (1976).

3.3.4. DEGREE OF IMPLEMENTATION OF OR RELIANCE UPON THE DECLARATION

If a resolution passes the preceding tests, it must then be shown that the subscribing States do in fact conduct their affairs in a manner consistent with the resolution. What is required is a pattern of behaviour that recognizes and respects the norm expressed by the resolution. State practice in this regard must exist over a period of time, although how long is a fairly contentious issue.[146] It appears, however, that where there is overwhelming evidence of opinio juris, thereby raising the expectation that a norm of international law is being created, the amount of State practice required by the test of implementation is only minimal.[147] Additionally, only a de minimis showing of actual implementation of the provisions of the resolution will be required.[148] By implication, where the evidence is not so strong, implementation may take a long period. Thus, the requirement of implementation, being, like that of expectation, of a

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[146] See, for example, Cheng, B., supra, note 87. Cf. D'Amato, supra, note 87, 111. See also, Kunz, supra, note 85, 666: "[I]nternational law contains no rules as to how many times or for how long (State) practice must have been repeated. To require that the practice necessarily must be "ancient", has no basis in positive international law."

[147] See Memorandum of the Office of Legal Affairs, United Nations, UN Doc. E/CN.4/L.610 of April 2, 1962.

[148] ibid.

temporal nature, cannot always be determined immediately.

The evidence of State practice shown above, which tends to support the claim that developed nations consider themselves morally obliged, at least, to treat Third World nations preferentially, is consistent with the declaration on the right to development. The provision of ODA by the developed States in the form of technical aid, their ongoing co-operation with Third World nations in the fields of education, manpower development and skills, as well as political and economic reforms, and the various concessions granted to them within multilateral and bilateral frameworks, all touch directly upon the central issues raised in the declaration.

Economic and political liberalization are crucial to the effective participation of Third World nations in the global market as well as to the democratization of their development processes; both forms of liberalization are now widely recognized as key to the attenuation of poverty and the worst forms of violation of human rights.[149] Through the World Bank, the IMF and other international development agencies, the developed nations have, for example, provided China, most countries of Africa, the transition economies of Eastern Europe and the former Soviet republics, and the Southeast

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[149] See, for example, UNDP Human Development Report, 1997 (New York: Oxford University Press, 1997), Chapters 3-6.

Asian NICs with the technical support and expertise necessary for effective economic restructuring. The developed nations have also provided critical support in the form of financial aid, technical training and infrastructure on behalf of the current effort at democratization in many parts of the Third World. Additionally, most international development agencies have voluntarily adopted one form of human-rights-impact assessment procedure or another to guide their activities in the Third World.[150] All of these developments tend to reinforce the legitimacy of the right to development, although it is not being claimed as yet that they have occurred in direct fulfilment of a legal obligation arising under the declaration on the right.

On the part of Third World nations, the movement toward democratization of economic and political structures, which first became noticeable in the mid-eighties, seems to be proceeding apace.[151] A large number of these nations now have elected governments, and others are in various stages of transition from authoritarian to democratic structures. Elections, written constitutions, legislatures and the paraphernalia of democracy do not necessarily constitute

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[150] See, for example, World Bank, Environmental Assessment Sourcebook, 3 Vols. (New York: World Bank, 1991).

[151] See, for example, Huntington, S., The Third Wave: Democratization in the Late Twentieth Century (Norman: Oklahoma University Press, 1992).

democracy, and a lot remains to be done in furtherance of the commitment to democratization which the leaders of the Third World have repeatedly declared and reaffirmed in recent times.[152] Human rights are still being violated in these countries, and the level of accountability remains low.[153] Nevertheless, to the extent that civil society seems to become increasingly vibrant in these countries,[154] it is perhaps correct to say that the current trend toward democracy will become irreversible.

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[152] See, for example, The African Charter for Popular Participation in Development and Transformation (Addis Ababa: UNECA, 1990), in which leaders of African nations affirmed that "nations cannot be built without the popular support and full participation of the people, nor can the economic crisis be resolved and the human and economic conditions improved without the full and effective contribution, creativity and popular enthusiasm of the vast majority of the people." The basic thrust of the Charter was reaffirmed by African ministers responsible for social development at the preparatory regional conference on the World Summit for Social Development (20-21 January, 1994) held in Copenhagen, Denmark, 6-12 March, 1995: UN Doc. A/CONF. 166/PC/10/Add.1 (1994).

[153] See, for example, Ihonvbere, J.O., "Where is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy", Africa Today, Vol.43(4), 343 (1996).

[154] In May 1997, popular uprising against the dictatorship of Suharto, for many decades ruler of Indonesia, led to his resignation: See The Toronto Star, May 21, 1997. Similarly, an armed insurgency in Zaire (now Democratic Republic of the Congo) led to the fall of Mobutu Sese Seko, another dictator, in mid-1997.

3.3.5. A SUMMING UP

The evaluation of the declaration on the right to development in light of the identified criteria shows both strengths as well as weaknesses. In terms of the degree of support for, and implementation of, the declaration, there is strong evidence of State practice in favour of, or not incompatible with, the declaration. However, the evidence is less strong when the declaration's language and form are considered. The expectation among developed States, at whom the international aspect of the declaration is directed, that the declaration shall have legal effect is, at best, ambivalent, and at worst, non-existent. These shortcomings cannot, however, be treated as fatal because only rarely does a resolution, including some of those that have today become part of international law, pass all the criteria. But the fact that certain rights were recognized or proclaimed as human rights invariably increased the likelihood that these rights would eventually acquire normative validity.

Having demonstrated a strong showing in some of the criteria of norm-creation in international law, the declaration on the right to development underscores a familiar dilemma: it cannot be regarded presently as part of international law, nor can it be dismissed as mere rhetoric

conjured up by Third World nations.[155] This dilemma cannot be resolved by insisting that resolutions of the UN General Assembly must, with mathematical accuracy, meet all the criteria for norm-creation at all times. Such a position does not accord with the reality of the norm-creation process. Rather, the process is better conceptualized as a spectrum, along which it is difficult to pinpoint the precise location where a norm authoritatively becomes law.[156] While a norm is in the process of traversing this spectrum, that is, while it occupies the "twilight" zone between non-legal and full legal effect, it is sometimes referred to as "soft law", or "value".

There is strong academic support for this view. Lauterpacht,[157] in a passage already cited above, argues in favour of such a scheme. Philip Alston[158] also dismisses the notion that "specific tests can be identified and then applied in a straight-forward manner in order to determine whether or not the right to development is a part of international law." He argues instead for a flexible and purposive approach,

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[155] See, for a similar opinion, Cassese, supra, note 5, 366.

[156] See Abi-Saab, G., "The Legal Formulation of a Right to Development (Subjects and Content)", in Dupuy, ed., supra, note 20, 159.

[157] Lauterpacht, supra, note 96.

[158] Alston, "Shortcomings", supra, note 98, 513.

similar to the one suggested. James C.N. Paul[159] disagrees with the argument that on account of the relatively small amount of State practice in support of the right to development it is, therefore, not law. He suggests that the force of international human rights law does not derive from States alone, but from the basic constitution and purposes of the international system and from the effort of people worldwide to use that system to demand respect for human rights. In other words, other considerations outside of State practice deserve to be recognized as well in the norm-creation process of international law.

4. "SOFT LAW": RELATIVIZATION OF NORMATIVITY AND THE FUTURE OF THE RIGHT TO DEVELOPMENT

The debate about the juridical integrity of the right to development mirrors the controversy about the nature and identity of international law.[160] That controversy has often pitted the claims of positivism against those of functionalism. The positivist perspective views international

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[159] Paul, James, C.N., supra, supra, note 122, 51.

[160] See Jennings, R.Y., "The Identification of International Law", in Cheng, B., ed., International Law: Teaching and Practice (London: Stevens and Sons, 1982), 3; Cheng, B., "On the Nature and Sources of International Law", ibid., 203, and generally, MacDonald, R. St.J., and Johnston, M., eds., The Structure and Process of International Law (The Hague: Martinus Nijhoff, 1983).

law as a set of neutral, value-free rules which are determined according to established criteria, and applied impartially. It is important, from this perspective, to maintain a clear distinction at all times between <u>lex lata</u> (law in force) and <u>lex ferenda</u> (desirable law); the latter is considered to be, not law, but ideology and morality, and its infiltration of the former puts the integrity of the international legal system in jeopardy, as law then becomes uncertain. Therefore, a supposed rule is either law or it is not - there is no half-way house. Positivists condemn the trend towards relativization of normativity in international law. According to Prosper Weil:[161]

> There is now a trend towards the replacement of the monolithically conceived normativity of the past by graduated normativity. While it has always been difficult to locate the threshold beyond which a legal norm existed, at least, there used to be no problem once the threshold could be pronounced crossed: the norm created legal rights and obligations; it was binding, its violation sanctioned with international responsibility. There was no distinction on that score to be made between one legal norm and another...(But today) [N]ormativity is becoming a question of "more or less": some norms are now held to be of greater specific gravity than others...so that, henceforth, there are "norms and norms."

On the other hand, the functionalist perspective views international law as a tool for the transformation of a highly divided international society. Accordingly, this perspective privileges purpose and result over predictability

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[161] Weil,supra, note 57, 421.

and rules. Richard Baxter[162] exemplifies the functionalist approach:

> What I have said about the instruments to which States subscribe - treaties, declarations, statements of policy, final acts, resolutions of international organisations, and other forms of expression of agreement - will, I hope, have persuaded the reader that it is excessively simplistic to divide written norms into those that are binding and those that are not. Provisions of treaties may create little or no obligation, although inserted in a form of instrument which presumptively creates rights and duties, while, on the other hand, instruments of lesser dignity may influence or control the conduct of States and individuals to a certain degree, even though their norms are not technically binding. It is inevitable that in the course of negotiation and compromise, those who write international instruments will set down on paper whatever will secure agreement, even though the resulting product may not fall into the neat categories to which lawyers are addicted. The lawyer's task is not only to interpret the resulting consensus but also to make understandings between States as flexible an instrument as possible in order to secure agreement. he does no service to the establishment of order if he adopts an either-or posture. . .The lawyer is indeed a social engineer and in that role, he must be able to invent or produce machinery that will assist in the resolution of disputes and differences between States. He must be prepared to fine-tune the law, to exploit its capacity for adaption to the needs of the parties, and to promote movement and change. One of the ways in which he can do so is by understanding the infinite variety of ways in which legal norms may reflect different intensities of agreement.

The NIEO documents seem to have been inspired by this perspective, just as the opposition of the industrialized nations to these documents is mostly informed by the positivist standpoint.

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[162] Baxter, supra, note 50, 564-566.

International law has come a long way from its origins as the law of a family of Western European nations.[163] Third World nations now constitute a majority of the international community of nations, and their activities, notably at the UN, have affected ways of thinking about international law.[164] To be sure, the fashioning of rules of international law is no longer the exclusive preserve of Western European nations. Third World nations actively participate in the process, and do sometimes succeed in extracting important concessions from their developed counterparts. However, these changes ought to be put in their proper perspective: they have occurred against the background of the economic and political dominance of the developed nations. Thus, as one commentator has observed, "States in a numerical majority are still in a sociological minority, so that the concept of majority does not mean much in the international sphere."[165] The fact is that bargaining remains the typical mode of resolving conflicts among nations, and

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[163] See, for example, Anand, R., supra, note 9, and Friedman, W., "The Changing Structure of International Law", in Falk, R., et al, eds., International Law: A Contemporary Perspective (Boulder: Westview Press, 1985), 142.

[164] See Henkin, L., How Nations Behave: Law and Foreign Policy, 2nd edn., (New York: Columbia University Press, 1979), 22.

[165] Pellet, A., " A New International Legal Order", in Snyder, F., and Slinn, P., eds., supra, note 123, 117, 129.

<u>opinio juris</u> the prime criterion of international law.[166] In the circumstances, the changes which Third World nations can properly claim to have brought about in international law are often not quite as drastic as they would seem to be.

In recognition of this situation, Third World States often resort to proposing law in "soft" language, calling them "declarations", "memorandum of understanding", "code of conduct", and so on. In these instruments, subscribing States may only agree or undertake to "promote", "examine with understanding", "co-operate", or "open negotiations". The major advantage of this technique is that it provides room for further elaboration and negotiation, which may result in modification of commitments or compromise on the issues covered by the agreement. Such compromise, if sufficiently translated into practice by the parties, may begin to "harden" the soft law into legal obligations.[167] This technique of "legislation" is used widely in international as well as national law, especially where the subject-matter of

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[166] See Schachter, O., "The Evolving Law of International Development", supra, note 69, 13. See also Gross, supra, note 33, 318: "[I]t must not be overlooked, however, that consent to the law is still a crucial requirement, and while it may appeal to a progressive audience to urge the Court (ICJ) to abandon the "sovereign state" oriented approach in favor of a "community" oriented approach, the time has not yet come for so radical a reorientation."

[167] See Pellet, A., supra, note 123, 123-130.

legislation is politically or ideologically sensitive.[168]

As observed above, the proponents of the right to development refrained from using the type of "strong" language that other resolutions on the NIEO used. The vehement opposition which the NIEO documents attracted from most nations of the developed world probably explains the programmatic language of the declaration on the right to development. It is clear from the declaration that many of its provisions are not cast in stone. Since 1986, several working groups,[169] as well as a global consultation,[170] have been convened under the auspices of the UN to elaborate the details of the assistance which Third World nations seek through the right to development, and to work out the modalities for implementation of the right. One clear notion that has emerged from this effort, for example, is that the right to development is not, contrary to the understanding of most developed nations who opposed the declaration, a "particular

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[168] See, for example, Gibson, L., "Subsidiarity: The Implications for Consumer Policy", Journal of Consumer Policy, Vol.16, 323 (1993). See also, Roessler, F., "Law, De Facto Agreements and Declarations of Principle in International Economic Relations", German Yearbook of International Law, Vol.27, 105 (1978).

[169] See http://www.unhchr.ch/html

[170] See Barsh, L.R., "The Right to Development as a Human Right: Results of the Global Consultation", Human Rights Quarterly, Vol.13, 322 (1991). For the conclusions and recommendations of the Global Consultation, see UN Doc. E/CN.4/1990/9/Rev.1 (1990).

right to a particular entitlement."[171] Rather, it is better perceived as a set of international principles of constitutional proportions which call "(notably via Article 10 of the Declaration) for creation of an expansive regime of human rights to be applied to many different sectors and kinds of international "development" activities."[172]

In consequence of the elaboration and negotiations that have taken place thus far, even the United States, which cast the lone vote against the declaration, has begun to show signs of accomodation. In 1993, the United States, and 171 other States (including all the developed nations), adopted by consensus the Final Declaration of the 1993 Vienna World Conference on Human Rights, which stated that "the right to development is an inalienable human right and an integral part of fundamental human freedoms." This was reaffirmed at the UN global conferences on population and development (Cairo, 1994), women (Beijing, 1995), the World Summit on Social Development (Copenhagen, 1995).[173] Moreover, in 1993, the United States, the only industrialized nation that has consistently opposed economic rights, softened its stance and signed the International Covenant on Economic, Social and

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[171] Paul, J.C.N., supra, note 122, 51.

[172] ibid.

[173] The texts of final documents adopted at the end of these conferences are available online at http://www.un.org .

Cultural Rights, although it has yet to ratify it.[174] All other

industrialized nations have signed and ratified the Covenant.

Economic rights - right to food, shelter, health and education

-, and social and cultural rights, as indicated in the

previous chapter, are vital components of the right to

development.

While repeated affirmations of the right to

development by States which had opposed it, or declined to

vote for it, may not, in and of themselves, constitute proof

of a compromise,[175] they may point to one when considered in

conjunction with other actions by these States. The

declaration's linkage of poverty to abuse of human rights, and

the conceptualization of development as a comprehensive

multidimensional process, is a departure from conventional

wisdom. Poverty, in mainstream development thinking, has often

been economically defined, and development equated with

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[174] See United Nations Centre for Human Rights, Status of
Selected International Human Rights Instruments (Geneva:
UNCHR, 1997). At the Global Consultation, the US
declined to participate in a vote on substantive
measures for implementing the right to development
proposed by Yugoslavia, in order to avoid a consensus;
Japan, the United Kingdom, and West Germany, indicated
that they did not believe that there was a right to
development, and that the Commission on Human Rights
ought not to address itself to economic questions: See
UN Doc.E/CN.4/1990/SR.38 (1990).

[175] See Bleicher, supra, note 82.

economic growth.[176] But the end of the Cold War and the persistent development failures of the Third World seem to have forced a re-examination of the concept and strategy of development - on the part both of the donors and receivers of development assistance. Thus, the increasing acceptance of the paradigm proposed under the declaration would tend to underscore this emerging consensus, "delegitimizing" growth-centred development and the discount of humanity associated with the pursuit of that strategy.

It is through this showing of negative _opiniones juris_ that the legal effect of the right to development will become evident in the future, rather than by an enforcement of "rights" and "duties" under the declaration. Clearly, therefore, "[A]s is the case with light and darkness there is indeed half-light or...semi-darkness. Lawyers are always free to decide the precise place where law (or light) begins and where it ends but, in doing so, they deny themselves any possibility to apprehend the whole reality, to describe international law in its totality."[177]

5. CONCLUSION

Traditional international law was geared toward a

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[176] See Chapters 2 and 3, supra.

[177] Pellet, supra, note 123, 124.

limited purpose - facilitation of peaceful co-existence among the few culturally homogeneous states that then constituted the international community. However, times have changed; within this century, two World Wars have been fought and won and colonial empires have disintegrated, precipitating a worldwide push toward nationalistic self-determination and independence. These changes have redounded to the emergence of "new" States, significantly enlarging the population of the international community of States, and at the same time multiplying the number of issues that compete for attention on the international agenda. Among these issues are the increasing poverty and marginalization of three-quarters of the world's population, disease, hunger, population explosion, and environmental pollution.

In the "global village" that the world has become, thanks to advancement in technology, no part of the world is immune from the adverse effects of seemingly domestic, local or regional problems of the other parts of the world. For example, excruciating poverty, political instability and social disintegration in the Third World have spurred an unprecedented wave of refuge- and asylum-seeking in the developed nations by individuals fleeing from the devastation in their home countries. In many of the host countries, facilities have been stretched almost to the limit, and there is currently a tendency among these countries to stem the flow

of refugees.[178] Similarly, the economic problems of the Southeast Asian NICs seem to have cast a chilling spell on the global economy[179] with the consequence that warding off a recession is currently taxing the ingenuity of economic planners in the richest nations. Yet, only recently the world seemed to stand on the edge of an unprecedented era of prosperity. These two cases merely illustrate the character of issues which the international community must deal with in modern times. Solutions to these problems lie beyond the best efforts of States acting individually.

The increasing transnationality of issues underscores the need for co-operation among nations.

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[178] See, for example, Loescher, G., "Mass Migration as a Global Security Problem", World Refugee Survey 1991 (Washington, DC: US Committee for Refugees, 1991), 7; Joly, D., Refugees: Asylum in Europe? (Boulder: Westview Press, 1993) - among other gate-keeping measures by Western nations, this book also details the racist backlash against refugees; Redmond, R., "Slamming Doors", Refugees, No.88 (1991); and Cruz, A., "Carrier Sanctions in Four European Community States: Incompatibilities between International Civil Aviation and Human Rights Obligations", Journal of Refugee Studies, Vol.4, No.1, 63 (1991) - legislation introduced by a number of countries in the EC to sanction carriers with fines for bringing passengers without valid entry visas or travel documents or with forged passports. In consequence of the growing difficulty with refuge-seeking, the UN High Commissioner for Refugees, Sadako Ogata, declared recently: "The right to seek asylum, one of civilization's oldest and most honoured principles, is under threat almost everywhere.": see Human Rights Internet Reporter, Vol.15, No.1, 41 (1994-95).

[179] See The Toronto Star, Monday, November 24, and Tuesday, November, 25, 1997.

International law, as the legal tool of the global community, must move beyond issues of co-existence - important though these are - and engage with the task of galvanizing the effort of nations to forge common goals and articulate global aspirations. Additionally, it must also reckon with the interests of the new members of the international community - interests that do not necessarily coincide with those of the original (now industrialized) States. To attain such relevance, however, international law cannot remain frozen in time. Its traditional sources have proven incapable of responding with the necessary alacrity and sensitivity to modern problems, precisely because these problems were not anticipated in the 17th and 18th centuries when the law of nations evolved. Clearly, a more versatile tool, such as a resolution of the UN General Assembly, is needed to play a vigorous role in the development of international law.

Indeed, resolutions of the UN General Assembly have been used since the 1940s to modernize international law in many areas, among them human rights, interstate deelings and restraint of force, the outer space, and the sea-bed, even if the results have not always been universally accepted.[180] The insistence of some scholars that resolutions have no legal effect, much less the capacity to create a norm of

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[180] See Joyner, supra, note 84, 464-475.

international law, is not warranted by the evidence. Similarly, the positivistic fixation on normative integrity and the corresponding unwillingness by these scholars to assess the merit and purpose of resolutions in the context of the exigencies of the modern world will only serve to fossilize international law whereas its dynamic development is precisely what is needed. The usefulness of resolutions in the progressive development of international law cannot be dismissed merely by the need to keep politics out of law and to maintain the purity of international law. The colour of law is essentially political,[181] and the zeal to desegregate law and politics into watertight compartments can easily degenerate into purposeless legalism.

Still, the spectre of indiscriminate use of resolutions cannot be dismissed lightly. Because resolutions of the UN General Assembly are often adopted by a simple majority, the temptation for Third World nations to use their numerical majority in a tyrannical manner is real. However, the descent to tyranny can be checked through the subjection

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[181] See, for example, Asamoah, supra, note 43, 10: "That political considerations play a part in the deliberations of the political organs of the United Nations cannot be denied. But that is legitimate. It is idle to see law in isolation from political developments or to regard it as an end in itself. The development of law by whatever process is politically motivated."

of resolutions to some form of quality control.[182] An outline of such control mechanism, analogous to that which is traditionally used to assess custom in international law, has been used in this chapter to analyze the right to development. Such a mechanism respects the consensual nature of international law by insuring that State practice and _opinio juris_ remain the crucial tests of integrity which norms purportedly created by resolution must pass. This process of quality control would confer respectability and wide acceptability on resolutions that meet the tests by reducing the mistrust and suspicion which currently characterizes the relationship of the developed and Third World nations in the matter of norm-creation through resolutions of the General Assembly.

The declaration on the right to development is currently passing through the process of validation. It is not yet law in the positivistic sense, but the strength of evidence of international support for the declaration suggests that it is not mere rhetoric either. Only time will show the final status of the declaration. From a practical perspective, however, the declaration's suspended animation or 'twilight'

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[182] For a similar opinion, see Schachter, O., "Towards a Theory of International Obligation", _Virginia Journal of International Law_, Vol.8, 311 (1968); Gross, supra, note, 319; and Alston, P., "Conjuring Up New Human Rights: A Proposal for Quality Control", _The American Journal of International Law_, Vol.78, 607 (1984).

status mirrors the general trajectory into the near future of that body of new "rules" of international law often referred to in legal literature as "the international law of development".

CHAPTER FIVE

THE RIGHT TO DEVELOPMENT IN PERSPECTIVE OF NON-WESTERN CULTURES

1. INTRODUCTION

There are significant differences between Western and non-Western views on human rights. In spite of their accession to human rights instruments, including the Declaration on the Right to Development, Third World elites and governments do not seem to have shifted in any significant way from their position that human rights are an alien imposition,[1] a "Western construct of limited applicability"[2]

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[1] See, e.g., the "Bangkok Declaration" of the Southeast Asian states (espousing an "Asian View" of human rights) made in the lead-up to the June 1993 World Conference on Human Rights, held in Vienna, Austria, Far Eastern Economic Review, June 17, 1993. Also, General Sani Abacha, the Nigerian dictator, in a recent national broadcast to mark his fourth anniversary as Head of State, was reported to have angrily dismissed international and domestic concerns over abuse and denial of human rights in Nigeria, as "unfair and unacceptable". Referring apparently to the United States, the European Union, and Canada, which have consistently criticized his government's human rights record, he continued: "Democracy and human rights are universal concepts, and not the exclusive preserves of any continent or race...(But) democracy and human rights are being used as a ploy to interfere (in the internal affairs of African states). (Nigerians) must, therefore, not allow ourselves as citizens of our country to be turned into sounding boards or mere echoes of foreign interests to the detriment of our national interests...(Relations between Nigeria and a section of the international community) have been beclouded by intrusions into our internal affairs... under the pursuit of human rights and democracy.":

in other cultures, and a tool of Western imperialism.[3] They

continue to claim that they have their own concept of human

rights which is 'collectivist' in nature as opposed to the

'individualism' of the Western concept. Several corollaries

flow from this, with profound implications for the economic,

political, social and cultural destiny of the populations of

the Third World.

This chapter will examine the right to development

in perspective of non-Western cultures. It begins with an

overview of the dichotomy which has characterized the human

Nigerian News du Jour, November 18, 1997 (accessible
online). Similarly, King Fahd of Saudi Arabia, recently
reaffirmed the position of his country that international
human rights and Islamic human rights are, on cultural
grounds, incompatible. He said: "The democratic system
that is predominant in the world is not a suitable system
for our region. Our people's make up and unique qualities
are different from those of the rest of the world. We
cannot import the methods used by people in other
countries and apply them to our people. We have our
Islamic beliefs that constitute a complete and fully-
integrated system...In my view, Western democracies may be
suitable in their own countries but they do not suit other
countries.": see "Empty Reforms, Saudi Arabia's New Basic
Laws" Middle East Watch (May, 1992), 2. Most Arab and
Islamic states maintain a similar position: see, e.g.,
Mayer, A.E., "Universal Versus Islamic Human Rights: A
Clash of Cultures or a Clash with a Construct?",
Michigan Journal of International Law, 15, 307 (1994).

[2] Pollis, A., and Schwab, P., "Human Rights: A Western
Construct with Limited Applicability", in Pollis, A., and
Schwab, P., eds., Human Rights: Cultural and Ideological
Perspectives (New York: Praeger, 1980).

[3] See, e.g., Shivji, I.G., The Concept of Human Rights in
Africa (London: CODESRIA Book Series, 1989), 53-63.

rights debate by counterpoising the claims of liberal universalism against those of cultural relativism. This overview will set the stage for a comparison of the values underlying the right to development with the core values of contemporary Third World cultures. Next, the chapter will attempt to find common grounds and reduce the philosophical distance between opposing views in the debate about the universality of human rights. It will conclude by advocating dialogue and mutual accomodation between the cultures.

2. HUMAN RIGHTS AND NON-WESTERN CULTURES: AN OVERVIEW

"Culture" can be roughly defined as a system of beliefs, customs, norms, and values, shared by a group of people who are defined by their common ancestry, language, religion, and territorial origin and/or abode. As with most definitions, especially those offered by non-experts, there is always room for improvement, and the sociologist or anthropologist would, perhaps, find a lot to improve upon here. However, most specialized definitions of culture emphasize two elements: the values and social practices of a people, which set them apart as a group from other groups similarly situated.[4] It is in the sense of these two elements,

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[4] See, e.g., Valentine, C.A., <u>Culture and Poverty: Critiques and Counter-Proposals</u> (Chicago: University of Chicago Press, 1968); Clifford, J., <u>The Predicament of Culture: Twentieth Century Ethnography, Literature and Art</u> (Cambridge, Mass.: Harvard University Press, 1988), and Park, R.E., <u>Race and Culture</u> (Glencoe, Ill.: The Free

which are also captured by the above definition, that "culture" is used in this chapter.

The debate over how human rights relate to non-Western cultures revolves around the universality of human rights as a concept.[5] Most Western liberal writers, while insisting on the moral and international universality of human rights, often adopt an immediately contradictory position by equally insisting on the historical particularity of the idea and practice of human rights. Thus, "[H]uman rights", writes Jack Donnelly, for example, "represent a distinctive set of social practices, tied to particular notions of human dignity, that initially arose in the modern West in response to the social and political changes produced by the modern states and modern capitalist market economies. Most non-Western cultural and political traditions, like the premodern West, lacked not only the practice of human rights but also the very concept."[6] Similarly, Rhoda Howard, writing on the social evolution of liberal society, in which she grounds her discussion of human rights, says: "Several centuries of social evolution in the

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Press, 1950).

[5] For a general review of the debate, see Perry, M., "Are Human Rights Universal? The Relativist Challenge and Related Matters", Human Rights Quarterly, 19(2), 461 (1997).

[6] Donnelly, J., Universal Human Rights in Theory and Practice (Ithaca: Cornell University Press, 1989), 50.

West have produced a type of society that has not evolved autonomously anywhere else".[7] On the other hand, some non-Western writers argue that human rights are not a Western discovery;[8] they insist that every society has a conception of human rights, even though this may be framed or expressed in a different cultural idiom.

The liberalism-communitarianism debate provides the larger philosophical scaffold for the universalism-relativism debate. Whereas the argument against the cultural relativism of human rights is framed in liberal terms, the contrary argument shares a lot in common with the communitarian critique of liberalism. Before evaluating the two positions, it is necessary to briefly set them out.

2.1. THE UNIVERSALIST ARGUMENT

The crux of the universalist argument is that human right is a universal concept based on a particular moral view

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[7] Howard, Rhoda, E., Human Rights and the Search for Community (Boulder, CO: Westview Press, 1995), 25.

[8] See, e.g., Manglapus, R., "Human Rights Are Not a Western Discovery", Worldview 4 (October, 1978); Khushalani, Y., "Human Rights in Asia and Africa", Human Rights Law Journal 4, 403 (1983); Panikkar, R., "Is the Notion of Human Rights a Western Concept?", Interculture, 17, Nos.1-2, 28 (January-June, 1984), and Legesse, A., "Human Rights in African Political Culture", in Thompson, K.W., ed., The Moral Imperatives of Human Rights: A World Survey (Washington, D.C.: University Press of America, 1980), 132.

of human nature which cuts across time, culture, value systems, and geographical boundaries. Human rights, argues the universalist, arise out of human nature, or humanity. The UDHR declares that human rights are universal, held by all human beings by virtue of their humanity, equally, and inalienably. Questions remain, of course, as to how being human gives rise to rights, and why such rights may be considered universal, or inalienable.[9] "Needs", "human dignity", "autonomy" and "nature",[10] are some of the concepts often employed to address these questions, but none of these has completely answered the questions raised in relation to the philosophical foundations of human rights.[11]

The roots of the universalist position on human rights can be traced to the Western tradition of thinking

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[9] See, e.g., Fields, Belden, A., and Narr, W.-D., "Human Rights as a Holistic Concept" Human Rights Quarterly, 14, 1 (1992); Shivji, I.G., supra., note 3; Rorty, R., "Human Rights, Rationality, and Sentimentality", in Shute, S., and Hurley, S., eds., On Human Rights (New York: Basic Books, 1993) 53; and Nickel, J.W., Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights (Berkeley: University of California Press, 1987).

[10] See, e.g., Bay, C., "Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community", Human Rights Quarterly, 4, 53 (February, 1982); Donnelly, J., supra, note 5; and Gewirth, A., Human Rights: Essays on Justification and Applications (Chicago: University of Chicago Press, 1984).

[11] See Freeman, M., "The Philosophical Foundations of Human Rights", Human Rights Quarterly, 16(3), 491 (1994).

about moral values. John Locke's natural rights theory,[12] for example, holds that human beings are endowed by nature with the rights to life, liberty, and property. Similarly, the autonomous rational-thinking individual is central to Immanuel Kant's notion of the "categorical imperative".[13] According to Kant, human beings are not means to an end but are ends in themselves; regardless of cultural differences, the notion that human beings have an infinite value holds good. As well, John Rawls' contractarian theory of justice[14] assumes that there is a universally valid set of principles of justice which individuals in the right context would readily allow as the governing principles of society. The one thread that runs through these theories is the assumption that there exists a set of universal moral principles, and a single, universal pattern of moral reasoning; accordingly, alternative modes of reasoning are implicitly discounted.

Maurice Cranston's[15] definition of human right is particularly instructive in this regard:

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[12] Locke, J., Second Treatise of Government (1689), in Laslett, P., ed., Two Treatises of Government (Cambridge: Cambridge University Press, 1967).

[13] Kant, I., Foundations of the Metaphysics of Morals (Indianapolis: Bobbs-Merrill, 1981).

[14] Rawls, J., A Theory of Justice (Cambridge, MA: Harvard University Press, 1971).

[15] Cranston, M., What are Human Rights?, 2nd edn. (London: The Bodley Head, 1973), 36.

> A human right by definition is a universal moral right, something which all (human beings), everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because (she) is human.

However, emphasis on the universal character of human rights notwithstanding, some universalists argue that human rights never existed in ancient civilizations, but were developed in modern times in response to the growth of state powers and the violence of market forces, both of which have mounted unprecedented threats to human dignity. They argue that non-Western moral systems could not have worked by any conceptions of right because they were essentially duty-based systems.[16] These viewpoints have exposed their holders often to charges of moral imperialism from non-Western scholars.[17]

2.2. THE RELATIVIST ARGUMENT

Relativists argue that in a multi-cultural world, there is no single culture whose standards may be used to evaluate other cultures; to judge any particular culture, one must use standards that are internal to that culture. The

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[16] See, e.g., Donnelly, J., "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights", American Political Science Review 76 (June 1982), and Howard, Rhoda, E., Human Rights in Commonwealth Africa (Totowa, NJ: Rowman & Littlefield, 1986) 16-34.

[17] See, supra, notes 3 and 8, and accompanying texts.

imposition of external standards in evaluating a culture amounts to ethnocentrism. Thus, in the words of one commentator, human rights are just "one window through which one particular culture envisages a just human order for its individuals".[18] There are present in other cultures, he believes, conceptions and idioms appropriate to the realization of the goal of human dignity, and these deserve to be recognized and respected in the same way that human rights are in Western society.

Alison Dundes Renteln[19] captures the essence of the relativist position thus:

> The central question is whether other cultures have a concept of human rights, and if they do, whether or not it resembles that of the Universal Declaration of Human Rights or any other human-rights instrument...Many peoples do not, of course, speak English and have no tradition of Enlightenment ideas, which means that looking for the literal existence of human rights will not be fruitful. Even if non-Western societies do not express moral concerns in a framework of human rights, they may nonetheless address them in some other conceptual framework. It becomes necessary to reformulate the basic question: are there any homeomorphic equivalents for human rights in other cultures?...[W]e should look not simply for rights cast in the Western mold but for the structural equivalents for human rights in other societies.

One recurring criticism of the relativist position

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[18] Pannikar, R., supra, note 8, 30

[19] Renteln, A.D., International Human Rights: Universalism versus Relativism (Newbury Park: Sage Publications, 1990), 11.

is that, by rejecting universal standards of morality, it becomes difficult for one culture to condemn repressive or inhuman practices in another culture. Some analysts[20] have suggested that tolerance in this context is an irresponsible and nihilistic idea which, if it were allowed to enjoy any credibility, would have compelled the world to tolerate the enormity of the Nazis, for example. Yet, this criticism would appear to rest on an inadequate understanding of the theory of cultural relativism.[21] The essential point of the theory is that standards of normalcy or of moral evaluation are culture-bound. These standards are filtered through, and conditioned by, existing conceptual categories. "Evaluations are relative to the cultural background out of which they arise".[22] But, as Renteln[23] has argued, tolerance and objectivity are not

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[20] See, e.g., Bagish, H., "Confessions of a Former Cultural Relativist", in Angeloni, E., ed., Anthropology 83/84 (Guildford, CT: Dushkin, 1983), 22-29; Winthrop, H., "Ethical Relativism and Its Irrelevancy for the Issues of a Complex Society", Religious Humanism, 11, 2-10 (1977); Harrison, G., "Relativism and Tolerance", Ethics 8, 122-135 (1976); Hartung, F., "Cultural Relativity and Moral Judgments", Philosophy of Science 21, 118-126 (1954), and Kluckhohn, C., "Ethical Relativity: Sic et non", Journal of Philosophy 52, 663-677 (1955).

[21] See, e.g., Redfield, R., The Primitive World and Its Transformations (Ithaca, NY: Cornell University Press, 1962), 146-7, and Brandt, R., Ethical Theory (Englewood Cliffs, NJ: Prentice-Hall, 1959), 288-93.

[22] Herskovits, M., Cultural Relativism: Perspectives in Cultural Pluralism (New York: Random House, 1972), 14.

[23] Renteln, A.D., supra, note 19, 77.

necessarily part of the theory of relativism; the relativist is avowedly ethnocentric: "ethnocentrism is a universal culture trait and denies the objectivity and tolerance which cultural relativism is ordinarily thought to imply".[24]

That some Western commentators tend to read tolerance into the theory of relativism would appear to be only a function of their uncritical acceptance of tolerance as a value, an acceptance conditioned by the liberal democratic value system upon which their own moral evaluatory standards are based. Once objectivity and tolerance cease to feature in our appreciation of the theory, then it becomes clear that the relativist, contrary to critics, need not foreswear cross-cultural moral criticism. The theory's only major drawback may then be that an ethnocentric criticism would lack the force of one based on universal consensus, such as the list of human rights in the UN's Universal Declaration of Human Rights. But difference is not the invariable hallmark of moral standards; there can also be convergence and overlap between discrete, separate and competing moral systems. The more congruence one finds between moral systems the stronger the force of cross-cultural relativist criticism of moral practices.

Both the relativist and universalist positions do, however, suffer from a common limitation: they are predicated

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[24] Hartung, F., supra, note 20, 123-4.

on the false assumption that political order is static and unchanging. Universalists present moral values as pre-cultural and pre-political constants; relativists, on the other hand, while claiming to reject universalism, actually subscribe to the universalist assumption that existing cultures are valid and that the existing order is basically unchanging. Both positions do not stand up to our understanding of cultures as continuously evolving discourse communities.[25] Far from being a static given, every political community is historically and culturally constituted, and is continuously engaged with the project of reconstituting and reinventing itself.[26]

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[25] See Gadamer, H.G., "The Problem of Historical Consciousness", in Rabinow, P., and Sullivan, W.M., eds., Interpretive Social Science: A Reader (Berkeley: University of California Press, 1979), 108: "It is a grave misunderstanding to assume that emphasis on the essential factor of tradition which enters into all understanding implies an uncritical acceptance of tradition and socio-political conservatism...In truth the confrontation of our historic tradition is always a critical challenge of this tradition... Every experience is such a confrontation." See also, Habermas, J., "Review of Gadamer", cited in McCarthy, T., The Critical Theory of Jurgen Habermas (Cambridge: MIT Press, 1981), 171.

[26] See Hobsbawm, E., and Ranger, T., eds., The Invention of Tradition (Cambridge: Cambridge University Press, 1983). See also Appiah, K.A., In My father's House (New York: Oxford University Press, 1992), 174: "Every human identity is constructed, historical; every one has its share of false presuppositions, of errors and inaccuracies that courtesy calls "myth", religion "heresy", and science "magic". Invented histories, invented biologies, invented cultural affinities come with every identity; each is a kind of role that has to scripted, structured by conventions of narrative to which the world never quite manages to conform."

2.3. NUANCES OF THE DEBATE: INDIVIDUALISM VS COMMUNITARIANISM

The debate about the relevance of human rights in the Third World is often at bottom one that purports to pit the "individualism" of the Western world against the "communitarianism" of non-Western societies. This is evident from individual commentaries and, sometimes, official government views, emanating from the Third World, which often reject the Western notion of individual rights as a prelude to extolling the virtues of communal living in non-Western societies. Fasil Nahum points out, for example, that in Africa individuals did not exist as separate entities independent of society: "The individual does not stand in contradistinction to society but as part of it. Neither should he be considered as alienated from and at war with society."[27] Asmarom Legesse asserts: "No aspect of Western civilization makes an African more uncomfortable than the concept of the sacralized individual whose private wars against society are celebrated".[28] Olusola Ojo distinguishes the harmony and concord of the African society from the supposed alienation and discord of the Western society: "The Africans assume

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[27] Nahum, F., "African Contribution to Human Rights", paper presented at the Seminar on Law and Human Rights in Development, Gaborone, Botswana, May 24-28, 1982, 5.

[28] Legesse, A., "Human Rights in African Political Culture", in Thompson, K.W., ed., The Moral Imperatives of Human Rights: A World Survey (Washington, D.C.: University Press of America, 1980), 124.

harmony, not divergence of interests...and are more inclined to think of their obligations to other members of society rather than their claims against them."[29]

Recently, an "Asian View" of human rights has been urged upon the international human rights community. In the lead-up to the 1993 World Conference on Human Rights, which was held in Vienna, Austria, various preparatory meetings were held across regions of the world for the purpose of formulating regional declarations and, thus, to help narrow or define the areas of debate or consensus. Asian governments met in Bangkok, Thailand, from 29 March to 2 April, 1993, and emerged with a consensus that "while human rights are

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[29] Ojo, O., "Understanding Human Rights in Africa", in Berting, J., et al, eds., Human Rights in a Pluralist World: Individuals and Collectivities (Westport, Conn.: Meckler, 1990), 120. See also the following: Mahalu, C.R., "Human Rights and Development: An African Perspective", Leiden Journal of International Law, 1(1), 15 (1988); Marasinghe, L., "Traditional Conceptions of Human Rights in Africa", in Welch Jr., C.E., and Meltzer, R.I., eds., Human Rights and Development in Africa (Albany: State University of New York Press, 1984), 32; Wai, D., "Human Rights in Sub-Saharan Africa", in Pollis, A., and Schwab, P., eds., Human Rights: Cultural and Ideological Perspectives (New York: Praeger Publishers, 1980), 116; Asante, S.K.B., "Nation Building and Human Rights in Emergent Africa", Cornell International Law Journal 2, 72 (Spring, 1969); Zvobgo, E.J.M., "A Third World View", in Kommers, D.P., and Loescher, G.D., eds., Human Rights and American Foreign Policy (Notre Dame, IN: University of Notre Dame Press, 1979), and Mojekwu, C.C., "International Human Rights: The African Perspective", in Nelson, J.L., and Green, V.M., eds., International Human Rights: Contemporary Issues (Stanfordville, NY: Human Rights Publishing Group, 1980), 85.

universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[30] Lee Kuan Yew, the then Prime Minister of Singapore, described the Bangkok Declaration (embodying the Asian View) as "a serious alternative formulation...with a different emphasis".[31]

In the view of spokespersons for non-Western cultures, individual rights are inimical to the cohesion and wholeness of the communal-bound social structures of the non-Western world. Kenneth Kaunda, former President of Zambia, once said of the African society: "The tribal community was a mutual society...individualism was discouraged...social harmony was a vital necessity..."[32] With reference to economic development, African and Asian political leaders have often maintained that individual rights exacerbate centrifugal tendencies in the fragile communities of the Third World;

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[30] See the so-called "Bangkok Declaration", supra, note 1. See also Onuma, Y., "In Quest of Intercivilizational Human Rights: "Universal vs. Relative" Human Rights viewed from an Asian Perspective", Occassional Paper No.2, Centre for Asian Pacific Affairs, The Asia Foundation, Japan, 1996).

[31] Burton, S., "Society versus Individual", Interview with Lee Kuan Yew, Time, 14 June, 1993, 21.

[32] Kaunda, K.D., A Humanist in Africa (London: Longmans, 1966), 24-25.

accordingly, the collective rights of society ought to take precedence over individual rights. It is even suggested sometimes that since a majority of the population lack an understanding of, or the necessary articulacy to pursue, their rights, these rights should be traded off for political stability and economic growth. Kwame Nkrumah, in the heydays of Nkrumahism in Ghana, urged Ghanaians to seek first the political kingdom, which apparently was sure to be followed by economic emancipation, the implication being that both ought not to be pursued at the same time. Echoes of this reverberate through the following statements by the promoters of the "Bangkok Declaration":

> The extent and exercise of rights, in particular civil rights, varies greatly from one culture or political community to another...There is already evidence that at some stage an excessive emphasis on individual rights becomes counter-productive.[33]

> Asia has never valued the individual over society. The society has always been more important than the individual...Human rights standards, as distinct from democracy as a form of government, will become universal.

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[33] Wong Kan Seng, Foreign Minister of Singapore, in an address to the Vienna Conference on human rights, 16 June 1993, quoted in Loh, C., "The Vienna Process and the Importance of Universal Standards in Asia", in Davis, M, ed., Human Rights and Chinese Values (Hong Kong: Oxford University Press, 1995), 145, 157. See also the speech by Liu Huaqiu, the Chinese Vice-Foreign Minister, on the same occasion, 15 June 1993, ibid. See also Mahathir bin Mohammad (Prime Minister of Malaysia), "East Asia will Find Its Own Roads to Democracy", International Herald Tribune, 17 May 1994, 3.

It will not be Western (individualistic) standards, because the West is but a minority of the world."[34]

The African Charter on Human and Peoples' Rights[35] exhibits considerable ambiguity in the matter of the universality of human rights. While the Charter guarantees a list of civil and political rights (articles 3-14) as well as economic, social and cultural rights (articles 15-18) to individuals, it also provides for collective rights, and specifies individual and collective duties to the community, in keeping with "the virtues of (African) historical tradition and the values of African civilization which should inspire and characterize their (Africans') reflection on the concept of human and peoples' rights".[36] Nevertheless, it seems clear

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[34] Lee Kuan Yew, in Burton, S., supra, note 31. See also Zakaria, F., "Culture is Destiny - A Conversation with Lee Kuan Yew", Foreign Affairs 97 (March/April 1994).

[35] Also known as the "Banjul Charter", the Charter was unanimously adopted by the Heads of State and Government of the Organization of African Unity (OAU), at their 18th Assembly in Nairobi, Kenya, June 24-27, 1981. It had earlier been approved by the OAU Ministerial Conference in Banjul, the Gambia, January 7-19, 1981 [OAU Doc. CAB/LEG/67/3/Rev.5, also published in 21 International Legal Materials 59 (1981)]. In October 1986 the Charter entered into force, having been ratified by a simple majority of the member states of the OAU, as prescribed in Article 63(3). The following states have not ratified the Charter: Cote d'Ivoire, Ethiopia, Kenya, Madagascar, and Mauritius.

[36] Preamble to the Charter. See, for a historical perspective, Kannyo, E., "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background", in Welch Jr., C.E., and Meltzer, R.I., eds., Human Rights

that through the Charter African States intend to underscore a distinctively "African" conception of human rights - one "in which civil and political rights (would be) seen to be counterbalanced by duties of social solidarity, just as they are complemented by economic and social rights and supplemented by peoples' rights".[37]

To fully appreciate the implications of the dichotomy which the leaders of the Third World are wont to draw ever so frequently, we must briefly look at the two radically different views of society represented in individualism and communitarianism. The characteristic models of social behaviour which we shall describe presently are only ideal types; they help to portray the two perspectives under discussion in their extreme versions - in order to boldly highlight the contradictions - but they are not meant as an accurate description of any living society.[38]

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and Development in Africa (Albany: State University of New York Press, 1984), 128. See also, Boven, T.V., "The Relations Between Peoples' Rights and Human Rights in the African Charter", Human Rights Law Journal, 7(2-4), 183 (1986), and Okere, B.O., "The protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems", Human Rights Quarterly 6(2), 141 (1994).

[37] Robertson, A.H., and Merrills, J.G., Human Rights in the World (Manchester: Manchester University Press, 1989), 216.

[38] Max Weber was probably the first to use the device of "ideal type" to construct characteristic models of social

In the communitarian perspective, the individual's ties in society are determined by her relations to family and kin; her role in society as well as her identity are prescribed socially, and her conformity to the rules, ethics and mores of her society, is taken for granted. Deviance or difference is frowned upon and frequently punished. The communitarian is troubled by the individualist's inclination to break free of social ties, and to live in an essentially normless and anomic society. She is horrified that the individualist permits "anti-social" lifestyle choices, such as single motherhood and homosexuality. Because of the tolerance of deviance in the individualist society, the individual is forever adrift, living only by her own rules, and therefore alienated from society. The communitarian, on the other hand, is firmly rooted in her society by virtue of her acceptance of her socially prescribed role; she conforms, therefore, she belongs, eccentricities and personal flaws notwithstanding.

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behaviour: see Weber, M., <u>The Protestant Ethic and the Spirit of Capitalism</u> (New York: Charles Scribner's Sons, 1958), 71, 98, 200 (n.25). The German sociologist, Ferdinand Tonnies, in his book, <u>Community and Society</u> (New York: Harper and Row, 1957) built his analysis of social organization around the concepts of <u>gemeinschaft</u> and <u>gesellschaft</u>, using both ideal types in contradistinction to each other. The first type corresponds to the small, closed, and largely rural, pre-industrial society, while the second refers to the modern, pluralistic, complex, industrialized society. A recent work that adopted Tonnies typology is Galenkamp, M., <u>Individualism versus Collectivism</u> (Rotterdam: Erasmus University, 1993).

Obedience of social rules makes personal shortcomings tolerable.

For some communitarians, social stratification is a perfectly acceptable way of allocating roles in society. What is important is not the individual's rank in the social hierarchy but the diligence with which one's role is fulfilled. All must co-operate to ensure the greater good of the entire community. The individualist, by contrast, rejects ascribed status distinctions, and seeks her own place in society through selfish and unregulated pursuit of wealth and prestige. The essentially anarchic competition that characterizes social interaction breaks down the ties that should bind individuals, breeding instead social and economic insecurity for all.

The communitarian perspective views society as culturally homogeneous, static and unchanging. Social interaction, according to this view is essentially harmonious, or at any rate, non-conflictual. Roles as well as rules are understood and accepted. Culture is the uniting force of society; conceptualized in unchanging terms, culture in the communitarian view, validates the individual's primary identity within her unchanging group, be it the family, the ethnic, or the religious group. The emphasis is on fitting into the group, not on deviating from one's group, on living together in mutual tolerance as opposed to the individualistic

claims of the self-seeking deviant.

Individualists favour a sharply contrasting society from that of the communitarians. They reject socially prescribed roles and ties as repressive of the individual's freedom to choose other social networks or lifestyles that may be considered more important to her than, say, family or kin, or deference to elders or to male members of her society. The chance to choose one's lifestyle, and to establish an identity independent of the group is considered liberating. Individualists believe that the belongingness of closed social groups, far from encouraging tolerance actually induces social exclusivism and mutual suspicion. An open society is considered to be the most potent antidote to bigotry.

Change, for the individualist, is an inherently healthy phenomenon. Change for her connotes progress, a movement away from less satisfactory communities and ways of living to new, more satisfactory ones. Thus, change is to be venerated for its own sake, and the momentum for it constantly facilitated. The individualist finds the communitarian's resistance to change repulsive. For the former, a society must change in order to avoid stagnation. For this reason, culture and tradition occupy no special place in the individualist's world. Indeed in her world there is not one culture, but many cultures borne of individual choices. Diversity is recognized and encouraged as the wellspring of individual achievement and

self-expression. Positions, statuses and respect must be earned, not conferred solely by tradition, and there are no social hierarchies, save those that arise as outcome of competition.

As we have already cautioned, the starkly contrasting pictures painted above[39] hardly reflects real-life societies. In real life, there is no pure individualist or communitarian society; each inevitably shares some attributes of the other. In spite of this, however, in the debate about the place of human rights in non-Western cultures, one frequently comes across arguments, such as the ones abstracted above, whose peculiar spin on the individualism-communitarianism contrast would seem to totally foreclose the possibility of a reconciliation of the dichotomy. But as Rhoda Howard notes, "[B]oth in practice and in theory, we need to reconcile the communitarian and the individualist account of society. The communitarian account is too critical of the

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[39] The following works have been drawn upon in the construction of the two ideal-types depicted here: Nisbet, R.A., _The Quest for Community_ (London: Oxford University Press, 1970); Coser, R.L., _In Defence of Modernity: Role Complexity and Individual Autonomy_ (Stanford: Stanford University Press, 1991); Durkheim, E., _Suicide: A Study in Sociology_ (New York: The Free Press, 1951); ibid., _The Division of Labour in Society_ (New York: The Free Press, 1933); Lukes, S., _Individualism_ (Oxford: Basil Blackwell, 1973); Moore, Jr., B., _Privacy: Studies in Social and Cultural History_ (Armonk, NY: M.E. Sharpe, 1984), and Berger, P., Berger, B., and Kellner, H., _The Homeless Mind: Modernization and Consciousness_ (New York: Vintage Books, 1973).

breakdown of community and tends to refer back to romanticized models, whereas the individualist account is too uncritical of the costs of individualism."[40]

2.4. SOCIAL AND POLITICAL ORDERS AS DISCOURSE COMMUNITIES

If, from the above debate and viewpoints, it is clear that there is a great deal of simplification, undue generalization and/or exaggeration on all sides, then it is important to take a second look at the relationship of human rights and non-Western cultures. Are human rights and non-Western cultures really irreconcilable?

We begin to answer this question, first by criticizing the assumption, common to the universalist and cultural relativist schools of thought, that social and political orders never change, and that local communities are, therefore, permanently isolated, closed and insulated against external influences. Social and political orders, contrary to this assumption, are continually evolving and are indeed open to transformation. The foundations of all political and social orders lie in the intersubjective understanding of intentions among the populace, and their general recognition and assumption of obligations toward each other. Thus, in every community, social interaction rests upon a gamut of binding

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[40] Howard, R.E., supra, note 7, 113.

consensual norms which are arrived at through a process of communication and dialogue.[41] Norms and meanings change in the process of discourse, either within traditions or between rival traditions. As these changes get ultimate expression in the social and political order, it is best to look at that order as dynamic rather than unchanging.

Another fallacy implicit in the doctrine of cultural relativism is that traditions are closed, self-contained and internally harmonious. In fact, though, traditions are best seen, not as static, harmonious whole, but as "continuously

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[41] The concepts of "Communication" and "dialogue" as used here are borrowed from Gadamer's hermeneutics and the postmodern notion of interpretive understanding which results from the interaction between a "reader" and the "text". Hermeneutics teach us that every knowledge is borne, not of passive analysis, but of dynamic interaction between what is sought to be known and the seeker of knowledge. Both do not cynically stand apart from each other; for true knowledge to occur, there must be a "fusion of horizons", a dynamic interplay which produces enrichment and enlargement of understanding: Gadamer, H.G., Truth and Method, translated and edited by Garrett Barden and John Cumming (New York: Seabury Press, 1975). Postmodernism teaches that the meaning of a text comes out of the reader's understanding the text. Meaning and understanding are thus part of the same process of communication. By the same token, there is no real self-knowledge without a dialectical interaction with the "other": "selfhood" and "otherness" are both products of dialogue: Lyotard, J.F., The Postmodern Condition: A Report on Knowledge, Geoff Bennington and Brian Massumi, trans. (Minneapolis: University of Minnesota Press, 1984); McGregor, G., "Postmodernism and Its Discontents", Border/Lines 18, 43-45 (1990); Hutcheon, L., The Politics of Postmodernism (London: Routledge, 1989), and Putnam, H., "The Meaning of "Meaning"", in Mind, Language and Reality Vol.2 (Cambridge: Cambridge University Press, 1975), 215.

evolving discourse communities".[42] In all social and political orders, traditions are subject to challenge and criticism from within and without. According to Alasdair MacIntyre,[43] traditions may change as a result of any of the following: internal self-examination, self-criticism or reflective understanding, encounter with other communities, and changes in material conditions which give rise to new issues.

Moreover, social boundaries between groups are seldom absolute, and critical scholarship has since exposed the pervasive fallacy that culture is the mirror of spontaneous community practice. Far from being the product of communally accepted usage, "culture" might indeed have been foisted upon a community by an elite group or even by an outsider.[44] For example, the construction of indigenous cultures as "other" by imperial powers in the days of colonialism has been upheld and fostered to this day in most parts of the Third world by indigenous ruling elites in order

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[42] Lee, E., "Human Rights and Non-Western Values", in Davis, M.C., ed., supra, note 33, 72.

[43] MacIntyre, A., Whose Justice? Which Rationality? (London: Gerald Duckworth & Co. Ltd., 1988).

[44] See. e.g., Tennant, C., "Indigenous Peoples, International Institutions, and International Legal Literature from 1945-1993" Human Rights Quarterly 16(1), (1994).

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to retain their hold on political power.[45] In South Africa under apartheid, exponents of apartheid were known to have actively stressed and created cultural differences, which they then exploited to restructure the social and political order.[46] An acceptance by South Africans that they had little in common with one another in terms of culture was precisely what was required to facilitate the balkanization of the population into ethnic "homelands".[47]

The emblems of culture - such as language, food, clothing, habits and values -, seldom representative of a community's total output or behaviour, nevertheless change in response to the evolution of culture. These distinctive features are the subject of a continuous process of selection and discarding. They may have emerged out of the community's past, or they may have been borrowed from another culture, or they may have been invented. While the claim that culture represents spontaneous communal practice is arguably the most popular explanation of the term "culture", the invention of

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[45] See Said, E.W., Culture and Imperialism (New York: Vintage Books, 1994).

[46] See, e.g., Harries, M., (commenting on the case of the Tshonga), in Vail, L., ed., The Creation of Tribalism in Southern and Central Africa (Berkeley: University of California Press, 1988), 83-107.

[47] See Bennett, T.W., Human Rights and African Customary Law Under the South African Constitution (Cape Town: Juta & Co. Ltd., 1995)

culture is also a fact that is well documented in the literature.[48]

Both the spontaneity of communal practice and the invention of culture do not occur in a vacuum: they are based upon life experiences and the preference of the community, or the community's elite, for one form of cultural artifice over another. This presupposes that for every cultural artifice that wins recognition in the community, perhaps one or more was/were rejected. Borrowing from another culture similarly presupposes the existence of rival traditions without or rivalry of traditions within the community. That cultures can benefit from each other in spite of their incommensurability proves that rivalry among world views does not of itself preclude the possibility of rational communication among them. The theory of "incommensurability" postulates that it is impossible to construct a framework by which rival paradigms might be correctly evaluated because there is no neutral measuring rod or language common to the rivals.[49] But, as Richard Bernstein[50] has argued, the incommensurability of paradigms does not mean that the paradigms can only be evaluated according to their own internally generated

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[48] See, e.g., Hobsbawm and Ranger, eds., supra, note 26.

[49] See Bernstein, R.J., _Beyond Objectivism and Relativism_ (New York: Basil Blackwell Publisher Ltd., 1983).

[50] ibid., 79-108.

standards and no more. A meaningful disagreement between paradigms, according to Bernstein, suggests instead that their concepts, standards and problems do share some commonality. Thus, the remarkable thing about incommensurability and the co-existence of rival cultures is not closure of discursive space, but its openness - openness to learning and to understanding other cultures which, in turn, has profound consequences for self-understanding.

All human knowledge is grounded in some historical or cultural context, and often the tendency is to exaggerate the good points of the "known" whilst diminishing, minimizing or ignoring those of the "unknown". But the clash of cultures creates opportunity for critical reflection, for deeper examination of one's own way of life, and for a new look at one's preferences and prejudices. It may well be discovered that "what we take to be intuitive, natural, obvious, or universal may not be so at all but is only one historical social possibility among several alternatives".[51]

Non-Western concerns about human rights, especially the liberal values that underpin them, highlight the conflict between these rights and communal values. Similar concerns - about the conflict between liberalism and communitarianism, between individual autonomy and community, and the prospects

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[51] ibid., 107.

of reconciliation or integration - have recently occupied Western philosophers as well. The communitarian critique of liberalism has been spearheaded by such writers as Alasdair MacIntyre,[52] Michael Sandel,[53] Charles Taylor,[54] and Michael Walzer.[55] These writers have criticized the liberal conception of the self, the relationship between the self and the community, and the role of the State, mostly as represented in the rights-based theories of Robert Nozick[56] and John Rawls.[57]

Communitarians have challenged the liberal representation of the ideal self as an antecedently individuated, "disengaged" or "unencumbered" individual, whose choices are autonomously (willfully and voluntarily) made, and whose identity is not determined or constituted by the community in which she happens to find herself. Charles Taylor

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[52] See, e.g., MacIntyre, A., After Virtue (Notre Dame, IN: University of Notre Dame Press, 1981).

[53] See, e.g., Sandel, M., Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982).

[54] See, e.g., Taylor, C., "Cross-Purposes: The Liberal-Communitarian Debate", in Rosenblum, N., ed., Liberalism and the Moral Life (Cambridge, Mass.: Harvard University Press, 1989), 47.

[55] See, e.g., Walzer, M., Spheres of Justice (New York: Basic Books, 1983).

[56] Nozick, R., Anarchy, State and Utopia (New York: Basic Books, 1974).

[57] Rawls, J., A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971).

maintains that the individual/selfhood is invariably a product of social conditioning. The process of knowing and defining the self involves conversations with social others, he insists, as identities are forged through concepts and standards immanent in bequeathed traditions and practices. Alasdair MacIntyre, through the concept of telos, similarly opines that one's identity and conception of the good life form part of a communal narrative, and that it is futile to attempt to tell the story of one's life apart from one's membership in a social group or community. If the abstract individualism favoured by the liberals were accepted, MacIntyre believes, the end product would be atomized, moral solipsists, for whom the community would be of no use save for the pursuit of personal interests.[58] On the contrary, he insists, such abstract individualism really subverts the obvious: our values, identities, aspirations, and life chances are rooted in social relationships.

The idea that the State maintains a neutral position in the debates regarding competing conceptions of the good is also considered an impracticable one by communitarians. The State is run by individuals, who themselves are product of social matrices. In arriving at public policy, especially in the area of distributive justice, it is entirely impossible to

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[58] See, e.g., Glendon, M.A., Rights Talk: The Impoverishment of Political Discourse (New York: The Free Press, 1991).

shut out one's judgement of the good. Joseph Raz[59] has recently argued that liberalism is a form of political community or culture, while rights are forms of social practice. The historic mission of the liberal State is the enhancement of a particular conception of the good, namely, individual autonomy and pluralism. The liberal ideal of individual autonomy is itself a theory of the good - a theory that venerates and eulogizes a particular kind of life in which individuals are in full charge of their own lives. The liberal State provides the milieu for the attainment of that vision of life. In the circumstance, it is not possible for the State to remain neutral: it must, at least, choose which life forms to support, since it cannot support all equally; in so doing, the State in fact makes judgments on conceptions of the good.

The communitarian critique of liberalism, however, does not mean that communitarians do not appreciate such key values as justice, freedom, and equality, which occupy the centre stage in liberal theory. Communitarians, for example, recognize the danger of oppression inherent in the subjugation of individual identity and autonomy completely to the determination of the collectivity.[60] They frown at the prospect

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[59] Raz, J., The Morality of Freedom (Oxford: Clarendon Press, 1986).

[60] See, e.g., Bell, D.A., "A Communitarian Critique of Authoritarianism", Society 38 (July/August 1995).

that, in the name of community, individuals may be coerced into staying in the group, or deterred from challenging the traditions of their community. They also refuse to endorse the structures of domination and subordination upon which the ascriptive definition of social roles in the traditional community rests. Rhoda Howard[61] describes the modern community:

> The difference between the traditional and the modern community is not one of commitment: it is one of citizenship. The modern community is a community of citizens. Anyone is permitted to be a member, regardless of gender, race, ethnicity, or place of origin...Another difference...is the value placed on individual self-expression. To be respected as a member of the modern community, professions of loyalty are not required. The deviant or critique is as entitled to protection of her human rights as the conformist and the patriot. Although community is strongly valued in modern society as in traditional society, community needs are not permitted to supersede individual rights...The principle of human rights protects individuals against abuses by the collectivity.

Liberal thinkers, on the other hand, seem to have abandoned some of the more anti-community elements of their theories. Indeed, some have explicitly brought community back into their theories. John Rawls,[62] for example, has moved away from his theory of justice as fairness being the universal

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[61] Howard, R.E., supra, note 7, 129.

[62] See Rawls, J., "Justice as Fairness: Political not Metaphysical" Philosophy and Public Affairs, 14(3), 52 (1985); ibid., Political Liberalism (New York: Columbia University Press, 1993).

outcome of free choice by rational individuals to a recognition that both the liberal self and the principle of justice as fairness are constituted and realizable only within the context of a liberal community. Rawls thus now recognizes that individual rights do not antedate the political community, but rather that rights are constituted by social practice.

This significant narrowing of the theoretical chasm between liberalism and communitarianism mirrors the exaggeration and misrepresentation that have for long characterized renditions of the rights-community dichotomy. An important point of this development is that core liberal values are not irreconcilable with community values. To be sure, difficult questions of public policy, such as what freedom and equality mean, may arise from the fundamental reconstruction of philosophical paradigms which an integration of liberal and communitarian values would entail. But such an integration is not impossible. What is not possible is to try and sustain a society solely on the idea of individual rights. Liberalism has always co-existed with other values and traditions. In America, republicanism, protestantism, and populism are examples of such traditions. The values of tolerance, love, friendship, generosity, etc, have always been part of the civilized society. In the end, one must agree with

Richard Flathman's[63] conclusion that:

> We are not presented with a simple choice between rights-oriented individualism and community. We are presented, rather, with a complex admixture of practices, arrangements, institutions, and values and with choices as to the ways in which that mixture should be preserved and/or altered in particular respects. From this perspective there are respects in which the values of the practice of rights and those of community, however irreconcilable they may be in abstract formulation, can be not merely compatible but complementary and mutually supportive.

From a tactical point of view, the absolutist liberal argument that human rights are a Western invention, incompatible with non-Western cultures and traditions, puts insuperable obstacles in the way of human rights diplomacy in the Third World. One commentator has referred to this as "secular fundamentalism", because it "treats alternative views as irrational, extremist, and deviant".[64] Such an argument can be redeployed on the other side in support of the extreme, and equally dangerous, cultural relativist stigmatization of human rights as a weapon for the destruction of indigenous culture. Secondly, stating the argument for human rights in black and white terms, such as liberal absolutism implies, is capable of drawing unnecessary hostility to human rights from many

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[63] Flathman, R.E., The Practice of Rights (New York: Cambridge University Press, 1976), 192.

[64] Esposito, J.L., "Political Islam: Beyond the Green Menace", Current History 93, 24 (1994).

traditionally friendly quarters. For example, if human rights are presented in stark opposition to religion, it might be expected that politically moderate Christians or muslims would probably rally behind their religion and become hostile to human rights positions.

A moral high ground is essential to the integrity of arguments aimed at inducing changes in the cultures or moral beliefs of others. Such a moral high ground or authority is today being severely undermined in the West by domestic social problems, such as drug abuse, high rates of crime, corruption, political marginalization, collapse of the institution of family, and increasing economic inequality. In addition to the effect of domestic social problems on the West's moral authority to shape the Third World's political direction, there is the tendency in the West to be inconsistent, and sometimes downright contradictory, on the issue of human rights. Often, Western nations have subordinated human rights concerns to commercial and security considerations - as in the maintenance of trade links with China in the face of egregious abuse of human rights in that country, or with Indonesia in spite of its ongoing gross violation of human rights in East Timor. Indeed, in 1992, only a few months after seventy-five unarmed demonstrators were murdered by the Indonesian army at Dili, the Timorese capital, the US voted to block UN action on East Timor in the UN Commission on Human Rights. During the

Cold War, Western nations actually ignored human rights violations in their satellite nations, and supported dictatorial regimes in Africa, Asia, and Latin America, for strategic reasons.

Corrupt and thieving despots like Mobutu Sese Seko of Zaire, Ferdinand Marcos of the Philippines, and Augusto Pinochet of Chile, relied on Western powers to maintain their rule. Eggregious violations of human rights - torture, disappearances, slayings, illegal arrests and detentions, etc. - were ignored by these powers as long as the dictators were committed to keeping communism at bay. Things only changed with the end of the Cold War, and many of the dictators have been thrown out of office through the struggle of vastly weakened populations.[65]

All of these pitfalls make it strategically unsound and unhelpful to continue to couch the liberal argument for human rights in absolute terms. Western justifications for human rights lack resonance in the Third World at this point, and it may be time to pay attention to cross-cultural foundations.

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[65] See Margolis, E., "Yesterday's Tyrants, Today's Outcasts", The Toronto Sun, September 18, 1997, 12.

3. THE RIGHT TO DEVELOPMENT AND CORE VALUES OF CONTEMPORARY NON-WESTERN CULTURES

In examining how the HRD relates to non-Western cultures, analysis must go beyond the often paternalistic claims by ruling elites of the Third World about the inappropriateness of "Western" human rights. Such claims lack rootedness in the objective circumstances of the Third World and its peoples. It is doubtful that the peoples of the Third World would reject human rights if they were properly informed about the concept, and provided with the legal resources to actualize them. At the other extreme are the liberal universalist claims which turn out to be both particularistic and exclusionary. Both extremes are unhelpful as they serve only to detain the emergence of cross-cultural consensus on the concept of human rights.[66] If the concern is in arriving

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[66] Both sides in the debate seem to ignore the fact that, at least, at the level of principle, there exists a moral consensus against murder, slavery, torture, and genocide: see, e.g. Walzer, M., _Interpretation and Social Criticism_ (Cambridge, Mass.: Harvard University Press, 1987). See also Walzer's _Thick and Thin: Moral Arguments at Home and Abroad_ (Notre Dame: University of Notre Dame Press, 1994).The areas of disagreement include the definition of crime, family law, social and economic rights, rights of indigenous peoples, and the universalism of liberal political thought. Some of these areas are contested in the Third World on grounds of culture, but others are not really subjects of dispute as such, but only a matter of prioritization of human rights in the development process. This realization ought to underscore the proximity of the sides to, not their distance from, each other.

at genuinely universal human rights, as it must be, then cross-cultural commonalities and points of convergence must be found and emphasized accordingly. In effect, both Western and non-Western cultures must engage in a process of dialogue, in ways that build on, rather than denigrate, each other's moral standpoint.   What follows presently is an attempt to set out the communicative scheme by identifying broad areas of cultural convergence as well as divergence between the West and the Third World.

3.1. DEMOCRACY/GOOD GOVERNANCE: The Declaration on the Right to Development can be properly described as a charter for participatory governance of development. Its preamble states clearly that development is a comprehensive economic, social, cultural and political process, aimed at constantly improving the well-being of an entire population "on the basis of their active, free and meaningful participation in development and in their fair distribution of benefits resulting therefrom". This cardinal principle of the Declaration is reiterated in various sections of the document.

Democratic governance, as a value, is not strange to non-Western cultures. In pre-colonial Africa, for example, social and political structures encouraged egalitarianism and discouraged tyranny. Among the Akans of Ghana, who operated a centralized political system based on the principle of

kinship, each political unit (i.e. a lineage) had an elder as head. The elder was elected by adults of the lineage. The elder, once elected, became a member of the village council. This council was headed by a chief chosen by priority of descent as well as by election. Decisions of the council were arrived at by consensus, and a chief who tried to rule by fiat or to be oppressive was liable to be dismissed by the populace. The basis of all authority was the consent of the governed.[67]

A similar political culture existed among many other ethnic groups across the continent. It was clearly understood that the basis of all political authority was the people. The Igalas of central Nigeria have a saying: "Onu n'oja k'oja n'onu", meaning "the king rules the people and the people, in turn, own the king".[68] Similarly, the Basutho of Lesotho maintain that "A chief is a chief by the people", while the Ndebele of Zimbabwe hold that "The king is the people".[69] Scholarly commentaries on pre-colonial African societies have pointed out the democratic features of African traditional political systems: rule by popular consent, citizens' freedom

[67] See, e.g., Gyekye, K., Tradition and Modernity (New York: Oxford University Press, 1997), 121-33.

[68] Personal knowledge of the author, who is Igala.

[69] Sithole, N., African Nationalism, 2nd edn. (London: Oxford University Press, 1968), 117

of expression on public issues, checks and balances in the exercise of power, and so on.[70] According to Fortes and Evans-Pritchard, for example, "[T]he structure of an African state implies that kings and chiefs rule by consent. A ruler's subjects are as fully aware of the duties he owes to them as they are of the duties they owe to him, and they are able to exert pressure to make him discharge these duties."[71] In spite of the introduction of Western forms of governance in African societies during the colonial era, and the relentless inroads of modernity which these societies have seen since then, the traditional political culture has largely survived in the rural towns and villages of the continent, where about 70% of the population resides.

In Asia, elements of classical Confucian thought relating to government and politics - such as benevolence, tolerance, justice and morality - bear obvious relationship to the concept of good governance, although the notion of democratic control of power probably did not exist. According

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[70] See, e.g., Forde, D., ed., African Worlds (Oxford: Oxford University Press, 1954); Kuper, H., An African Aristocracy: Rank among the Swazi (Oxford: Oxford University Press, 1961); compare Simiyu, V.G., "The Democratic Myth in African Traditional Societies", in Oyugi, V.O., and Gitonga, A., eds., Democratic Theory and Practice in Africa (Nairobi: Heinemann, 1987), 55.

[71] Fortes, M., and Evans-Pritchard, E.E., African Political Systems (Oxford: Oxford University Press, 1940), 12.

to Gangjian and Gang,[72] in Chinese culture, the Confucian
tradition drew a sharp distinction between the ruler and the
ruled. Indeed, "Confucianism never held that the people as a
whole could be the masters, engaged directly in political
administration. Confucianism was concerned with elite
politics. Modern democracy is therefore somewhat alien to
Chinese soil".[73] Yet, rulers are enjoined to be restrained in
their exercise of power - "The morality of a superior man is
to treat everybody kindly and tolerantly",[74] to deal
compassionately with their subjects or risk rebellion of the
latter - "Do not support injustice and do not wait upon a non-
benevolent monarch".[75] Rulers owe a duty to create harmony and
a conducive atmosphere for the prosperity of their subjects.
This does not mean that people should be coerced into
compliance; the stability of society depends on the idea that
"when the people keep their several places, there will be no
poverty; when harmony prevails, there will be no scarcity; and

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[72] Gangjian,, D., and Gang, S., ""Relating Human rights to
Chinese Culture: The Four Paths of the Confucian Analects
and the Four Principles of a New Theory of Benevolence",
in Davis, M.C., ed., supra, note 33, 35.

[73] ibid., 50.

[74] The Path of Tolerance, a Confucian Analect mainly
directed at rulers, as translated in Legge, J., ed., The
Chinese Classics, Vol. I: Confucian Analects, The Great
Learning, The Doctrine of the Mean (Hong Kong: University
of Hong Kong Press, 1960), Lirun Essay, No.4.

[75] ibid., Wei Zi Essay, No.15.

when there is such a contented repose, there will be no rebellion".[76] This example again illustrates the compatibility of traditional non-western political values with the core message of the right to development.

3.2. HUMANITY AS END IN ITSELF: Most non-Western cultures tend to place supreme value on the human person for her own sake. Africans generally tend to prefer, if it became a matter of choice, children, brothers, sisters, relatives, to material wealth. For them, to be surrounded by one's people is to be wealthy. The human person is celebrated throughout her life span: at birth, at important milestones, such as marriage or success in pursuits of various kinds, and at death. Article 29 of the African Charter on Human and Peoples' Rights, for example, casts a duty on Africans to "preserve the harmonious development of the family and...to respect (their) parents at all times, to maintain them in case of need".

Similarly, filial piety is a cardinal value of the Asian society, "the essential way of learning to be human".[77] Daniel Bell states of this value: "Children have a profound duty to care for elderly parents, a duty to be forsaken only

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[76] ibid., Guishi Essay, No.16.

[77] Ming, T.W., Confucianism in an Historical Perspective, Occasional Paper No.13, Institute of East Asian Philosophies, Harvard University, 1989), 15.

in the most exceptional circumstances, and parents have a fundamental right to be cared for by their children. Thus, whereas it is widely seen as morally acceptable in the West to commit elderly parents to nursing homes, from an East Asian perspective this often amounts to condemning one's parents to a lonely and psychologically painful death and is a violation of a vital human interest".[78] Indeed, Asian social and political systems are typically structured to facilitate the taking care of the elderly by adults.[79]

Furthermore, all the major non-Western religions - Islam, Buddhism, Confucianism, Hinduism - extol the virtue of love for humanity. The Declaration on the Right to Development captures this theme in Article 2(1) thus:

> The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

3.3. COMMUNALISM: Another cherished value in most of the Third World is the communal approach to life. The belief seems to be

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[78] Bell, D.A., "The East Asian Challenge to Human Rights: Reflections on an East-West Dialogue", Human Rights Quarterly, Volume 18 (3), 641, 665-6. See also Asiaweek, 2 March 1994, at 24, where, under a report titled "The Cultural Element", Dewi Fortuna Anwar, Head, Regional and International Affairs Division, Centre for Political and Regional Studies, Jakarta, was quoted as saying: "(F)amily ties are considered the most important in society. If a member does very well, he has a responsibility toward those who are not as fortunate".

[79] In Singapore, providing for elderly parents by children is required by law. Ditto, Japan.

that life is richer when its triumphs and failures are socially shared, when it is lived in the community, and not in isolation from one's kiths and kin. It may be that this approach to life has come under pressure from the march of modernization, but there is evidence that group-centred forms of consciousness and cultural norms have generally held their own. In North America, for example, the tendency of immigrants from the Third World to agglomerate in neighbourhoods, and to replicate many aspects of communal living in their new countries, is well known. Even within the Third World itself, this tendency has been observed among rural-urban migrants.[80] Overall, it seems correct to say that rural (communal) value systems are strengthened, not weakened, by rural-urban or Third World-Developed World migration as communal networks and kinship ties continue to represent the dominant approach to social relations.

The Declaration on the Right to Development again pays due regard to this important aspect of non-Western cultures by providing, in Article 2(2), that:

> All human beings have a responsibility for development, individually and collectively...taking into account...

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[80] See, e.g., among the early studies, Little, D., <u>West African Urbanization</u> (Cambridge: Cambridge University Press, 1965), and Plotnicov, G., <u>Strangers to the City: Urban Man in Jos, Nigeria</u> (Pittsburgh: University of Pittsburgh Press, 1967).

their duties to the community, which alone can ensure the free and complete fulfilment of the human being...

3.4. SOCIAL JUSTICE AND EQUALITY: The opening up of participatory space to all members of society in the social, economic, cultural, and political spheres, is yet another area in which the HRD and traditional non-Western values do not necessarily clash. Some commentators have characterized non-Western societies as ones dominated by hierarchy, patriarchal ideologies, and relations of domination and subordination. This characterization is only partially correct. Unjust division of labour - as in, for example, the caste system of India which stigmatizes some citizens as "untouchables",[81] chattel slavery in Sudan and some other parts of Africa,[82] child labour and prostitution in some parts of Asia, including the NICs - has co-existed in these societies along with some of the most expansive political participatory spaces in human history. Take gender justice, for example. While institutional and systemic discrimination against women remains alive in these societies, yet it is true that women of the Third world

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[81] See, e.g., Joshi, B.R., "Human Rights as Dynamic Process: The Case of India's Untouchables", in Welch Jr., C.E., and Leary, V.A., eds., <u>Asian Perspectives on Human Rights</u> (Boulder, CO: Westview Press, 1990), 162.

[82] See, e.g., Lovejoy, P.E., <u>Transformations in Slavery: A History of Slavery in Africa</u> (New York: Cambridge University Press, 1983), and Kopytoff, I., and Miers, S., <u>Slavery in Africa</u> (Madison: University of Wisconsin Press, 1977).

have risen to increasingly high social and political positions in their societies, especially in recent times. Benazir Bhutto of Pakistan, Indira Gandhi of India, Mrs. Kumaratunga (as was Mrs.Bandaranaike before her) of Sri Lanka (formerly Ceylon), Golda Meir of Israel, and Corazon Aquino of the Philippines, are examples of women who have occupied the highest political offices in their respective countries. In West Africa, women have traditionally occupied leading political and religious positions in society. In Nigeria, Queen Amina is revered as a legendary warrior among the Hausas of the north, and among the Yorubas of the West, as well as in Ghana, women served as priestesses in religious shrines.

Material sustenance and well-being of society in its entirety is another aspect of life in which some non-Western societies truly demonstrate their respect for social justice. Some of these societies contain the most elaborate forms of social security, rooted in communal provision for those in need, such as widows, orphans, and those who have simply fallen on bad times. Indigenous social philosophy in most parts of the Third World encourage generosity and kindness toward the less fortunate. In some non-Western religions, for example, Islam, providing for the poor or less fortunate is mandatory for those who have the wherewithal.[83] Yet, it is true

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[83] See An-Na'im, A.A., Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Syracuse:

that some of the cases of poverty in these societies are attributable to execrable forms of human exploitation, abuse, subjugation, and sheer callousness, practised by those in privileged positions. Thus, the true characterization of these societies would seem to be that they are ambiguous in relation to social justice.

The Declaration on the Right to Development enjoins all states to ensure "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income".[84] Additionally, women are required to be assured "an active role" in the development process, whose hallmark must be "popular participation" and the eradication of all "social injustices".[85] Clearly, this invitation to egalitarianism is not incompatible with the cultures of the Third World.

Resistance to equality, especially for women, has come mostly from Islamic states,[86] and those states in which

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Syracuse University Press, 1990), and ibid., "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel Inhuman, or Degrading Treatment or Punishment", in An-Na'im, A., ed., Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (Philadelphia: University of Pennsylvania Press, 1992), 34.

[84] Article 8(1).

[85] ibid., and (2).

[86] "Islamic states" refers to Iraq, Iran, Morocco, Kuwait, Sudan, Egypt, Algeria, Tunisia, Syria, Lebanon, Jordan,

Islam is the dominant religion.[87] Thus, even though many of these states have ratified international human rights treaties dealing with equality of women,[88] these ratifications have been accompanied by substantial reservations. For example, Egypt's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was made subject to absence of conflict between particular provisions of the convention and the dictates of the Shari'a, that is, Islamic law.[89] Yet, the opinions of respected Islamic jurists[90] suggest

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Bahrain, Oman, Qatar, Yemen, the United Arab Emirates, Saudi Arabia, Libya, Mauritania, Djibouti, Comoro Islands, and Somalia.

[87] These states include Bangladesh, Malaysia, Indonesia, Pakistan, the Maldives, and Afghanistan. See Venkatraman, B.A., "Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?" 44 American University Law Review 1949 (1995).

[88] For example, the Convention on the Political Rights of Women (affirming women's right to vote and to hold public office), March 31, 1953, 193 U.N.T.S 135; Convention on the Nationality of Married Women (affirming the right of married women to retain nationality regardless of marriage, divorce, or husband's change of nationality), February 20, 1957, 309 U.N.T.S 65; and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (reaffirming marriage as consensual and providing for the establishment of minimum age for marriage as well as for registration of marriage), December 10, 1962, 521 U.N.T.S. 231.

[89] See Multilateral Treaties Deposited with the Secretary-General (Status as of 31 December, 1995), 169. Bangladesh was another state that declared Article 2 of CEDAW not binding on it on the grounds that this section was conflicted with the Qur'an and Sunnah, that is, the teaching and example of Prophet Muhammad (Sal allaihi wa

that equality of the sexes is one of the fundamental principles recognized in the Qur'an - the basic text upon which the Shari'a and the precepts and practices of the Islamic faith are based. According to Urfan Khaliq,[91] autonomy, justice, freedom, equality, consultation, and tolerance are values which the Qur'an repeatedly enjoins the faithful to practise. Of gender relations, the Qur'an is particularly emphatic concerning equality: men and women were created from the same soul that they may complement each other.[92] Similarly, Azizah al-Hibri[93] argues that there is no inconsistency between the basic principles of Islam and international human rights. According to him, the denial of equality to women in most Islamic societies is not due so much to the Qur'an's dictates

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salaam): ibid.

[90] See, e.g., al-Hibri, A., "Islam, Law and Custom: Redefining Muslim Women's Rights" American University Journal of International Law and Policy, 12, 1 (1997); Tibi, B., "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" Human Rights Quarterly, 16, 277 (1994); Khaliq, U., "Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in the Shari'ah" Buffalo Journal of International Law, 2, 1 (1995).

[91] Khaliq, U., ibid., 47.

[92] Khaliq cites, in this, regard Chapter 30 verse 21 of the Qur'an: "He created [f]or you mates from among [y]ourselves, that [y]e may [d]well in tranquility with them". He refers to this passage as encapsulating the "Equality Principle".

[93] al-Hibri, A., supra, note 91, 5-6.

as it is to the patriarchal structure of these societies. What
is needed, therefore, al-Hibri suggests, is a disposition on
the part of Islamic jurists to flexibly reinterpret the Qur'an
and the other precepts and standards of Islam in accordance
with modern social changes.[94]

4. CULTURE, RIGHTS, SOCIAL CHANGE AND THE POLITICS OF REPRESENTATION IN THE THIRD WORLD

A dialogic approach to the construction of human
rights assumes equality of participation in dialogues as well
as the capacity of all participants equally to define or

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[94] ibid., 57. Other liberal scholars and Islamic reformers
have expressed a similar view: see, e.g., An-Na'im, A.A.,
"Religious Minorities Under Islamic Law and the Limits of
Cultural Relativism" Human Rights Quarterly, 9, 1
(1987); Knauss, P.R., The Persistence of Patriarchy:
Class, Gender, and Ideology in Twentieth Century Algeria
(New York: Praeger,1987), 124; An-Na'im, A.A., supra,
note 84; Mayer, A.E., Islam and Human Rights: Tradition
and Politics (Boulder, CO.: Westview Press, 1991);
Mernissi, F., Women and Islam: An Historical and
Theological Inquiry, Lakehead, M.J., trans, (Oxford:
Basil Blackwell, 1991); Kampelman, M.M., "Entering New
Worlds: A Challenge" Columbia Journal of Transnational
Law, 32, 457 (1995); and Entellis, J., "International
Human Rights: Islam's Friend or Foe? Algeria as an
Example of the Compatibility of International Human
Rights Regarding Women's Equality and Islamic Law"
Fordham International Law Journal, 20, 1251 (1997).
However, some conservative Islamic scholars see no
meeting point between Islamic tradition and human rights,
while others seek to redefine human rights in the image
of Islam: see, e.g., Afshari, R., "An Essay on Islamic
Cultural Relativism in the Discourse of Human Rights"
Human Rights Quarterly, 16, 235 (1994). See also,
Bielefeldt, H., "Muslim Voices in the Human Rights
Debate" Human Rights Quarterly, 17, 587 (1995).

influence the terms of discourse. In reality, the international dialogue is conducted against a background of inequality of power between the Western world and the Third World. It is for this reason that leaders of the Third World have often accused the West of using its vast economic and political leverage not only to dictate all the terms of the discourse but to press these terms upon the Third World. Frequently, Third World leaders have claimed that human rights discourse is an ideological resource by which the West imposes its moral values on the Third World. These leaders have thus attempted to dress their resistance to human rights in the garb of anti-imperialist struggle.

Third World leaders do frequently justify their denial of human rights to their citizens by the need to protect traditional cultures from the "corrosive" influence of Western imperialism. They claim that human rights instigate and unleash centrifugal forces in the body politik, whereas what is needed for nation-building is unity and a pooling together of resources.[95] But it is difficult to see how the modern state in the Third World qualifies to be the cultural surrogate of its population. There is nothing remotely "traditional" about the modern state - with its bureaucracy,

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[95] See, e.g., Asante, S.K.B., "Nation Building and Human Rights in Emergent Africa", Cornell International Law Journal 2, 72 (1969).

corruption, police and security, and so on - and nothing "traditional" in the development programmes which the state and its collaborators often impose on the people of the Third World. On the contrary, basic cultural values and interests are often negatively impacted by the institutions of modernization.

We analyzed the nature of the state in the Third World and the negative impact of its interventions in chapters 3 and 4. The state here is neither an impartial referee nor a disinterested observer. It is, as presently constituted, principally an arena for private accumulation, corruption and abuse of power by elitist officials. State intervention has in many cases been marked by increasing immiseration of the masses of the population be it in the form of excessive taxation, expropriation of land, or environmental despoliation. It is this exogenous state and its alien culture and system of domination that is the real threat to unity and nation-building in the Third World. Being essentially a privatized domain at the service of ruling elites, the state is itself a veritable danger to those ethnic groups who lack the clout to effectively participate in the struggle for its patronage.

In examining the claims of Third World ruling elites, therefore, the relevant questions must be: who is representing who? To what end? Whose narratives have

dominated, and whose marginalized, in the process of constructing the Third World identity? Is it right to seek to homogenize or naturalize the cultural practices of the Third World or is the Third World better represented as a heterogenous community?

Claims that human rights are inappropriate in the Third World would be acceptable if time had stood still, and if the poverty-stricken masses of the population who have been the victims of the state's arbitrariness are the ones making these claims. This is certainly not the case. But, in addition to the absurdity of the elites' claim to cultural surrogacy, there is the fact that the traditional checks and balances which ensured constitutionality in the governance of the small, homogenous, closed, pre-colonial Third World societies are unable to restrain the modern, large, extremely armed, and impersonal state. Furthermore, social attitudes are changing rapidly as a result of state-induced economic vagaries and hardships - hunger, unemployment, landlessness, etc., and the increasing complexity of the relationship of the individual to the state. For example, in some parts of Africa, women-headed households have emerged, either as a result of civil wars in which large numbers of men have perished or as a result of the migration of men to sources of employment, such as the mining

fields.[96] In spite of this important social change, traditional discrimination against women in terms of access to land and other resources necessary for productive citizenship persists.[97]

Under the tide of modernization and urbanization, the communitarian ethic is still strong, but there is increasing gravitation among individuals from ethnically homogenous groups towards associational ties. They may belong to their village associations at the same time as they are

[96] See, e.g., Kimble H., "Agricultural Transformation in Namibia after Apartheid", in Nett, B., et al, eds., Agricultural Transformation and Social Change in Africa (Frankfurt am Main: Peter Lang, 1992), 79. See also the following: Chidzonga M., "The Situation of Women in the Communal Areas of Zimbabwe", in Mkandawire, R., and Matlosa, K., Food Policy and Agriculture in Southern Africa (Harare: SAPES Books, 1993, 181; Mkandawire, R.M., "Women, Food Security and Agricultural Policy in the SADCC Region: A Case Study of Malawi", ibid., 209 and Silberschmidt, M., "Have Men Become the Weaker Sex? Changing Life Situations in Kisii District, Kenya", The Journal of Modern African Studies 30(2), 237 (1992).

[97] See, e.g., McCarney, R.A., "Household Food Security and the Role of Women in Africa", Third World Legal Studies 157 (1991); Davison, J., ""Without Land We are Nothing": The Effect of Land Tenure Policies and Practices upon Rural Women in Kenya", Rural Africana 27, 19 (Winter, 1987); Atsenuwa, A.V., Women's Rights as Human Rights: The Nigerian Experience (Lagos: Legal Research and Resource Development Centre, 1995); and Ofei-Aboagye, R.A.O., Ghanaian Women: Equality and Empowerment, doctoral dissertation, Osgoode Hall Law School, York University, Toronto, Canada (1994); the impressive collection of essays in the special volume of the Canadian Journal of African Studies, 22 (1988), and of the Third World Legal Studies (1994-95), titled "Women's Rights and Traditional Law: A Conflict".

members of a trade union, a church, or a professional association. This is because the individual now finds herself beset by the need to protect quite different interests by different means. Increasingly, she can no longer be represented in all spheres by her village head, as her interests do not necessarily coincide with those of the community at all times. If she has been discriminated against in her quest for employment, for example, she needs to be able to demand that her right to equal treatment with male counterparts be respected; such a demand would differ from her community's demand for clean, potable water or for electricity. As a result of all these, human rights are necessary, not irrelevant, to the population of the Third World.

Given that the need for human rights is obvious in the modern society, why do economic and political elites persist in their claims that human rights are irrelevant to contemporary non-Western societies? Why do they persist in romanticizing the traditional cultural past and insisting that it be re-enacted, when it is clear that culture is neither static nor unitary? The answer may lie in the elites' need to protect their own self-interests. Rhoda Howard's[98] exegesis is quite illuminating:

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[98] Howard, R.E., supra, note 7, 61.

Cultural practices are not neutral in their impact. Very few social practices, whether cultural or otherwise, distribute the same benefits to each member of a group. In considering any cultural change it is certainly useful to ask who benefits from its introduction. But similarly, in considering any unchanged cultural practice, it is useful to ask who benefits from its retention. Those who speak for the group are usually those most capable of articulating the group's values to the outside world. But in their articulation of group values such spokespersons are likely to stress those particular values that are most to their own advantage.

Evidence abounds of the manipulation of culture, traditions and customs by the elites of the Third world in order to enhance and justify their control of economic and political power. Terence Ranger[99] discovered that, in Africa, many were the uses of 'tradition': "Elders tended to appeal to 'tradition' in order to defend their dominance...against challenge by the young. Men tended to appeal to 'tradition' in order to ensure that (there was no diminution) of male control over women...Paramount chiefs and ruling aristocracies...appealed to 'tradition' in order to maintain or extend their control over their subjects."[100] In a similar fashion, political leaders regularly extol the virtues of communalism, and call for a rehabilitation of the tradition of unanimity through "palaver" or "talking out" issues, in order

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[99] Ranger, T., "The Invention of Tradition in Colonial Africa", in Hobsbawm, E., and Ranger, T., eds., supra, note 26, 211.

[100] ibid., 254.

to discourage political competition, "dissent, interest articulation, and democratic participation".[101] Other examples point to the use, by political leaders, of traditional courts to persecute political opponents, to their revival of forced labour (a colonial practice) under the guise of communalism, and their crude arrogation of absolute power.[102]

These practices have no basis in African political culture. They represent the cynical manipulation of a power-hungry, corrupt and culturally-deracinated elite. The lifestyle and habits of power of these elites betray the selfishness and lack of sincerity of their call for a return to 'tradition'. They decry "Western individualism", but embezzle public funds, build mansions for themselves and their families out of the proceeds of thievery from public coffers, holiday in Europe and America, train their children in the best Western schools, and regularly visit Western capitals for medical check-up and treatment while their citizens die of the

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[101] Ake, C., "The Congruence of Political Economies and Ideologies in Africa", in Gutkind, P.C.W., and Wallerstein, I., eds., The Political Economy of Contemporary Africa (Beverly Hills: Sage, 1976), 205-6.

[102] See, e.g., Callaghy, T.M., "State-Subject Communication in Zaire: Domination and the Concept of Domain Consensus", Journal of Modern African Studies 18, 469-92 (1980); Africa Contemporary Record 14, B490-1 (1981-2), and All Africa Council of Churches, (World Council of Churches Human Rights Consultation), "Factors Responsible for the Violation of Human Rights in Africa", Issue 6, 44-6 (Winter, 1976).

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most treatable diseases owing to lack of basic health facilities.

Furthermore, those who claim to cherish tradition have everywhere on the continent put in place policies and programmes that challenge and undermine traditional authority. The widespread abuse of human rights, forceful seizure, and abuse of power by the military, rigging of elections, state instigation of economic hardship, and the multiplication of threats to human dignity which have become regular features of the exercise of political power in Africa have no root in culture or tradition; in fact, such misuse of power and callous disregard for the welfare of the community infringe indigenous cultural values.

The political leaders of the Third World claim to represent the views and aspirations of their entire population. The Bangkok Declaration, for example, is an attempt at empowering the East Asian population vis-a-vis the Western world in the matter of human rights. In this process, the "East Asian" identity has been politically constructed,[103] imposing a single identity on otherwise diverse cultural communities in order to create the impression of homogeneity

[103] See, e.g., Befu, H., ed., Cultural Nationalism in East Asia: Representation and Identity (Berkeley: Institute of East Asian Studies, 1993), and Gladney, D.C., "Representing Nationality in China: Refiguring Majority/Minority Identities", The Journal of Asian Studies 53(1), 25 (1994).

and thus to demarcate them (the East) from others (the West). In reality, however, not all the views of East Asia are represented in the Declaration. For a great many of the population, the opportunity to construct narratives or to participate in the human rights discourse has been blocked by political oppression. The danger of such blockage is that the homogenization of cultural practices - and therefore the distortion of dialogue - which it represents limits the opportunities for change.

This political construction of ethnicity - pitting the "East" against the "West" in Asia, for example - is similar to the historical construction of "Self" and "Other" by Europe in the days of colonialism (where "self" referred to Europe and the colonized territories were the "other").[104] As Elizabeth Lee[105] correctly observes, "[I]t is ironic that the same cultural resources are now utilized by Asian political leaders to colonize their own people, in the sense of denying them the very right to reflect on their own cultural practices and actively to construct/reconstruct their own identities." She might as well have been speaking of the situation in Africa, and in Latin America. Those who have spoken out in

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[104] See Brah, A., "Re-framing Europe: Engendered Racism, Ethnicities and Nationalisms in Contemporary Western Europe", Feminist Review, 45 (Autumn, 1993).

[105] Lee, E., supra, note 33, 88.

favour of responsible government and respect for human rights in these regions have been labelled "dissidents", "rebels", and "enemies of the people". Torture, disappearances, genocide, and various forms of incapacitation are regularly employed against them. The abuse of power for which the leaders of these regions roundly excoriated colonial masters pale in comparison to the brutality and barbarism of the terror which they themselves now visit on their own people.

Against the background of poverty, oppression, class and other forms of distinctions that characterize the Third World, attempts by elites to homogenize society and culture cannot bear close scrutiny. The artificial homogenization of culture by the power elite only serves to create a facade of "we" against "them", to represent the people so homogenized as collectively opposed to change, and to cast the elites in the role of champions of the people. In reality, however, the poor, the disenfranchised, and the dominated of the Third World are no more opposed to change than they are permitted the space by their rulers to imagine the possibilities of change. Change is undoubtedly a mortal threat to the power base of the ruling elites, and this accounts for the strenuous effort which the latter makes to obfuscate the real issues in the human rights debate.

5. CONCLUSION

The debate about the applicability of human rights in non-Western cultures fails to take account of the essential place of human dignity in the development of the human person. No culture is bereft of a concept of human dignity or good governance. The debate is, therefore, in essence about semantics, rather than substance. Times spent arguing about the applicability of human rights in the Third World are thus better utilized in putting human dignity in the forefront of the planning and practice of development.

The debate also misses the essential interconnectedness of societies and the human community. Whether it is the universalist or the relativist argument, the tendency to be exclusivist about human rights endangers the development of a true human community. Edward W. Said[106] put the point accurately: "No one today is purely one thing. Labels like Indian, or woman, or Muslim, or American are not more than starting-points, which if followed into actual experience for a moment are quickly left behind. . . No one can deny the persisting continuities of long traditions, sustained habitations, national languages, and cultural geographies, but there seems no reason except fear and prejudice to keep insisting on their separation and

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[106] Said, E., <u>Culture and Imperialism</u> (New York: Vintage Books, 1994), 336.

distinctiveness, as if that was all human life was about."

What is at issue under the right to development is how to ensure human dignity for the millions of poverty-stricken people the world over, and in that context, cultures must engage in productive dialogue to emphasize the commonalities of humanity rather than the apparent differences.

CHAPTER SIX

THE DOMESTIC REALIZATION OF THE RIGHT TO DEVELOPMENT

1. INTRODUCTION

The Declaration on the Right to Development ("Declaration") prescribes changes in the domestic politics, economics, public administration, and governance of Third World countries. Among the changes canvassed in the Declaration are: the need to encourage popular participation in all spheres of development activity (s.8(2)), to respect and observe all human rights (s.6(1)), to provide equality of opportunity for all citizens, and in citizen access to food, health services, education, employment and income (s.8(1)). Given the entrenched nature of poverty and the vested interests of ruling elites in the status quo, it is obvious that the changes advocated require a fundamental reconstruction of the social, political, and economic structures of the Third World. Indeed, as the Working Group on the Right to Development ("the Working Group") observed in its closing session[1]:

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[1] See <u>Report of the Working Group on the Right to Development on Its Fifth Session</u> (Geneva, 27 September - 6 October 1995), presented to the Commission on Human Rights at its Fifty-Second session, Item 6 of the provisional agenda: UN Doc. E/CN.4/1996/24, para. 216; also available online at http://www.unhchr.ch/html .

> The world-wide realization of the right to development presupposes fundamental changes in national and international policies, in the behaviour of decision makers...with a view to ending violations of human rights, poverty, illiteracy, exclusion and the social ills affecting billions of individuals throughout the world today.

The Working Group, as well as the Intergovernmental Group of Experts on the Right to Development, which succeeded it, envisaged that the fundamental changes demanded in the domestic affairs of the Third World would be achieved through the democratization of governance at all levels, and other policy measures, such as legislation. A number of questions arise in connection with the objectives of the Declaration. First, can Third World ruling elites, whose enormous privileges are anchored upon the stability of the present order, be relied upon to voluntarily change the same order?[2] Secondly, the Declaration itself is a piece of international legislation, which provides for its implementation through, inter alia, domestic legislation. The authoritarianism of

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[2] David Williams asks the same question in "The Authoritarianism of African Legal Orders: A Review of Robert B. Seidman's The State, Law and Development", Contemporary Crisis Volume 5, 247-262 (1981). He opines that the argument that the governing class in Africa might willingly put the exploited classes in a position whereby the latter have the power to put an end to their exploitation and oppression is unrealistic, being an invitation to the former "to commit class suicide": ibid., 249. See also Martin, R., "The Use of State Power to Overcome Underdevelopment", The Journal of Modern African Studies, Volume 18(2), 315-325 (1980).

state structures in the Third World is built to a great extent
on the legal order. The legal order was used by colonial
regimes and their successors to legitimize top-down, non-
participatory, and even downright discriminatory, approaches
to development.[3] Successor States have largely left the
colonial oppressive structures intact, and have indeed used
them to impoverish the vast majority of their citizens.[4] Can
that same legal order now be relied upon to serve a
developmental role in favour of the poor?

These are the questions that will be examined in
this chapter. The aim is to explore the constraints as well as
the prospects of realizing the right to development and the
vision of development which it embodies.

2. THE BASIC OBJECTIVE OF IMPLEMENTATION: CREATION OF AN ENABLING ENVIRONMENT

The Declaration, as was noted in chapter two,
imposes many specific duties on both states and the

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[3] See, for example, Seidman, A., and Seidman, R.B., "The
Political Economy of Customary Law in the Former British
Territories of Africa", Journal of African Law, Volume 28
(Nos 1 & 2), 45-55 (1984), and Reyntjens, F.,
"Authoritarianism in Francophone Africa from the Colonial
to the Post-Colonial State", Third World Legal Studies 59
(1988).

[4] See, generally, the collection of essays in the special
edition of Third World Legal Studies entitled "Police,
Security Forces and Human Rights in the Third World"
(1990).

international community. International development agencies, such as the United Nations' specialized agencies, the World Bank, the International Monetary Fund (IMF), various donor agencies, and Third World states, are all obligated to create an enabling environment of law, policy and practice in order to facilitate the enforcement of all human rights in the processes of development. The term "enabling environment" has featured prominently in the language of development discourse within the UN system since 1995 when, at the World Summit on Social Development, a solemn undertaking was made by the international community[5] to create it. As used in that commitment, the term obviously refers to new standards and processes to govern the design, implementation and evaluation of development programmes. The term also refers to the promotion and protection of human rights in and through development activities, by putting the business of development under a rule of law. However, a close look at modern development debate reveals not one but two conceptions of the "enabling environment".

2.1. EMERGING CONCEPTIONS OF THE "ENABLING ENVIRONMENT"

2.1.1. THE "NEO-LIBERAL ECONOMIC" SCHOOL

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[5] See United Nations Commission on Social Development, _Copenhagen Programme of Action adopted by the World Summit for Social Development, Copenhagen, 6-12 March, 1995_, Commitment 1, UN Doc. A/Conf.166/L.1 (1995).

One conception of the enabling environment, favoured by the World Bank and the International Monetary Fund - referred to here as the "neo-liberal economic school" - seems to equate the enabling environment with a healthy and thriving economic system. For the International Monetary Fund (IMF), an enabling environment refers to macroeconomic stability, external viability, and the orderly growth of an economy. Holding that the greatest incentive to the development of individual potentials is the free reign of market forces and the competition which this engenders, the IMF believes that the key to constructing an enabling environment for development lies in creating systems that limit the scope for ad hoc decision-making, rent-seeking, and undesirable preferential treatment for indivduals and organizations. To this end, the IMF identifies its mission in the development of the Third World as, among others: (i) liberalization of exchange, trade, and the elimination of direct credit allocation (ii) provision of technical assistance to enhance capacity to design and implement economic policies, to build effective policy-making institutions, and to improve public sector accountability, and (iii) promotion of transparency in financial transactions in the government budget, central bank, and the public sector, by providing assistance to improve

accounting, auditing, and statistical systems.[6]

The World Bank's conception of the enabling environment is slightly broader than the IMF's, although the overwhelming emphasis is, like the IMF's, on economic efficiency. For the Bank, an enabling environment is a strong economy, sustained by rapid and "broad-based" economic growth (i.e. growth that benefits as many people as possible), sound macroeconomic policies, sustainable environmental policies, and a strategy that favours investment in human capital, such as primary health care and universal primary education. A strong economy, according to the Bank, is one that generates high incomes and engages in/attracts the highest volumes of trade and investment. In order to position themselves properly to create such an enabling environment, the Bank advises Third World governments to institute structural reforms of their economies to make them more export-oriented; to deregulate their economies; to eliminate market distortions by removing subsidies through privatization and commercialization of public enterprises; to control their population growth; to create the legal and institutional frameworks for transparency, predictability, and competence in the conduct of

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[6] See, e.g., IMF, IMF Survey, Volume 26, No.15 (August 5, 1997) 233-238.

public affairs and the management of economic development.[7]

2.1.2. THE "HUMAN DEVELOPMENT" SCHOOL

Another conception of the enabling environment comes through in those discussions which view development in terms of the improvement of human capabilities, social equity, environmental sustainability, human security and freedom. We refer here to this school of thought, typified by the United Nations Development Programme (UNDP), as the "Human Development" school. According to the UNDP, for example, alleviation/eradication of poverty and sustainable human development are the cornerstones of an enabling environment. An enabling environment, the UNDP maintains, is one that empowers individuals, households, and communities, through the expansion of their capabilities and choices. The ability to exercise choice is based on freedom from hunger, ignorance, disease, and sundry vulnerabilities. Secondly, an enabling environment is one that promotes equity. This refers to equality of opportunity for men and women alike, through, for example, equal access to education, health, employment, land (where farming is the main source of livelihood) and credit, and action to end domestic violence. Thirdly, an enabling

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[7] See Herman, T., at the World Bank's Website, http//www.worldbank.org (bulletin dated October 4, 1996), on the role of the Bank in development.

environment is one that makes it possible for development
goals to be met in a sustainable manner. Accordingly, the need
to satisfy today's needs must not be the excuse for mortgaging
the chances of future generations to meet their own needs.
Finally, the UNDP believes that an enabling environment is one
that provides security of livelihood, that is, freedom from
vulnerability to disease, hunger, oppression, or to sudden
dislocations of individual or family life.[8]

2.2. AN ASSESSMENT

In spite of allusions to notions of accountability
and rational management of public affairs, it is obvious that
economic efficiency constitutes the central pillar of the kind
of enabling environment favoured by the neo-liberal economic
school. The narrow conception of the enabling environment
favoured by the IMF and the World Bank can be readily
understood in terms of the circumscribed mandates of these
institutions. Their respective mandates prohibit them from
interfering in the political affairs of member countries.[9]

[8] See, e.g, UNDP, Reconceptualizing Governance, Discussion
Paper 2 (New York: Management Development and Governance
Division, January 1997), Governance for Sustainable
Development, a UNDP policy document (New York: UNDP,
1997), and the Human Development Report 1997 (New York:
Oxford University Press, 1997).

[9] Article 1(10) of the Bank's Articles of Agreement, for
example, provides: "(t)he Bank and it's officers shall
not interfere in the political affairs of any member".

However, what the enabling environment for development must entail is far broader than economic growth and efficiency.

Of course, absent market imperfections and distortions, it is possible in theory that everyone would benefit from sound competition and stable macroeconomic policies. The World Bank, for example, declares: "[P]oor people can benefit quickly from (economic) adjustment: farmers get higher prices for their crops and currency devaluation helps workers in export industries... [I]n the long run these adjustments lead to higher incomes, strengthen civil institutions, and create a climate more favourable to private enterprise; all of which benefit the poor."[10] However, evidence supports a different reality. Contrary to the Bank's claims to poverty alleviation, explaining away the hardships of economic reform - rise in unemployment, spiralling inflation, deteriorating social services, social fragmentation, political instability, etc. - as "temporary" or "short-term", these hardships have proven to be chronic and intractable in most of the Third World.[11]

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[10] Herman, T., supra, note 7.

[11] See, for a review of the consequences of structural adjustment for the poor, Cornia, G.A., jolly, R., and Stewart, F., Adjustment with a Human Face: Protecting the Vulnerable and Promoting Growth (Oxford: Clarendon Press, 1987). See also, George, S., A Fate Worse than Debt (Hammondsworth: Penguin, 1988); Bienefeld, M., "Structural Adjustment: Debt Collection Device or Development Policy?" Advanced Development Management

The IMF/World Bank-inspired Structural Adjustment Programmes (SAPs), which most Third World countries have instituted, have done more harm to the latter's economies than is often admitted in official reports. In the implementation of SAPs, the lip service paid to issues of accountability and good governance is quite evident in many countries of the Third World. Privatization and commercialization of essential services (i.e. removal of subsidies), which are an inevitable policy recommendation in the SAP package, puts many of these services beyond affordability for low-income groups. Privatization essentially puts national institutions out on the auction block, to be purchased by the highest bidders, who are invariably the wealthy members of society. When this happens in countries where virtually no social security programmes exist - as in most of the Third World - the incidence of poverty rises.

Notwithstanding the rhetoric of democratization, such as decentralization, participation, capacity-building, civil society and so on, which liberally lace their policy recommendations to poor countries, the actions of the IMF and the World Bank in the Third World bespeak authoritarianism. In many of the agricultural and energy projects which the World

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Programme Series (Tokyo: Sofia University, 1993); and Korner, P., (translated from German by Paul Knight), The IMF and the Debt Crisis: A Guide to the Third World's Dilemma (London: Zed Books, 1986).

Bank has helped to fund in many parts of the Third World, the Bank's arrogant disregard of the wishes of affected communities has often led to disastrous project performance,[12] where success is measured in terms of positive impact on the lives of the poor. The emphasis on economic efficiency often pushes issues of participation and sustainability to the background.

Another instance of dissonance between rhetoric and action is the packaging of the SAP itself. Between the IMF and the World Bank, Third World countries lose their sovereignty as they are denied a say in their economic (and ipso facto political) destiny.[13] The economic reform package often

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[12] See the illustrative cases presented in chapter 3, supra. See also, World Bank Portfolio Management Task Force, Effective Implementation: Key to Development Impact (1992)(the Wapenhans Report), the outcome of the Bank's own internal evaluation of its loan portfolio. The report catalogued a number of serious problems with Bank-assisted development projects which had led to about 50% cancellation rate. This report was given wide publication in the print media: see, e.g., Todd, D., "Study slams World Bank Lending to Failed projects", The Gazette (Montreal), September 12, 1992, D3; Graham, G., "World Bank Debates Its Role as Lender", Financial Times, November 25, 1992, 6. And see, Cahn J., "Challenging the New Imperial Authority: The World Bank and the Democratization of Development" Harvard Human Rights Journal, vol.6, 159 (Spring, 1993).

[13] Loss of sovereignty to the logic of the market has apparently become a global phenomenon, although the extent of loss is less for the rich than for the poor countries. Some scholars have found this development troubling: see, e.g., Buzan, B., and Segal, G., "The Rise of "Lite Powers": A Strategy for the Postmodern State" World Policy Journal 1-10 (Fall, 1996). The

assembled without real participation of the poor countries are extremely stringent,[14] and political leaders know that they can only implement them at a steep political price. These leaders are advised, nonetheless, to have the "strong political commitment" to implement the prescriptions. Not surprisingly, riots and serious social and political instability have accompanied the introduction of SAPs all over the Third World.[15] Yet, countries which have adopted SAP are "locked in"

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authors observe that postmodern states appear increasingly less able to manage their economies or to use their power as effectively as their predecessors did. "Why", they ask, "since the end of the Cold War, have the remaining great powers so quickly gone lite?". In their opinion, the explanation for this structural change lies in "the effects of liberalization - economic, political, and social - although different mixes make each case distinctive".

[14] See Toye, J., "Structural Adjustment", in van der Hoeven, R., and van der Kraaij, F., eds., Structural adjustment and Beyond in Sub-Saharan Africa (London: James Currey, 1994), 18-35; and Mosley, P., "Decomposing the Effects of Structural Adjustment: The Case of Sub-Saharan Africa", ibid., 70-98.

[15] "SAP Riots" have occurred in Nigeria, Cameroon, and Ghana, Zaire, Zambia, Gabon, and Benin: See, for example, Ihonvbere, J.O., "Where is the Third Wave? A Critical Evaluation of Africa's Non-Transition to Democracy", Africa Today, Volume 43(4) 343-368 (1996), 346. Thais took to the streets in protest when SAP was introduced in Thailand in the wake of the country's economic crisis in the summer of 1997: see "Thais Hit Streets to Demand PM's Resignation", The Toronto Star, October 21, 1997. The sustained violent protests that accompanied SAP in Indonesia eventually led to the resignation of Suharto, leader of the country for several decades, on May 21, 1997. See, further, Walton, J., and Seddon, D., eds., Free Markets and Food Riots (Oxford: Blackwell, 1994).

and can only retreat on pain of severe punishment. The real discount of participation, and the virtual instigation of authoritarian tactics to implement what the IMF and the World Bank know, given the fragile economic and political foundations of Third World countries, to be impossible demands, is incompatible with their frequently professed commitment to democracy or good governance. The "accountability" which they call for, it would appear, is more of a technocratic than a democratic one.[16] The World Bank, for example, propagates the idea that tackling poverty in Sub-Saharan Africa requires the establishment of a better system of "governance".[17] In fact, however, the overwhelming emphasis rests with the notion that good governance cannot be divorced from the capacity of States to promote development based on market forces. It is an idea driven more by the corporate agenda of global finance houses and donor agencies regarding the use of the development funds that they advance to increasingly corrupt governments, than any real concern about

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[16] See, for example, Schmitz, G., "Democratization and Demystification: Deconstructing "Governance" as Development Paradigm", in Moore, D., and Schmitz, G., eds., Debating Development Discourse (London: Macmillan, 1995), 54-90.

[17] See World Bank, Governance and Development (Washington: World Bank, 1992). See also, ibid., Sub-Saharan Africa:From Crisis to Sustainable Growth (Washington: World Bank, 1989), 5.

the accountability of governments to the governed.[18]This is obviously not the kind of accountability envisaged under the Declaration.

On the economic front, the results of economic reform do not justify the pains which SAPs have inflicted on the poor in the Third World.[19] The statistics are gruesome.[20] For example, after almost two decades of SAP, Ghana, the "success story" of the IMF and the World Bank involvement in Sub-Saharan Africa, is still a "severely indebted low-income" country, with a foreign debt almost equal to its GNP. The country's score on the Human Development Index (the UNDP's measure of the development of countries using such indices as access to education, sanitation, health facilities, infant mortality, life expectancy at birth, women's empowerment, etc) is equally as dismal as those of the other countries in the region.[21] In Latin America, Brazil is equally severely indebted, spending over $20 billion annually in debt service

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[18] See, for a similar opinion, Mkandawire, T., "Adjustment, Political Conditionality and Democratisation in Africa", in Cornia, G.A., and Helleiner, G.K., eds., From Adjustment to Development in Africa (New York: St. Martin's Press, 1994), 155-173.

[19] See, for example, Mosley, P., supra, note 14.

[20] See, e.g., the World Bank's World Debt Tables 1996, Volume 1 (Washington, D.C.: The World Bank, 1996).

[21] See UNDP, Human Development Report 1997 (New York: Oxford University Press, 1997), 146-228.

and interest payments.[22] In South Asia, India spends over $15 billion annually to service a $98 billion debt.[23] The debt load continues to escalate with little hope that these countries might eventually be able to pay them down; all they do at this time, with great difficulty and deprivation for their teeming millions, is just service the debt and pay the interest. Yet, these countries have all "structurally adjusted" their economies. If balance of payment problems persist, and if poverty deepens and social polarization worsens in these countries regardless of structural adjustment, it may well be that SAPs impact adversely on the ability of these countries to cater to the needs of their populations, even if they wanted to.

The World Bank and the IMF seem to assume that economic growth alone is the panacea for poverty. An assumption which underscores their passion for economic growth is that the abuses and denial of human rights which the poor suffer in the process of growth are only a short-term

[22] supra, note 20. The Brazilian economy suffered a currency crisis in late 1998, prompting massive infusions of loans from the IMF: see Lisa Wright, "Brazil's Crisis Rattles Markets", in The Toronto Star, January 14, 1999, section C.

[23] ibid.; see also Kothari, S., "Whose Independence? The Social Impact of Economic Reform in India", Journal of International Affairs Volume 51, No.1, 85 (Summer, 1997); Margolis, E., "India: A Promise Unfulfilled", The Toronto Sun, Thursday, August 14, 1997.

sacrifice which would be amply compensated for in the form of prosperity for all in the long run. But this assumption has been called into question repeatedly in many parts of the Third World.[24] Significant economic growth has not reduced poverty; indeed, in many cases, it has deepened poverty and exascerbated social cleavages, as the cases of Brazil[25] and Nigeria[26] illustrate. What is required, therefore, is not just economic growth, for growth alone would not automatically benefit the poor. To constitute an enabling environment for development, economic growth must be pro-poor, that is, it

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[24] See, e.g., Kohli, A., The State and Poverty in India (Cambridge: Cambridge University Press, 1987).

[25] See, e.g., Weyland, K., Democracy Without Equity: Failures of Reform in Brazil (Pittsburg, Pa: University of Pittsburg Press, 1996).

[26] Beginning from 1973 Nigeria has earned tens of billions of dollars from the sale of crude oil. This has not improved the conditions of living for a majority of Nigerians. Indications are that poverty has deepened as most of this wealth has been stolen by corrupt government officials and public servants or lost through sheer mismanagement: see UNDP, supra, note 21, for statistics on poverty in Nigeria. From a middle-income country in the early 1980s, Nigeria is now classified as a severely distressed low-income country, the thirteenth poorest country in the world. See also Ihonvbere, J.O., "Oil Revenues, Underdevelopment and Class Struggles in Nigeria", Scandinavian Journal of Development Studies, Volume 2, 25 (1983); Rimmer, D., "Development in Nigeria: An Overview", in Bienen, H., and Diejomaoh, V., eds., The Political Economy of Income Distribution in Nigeria (New York: Holmes and Meier, 1981), 29-87; and Dudley, B.J., An Introduction to Nigerian Government and Politics (Bloomington, IN: Indiana University Press, 1982), 80.

must:

(a) accord high priority to full employment and expansion of opportunity;

(b) incorporate small-scale agriculture, micro-enterprises and the informal sector;

(c) restructure public expenditure and tax policy to support poverty reduction and social security; and

(d) conserve or protect the environment from degradation, in order to promote and secure sustainable livelihoods, especially on the marginal lands on which half the world's population depend for their provisioning.[27]

Thus, in the context of the Declaration, a comparison of the two schools of thought regarding the nature of the enabling environment required for development shows clearly that the "Human Development" school has the right of it. That does not mean that both perspectives - the material and the human aspects of development - are mutually exclusive. Indeed, they are complementary, and ought to be pursued as such. Economic growth and material suffiency are very important, perhaps indispensable, to human development. But, without the humane considerations of equity, security, and sustainability in the pursuit of economic growth, poverty

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[27] See, for the essentials of "pro-poor" development, UNDP, Human Development Report 1997 (New York: Oxford University Press, 1997), 7.

remains the lot of the majority regardless of how statistically impressive the outcome of the pursuit might seem. One is incomplete without the other; thus, an adequate definition of the "enabling environment" under the Declaration must synthesize the material and the human aspects of development.

3. EXPLORING THE MECHANISM OF CHANGE: LAW IN THE PROCESSES OF SOCIAL CHANGE

It is apparent from the foregoing that creating the enabling environment for development involves a process of social change - a clear break from the old ways of approaching development. This necessarily involves a reorientation of societal and governmental institutions. "Institution" has been defined as "repetitive patterns of behaviour".[28] In every society, there are patterns of behaviour by people and governments which result either in social development and prosperity or in poverty, stagnation and misery for the masses of the people. On this analysis, poverty continues in the Third World because people and governments behave in the institutions that they do.[29] For example, governments are

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[28] See, e.g., March, J.G., and Olsen, J.P., Rediscovering Institutions: The Organizational Basis of Politics (New York: The Free Press, 1989).

[29] See, for example, Seidman, R., The State, Law and Development (London: Croom Helm, 1978), 29-48.

undemocratic and unaccountable;[30] the legal system stacks the odds against poverty-stricken members of society;[31] public resources are often privatized for selfish ends by ruling elites;[32] development plans die in parturition as public policy is often infested with pathologies: authoritarianism, corruption, lack of transparency and rationality in decision-making, and a deficit of political authority.[33] While participatory studies show that the poor have a clear grasp of what it means to be poor,[34] they lack any real understanding of the causes of their poverty; they are often ignorant, fatalistic, illiterate, and inarticulate.[35] Even though they

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[30] See, for example, Ake, C., Democracy and Development in Africa (Washington, D.C.: The Brookings Institution, 1996).

[31] See, for example, Galanter, infra, note 59.

[32] See, for example, Transparency International, Sharpening the Response Against Global Corruption: Transparency International Global Report 1996 (Berlin: Transparency International, 1996).

[33] See, for example, Myrdal, G., Asian Drama: An Inquiry into the Poverty of Nations 3 volumes (New York: Pantheon, 1968); and Migdal, J.S., Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World (Princeton: Princeton University Press, 1988).

[34] See, for example, Chambers, R., Whose Reality Counts? Putting the First Last (London: Intermediate Technology Publications, 1997).

[35] See, for example, Athreya, V.B., and Chunkath, S.R., Literacy and Empowerment (New Delhi: Sage Publications, 1996). Studies show, for example, that in Africa, rather than confront the source of their misery, response to

are in the majority, they are often segmented and unable to turn their numerical strength to political advantage.[36] In addition, certain customs and beliefs to which they subscribe serve to alienate and disempower significant portions of their rank, such as women and children, and ipso facto, contribute to their poverty. Under customary law, for example, women have sometimes been denied full participation in the social and economic life of their communities;[37]and children have often been regarded as no more than personal property to be used and abused in the production of labour and other forms of

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the decay of the state has been in the form of withdrawal by civil society into a plethora of survival activities in the informal sector, away from the prying eyes of the state: see Azarya, V., and Chazan, N., "Disengagement from the State in Africa: Reflections on the Experience of Ghana and Guinea", Comparative Studies in Society and History, Volume 29, 1 (1987); and generally, Rothchild, D., and Chazan, N., The Precarious Balance: State and Society in Africa (Boulder, CO: Westview Press, 1988). cf. Poggi, G., The Development of the Modern State: A Sociological Introduction (Stanford: Stanford University Press, 1978).

[36] See, for example, Weyland, supra., note 25.

[37] See, for example, Shaffer, P., Poverty and Gender in the Republic of Guinea (Ottawa: CIDA, 1996); Sen, A.K., "More Than 100 Million Women are Missing", New York Review of Books Volume 37(20), 61-66 (1990); Agarwal, B., A Field of One's Own: Gender and Land Rights in South Asia (New York: Cambridge University Press, 1994); and Moghadam, V., "The Feminization of Poverty? Notes on a Concept and Trends", Background Paper for UNDP, Human Development Report 1997 (New York: Oxford University Press, 1997).

economic activities.[38]

A change in the way of doing things - the transformation of societal and governmental institutions - is the central project in the building of an enabling environment for development. The Declaration imagines the possibility of change to reside in the allocation and vindication of rights. This faith in the emancipatory power of rights and legal instrumentalism will be examined presently. It is the core of the entire strategy prescribed by the declaration.

3.1. LAW AS AN INSTRUMENT OF SOCIAL CHANGE: AN OVERVIEW

Changes occur all the time in society, and it is difficult to identify a society that is wholly static.[39] Changes in attitudes and beliefs, social well-being, culture, and technology, are continuous in most societies. Yet, it would be a mischaracterization to refer to these kinds of change as "social change". Social change occurs only when the basic structure of society - patterns of social relations,

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[38] See, for example, UNICEF, The State of the World's Children 1997 (New York: Oxford University Press, 1997); World Summit for Social Development, Report of the World Summit for Social Development, Copenhagen, 6-12 March, 1995 (Geneva: UNRISD, 1995).

[39] See, for example, Friedman, L.M., The Republic of Choice: Law, Authority, and Culture (Cambridge, Mass.: Harvard University Press, 1990), Chapter 4.

social norms, and social roles - changes.[40] Thus, in the
context of development, a change in the pattern of social
relations between the rich and the poor, or a change in the
structures of power in society, would constitute social
change. On the other hand, a general increase or decrease in
the level of wealth, as through a rise in Gross Domestic
Product or some other index of economic growth, would not
amount to social change. Friedman and Ladinsky,[41] thus, define
"social change" as "any nonrepetitive alteration in the
established modes of behaviour in society". The emphasis here
on nonrepetitiveness of change captures the transformative
nature of social change.

Grossman and Grossman[42] added a broader dimension to
the definition of social change, recognizing within the
concept different "levels or orders" of change. They have put
forward three gradations of social change: incremental,
comprehensive, or revolutionary. Incremental social change
merely alters patterns of individual behaviour. An example of
this would be an increase or decrease in birth rate. A

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[40] See Cotterrell, R., The Sociology of Law: An Introduction
    (London: Butterworths, 1992), 47.

[41] Friedman, L.M., and Ladinsky, J., "Social Change and the
    Law of Industrial Accidents", Columbia Law Review,
    Volume 67, 50-82, 50 (1967).

[42] Grossman, J.B., and Grossman, M.H., eds., Law and Change
    in Modern America (Pacific Palisades, CA.: Goodyear
    Publishers, 1971), 4.

comprehensive social change involves a change in group norms or patterns of relations of individuals or groups to each other or in relation to the political, economic and social system. An example of this form of social change would be a destruction of the barriers to the equal participation of women in economic, political or social life. Social change is revolutionary when it alters society's basic values or mores. This type of change, according to Grossman and Grossman, is difficult to describe, achieve or quantify. However, what is clear is that these forms of social change shade into each other and are interrelated in complex ways.[43]

The idea that law has the capacity to induce social change has dominated much legal thought in the twentieth century.[44] At the same time, questions of the effectiveness of law as an instrument of social change have occupied many scholars of the sociology of law.[45] Those who have expressed faith in the ability of law to influence social change have

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[43] ibid., 6.

[44] See, for example, Nisbet, R., Twilight of Authority (New York: Oxford University Press, 1975), 173.

[45] See, for example, Handler, J., Social Movements and the Legal System: A Theory of Law Reform and Social Change (New York: Academic Press, 1978); Macaulay, S., "Non-Contractual Relations in Business: A Preliminary Study", American Sociological Review, Volume 28, 55-67 (1963); Lustgarten, L., "Racial Inequality and the Limits of Law", Modern Law Review, Volume 49, 68-85 (1986); Podgorecki, A., and Whelan, C. J., eds., Sociological Approaches to Law (London: Croom Helm, 1981).

tended to do so from a perspective that views law, not as part of society, but as an independent institution which "acts upon" society. The capacity of law to function as an autonomous agent of social control, independent of morality or custom, is considered an aspect of the autonomy of the modern state from the society in which it exists.[46] In this context, the state is seen as an embodiment of political power, with distinct elements of this power concentrated in specific institutions and processes. The legal system (in which legal power resides) is for example, thought to stand apart from the bureaucracy (which controls technocratic power). The autonomy of law is also considered a natural product of the public/private dichotomy which highlights the separation of "State" and "Civil Society"; the "State" is the public realm of government, politics and collective interests, while "civil society" is the private realm of individual interests, and social relations reflecting those interests.[47] The belief in law as an instrument of the modern state seemed to have grown with the expansion of governmental influence over the private

[46] See, for example, Mann, M., "The Autonomous Power of the State: Its origins, Mechanisms and Results", reprinted in Hall, J.A., ed., States in History (Oxford: Basil Blackwell, 1986), 109-136.

[47] See Keane, J., "Despotism and Democracy: The Origins and Development of the Distinction between Civil Society and the State 1750-1850", in Keane, J., ed., Civil Society and the State: New European Perspectives (London: Verso, 1988), 35-71.

realm in order to control the direction of social development. Modern law is seen as the instrument of the modern state.

Many writers have, thus, extolled the virtues of law as an instrument of social change. Robert Seidman,[48] for example, draws a direct link between the legal order and development. For him, "the legal order is. . . one side of the coin whose reverse is the state". Starting from the premise that only the state possesses the resources, capacity and legitimacy to undertake development, he writes: "Typically, the state tries to induce development by changing the rules defining repetitive patterns of behaviour, and by directing its officials to act in new ways - that is by changing the legal order. Demands for development therefore appear as demands for new law: new rules of land tenure, marketing boards, planning machinery, electoral politics, educational institutions, monetary systems, taxation. . . However little a government changes its law, vast upheavals inevitably erupt: wars, revolutions, famines, new philosophies, cash cropping, industrialization, foreign or domestic investment."[49]

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[48] Seidman, supra., note 29, 23. See also Grossman and Grossman, supra., note 42, 2: "(Law is) a desirable and necessary, if not a highly efficient means of inducing change. . . wherever possible, its institutions and procedures are preferable to others of which we are aware."

[49] ibid., 17.

The sociologist, Yehezkel Dror,[50] while recognizing that legal instrumentalism is fraught with problems, argues that law can and does play an indirect role in the promotion of social change in three ways. First, law shapes various social institutions which exert direct influence on the nature, rate, or character of social change. Thus, for example, patent and copyright laws may encourage invention and act as a spur for technological change, which in turn may influence social change. On the other hand, a regime of strict curtailment of freedom of association, or of information and discussion may hinder social change by stemming the free flow and exchange of ideas that promote social change.

Secondly, the institutional framework for agencies, such as boards or commissions, which effect policy goals, is often provided by law. Many of such agencies are often directly involved in promoting the governments social and economic priorities. Examples include rural development commissions, energy commissions, environmental agencies, enterprise promotion boards, and so on. These are usually charged with specific policy goals aimed at chanelling the direction of social change.

Thirdly, Dror writes, law is also often used to

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[50] Dror, Y., "Law and Social Change" Tulane Law Review, Volume 33, 787-802 (1959).

create legal duties on individuals and administrative bodies to the end that discharge of such duties will foster social change. A fairly common example is the specific duty often imposed on government authorities to build equity and fairness into hiring policies.

All of this is true, but it portrays only a part of the law - social change dynamic. The other part of the picture is that legal development, rather than influencing social change, may itself reflect social change.[51] For example, the development of Western law in many areas of agency, torts, and contracts in this century has reflected the direction of technological change. Just now modern legislation is in the process of responding to the revolutionary consequences of information technology, and advancements in other forms of technology, such as biotechnology. The fact that legal response to these changes is taking longer than the simple law-social change equation presented by Seidman would suggest implies that the process of change in either direction is complex and problematic.

In addition, change may occur without use of the legal system, and the fact that law can adapt to such change without losing its basic character may infact make the change

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[51] See, for example, Ehrlich, E., _Fundamental Principles of the Sociology of Law_, translated by W.L. Moll (New York: Arno Press, 1975).

more orderly and assimilable. This has been demonstrated by Karl Renner[52] in his study of the development of capitalism in Western societies and the role of the legal concepts of property and contract in the process. Renner's analysis shows, for example, the metamorphosis of the legal concept of "property" from its original meaning of "house and home and everything around it", to title (which gives the owner of property the exclusive right to profit, rent or interest on the property), and ultimately, to power (i.e. power to control the property and everything in or on it).[53] This metamorphosis, the analysis shows, constitutes the basis of capitalist relations. Yet, as profound as the adaptation may seem, Renner argues, "[f]undamentally the norms which make up the law have remained absolutely constant, and yet an enormous revolution has occurred without any change of norms".[54]

The possibility of a reverse direction of influence in which social change may infact "act upon" law and not vice-versa is the reason that other scholars have demonstrated less optimism about the capacity of law to mould society. Beginning

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[52] Renner, K., The Institutions of Private Property and Their Social Functions, translated by A. Schwarzschild (London: Routledge and Kegan Paul, 1949).

[53] ibid., 84.

[54] ibid., 88-89.

with Roscoe Pound's seminal article,[55] "The Limits of Effective Legal Action", published in 1917, several studies have been devoted to a consideration of the characteristics of modern law as a governmental instrument, and have concluded that law's capacity to cause social change is limited.[56] Pound drew a distinction between law and morals, basing his distinction on the differing capacities of both as instruments of social control. For him, given the characteristics of law, it can only deal with the outside as opposed to the inside of people and things; it cannot control attitudes and beliefs but only observable behaviour. The major obstacle for law in this regard is the problem of proof.[57] The facts upon which law operates, and the precepts that it uses must be clear. But ascertaining the facts with sufficient clarity for the operation of law often involves great difficulty. This is one limitation on legal effectiveness as an instrument of social

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[55] Pound, R., "The Limits of Effective Legal Action", International Journal of Ethics, Volume 27, 150-167 (1917).

[56] See, for example, Allot, A., The Limits of Law (London: Butterworths, 1980); Summers, R.S., "Naive Instrumentalism and the Law", in Hacker, P.M.S., and Raz, J., eds., Law, Morality and Society (Oxford: Oxford University Press, 1977), 119-131; Evan, W.M., ed., The Sociology of Law: A Social-Structural Perspective (New York: Free Press, 1980); and Hepple, B., and Szyszczak, E.M., eds., Discrimination: The Limits of Law (London: Mansell Publishing Ltd., 1992).

[57] Pound, supra, note 55, 161-162.

control. The capacity of morals, on the other hand, to shape or direct attitudes and beliefs, is unencumbered by the technical requirements of fact-finding.

A second reason why the legal order may be of limited capacity in the process of social change, Pound points out, is that law cannot act of its own motion; as an instrument of government, it must rely for the activation of its machinery on some external agency. The external agency may be people who are motivated to invoke legal rules and procedure in support of their own interests, or the state acting on behalf of citizens. The activation of criminal law depends to a large extent on the public reporting of crime to law enforcement agents, while that of civil law (non-criminal law) may depend on aggrieved individuals, corporate bodies or groups of individuals who are seeking some judicial redress. If, therefore, law is not invoked by citizens, or it cannot be enforced, it follows that it cannot shape behaviour.

There are several reasons why citizens may be averse to the idea of invoking the machinery of law. First, professionalization of legal knowledge tends to alienate those who lack the skills to engage in the specialized form of communication which legal disputation involves.[58] The special

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[58] See, for example, Dias, C.J., and Paul, J.C.N., "Educating for Alternative Development: Sharing Knowledge about Law", Third World Legal Studies, 65 (1985).

terminologies, concepts and theories regularly employed in legal reasoning often operates as a tacit rule of exclusion against non-lawyers. The problem is worse in societies where legal rules are framed in foreign language. Secondly, the financial and emotional costs associated with litigation often deter the disadvantaged in society from resort to the machinery of law.[59] Cost of litigation constitutes a significant deterrent in most societies, and in most parts of the Third World it accounts partly for why resort to the law is often viewed as an extreme act, to be avoided as much as possible. Finally, and this is related to the last point, in the Third World, the legal order is mostly a colonial imposition; in the colonial days, as a way to facilitate the extraction of resources from the colonies, colonial administrators imposed draconian and inhumane laws which were enforced with equal brutality.[60] The uncivilized manner in which taxes were levied and collected from colonized territories, for example, and the use of the machinery of law for this purpose, left a legacy of unhealthy association of law with arbitrariness and exploitation. Suspicion of the law and a lack of identification with its purpose are major

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[59] See, for example, Galanter, M., "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change", Law and Society Review, Volume 9, 95-160 (1974).

[60] See Seidman and Seidman, supra., note 3.

deterrents against resort to the legal machinery.

Pound argues, thirdly, that regardless of the merit of certain interests and demands, law may be unable to recognize them if doing so may involve the marshalling of problematic evidence or complex or controversial material that cannot be objectively assessed by the court. Courts define their territory very narrowly; as Ronald Dworkin[61] observes, the proper role of the court is to adjudicate on matters of principle, that is arguments aimed at establishing individual rights, not those aimed at establishing policy or the goals of society. Social change is essentially about reordering of the goals of society. In addition, the objective of judicial proceedings is to put an end to disputes, and decisions have to be made on the basis of available facts. The pursuit of truth in a speedy manner is the central object of the legal process; where available evidence is not readily reconcilable with this object, courts would be reluctant to adjudicate on it.

Finally, Pound notes that law is basically unsuited to the regulation of many areas of social life. He argues that some morally important rights or duties defy legal enforcement, and the intrusion of law in these areas disrupts rather than repair or enhance social relations. More recent

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[61] Dworkin, R., Taking Rights Seriously (London: Duckworth, 1977), 92.

writings have built upon this last point, criticising the "legalization" or "juridification" of spheres of social relations in which law ought to have little or no place.[62] Examples are industrial relations, family life, politics, commercial activity and the organization of business enterprizes. The concern here has shifted somewhat from Pound's lament of law's ineffectiveness to the pathological effects of law.

By bureaucratizing social relations and "polluting" moral spheres, some contemporary writers say, law misinterprets these relations and ultimately disrupts them. Writing about the Canadian Charter of Rights and Freedoms, for example, Michael Mandel[63] argues that the Charter is an unwelcome intrusion in the politics of Canada - a "legalization of politics", which constrains rather than foster political development: "The Charter of Rights, in its substitution of judicial for representative forums and of abstract/principle for concrete/policy forms of argument for the resolution of political controversy, represents a fundamental change in the structure of Canadian political

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[62] See, for example, Mandel, M., The Charter of Rights and the Legalization of Politics in Canada (Toronto: Thompson Educational Publishing, 1989); and Teubner, G., ed., Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust Law and Social Welfare Law (Berlin: de Gruyter, 1987).

[63] Mandel, ibid.

life, a "legalization of politics". . . Legalized politics. .

. (is) a defence mechanism developed to preserve the status

quo of social power from the threats posed to it by (social

change)."[64] Gunther Teubner[65] suggests that rather than seeking

to utilize law in this way, it is better to find an

appropriate relationship between law and other normative

systems.

This shift in thinking about the role of law in

social change sheds light on the extent to which the stress on

legal instrumentalism has tended to divert attention from the

capacity of law to legitimize the status quo and prevent

change. Often the tendency is to "reify" law, that is to

artificially detach law from its societal base and treat its

institutions and doctrine as social forces in themselves

without regard to the interests that it represents. But law is

not an independent mechanism acting upon social life. Law is

part of society, an instrument of human actors. As one

commentator has put it, "law . . . is only one component of a

large set of policy instruments and usually cannot (be). . .

and is not used by itself. Therefore, focusing of exclusive

attention on law as a tool of directed social change is a case

of tunnel vision, which lacks the minimum perspective

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[64] ibid., 71.

[65] Teubner, G., "Juridification: Concepts, Aspects, Limits, Solutions", in Teubner, G., ed., supra., note 62.

necessary for making sense from. . . observed phenomena."[66]

Once law is removed from the realm of abstraction and treated as part of society, it might become easier to identify the interests which it protects and to interrogate its ability to direct social change. Such deconstruction of law has convinced many Leftist writers[67] of the limited utility of law in progressive struggles because, as they discover, law preserves the essential relationships in capitalism through the notion of rule of law (and the many precepts and doctrines which it spawns), and the concepts and ideology of private property and contract. These notion, precepts, concepts, and ideology, they contend, serve to entrench inequality by ensuring the dominance of the rich over the poor. Since law's essential mission is to foster this unequal relationship in society, attempts by progressive lawyers to effect reform of the law through the legal process will achieve only minimal results at best because "the fundamentals of capitalist

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[66] Dror, Y., "Law as a Tool of Directed Social Change: A Framework for Policy-Making", American Behavioral Scientist, Volume 13, 553-559, 554 (1970)

[67] See, for example, Glasbeek, H.J., "Some Strategies for an Unlikely Task: The Progressive Use of Law", Ottawa Law Review, Volume 21 (2), 387-418 (1989); Gabel, P., and Feinman J., "Contract Law as Ideology", in Kairys, D., ed., The Politics of Law - A Progressive Critique, 3rd edn., (New York: Basic Books, 1998), 497-510; Mensch, B., "Freedom of Contract as Ideology", Stanford Law Review, Volume 33, 753-792 (1980-81); and Petter, A., "Legitimizing Social Inequality: The Early Charter Cases", McGill Law Journal, Volume 34, 358 (1989)

relations of production are unlikely to come under serious challenge in (that) way."[68]

What these different perspectives on the role of law in social change suggest is that the relationship of the legal order to social change is more problematic than the assumption underlying the declaration on the right to development implies. That assumption is that the resort to law by the poor through the claim of rights will usher in a new society in which poverty and all the vulnerabilities associated with that condition will be effectively contained, if not eradicated. However, the least controversial conclusion that can be fairly drawn from the foregoing is that the efficacy of law in social change is contingent: while, under certain circumstances, law can be effective in championing the cause of change, it can also act as a bastion of conservatism in other circumstances. The real question, then, is not whether law is useful or disutile in the struggle for social change, but whether those who are engaged in the struggle can navigate law's variegated contours in order to take advantage of its essential contigency for their own purpose. The concept of "rights" – through which the law protects interests and claims – can help us to develop a more complicated understanding of this question.

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[68] Glasbeek, ibid., 400.

3.2. RIGHTS - THE HANDMAIDEN OF LAW

In legal philosophy, a right connotes title.[69] To have a right to a claim is to have the legal power to assert that claim with an insistence that the claim be recognized.[70] There are broadly speaking two kinds of rights: legal/constitutional rights (which have been recognized in positive law, and moral rights (which are rooted in moral notions of what is right). The distinction between legal and moral rights reflects the tension between the rights which citizens have and those that they ought to have.[71] Legal rights have the special significance of being pre-legitimated claims, that is, the determination of the duties which these rights justify has been removed from the pressures of day to day politics and made the exclusive preserve of the courts or other specialist institutions which are best equipped for that task. According to Bartholomew and Hunt,[72] "(L)egal and

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[69] See, for example, Dworkin, supra., note 61, 100; Raz, J., "Legal Rights", Oxford Journal of Legal Studies, Volume 4, 1 (1984).

[70] See Raz, J., "Promises and Obligations", in Hacker, P.M.S., and Raz, J., Law, Morality and Society (Oxford: Oxford University Press, 1977), 210; and Feinberg, J., Rights, Justice and the Bounds of Liberty (Princeton: Princeton University Press, 1980), 150.

[71] See Donnelly, J., Universal Human Rights in Theory and Practice (Ithaca: Cornell University Press, 1989), 12.

[72] Bartholomew, A., and Hunt, A., "What's Wrong with Rights", Law and Inequality, Volume 9, 1, 19 (1990).

constitutional rights mark out those social claims and demands which are already adopted for approval by the political system and which have available some access to legal resources for their enforcement". However, formal recognition of rights does not always mean effective guarantee in practice, and the invocation of moral claims is often in the context of a failure of national constitutional processes. Such claims are demands by social groups or interests seeking to convert those demands into legal or constitutional rights.[73]

Since rights protect interests, their legal distribution in a society offers a fairly clear idea of the political goals of that society. As Joseph Raz[74] has rightly observed, "(c)onstitutional rights . . . are part of the institutional protection of the basic political culture of a society". In liberal democracies, the primacy of individual autonomy means that all the tools for the realization of that goal - such as the freedom to think and act as one chooses, subject only to the freedom of others to similarly conduct themselves - are recognized as fundamental interests, constitutionally entrenched as rights.[75] On the other hand, in

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[73] See Donnelly, J., International Human Rights (Boulder, CO: Westview Press, 1993), 19-21.

[74] Raz, J., The Morality of Freedom (Oxford: Clarendon Press, 1986), 260.

[75] See generally, Dworkin, R., supra, note 61; Hogg, P., Constitutional Law of Canada (Toronto: Carswell, 1985).

the defunct socialist regimes of the Soviet Union and Eastern Europe, freedom from want (equality) as opposed to freedom from political tyranny (liberty) was the preeminent goal of society. As such, social and economic interests - food, shelter, education, health, etc - took precedence over all other interests.[76]

The assumed relevance of rights in the process of social change is based on the distinction which liberal democracies draw between law and politics, and the belief that politics ought to be conducted according to the patterns of rights and obligations established under law.[77] All social problems can be broken down into legal responsibilities and entitlements; their analysis in terms of this legal paradigm assures that their resolution will usher in social change. Rights "define a particular program of social action as legitimate and worthy of support."[78] Litigation, through which

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[76] See, for example, the Constitution of the former USSR (1936), in Brownlie, I., <u>Basic Documents on Human Rights</u> (Oxford: Clarendon Press, 1971), 25-28; Marx, K., "The Communist Manifesto", in Feuer, L.S., ed., <u>Marx and Engels - Basic Writings on Politics and Philosophy</u> (London: Fontana, 1969), 65 ff.; and Campbell, T., <u>The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights</u> (London: Routledge and Kegan Paul, 1983).

[77] See Scheingold, S.A, <u>The Politics of Rights: Lawyers, Public Policy, and Political Change</u> (New Haven and London: Yale University Press, 1974), 13 ff.

[78] Johnson, H.M., "Ideology and the Social System", in <u>International Encyclopedia of Social Sciences</u>, Volume

such analysis can be made by lawyers and the court, is the principal institutional mechanism of rights. The invocation of rights as well as the realization of rights depend on litigation. Litigation, rights, remedies and social change are therefore organically linked.

3.2.1. THE POLITICS OF RIGHTS

This neat rights-social change schema tends to obscure the fact that the recognition of a right does not remove it from politics understood in the wider sense. It only gives the courts a preeminent role in determining the content of the right or in the articulation of public policy regarding the interest which the right protects or seeks to enhance.[79] Institutionally, the courts themselves are part and parcel of the political process. They are sensitive to political factors, and their decisions are informed by the need to protect the basic political culture of society. The general acknowledgement that courts must be above politics only refers to a narrow conception of politics, that is, the rough and tumble of everyday political pressures and passing fads. The respectable distance which the court maintains from politics in this sense enables, or should enable, it to preserve the

7, 76-85, 81 (1968).

[79] See Mandel, supra, note 62, passim; and Raz, supra, note 74.

lasting general consensus on which the political culture is built.[80]

If courts have the institutional role of undergirding the political culture of society, then the question is whether the litigation of rights can yield a fundamental change in the power relationships that are the leitmotif of society. In other words, if litigation can redistribute power in society then its instrumental quality in social change cannot be doubted. But if not, then it is necessary for those who desire social change to develop a more sophisticated understanding of the litigation/rights approach to social change.

Various examples can be cited of the dissonance between the promise of rights and the actual outcome of its litigation. The Canadian Charter of Rights and Freedoms[81] is a classic illustration of the appeal to rights in aid of social change. At the time of its enactment, the Charter was hailed as a harbinger of modern democratic politics in which the full participation of citizens was guaranteed. The

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[80] See Raz, ibid.

[81] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K., 1982, c.11) (Hereinafter cited as the "Charter").

Canadian Government[82] explained that the constitutional entrenchment of the Charter limited the power of government "in favour of the rights of individual citizens" by giving people "the power to appeal to the courts if they feel their rights have been infringed or denied". The Government[83] promised that one of the reasons for enunciating the Charter was to authoritatively set the parameters upon which Canadians will live as citizens of a democratic polity, and thus to remove that question from political debate: "Now, these rights will be written into the constitution so that you will know where you stand. . . The courts are there as an impartial referee to correct injustices in the event that you find that your constitutional rights are being denied."[84]

Putting the Charter to work on behalf of democracy in Canada has generated a considerable amount of litigation.[85] Many scholars have written positive reviews of the outcome of the litigation, especially in regard to the expansion of the legal rights of due process under the law. The courts have,

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[82] The Constitution and You (Ottawa: Government of Canada, 1982), 12-13.

[83] ibid.

[84] ibid., 7.

[85] See, for example, Morton, F.L., "The Political Impact of the Canadian Charter of Rights and Freedoms" Canadian Journal of Political Science, Volume 20, 31 ff. (1987); Glasbeek, supra, note 67, 402-403.

for example, widened the right of prisoners and parolees to be represented by counsel;[86] they have held that refugee claimants are entitled to a fair hearing;[87] that searches and seizures must be properly authorized;[88] that undue delays in criminal courts are a violation of the prisoner's right to a fair hearing and must be avoided;[89] that suspects' right to counsel must be respected at all times;[90] and that the judiciary must closely monitor coercive behaviour by the police.[91] However, judged as an instrument for the transformation of Canadian politics, most commentators consider the Charter a failure in many respects.[92]

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[86] See Morin v.National Special Handling Unit Review Committee (1985), 49 C.R. (3d), 260 (S.C.C.).

[87] See Singh v. Minister of Employment and Immigration [1985], 1 S.C.R. 177.

[88] See Hunter et al. v. Southam Inc. (1984), 11 D.L.R. (4th) 112.

[89] See R. v. Askov (1990), 74 D.L.R. (4th) 355 (S.C.C.).

[90] See R. v. Manninen [1987] 1 S.C.R. 1233.

[91] See Collins v. R. [1987] 1 S.C.R. 256.

[92] See, for example, Ruff, K., "The Canadian Charter of Rights and Freedoms: A Tool for Social Justice?" Perception, Volume 13 (2), 19 (1989); Russell, P.H., "Canada's Charter of Rights and Freedoms: A Political Report" Public Law 385 (1988); Petter, A., "Legitimizing Sexual Inequality: Three Early Charter Cases", McGill Law Journal, Volume 34, 358 (1989); Hutchinson, A.C., and Petter, A., "Private Rights/Public Wrongs: The Liberal Lie of the Charter", University of Toronto Law Journal, Volume 38, 278 (1988); Hutchinson, A.C., "Waiting for Coraf (or The Beatification of the

Take freedom of speech for example: there is no reason to believe that individuals have since the advent of the Charter won the right to more public space for the exercise of their right to free speech; on the contrary, the monopoly which the owners of the mass communication media have held on news and opinion dissemination before the Charter has remained virtually unchallenged,[93] even though the power of some censoring boards has been curtailed.[94] More significantly, corporations have used the Charter to successfully challenge efforts to restrict advertizing as an infringement of freedom of speech.[95] The result is that freedom of commercial speech has been placed on an equal pedestal with the individual's freedom of speech. Yet, the tendency of corporations to use their enormous resources to crowd out individuals in the execise of this freedom, or to ignore the public interest (as in tobacco advertizement) did not seem to weigh much in the

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Charter)", University of Toronto Law Journal, Volume 41, 332 (1991).

[93] See Glasbeek, H.J., "Entrenchment of Freedom of Speech for the Press - Fettering of Freedom of Speech of the People", in Anisman, P., and Linden, A.M., eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986), 101.

[94] See Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984) 45 O.R. (2d) 80, 38 C.R. (3d) 271 (C.A.), leave to appeal granted (1984) 3 O.A.C. 318.

[95] See Royal College of Dental Surgeons (Ont.) et al. v. Rocket and Price (1988) 27 O.A.C. 52.

court's consideration.

Another example is the guarantee of sex equality rights under the Charter. Against the failure of American feminists to secure an Equal Rights amendment to the American Constitution, the constitutionalization of sex equality rights in the Charter was initially hailed as a significant victory for feminists in Canada.[96] However, the groundswell of optimism generated for sex equality by the Charter has been largely dissipated by the actualities of the judicial process. When read together the various equality provisions[97] in the Charter seem to establish a legal basis for the elimination of social and economic inequalities. In some cases, the courts have held

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[96] See, for example, MacKinnon, C., "Making Sex Equality Real", in Smith, L., et al., eds., Righting the Balance: Canada's New Equality Rights (Saskatoon: The Human Rights Reporter, 1986), 21.

[97] For example, Section 15:
   (1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
   (2) Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

   Section 28:
   Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

that this is indeed the true interpretation of these provisions.[98] The case of R. v. Morgentaler,[99] in which section 251 of the Criminal Code - which restricted and regulated the access of women to safe legal abortions - was successfully challenged arguably supports this view. As well, the equality guarantees have enabled women to successfully attack a number of statutes which denied formal equality to women and men in marriage, resulting in the amendment of their offending provisions.[100]

However, by and large, the courts have demonstrated extreme reluctance to adopt a contextual and substantive approach to the determination of the scope of equality rights where the issue is one of systemic discrimination, preferring

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[98] See, for example, Action Travail des Femmes v. C.N.R. (1987) 1 S.C.R. 1114 (S.C.C.); and [1987] 11 F.T.R. 279; and Weatherall v. Canada [1988] F.C.J. No. 596 (Federal Court of Appeal).

[99] R. v. Morgentaler (1988) 1 S.C.R. 30, 82 N.R. 1 (S.C.C.).

[100] For example, the Women's Legal Education and Action Fund (LEAF) successfully challenged provincial legislation which precluded married women from using names other than their husbands' or passing their surnames, if different from the husbands' to their children: see LEAF, Litigation Works: A Report on LEAF Litigation Year Two (Toronto: Carswell, 1987), 4-5, 19. See also Boivin, S.P., "The Surname of the Married Woman and of Children", in Sloss, E., ed., Family Law in Canada: New Directions (Ottawa: Canadian Advisory Council on the Status of Women, 1985), 195-210; and Brodsky, G., and Day, S., Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

instead a narrow and formalistic approach. In <u>Andrews v. Law Society of British Columbia</u>,[101] the Women's Legal Education and Action Fund (LEAF), an intervenor, urged the court to "adopt a purposive approach to the interpretation of section 15 (the principal equality provision of the Charter), which would recognize both the legal process and substantive aspects to equality, and acknowledge that the purpose of substantive equality guarantees is to promote the equality of hitherto powerless, excluded and disadvantaged groups."[102]

LEAF further urged the court, in adopting this approach, to take into consideration "an historical context characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and a sex-based poverty and devaluation of women's contributions in all spheres of social life which continue down to the present day."[103] The court rejected this appeal, holding that section 15 of the Charter requires that those who are similarly situated must be treated similarly. On further appeal to the Supreme Court,

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[101] <u>Andrews v. Law Society of British Columbia et al.</u> (1986) 23 C.R.R. 273 (B.C.C.A.); (1989) 1 S.C.R. 143 (Supreme Court). See also <u>Smith, Kline & French Laboratories Limited et al. v. A.G. of Canada</u> (1986) 34 D.L.R. (4th) 584; Eberts, M., "Risks of Equality Litigation", in Martin, S., and Mahoney, K., eds., <u>Equality and Individual Neutrality</u> (Toronto: Carswell, 1987), 89, 102-5.

[102] ibid., 37 (Factum).

[103] ibid.

however, the "similarly situated" test was rejected as a "fixed rule or formula" for the resolution of questions of equality. One would have thought that this conclusion would have been the only reasonable one, even at the lower courts. That this case had to go to the Supreme Court for this outcome highlights the unpredictable nature of rights litigation.

The equal treatment of unequals, without regard to the context of equality, guarantees that unequal relationships remain unchanged. This cannot be the kind of transformation which feminists in Canada rooted for when the Charter was promulgated. According to an audit conducted by Kathleen Lahey,[104]

> [o]n an empirical level, male complainants are making and winning ten times as many equality claims as women. On the substance level, women are loosing claims when a loss has a major and material impact on the conditions of inequality that women experience. . . And even when women have successfully pursued equality claims on the substance, judges have applied a purely neutral and "empty" concept of equality which defines discrimination as any form of classification. Each and every victory for women on this basis makes it even easier for men to win equality claims than it is for women.

In all these cases, the universal nature of rights and the courts' penchant for approaching rights in an abstract form ensured that the Charter did not work to transform

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[104] "Feminist Theories of (In)Equality", in Martin and Mahoney, eds., supra, note 101, 82. See also, Romanow, R., "And Justice for Whom?" Manitoba Law Journal, Volume 16, 102 (1986).

form ensured that the Charter did not work to transform existing power relationships.[105] The universal nature of rights allowed them to be used, not only by the disadvantaged and the powerless, but also by the privileged - in the latter case to prevent social change and legitimize the status quo. The judicial technique of abstraction served to individualize, rather than contextualize, equality rights claims, thereby depriving the feminist struggle of its political character.

The miserly and ambiguous benefits of Charter rights for the transformative project generally, and for feminist struggles in particular, highlights the politics of rights. Most progressive legal scholars agree that rights are a problematic weapon in the struggle for social change for a variety of reasons. While most agree that rights are abstract, individualistic, disempowering and obfuscatory,[106] some argue that in spite of these attributes and pitfalls, rights can

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[105] See Fudge, J., "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles", Osgoode Hall Law Journal, Volume 25, No.3, 485 (1987).

[106] See Gabel, P., "The Phenomonology of Rights-Consciousness and the Pact of the Withdrawn Selves", Texas Law Review, Volume 62, 1563 (1984); Kingdom, E., What's Wrong with Rights? Problems for a Feminist Politics of Law (Edinburgh: Edinburgh University Press, 1991); Tushnet, M., "An Essay on Rights", Texas Law Review, Volume 62, 1363 (1984); and Smart, C., Feminism and the Power of Law (London: Routledge, 1989).

simultaneously empower and enable the disadvantaged.[107]

Perhaps the debate about the efficacy of rights in progressive struggles has received its most elaborate articulation in American legal scholarship. The most recent articulation of the debate is the "critique of rights" advanced by the Critical Legal Studies Movement (CLS).[108] Much of the CLS critique of rights is directed at the form of rights - the internal coherence of rights discourse within liberal legalism[109] - rather than on its substantive political

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[107] See Hunt, A., "Rights and Social Movements", <u>Journal of Law and Society</u>, Volume 17, 309 (1990); Minow, M., <u>Making All the Difference: Inclusion, Exclusion, and American Law</u> (Ithaca: Cornell University Press, 1990); Schneider, E., "The Dialectic of Rights and Politics: Perspectives from the Women's Movement", <u>New York University Law Review</u>, Volume 61, 589 (1986); Williams, P., "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights", <u>Harvard Civil Rights-Civil Liberties Law Review</u>, Volume 22, 401 (1987); Minow, M., "Interpreting Rights: An Essay for Robert Cover", <u>Yale Law Journal</u>, Volume 96, 1860 (1987); and Sparer, E., "Fundamental Rights, Legal Entitlement and Social Change: A Friendly Critique of the Critical Legal Studies Movement", <u>Stanford Law Review</u>, Volume 36, 509, 560 (1984).

[108] See Unger, R., "The Critical Legal Studies Movement", <u>Harvard Law Review</u>, Volume 96, 561 (1983); Note, "'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship", <u>Harvard Law Review</u>, Volume 95, 1669 (1982).

[109] See, for example, Hutchinson, A.C., <u>Dwelling on the Threshold: Critical Essays on Modern Legal Thought</u> (Toronto: Carswell, 1988); Hunt, A., "The Theory of Critical Legal Studies", <u>Oxford Journal of Legal Studies</u> 1 (1986); and ibid., "The Critique of Law: What is 'Critical' About Critical Legal Studies", in Fitzpatrick, P., and Hunt, A., eds., <u>Critical Legal</u>

efficacy. This has, in turn, given rise, within the CLS Movement, to a "minority critique" of the CLS critique of rights. The "minority" segment of the CLS Movement - women, non-white men, and other disadvantaged groups - accept the basic premises of the CLS critique but challenge the critique's discount of the political utility of rights in progressive struggles.

The CLS critique of rights is based on three principal arguments. First, it is argued that rights are unstable because their meaning cannot be determined without reference to the history and culture of the society from where they arise. In other words, rights are historically and culturally relative. According to Mark Tushnet,[110] "[r]ights (are) identified with particular cultures and are relativized: to say that some specific right is (or ought to be) recognized in a specific culture is to say that the culture is what it is." Thus, rights are never a fixed and universal category, applicable to all cultures at all times, but they are more properly understood as open and fluid concepts whose specific content and context shift over time and space.

Secondly, rights are technically indeterminate, that is, the invocation of rights cannot resolve concrete disputes;

Studies (Oxford: Basil Blackwell, 1987).

[110] Tushnet, supra, note 106, 1365.

as such, rights cannot offer the determinate guidance needed to convert the promise of rights into particular results. For example, Allan Hutchinson[111] notes, "the enumeration of a right to free speech in itself provides no determinate answer to how society should deal with thorny problems, such as pornography, hate literature, picketing, advertizing, soliciting and the like. . . As such lawyers and judges must always look beyond rights-talk to give discrete rights any purchase or precision. Touted as a solution in itself, rights-talk is more effectively understood as a convenient screen of institutional propriety behind which competing interests can be accomodated and behind which the ideological choices required to effect such an accomodation can be hidden." Hutchinson enumerates the markers of this indeterminacy: there is no neutral standpoint from which to identify who are to be the recipients of rights; there is no non-political way of determining what particular group of rights are to be recognized and enforced; there is no uncontroversial means of determining the scope and nature of each particular right; there is no method internal to the theory of rights that can be used to adjudicate upon the clash of competing rights; and the recognition that rights are fundamental, but not absolute, gives rise to the difficulty of

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[111] Hutchinson, A.C., Waiting for Coraf: A Critique of Law and Rights (Toronto: Osgoode Hall Law School, 1993), 31.

balancing the public interest against the individuals' claims.[112]

The third leg of the CLS critique - the "reification critique" - is that the language of rights mischaracterizes life's experiences when it abstracts these experiences in terms of the individual and denies the interdependence and connection of human experiences. "(Life's) experiences become dessicated when described that way" , writes Tushnet.[113] Rights, by defining human beings as voluntaristic and atomistic individuals, seek to separate self from the other.

The CLS critique pries open an important window through which to understand the dissonance between promise and results in the discourse of rights. Many of the ambiguities and dissemblance associated with rights-talk which the CLS critique helps to illuminate have been demonstrated in concrete disputes. Besides, it is practically impossible for judges to formulate a right to secure all social goals. Even where a right is formulated, there is no guarantee that a remedy will be fashioned to deter its violation. To obtain a remedy for a violated right pits one party to a suit against the other in a test of wills and resources. Frequently,

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[112] ibid., 32.

[113] Tushnet, supra, note 106, 1382.

resource differentials among litigants determine the outcome of litigation. Furthermore, the legal approach confines the issues to be adjudicated upon, often reducing political conflicts to disputes between parties in an adversarial framework. Although these disputes may reflect the clash of more general social forces (and as such may be symptomatic of underlying social struggles), the need for each party to establish a personal entitlement to the right claimed often entails distinguishing one's cause from those of others with similar claims. This can drive a wedge between potential allies and make the task of political organization much more difficult. In addition, if changes are ever yielded through the legal system, such changes are often incremental, small and erratic, almost certainly never fundamental. Yet, such symbolic changes - isolated courtroom victories - when they do occur carry the danger that they may be mistaken for real progress, and thus help to divert attention from the inequities of the status quo.[114]

Resistance to change is woven into the fabric of the judicial process in, at least, two ways. First, the judges' loyalty to precedent means that changes must be introduced gently and in a manner that assures stability and continuity

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[114] See generally Scheingold, supra, note 77, especially Part Two, and Hutchinson, supra, note 111, Chapter Six.

in the established mode of reasoning.[115] Secondly, judges are reluctant to engage in dramatic policy departures because they are sensitive to the counter-majoritarian character of their own position in the political system.[116]Consequently, judges have exhibited a tendency to be guided in decision-making by non-threatening and traditional understandings about the social order in which they operate, thereby helping to reproduce rather than transform the status quo.

Nevertheless, the CLS critique is more useful as an insight into what rights <u>are</u>, than what practical use rights <u>can be put to</u>. The CLS position is that rights have no useful role to play in politics: "the idea of rights is affirmatively harmful to the party of humanity."[117] For that reason, it is bootless to seek to reform the judicial system.[118]

Rights may be unstable and technically indeterminate in operation, and they may manifest reification, but the conclusion that they are therefore politically disutile has been vigorously challenged even within the CLS Movement. The controversy has given rise to the "minority" response to the

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[115] ibid.

[116] See Bickel, A.M., <u>The Least Dangerous Branch: The Supreme Court at the Bar of Politics</u> (Indianapolis: Bobbs Merrill, 1962), 16-23.

[117] Tushnet, supra, note 106, 1489.

[118] See, for example, Hutchinson, supra, note 111, 200.

CLS critique of rights. From the "minority" viewpoint the CLS critique displays a lack of sensitivity to the plight of a majority of the world's population to whom rights, however formal, can provide a powerful mode of expression.[119] White male academics who formed the CLS Movement have been criticized for making proclamations about rights which ignore the differential experiences of minorities with rights struggles. Robert Williams, Jr., for example, has noted that the failure of the CLS critique of rights to advert to these experiences demonstrates the "perils of a disengaged theoretical stance".[120] According to him, rights are important for minorities (in the United States):[121]

> (Rights). . . mark trails along sacred ground. The attack by the Critical Legal Studies movement on rights. . . discourse can be seen as a counter crusade to the hard campaigns and long marches of minority peoples in this country. Minority people committed themselves to these struggles, not to attain some hegemonically functioning reification leading to false consciousness, but a seat in the front of the bus.

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[119] See, for example, Delgado, R., "The Ethereal Scholar: Does Critical Legal Studies Have What minorities Want?", Harvard Civil Rights-Civil Liberties Law Review, Volume 22, 301 (1987); Matsuda, M., "Looking to the Bottom: Critical legal Studies and Reparations", ibid., 323; Dalton, H.L., "The Clouded Prism", ibid., 435; Williams, P., supra, note 107, 401; and Williams Jr., R.A., "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color", Law and Inequality, Volume 5, 103 (1987).

[120] Williams Jr., R.A., ibid., 121.

[121] ibid., 120.

Kimberle Crenshaw[122] has argued in a similar vein. She contends that the CLS critique of rights is deficient because it has failed to understand the choices which the civil rights movement confronted, and does not recommend solutions to its current problems. The entrenched discourse of liberal rights in America, she contends, provided the civil rights movement with the needed language to turn the American society's "institutional logic" against itself.[123] She insists that the CLS critique, by focusing on rights, draws attention away from racism and race consciousness, which, she argues, are a far more plausible explanation for the "otherness" of the African-American than legal ideology.[124] She acknowledges that while rights discourse is fraught with the dangers of legitimation for the oppressed, there is a transformative potential embedded within the political use of that discourse that cannot be ignored.[125] She suggests, therefore, that "[w]hat subordinated people need is an analysis which can inform them how the risk can be minimized, and how the rocks

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[122] Crenshaw, K.W., "Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law", Harvard Law Review, Volume 101, No.7, 1331 (1988).

[123] ibid., 1366.

[124] ibid., 1357-58.

[125] ibid., 1378.

and the very hard places can be negotiated."[126]

While some feminist scholars discount the utility of rights for similar reasons as the CLS critique, others point to the dangers inherent in a wholesale subscription to the rhetoric of rights in feminist struggles. For example, Carol Smart[127] argues that rights may not be useful in feminist struggles for equality because of their susceptibility to hostile manouvre by the strong against the weak: "[r]ights formulated to protect the indivdual against the state, or the weak against the strong, may be appropriated by the more powerful."[128] Judy Fudge,[129] in a review of the use of the Canadian Charter in aid of feminist struggles, drew attention to the concurrent use of the Charter by various anti-feminist groups as a political symbol for mobilizing opposition to affirmative action for women. She cautioned the women's movement to approach rights with a healthy dose of scepticism: "[t]o the extent that the Charter can be used as a symbol for political mobilization by feminists, it can also be used by groups and organizations which are directly opposed to a

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[126] ibid., 1369.

[127] Smart, C., supra, note 106.

[128] ibid., 145.

[129] Fudge, J., "The Efficacy of Entrenching a Bill of Rights Upon Political Discourse", International Journal of the Sociology of Law, Volume 17, 445 (1989). See also Fudge, J., supra, note 105, 551.

feminist political agenda."[130]

Elizabeth Schneider[131] makes a similar contribution. She suggests that rights are useful for mobilization, consciousness-raising, and the communication and legitimization of demands. But she emphasizes that the use of rights must be informed by a sophisticated understanding of the politics of rights; reliance on rights must be contextualized within a larger framework of political struggle. Brenda Cossman[132], drawing on these views, argues for a more complicated understanding of the role of rights in the feminist struggle. She contends that if rights are to be meaningful in the struggle for social change, they must be used contextually and strategically:[133]

> Legal battles must be located within the larger political struggle and must make sense in terms of the more general, less specifically legal objectives of such a struggle. Long term political objectives as developed by the social movement must not be lost to the shorter term objectives of litigation strategies. Without such linkage. . . (feminists) risk both isolating and reifying the struggles in the legal forum.

The upshot of all this is that rights are neither good nor bad in progressive struggles. To subscribe to an

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[130] ibid., 448.

[131] Schneider, E., supra, note 107.

[132] Cossman, B., "Dancing in the Dark", Windsor Yearbook of Access to Justice, Volume 10, 223 (1990).

[133] ibid., 234.

"either/or" position regarding rights entails an assumption that in the struggle for change law can be avoided. This is an unrealistic assumption because "many of the disadvantaged and disenfranchised are not accorded the privilege of choosing the institutional site or rhetorical conditions of their struggle for social transformation".[134] Most of the time, the law is either the obstacle to change which needs to be frontally assailed, or it is the arena chosen by the privileged for the struggle against change. In either case, social movements must participate in the legal arena. Rights may manifest all the contradictory features enumerated in the CLS critique, but it is clear from the "minority" insight that, provided progressive movements are conscious of the limits and potential of rights, it is possible to deploy rights in ways supportive of the struggle for social transformation.[135]For that reason, therefore,

> [P]erhaps we need to retreat from an either/or position. Rights. . .mean different things to different people. In asserting the efficacy of rights claims, it may be useful to distinguish between various rights, their initiating process, and the way a social movement takes up a

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[134] Hutchinson, supra, note 112, 211. See also Cossman, ibid., at 233: " Indeed, the idea that social movements can avoid the law is unrealistic. Clearly, the law may stand in the way of (feminist) struggles, or the law may be called upon by others, leaving women with no choice but to engage with it."

[135] See Brickley, S., and Comack, E., "The Role of Law in Social Transformation: Is a Jurisprudence of Insurgency Possible?", Law and Society, volume 2, 97, 104 (1987).

particular rights struggle as a political mobilizer. We need to appreciate the particular circumstances where rights claims are necessary, strategic and even empowering, and acknowledge that the acquisition of formal rights may be a precondition for more substantive or fundamental change. Yet, at the same time, we may need a heightened awareness of the pitfalls of rights discourse.[136]

3.3. IMPLICATIONS FOR THE STRUGGLE AGAINST POVERTY IN THE THIRD WORLD

The purpose of the foregoing discussion of the relationship between law and social change is to put in perspective the legal approach to development which is the centrepiece of the Declaration on the Right to Development. A fundamental assumption of a "rights" approach to social change is faith in liberal legalism - that is, that the law is not only politically efficacious but ethically sufficient as a principle of government.[137] Such faith encourages individuals and groups to be willing to identify constitutional values with social justice, and to treat the shortcomings of law as only slippages, amenable to correction with time. It fosters a belief that once social problems are broken down into

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[136] Herman, D., "Are We Family? Lesbian Rights and Women's Liberation", Osgoode Hall Law Journal, Volume 28, 789, 809 (1990).

[137] See Scheingold, supra, note 77; Trubek, D.M., and Galanter, M., "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States", Wisconsin Law Review, 1062 (1974).

responsibilities and entitlements they will be satisfactorily resolved by autonomous and impartial tribunals.

In the Western democracies where this faith in law is strong, such as the United States and Canada, the lessons of experience suggest that as a strategy of social change, a "rights" approach is not the magic formula that it is regularly advertized to be. It is increasingly realized even in these developed societies that the formal neutrality of the legal system may not be incompatible with the use of law as a tool to further the interests of dominant groups. The wealthy and more conservative members of society may have better access to the legal system, while the legalization of areas of social life and the increasing formalization of the legal process may deflect political pressures for social change by increasing the costs of protest and providing no corresponding pay-offs in freedom and equality. Law may be used to legitimate or justify arbitrariness by government rather than to curb or ban governmental excesses. Legal changes supposedly designed to reform major areas of social life may in fact represent only "symbolic politics",[138] aimed at containing protests and defeating change rather than inducing it, in effect strengthening rather than weakening the forces committed to the status quo. As well, the social structure of

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[138] See Edelman, M., The Symbolic Uses of Politics (Urbana: University of Illinois Press, 1967).

these societies and perceived the economic interests of the legal profession may make lawyers natural allies of conservative groups and enemies of progressive groups.[139]

There is no reason to believe that such a strategy would work better in the Third World. On the contrary, the alien nature of the modern State[140] and law, the aversion of state officials to constitutionalism, as exemplified by official lawlessness and the many failures of governments to promote social justice[141] - all of these tend to suggest that there is no minimum basis upon which to even begin to erect a strategy of rights. In empirical terms, liberal legalism

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[139] See Glasbeek, H.J., and Hasson, R.A., "Some Reflections on Canadian Legal Education" Modern Law Review, Volume 50, 777 (1987).

[140] In Africa, the State is treated by citizens, not as a joint work-in-progress, worthy of nurturing and respect, but as an alien entity, to be cheated, "its" property stolen or vandalized, and "its" vision frustrated. This is arguably responsible for the emergence of two different "publics" to which citizens relate in Africa: a "primordial public" (the area governed by traditional values), where moral decency and integrity are considered appropriate, and the State, where irresponsibility and amoral conduct incur neither outrage nor opprobrium: see Ekeh, P., "Colonialism and the Two Publics: A Theoretical Statement", Comparative Studies in Society and History, Volume 17 (1), 91 (1975). Stories of corruption from other Third World countries are not incompatible with this theoretical construct, although obviously the extent of the gap between the "two publics" would vary with the level of development and the capacity of the State.

[141] See supra, note 33, and accompanying texts.

assumes social and political pluralism, but most of the Third World is riven by social stratification and class cleavage juxtaposed with authoritarian political systems; it assumes that state institutions are the primary locus of social control, but in most of the Third World tribe, clan and local community retain a far stronger grip on the populace than the nation-state; it assumes that constitutional values guide state actions - in other words, that legal rules reflect the interests of a vast majority of citizens, and the citizens therefore identify with and internalize the rules, but the situation in the Third World is pointedly different: rules are imposed on the many by the few and honoured more in the breach than in the observance. Infact, evidence suggests that the increased governmental regulation of economic life and the legalization of social processes of production have supported the material well-being of only a small elite, leaving the masses of the people worse off. Finally, the assumption that courts are relatively autonomous from political, tribal, religious or class pressures, or that they enjoy primacy in social control is doubtful in the Third World. In these societies, courts are neither very independent nor very important.

In consequence, the provision of rights and more rights is unlikely to change the destiny of the poor. In fact, in most parts of the Third World many of the rights

represented in the right to development, such as participation rights, have since independence been constitutionally entrenched as enforceable rights under the law.[142] While social and economic rights do not enjoy the status of justiciability accorded civil and political rights in these constitutions, they have been recognized in many cases as objectives and directive principles of State policy.[143] In addition, these rights have been recognized as international human rights under various instruments to which Third World countries are party. Yet, neither the constitutionalization of these rights nor accession to the international instruments embodying them by Third World States has greatly enhanced the chances that the rights will be honoured either by these States or even by private actors.[144]

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[142] See Blaustein, A.P., and Flanz, G.H., eds, Constitutions of the Countries of the World (Dobbs Ferry, NY: Oceana Publications, Inc., regular updates). The Constitutions of Third World countries directly proclaim adherence to the Universal Declaration of Human Rights (UDHR), or use other language to incorporate the provisions of the UDHR. For example, whereas Chapter III of the Constitution of Zimbabwe, 1979 is titled "Declaration of Rights", Chapter IV of the Nigerian Constitution, 1979, is titled "Fundamental Human Rights".

[143] Examples are the Nigerian and Indian Constitutions.

[144] "Human Rights Watch", and Amnesty International, Non-Governmental organizations which monitor and report on human rights in the Third World, turn out volumes on human right violation annually. See also Nwabueze, B.O., Constitutionalism in the Emergent States (London: C. Hurst and Co., 1973).

The prevalence of abject poverty in the face of the rights which Third World States claim to guarantee is the best evidence of the contradictions and ambiguity of rights-talk. If access of the poor to the courts is limited, if lawyers are biased and remote, and if the socio-political structure is such that the interests of the poor can be treated with cavalier disregard by decision-makers, then the provision of rights may at best be a palliative, and at worst a symbolic act to mask continued exploitation. In either case, a "rights" strategy is unlikely to usher in the fundamental change that the eradication of poverty demands. The more realistic expectation, consistent with history, is that such a fundamental change will not occur through the litigation of rights, but through sustained political struggle. The primary focus of such a struggle must be democratization of the development process. This involves organizing the poor for co-ordinated social action designed to make major changes in the institutions and processes which create and reproduce wealth and privilege for the few and poverty and misery for the many.

Law and the judicial process, as the above discussion shows, are clearly an arena of struggle, and rights are better understood as a means in that struggle - a political resource which can be deployed through litigation to spark hopes or kindle indignation - rather than an end in

themselves. While lawsuits cannot be expected to fundamentally alter the situation of the poor, they can be treated as vehicles for setting in motion other political processes and for building coalitions and alliances. Thus, rather than interpret the right to development in terms of a "rights" strategy, the perspective gained from the above analysis points us toward political mobilization as the central strategy, with rights and litigation as only a source of leverage and a contributing tactic.

4. BUILDING THE ENABLING ENVIRONMENT: TOWARD THE DOMESTIC REALIZATION OF THE RIGHT TO DEVELOPMENT

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.[145]

> All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.[146]

These provisions of the Declaration on the right to development lay out the focus and substance of the struggle

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[145] Article 2(3)

[146] Article 2(2).

for social transformation in the Third World. In that struggle, the State as well as the poor are enjoined to create favourable conditions for the realization of the right to development. On the part of the State, it must aim to constantly improve the well-being of the population by promoting the participation of all in the processes of development, and ensuring equity in the distribution of the rewards of development activity. On the part of the poor, they must individually and collectively struggle to secure respect for their human rights and fundamental freedoms.

In practical terms what this means for the Third World State is that the State must begin to dismantle the philosophy which for decades has guided its development effort. That philosophy of development privileges economic growth over the welfare of human beings, and positions the State as the most powerful actor in economic development. The pursuit of economic growth, according to this philosophy, involves a trade-off of equality and liberty on the part of the poor in the short-term; in the long-term, the achievement of economic growth would compensate for the deprivation through the diffusion of prosperity. In seeking to understand the connection between this philosophy and the growing poverty of the masses of the population, it is necessary to explain the synergy which was forged by the leaders of the Third World between the need for economic development and the use of State

power ostensibly in furtherance of that need.

Most Third World States came into being through mere accidents of history. Unlike their older counterparts in Europe, these States did not emanate from a process of evolution.[147] Rather, most were hurriedly put together by departing colonial powers for whom the question of legitimacy was of little concern. But for any State, the issue of legitimacy, the need for a moral understanding among citizens regarding the need for the State, is of paramount importance, with far-reaching implications for the ability of the State to mobilize its citizens and the resources available to it in ways that it may consider developmental.[148] In addition, Third World States, once they came into being, unlike the older States, were confronted by the existing models of mature, industrialized nations, against whom they became painfully aware of their own backwardness or underdevelopment. This perception generated high expectations on the part of the citizens for instant economic development, as opposed to the gradual or evolutionary progression which marked the transition of the older States to modernity.[149]

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[147] See Poggi, supra, note 35.

[148] See Habermas, J., Toward a Rational Society: Student Protest, Science and Politics translated by Jeremy J. Shapiro (Boston: Beacon Press, 1970).

[149] See Huntington, S.P., Political Order in Changing Societies (New Haven, Conn.: Yale University Press,

Lacking a basis of authority in popular consent, and lacking other legitimating ideologies, such as the market, the Third World State was constrained to rely on its own positive program of action as a way to acquire legitimacy. To establish hegemony over its domain, it became imperative for the State to harness the vague yearnings of its population for change into a coherent set of aspirations for "development", and to offer itself as the best method for achieving them. Having coupled its legitimacy to the promise of economic prosperity, the dilemma with which the State had to deal remains how to assume responsibility for the major allocative and production decisions and at the same time encourage the social and cultural transformations essential to the creation of a rationalized industrial system (which it considered as the panacea for poverty). In Third World societies, where traditional cultural ideas and social structures remain strong, such transformations were bound to create tensions so intense as to threaten the very stability necessary for an industrial economy.

The tension between social transformation and industrialization in circumstances where the State is too riven by class, racial, and cultural cleavages to tolerate democratic pluralism, begins to explain the prevalence of

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1968); Apter, D., The Politics of Modernization (Chicago: University of Chicago Press, 1965).

authoritarianism in the Third World. With the emergence of authoritarianism came extensive limitations on political participation, and the use of coercion and bribery to neutralize or co-opt the opposition.[150] Third World States typically resort to violence in order to coerce their citizens into conformance with their vision of "development", and otherwise discourage political mobilization by converting political issues into technical problems over which they claim monopoly of expertise.[151] In recent times, amid glaring evidence of the failure of the developmentalist project, changes in the global environment at the end of the Cold War, and pressures by international donors and other groups for improved governance, most Third World States have taken hesitant steps toward political and economic liberalization. However, the institutions and processes which supported authoritarianism have shown great resilience,[152] and in some cases have been reinforced by the recent developments.

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[150] See, for example, Joseph, R., Democracy and Prebendal Politics in Nigeria (Cambridge: Cambridge University Press, 1987).

[151] See, for example, Ocheje, P.D., "Legalizing Displacement: The Legal Order in the Political Economy of Nigeria" Journal of Asian and African Studies, Volume XXXII (1-2), 120 (1997).

[152] See, for example, Ihonvbere, supra., note 15; See also "Free Speech Costly in Singapore", The Toronto Star, A10, February 3, 1999; "Zimbabwe Faces New Threat of Riots", The Toronto Star, A3, February 9, 1999.

The institutions and processes of the developmentalist State privileges top-down development planning and all the pathologies associated with it, such as lack of transparency in decision-making and lack of participation of the masses of the people in the decisions that affect their lives. The operation of the law, the civil service, the police and the armed forces, and even the intervention of private international donor organizations are all structured to fit into the developmentalist mould. The ongoing political and economic liberalization have not affected the way that the task of development is approached in the Third World. For many Third World States, perhaps the only visible indication of political liberalization in them is elections. Most elections have been staged, returning the same old group of ruling elites to power, and leaving the State apparatus of terror intact. Economic liberalization, patterned on neoliberal economic thinking, has involved the opening up of economies for indiscriminate foreign investment, for the production of goods which the Third World population do not or cannot afford to consume, and the consumption of goods which they cannot or do not produce; the privatization of social assets and the commercialization of social services removing those services further from the reach of the poor; the setting up of export processing zones (EPZs), where foreign investors pay no taxes but only starvation wages, the repression of

labour for the benefit of capital, etc.

In contrast to the growth-centred philosophy of development, the right to development mandates a people-centred approach. This approach implies the establishment of new institutions and processes, to:

(a) build participation into development activity, so as to enable the poor to influence decision-making and administration;

(b) build due process into development activity, provide remedies for development wrongs, and impose accountability on development actors;

(c) incorporate social entitlements, such as health care, employment and income, food security, shelter, clothing, education and cultural autonomy as primary goals of development.

Owing to the historical inadequacy of the Third World State and its demonstrated inability to reverse the conditions that have impoverished the masses of its citizens, expectations that it will, of its own accord, re-invent itself in the socially transformative manner necessary for the realization of the right to development are, perhaps, misplaced. For one thing, radical redistributive policies are often politically infeasible.[153] This has been repeatedly

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[153] See Kohli, A., _The State and Poverty in India: The Politics of Reform_ (Cambridge: Cambridge University

demonstrated in many parts of the Third World. No one seriously expects that ruling elites will voluntarily dismantle the institutions which guarantee their power and privileges, except for compelling reasons. Historically, poverty of the majority has never been adjudged to be such a reason. For a second, barring political pressures from within, the increasing coupling of Third World economies to the international system through multilateral investment and trade frameworks, which significantly erodes the sovereignty of these States with respect to the use of their own resources,[154] means that it will become increasingly difficult for them to institute any pro-poor programmes even if they were disposed so to do.

Under the circumstances, the only real possibility for change lies in the struggle of the victims of development failure - the poor themselves - to bring about the change. Such a task requires political organization. However, the constraints which the poor face in terms of political mobilization, an essential element of political action, are legion. Aside from certain limiting attributes first mentioned above, they lack organizational skills, and they are often politically segmented. For the poor to be active participants

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Press, 1987); and Weyland, K., supra, note 25.

[154] The General Agreement on Tariffs and Trade (GATT), and the World Trade Organization, are just two examples.

in the struggle for change, they must first overcome these organizational problems. Given that the terms and sites of the political struggle have been defined by the existing system, the challenge is to determine how best to facilitate the participation of the poor in that struggle.

4.1. MOBILIZING THE POOR - THE ROLE OF PROGRESSIVE LAWYERS

The lawyer occupies a unique position in the political system because of his access to important symbols of political legitimacy, such as the courts, the law, constitutional rights, etc. This privileged access casts the lawyer in the role of a mediator between the individual and governmental and private power-wielders. In the confrontation of the individual with power, adequate legal representation can alter the individual's sense of powerlessness and increase her self-confidence. As well, lawyers, by virtue of their training, can provide organizing skills and resources at the early stages of political mobilization. They can make available the technical skills needed to establish collective political identity, such as drafting a charter, or establishing the legal status of the organization. More generally, because of the high social status of lawyers in society, their mere presence at an organizational meeting can lend an air of importance and legitimacy to the objectives of the organization and enhance the organization's political

status in the eyes of its potential constituency. Most importantly, the lawyer's adroit deployment of the concept of rights in litigation can have very important effects on mobilization. Rights evoke images of entitlement, and a declaration of rights can politicize needs by changing the perceptions of the poor regarding their conditions, cue their expectations, and generally activate a movement for change.

In what follows, we identify three ways in which progressive lawyers can facilitate the political mobilization of the poor: education, advocacy, and the delivery of legal services. These will be considered in turn.

4.1.1. EDUCATION

The acquiescence of the poor in the injustice of their condition is one of the props on which State lawlessness and irresponsibility, and even the abuse of private power, thrives in the Third World. All over the Third World, the poor seem resigned to their fate; they have learnt in many cases to adapt to the material and emotional deprivations that burden their lives, and to endure these with equanimity. If they have any sense of moral indignation, it is rarely shown in the open. After many decades of social injustice, the poor seem to have accepted the existing order as inevitable. That is not a surprise: for the teeming millions of Third World citizens, poverty is the only reality that they know and can fully

comprehend. As we are constantly reminded by social scientists, identity - the expectations and aspirations of a people - or conceptions of the self are socially determined. Murray Edelman[155] puts it accurately: "Perception of deprivation. . . like all perception, is a function of social cues regarding what is to be expected and what exists; it does not correlate directly or simply with objective conditions or with any particular measure of them." Imposed political identities hamper change because they make patterns of subordination and superordination look natural both to the deprived and to the privileged.

The lawyer, as mediator of power relations, can help the process of political activation by transforming discontents into political demands through imaginative litigation. To do this effectively, lawyers must themselves develop a sense of critical consciousness which allows them to seize the possibilities of any contingent moment to judicially expose the contradictions of the status quo and highlight the availability of political action. For example, the historic United States Supreme Court decision in Brown v. Board of Education of Topeka[156] is hailed today more for its political impact on the civil rights movement than on its actual results

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[155] supra, note 138, 56.

[156] 347 U.S. 483 (1954)[Brown I]; 349 U.S. 294 (1955)[Brown II].

in terms of the segregation of schools which it declared to be inherently contrary to the principle of equality as enshrined in the US constitution.[157] "Nine of the most powerful white men in the United States unanimously declared that separate was not equal, at least in the area of education."[158]That decision energized the civil rights movement to challenge the political norms of the time and to push for more political concessions. Subsequent official policy tended to recognize that the deprived condition of African-Americans was a function of the operation of established social forces in the American system.

A high-visibility political case of this nature, regardless of its outcome, officially acknowledges the existence of a problem, lifting it from the private to the public domain. In addition, it may not succeed in redistributing resources or influence (the effect of the Brown decision is ambiguous in this regard),[159] but it will cue

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[157] See Weisbrot, R., _Freedom Bound: A History of America's Civil Rights Movement_ (New York: Norton,1990), 11-18. See also Wolters, R., _The Burden of Brown: Thirty Years of School Desegregation_ (Knoxville: University of Tennessee Press, 1984), 7.

[158] Slye, R.C., "Community Institution Building: A Response to the Limits of Litigation in Addressing the Problem of Homelessness", _Villanova Law Review_, Volume 36, 1035, 1054 (1991).

[159] See Freeman, A., "Legitimizing Racial Discrimination through Antidiscrimination Law: A critical Review of Supreme Court Doctrine", _Minnesota Law Review_, Volume 62, 1049 (1978).

expectations for redistribution. A successful litigation creates legal rights and these connote entitlement, carrying with it the possibility of converting perceptions of deprivation rooted in self-doubt and fatalism to ones predicated on governmental or systemic inadequacy and indebtedness. Whether or not litigants actually are able to realize their rights through litigation is less important than the sense of power which their legal confrontation with the source of their deprivation imbues in them. Turning to the courts may mark an end of the sublimation of grievances and the beginning of assertiveness.

Conscious of the constraints which political, economic and social contexts impose on the realization of rights, the progressive lawyers' strategy must not be limited to winning cases as such, but must focus more on raising the consciousness of the poor about "the way law and its functionaries have helped create a hegemony by which the inequality in (the) polity is made to look natural".[160] It is impractical to avoid the courts; the choice is not between law and no law, because there is no "outside" from which to engage in transformative struggle. All struggle is already situated within the structures and institutions that must be transformed. But emphasis must shift from an exclusive appeal

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[160] Glasbeek, H., supra, note 67, 411.

to rights because it allows the State to define the terms of the struggle by reinforcing the belief that the source of power is the State rather than the people. Moreover, a fixation on the acquisition of legal rights might scuttle the development of popular movements as the granting of new rights to groups and individuals often ultimately renders the winners of rights liable to co-optation and their demands to deradicalization through doctrinal manipulation.

Progressive lawyers might begin to build a sense of personal and political power by, first, destroying the artificial inhibition which society places on the development of a genuine relationship of mutual respect and equality between the lawyer and her client. They might begin by working closely with the client to explore all the options available in a given case. One approach may generate greater political consciousness than another. In a landlord-tenant case, for example, it might be more politically effective for tenants to collectively bargain with big landlords or to obstruct the processing of evictions through local courts than to press for law reform to grant more tenant rights. Secondly, they should always seek to bring out clearly the socio-economic and political foundations of legal conflicts by breaking out of the limited characterization of these disputes imposed by legal ideology. Courts regularly aim to influence mass consciousness through the rhetoric of their opinions.

Progressive lawyers should seek to contest the judicial world-view in public fora and wherever else the opportunities for contestation exist. Thirdly, they must seek to demystify the authority of the State as symbolized in laws and other institutions of power. A meaningful step in this direction could be the sharing of legal knowledge. Experience tends to support the view that the generation of legal knowledge in communities often triggers processes that lead to self-help. One account of the impact of such knowledge on landless rural workers in Asia is illustrative of this tendency:[161]

> As these people engaged in social analysis and investigation, they progressively acquired greater knowledge of their legal rights and thereby the perception of deprivation from them. Sharing this perception among themselves stimulated the people into action - transforming a state of alienation rooted in ignorance, first into awareness that the power was theirs. . . and then into an act of exercising that power. Law and legal knowledge which they acquired, thus constituted strategic elements of conscientization and mobilization of the people. This gave them concrete issues around which participatory, collective activity could be focused.

4.1.2. ADVOCACY

Advocacy presents another opportunity for progressive lawyers to put their leadership role in society in the service of social change. In the Third World, the effort

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[161] Rahman, A. Md., "The Roles and Significance of Participatory Organizations of the Rural Poor in Alternative Strategies of Rural Development: Theory and Experience - An Overview", Third World Legal Studies 1, 13 (1987).

of progressive lawyers has been most visible in this regard. They have documented official excesses, led protests and demonstrations, and engaged in other forms of campaigns aimed at exposing social injustice. All of these are helpful in the task of political mobilization. However, much remains to be done in the way of contesting or interrogating the legal process and the esoteric wisdom by which it is operated. The courts, the law, and the entire paraphernalia of the modern justice system play a significant role in the political denial and concealment of injustice, and, for that reason, the impoverishment of the people. Helping to focus the spotlight on the limitations of legal wisdom and its contextual absurdity may or may not move the system into making amends, but to the poor the realization that this wisdom is not unassailable can help the process of empowerment.

Take, for example, the uninterrogated exclusion of social and economic rights from justiciability under most constitutions in the Third World. While civil and political rights are frequently entrenched and made judicially enforceable under these constitutions, social and economic rights are invariably articulated only in terms of objectives to be pursued by the State. Citizens have no enforceable social and economic rights, and the State is put under no obligation to fulfil these rights in any particular manner or within any defined parameters. Civil and political rights are

obviously crucial to human development, but in the context of widespread poverty - where hundreds of millions remain illiterate and unable to articulate their views, where millions more are homeless, hungry and barely clothed, where children are frighteningly malnourished, where unemployment is an intractable menace - under these conditions, the prioritization of these rights over social and economic rights is certainly questionable. The travesty of such prioritization is all the more eggregious when it is considered that, as we pointed out earlier, the difficulty with regard to meeting these basic needs of the population in the Third World lies not so much in lack of resources as in the lack of rationality in the allocation of available resources. A quick look at budgetary allocations for armaments across the Third World would bear out this point clearly.[162] To this can be added the colossal amounts of national wealth that is routinely stolen by government and public officials, or lost through sheer mismanagement.

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[162] See UNDP, <u>Human Development Report 1997</u> (New York, Oxford University Press, 1997), 101-103: in 1995, South Asia, one of the poorest regions of the world, spent $15 billion on armaments, more than what the UN estimated it would cost annually to achieve basic health and nutrition worldwide; Sub-Saharan Africa, perhaps the poorest of the poor, spent $8 billion, enough to provide all of the third World with universal access to safe water and sanitation for one year; East Asia's expenditure of $15 billion was roughly fifteen times the amount required annually to provide free primary education throughout the Third World.

Civil and political rights as well as social and economic rights are interdependent; one cannot be fully respected or realized without the other. Similarly, the violation of one invariably involves the violation of the other. This symbiotic relationship needs to be constantly emphasized through day-to-day work by progressive lawyers in the Third World. Judges are not all unsympathetic to progressive causes. Indeed, some of the most judicially creative supporters of progressive causes in the Third World have been judges. Justice P.N. Bhagwati of India and Justice Akinola Aguda of Nigeria stand out as shining examples. Once the courts affirm the interdependence of these rights, the burden of explaining the discrepancy between promise and reality would shift to the State. This situation puts the poor in a position of power, to question the action or inaction of the State, and to put the State on the defensive.

An illustration of how lawyers may approach their work in this regard is provided by some innovative decisions recently handed down by the Indian courts. Article 37 of the Indian Constitution states that the Directive Principles of State Policy are non-enforceable in court. However, entrenched constitutional guarantees (civil and political rights), referred to as Fundamental Rights, are judicially enforceable under the constitution. The Indian courts have attempted, through a long line of cases, to give equal regard to both

types of rights by interpreting Fundamental Rights in light of the Directive Principles. For example, Article 21 of the Constitution guarantees the right to life. In <u>Frances Mullin v. Union Territory of New Delhi</u>,[163] a British national who was arrested on smuggling charges was denied full access to a lawyer and to her family. Defendants argued that a right to counsel was not a fundamental right, but court held that the right to life includes a right to counsel, and to consultations with friends and family. The court was of the opinion that the right to life was the "ark of all rights", which must be interpreted progressively and expansively, rather than be allowed to become "atrophied or fossilized."[164] The court's view is instructive:[165]

> [T]he right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. . . Every act which offends against or impairs human dignity would constitute deprivation <u>pro tanto</u> of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. (emphasis original).

Another case illustrative of this approach is

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[163] [1981] 2 S.C.R. 516 (India).

[164] ibid., 528.

[165] ibid, 529.

Bandhua Mukti Morcha v. India.[166] In this case, a letter form

a social action group (the Bonded Labour Liberation Front)

moved the court to consider the working conditions of quarry

workers. The allegation was that the constitutional right to

life was being violated by the lack of enforcement of certain

social welfare and labour statutes at various levels of

government. Again, the court read and interpreted the

Directive Principles in tandem with Fundamental Rights. The

court began by considering the context of the motion - the

lived experiences of bonded labourers. It observed that "

[Bonded labourers] are non-beings, exiles of civilization,

living a life worse than that of animals. . . Not having any

choice, they are driven by poverty and hunger into a life of

bondage, a dark bottomless pit from which, in a cruel

exploitative society, they cannot hope to be rescued."[167] The

court cited Frances Mullin with approval, and held that the

right to live with human dignity "derives its life from the

Directive Principles."[168]

Since the Directive Principles were, however, not

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[166] [1984] 2 S.C.R. 67 (India). See Note, "Application of the
Rule of Law: Bandhua Mukti Morcha (Bonded Labour
Liberation Front) v. Union of India and Others",
International Commission of Jurists Review, Volume 36,
69 (1986).

[167] Bandhua Mukti Morcha, ibid., 91.

[168] ibid, 103.

enforceable in a court of law, the court could not compel the State to make provision by statutory enactment to ensure that the basic needs embodied in the Directives were provided or not threatened. But the State had already enacted legislation providing for workers' welfare, so the court declared that under those circumstances "the State can certainly be obligated to ensure observance of (the) legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21. . . "[169] By making legislative enactment its baseline for declaring the State obligated to meet its commitments, the court was trying to avoid charges of usurpation of legislative and executive powers. However, the importance of the court's declaration from the viewpoint of mobilization cannot be underestimated. The order handed down, in the court's view, was meant to give the government the opportunity "to examine whether the poor and the down-trodden are getting their social and economic entitlements."[170] It was, nevertheless, an implicit judgement that the State was not doing enough to secure conditions of social justice.

Arguments have been advanced against the

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[169] ibid.

[170] ibid., 102.

institutional competence of the judiciary to engage in this form of judicial review which aims to resolve fundamental moral issues in national politics. Alexander Bickel[171] refers to judicial review as a "counter-majoritarian force" which requires justification in a system of government based on the consent of the governed. He argues that the exercise of enormous powers of judicial review by courts either to strike down laws passed by duly elected representatives of the people or to require them to pass certain laws wrests power from the hands of the many and places it in the hands of a few unelected persons. "If the judges exercise a monopoly over constitutional decisionmaking", writes Paul Brest,[172] "then other citizens and their representatives are excluded in what are among the polity's most fundamental decisions." In answer, it ought to be appreciated that democracy is not synonymous with simple majoritarianism. Any system of government which lays claim to democratic governance ought to respect the views and interests of those who are not adequately represented in the democratic process. From this perspective, judicial limitation on majoritarian power does

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[171] Bickel, supra, note 116, 16-23. But see also Ackerman, B., "The Storrs Lectures: Discovering the Constitution", Yale Law Journal, Volume 93, 1013 (1984).

[172] Brest, P., Processes of Constitutional Decisionmaking: Cases and Materials (Toronto: Little, Brown, 1983), 181-2.

not threaten, but strengthens democracy, by ensuring that underrepresented minorities receive equal respect and concern.

In the Third World, where the numerical majority is overwhelmingly underrepresented in the political process, the argument against judicial review is particularly weak. If the poor had any influence in the political process, social and economic rights would probably have been entrenched in most constitutions in the Third World, for the reason that these rights are, just like civil and political rights, directly and immediately relevant to their circumstances. Unfortunately, however, those who claim to represent the poor fail to consider that economic and social rights are as important as civil and political rights.[173] Under the circumstances, the courts fulfil a great need if they employ the power of judicial review to goad governments toward greater concern for

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[173] For example, the Constitution Drafting Committee, whose recommendations provided the basis for the Nigerian Constitution (1979), took the following position: "All fundamental rights (i.e. civil and political rights) are in the final analysis rights which impose limitations on the executive government and are accordingly justiciable. By contrast economic and social rights are different. They do not impose any limitations on governmental powers. They impose obligations of a kind which are not justiciable. To insist that the right to freedom of expression is the same kind of "right" as the "right" to free medical facilities and can be treated alike in a constitutional document is to the majority of us basically unsound. . . ": see Report of The Constitution Drafting Committee Volume 1 (Lagos: Government Printer, 1976).

the poor.

Another opportunity for effective progressive advocacy might lie in the interrogation of the processes of court. After all, if the law is a terrain of struggle, it follows that progressive lawyers must seek to break down the barriers to popular participation at the curial site of this struggle. The aim would be to democratize this site as much as possible. One barrier that needs to be assailed is the rule on standing. Strict rules regarding standing to bring a case before the court excludes persons or groups who may not be immediately connected to a dispute but whose interests are generally implicated and may be impacted by the outcome of judicial decision. For example, an individual claim to collective goods, such as clean potable water or electricity, which is either lacking or inadequate due to government action or inaction, is actually a claim on behalf of many in his neighbourhood or city or country who suffer from the same governmental irresponsibility or inadequacy; the outcome of such a claim would affect all who are similarly distressed as the claimant.

Most social and economic rights litigation would involve this element of broad significance beyond the immediate dispute. Relaxation of standing and intervention rules would minimize exclusion by allowing various shades of opinion to be fed into judicial interpretation of

constitutional provisions. This can be accomplished through the bringing of public interest actions to court as class actions. Class actions are an important tool of mobilization because they can empower claimants through their association with others in the same struggle and the contextualization of their collective struggle within the larger narrative of systemic deprivation. The relative freedom of judges in public law adjudication to be creative and the wide range of reliefs available recommend class actions over the traditional model of litigation in the kinds of situation described above.[174]

Making courts more accessible might also involve substantial modification or informalization of the procedural rules that exclude the poor. The judicial creativity which judges of the Supreme Court of India have shown by allowing what has been described as "Social Action Litigation"[175] is worth emulating in other parts of the Third World. Anchored on the epistolary jurisdiction of the court, Indian judges have substantially informalized procedural rules by accepting written communications, newspaper or other investigative reportage on abuses or violations of human rights and

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[174] See Chayes, A., "The Role of the Judge in Public Law Litigation", Harvard Law Review, Volume 89, 1281, 1282-84 (1976).

[175] See Baxi, U., "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", Third World Legal Studies, 107 (1985).

converting these into writs on behalf of those who, although clearly wronged, lacked the articulacy or the resources to express their claims in the judicial language.

The question of who becomes a judge and who selects judges is also closely related to the possibilities suggested above. If the judicial process would be shorn of most of its elitist cast, then judges ought to be selected by individuals and groups drawn from all segments of society: politicians, farmers, men, women, corporate lawyers, public interest lawyers, human rights activists, traders, bankers, academics, etc. At present, most judges in the Third World are appointed by fellow lawyers. The task of constitutional interpretation, especially in conditions of mass deprivation, is too important to be left to lawyers alone. Progressive energies must be directed at the possibility of appointing nonlawyers to serve, at least in advisory capacity, on the judiciary.

4.1.3. DELIVERY OF LEGAL SERVICES

Effective political action does not depend only on political activation. The consciousness of deprivation and powerlessness which is borne of activation needs to be converted to political demands such that they become political issues. This conversion process can only be achieved through political organization. Here again, the lawyer's technical skills and organizational ability can be of great, though

hardly decisive, use in the task of mobilization.

The establishment of a collective political identity would include the drafting of a charter and other details regarding the acquisition of legal status. Contractual arrangements would also need to be made on administrative matters. In all of this, the lawyer's technical skill would be needed to lend an air of legitimacy and a sense of importance to the effort of otherwise politically inexperienced group of citizens. But the provision of technical assistance is only a part of the lawyer's relevance in political organization. One of the most important things that the poor lack is local institutions that provide them with opportunities for participation, control and mutual benefit. Drawing on their counselling and advising skills, lawyers can help build community institutions that empower the poor both to identify and to address social problems without continued dependence on outside help.

The approach to mobilization here is different from that of traditional advocacy. Traditional advocacy focuses on the breakdown of human relations and on litigation. Delivery of legal services, on the other hand, focuses on helping communities to structure and maintain mutually beneficial institutions within which they can exercise greater control over their own lives. An institutional possibility that would meet this need, for example, is the Community Development

Association (CDA). Many rural communities in the Third World have collectively striven through CDAs, as a response to government neglect, to provide for themselves social amenities such as schools, hospitals, and water systems. These communities learn a great deal about independence, co-operation and participation through their control of the funding and management of these amenities.

Legal aid to help communities identify government policies and practices which harm these communities presents another organizational opportunity for the progressive lawyer. To the extent that national constitutions speak of rights, it may serve a useful organizational purpose to help communities identify their rights and how those rights might be threatened, for example, by the citing of new development projects in the communities. Identification of rights and the shortfall between promise and reality might point to the existence of concrete issues around which the communities would organize for collective effort.

4.2. THE FOCUS OF MOBILIZATION - DEMOCRATIZATION OF DEVELOPMENT PROCESSES, POLICY-MAKING AND ADMINISTRATION

A successful legal campaign of political mobilization built on the right to development will set the scene for an increasing interrogation of the status quo by the poor. The purpose of mobilization is to help the poor to develop a sophisticated understanding of their condition: what

it means to be poor, how poverty arises, and what it requires to at least begin to address it. If the prevalence of poverty is evidence that the interests of the poor have been ignored in development planning and administration, the realization of the right to development would require the creation of new processes and institutions in place of the old. This implies a more general progressive struggle by the poor to influence the direction of development activity. The following sets out the focus of that struggle.

(a) Access to basic resources

The starting point of effort to reverse conditions of poverty is the guarantee of access to basic needs. Food, health, shelter and economic security are basic to human life, and they ought to be the centrepiece of human development. Development planning in the Third World not only ignores this fact, but often puts access to these basic resources at risk. Development programmes must be oriented towards the provision of access to these resources. At the minimum, development activity must not be allowed to interfere with the sources of a people's sustenance, including their habitat, their land, social and cultural structures. Forced displacement to provide land for development projects destroys communities, their cultures, and their entire subsistence structures. The citing of projects must be preceded by a human rights and

environmental impact assessments. Where the results indicate significant risks to the livelihood and mainstays of communities, proposed projects must be stopped.

(b) Equity in the distribution of amenities

Third World governments must be obligated to ensure equity in the distribution of amenities, such as schools, hospitals, electricity, and pipe-borne water. The effect of bias against rural areas in development planning is well documented. This will not change unless the poor reject irrationality in government decision-making and demand a change of attitude. They must engage their governments in vigorous debate about budgetary priorities. Budgetary allocations must be judged, among other parameters, by how much they potentially penetrate the rural areas where a majority of the poor live.

(c) Inclusivity of development programmes

Poverty cannot be successfully tackled if development programmes continue to discriminate against sections of society, such as women and members of castes. Ironically, these groups are some of the most productive in the Third World. In Africa, most accounts put women's share of food production at between 70 and 85%, and an even higher

share of marketing.[176] In addition, women-headed households are becoming the norm in some parts of the continent.[177] Yet, archaic and discriminatory laws deprive women of access to productive resources, such as land and credit.

One requirement which needs to be insisted upon in all development programmes, therefore, is inclusivity. The cardinal question, in all cases, must be whether the programmes respect all human rights. Discrimination under any disguise offends many of the human rights currently guaranteed in international law. Many national constitutions also prohibit discrimination on the grounds of social standing, sex or the circumstances of one's birth.

(d) Participation of communities in the design, management, monitoring and control of development projects

The participation of groups and communities must be built into development programmes. A bottom-up, as opposed to a top-down, strategy must become the central requirement of

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[176] See McCarney, R.A., "Household Food Security and the Role of Women in Africa", Third World Legal Studies, 157 (1991); the special edition of Canadian Journal of African Studies, Volume 22, (1988); and Silberschmidt, M., "Have Men Become the Weaker Sex? Changing Life Situations in Kisii District, Kenya", The Journal of Modern African Studies, Volume 30, No.2, 237 (1988).

[177] See Kimble, H., "Agricultural Transformation in Namibia after Apartheid", in Nett, B., et al., eds., Agricultural transformation and Social Change in Africa (Frankfurt am Main: Peter Lang, 1992), 79.

development planning. This means that target communities must be consulted for their input in the planning of development projects. In particular, these communities must be allowed to understand and identify the social and economic impacts of proposed development activities, and to assert or demand that their interests be respected through those activities. To do this effectively, target communities must: i. receive timely notification of measures proposed or likely to be undertaken in connection with a development project;

ii. receive all relevant information necessary to make an informed assessment of the impact of the project on the social, economic, environmental and cultural life of the community;

iii. be allowed to assemble, consult, debate and discuss among themselves regarding the desirability of the project;

iv. be allowed to seek assistance -technical, financial, organizational or legal- from other communities and organizations in the discharge of their participatory responsibilities;

v. have access to development officials for continual consultation during the progress of the project.

(e) Special procedures for complaint about, and remedy of, development wrongs

Development wrongs are usually wide-ranging in their

enormity. It is impossible to evaluate some of them in monetary terms. The loss of ancestral shrines, of cultural identity, and of natural or environmental support systems which often make a community distinctive to its members, cannot be adequately compensated for with money, or with the provision of another "artificial" community. But, as much as possible, compensation must be provided through procedures that are simple, non-curial, and fair. The adversary procedures which have characterized the process of compensation perpetuates unfairness by pitting poor rural dwellers against the vast resources of governments and development agencies. The need for a change of process can be met with the creation of national development commisions, composed of members drawn from government, private organizations and local communities, which would hear complaints from affected communities in an informal setting, make a factual assessment of the alleged wrong, and compensate or deny compensation where no damage is found. The broad range of remedies available to such a commission should enable it to offer alternatives to monetary compensation that are adjudged to be more suitable in particular situations.

(f) Enlargement of the political space

"Political space" refers to the arena in which non-state actors may undertake initiatives independently of the

State. Today, many Non-Governmental Organizations (NGOs) have sprung up both within the Third World and on the international scene with the avowed purpose of helping to combat poverty. They are mostly composed of volunteers. Some NGOs are humanitarian in outlook, delivering only relief and welfare services to alleviate immediate suffering; some engage in community development activities as a way of building local capacity for self-help; yet others help to articulate a broad social vision, facilitating broad-based social movements and providing alternative models of institutions and policies. All of these are relevant to an effective challenge of the conditions of poverty that currently obtain in the Third World. However, NGOs have no independent sovereign framework of their own; they act within the boundaries, and at the pleasure, of foreign governments. Often, the transformative agenda of NGOs brings them into direct conflict with governments of the Third World.

Governments regularly seek to constrict the political space for NGOs and other public interest groups through restrictive legislation, harrassment, and sometimes, co-optation. In each case, the poor are denied an opportunity to benefit from the innovativeness which NGOs bring to bear on the issues which they (the poor) care most about. Generally, NGOs are built around a compact and coherent consensus of values. They represent at the micro-level what political

parties are at the macro-level. NGOs thus have a smaller constituency, compared to governments whose function depends on more broadly-based consensus forged out of negotiation among a plurality of stake-holders and interest groups. Consequently, NGOs - especially those who are engaged in institutional transformation - have a unique ability to define their positions with clarity, to engage in experimentation of the kind that governments would consider expensive and unwieldy, and to press for innovative changes that would often lie beyond the discursive purview of the political mainstream. Governments, if they ever consider institutional change, prefer incremental changes, as opposed to the radical changes often advocated by NGOs.

Given the radical transformation of institutions envisioned under the right to development, NGOs are indispensable as animaters of change. Governments must be held to their commitments under the right to development to yield political space for the participation of non-state actors in the development enterprise of the Twenty-First century. That commitment means that governments must:

- not interfere with the rights of the poor collectively to enter into alliances domestically and across international borders with NGOs and groups committed to the alleviation of poverty;

- repeal all legislation, and refrain from making new ones,

restrictive of the political space;

- create enabling policy environments for NGOs to carry out activities that would help the poor to realize their right to development.

4.3. THE ROLE OF THE INTERNATIONAL COMMUNITY

The intervention of the international community in goading Third World governments toward the new vision of development espoused in the right to development is mandated by the Declaration. States have a duty, individually and collectively, "to formulate international development policies with a view to facilitating the full realization of the right to development" (Article 4(1)), and to promote, encourage and strengthen "universal respect for all human rights and fundamental freedoms for all" without discrimination (Article 6(1)).

It is clear from what is required to democratize the development process in the Third World that it effectively pits the poor against the State. Even assuming a mobilized population, the resistance of ruling elites through the State will be overwhelming. Mass mobilzation will achieve only limited success in the Third World unless it is supported by forces external to the State. The international community - the United Nations, International Development Agencies, International Non-Governmental Organizations etc. - can

support the domestic pressure for democratization in at least three ways:

i. Establishment of institutions to measure progressive realization of the right to development

The bilateral and multilateral aid which the international community gives to the Third World countries is ostensibly to help these countries develop their potentials and alleviate poverty. In many cases, this aim is perverted by the recipients and aid only helps to prop up authoritarian regimes. The international community should consider establishing institutions to periodically measure progressive realization of the right to development and tie further grants of aid to the satisfactory performance of individual Third World countries on certain specified parameters. Such parameters may include those currently being used to evaluate human development by the United nations Development Programme (UNDP): education, shelter, nutrition, sanitary and health facilities, infant mortality, life expectancy, women empowerment, etc. Countries that fail to perform satisfactorily, given the amount of resources at their disposal, may be declared to be in wilful violation of human rights and refused further assistance until satisfactory progress is shown.

ii. Genuine political conditionality for all international aid

The IMF and the World Bank exert considerable influence in the economic destiny of Third World countries. They have either granted loans directly to these countries or granted them facilities by which they could borrow from commercial lenders. It is well known today that some of these loans, meant to shore up sagging economies, are often diverted by corrupt officials to private use, or used for other purposes unconnected with development, such as the procurement of armament. The lending institutions can aid the process of democratization of the development process and curb irrationality and lack of transparency by insisting on a political auditing of all loans. In particular, they can insist on a satisfactory showing of enhancement of the human condition by borrowers from the Third World as condition for further loans.

The World Bank is also a major collaborator in development projects with Third World governments. Such collaboration can be made subject to political conditionality as well. The Bank should independently undertake prior assessment of the potential human rights impact of proposed projects, and reserve the right to withdraw its assistance where the projects would adversely affect the welfare of the target communities.

In opposition to these seemingly politically intrusive measures, arguments might be advanced that the sovereignty of Third World countries might be compromised. On the other hand, it is possible to argue that the poverty of one billion people and its implications for the stability and survival of planet earth is not an entirely domestic issue for any one country. On the contrary, poverty and its implications for global security is an issue of transnational concern. Secondly, the only sovereignty worthy of international respect is that of the people; States enjoy the rights of sovereignty only by surrogacy. States that do not respect the human rights of their population do not deserve to be recognized as legitimate surrogates of their population.[178] International law is moving away from the unquestioned ascription of sovereignty to States regardless of how States relate to their citizens.[179]

iii. Public education

The United Nations, in collaboration with IDAs and

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[178] See, for the development of this argument, Reisman, W.M., "Sovereignty and Human Rights in Contemporary International Law", The American Journal of International Law, Volume 84, 866-876 (1990): Those who continue to trumpet terms like "sovereignty" without relating them to (the) human rights conditions within (the) States . . . undermine human rights." (876).

[179] See Sohn, L.B., "The New International Law: Protection of the Rights of Individuals rather than States", The American University Law Review, Volume 32(1), 1 (1982).

States, should consider the mounting of massive educational drives to conscientize the populace of the Third World on issues of poverty and social justice. Government officials, politicians, soldiers, merchants, and professionals from all walks of life need to be educated on the consequences of escalating poverty. There is no doubt now that the current neglect of the welfare of over two billion poverty-stricken members of the human race portends danger for humankind in the long run. Communal clashes over shrinking farm and graze lands are becoming quite frequent in some countries. These clashes have occasionally spilled over to neighbouring countries, escalating into full-scale wars. In others, the flagrant display of affluence by the rich amid widespread deprivation has elicited desperate criminal conduct from the deprived especially in the cities. The destruction of the eco-system by economic explorers proceeds apace, with the connivance of governments.

The untoward effects of these economically-induced social problems are beginning to be felt internationally. Child labour, prostitution, mass displacement and migration, famine, continual depletion of the ozone layer, global warming, the transborder spread of diseases – all of these are beginning to task international resources. The situation can only get worse with time.

The aim of public education is to build political

will for poverty eradication and thus to reduce resistance from vested interests to programmes geared to a broadening of opportunity. A public campaign of this nature must emphasize the social and material benefits which even the privileged stand to gain from the adoption of a people-centred development strategy.

5. CONCLUSION

This chapter explored the constraints and prospects for the realization of the right to development. As a proposed solution to the problem of poverty in the Third World, the "rights" approach which the Declaration on the right to development prescribes is potentially susceptible to the dangers associated with the politics of rights. Advertized as a potent harbinger of social change, rights often fail to deliver on their promise. The politics of rights accounts for the discrepancies between the promise of rights and its actual outcome in the struggle for social change. There is little evidence to suggest that history will not repeat itself in the struggle for social justice in the Third World.

However, the normative character of rights makes them a useful tool for social mobilization. The right to development is significant as a legal affirmation by Third World countries of the gravity of the poverty issue, an acknowledgement of the error of their previous approaches to

the issue, and of the need for change in the pattern of State behaviour which immiserates the majority of Third World citizens. This is no guarantee, however, that the required changes would be attainable through a litigation of the right to development by the poor. The court is part of the political system, and its limited mandate and structural limitations render it an unsuitable forum for the pressing of redistributive goals. But the right can be used as a leverage to mobilize the poor and to legitimize their demands for substantive changes in the conceptualization and practice of development. The ultimate goal of the struggle against poverty is to force a reorientation in development planning and administration from the development of things to the enhancement of human welfare. This involves the creation of new institutions, standards and processes to humanize and democratize the development process.

CHAPTER SEVEN

CONCLUSION

1. INTRODUCTION

The objective of this study was to examine the domestic dimension of the right to development in international law. In the preceding chapters, several issues relating to the nature of the right to development, its legal status, its relationship to culture, and its realization were considered. The aim of this chapter is not to recapitulate all the conclusions reached in those chapters, but to draw the various threads in the analysis together by way of concluding reflections on the domestic dimension of the right to development.

2. THE PROMOTION OF HUMAN RIGHTS THROUGH DEVELOPMENT

Human rights are those rights which are necessary to a life of dignity; by international consensus as expressed in all human rights instruments, human beings are entitled to these rights by virtue only of their humanity. The Universal Declaration of Human Rights (UDHR) refers to human rights as universal, held by all human beings by virtue of their humanity, irrespective of their status in life, equally and

inalienably. The philosophical controversy over the origins and nature of human rights notwithstanding, these rights are recognized in international law and in most national constiututions. However, formal recognition does not always mean effective guarantee in practice.

In the Third World, human rights often become the casualty when States pursue what they call "development". Ironically, "development", which aims to tackle poverty becomes in practice the harbinger of the worst forms of poverty. The interdependence and indivisibility of all human rights - civil and political on the one hand, and social, economic and cultural on the other - is a complex and interacting process, and in the context of development often produces conflict between competing objectives. The major difficulty in the Third World regarding respect for human rights arises, however, from the tendency to analyze conflict situations in terms of a choice between one extreme and another, rather than seeking a balance between the two. Thus, policy prescriptions often assume the necessity to abandon human rights objectives in order to realize what are sometimes broadly defined as the objectives of development. For example, it is sometimes argued, in defence sub-human labour conditions, that adherence to international labour standards are a luxury which a country suffering from unemployment and under-employment cannot afford. But, while it may be

impractical or even inappropriate in some cases to insist that all standards must be promoted (for example holidays with pay), it does not follow that all the other basic human rights standards relating to working conditions are a luxury over which the need for employment must take precedence.

This form of reasoning provides a ready excuse for the perpetuation of situations involving forced labour, or child labour, and other similar practices which ultimately entrench feelings of exploitation and powerlessness. The appropriate response requires a balancing of the different objectives being sought - in this particular example, employment and respect for human rights.

A development strategy which is based on repression and the denial of either civil and political rights or economic social and cultural rights, or both sets of rights, negates the very concept of development. This proposition is an essential component of the right to development. For Third World countries, the practical implication of this proposition is: how does a country struggling to escape the stranglehold of poverty simultaneously promote human rights and development? Might it not be more sensible to attain development first and then respect human rights later? Various arguments are often invoked by Third World governments to

justify the prioritization of development over human rights.[1]

First, it is argued that democracy is inimical to development aspirations of poor countries as it brings large masses of people into the political process, unnecessarily raising their expectations and instigating unrest; what is required to facilitate development on the other hand is a strong political order, not the centrifugal forces which democracy unleashes. The importance of order, discipline and stability cannot be generally doubted in the context of development. However, from the perspective of the right to development, this argument loses credibility when order, discipline and stability are raised to the level of values to be pursued at the cost of human rights. When these elements become values, all too often they move from being a legitimate approach to the implementation of decisions arising out of participatory and democratic processes to an excuse for insisting on conformance to orders imposed from above regardless of the popular legitimacy of such orders. This is a position that puts beyond questioning the legitimacy of the

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[1] See the following: Huntington, S.P., Political Order in Changing Societies (New Haven: Yale University Press, 1968); Hewlett, S.A., "Human Rights and Economic Realities: Trade-offs in Historical Perspective", Political Science Quarterly, Volume 94, No.3, 450, 454 (1979); Pye, L.W., Politics, Personality and Nation-Building (New Haven: Yale University Press, 1962); and Newberg, P., ed., The Politics of Human Rights (New York: New York University Press, 1980).

means which governments use to maintain power. "The concept of political order is not neutral:", writes Kesselman,[2] "it places the burden of disorder on subordinates who challenge elites."

In practice, the concept of political order, and the goals associated with it, is used to violate the right to freedom of expression. As one commentator notes, "without freedom to dissent responsibly, the creative developmental impulses of a society disappear and the struggle for the other human rights becomes impossible. If, then, the limits to the right to dissent are wrongly drawn, fear, hatred, violence and cruelty (whether related to class, race or religion) are bound to take over."[3] Indeed, those who advocate stability without regard for human rights violations fail to appreciate the possibility for greater cohesion and stability which more naturally inures in an open political process especially in societies that are diverse and plural in terms of allegiance and identity. The right to development demands a balanced approach to development which takes full account of human rights as well as the imperatives of stability, order and discipline in the development process.

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[2] Kesselman, M., "Order or Movement? The Literature of Political Development as Ideology", World Politics, Volume 26, No.1, 143 (1973).

[3] Soejatmoko, P., "Freedom and Development", Development Forum, Volume VIII, No.7, 1, 4 (1980).

Another argument which is closely related to the one above is that nation-building demands that democracy or respect for human rights be kept in abeyance until nations have consolidated their bases, as pluralism is apt to tear apart rather than coalesce differing interests toward a common goal. The challenge of nation-building is a pressing one for many a Third World country. Acute poverty, unstable colonial heritage, resource and population pressures, threats to national sovereignty and integrity, frequents attempts at internal subversion - all of these make the challenge particularly stiff for these countries. In many respects, the realization of the right to development depends on the achievement of a secure State and nation. However, the importance of nation-building often provides the excuse for those in power to justify the adoption of repressive policies that are in reality aimed at perpetuating or consolidating their positions rather than nation-building on the bedrock of popular participation and support.

The most popular argument in justification of human rights violations under the guise of development is that existing international norms are culturally or otherwise inappropriate in the Third world. One commentator reviews the fashionable justifications for authoritarianism in Asian countries thus: "One (justification) is that Asian societies are authoritarian and paternalistic and so need governments

that are also authoritarian and paternalistic; that Asia's
hungry masses are too concerned with providing their families
with food, clothing, and shelter, to concern themselves with
civil liberties and political freedoms; that the Asian
conception of freedom differs from that of the West; that, in
short, Asians are not fit for human rights (. . . This) is
racist nonsense. . . Authoritarianism promotes repression, not
development - repression that prevents meaningful change and
preserves the structures of power and privilege."[4] Besides,
the idea of human rights is based on the conviction that all
human beings are endowed with the same capabilities, which
allow them to attain the highest levels of intellectual,
social, economic, cultural and political development. The
differences to be observed in the the achievements of
different peoples can be explained in terms of geographical,
historical, political, economic, social and cultural factors;
they cannot be the excuse for any rank-ordered classification
of nations or peoples from the point of view of their human
values.

Aside from the above political arguments, economic
arguments are also frequently made to show that human rights
cannot be simulataneously promoted with development. One of

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[4] Diokno, J.W., _1978 Sean MacBride Human Rights Lecture_,
International Council of Amnesty International, Cambridge,
21 September, 1978, 9.

the arguments often made in support of giving absolute priority to economic growth is that human rights need to be traded off in the short term for economic growth because "there is likely to be a conflict between rapid growth and an equitable distribution of income; and a poor country anxious to develop would probably be well advised not to worry too much about the distribution of income."[5] Since patterns of income distribution cannot be dissociated from the distribution of social, political and cultural power, such trade-off would be all-encompassing. This argument is flawed in many respects: "[I]t ignores the possibility that high-income groups in underdeveloped countries may indulge in conspicuous consumption rather than save; it neglects the growing importance of corporate savings and public sector savings in modern growth processes; it forgets that private savings may be channelled into Swiss bank accounts rather than domestic investment; and it overlooks the fact that empirical evidence shows no correlation between inequality and high rates of savings and investment in developing countries."[6] While the importance of savings and economic growth in development cannot be doubted, it is not by itself a

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[5] Johnson, H.G., Money, Trade and Economic Growth (London: George Allen and Unwin, 1962), 153.

[6] Hewlett, S.A., The Cruel Dilemmas of Development: Twentieth Century Brazil (New York: Basic Books, 1980), 457.

sufficient argument that human rights cannot be respected simultaneously with economic growth.

Associated closely to the economic argument is the belief that a strong and centralized government with dictatorial powers is better able to embark on rapid economic development and take radical measures aimed at removal of poverty and inequity among the mass of the people. There is no basis in truth for this belief, except the desire on the part of ruling elites to maintain power. Assuming that such a strong government can effectuate the trade-offs alluded to above, that entails a number of value judgments which on empirical grounds are highly questionable. For example: What economic and social needs merit attention and what needs merit neglect? What are the civil and political rights that can be suspended and to what extent can the rest be enjoyed while the suspension lasts? Without political controls on this process, who will decide what the people need and in what order of priority? At what stage will the suspension of rights be terminated and at whose initiative?

The common thread running through these arguments is the tendency to single out particular aspects of the multi-faceted processes of development and to emphasize them at the cost of other equally important aspects. The arguments seek to set up false dichotomies by which allegedly incompatible choices are made to look inevitable: food or freedom,

democracy or development, employment or reasonable working conditions, freedom of speech or economic security, etc. The necessary connection which authoritarian systems in the Third World routinely draw between resolving balance of payment problems, say, and the imposition of torture on the population or the suspension of elections is not obvious; rather it seems to reflect the voluntary preference of specific ruling elites. Moreover, experience has shown that the "temporary" consolidation of inequalities in an effort to promote economic growth represents an enormous obstacle to the possibility of promoting equity at a later stage. Most entrenched elites will invariably resist proposals to alter the status quo in favour of those whose freedoms have been hitherto traded off for economic growth.

Human rights can be promoted through the development process if the priorities are set to produce such a result. Prioritization of objectives to be achieved through development is important in the context of scarcity of resources: more foreign exchange for importing private automobiles or an expanded bus fleet; elaborate government offices or squatter settlement upgrading; a new generation of jet fighters for the air force or a new generation of infants who will live well beyond their fifth birthday. No government can do everything. To govern is to choose. But poverty will persist and grow if the choice too often favours the

peripheral extravagance over the critical need.

It is unfortunately the case that the determination of priorities in the development process has often been dictated by the selfish interests of small and powerful elites rather than by the application of human rights criteria. Thus, poverty and its perpetuation in the Third World have a direct connection with this skewed prioritization of goals in which pro-poor policies occupy the lowest end of the hierarchy, and in which the poor have little or no influence in the process of allocation of resources.

There is no inherent conflict between human rights and development. On the contrary, there is an increasing realization that both development and human rights, through equitable prioritization, can create a synergy of tremendous benefit to social progress. The satisfaction of basic needs, for example, can contribute to economic growth through the enhanced productivity of people who are literate and in good health. Other benefits of respect for human rights in the development process are unquantifiable, but they foster an environment which unleashes, stimulates and channels the enthusiasm, energy and creativity of the masses of the people. The opposite side of the coin of course is the tremendous costs of repression in development. Huge quantities of resources are expended in the unproductive attempt to establish large internal security bureaucracies. Violence

often erupts directly from the stifling of political avenues for ventilation of opposing views. Corruption and mismanagement occur with impunity where there are no political controls on power. The best brains migrate from oppressive environments to freer ones to enhance their chances of putting their creativity to work. All of these are a tremendous cost to development effort.

The central domestic challenge of the right to development in the Third World is how the goals of development can be focused on eradication of poverty, that is, on respect for all human rights. That challenge can only be met through the active participation of the poor in the political process.

3. CULTURE AND HUMAN DEVELOPMENT

The major argument about culture in the context of development is that "Western" moral postulates, such as human rights are inappropriate in Non-Western cultures. In that argument, human rights are presented as "individualistic" ideals that cannot serve the interests of collectivist-oriented societies. The idea of human rights is historically tied to the need for human dignity. The right to development places this need at the centre of all legitimate development activity. If Third World governments seek to ensure human dignity through development, then their rigid opposition to the concept by which the idea is captured in Western societies

is unwarranted. The differences here relate to method of ensuring human dignity, not to the substance of human dignity - on that, there is universal consensus, even though that consensus is rarely reflected in development policies and practice in the Third World. The perceived differences can be reconciled through cultural dialogue.

The more important interface of culture with development in the Third World occurs in relation to the issue of life-styles and consumption. The activities of multinational corporations and the mass communications media have a great influence in shaping the consumption patterns in the Third World, and help to foster an environment in which development strategies and methods which are not necessarily appropriate to meet the genuine needs of the people are adopted. Multinational corporations promote a "business culture", with certain value orientations and an ideal life-style geared to such attitudes, forms of corporate organization, product design and consumption patterns imitative of the rich countries. The compatibility of excessively affluent consumerist lifestyles with efforts to promote balanced and equitable development patterns is questionable at best. Here again, it is a question of balance; the possibility of such a balance in the setting of development patterns is realizable only when development becomes a participatory activity, undertaken in full

partnership with the people whose lives are most negatively impacted by the invasion of alien life-styles.

It has become clear that the consumption habits which prosperity has fostered in the rich nations is unsustainable in the long run. It poses great danger to the survival of the planet and of humankind. The need for development must therefore be balanced against the need for sustainability. Culture and development thus intersect in a more profound way than the current elitist power-driven arguments against "cultural imperialism" reveals.

4. DOMESTIC REALIZATION OF THE RIGHT TO DEVELOPMENT

The ultimate relevance of the right to development will depend on the translation of the right into concrete results within the domestic politics and policies of Third World countries. As a legal device for social change, however, rights are a questionable vehicle for the struggle against poverty. The experience of advanced societies with rights demonstrates that rights often come up considerably short of their promise for social transformation. As an ideal, however, rights cue expectations and are a useful strategy for mobilization. From this perspective, it is impossible to deny the potentially salutary effect of the right to development in the struggle to erect a new structure of accountability, social justice, equity and fairplay in the domestic politics

of Third World countries.

It is a historical fact that rights are never handed to people on a platter. Those who must benefit through the allocatory medium of rights must struggle to win their rights. Third World governments in association with others in the international community have enunciated the right to development as a right of all peoples who are suffering from maldevelopment or oppressive development patterns. This has to be understood as only the beginning of the struggle to realize the promise of the right, not the end of that struggle. For people cannot be developed; they can only be helped to develop themselves. Julius Nyerere[7] put it correctly:

> . . . [W]hile it is possible for an outsider to build a
> man's house, an outsider cannot give the man pride and
> self-confidence in himself as a human being. Those things
> a man has to create in himself by his own actions. He
> develops himself by what he does; he develops himself by
> making his own decisions, by increasing his understanding
> of what he is doing, and why; by increasing his own
> knowledge and ability, and by his own full participation
> - as an equal - in the life of the community he lives in
> . . . Development of a man can, in fact, only be effected
> by that man; development of the people can only be
> effected by the people.

In the struggle to realize the right to development, outsiders, such as NGOs, both local and international, the United Nations, international development agencies, and foreign governments are not the primary forces. The poor

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[7] Nyerere, J., Freedom and Development (London: Oxford University Press, 1973), 60.

themselves are primarily responsible for their own emancipation, and whatever help they may garner in the process of their struggle can only be supplementary to their own drive and persistence to realize their right to development.

5. THE PRESENT INTERNATIONAL CONTEXT OF DEVELOPMENT AND THE PROSPECTS FOR DEVELOPMENT IN THE THIRD WORLD

It is generally agreed among commentators that the struggle against poverty cannot be won if the States of the Third World continue to suffer from foundational weakness. Crucial to strength of these States is the democratization of their domestic political structures and the transformation of their economic bases. However, the international context in which development would be approached in the next millennium threatens to further weaken these States by putting them under increasing pressures. Globalization in all aspects of development threatens to complicate the equation traditionally drawn between domestic policies and development. As has been rightly observed, " [T]he greatest benefits of globalization have been garnered by a fortunate few. A rising tide of wealth is supposed to lift all boats, but some are more seaworthy than others. The yachts and ocean liners are rising in response to new opportunities, but many rafts and rowboats are

taking on water - and some are sinking".[8]

In the poorest countries, there is the real likelihood that it will become increasingly difficult to effect pro-poor policies even if the political will exists, due to increasing rigidities of the international economic order. The global ascendancy of neoliberal economic policies, including multilateral trade frameworks (such as the World Trade Organization (WTO) which exposes the poor countries to ruthless market competition for which they are ill equipped) and the curtailment of aid by the rich nations add desperation to an already gloomy situation. The process of rolling back the State, a central plank of the neo-liberal economic prescription, has left many a poor State in Sub-Saharan Africa too destitute to provide even basic services. This situation puts the legitimacy of these States continually in question. It is a critical dilemma because a strong, proactive, and enabling State is essential to the translation of globalization into poverty reduction. This translation would involve the improvement of governance, the effective management of trade and capital flows, investment in education and social services, the provision of safety nets, and the promotion of small enterprises, and the management of new technology. But weak states would find this challenge

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[8] UNDP, Human Development Report 1997 (New York: Oxford University Press, 1997), 82.

insuperable.

Given the penurious condition of most of the States, it is obvious that in the absence of a sustained international action to support them in several key areas, the dream of poverty eradication would remain just that - a dream. These areas include faster debt reduction (through loan forgiveness and the conversion of loans to grants, perhaps, tied to progress in human development), more aid focused on human development and poverty reduction, and more access for Third World exports.

6. FINAL REMARKS

The intensity of poverty in the Third World is a blight on the otherwise impressive achievements of humankind in the Twentieth century. The denial to more than three-quarters of humankind of the choices and opportunities for living a tolerable life, and the real, but needless, suffering which this represents constitutes poverty into a moral issue. This is so because, given the present state of technological advancement and the size of global wealth, eradicating absolute poverty in the first decades of the coming century is both feasible and affordable. Even though this thesis has focused on the domestic dimension of the poverty issue, the objective ramifications of the issue extend beyond the borders of the Third World. As such, poverty is not just a domestic

issue, but an international one.

In the final analysis, viable solutions to the problem must take account of the multi-dimensional nature of poverty. Within the current global configuration, no single country in the Third World can approach the problem alone. There must be a convergence of domestic and international political will.

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DECLARATION ON THE RIGHT TO DEVELOPMENT**

The General Assembly

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

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

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

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

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

** UNGA Resolution 41/128 of 4 December, 1986, adopted by 146 votes to 1 (US) with 8 abstentions (Denmark, FRG, Finland, Iceland, Israel, Japan, Sweden and UK).

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

Mindful of the obligation of States under the Charter to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

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

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

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

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

Recognizing that the human person is the central subject of

the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

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

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

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

Proclaims the following Declaration on the right to development:

Article 1

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

(2) The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over their natural wealth and resources.

Article 2

(1) The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

(2) All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete

fulfilment of the human being, and should therefore promote and protect an appropriate political, social and economic order for development.

(3) States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

(1) States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

(2) The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

(3) States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should fulfil their rights and duties in such a manner as to promote a new international economic order based on soveregn equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

(1) States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

(2) Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries effective international co-operation is essential in providing these countries with appropriate means to foster their comprehensive development.

Article 5

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

Article 6

(1) All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language and religion.

(2) All human rights and fundamental freedoms are4 indivisble and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

(3) States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights.

Article 7

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

Article 8

(1) States shall undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of

opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

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

Article 9

(1) All the aspects of the right to development set forth in this Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

(2) Nothing in this Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

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