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On the Theory and Practice of the Right to Development

*Arjun Sengupta**¹

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1. This paper is primarily based on the following three reports that the author, as Independent Expert on the Right to Development to the Human Rights Commission in Geneva, submitted to the Commission in 1999, 2000, 2001: First Report, U.N. Doc. E/CN.4/1999/WG.18/2; Second Report, U.N. Doc. E/CN.4/2000/WG.18/CRP.1; Third Report, U.N. Doc. E/CN.4/2001/WG.18/2. The Reports are *available at* <<http://www.unhchr.ch>>. This paper was completed at the François-Xavier Bagnoud (FXB) Center for Health and Human Rights, Harvard School of Public Health, where the author is a Senior Visiting Fellow. He is grateful to Professor Stephen Marks of Harvard, Professor S.R. Osmani of WIDER, Mr. Bertie Ramcharan of the Human Rights Commission, Ms. Rita Nangia of the Asian Development Bank, and Mr. Clarence Dias of New York for their critical comments and discussion on the author's approach. He is also greatly indebted to Ms. Rachel Hammonds for research assistance.

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I. THE RIGHT TO DEVELOPMENT IN THEORY

A. Definition and Content of the Right to Development

The adoption by the United Nations in 1986 of the Declaration on the Right to Development² (“the Declaration”) was the culmination of a long process of international campaigning for human rights. From the beginning, the idea of human rights as an international concern was perceived as an integrated whole consisting of all civil, political, economic, social and cultural rights. It was first promoted in the Philadelphia Declaration of the International Labor Conference in 1944, and was then embodied in the Charter of the United Nations³ (“the Charter”), in 1945. After that, the Universal Declaration of Human Rights of 1948⁴ (“the Universal Declaration”) clearly recognized the unity of all rights and elaborated the theme that everybody was equally entitled “to all the rights and freedom set forth in that Declaration” (Articles 1 to 21 covering civil and political rights, and Articles 22 to 28 covering economic, social and cultural rights). Later, in the preamble to each of the International Covenants on Human Rights, this principle was reiterated as, “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved

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2. The Declaration on the Right to Development, *adopted* 4 Dec. 1986, G.A. Res. 41/128 U.N. GAOR, 41st Sess., at 3, Annex, U.N. Doc. A/Res/41/128 Annex (1987) [hereinafter Declaration on the Right to Development].
 3. U.N. CHARTER, *signed* 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* 24 Oct. 1945).
 4. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter Universal Declaration].

if conditions are created where everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”⁵ The integral nature of all these rights was thus recognized as the guiding principle of the exercise of human rights.

After the adoption of the Universal Declaration, one overall single covenant was to be negotiated to include all those rights identified in the Universal Declaration, giving them the sanction of an international treaty. However, as the years passed, the post-war solidarity gave way to the Cold War and the countries were divided in their support of the different rights. So, instead of one unified covenant, those rights were codified in 1966 in two international covenants—one on civil and political rights, the other on economic, social and cultural rights. In spite of the integrity of these rights, the real politick of international relations at that time dictated a split in the treaty obligations of the different states in implementing these rights.

However, much of the international community was not satisfied with this split in the commitment to human rights and the adoption of these two separate instruments. As early as 1968, the Proclamation of Tehran stated: “since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”⁶ In 1969, the Declaration on Social Progress and Development⁷ further emphasized the interdependence of these two sets of rights, and by the early 1970s, the concept of the right to development emerged as a human right. It was first articulated by the developing countries in the context of the New International Economic Order and later taken up by experts, academics, and NGOs as unifying in itself the civil and political rights as well as the economic, social and cultural rights. Throughout the 1970s, the international community repeatedly examined and debated the different aspects of the right to development. The Commission on Human Rights’ Resolution 4 (XXXV) of 2 March 1979 expressly recognized the right to development as a human right and asked the Secretary-General to study the conditions required for the

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5. The International Covenants on Human Rights include the International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR] and the International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) [hereinafter ICESCR].
 6. Proclamation of Tehran, *proclaimed* by the International Conference on Human Rights at Tehran on 13 May 1968, U.N. Doc. A/Conf.32/41, U.N. Sales No. E.68.XIV.2, *endorsed* by G.A. Res. 2442 (XXIII) 19 Dec. 1968.
 7. Declaration on Social Progress and Development, *adopted* 11 Dec. 1969, G.A. Res. 2542 (XXIV), U.N. GAOR 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1969), *reprinted in* INT’L INSTRUMENTS OF THE UNITED NATIONS 160, U.N. Sales No. E.96.I.15 (1997).

effective enjoyment of the right by all peoples and individuals. Subsequently, various reports examining the right to development, and extensive discussions in the Commission and the General Assembly, led to the formulation of the draft declaration on the right to development, which was formally adopted by the General Assembly in December 1986.⁸ The right to development unifies civil and political rights with economic, social and cultural rights into an indivisible and interdependent set of human rights and fundamental freedoms, to be enjoyed by all human beings, “without distinction as to race, sex, language or religion,”⁹ thus bringing to a close the split that had occurred earlier.

The United Nations General Assembly adopted the Declaration by a majority. Several countries abstained¹⁰ and the United States cast the single dissenting vote, even though the Declaration was, in effect, an attempt to revive the immediate post-war consensus about human rights developed by US President Roosevelt, based on four freedoms—including the freedom from want. In the aftermath of World War II, the US position had recognized that political and economic rights were interrelated and interdependent components of human rights, and that “true individual freedom cannot exist without economic security and independence.”¹¹ However, that consensus over the unity of these rights was broken in the Fifties, with the spread of the Cold War, and although the Declaration tried to get back to the original conception of integrated and indivisible human rights it did not imply a consensus or the end of controversy on all the issues. Questions were raised about the foundational basis of this right, its legitimacy, justiciability, and coherence. The world was still divided between those who denied that economic, social, and cultural rights could be regarded as human rights, and those who believed that economic, social, and cultural rights were not only fully justifiable human rights but were essential even necessary, to realize the civil and political rights.

8. Declaration on the Right to Development, *supra* note 2.

9. *Id.* at pmb1.

10. The eight countries that abstained were: Denmark, Finland, The Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom. Four countries did not vote: Albania, Dominica, South Africa, and Vanuatu. In the third committee vote on the Declaration (draft resolution U.N. Doc. A/C.3/41/L.4) Norway also abstained (see U.N. Doc. A/C.3/41/SR.61 ¶ 57).

11. President Franklin Roosevelt, State of the Union Message to Congress (11 Jan. 1944). The credit should rightfully go to Eleanor Roosevelt who was the head of the US delegation during the drafting of the Universal Declaration, for having first identified and advocated for the right to development when she stated, “[W]e will have to bear in mind that we are writing a bill of rights for the world, and that one of the most important rights is the opportunity for development.” Eleanor Roosevelt, *My Day*, February 6, 1947, cited in M. Glen Johnson, *The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights*, 9 HUMAN RIGHTS Q. 19, 36 (1987).

Finally, a new consensus emerged in Vienna at the Second UN World Conference on Human Rights in 1993, which even the United States supported.¹² The Vienna Declaration reaffirmed “the right to development, as established in the Declaration, as a universal and inalienable right and an integral part of fundamental human rights.”¹³ It also committed the international community to the obligation to cooperate in order to realize these rights. Thus the right to development was recognized as a human right, which integrated economic, social, and cultural rights with civil and political rights in the manner that was envisaged at the beginning of the post–World War II human rights movement. The world got back, so to speak, to the mainstream of the human rights movement from which it was deflected for several decades by Cold War international politics.

As a result of this consensus, there is no more room for promoting one set of rights as against another, or putting forward some rights, such as economic and social, to be fulfilled prior to or in violation of civil and political rights, or vice versa. All rights have to be fulfilled together and the violation of one would be as offensive as that of another. The international community, instead, has moved on to examine the question of implementation of those rights as a part of the right to development and ensuring the realization of the right to development has become a major concern of the member Governments of the United Nations. A number of working groups of experts were established to identify the obstacles to the implementation of the right to development and to recommend ways and means to the realization of that right. They also proposed a global strategy involving the United Nations and its agencies, states’ parties, and civil society.¹⁴

1. *The Right to Development as a Human Right*

There has been considerable debate as to whether the right to development can be regarded as a human right. This issue can now be taken as settled, after the achievement of the consensus for the Vienna Declaration and Programme of Action in 1993, which has been reaffirmed in a series of intergovernmental conferences since then.¹⁵ We must distinguish between

12. Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. On Hum. Rts., 48th Sess., 22d plen. mtg., pt. 1, U.N. Doc. A/CONF.157/23 (1993), *reprinted in* 32 I.L.M. 1667 (1993); also *available at* <<http://www.unhchr.ch/html/menu5/d/vienna.htm>> [hereinafter Vienna Declaration].

13. *Id.*

14. Reports of the Working Group on the Right to Development—Report on its 1st session, U.N. Doc. E/CN.4/1994/21, Report on its 2nd session, U.N. Doc. E/CN.4/1995/11, Report on its 3rd session, U.N. Doc. E/CN.4/1995/27, Report on its 4th session, U.N. Doc. E/CN.4/1996/10, Report on its 5th session U.N. Doc. E/CN.4/1996/24.

15. The right to development has been recognized as a human right at most international conferences since the Vienna Declaration. At the 1994 International Conference on

recognizing the right to development as a human right—which is an undeniable fact—and the creating of legally binding obligations relating to that right—which requires a more nuanced explanation. In the tradition of legal positivism, human rights are those rights that are authoritatively given by a society to itself. They are not granted by any external authority, nor are they derived from some overriding natural or divine principle, although individuals' philosophical or religious belief in such a transcendent origin may be essential to their joining in a consensus on the value of human rights. They are human rights because they are recognized as such by a law-creating authority within a society, flowing from its own conception of human dignity, in which these rights are supposed to be inherent. Once they are accepted through a norm-creating process, they become binding on the community.¹⁶ The same argument applies to societies governed by a state

Population and Development, it was stated “the right to development must be fulfilled so as to equitably meet the population, development and environment needs of present and future generations.” The report from the 1995 World Summit for Social Development mentioned that “the international community should promote effective international cooperation, supporting the efforts of developing countries, for the full realization of the right to development and the elimination of obstacles to development, through, *inter alia*, the implementation of the provisions of the Declaration on the Right to Development as reaffirmed by the Vienna Declaration and Programme of Action.” The Platform for Action at the 1995 Fourth World Conference on Women “reaffirm[ed] that all human rights—civil, cultural, economic, political and social, including the right to development—are universal, indivisible, interdependent and interrelated, as expressed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights.” The 1996 World Food Summit “emphasize[d] the need for democracy and the promotion and protection of all human rights and fundamental freedoms, the right to development and the full and equal participation of men and women as essential determinants of success in achieving sustainable food security for all.” The report from the Second United Nations Conference on Human Settlements (Habitat II) in 1996 stated that “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of all States to promote and protect all human rights and fundamental freedoms, including the right to development.” At the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the report affirmed “the solemn commitment of all States to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance.”

16. The American Declaration of Independence (1776), which was probably the first clear enumeration of the principles of human rights, squarely made this point, stating:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just powers from the Consent of the Governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.

Even at that time, it was recognized that the list of rights would expand with changed circumstances. In 1791, the United States adopted the first ten amendments to its Constitution of 1789, known as the Bill of Rights, containing a list of guaranteed human

and to international society, each with its own norm-creating processes. Whether a particular claim is a human right in international law can be determined by whether it has been accepted as such by the different nations through such a process. A pronouncement by the General Assembly of the United Nations can contribute to this process either by adopting and opening for signature an international convention or treaty, creating legally binding obligations on states that ratify it, or by expressing the consensus of the international community on the meaning of a particular human right through a declaration or other resolution, which, if reaffirmed in subsequent international pronouncements as well as by state practice, may gradually gain the status of customary international law.¹⁷

Generally in the human rights literature, to have a right means to have a claim to something of value on other people, institutions, a state, or the international community, who in turn have the obligation of providing or helping to provide that something of value. "Rights are entitlements that require, in this view, correlated duties. If person A has a right to some *x*, then there has to be some agency, say B, that has a duty to provide A with *X*."¹⁸ Recognizing a right would necessitate identifying the duty holder who has the obligation of fulfilling or enabling the fulfillment of the right. Any attempt to justify the use of rights must be preceded by specifying the nature of the valuable elements that are considered as entitlements or rights, and then specifying the agents who have the corresponding duties to bring about the fulfillment of those rights.

In the early history of the human rights movement, this binary matching of rights with duties was understood too inflexibly. Rights would be

rights beyond those of life, liberty and the pursuit of happiness. This list was expanded by a number of subsequent amendments, the adoption of each of which was preceded by intense debate and discussion regarding their worth and implications. But the sanction, behind their recognition as rights, was their acceptance by the people through due process.

17. As Philip Alston says, "most member states of the United Nations implicitly recognized the authority of the General Assembly to determine which claims should be deemed rights and which should not." See Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 608–09 (1984). According to him the authority vested in the Assembly to proclaim human rights is based on firm legal foundations, derived from the mandate given by Article 13 of the UN Charter to "initiate studies and make recommendations for the purpose of . . . assisting in the realization or human rights and fundamental freedoms for all." *Id.* Richard Bilder put it more explicitly. "In practice a claim is an international human right if the United Nations General Assembly says it is." Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 173 (1969). Regarding international conventions and deliberations gaining the status of customary international law, see Oscar Schacter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976).
18. AMARTYA SEN, DEVELOPMENT AS FREEDOM 227–31 (1999).

acceptable only if they were realizable, and that would require matching rights claims with corresponding duties that has identifiable methods of carrying out the obligations by the duty holder. Amartya Sen describes this matching in terms of the Kantian concept of “perfect obligation.” According to those espousing rights as “perfect obligations,” saying that everyone has a right to a “valuable something” does not mean much unless agent-specific duties and methods of fulfilling the obligation of the duty holders can be identified.

Over time, this rigid and inflexible view of rights has given way to a broader understanding of the rights-duty relationship in terms of what Sen describes as the Kantian view of “imperfect obligations.” Instead of perfectly linking rights to exact duties of identified agents, as Sen puts it, “the claims are addressed generally to anyone who can help,” and the rights become “norms” of behavior or action of the agents, such as other individuals, the state or the international community, who can contribute to the fulfillment of those rights.¹⁹ Nevertheless, in order for a claim to be recognized as a right, the feasibility of realizing the right still has to be established. A claim that cannot be realized in a given institutional set up, however laudable it may be, can possibly be a societal goal or a “manifesto right” or an “abstract right.” However, it cannot be a right proper, a “valid right” or a “concrete right” related to any practical social arrangement.²⁰ Even in a world of imperfect obligations, feasibility would still have to be established, at least in principle—how different duty holders, if they operated in a coordinated manner according to a properly designed program of action, could realize that right, if possible within the existing institutions, but if necessary by changing those institutions.

Feasibility in principle does not automatically lead to actual realization. Realization would depend on the agreement of the duty holders to work together according to a program and some binding procedures to honor the agreement. Legislation that converts an “in-principle valid” right into a

19. *Id.*

20. “Manifesto rights”—a term used first by Joel Feinberg and later elaborated by others like Rex Martin and Morton E. Winston, are objects of claim as a moral entitlement, or a need requiring social protection; they are “the natural seeds from which rights grow,” but are not yet actual rights, as duty-holders are not yet identified, nor are the sources or methods of realization. *THE PHILOSOPHY OF HUMAN RIGHTS* (Morton E. Winston ed., 1989). Actual rights are valid claims, justified under a system of governing rules and with appropriate procedures for their realization. According to Dworkin, “abstract rights” are general political aims, and concrete rights are “political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 93 (1977). Only such concrete rights can spell out the trade-offs with other objectives that would be essential to specify the procedures to realize them.

justiciable “legal” right is one such procedure, but it need not be the only one. There are many other ways of making an agreement binding among different duty holders. This is particularly true if the duty holders are different states parties and the imperfect obligations cannot be reduced to legal obligations. Even if a right cannot be legislated, it can still be realized if an agreed procedure for its realization can be established. In other words, such an agreed procedure, which can be legally, morally or by social convention binding on all the parties, would be necessary to realize a valid right, that is, a right that is feasible to realize through interaction between the holders of the right and of the obligations.²¹

Human rights set universal standards of achievement and norms of behavior for all states, civil societies, and the international community and impose inviolable obligations on all of them to make those rights achievable.²² Recognizing the right to development as a human right raises the status of that right to one with universal applicability and inviolability. It also specifies a norm of action for the people, the institution or the state and international community on which the claim for that right is made. It confers on the implementation of that right a first-priority claim to national and

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21. Sen introduces a concept of “metaright” in the context of a right, which may not be immediately achievable, but can be achieved if appropriate policies are adopted. “A *metaright* to something x can be defined as the right to have policies $p(x)$ that genuinely pursue the objectives of making the right to x realisable.” Amartya Sen, *The Right Not to Be Hungry*, in *THE RIGHT TO FOOD* 69, 70 (Philip Alston & Katerina Tomashevski eds., 1984) [hereinafter Sen, *The Right*]. Sen talked about this right while discussing how the right not to be hungry related to the right to food, which for many countries may not be possible to guarantee for all persons in the near future, though “policies that would rapidly lead to such freedom do exist.” *Id.* So a right to X , such as not to be hungry, or the right to an adequate means of livelihood, may be an abstract background right. But “to give a person the right to demand that policy be directed towards securing the objectives of making the right to adequate means a realisable right,” is a right to $P(X)$, which as a metaright to ‘ X ’, will be a real and valid right. It has all the justification of the abstract background right. *Id.* If the people are justified in rebelling against or overthrowing the government for not securing X , they are equally justified to do so if the right to $p(X)$ is not guaranteed. But it would also be a valid and concrete right, because it would be feasible and all the actions of the duty-bearers can be specified with accountability.
22. These human rights were given by the Declaration of Independence – 1776, the status of claims of individuals against their governments which, if not fulfilled, gave them the right to overthrow the government. Although the right to revolt against tyranny could be said to have a much older origin, going back at least to Socrates (see Plato, *The Apology* 29, as has been pointed out by Stephen Marks, *From the “Single Confused Page” to the Decalogue of Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution*, 20 *HUM. RTS. Q.* 459 (1998)), the 1776 Declaration explicitly makes the fulfillment of human rights a binding obligation of the government, justifying its overthrow in the case of non-fulfillment of those obligations. Dworkin talks about such rights as “background rights” which would justify the people to change the constitution if needed to achieve these, or “perhaps in rebelling or overthrowing the present form of government entirely.” DWORKIN, *supra* note 20, at 93.

international resources and capacities and, furthermore, obliges the state and the international community, as well as other agencies of society, including individuals, to implement that right. The Vienna Declaration not only reaffirmed that the promotion and protection of such a right “is the first responsibility of Governments,” but also reiterated the commitment contained in Article 56 of the Charter to take joint and separate action, stating specifically: “States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.”²³

2. *Content of the Right to Development*

The right to development refers to a process of development which leads to the realization of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process. Equity—which is essential to any notion of human rights derived from the idea of equality of all human beings in rights, dignity and opportunity, and is associated with fairness or the principles of a just society—is basic to that process. Secondly, the objectives of development should be expressed in terms of claims or entitlements of right-holders, which duty-bearers must protect and promote. The identification of the corresponding obligation at the national and the international level is essential to a rights-based approach. As the Declaration on the Right to Development itself points out, the primary responsibility for implementing the right to development belongs to states.²⁴ The beneficiaries are individuals. The international community has the duty to cooperate to enable the states to fulfill their obligations. Thirdly, to make the right to development a valid, concrete right, the procedures for carrying out the obligations have to be worked out so that the rights can be realized through appropriate social arrangement. The following sections elaborate on these implications.

The content of the right to development can be analyzed on the basis of the text of the Declaration on the Right to Development. Article 1, paragraph 1 of the Declaration states, “The right to development is an inalienable human right by virtue of which every human person and all

23. Vienna Declaration, *supra* note 12, ¶ 10.

24. Declaration on the Right to Development, *supra* note 2.

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."²⁵ This Article spells out three principles: (a) there is an inalienable human right that is called the right to development; (b) there is a particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized; and (c) the right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy that particular process of development.²⁶ The first principle affirms the right to development as an inalienable human right and, as such, the right cannot be taken or bargained away. The second principle defines a process of development in terms of the realization of "human rights," which are enumerated in the Universal Declaration and other human rights instruments adopted by United Nations and regional bodies. The third principle defines the right to that process of development in terms of claims or entitlements of rights holders, which duty bearers must protect and promote.

Development is defined in the preamble of the Declaration of the Right to Development as 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 there from."²⁷ The process of development that is recognized as a human right is the one, "in which all human rights and fundamental freedoms can be fully realized," consequent to the constant improvement of well being that is the objective of development.²⁸ According to Article 2, paragraph 3, such a development process would be the aim of national development policies that the states have the right and duty to formulate. Article 8 states more specifically that in taking steps to realize the right to development, states shall ensure "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income," and take effective measures to ensure "that women have an active role in the development process," as well as carrying out "appropriate economic and social reforms . . . with a view to eradicating all social injustices."²⁹

25. *Id.* art. 1, ¶ 1.

26. *Id.*

27. *Id.* at pmb1.

28. *Id.*

29. *Id.* art. 8.

3. *The Right to Development as the Right to a Process of Development*

Several articles in the Declaration elaborate the point that the right claimed as a human right is the right to a particular process of development. A closer analysis of these articles reveals a number of important features of that process. A country, it may be noted, can develop by many different processes. There may be a sharp increase in gross domestic product (GDP) with the "richer groups," which have greater access to financial and human capital, becoming increasingly prosperous, and the "poorer sections" lagging behind, if not remaining deprived. There may be some industrialization, rapid or not so rapid, without the increased income spreading over all the sectors, with the small-scale and informal sectors getting increasingly marginalized. There may be an impressive growth of the export industries with increased access to global markets, but without integrating the economic hinterland into the process of growth and not breaking the structure of a dual economy. All these may be regarded as development in the conventional sense. However, they will not be regarded as a process of development, as objects of claim as human rights, so long as these are not accompanied by a process where equal opportunities were provided. Economic growth, attended by increased inequalities or disparities and rising concentrations of wealth and economic power, and without any improvement in indicators of social development, education, health, gender balance and environmental protection respecting the human rights standards and, what is most important, if such growth is associated with any violation of civil and political rights, it cannot fulfill the human right to development.

The nature of this process of development is centered around the concept of equity and justice, with the majority of the population, who are currently poor and deprived, having their living standards raised and capacity to improve their position strengthened, leading to the improvement of the well-being of *the entire population*. The concept of well-being in this context extends well beyond the conventional notions of economic growth to include the expansion of opportunities and capabilities to enjoy those opportunities, captured in the indicators of social and human development, which in turn expand their substantive freedoms.

On the face of it, this approach is substantially different from the usual approach to economic development, preoccupied with the growth of output of material products and marketable services. The industrial countries developed through a prolonged process of capital accumulation and economic growth without any impressive record of equity and justice, at least in the initial phases of industrialization. The developing countries were expected to follow the same path of accumulation and the international

community provided substantial assistance through bilateral resource transfers, balance-of-payments support from the International Monetary Fund (IMF) and long-term investment finance from the World Bank for maximizing the growth of their GNP³⁰ and aggregate consumption. Equity, justice, participation and freedom were peripheral and were raised only as afterthoughts in the national and international development policies. Yet, it is these very notions that comprise the value added by the concept of the right to development.

It is important to appreciate the full significance of the point that the right to development implies a process with equity and justice. Any human rights approach to economic and social policy must be constructed on the basis of justice because justice follows from a notion of human dignity and from a social contract, in which all members of civil society are supposed to participate. But not all theories of justice are based on equity. In reading the Universal Declaration, it is clear that equity was one of its fundamental concerns as the first Article itself asserts that all human beings are born free and equal in dignity and rights.³¹ Similarly, the Declaration on the Right to Development is founded on the notion that the right to development implies a claim for a social order based on equity. Several of its articles call for equality of opportunity, equality of access to resources, equality in the sharing of benefits and fairness of distribution, and equality in the rights to participation.³²

The tenor of the debates that took place at the United Nations and other international fora during the period of the negotiation and adoption of the draft left no one in doubt that what the proponents of the right to

30. Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1 (1955).

31. Universal Declaration, *supra* note 4, arts. 1 & 2. The Universal Declaration recognizes a form of equity inherent in human dignity with equal and inalienable rights as the foundation of freedom and justice; that all men are born free and equal in dignity and rights; that all are equal before the law; and that all are entitled to equal protection against discrimination and that everyone has the right to freedom of thought, religion, expression and opinion. It is possible to build up a whole structure of relationships with equity on the basis of political and civil rights. But in Article 25 of the Universal Declaration everyone has a right to an adequate standard of living for health and well-being, including food, clothing, housing, medical care, and necessary social services, without mentioning that it should be equitable. Article 8 of the Declaration of the Right to Development, however, states that for the realization of the right to development, the states shall ensure "equality of opportunity for all in the access to basic resources, education, health services, food, housing, employment and the fair distribution of income." Declaration of the Right to Development, *supra* note 2. This together with its emphasis on every person being entitled to "participation in, contribute to and enjoy" the development process where "fundamental freedoms can be fully realized," should be seen against the preambular statements, viz., "equality of opportunity for development is a prerogative of nations and of individuals who make up nations," to appreciate the central message of equity and justice in the right to development. *Id.*

32. See Declaration on the Right to Development, *supra* note 2.

development requested was an economic and social order based on equity and justice. The “have-nots” of the international economy would have a right to share equally in the decision making privileges as well as in the distribution of the benefits, just as the rich developed countries. The significance of the North-South divide among the countries in the world economy may have become diluted in the contemporary interdependent world. But the essential spirit of the demand for equity remains in force in all forms of international cooperation envisaged in the realization of the right to development. Within a national economy, also, development as a human right, as defined in the Declaration, has to be firmly rooted in equity. The claim that the right to development is a human right is a claim for a process of development with equity and justice.

According to the right to development, considerations of equity and justice would determine the whole structure of development. For example, poverty has to be reduced by empowering the poor and uplifting the poorest regions. The structure of production has to be adjusted to produce these outcomes through development policy. The aim of the policy should be to achieve this with the minimum impact on other objectives such as the overall growth of output. But if there is a trade-off, such that growth will be less than the feasible maximum, that will have to be accepted in order to satisfy the concern for equity. This development process has to be participatory. The decisions will have to be taken with the full involvement of the beneficiaries, keeping in mind that if that involves a delay in the process, that delay should be minimized. If a group of destitute or deprived people has to have a minimum standard of well-being, a simple transfer of income through doles or subsidies may not be the right policy. They may actually have to be provided with the opportunity to work, or to be self-employed, which may require generating activities that a simple reliance on the market forces may not be able to ensure.

Indeed, to go beyond looking at development simply in terms of growth of income or opulence and to capture the quality of growth in terms of social and human development and the notion of equity based on a fair distribution of the benefits and meaningful participation by all concerned was, in a way, introducing a paradigmatic shift in the thinking about development. It is true that several early economists, dating back to Adam Smith, talked about development as not just the growth of income but also the spread of education, health, and social and human development. But most of them were persuaded to accept the principles of maximizing per capita GNP as the basis of their strategies of development, because as W.A. Lewis, the Nobel-Laureate in development economics, wrote in *The Theory of Economic Growth*, the growth of output per head “gives man greater control over his environment and thereby increases his freedom.”³³ But they

33. W. ARTHUR LEWIS, *THE THEORY OF ECONOMIC GROWTH* 9–10, 420–21 (1955).

did not follow up on the argument that such a growth process may not give "all individuals" greater control over their environment, unless this process is associated with deliberate actions to ensure "equity" of opportunities and that they may not automatically increase their "freedoms" unless specific policies are adopted to achieve those freedoms.

The new paradigm of development thinking was also introduced in the human development approach, as built up by the Human Development Reports of the United Nations Development Programme (UNDP) and as articulated by Amartya Sen in his writings on development. Expansion of well being equated with the expansion of "substantial freedoms," is what Sen describes as the development process and identifies with expansion of "capabilities of persons to lead the kind of lives they value or have reasons to value."³⁴ These freedoms, as Sen points out, should be seen as both the "primary end" and the "principal means" of development, both in a "constitutive role" and in the "instrumental role."³⁵ The freedom to achieve valuable functionings is called "capability" and "functionings" are defined as things we value doing or being, such as being in good health, being literate or educated, being able to participate in the life of the community, being free to speak, being free to associate and so on. In that sense development becomes the expansion of capabilities or the substantive freedoms to allow people to lead the kind of life they value. But then capabilities are also instrumental to further expansion of these capabilities. Being educated and healthy permits them, for example to enjoy their freedoms. The free agency of people who enjoy civil and political rights is essential for that process.³⁶

The right to development builds upon the notion of human development and can be described as the right to human development, defined as a development process that expands substantive freedoms and thereby realizes all human rights. However, when human development is claimed as a human right, it becomes a qualitatively different approach. It is not just achieving the objectives of development, but also the way they are achieved that becomes essential to the process. The objective is fulfilling human rights and the process of achieving this is also a human right. That process must possess the features of all human rights, namely respecting the notion of equity and participation, not violating human rights, including a clear specification of obligations and responsibilities, establishing culpability and having a mechanism for monitoring and correcting the failures of the process.

Indeed, realization of the right to development goes far beyond improving human development. Aggregate human development indicators,

34. SEN, *supra* note 18, at 24–25.

35. *Id.* at 36.

36. *See id.* at 37.

such as the human development index propagated by UNDP, usually combine GDP with some simple measures of health and education such as life expectancy and literacy or years of schooling.³⁷ But they do not, however, show how these indices are raised or how they fulfill human rights. Although concerns with equity and justice and with basic freedoms are taken up in the UNDP's Human Development Reports, they do not often form the foundation of arguments or programs for improving human rights. The *Human Development Report 2000*³⁸ notes that although human development thinking insisted on the importance of the process of development, it has traditionally focused on the outcomes of various kinds of social arrangements in a way that is not sensitive to *how* these outcomes were brought about. The "Human Rights thinking" is essentially concerned with not only the nature of those outcomes, which are the objects of claim, but how those outcomes are brought about, and through what kind of social arrangements and public and individual action, so that the duties and responsibilities of different agents can be specified. Using the right to development approach, the objectives of development are set up as entitlements of rights holders, which duty bearers, the individuals, the states, and the international community are expected to fulfill, respect, protect, and promote while respecting international human rights standards. In that sense, the approach of the right to development subsumes within itself the approach of human development. It is carrying out a process of human development in a manner fulfilling human rights standards.

4. Duties and Obligations

This takes us to another feature of the process related to designing the social arrangement, public action, and individual duties and assigning responsibilities to the different agents. For the realization of any right under a regime of perfect or imperfect obligations, the assignment of duties must be carried out so as to establish accountability. The Declaration assigns these responsibilities, which need to be analyzed in the context of a program for implementing that right.³⁹

Article 2, paragraph 2 (all references are to the Declaration) stipulates that all human beings, individually and collectively have a responsibility for

37. UNITED NATIONS HUMAN DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 17 (2000) [hereinafter HUMAN DEVELOPMENT REPORT 2000].

38. HUMAN DEVELOPMENT REPORT 2000.

39. The following articles of the Declaration on the Right to Development, *supra* note 2, identify the responsibilities of individuals (art. 2 ¶ 2), states at the national level (art. 2 ¶ 3, art. 3 ¶ 1, art. 5, art. 6 ¶¶ 2 & 3, art. 8 ¶¶ 1 & 2), states at the international level (art. 3 ¶ a 3, art. 4, ¶¶ 1 & 2, art. 6 ¶ 1, art. 7), and all agents and duty bearers (arts. 9 & 10).

securing the right to development, "as well as their duties to the community" with full respect for human rights and fundamental freedoms.⁴⁰ States, according to Article 3, have "the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."⁴¹ The responsibility of states, which is complementary to that of individuals, is basically to create the conditions for realizing the right to development, and not necessarily for actually realizing development. The actions that states need to adopt to create such conditions are elaborated in the different articles in terms of both national and international operations. At the national level, in Article 2, paragraph 3, it is pointed out that "States have the right and the duty to formulate appropriate national development policies."⁴² According to Article 8, "States should undertake, at the national level, all necessary measures for the realization of the right to development," and "should encourage popular participation in all spheres."⁴³ In addition, in Article 6, states are required⁴⁴ to take steps "to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social, and cultural rights," because the implementation, promotion and protection of those rights would be essential for realizing the right to development.⁴⁴

The national development policies that states have a duty to formulate, according to Article 2, paragraph 3, will have two characteristics: a) they must be participatory ("on the basis of their active, free and meaningful participation") and b) equitable ("the fair distribution of benefits").⁴⁵ Further, states have the right to adopt these policies, implying that if states acting on their own are unable to formulate and execute those policies in a globalized and interdependent world, they have the right to claim cooperation and help from other states and international agencies. Articles 3 and 4 elaborate on the nature of that international cooperation. Articles 6, 9, and 10 clearly state that the implementation of the right to development involves implementing all the civil, political, economic, social, and cultural rights, as they are indivisible and interdependent, and that enhancement of the right to development would imply adoption and implementation of policy, legislation and other measures at the national and international levels. This would mean that all of the obligations the two International Covenants on Human Rights impose on states and the international community apply to all measures associated with implementing the right to development.

40. *Id.* art. 2, ¶ 2.

41. *Id.* art. 3.

42. *Id.* art. 2, ¶ 3.

43. *Id.* art. 8.

44. *Id.* art. 6.

45. *Id.* art. 2, ¶ 3.

With respect to the obligation of states operating at the international level, the Declaration is forthright in emphasizing the crucial importance of international cooperation. According to Article 3, paragraph 3, states have the duty "to cooperate with each other in ensuring development and eliminating obstacles to development" and should fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence and mutual interest.⁴⁶ This is reiterated in Article 6, which states, "all States should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms."⁴⁷ According to Article 7, all states should promote international peace and security and complete disarmament, ensuring that resources released thereby are used for comprehensive development, in particular that of developing countries.

Article 4 declares quite categorically that states have the duty, individually and collectively, to formulate international development policies to facilitate the realization of the right to development. It recognizes that sustained action is required to promote rapid development of developing countries, and that as a complement to the efforts of developing countries, "effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development."⁴⁸

To appreciate fully the emphasis that the Declaration puts on international cooperation, Article 4 should be read in conjunction with the opening sentences of the preamble of the Declaration itself that refer to:

the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation in solving international problems of an economic, social, cultural and humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms.⁴⁹

That reference is to Article 1 of the Charter, and the case of international cooperation could be further strengthened by referring to Articles 55 and 56 of the Charter. According to those Articles, member states pledge themselves to take joint and separate actions to promote: (a) high standards of living, full employment and conditions of economic and social progress and development, (b) solutions of international economic, social, health, and related problems and international cultural and educational cooperation, and (c) universal respect for and observance of human rights and fundamental freedoms without distinction as to race, sex, language, or religion. Then

46. *Id.* art. 3, ¶ 3.

47. *Id.* art. 6.

48. *Id.* art. 4.

49. *Id.* at pmb1.

the Charter declares that all members of the United Nations Organizations “pledge themselves to take joint and separate actions in cooperation with the organization for the achievement of [these] purposes.”⁵⁰ Because the Charter has a special status as the foundation of the present international system, this pledge is a commitment to international cooperation by all states within the United Nations.

The Vienna Declaration of 1993 reaffirms the solemn commitment of all states to fulfill these obligations in accordance with the Charter (paragraph 1), which provides: that states should cooperate with each other in ensuring development and eliminating obstacles to development, and that the international community should promote effective international cooperation for the realization of the right to development (paragraph 10); that progress towards the implementation of the right to development requires effective development policies at the national level, and a favorable as well as equitable economic environment at the international level (paragraph 10), and that the international community should make all efforts to alleviate specific problems such as the external debt burden of developing countries to supplement the efforts of the governments of these countries.⁵¹

In sum, the primary responsibility for implementing the right to development will belong to states, as clearly indicated in the Declaration. The beneficiaries would be the individuals. The international community has the duty to cooperate to enable the states parties to fulfill those obligations. But when realizing the right to development is seen not as realizing a few rights in isolation but as implementing all or most rights in a planned manner in tandem with an appropriately high and sustainable growth of the economy and change in its structure, the importance of international cooperation becomes even more evident. It may be possible for a state party to implement one or two rights, such as the right to education or to primary health, considered in isolation by making some changes in the legal framework and reallocating the resources available within the country; however, implementing a plan of development with fundamental institutional changes may not be possible for individual nation states without substantial help from or the cooperation of the international community.

What about the notion of accountability, that we have mentioned above, about applying human rights standards to the implementation of human development? Clearly the obligations involved in the implementation of the rights are not always perfect, in the sense that the non-fulfillment or violation of a right can be attributed to a specific duty holder for not

50. U.N. Charter, *supra* note 3, art. 56.

51. Vienna Declaration, *supra* note 12.

meeting her/his obligation. That is the nature of obligations in the case of justiciable “legal rights.” The obligations related to the right to development are more in the nature of “imperfect” obligations, with a number of agents, individuals, states and the international community having different kinds of obligations, with no specific agent responsible for its violation. But that does not mean that the right-duty correspondence cannot be established or that the obligation of the different agents or duty holders cannot be specified. For some of the duty holders—whom Sen describes as “anybody who can help”—the specifications of the obligations may not be exact but still they may be helpful for securing the rights, because if somebody can help they have an obligation to help.⁵² But for other duty holders the obligations can be more precisely formulated and imposed. Or some obligations can be formulated in a manner so that their accountability takes the form of enforceable remedies. Thus, even for the right to development, as in the case of the economic, social, and cultural rights, not to speak of the civil and political rights, the rights-duty correspondences, or the obligations of the different parties, and therefore the accountability can be established.

Steiner and Alston enumerate the duties of the state parties in terms of five obligations: a) respect the rights of others, b) create institutional machinery essential to realization of rights, c) protect rights and prevent violations, d) provide goods and services to satisfy rights and e) promote rights.⁵³ The Maastricht Guidelines on Economic, Social, and Cultural Rights address the obligations to respect, protect and fulfill, and lay down enforceable remedies.⁵⁴ Stephen Marks analyzes four obligations, two perfect and two imperfect.⁵⁵ In the first category he places the obligations to respect (i.e., prevent a state agent from denying a right and punish the agent for acts and omissions) and protect (i.e., prevent third parties from violating rights). These can be enforced through a judicial process. In the second category are obligations to fulfill, which he describes as obligations to promote and provide and which are “general commitments to pursue a certain policy or achieve certain results.”⁵⁶ These are not justiciable, as “immediate individual remedies through the courts are not normally

52. Sen, *supra* note 18.

53. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 182–84 (2d ed. 2000).

54. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998) [hereinafter *Maastricht Guidelines*].

55. See Stephen P. Marks, *The Human Rights Framework for Development: Five Approaches*, FXB WORKING PAPER SERIES NO. 6, 12 (2000), available at http://www.hsph.harvard.edu/fixbcenter/working_papers.htm; see also Amartya Sen, *Consequential Evaluation and Practical Reason*, 97 J. PHIL. 478 (Sept. 2000).

56. Marks, *supra* note 55, at 14.

provided when the State falls short of its responsibilities."⁵⁷ But he still considers them legal obligations, because the states are required to take steps "in the direction of sound progressive realization of the right."⁵⁸

The right to development, as mentioned above, involves the realization of all the civil, political, economic, social, and cultural rights, and therefore all the characteristics of the state obligations apply equally to its implementation. But in the nature of things, the right to development would largely entail obligations to fulfill or to promote and provide which will in general be "imperfect obligations." That will not however make the right to development invalid or unrealizable. It should still be possible to specify a program of action, where all parties, particularly the states and the international community have clear roles to play in helping realize the right to development. These roles can be translated into obligations with provisions for corrective action and enforceable remedies if the obligations are not fulfilled. Since these policies or programs involve the action of a number of agents and are vulnerable to exogenous developments and uncertainties, they can be evaluated only in terms of a probability of success, and therefore the rights may remain unrealized or unfulfilled. But still these programs can be designed, with a high probability that the right will be delivered and with a clear assignment of roles and obligations of all the parties concerned.⁵⁹

B. Controversies Regarding the Right to Development⁶⁰

Once the right to development is seen as a human right derived from an implicit social contract binding civil society that identifies duty-holders—

57. *Id.*

58. *Id.*

59. Sen refers to the charge that "in the absence of perfect obligations, demands for human rights are often seen just as loose talks." SEN, *supra* note 18. (This is repeated in the HUMAN DEVELOPMENT REPORT 2000, *supra* note 38, ch. 1.) He holds that the rights-duty correspondence can be established even with imperfect obligations, and states that "It is certainly plausible to presume that the performance of perfect duties would help a great deal towards the fulfillment of rights. But why cannot there be *unfulfilled* rights." SEN, *supra* note 18 at 25. The issue is not whether a right remains unrealized or not, because even with perfect obligations the right may well remain unrealized for many other unaccounted factors. The issue is whether the right is "realizable or not," which means whether it is possible to design a program or a social arrangement that can result, with a high probability, in the fulfillment of the right. If so, that right is a valid, real right. In terms of the earlier discussion on metarights, even if the right to X remains unfulfilled or immediately unrealizable the metaright to X, p(X) can be a fully valid right if all the obligations associated with p(X) can be clearly specified.

60. Most of the arguments in this section are taken from Arjun Sengupta, *The Right to Development as a Human Right*, FXB WORKING PAPER SERIES NO. 7 (2000), available at http://www.hsph.harvard.edu/fxbcenter/working_papers.htm.

primarily the nation-states—but also the international community, individuals, and groups operating in civil society—with the obligation to deliver this right, it should not be difficult to understand the controversies surrounding this right.

1. *Human Rights as Natural Rights*

The traditional argument against economic, social, and cultural rights, and hence the right to development, has been that they are not human rights because they cannot be identified with natural rights. As Donnelly puts it, in the Universal Declaration, “human rights are clearly and unambiguously conceptualized as being inherent to humans and not as the product of social cooperation. These rights are conceptualized as being universal and held equally by all; that is, as natural rights.”⁶¹ In that paradigm, human rights are only personal rights, based on negative freedom, such as the rights to life, liberty, and free speech, whereby the law prohibits others from killing, imprisoning, or silencing an individual who has a claim to such freedoms that the state is expected to protect. Economic and social rights are, however, associated with positive freedoms, which the state has to secure and protect through positive action. They are not natural rights, therefore, according to this view; they are not human rights. The right to development is seen as linked to collective rights, which are more than just the sum of individual or personal rights, and to positive economic rights, and therefore it would not be regarded as a human right.

All these arguments have been substantially repudiated in the literature. The Universal Declaration has many elements going beyond the principles of natural rights. In fact, it is firmly based on a pluralistic foundation of international law with many elements of economic and social rights, considering an individual’s personality as essentially molded by the community.⁶² Indeed, logically, there is no reason to take the rights of a group or

61. Jack Donnelly, *Human Rights as Natural Rights*, 4 *HUM. RTS. Q.* 391, 401 (1982). These issues have been debated extensively in human rights literature. Most of the arguments are well summarized in two articles by Alston: Philip Alston, *The Right to Development at the International Level*, in *THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL* 99 (René-Jean Dupuy ed., 1980), and Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 *HUM. RTS. Y.B.* 3 (1988) [hereinafter Alston, *Making Space*]. See also Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 *CAL. W. INT’L L. J.* 473 (1985), and SEN, *supra* note 18, ch. 12.

62. According to Alston, “The Reagan Administration’s outright refusal to accept the validity of the idea of collective human rights flows quite logically from its conception of human rights which is based not on the Universal Declaration of Human Rights but on the American Declaration of Independence.” Alston, *Making Space*, *supra* note 61, at 27.

a collective (people or nation, ethnic or linguistic groups) to be fundamentally different in nature from an individual's human rights, so long as it is possible to define the obligation to fulfill them and for duty-holders to secure them. Even personal rights can be taken as rights to be protected for individuals and groups.⁶³ Furthermore, it is well established that the identification of civil and political rights with negative rights and economic, social, and cultural rights with positive rights is too superficial because both would require negative (prevention) as well as positive (promotion or protective) actions. So logically, it is hard to regard only civil and political rights as human rights; and to not regard economic and social and collective rights as human rights. As we have noted above, it is ultimately for the concerned people to decide what they would regard as human rights and which rights the states would have the obligation to deliver.⁶⁴

2. Justiciability

Another criticism of the right to development is related to its justiciability. There is a view, particularly among lawyers of the positivist school, that if certain rights are not legally enforceable, they cannot be regarded as human rights. At best they can be regarded as social aspirations or statements of objectives. The skeptics, who doubt the appeal and effectiveness of ethical standards of rights-based arguments, would not consider a right to be taken seriously unless the entitlements of those rights are sanctioned by a legal authority, such as the state, based on appropriate legislation. As Sen puts it, these skeptics would say, "Human beings in nature are, in this view, no more born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring."⁶⁵ This view, however, confuses human rights with legal rights. Human rights precede law and are derived not from law but from the concept

See also, Marks, *supra* note 55. This piece by Marks is a well-reasoned paper in which he shows that the form and the content of the Universal Declaration of Human Rights were very much influenced by the French Revolution.

63. See Charles Taylor, *Human Rights: The Legal Culture*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* (Alwin Diemer et al. eds., 1986); VERNON VAN DYKE, *HUMAN RIGHTS, ETHNICITY AND DISCRIMINATION*, *CONTRIBUTIONS IN ETHNIC STUDIES* No. 10 199 (1985).
64. Alston put it categorically: "It is a matter of human decision what kinds of units are accepted as right-and-duty bearing units and what kinds of rights they shall have." Alston, *Making Space*, *supra* note 61, at n. 27. Marks enumerates eight characteristics "traditionally used to distinguish civil and political from economic, social and cultural rights" and which he claims are "disappearing in theory and practice." *Id.* See also Marks, *supra* note 55, at 2-3.
65. Sen, *supra* note 18, at 228.

of human dignity. There is nothing in principle to prevent a right being an internationally recognized human right even if it is not individually justiciable.⁶⁶

Human rights can be fulfilled in many different ways depending on the acceptability of the ethical base of the claims. This should not, of course, obfuscate the importance or usefulness of such human rights translated into legislated legal rights. In fact, every attempt should be made to formulate and adopt appropriate legislative instruments to ensure the realization of the claims of a human right once it is accepted through consensus. These rights would then be backed by justiciable claims in courts and by authorities of enforcement. But to say that human rights cannot be invoked if they cannot be legally enforced would be most inappropriate. For many of the economic and social rights and the right to development, and even for some elements of civil and political rights, the positive actions that are necessary may often make it very difficult to identify precisely the obligations of particular duty-holders to make them legally liable to be prosecuted. Enacting appropriate legislative instruments for any of these rights would often be a monumental task, and it would be often useful and necessary to find alternative methods of enforcement of the obligations rather than through the courts of law.

The two international covenants on human rights gave legal force to the obligation to respect civil and political rights as well as economic, social, and cultural rights. Mechanisms have been established to review and monitor state compliance, and under the Optional Protocol to the International Covenant on Civil and Political Rights, individuals may bring a complaint to enforce their human rights.⁶⁷ However, the absence of an individual complaints mechanism under the International Covenant on Economic, Social and Cultural Rights in no way prevents the rights recognized by the Covenant from being human rights. Furthermore, a number of economic and social rights (such as labor rights) are already protected in national law and are justiciable before national courts, as well as through procedures of the International Labor Organization.

Although civil and political rights and economic, social, and cultural rights have been codified in international treaties or covenants and ratified by a large number of countries, the Declaration does not have that status, and therefore cannot be enforced in a legal system. That still does not detract from the responsibility of states, nationally or internationally, as well

66. This issue has been dealt with extensively in the deliberations of the Committee on Economic, Social and Cultural Rights and its general comments (for example, *General Comment No. 3* of 1990 (E/1991/23, annex III)). See also Julia Hausserman, *The Realization and Implementation of Economic, Social and Cultural Rights*; Michael K. Addo, *Justiciability Re-examined*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT* (Ralph Beppard & Dilys M. Hill eds., 1992).

67. ICCPR, *supra* note 5.

as of other individuals and agencies of the international community to realize the right to development. It may be necessary to suggest some mechanism to monitor or exercise surveillance over the states and the agencies of the international community to ensure that they are complying with their commitment to realize the right to development. That mechanism might not have the same legal status as a treaty body but may still be effective in ensuring the realization of this right through peer pressure, democratic persuasion and the commitment of civil society.

3. Monitoring of Implementation

For many of the positive rights, implementability is often a more important issue than enforceability. Designing a program of action that would facilitate the realization of the right might be a better way of going about it than trying to legislate on those rights. In that case, what may be required is a monitoring authority or a dispute settlement agency, other than a court of law for settling claims. Democratic institutions of local bodies, or non-governmental organizations, or public litigation agencies, may prove to be quite effective in dealing with the rights-based issues, which are not amenable to precisely formulated legislative principles.

Establishing such monitoring agencies or consultative forums may often be the only way to enforce obligations of the international community. Indeed, justiciability of international commitments must be dealt with differently from the enforcement of national obligations. The world has of course many different agencies of international arbitration of which the international court is only one. There are established institutions and procedures for settling trade and financial disputes. For human rights, however, such agencies may not be useful unless the failure of the obligation can be put in a relevant form admissible to these institutions. The human rights treaty bodies, operating mostly on reporting methods, may be often quite inadequate, even when direct complaint procedures are available. What would be needed in most cases is a forum where international agencies and concerned governments could get together and talk to each other. A transparent consultation mechanism, subject to the democratic pressure of public opinion, may often play a much more significant role in enforcing institutional agreements, especially on human rights, than any outside judicial authority.

4. Collective Rights vs. Individual Rights

There is a different type of criticism, which has been most persistently leveled against the right to development, in particular, which is applicable to all rights other than the civil and political rights. The right to development

was promoted both by the Third World protagonists and First World critics as a collective right of states and of peoples for development. We have already dealt with the problem of the admissibility of collective rights as human rights, as against individual rights, and have argued that it is perfectly logical to press for collective rights to be recognized as human rights. But then care must be taken to define the collective rights properly and not in opposition to individual rights per se. Indeed there are legal institutional agreements and covenants that have recognized and built upon collective rights, and the Declaration on the Right to Development itself has recognized the collective right of peoples in Article 1 which states that every human person and all peoples are entitled to the human right to development and also the right to self-determination, which includes "the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."⁶⁸ But these collective rights are not to be seen as opposed to, or superior to, the right of the individual. The Declaration states categorically (Article 2) "the human person is the central subject of development and should be the active participant and beneficiary of the right to development."⁶⁹

One of the most articulate defenders of the Third World position regarding collective rights, Georges Abi-Saab, a Professor at the Graduate Institute of International Studies in Geneva, suggests two possible definitions of collective rights, first as a sum-total of double aggregation of the rights and of the individuals. (If there are n different rights, r_i , $i = 1, \dots, n$, and if there are m different individuals $j = 1, \dots, m$, having these rights, the collective rights will be $R = \sum_i \sum_j r_{ij}$).⁷⁰ This, as Abi-Saab says, has the intent of highlighting the link between the rights of an individual and the rights of the collectivity. The second definition of collective rights is seen as a right from the collective perspective, "(without going through the process of aggregating individual human rights) by considering it either in the economic dimensions of the right of self-determination, or alternatively as a parallel right to self-determination."⁷¹

Both these definitions build on the rights of individuals. Indeed, the right to self-determination gives nations "the full sovereignty over all their natural wealth and resources," but that has to be exercised for the benefit of all individuals.⁷² In the case of an individual, the rights-holder is also the beneficiary of the exercise of the right. In the case of collective right, such as that to self-determination, the right-holder may be a collective such as a

68. Declaration on the Right to Development, *supra* note 2, art. 1.

69. *Id.* art. 2.

70. Georges Abi-Saab, *The Legal Formulation of a Right to Development*, in *THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL*, *supra* note 61, at 159, 164.

71. *Id.*

72. *Id.*

nation, but the beneficiary of the exercise of the right has to be the individual. There may of course be some occasion when the right of a particular individual may come into conflict with the right of a collective. An obvious example would be the closed-shop practices of a trade union conflicting with the right to work of a particular unemployed person. But the beneficiaries of a trade union practice must be all individual workers, and not just the trade union, as an organization, its management and its treasury. It is also quite possible that different rights or different individuals enjoying a right may come into conflict in some specific situations. It would be necessary to institute some transparent procedures to resolve these conflicts. But such procedural restrictions in dealing with the exercise of a right do not detract from the nature and importance of the collective right seen as built on individual rights.

It is important to note this point on the integral relationship between the collective and the individual in understanding the human rights approach to development. In 1979, the Commission on Human Rights adopted Resolution No. 5 (XXXV) stating "that the right to development is a human right and that equality of opportunity is as much a prerogative of nations as of individuals within nations."⁷³ Indeed, in many cases individual rights can be satisfied only in a collective context, and the right of a state or a nation to develop is a necessary condition for the fulfillment of the rights and the realization of the development of individuals.

Indeed, most of the demands of the developing countries during the 1970s, when the content of the right to development was negotiated, can be put forward in these terms. The integrated program of commodities, the generalized preference scheme, industrialization, and technology transfers and all the essential components of the New International Economic Orders were the claims made on behalf of the developing countries and were all meant to be preconditions for development of all peoples in those countries. Many of these proposals may no longer be relevant in the changed conditions of the world economy, and the developing countries themselves may not put them forward as parts of their development agenda. But during the 1970s and 1980s they were regarded as highly relevant, and this is reflected in the wording of the preamble of the Declaration. However, they were never meant to disregard the primacy of individual rights which used the foundations of human rights theory and which developed over time with collective rights complementing the individual rights. Those who detract from the significance of the right to development by arguing that it is a protection of a collective right of the state or the nation, in conflict with the

73. United Nations Economic and Social Council, Official Records, Supp. No. 6, U.N. Doc. E/CN.4/1347 (1979).

individual rights foundations of the human rights tradition are more often than not politically motivated.

5. *Resource Constraints*

A related issue is the question of resources—financial, physical and institutional, both at the national and the international level—which would put a constraint on the speed and the coverage of the realization of the right to development and of the individual rights recognized in the two International Covenants on Human Rights. There was earlier a view that civil and political rights had a greater claim to being regarded as human rights, because they could be protected immediately by law, mainly through proscriptive and enforceable legislation. Economic, social, and cultural rights, on the other hand, required positive action over time, which would consume resources, and since resources were always limited, the realization of these rights would naturally be constrained. According to this view, if certain rights cannot be fully realized and protected within a limited time, they cannot be regarded as inalienable and indefensible human rights. This argument, however, does not hold because many of the civil and political rights also require as much positive action as economic and social rights, thereby consuming many resources.

Indeed, the existence of the rights should not depend on the availability of resources or the methods of realizing them, but should, once they are recognized as human rights, guide the determination of the methods of their realization depending upon the objective conditions in the states parties, including the availability of resources, and the international environment. The human rights instruments recognize the importance of resource constraints quite explicitly. Article 2 (1) of the ICESCR states:

Each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁷⁴

Article 10 of the Declaration states “Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.”⁷⁵

74. ICESCR, *supra* note 5, art. 2(1).

75. Declaration on the Right to Development, *supra* note 2, art. 10.

International lawyers and human rights agencies have been debating the implications of such resource constraints and the Limburg Principles, formulated at the University of Limburg (Maastricht, The Netherlands), by a group of distinguished experts in international law, laid down the principles for dealing with them.⁷⁶ The Principles stated, *inter alia*, that

the obligation to achieve progressively the full realization of the rights requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.⁷⁷

Further: "Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized."⁷⁸ Similarly: "The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available."⁷⁹ The Principles define the term, "its available resources" as referring to "both the resources within a State and those available from the international community through international cooperation and assistance."⁸⁰ "In determining whether adequate measures have been taken for the realization of the rights," the Principles reiterate, "attention shall be paid to equitable and effective use of and access to the available resources."⁸¹

The approach in all these has been based on the principle that all states parties must make "the best endeavour" to fulfill their obligations and that the monitoring mechanisms of the treaty bodies would have the jurisdiction to examine and pronounce on whether that best endeavour has been exercised. Included in that process are those measures that can be adopted immediately and without much expenditure of resources, such as prohibiting discrimination in the access to available services and benefits and adopting legislation and administrative measures to fulfill or to redress the violation of the obligations. If all states parties follow the Limburg Principles, it would go a long way towards the realization of economic, social,

76. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, adopted 8 Jan. 1987, U.N. ESCOR, Comm'n on Hum. Rts., 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), reprinted in *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987), available at <http://www.law.uu.nl/english/sim/instr/limburg.asp>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

and cultural rights which, together with civil and political rights, form an essential basis for the right to development.

There would still remain the issue of prioritization, which cannot be ignored if the realization of these rights requires expenditure of resources, the supply of which remains limited. The problem should not be blown out of proportion or used as a pretext for avoiding action. Most of the activities needed to fulfill these rights do not require many financial resources. They may require more input of administrative or organizational resources whose supplies are relatively elastic, depending upon political will rather than on finance or physical infrastructure. Similarly, the resources requested may not be limited to national availability but also can be complemented by international supply, both of an appropriate quantity and quality. As a result, for many countries the resource constraints may not be insurmountable, also a better way of using the existing resources, i.e., more efficiently and less wastefully, may have a much greater impact on realizing the rights than increasing the supply of resources.

The resource constraints affect different countries differently. For the very poor countries the institutional constraints may be so important that unless they are removed little can be done to use financial and other resources efficiently to realize the rights. For other developing countries, it may be the fiscal resources of the Government rather than the overall savings that are more crucial. For many others, the infrastructure services, like roads, communication, transportation, electricity or water supply, may turn out to be the binding constraints. If all rights are of equal value or have the same importance—as it is claimed in the human rights instruments—it is the nature of the resource constraints that may determine the priorities. Those rights that require the least expenditures of those resources, which are most binding or in short supply, will tend to be realized first. There is a risk that this may, as a result, fail to bring about the social change that is the ultimate objective of following the rights approach to development. For example, if providing primary education to any poor child is equally important, whether the child lives in a remote village or in an urban area, in a country with limited road connectivity or transport facilities, the children in the remote village could be ignored. If providing food to poor families in all parts of the country is given equal value in a financially expensive program of food security, the female children in villages may continue to be deprived, if social reforms are not pursued effectively. As noted above, one of the benefits of using a human rights approach to development is that it focuses attention on those who lag behind others in enjoying their rights, and requires that positive action be taken on their behalf.

However, if resource constraints do become acute, it may be necessary to prioritize among the different rights. But such prioritization need not

contradict the principles, as the Maastricht Guidelines put it, "all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity."⁸² That principle enjoins upon any program or mechanism for influencing these rights the conditions that all these rights should be taken in their totality as an integrated whole, by recognizing fully the implications of their interrelations and that no particular right should be violated in fulfilling any other right. There cannot be any trade-off between these rights, the violation of any right cannot be compensated by the improved realization of any other right.

When the right to development is taken as a process where all the rights are progressively realized, such prioritization would mean that some rights could be realized earlier than the others, without violating or retrogressing on the fulfillment of any right. The comparison could be then between the incremental changes in the realization of the right rather than between giving up some in exchange of a gain in others.⁸³

Even then the question of how to decide on the relative preference between the incremental changes in the improvement of rights would arise. Henry Shue has in such a context, talked about a set of "basic" rights, the enjoyment of which is essential to the enjoyment of all others. "When a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself."⁸⁴ The Committee on Economic, Social and Cultural Rights has treated this problem somewhat differently. It referred to:

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. . . . For example a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, or basic shelter and housing or of the most basic form of education is prima facie violating the Covenant.⁸⁵

Whatever the resource constraints, these minimum obligations must be satisfied. The only way to decide on these "minimum obligations" or "basic rights" of preferred incremental change of some rights, is, in a human rights framework, through public discussion. It should be based genuinely on public choice through a participatory process of consultation with the beneficiaries or in a democratic forum of a state.

82. *Maastricht Guidelines*, *supra* note 54, Point 4, at 692.

83. The author is indebted to Professor S.R. Osmani for pointing this out in correspondence.

84. Winston, *supra* note 20, at 27.

85. *The Nature of States Parties Obligations*, General Comment No. 3, Comm. on Econ., Soc. & Cult. Rts, 5th Sess., U.N. Doc. No. E/1991/23 (1990).

6. Interdependence of Rights and the Process of Development

The right to development as the right to a process of development is not just an umbrella right or the sum of a set of rights. It is the right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value. A process implies an interdependence of different elements. The interdependence can be understood over time, as a sequence of what happens today related to what happens tomorrow, and also at a particular point in time, as the interaction of cross-sections of elements that are related to each other where the value of a single element depends upon the value of other elements.

The process is not the same thing as the outcome of the process, although in the right to development, both the process and the outcome of the process are human rights. It is possible for individuals to realize several of the rights separately, such as the right to food, the right to education or the right to housing. It is also possible that those rights are realized separately following fully the human rights standards, with transparency and accountability, in a participatory and non-discriminatory manner, and even with equity and justice. But even then the right to development may not be realized as a process of development if the interrelationships between the different rights are not fully taken into account. A program of policies can be worked out based upon the relationships between different rights and a process can be established that would facilitate the realization of those rights. In other words, the process must be distinguished from the outcomes of the process. Even if the outcomes or all the different civil, political, economic, social, and cultural rights cannot be fully realized, or are realized only after a long time, the process can be established and realized more immediately and so long as that process is expected, with a high probability to lead to the desired outcomes, claiming that process as a right may be the best option in a given situation.

The right to development as a right to a particular process of development can be best described as a "vector" of all the different rights and freedoms. Each element of the vector is a human right just as the vector itself is a human right. They all will have to be implemented following fully the human rights standards. Furthermore, all the elements are interdependent, both at any point in time and over a period of time. They are interdependent in the sense that the realization of one right, for example the right to health, depends on the level of realization of other rights, such as the right to food, or to housing, or to liberty and security of the person, or to freedom of information, both at the present time and in the future. Similarly, realization of all these rights in a sustainable manner would depend upon the growth of GDP and other resources, which in turn would depend upon the realization of the rights to health and education, as well as to freedom of information

given the initial stock of human, material and institutional assets. This means, in symbols, if R_D is the right to development, it is defined as $R_D = (R_1, R_2 \dots R_n)$, where R_i is a human right ($i = 1 \dots n$). Further if 'g' stands for growth of GDP, we shall have $R_i = f(g, R_j)$, $j \neq i$, $j = 1, 2 \dots n$ saying that each right depends upon all other rights and the growth of GDP. Growth is not here any per capita rise in GDP, but a particular form of economic growth that is related to the realization of all the human rights and therefore associated with equity and justice, together with the expansion of other human, technological and institutional resources which constrain that process. A 'g' of this kind facilitates the realization of all these rights and can be described as dependent on not only the existing stock of resources, technology and institutions, (S), and the level of realization of all the rights (R_i), but also on a set of policies (P) ensuring equity and justice. [$g = G(S, R_i, P)$].

An improvement in the realization of the right to development or an increase in the value of the vector will be defined as an improvement in all the elements of the vector (i.e. human rights), or at least in one element of the vector while no other element deteriorates. Because all human rights are inviolable and none is superior to another, the improvement of any one right cannot be set off against the deterioration of another. Thus, the requirement for improving the realization of the right to development is the promotion or improvement in the realization of at least some human rights, whether civil, political, economic, social, or cultural, while no other deteriorates. If any one right deteriorates, or is violated, then the right to development is violated. In symbols $dR_D > 0$ would imply that there is at least one i , such that $dR_i > 0$, and that all other rights $dR_j = 0$, as well as $g > 0$, because if g were negative, then some R_j may also be negative. To ensure an improvement in the R_D , it would be sufficient if these constraints are supplemented by the condition $\partial R_i / \partial g \geq 0$ and $\partial R_i / \partial R_j \geq 0$ or that the improvement of growth or the realization of any one right, does not reduce the enjoyment of any other right.⁸⁶

86. The programs for growth should be such that their impact on any human right must be non-negative. Similarly the improvement of any one right must not violate any other right.

Each of the rights, R_i , can be represented by an indicator as a real number or index. But R_D need not be represented by a scalar, as a function of these variables, as what we want to know is whether R_D is improving or being violated, and not by how much over time or over others. It is possible to convert the fulfillment of the individual rights into a scalar index of R_D , by weighting these rights or making $R_D = F(g, R_i, i = 1 \dots n)$. But that procedure may be highly controversial, and not very useful for guiding the policies in any country. So R_D can be treated as a vector constrained as above.

This formulation can also accommodate the point made by Mr. Abi-Saab (*supra* note 70) to define collective rights, as a sum-total of double aggregation of the rights for all the individuals. Accordingly if there are n different rights, $i = 1, \dots, n$, and if there are

Looking at the right to development as a vector of rights brings out clearly that any program that raises the level of any of the elements of the vector of development without lowering the level of any other element would increase the level of development. That approach in this context would essentially mean not violating if not actually improving the rights, such as civil and political rights, and improving all other rights such as the economic, social, and cultural rights by promoting and providing the goods and services that are enjoyed in those rights for all people, and respecting

m individuals, $j = 1, \dots, m$ having these rights, then the Right to Development can be described as $R_D = \sum_i \sum_j r_{ij}$, where r_{ij} is the i th human right for the j th individual.

This can be regarded as a special case of our formulation above, where the Right to Development R_D becomes an additive function only of all the rights, i.e., $R_D = \sum_i R_i$, $i = 1, \dots, n$, and each $R_i = \sum_j r_{ij}$, for all $j = 1, \dots, m$.

According to this formulation, all individuals and all rights are given equal weight.

Our formulation, is more in line with Mr. Abi-Saab's second definition of collective right, seen as a right from the collective perspective, "without going through the process of aggregating individual human rights." It is a composite of all the human rights implemented together in an integrated manner, as a part of a development program in the context of growth of resources. There is no need to add them, or combine them into an overall index, to judge whether for a country there are policies that lead to an improvement in the realization of the right to development or there is a violation. Any particular right, R_i , is however a function of the enjoyment of that right by all the individuals and the growth of resources, i.e. $R_i = f(g, R_j)$, $j \neq i$.

The functional form, not necessarily additive, will lead to the construction of the indicators, and will depend upon the context of the country where those individuals reside. The functions, or the indicators, need not be uniform for all countries or for all rights.

It should also be noted that in our formulation g , or the growth of resources is exogenous, determined by factors such as technology, institutions, factor accumulation, other than the different rights. This is a simplification making it mainly a means for realizing these rights, with the constraint that such growth should be so programmed that it does not violate any particular human right. Analytically, g can also be made a function of other rights, (for instance, fulfillment of the right to education may raise the rate of growth), when growth becomes both a means and an end in the process of development. It would however enormously complicate the formulation of the development programs, because in most policy-plans, growth is related to capital accumulation, labor productivity etc., and the specification of the functional relationship between growth and other social development indicators would often be very difficult. So the constraint that g and R_i 's are positively, or at least non-negatively related should be sufficient for our purpose.

In actual practice, growth may actually violate some human rights, say by increasing inequalities or regional disparities, or through increased unemployment or deprivation. In our formulation, this would violate the right to development and a policy-program that leads to that will not be acceptable as a program for realizing the right to development. This may be considered by some as too strong a condition, or that the violation may be seen as small and temporary, leading to a much larger rise in g in the longer run, or a much wider fulfillment of human rights. Analytically this would imply conditions on the cross-effects or the second-order effects, which would more than compensate the direct effect on violation. This would be very difficult to establish, especially if the enjoyment of rights by different individuals may not be comparable. Our formulation of violation of the right to development is simpler and more straightforward.

the principles of equity, non-discrimination, participation, accountability, and transparency that constitute the basic human rights standards. In a practical program, the interrelation between the different rights and the provision of goods and services associated with them should be fully taken into account, both at the present time and over the future. The optimal program, that is the program that yields the maximum value of the indicators of each of these rights, when all of them are taken together, will be a constituent element to the development process claimed under the right to development.

A program implemented over a period is defined as a set of policies that is sequentially consistent with a phased realization of the outcomes. When that program itself, with its outcomes as human rights, is carried out respecting the human rights standards it will become the process of development that is an object of claim under the right to development. But any such optimal program must fully take into account the constraints imposed by the process of economic growth, or 'g' as we have defined above. That 'g' is a function of or related to all human rights, and the human rights themselves are a function of 'g'. In that sense growth becomes both a means and an end in the process of development.

It is possible and will be logically quite consistent with the right to development to make 'g' also an element of the vector of human rights, the process of realization of which is the human right called the right to development. Economic growth with justice and equity, or a process of growth that is carried out maintaining the universal standards of human rights, can indeed be regarded as a human right. But even if that 'g' is not included in the vector of human rights—mainly because that has not yet been accepted by the United Nations or the international community as a human right—the importance of 'g' in the realization of the right to development remains paramount, because 'g' affects all the individual rights. Even if the isolated impact of 'g' on the 'improvement' of individual human rights may not be large, their combined impact will be quite significant. The resource constraint (when resources refer to output, technology and institutions) may not be quite binding if the implementation of any one human right is considered in isolation. But it may be quite severely binding for any program trying to implement all the rights. Any program for realizing the right to development must be based on a design of expanding the resources through a process of sustainable growth consistent with human rights standards.

There is another issue related to the vector approach, which may become quite important in the context of implementing and monitoring a program for the right to development. In the vector approach, we constrain the process of fulfilling the right to development by the condition that while the realization of some rights may improve, no rights can be violated. This

may turn out to be a rather stringent condition, when the overall resource constraints are serious. We noted that in the context of growing resources for a process of development, there may be choices between incremental changes—some rights may improve faster than others and still the condition that no right actually is violated can be satisfied. But this may not always be possible. The technological characteristics of a program may be such that the provision of some goods and services may have to be sacrificed in order to carry out a generally beneficial project, which may lead to the deterioration of the enjoyment of some rights, at least for some time. In terms of our vector approach, that generally beneficial project will then violate the right to development, unless supplementary action is taken to neutralize the negative effects.

The answer to this problem is not to argue that the project will benefit a much larger number of people compared to those whose rights are violated. No such interpersonal comparison of benefits can be made. The only solution would be to write in explicitly that those whose rights are violated must be fully compensated so that after such compensation the individuals who are affected would no longer regard their rights as violated.⁸⁷ The compensation need not be only pecuniary and it may imply adopting other special programs. But the total benefits of the project must be such that the beneficiaries could afford to provide that compensation, if some way could be found to make them do so. According to the compensation principles in economics if the incremental benefits of a project are higher than the required compensation, the project should be accepted even if no compensation is actually paid. In the rights approach however, such compensation will have to be actually paid so that the person whose rights are violated can at least be indifferent between the pre-violation and the compensated post-violation states. If such compensation cannot be extracted from the beneficiaries through tax or other means the government will have to provide compensation. And there must be an appropriate, transparent and consensual mechanism to decide on that compensation and settle all the disputes, with full respect of the sensitivities of the parties concerned, before the execution of the project. In other words, such compensation should be decided through a well defined participatory process where the affected people themselves make these choices.

87. This principle is already adopted by international financial institutions in terms of adhering to acceptable social standards when implementing projects involving resettlement.

7. Value Added of the Right to Development as a Process

We have discussed earlier the value-added to development thinking, from moving beyond per capita GNP growth to adopting a human development approach, where policies focus on providing goods and services that expand peoples' capacities. We have then shown how the human rights approach took that policy paradigm further by providing for the access and availability of those goods and services following the human rights standards. The policies would have to aim at realizing the rights, where each right, whether to food, health, education, housing etc., would involve increasing not only the availability of goods and services associated with the right, but also the access of it to all in a non-discriminatory and equitable way, fulfilling the human rights standards as specified in the different international human rights instruments, related to a manner of implementation that is participatory, transparent, non-discriminatory and accountable with a fair and equitable distribution of benefits.⁸⁸ All these standards impose specific constraints on the policies, in addition to the conditions of efficiency required by the paradigm of economic growth.

The human rights approach helps to establish accountability, and where possible culpability for the failures or mistakes in implementing the policies by establishing the duties and obligations of the different parties, especially of the state and of the international community. Even if they are "imperfect obligations" the rights-duty correspondence for each of the rights has to be established. The remedial or corrective actions have to be enforceable, some of them through legislation, where possible, others through appropriate monitoring mechanisms. The search for accountability leading up to culpability is a genuine value addition of the human rights approach to the fulfillment of human development.

Is there any further "value addition" to the already recognized rights, such as the economic, social, and cultural rights involved in human development, by invoking and exercising the right to development? The question would be legitimate if the right to development were defined merely as the sum total of those rights. Looking at the right to development as a process brings out the value added clearly: it is not merely the realization of those rights individually, but the realization of them together in a manner that takes into account their effects on each other, both at a particular time and over a period of time. Similarly, an improvement in the

88. Those standards have been specified in the different international human rights instruments, but also elaborated in the General Comments of the Committee on Economic, Social and Cultural Rights.

realization of the right to development implies that the realization of some rights has improved while no other right is violated or has deteriorated.

For example, in implementing the right to adequate food, as in Article 11 of the ICESCR, the General Comment of the Committee on Economic, Social and Cultural Rights of 12 May 1999,⁸⁹ which must be taken fully into account in any rights-based program, refers to three levels of obligations, respecting, protecting and fulfilling. Each one of them is interrelated with the level of realization of other rights and that must be taken into account when realization of the right to food is considered as an element of the right to development. For example, it may not be possible to respect or protect this right if there is no freedom of information or association. Fulfilling, on the other hand, requires providing people access to adequate food and will depend on the resource base for food, whether for production or for imports. The General Comment recognizes this (para. 27), but does not go to the extent of noting that it implies looking at the provision of food as a part of a country's overall development program, bringing in fiscal, trade and monetary policies and the issues of macroeconomic balance which the right to development approach must take into account. Similarly, with regard to the right to health, or the right to housing, or even the right to education, fulfilling these rights together would imply augmenting the availability of resources and the proper allocation of existing resources. This would mean changes in overall economic policies, so that the increased realization of any one right is achieved without detracting from the enjoyment of the other rights.

There are two obvious implications of looking at the right to development as an integrated process of development of all human rights. First, the realization of all rights, separately or jointly, must be based on comprehensive development programs using all the resources of output, technology and finance, through national and international policies. The realization of human rights is the goal of the programs, and the resources and policies affecting technology, finance and institutional arrangements are the instruments for achieving this goal. If a rights-based approach to participatory, accountable and decentralized development turns out to be cost-effective it may be possible to reduce the expenditure of resources in one direction, for example education, and raise it in another, such as health, and thereby register an improvement in the realization of both rights. But if these improvements are to be sustained and extended to cover all rights, the resource base of the country must expand to include not only GDP, but also technology and institutions. In other words, the value added of the concept

89. *The Right to adequate food*, General Comment No. 12, Comm. on Econ., Soc. & Cult. Rts, 20th Sess., U.N. Doc. E/C.12/1999/5 (1999).

of the right to development is not just that the realization of each right must be seen and planned as dependent on all other rights, but also that the growth of GDP, technology and institutions must be planned and implemented as part of the right to development. Like the rights to health, education, etc. the growth dimension of the right to development is both an objective and a means. It is an objective because it results in higher per capita consumption and higher living standards; it is instrumental in that it allows for the fulfillment of other development objectives and human rights.

However, to be recognized as an element of the program for the right to development, growth of resources must be realized in the manner in which all human rights are to be realized, that is, following the so-called human rights standards, ensuring in particular equity or the reduction of disparities. That would imply a change in the structure of production and distribution in the economy, which ensures growth with equity and would imply a program of development and investment that may not depend on reliance on market mechanisms alone, but may require substantial international cooperation. Indeed, once the right to development is seen in the context of a development program aiming at a sustained, equitable growth of resources, it becomes clear that national action and international cooperation must reinforce each other in order to realize rights in a manner that goes beyond the measures for realizing individual rights.

Looking at the right to development as the right to a process of development also brings out another advantage of such a human rights claim. Following Sen, it is possible to say that the right to development as a process of development is a metaright to the set of recognized human rights and fundamental freedoms.⁹⁰ That process of development consists of a program or plan of policies executed over time maintaining consistency and sustainability with phased realization of the targets. The right to that process is different from the right to the outcomes of that process. But it is expected that the process would lead with a high probability to the realization of all these outcome rights. The right to that process of development is thus a metaright to all these human rights.⁹¹

90. See Sen, *The Right*, *supra* note 21.

91. See Declaration on the Right to Development, *supra* note 2. This can be seen as the reduced form equation of the two equations presented there, to represent first, that each right is a function of a particular pattern of growth and all other rights $R_i = f(g, R_j)$, $j \neq i$, $j = 1, 2, \dots$ and second, that the particular pattern of growth is derived from the function $g = G(S, R_i, P)$, where growth depends on the stock of resources, technology and institutions (S), the realization of the different rights and the set of policies (P). These two equations reduce to the equation $R_i = F(S, R_j, P)$ where S is exogenously given. P is then a set of policies to be chosen from many alternatives so that it has the maximum impact on the realization of any right, through its effect on growth, and directly and indirectly on other rights. That process of development, which is a process over time, consists of

This would mean that even when there is no international consensus about the validity or attainability in the near future of all the rights recognized as human rights, for whatever reasons, there can still be a full consensus about implementing the right to development as a process of development that has a high probability to lead to the realization of these rights over time. Indeed, even if the accountability or the responsibility of the different agents with respect to the fulfillment of the outcome rights cannot be fully specified, because they may be contingent on the actions of other agents, the obligations of all the parties with respect to the implementation of the program of policies can be laid down more precisely and in a more binding manner. In this sense, the right to development is a concrete implementable right with identifiable obligations for national action and international cooperation.

II. THE RIGHT TO DEVELOPMENT IN PRACTICE

A. International Cooperation

As we discussed earlier, the movement for the right to development was initiated by the developing countries as a claim of the developing countries on the international community. It was associated with the 1970s movement for establishing a New International Economic Order when the world was largely divided between the North and the South, the industrialized versus the developing countries, with the countries in the Soviet bloc generally supporting the South from the sidelines. The right to development, besides being a claim on equitable treatment in all international transactions of the developing countries, became concerned mostly with the transfer of resources and the favorable treatment of those countries in international trade and finance.

Much of the language used by the developing countries at that time has lost its relevance today. The world is no longer that sharply divided between the North and the South, the Cold War has come to an end and the Soviet bloc has disintegrated. But despite the considerable differences in the

the levels of realization of the different rights, in proper sequences and phases, and a set of policies P, also in proper sequences and phases. Clearly, it depends crucially on P being chosen through a proper exercise not only of technical optimization but also through a participatory and consensual process. Once such a P is chosen that has a high likelihood of realizing the targeted rights, then that P together with the phased realization of the different rights would contribute to a program or process of development that would be the metaright to realize the targeted human rights and that would itself be a human right.

interests of different developing countries, arising from their different levels of development, the essential nature of their dependence on international cooperation has not changed. Except in the case of a few newly industrialized economies, most developing countries are still short of resources. They require a substantial transfer of resources from the industrial countries to supplement their domestic resources and much more such as debt relief, commodity price stabilization or preferential access to markets. The structure of the international financial system still discourages private capital flows to most low-income countries, and any external shock can generate panic in the international capital market, resulting in the flight of capital from most developing countries. Developing countries still require international cooperation to enable them to cope with such problems.

For a great number of countries, in order to realize many of the objectives related to the right to development, making more effective use of existing resources may be more important than the additional flow of resources. For many projects implemented with a rights-based approach to development, the resulting transparency, accountability, increased equity and empowerment may be cost-effective in terms of public expenditure and may substantially reduce the need for a large injection of foreign aid. But this does not mean that there is no need to increase the transfer of resources: the resource gap is still very large for most developing countries, especially in those poorer countries, which are bypassed by private capital. There certainly is a case for more effective use of aid, but there is no case for reducing those flows. In addition, international cooperation will have to take many different forms to tackle the problems mentioned above, such as solving the debt problem, decreasing the instability of commodity prices and export earnings, reducing the protectionism in developed countries and dealing with the inadequacies of the international financial system.

However, the overall responsibility of developing countries themselves in implementing the right to development, following the human rights approach, is not diminished even if international cooperation is not forthcoming to the extent desired. The states' responsibility remains absolute in the human rights approach. They must enact legislation, adopt appropriate measures, engage in public actions, formulate schemes that empower the beneficiaries at the grass-roots level, allocate investment and restructure production to promote a process of development with equity and sustainable growth with whatever resources they have in a given framework of international cooperation. If the level of that international cooperation improves, they will be able to do the job more effectively. But states cannot simply wait for that increase while not doing all that they can to implement the right to development and protect, promote, fulfill and facilitate the enjoyment of all civil and political rights, as well as the economic, social, and cultural rights.

The duty of the international community to cooperate in order to implement the right to development is also absolute, and it is imperative that a consensus is created around a framework for international cooperation enabling the states parties, with the help of civil society, to realize the right to development for all the people of the developing countries. As the realization of the right to development is a process, it can be done step by step, creating a framework and taking up areas progressively in accordance with the availability of financial, technical and institutional resources.

Such international cooperation would usually have two, not mutually exclusive, dimensions. First, cooperation measures should be conceived and executed internationally in a multilateral process in which all developed countries, multilateral agencies and international institutions could participate by providing facilities to which all qualifying developing countries could have access. Secondly, bilateral facilities or country-specific arrangements would deal with problems requiring measures adapted to particular contexts. There are now a number of multilateral facilities and arrangements dealing with the debt problems of developing countries; structural adjustment, concessional financing facilities of international financial institutions, world trade organizations and developed industrial countries' programs of providing market access, and restructuring of the international financial system to solve the many problems of inadequacy and instability of financial flows of developing countries. All of these require intensive review from the point of view of meeting the obligations of international cooperation with different states trying to realize the right to development. In a human rights framework such international cooperation should not only be transparent and non-discriminatory but also equitable and participatory, both in the decision-making and in the benefits-sharing. The *quid pro quo* for the industrial countries and the international institutions of accepting this human rights framework is that their obligation is matched by the obligation of the developing countries to facilitate the realization of the right to development of their people.

With regard to bilateral facilities and country-specific arrangements, it is possible to operationalize them to realize the right to development in a step-by-step manner. Indeed, both the multilateral and bilateral dimensions of international cooperation open up new possibilities for realizing the right to development in a human rights framework. This can radically transform international economic relations, especially between the developed and developing countries. The human rights approach to the realization of the right to development provides scope for building up a cooperative relationship between the developed and developing countries on the basis of partnership rather than the confrontation of earlier years.

1. *Development Assistance*

One of the instruments of international economic cooperation has been official development assistance (ODA) or foreign aid. But that is just one of several methods that can be used by the bilateral donors to cooperate with the developing countries. A bilateral approach can be extended also to providing access to markets through preferential trade liberalization, providing incentives to increase investment flows and transfer of technology, debt forgiveness, and assisting countries to meet financial crises and other emergencies. However, there are two characteristics of ODA that make it so crucial an instrument of support for the developing countries. First, ODA is provided by most donors as grants or at highly concessional terms. Second, ODA can be given and used at the discretion of the public authorities, without being guided by market returns. Most developing countries cannot attract private flows, as they cannot generate sufficient market returns to provide the incentives, even though the social returns on these investments are very high. ODA can then finance activities with very high social returns, such as education, health, nutrition and other items of social development, all of which are important for realizing the right to development. ODA can also be used to leverage an increase in the flow of private capital to these countries through sharing the risk and raising the market return on a project through joint ventures or capital subsidies.

Since ODA is like public grants by the developed industrial countries, its flows will depend upon the motivation of the donor governments or the public perception of the benefits of foreign aid used in the developing countries. Industrial countries have not lost their interest in foreign aid, nor have they really developed "aid fatigue." Although ODA from the industrial countries taken together, never reached the 0.7 percent target, it hovered around 0.32 to 0.33 percent of GNP for all DAC countries excluding the USA, and the real ODA at 1999 prices and exchange rates has been increasing, although not very fast in the last two decades—a fall in the mid-1990s has been fully compensated by the increase from 1996.⁹² ODA in the USA has however fallen quite sharply, after the end of the cold war, clearly because the balance of power reasons of the earlier years did not find a matching motivation to replace them in the recent years. But even the US experience has shown that the authorities did not hesitate to pump in substantial amounts of public money to help the developing countries to emerge from financial crises and to continue making large contributions to the concessional windows of the World Bank and the IMF. In other words,

92. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *SHAPING THE 21ST CENTURY: THE CONTRIBUTION OF DEVELOPMENT CO-OPERATION* (1996) [hereinafter *SHAPING THE 21ST CENTURY*].

with proper motivation, the successive US governments have shown significant inclination to devote public funds to focused assistance for developing countries. If there is any fatigue in the industrial countries it is not related to giving away public money to aid and assist the developing countries, but to the manner and purpose with which aid has so far been provided.

Development assistance would remain the most important instrument of international cooperation, and surely it would be desirable if the volume of foreign aid would increase. It is useful to remind ourselves of the voluntary, albeit only morally binding, commitment of the industrial countries to provide 0.7 per cent of GDP as foreign aid, and to urge those countries that have failed to meet their commitments to fulfill them. If in addition, it can be shown that this development assistance is facilitating the realization of human rights in the developing countries, then perhaps substantial public support can be built up in these countries in favor of ODA. Indeed, the volume of ODA can significantly increase if it is used for implementing the right to development, supplying the appropriate motivation for a new paradigm of development cooperation.

2. *Development Compacts*

The donors have a legitimate concern about the effectiveness of the resources they provide to the developing countries in furthering the objectives of development. Conditionalities, when they are imposed without the willing consent of the recipients, would go against the spirit of the rights approach to development. But if they are part of an understanding and are perceived as a "compact" based on mutual commitment to fulfilling conditions for implementing programs, they can become an effective instrument for realizing the right to development.

The idea of a "compact" was first floated by the Norwegian Foreign Minister, T. Stoltenberg, in the late 1980s and was elaborated upon by other development economists and in the *Human Development Reports*. It was meant to support programs, which the developing countries were supposed to implement according to a sequenced design of policies with a clear commitment by donors to provide the required assistance in terms both of finance and trade access and other policies to match the efforts of the recipient countries.⁹³

93. T. Stoltenberg, *Towards a World Development Strategy*, in *ONE WORLD OR SEVERAL* (Louis Emmerij ed., OECD, 1989). Stoltenberg talked about development contracts as comprehensive long-term commitments by industrial countries for development assistance to implement long-term development plans of the third world countries. This was taken up by others at the OECD Development Centre, when it was suggested that a Development Commission be formed to conduct continued dialogue between developing and industrial countries. The idea of a Development Compact is less ambitious and

It would be useful to invoke the concept of a development compact once again in working out programs for implementing the right to development. It does not have to detract from existing arrangements and the use of resources for ongoing programs. But the international community might like to decide to adopt a few specific international programs to realize at least some of the targets as human rights, to begin implementing the right to development as compacts between developed and developing countries which would take on the obligations of following policies and procedures mutually agreed upon and of providing required financial and other assistance as identified. As long as implementing these programs does not worsen the achievement of other programs or objectives, there will be definite progress towards realizing the right to development.

The reciprocal obligations that will have to be spelled out in the development compacts must be worked out carefully. The developing countries must accept the primary responsibility of implementing programs for realizing the right to development covered by the compact, with all the necessary policies and public actions. Several studies of the World Bank and IMF showed that the usual process of imposing conditionality in financial programs did not work in most cases because they appeared to be imposed from outside and therefore not owned by the developing countries.

As one recent assessment put it: 'Although much has been added to the conditionality menu since 1981, nothing has been taken off.' The time government officials spend negotiating and monitoring these conditions is time they could better have spent analysing development problems and designing development strategies.⁹⁴

It is imperative that whatever conditionality or obligations the developing countries have to take up should be seen by them as being in their own interest and should be monitored mostly by them. In a rights-based approach, this is particularly important to ensure equality of treatment.

In a development compact, the developing countries will have to assume obligations regarding fulfilling and protecting human rights. The most equitable manner of monitoring the fulfillment of those obligations

more linked to an understanding or an agreement between a developing country undertaking programs of adjustment and reform and a group of industrial countries which would ensure the provision of necessary assistance to implement the programs. The logic of reciprocal obligation was spelled out in the report of the IMF Group of 24, *The Functioning and Improvement of the International Monetary System*, IMF SURVEY (Sept. 1985), and developed by Arjun Sengupta, *Multilateral Compacts Supporting Economic Reforms*, THE CHALLENGE TO THE SOUTH: THE REPORT OF THE SOUTH COMMISSION (1990), and in the UNDP, HUMAN DEVELOPMENT REPORT, 1992 (1992).

94. WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001, ATTACKING POVERTY 93 (2001) [hereinafter WORLD DEVELOPMENT REPORT].

would be through the establishment in each country of a national human rights commission, consisting of eminent personalities from the country itself. For that purpose, all countries wishing to implement the right to development through development compacts will have to set up such national commissions, which will investigate and adjudicate on violations of human rights. That is initially the only way to ensure against such violations. No country in the world could claim that there are absolutely no violations of human rights in its territory. All that can be ensured is that there is an adequate mechanism in the legal systems to redress such violations. If a developing country sets up a national human rights commission in accordance with international norms and it can function independently without any hindrance or obstacle and appropriate legislation is framed, then that should be sufficient guarantee that the country will carry out its human rights obligation according to the development compact.

The obligation of the international community should also be set out in the context of the development compact. If a developing country carries out its obligations, the donor countries and the international agencies must ensure that all discriminatory policies and obstacles to access for trade and finance are removed and the additional cost of implementing those rights is properly shared. The exact share may be decided on a case-by-case basis or in accordance with an international understanding of, say, half-and-half share of the additional cost between representatives of the international community and the country concerned.

The details of the compacts and the rights-based approach to the implementation of such a program may be worked out without much difficulty by experts from the countries concerned and the international agencies that were involved in the countries and experienced in the appropriate fields. What is necessary is political will, determination on the part of all the countries that have accepted the right to development as a human right to implement the right to development in a time-bound manner through obligations of national action and international cooperation.

The idea of a compact is only one model of international cooperation; the practical feasibility of that idea, as well as other alternatives, will have to be examined in further detail. The approaches to development cooperation brought out by the Development Assistance Committee (DAC) of the OECD and the bilateral donor agencies are very consistent with our approach of realizing the right to development. The 1996 DAC study *Shaping the 21st Century: The Contribution of Development Cooperation*; the 1997 Swedish International Development Authority study, *Development Cooperation in the 21st Century*; the 1997 White Paper by the United Kingdom Secretary of State for International Development, *Eliminating World Poverty: A Challenge for the 21st Century*; and the World Bank policy research report, *Assessing Aid*, all spelled out the essential ingredients on which the

approach of a development compact proposed here can be built.⁹⁵ To this must be added the *World Development Report of 2000/2001* by the World Bank and the *Poverty Reduction Strategy Papers* prepared by the IMF and the World Bank in the context of the HIPC initiatives where the industrial countries and the international financial institutions enter into some form of reciprocal obligations.⁹⁶ The Fourth Report of the Independent Expert on the Right to Development to the Human Rights Commission spells out the modalities of such development compacts in greater detail.⁹⁷

B. Elements for a Program to Implement the Right to Development

The basic characteristics of any program for realizing the right to development can be summarized as follows:

- (a) The implementation of the right to development should be seen as an overall plan or program of development where some or most of the rights are realized while no other rights are violated. In addition, there should be sustained overall growth of the economy, with increased provision of resources for the realization of those rights and with improved structure of production and distribution facilitating that realization;
- (b) Implementation of any of the rights cannot be an isolated exercise, and plans or projects for the implementation of the other rights should be designed taking into account consideration of time and cross-sectoral consistency;
- (c) The exercise of implementing the overall plan and realizing individual rights must be carried out according to the human rights standards, that is, with transparency, accountability and in a non-discriminatory and participatory manner and with equity and justice. In practice, this means that the schemes should be formulated and implemented at the grass-roots level with the beneficiaries participating in the decision-making and implementation, as well as sharing equitably in the benefits. In short, this implies planning that empowers the beneficiaries;

95. SHAPING THE 21ST CENTURY, *supra* note 92. See, e.g., SWEDISH INTERNATIONAL DEVELOPMENT AUTHORITY, *DEVELOPMENT COOPERATION IN THE 21ST CENTURY* (1997); UNITED KINGDOM SECRETARY OF STATE FOR INTERNATIONAL DEVELOPMENT, *ELIMINATING WORLD POVERTY: A CHALLENGE FOR THE 21ST CENTURY* (1997); WORLD BANK, *ASSESSING AID: WHAT WORKS, WHAT DOESN'T, AND WHY* (1998).

96. *WORLD DEVELOPMENT REPORT*, *supra* note 94; IMF and World Bank, *Poverty Reduction Strategy Papers*.

97. Fourth Report of the Independent Expert on the Right to Development, U.N. Doc. E/CN.4/2002/WG.18/2. The OHCHR website is available at <http://www.unhchr.ch>.

- (d) The interdependencies of the different elements of the right to development be determined by the economic, political, social, and legal institutions and the rules and procedures of their operation; and a process of development associated with human development and expanding opportunity with equity and justice will often require a fundamental change in those institutions. The realization of the right to development would in such cases imply a change in the institutional framework, and that would often spill over from national to international institutions;
- (e) While the holders of the right to development are peoples and individuals in developing countries as specified in the 1986 Declaration, the duty bearers are primarily the states and the international community and the other members of national and international civil society. It would therefore be necessary to specify the policies in pursuance of these obligations, which states parties and the international community, consisting of the international agencies, donor countries and other Governments, as well as multinational corporations, must carry out to implement those rights.

Although not clearly identified as an abiding principle in human rights instruments, the motivation of the human rights approach to development guides one along the lines of protecting the worst-off, the poorest and the most vulnerable. In theory, this would be the application of the Rawlsian Difference Principle that requires maximizing the advantages of the worst-off, no matter how that affects the advantages of the others.⁹⁸ This could also be regarded as the minimal principle of equity, over which there may be not much difficulty in generating a universal consensus. Poverty is the worst form of violation of human rights and it naturally becomes the target of any program to realize human rights based on equity and justice. If it is possible to generate greater consensus on international cooperation for poverty eradication, that might be most useful for realizing the right to development.

Eradicating poverty as improving the well-being of the most vulnerable segments of the population meets, with the criteria of equity and the Rawlsian principle of justice, and if the lot of the poorest 30–40 per cent of population is improved, it may not matter at least in the first phase of development what happens to the other richer segments of the population. Economic policies other than poverty eradication programs can be built on a reliance on the market forces to improve the well-being of the other segments of the population. The only problem to be concerned about is that an overdependence on market forces should not create the conditions for an

98. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

economic and financial crisis that may suddenly have an adverse effect on the nature of the poverty or increase the number of the poor. There should be enough international cooperation, such as creating a lender of last resort or contingency financing facilities with international institutions, to take care of such problems. All the consensus and good will generated by such arrangements could then be focused on programs for the eradication of poverty.

Poverty has at least two dimensions. The first is income poverty, which relates to what percentage of a country's population subsists below a minimum level of income or consumption. The second is related to the capability of the poor to come out of poverty in a sustainable manner by having increased access to facilities like health, education, housing and nutrition. In that context, pursuing policies to realize some of the other basic rights, such as the right to food, the right to health and the right to education in a framework of international cooperation would be wholly consistent with a program for the reduction of income poverty.

From the perspective of realizing human rights, the concept of poverty goes much beyond just income poverty. It signifies an unacceptable level of deprivation of well-being, a level that a civilized society considers incompatible with human dignity. Amartya Sen claims that poverty must be seen as deprivation of basic capabilities rather than merely as low incomes.⁹⁹ Capabilities are essentially related to human rights, giving individuals expanded choice or freedom to be and do things that they value. Capabilities are not limited only to basic education and health care, although they are undoubtedly important not just as values but also in raising the capacity of individuals to increase their income and well-being. Several studies that asked poor people in different countries what they considered to be basic characteristics of poverty found that income mattered, but so too did other aspects of well-being and the quality of life—health, security, self-respect, justice, access to goods and services, family, and social life.¹⁰⁰

So, for a program for the eradication of poverty, it is necessary to look at a number of indices of well-being or social indicators together, and an approach based on the right to development implies considering improvement in each of the indices through schemes that have to be implemented following the rights-based approach and as a part of a coordinated program of growth and development. The rights-based approach, where the beneficiaries are empowered to participate in the decision-making and in executing the different schemes, transparently and accountably, and sharing

99. See SEN, *supra* note 18.

100. Robert Chambers, *Poverty and Livelihoods: Whose Reality Counts?* DISCUSSION PAPER NO. 347, INSTITUTE OF DEVELOPMENT STUDIES, UNIVERSITY OF SUSSEX (1995).

the benefits equitably, is not just an end in itself, realizing the human right to development. Such an approach also improves the outcome of the schemes that increase the value of the different social indicators. The rights-based approach would then also be instrumental to improving the realization of the right to development.

1. Illustrative Elements of a Program

In light of the discussion above, it may be useful to reformulate an international program for realizing the right to development based on national action, international cooperation and development compacts for the countries that adopt the program. Surely a program of coordinated actions may take the form of a development plan that strives for growth of GDP and other resources, as well as sustained improvement of the social indicators related to the different rights. All the individual and interdependent schemes need to be designed and implemented following the human rights standards, based on empowerment and participation in the decision-making and execution, with transparency and accountability, and equity and non-discrimination in the enjoyment of the benefits. Such a plan would be totally different from the earlier forms of central planning because these would be based entirely on decentralized decision-making with the participation and empowerment of the beneficiaries. The plan has to be formulated through a process of consultation with civil society and the beneficiaries in a non-discriminatory and transparent manner.

In the initial phase, such a development plan may concentrate on a well-designed and well-targeted program for the eradication of poverty in its broad dimensions; not just income poverty, but also the deprivation of capabilities. The reduction of income poverty would require a plan that not only would raise the rate of growth of the country but also would change the structure of production to facilitate the income growth of the poor, as well as increased equality of consumption, both within the region concerned and between regions. In addition, there will have to be an improvement of the social indicators that expand the capabilities following the rights-based approach consistent with the planned rate of growth of the overall output and of the indicators and their interdependence. However, since all these rights cannot be realized in the immediate future, it may be practicable to concentrate on at least three basic rights, like to food, to health and to education, with their broad targets to be realized first. In accordance with our approach to the right to development, it must be ensured that while at least these three rights improve in their realization, no rights, including the civil and political rights, deteriorate or are violated.

These three rights are chosen, as they are the basic capabilities that

have to be associated with any sustainable program of poverty reduction. They are basic because the fulfillment of many other rights depends on the prior fulfillment of these rights. They also involve provision of goods and services on which people at the early stage of development spend most of their incremental income to raise their well-being. But this does not mean that other rights are not important. It is possible to choose more such rights as targets, including housing, sanitation, slum clearance, or specific mortalities and tackling problems like that of HIV AIDS, along the lines of the Millennium Summit. The focus would depend upon the political consensus in the countries concerned and the donor community as well as the availability of resources. But at the minimum, there should be no disagreement in adopting targets related to these three rights, such as abolishing hunger and malnutrition, illiteracy and lack of basic education, and ensuring access to primary health care facilities, within a well-specified period.

Once the program is worked out and accepted by the countries concerned, the developed industrial countries may enter into development compacts with the different countries laying down benchmarks of reciprocal obligations. If the developing country concerned fulfills its obligation according to those benchmarks, the international community would guarantee the fulfillment of their part of the obligation. A mechanism has to be established to work out the burden sharing arrangements among the industrial countries. If there is the political will, such arrangements can be worked out for implementing the development compacts.

2. Importance of Economic Growth

Before we end it may be useful to highlight the most important features of the program for realizing the right to development, which is that it is based on a strategy of growth of resources with equity and respect for human rights standards. Resources here include not only GDP, but also legal, technical and institutional resources. Any improvement in those resources improves the prospects of realizing all the rights and increases the value of their indicators.

The doubts raised in the human rights discussion about the relationship between growth of GDP and the values of those indicators have been mostly the result of confusion between what is the necessary and what is the sufficient condition in the relationship. For any sustained increase in the value of the indicators, it is necessary to have higher growth of GDP. But having higher growth of GDP is not sufficient to have a high value of the indicators.

There are several studies that show that a reduction of income poverty

is almost always associated with growth (in income or consumption) and that negative growth is accompanied by an increase in poverty.¹⁰¹ However, for any given rate of growth, different countries may have different values of income poverty, depending upon how the results of growth are distributed, or the pattern of growth, whether the sectors producing Labor-intensive outputs, such as agriculture, are growing more or whether regions that have higher growth of population or labor force are growing faster. With regard to the non-income variables or other social indicators, it is possible at a given moment to raise those values by reallocating the resources within a given level of income. But this cannot be sustainable, even in the medium term, without an increase in the availability of resources, especially when a number of such indicators, each with its claim on resources, are expected to increase together in a coordinated manner in a program for realizing the right to development.

In other words, the resource implications of implementing any one right separately and independently from others are different from implementing all or most rights together as part of a development program. It may be possible to implement any one single right without spending many additional resources, just by using the current level of expenditure more efficiently or through better allocation of the expenditures. In most cases, it would only be necessary for the states parties to adjust their method of functioning and fulfill their obligations to the beneficiaries according to the human rights approach. There will be indirect effects of not fulfilling the other rights, because as noted earlier, the level of enjoyment of any one right will depend upon the level of enjoyment of the other rights, but those effects could be ignored if the concern is with the implementation of one single right in isolation. However, if implementing a single right is seen as a part of a program for development, it will have to build on the interdependence between the rights or between the flows of goods and services that are reflected in the social indicators associated with different rights. This would call for a substantial increase in net resources, often to a level well beyond the domestic resources that are available.

In order to sustain a high and feasible level of growth that expands the supply of resources over time, most developing countries require a domestic rate of investment that is higher than the rate of savings, which must be bridged with a supply of foreign savings or international transfer of resources. Developing countries' claim on international cooperation, to which they will be entitled by virtue of the international acceptance of the right to development, will include, in addition, a change in the framework

101. See Martin Ravallion & Shaoshu Chen, *What Can New Survey Data Tell Us About Recent Changes In Distribution and Poverty?* 11 *WORLD BANK ECON. REV.* 360 (1997).

of international relations giving them an equitable share in the fruits of international transactions. The need for such cooperation will be much greater than in the usual human rights approach to realizing individual rights.

The obligation of the developing countries themselves would also be designing and implementing policies that produce not only equitable but also sustainable growth. They have to be based on programs of redistribution as well as allocation of resources that ensure the fulfillment of the basic rights, which must not allow inefficiency and market distortions causing avoidable waste of resources. They also must follow the conditions of macro-economic stability to ensure sustainability of the process of growth. A program for realizing the right to development should not be seen as ignoring the policies of stability and sustainability of economic growth with efficient allocation of resources. Instead, it builds on those policies to channel the economic activities, maintaining the human rights standards, to realize all the human rights and fundamental freedoms.