

HUMAN RIGHTS AND ECONOMIC DEVELOPMENT*

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Human rights and development: are these two notions antithetical? Is there, as is sometimes claimed, an “Asian exception” which postpones civil and political rights until there has been achievement of economic, social and cultural rights, and of the right to development?

I would like to start by tracing, as a lawyer should, the international legal principles which support human rights and the right to development. Reference will be made to some of the practical work I recently did in Asia, specifically in Cambodia, on behalf of the United Nations Secretary-General.

My propositions will be that we are all on a journey of discovery in the matter of human rights; that we can all learn from each other; that all fundamental human rights are important, integrated and universal; and that it is the duty of lawyers all over the world to contribute to the building of the rule of law and respect for the whole variety of human rights.

THE RISE OF UNIVERSAL HUMAN RIGHTS

The idea of universal, fundamental human rights steadily gains power. The idea has an ancestry which may be traced to the writings of ancient prophets and philosophers. But in terms of the modern, global community, its international influence follows the adoption by the General Assembly of the United Nations of the Universal Declaration of Human Rights on 10 December 1948. This has been described as a major step forward in the promotion of the rule of law at the international and national levels. The

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Declaration comprises, in one consolidated text, nearly the entire range of what today are recognised as human rights and fundamental freedoms.¹

The Universal Declaration was followed by a call from the General Assembly, to convert its broad and general language into a legally binding treaty. At first it was envisaged that a single Convention would be adopted. However, at the time, in the midst of one of the frostiest periods of the Cold War, the western states were resistant to the idea of a treaty with binding obligations concerning economic, social and cultural rights. This was seen by many western jurists as adopting the language of the communist states. The result was the decision of the General Assembly to divide the rights contained in the Universal Declaration into two separate international Covenants, one on civil and political rights (ICCPR) and the other on economic, social and cultural rights (ICESCR).² A great deal of attention has been given by jurists to the ICCPR. In many countries, including Australia, the First Optional Protocol renders infractions accountable on the individual petition of citizens. Much jurisprudence has now grown up around the provisions of the ICCPR. But the other Covenant, the ICESCR, is relatively unexplored territory for most lawyers.

Yet it is here, in economic and social rights, that at least some matters of special interest to the average citizen are mentioned. Take the reference to women. Article 10(2) mentions "special protection" for "mothers during a reasonable period before and after childbirth" including paid maternity leave. Article 12(2) refers to "provision for the reduction of the still-birth rate and infant mortality". Article 7(a)(i) envisages "equal pay for equal work".³ These are very practical concerns. A purpose of my contribution is to draw attention to the ICESCR and to suggest ways in which lawyers may promote its objects and enhance its impact.

The ICESCR, and its subject matter, suffered years of neglect. This was because of ideological differences and, in part, for technical legal reasons. To some, the rights collected in the ICESCR were not true "rights". To

¹ Eide and anor, "Economic, social and cultural rights: a universal challenge" in Eide and ors, *Economic, Social and Cultural Rights* (1995, Martinus Nijhoff, Dordrecht) 15.

² General Assembly 543 (VI), 5 February 1952.

³ Wright, "Human rights and women's rights" (1993) 18 *Alternative Law Journal* 113, 125.

others, they are more important rights, even having priority over civil and political rights on the suggested footing that affording to every citizen a full stomach is more urgent and important than securing “developed” or “western rights” of a political or legal character.⁴ As Asbjorn Eide and Allan Rosas observe:⁵

Regrettably, adherents of opposing schools of thought resort more to catchwords and political sloganism than to serious analysis of economic, social and cultural rights as individual, enforceable rights... At least some of the rights falling into the category of economic, social and cultural rights lend themselves to what is often referred to as “justiciability”. A crucial question is whether we, as human beings, are willing to uphold the vision of a universal rule of law embracing the civil, political, economic, social and cultural aspects of human existence and to promote the concern with solidarity which is essential to integration, both at national and international level. Alternatively, we might have to be prepared to allow the world to break up even more than before into profit-centred individualism in some parts of the world, and into ethnically and culturally defined entities in other places – entities which might contain a degree of solidarity within the group while excluding others.

Some writers, tracing the development of human rights since the establishment of the United Nations, discern what they describe as different “generations” of human rights, reflecting different stages of their conception, institutionalisation and achievement.

The so-called “first generation” human rights are those dealing with basic civil and political matters. They were conceived and expressed early in the history of the international human rights movement. In many countries, they have a long history of institutional protection. Following the Universal Declaration they have been addressed both in the ICCPR and in numerous regional conventions and national constitutions.

The “second generation” human rights are those dealing with economic, social and cultural rights. Many of these were conceived at the same time

⁴ Eide note 1 at 17.

⁵ Ibid at 17-18.

as the statement on civil and political rights. But their development has been retarded. The institutional arrangements for their enforcement are still very weak. Until 1986, the ICESCR existed only as a textual reference point.⁶ It was in that year that the United Nations Committee on Economic, Social and Cultural Rights, comprised of independent experts, was established to receive state reports on the carrying into effect of the high objectives of the Covenant. According to expert observers, “the Committee has begun the important but lengthy process of normative development”.⁷

The “third generation” human rights comprises group or “solidarity” rights. These are also sometimes contested by lawyers.⁸ The group rights usually dealt with in the so-called “third generation” category are the suggested right to a healthy and sustained environment and the right to development.

The notion that the people of the world have a claim on economic and social development is actually reflected in the United Nations Charter. Thus, Article 55 requires the United Nations to promote higher standards of living and conditions of economic and social progress and national development. It requires the United Nations to find solutions to international economic, social, health and related problems. It requires universal respect for human rights and fundamental freedoms. By Article 56, all member states of the United Nations pledge themselves to take joint and separate action, in cooperation with the organisation, for the achievement of the purposes of Article 55.

The existence of a fundamental human right, of the “third generation”, to economic development is still controversial.⁹ In 1969, the General Assembly adopted a Declaration on Social Progress and Development. The idea of a separate right to development was first put forward by Judge

⁶ Craven MCR, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (1995, Clarendon Press, Oxford) 1.

⁷ *Ibid.*

⁸ Rosas, “The right to development” in Eide A and ors, *Economic, Social and Cultural Rights* (1995, Martinus Nijhoff, Dordrecht) 247.

⁹ *Ibid.*

Kéba M'baye in 1980.¹⁰ The United Nations Commission on Human Rights then called for a study of the international dimensions of the right.

In 1986, the General Assembly adopted a declaration on the right to development. It was adopted by a vote of 146:1 with eight abstentions. The United States of America was the sole dissident. The abstaining states were the Nordic countries (except for Norway), Germany, Israel, Japan and the United Kingdom. This declaration was followed by several expert meetings. In June 1993, the United Nations' World Conference on Human Rights in Vienna adopted, by consensus, a Declaration and Programme of Action containing passages reaffirming the right to development as:¹¹

a universal and inalienable human right and an integral part of fundamental human rights.

Following the Vienna Declaration, the United Nations Commission on Human Rights established a working group on the right to development. It held its first session in November 1993. In 1994 it adopted a resolution calling for the establishment of a permanent mechanism to evaluate the achievement of the right to development. By this time it had become clear that many developing countries saw the issues involved in the "right to development" as being concerned with equitable economic relations, favourable economic environments at the international level more to the liking of developing countries, and relief from the crippling burden of servicing international loans. It is perhaps because of these divisions that the proposal of the Commission on Human Rights that its working group should address global economic issues (such as the debt problem) resulted in a sharp division in the membership of the Commission on Human Rights. Whilst 43 states supported the proposal, three of them (Japan, United Kingdom and United States of America) voted against it. Eight countries, all from Europe, abstained. The vote shows the "continuing divergences of views as to the implications of the right to development and its follow-up".¹²

¹⁰ M'Baye, "de Droit au Developpement" in Dupuy RJ (ed), *Le droit au developpement au plan international* (1980, Sijthoff and Noordhoff, Alphen aan den Rijn) 72.

¹¹ Vienna Declaration, World Conference on Human Rights, United Nations Document A/Conf/57/23 para 1/10.

¹² Rosas note 8 at 251.

Three elements of the content of the right to development may be noted. The first is the importance of *participation*.¹³ Individuals and peoples have the right to participate in, contribute to and enjoy development.

Secondly, the Declaration makes reference to the need to ensure that the improvement of the well-being of the entire population and of all individuals takes place on the basis of their participation not only in development but also in “the fair *distribution of the benefits* resulting from it”. This envisages the eventual elimination of extreme poverty and gross disparities in income distribution within nations and as between nations.

Thirdly, the Declaration emphasises both national policies and international cooperation. The right to development envisages that individuals, groups and peoples have *rights against their own governments* where they neglect or frustrate the achievement of that right.

In my opinion, the best evaluation of the third generation “right to development” is written by Allan Rosas:¹⁴

The right to development should, perhaps, be seen as an umbrella concept and programme rather than a specific human right. It may be of particular relevance as a summary and pointer of the human rights dimension for development cooperation and development aid purposes, including the notion of “human rights impact statements”. It could then play a role in planning and implementing policies and programmes, rather than function as a legal mechanism *per se*. For the right to development to play a constructive role in such contexts, however, there must be less political controversy and more analytical and critical discussion surrounding the concept.

UNIVERSALITY AND INTEGRATION IN PRACTICE

From this level of generality, with a description of the international developments affecting human rights, I now wish to descend into the engine room. Until May 1996 it was my privilege, for two and a half years, to serve as the Special Representative of the Secretary-General for Human

¹³ This draws on the analysis of Rosas *ibid* at 253.

¹⁴ *Ibid* at 254-5.

Rights in Cambodia. My period of service gave me the rare opportunity to see the implementation of specific programmes for human rights protection in a particular country sorely afflicted, in the past, by human rights derogations. As that country is in the Asian region, with which we are increasingly involved, it may be of interest to consider my experience and to observe the way in which the United Nations contributes, in practical ways, to human rights protection.

There are about 25 Special Rapporteurs and Special Representatives working on the Commission on Human Rights. Some have thematic responsibilities (for example, summary executions, independence of the judiciary and of lawyers, and rights of women). Others have country responsibilities. Most of these lie in the field of "Special Procedures", designed to respond to urgent concerns about reported human rights abuses. My own responsibility fell under that item of the agenda of the Commission on Human Rights dealing with "Technical Assistance". It derived from a provision in the Paris Peace Agreements by which peace was brought to Cambodia after decades of war, revolution, genocide, invasion and resistance.

Entering upon my responsibilities in Cambodia, I was very conscious of the suggestion that there are different priorities for human rights in countries in the Asian region. Some commentators have even suggested that there is an "Asian exception" to the universality of human rights, reflective of the traditional emphasis placed by at least some of the philosophies of Asian societies upon duties not rights; upon the community not the individual; and upon the rule of powerful men of virtue not the rule of law.¹⁵ One observer has described the debate thus:

The ideological debate between East and West then, and between North and South now, has...affected the realisation of [human] rights. In the past, socio-economic rights were seen as requiring a strong state and forceful state action. They were thus championed strongly by the former Soviet Union and Eastern European countries. The countries of the West, on the other hand, sometimes did not even recognise them as rights. This was one reason why the General Assembly adopted two Covenants and not one.

¹⁵ Little R and anor, *The Confucian Renaissance* (1989, Federation Press, Sydney).

A similar ideological class is taking place now. Countries of the South, led by China, India, Indonesia and Malaysia, argue that socio-economic rights are equally important as, if not more important than, civil and political rights. Very few of these have recognised socio-economic rights at human rights, though they have spoken strongly in favour of these issues at several international fora. Their views, however, have been given increasing prominence because some of these countries are in the forefront of the economic boom that is now taking place in the Asia-Pacific region.¹⁶

When proponents from the “West” speak of the universality of human rights, perceptive commentators from the “East” point to the imperfect protection, in earlier decades in “Western” countries of rights now claimed to be universal and fundamental. Thus, women did not secure the vote in England until this century. African Americans did not have an effective right to vote in some parts of the United States until 1965. Homosexual citizens were criminalised and punished in Western countries until even more recently. These points are made to emphasise that perceptions of what are “fundamental human rights” take time. Accordingly, Western countries and their citizens should not be insensitive to the different stages at which Asian countries find themselves in the process of “enlightenment”.¹⁷ Their minds should be open to enlightenment which they may receive from other cultures.

Within the resolutions and declarations of the United Nations, the notion of an Asian cultural exception, or of the division of human rights into different priorities, has been rejected. Thus, the Vienna Declaration of June 1993 affirms:¹⁸

All human rights are universal, indivisible and interdependent and inter-related...While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be

¹⁶ Gomez, “Social economic rights and Human Rights Commissions” (1995) 17 *Human Rights Quarterly* 155, 161-2.

¹⁷ Statement to the Vienna Conference by the Singapore Minister for Foreign Affairs.

¹⁸ Vienna Declaration, World Conference on Human Rights, United Nations Document A/Conf/57/23 para 1/10 note 18.

borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

This is not the place to review at length my work in Cambodia. Every report which I produced contained scrutiny of issues beyond civil and political rights such as the right to health, the protection of cultural rights, the furtherance of rights to education, and protection of the right to a healthy environment and of the right to sustainable development.¹⁹

In each of the reports, I called to notice the progress that had been made in the economy of Cambodia. Predictably enough, following the end of the war and the confinement of rebellion to a small area of the country, economic activity began to flourish in Cambodia. With it came job opportunities, educational demands, and a gradual improvement (at least in the cities) of general standards of living. Derelict buildings were repaired to provide office and housing space. Long abandoned canals were restored. A ready measure of economic progress could be seen in the increased number of motor cars and motorised bicycles visible upon every fresh visit to Cambodia.

Although economic development is not a necessary assurance of improvement of human rights, it is difficult to provide the environment for respect for the whole range of human rights referred to in United Nations' instruments without the basic necessities that a modern economy provides. Credit must be given to the Government of Cambodia for promoting at least some of the improvements in the infrastructure which are necessary for modern economic development. Amongst other things, such developments have raised the aspirations of those people who are its beneficiaries. They begin to demand reading matter and access to informative, non-propagandist radio and television. They travel, including overseas. They become aware of derogations from basic human rights, particularly in the areas of civil and political rights, in their own country. They organise themselves and lift their voices, in human rights bodies, calling for improvements.

¹⁹ Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, UN Doc E/CN 4/1996/93 (26 February 1996).

These are the positive sides of economic development, relevant to human rights, which were clearly visible in Cambodia. But there are negative sides as I observed in my last mission in January 1996.

For example, the protection of Cambodia's environment is particularly important because of the vulnerable ecosystem and the damage already done in the region by the large-scale destruction of forest timber and the substitution of large-scale agri-business. The danger of enduring damage to the environment for short-term, and relatively modest, economic returns was described by me as a challenge to fundamental human rights because of the potential of such developments to affect, in the long run, the living standards of all Cambodians – indeed of all people living in the region served by the river and ecosystem of Cambodia.

During my last mission to Cambodia I visited the province of Rattanakiri in the remote north-east of Cambodia. I received many complaints of the intrusion of foreign-backed developers who reportedly, for a relatively small payment, gained concessions.²⁰ These allegedly entitled them to clear forest areas, sell the removed timber and substitute palm oil and other agri-businesses to the destruction of the environment of indigenous people who had lived there since time immemorial.

In my last report on Cambodia I also concentrated upon a number of particular ways in which the human rights of women are especially neglected in Cambodia. By reporting this, I do not mean to infer that Cambodia is more neglectful of the rights of its women than other states of the region. But one function of the United Nations Commission on Human Rights, and its Special Rapporteurs and Special Representatives, is to bring the jurisprudence of the International Covenants down to the grass-roots by offering commentary on local practices when measured against the adopted international standards. The aim is to assist the governments of member states, and their peoples, and to translate the fine language of the international instruments into practical reality. It brings defaulters before the bar of humanity in Geneva and New York, to receive praise where it is due but also to answer criticism. Many of the defaulters do not permit any criticism at all at home. Yet, in the United Nations, they have to face it and answer it.

²⁰ Ibid at 26 para 90.

The United Nations treaty and human rights mechanisms may not be perfect. But at least they provide standards to measure basic human rights and institutions to scrutinise compliance. They create fora in which people can raise their voices. It is easy to condemn the weaknesses of the treaty system and of the institutions (including of office-holders such as I, until recently, was). Many of the recommendations I made gained the concurrence of the Government of Cambodia. Some of my proposals will doubtless be overlooked or ignored. A few were expressly rejected. But others, I feel sure, will influence policy and legal developments in Cambodia to the improvement of human rights generally and specifically those of women, children and other vulnerable groups.

This is one of the ways in which the United Nations contributes to the protection of basic human rights. The work of the United Nations agencies can also be directed and mobilised in this way in order to target those areas needing particular support and assistance.

CONCLUDING REMARKS

It has been seen above that economic development is closely entwined with human rights protection and reasons have been given for that conclusion. The following are other concluding remarks, on the things to be done, and they will be made from the specific viewpoint of a jurist.

Some leaders take a leadership position in the government of their countries and contribute in that way, to building economic development as a foundation for human rights advancements. But from the rest there is a somewhat crippled response to assertions that the law should protect and uphold fundamental social and economic rights essential to equitable development. The courts are often reticent in such matters. For example, in *DeShaney v Winnebago County Department of Social Services*²¹ the United States Supreme Court ruled that, under the Constitution of that country, the government had no affirmative duty to provide positive rights to individuals. In *Webster v Reproductive Health Services*²² the same Court held that the government had no affirmative duty to provide medical care to individuals. Commentators have explained that these cases (which find

²¹ (1989) 489 United States 189, 196-197.

²² (1989) 492 United States 490.

reflection in decisions in England, Australia, Malaysia and elsewhere) may be traced to a particular conception that the best government is generally one that leaves its citizens alone. For government to provide positive freedoms to the disempowered is seen as limiting the content of the individual freedoms of others.²³ Yet many of the remarkable economic and social developments achieved in Asian countries since independence have been secured by well-targeted governmental policies designed to achieve large social goals. In this, Asian nations can show other countries how governments can play an affirmative role in promoting equity and development whilst presiding over a highly successful market economy.

It is often said that jurists are not really concerned in economic and social rights because these rights are not justiciable. They are not readily enforceable in courts of law. The International Commission of Jurists, of which I am President, has repeatedly sought to demonstrate that, on the contrary, there is a close inter-relationship between the effective attainment of economic, social and cultural rights with the full enjoyment of civil and political rights. The International Commission of Jurists made this clear in 1986 when it adopted the Limburg Principles.²⁴ These examined the nature and scope of the obligations of states under the ICESCR. More recently, in 1995, at Bangalore in India, the International Commission of Jurists adopted the *Bangalore Declaration and Plan of Action*. I participated in this event. The Declaration called for:

equal attention and urgent consideration...[to] be given to the implementation, promotion and protection of economic, social and cultural rights, as well as civil and political rights.

The Bangalore Declaration deplored the “professional failure and indifference which has often marked, in the past, the response of lawyers” to the rights enshrined in the ICESCR. It stated that:

for lawyers to exclude themselves from a proper and constructive role in the realisation of [economic social and cultural] rights would be to deny themselves a function in a vital area of human rights... The lack of

²³ Motala, “Socio-economic rights, federalism and the courts: comparative lessons for South Africa” (1995) 1112 South African Law Journal 61, 71.

²⁴ (1986) 37 International Commission of Jurists Review 43.

involvement of lawyers in the realisation of more than half of the field of human rights, vital to humanity, is no longer acceptable.

The Action Plan lists action that can be taken by lawyers, individually, nationally and internationally, to strengthen the attainment of economic, social and cultural rights, including by the contribution of lawyers. Individual lawyers are urged to ensure that their professional organisations include such rights within their human rights strategies. At the national level, the Plan of Action proposes increased attention to the obligations contained in the ICESCR, which many states have ratified. Judges are encouraged to apply, in the cases coming before them, international human rights norms in the field of economic, social and cultural rights. It is acknowledged that the implementation of economic, social and cultural rights in legal decision-making demands both “legal skills and imagination”. I believe that the legal profession has these qualities.

At the international level, a call is made to secure more ratifications of both International Covenants from countries in the Asia Pacific region. Renewed efforts toward the adoption of an Optional Protocol to ICESCR, akin to that under the ICCPR, to provide a complaints mechanism for alleged violations is mentioned. Attention to the reduction of manufacture, sale and purchase of armaments and greater equity in debt repayments are listed as practical ways for improving the position of economic, social and cultural rights, especially in poorer countries.²⁵

To say that ordinary citizens are more interested in a full stomach, in educational chances for their children and health facilities, in clean water supply, and in protection of local culture than they are in what happens in courts, police stations and legislatures is a serious over-simplification of the views of ordinary people about basic human rights. I have learned in Cambodia that “ordinary citizens”, in so far as such mythical people exist, are interested in *all* aspects of human rights. Truly, they see human rights are inter-related and indivisible. It is for that reason that lawyers should, as the Bangalore Declaration urges, become more knowledgeable about, and interested in, the “other half” of human rights. They should realise the

²⁵ See Hunt, “Reclaiming economic, social and cultural rights” [1996] *New Zealand Law Journal* 69, 68 quoting the Bangalore Declaration and Plan of Action, International Commission of Jurists, Bangalore, India, 25 October 1995.

occasional potential of the law to provide support for the achievement of those rights. Increasingly, it is being perceived that economic liberty and progress are on the other side of the coin which celebrates progress in political and civil liberties. The reverse is also true. Economic and civil liberties are inter-related and interdependent.

We will not see, in a decade or even in our lifetime, the fulfilment of our dreams of a world with human rights for all and economic development in every land. But it is the obligation of each one of us to contribute in whatever way we can, to this end. Tun Abdul Razak did not live to see the extraordinary economic development of Malaysia or the building of a diverse and pluralist society in which there are opportunities for all and in which all enjoy basic civic rights under the rule of law upheld in independent courts. But, by his labours and example, those who come after him have benefited greatly. It now falls to the new generation in Malaysia in the coming millennium to accept a leadership role in the region. This will surely be done in matters of economic advancement. But I believe that Tun Abdul Razak, a jurist, would also expect it to be done in the fields of law, in the building and training of truly independent courts in respect of universal human rights. I expect that this will be a great challenge for Malaysia in the coming years. No one who has seen the economic and social achievements of recent years can be other than optimistic about Malaysia's response to that challenge.