

## Human Rights Protection: The Role of Institutional Capacity and Selective Adaptation

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### Abstract

Selective adaptation describes the process by which international legal rules are contextualized to local conditions. The institutional and cultural contexts for selective adaptation involve a process by which non-local institutional practices and organizational forms are mediated by local norms. This process can be illustrated by reference to the local implementation of international human rights regimes.

Selective adaptation is made possible by ways in which governments, elites, and other interpretive communities express their own normative preferences in the course of interpretation and application of practice rules. Selective adaptation depends on a number of factors, including perception, complementarity, and legitimacy. Perception influences understanding about foreign and local norms and practices. Originally a principle of nuclear physics, complementarity describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner. Legitimacy concerns the extent to which members of local communities support the purposes and consequences of selective adaptation. These three factors exercise a powerful influence on local compliance with international human rights regimes, as local interpretive communities endeavor to harmonize international rules with local norms.

This paper will apply selective adaptation paradigm to performance of international human rights obligations such as the right to development. The paper draws on documentary and field research in China and Asia during 2002-2004. Supported by a Major Collaborative

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Research Initiatives project funded by the Social Sciences and Humanities Research Council of Canada, the paper will suggest how selective adaptation affects the dynamics of the right to development, and how compliance with international human rights rules remains contextualized to local legal and political culture.

**Keywords:** Human Rights; Selective Adaptation; Institutional; Legitimacy.

## 1. Introduction

We have examined previously the role of institutional capacity and selective adaptation in the interaction between international rule regimes on trade and human rights and local norms and practices, in the context of globalization.<sup>1</sup> This work is ongoing, through archival and survey research on the relationship between acceptance of globalized rule regimes among interpretive communities charged with interpreting, applying, and enforcing non-local rules, and the resilience of local norms. This paper will examine the potential application of selective adaptation and institutional capacity to understanding of international human rights norms and practices.

## 2. Protection of Human Rights: Issues of Institutional Capacity

Enforcement of international human rights norms depends on the capacity of intermediary institutions. Institutional capacity refers to the ability of institutions to perform their assigned tasks. Institutional capacity has been examined from relational perspectives that focus on issues of responsibility between organizations and their constituencies; efficiency in performance and the use of resources; and accountability to varying sources of authority.<sup>2</sup> Functional perspectives have also been applied to the question of institutional capacity, in such areas as access to information; effectiveness and methods of communication; organizational symmetry; and ability to enforce rules and directives.<sup>3</sup> However useful these approaches may be in the abstract, actual institutional performance remains contingent on domestic political and socio-economic conditions.<sup>4</sup> In many economies, local conditions of rapid socio-economic and political transformation pose particular challenges for institutional capacity. Accordingly, institutional capacity in China may usefully be examined by reference to issues of institutional location, orientation, cohesion, and most importantly institutional purpose.

Institutional capacity also depends on issues of *Geographical Location*, particularly the question of balancing central authority with decentralization of social and economic development initiatives.<sup>5</sup> Many societies exhibit tension between local and central authorities and among the regions. The practical divisions of power and authority between local and central government

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1. See: Potter, 2004: 465-495.

2. See: Savitch, 1998: 248-273.

3. See: Blomquist and Ostrom, 1999.

4. See: P., 1998: 1531-1546; Martin and Simmons, 1998: 729-757.

5. See: Wunsch, "Institutional Analysis and Decentralization: Developing an Analytical Model for Effective Third World Administrative Reform". In McGinnis.

departments permit an interplay of power and politics between the central and sub-national governments that echoes practices of federalism. Yet this may conflict with state-directed ideals of conformity and unity. In the process of bargaining that accompanies the allocation of resources and the distribution of costs and benefits of policy initiative, requirements of submission to the unified state may limit the flexibility of local officials. Rigid adherence to contested ideals of unitary authority also may limit the ability of legal institutions at both local and national levels to exercise even limited autonomy in support of predictability and stability in socio-economic and political relations. As a result institutional capacity of the legal system more broadly suffers. In the human rights context, this may affect the ability of local institutions to carry out central government edicts purporting to protect human rights.

Institutional capacity also depends on *Institutional Orientation*. Orientation refers to the priorities and habitual practices that inform institutional performance. For human rights institutions, orientation involves particularly the tension between formal and informal modes of operation. Much has been written on the role of informal networks as vehicles for socio-economic regulation and development. Informal networks may serve as a substitute for the norms and processes associated with formal institutions, allowing more flexible responses to increasingly complex social, economic and political relations. However, the potential role of informal institutions is often challenged by development policies of political regime which insist on maintaining formal organizational systems to defend ideological orthodoxy and enforce political loyalty. The tension between statist ethics of formal institutionalism and local informal arrangements may work to divert resources from institutional performance and undermines institutional capacity. In the human rights context, this may undermine the ability of governments to deliver the opportunities for development that the right to development requires as well as the civil and political rights envisioned under the Universal Declaration.

Finally, institutional capacity depends on issues of *Institutional Coherence*, involving the willingness of individuals within institutions to comply with edicts from organizational and extra-organizational leaders, and enforce institutional goals. Compliance concerns the recognition and enforcement of norms.<sup>1</sup> Conflicts arise when the norms of particular organizations differ from those of the individuals within these organizations – such as where norms of

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1. See: Etzioni, ed., 1969; Rinehart and Winston, 1969; Etzioni, 1961.

public policy that drive organizational priorities require subordination of parochial interests of individual officials within the organization. Often the lack of institutional coherence is revealed through the presence of corruption. This has an effect not only on the emergence of human rights abuses, which often are the result of challenges to arbitrary and abusive exercise of authority, and their resolution, which may require punishment of officials protected by extensive patronage networks.

Of the elements of institutional capacity that affect enforcement of human rights norms, perhaps the most important is *Institutional Purpose*. Institutional purpose concerns the way in which the goals of institutions reflect material and ideological contexts, the availability and nature of financial, human and other resources, and the various limitations that attend institutional performance. Institutional purpose plays a significant role in determining the capacity of institutions to respond to socio-economic change. Political and legal institutions often function according to the policy priorities imposed upon them by the local regimes. The “relative autonomy” ascribed to legal institutions in the European and North American traditions is often limited in developing economies outside the European tradition. Thus, the capacity of legal institutions reflects the extent of commonality of purpose between legal norms and processes and the policy imperatives of the local government. This involves a dynamic of selective adaptation.

### **3. Selective Adaptation: An Overview**

As discussed previously, the notion of “selective adaptation” proceeds from assumptions about the importance of cultural norms in influencing behavior. Cultural norms are reflected in rules, including formal laws and regulations and informal procedures and practices. The distinction between rules and the cultural norms they represent becomes especially important when rules particular to one cultural group are used by another, without a corresponding assimilation of underlying norms. This phenomenon is reflected in current conditions of globalization, as liberal rules of governance generally associated with the Europe and North America are disseminated to other areas, but little attention is given to questions about local acceptance of the norms on which these rules are based.

Selective adaptation describes a process by which practices and norms are exchanged across cultural boundaries. Selective adaptation is made possible by ways in which governments and elites express their own normative preferences in the course of interpretation and application of practice rules. Selective

adaptation also operates within societies as different groups interact with and respond to dominant discourses. While selective adaptation explains much about the general conditions for exchange of practice rule and norms between cultural communities, more work is needed to confirm the operational details of selective adaptation, identify the internal components, and explain the implications for cross-cultural dispute resolution.

Selective adaptation depends on a number of factors, including perception, complementarity, and legitimacy. *Perception* influences understanding about foreign and local norms and practices. Perceptions about the purpose, content and effect of foreign and local trade law norms and practices affect the processes and results of selective adaptation. For example, local government efforts to comply with international trade rules on transparency while still pursuing local policy priorities, may hinge on the content and accuracy of perceptions about treaty norms and practices and their relationship to local systems. The interpretation and application of non-local rules in light of local norms thus depends on perceptions about both. Drawing on principles of nuclear physics, *complementarity* describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to operate together in a mutually reinforcing and effective manner.<sup>1</sup> Complementarity may allow adjustment of norms and practices of particular cultural communities to satisfy expectations imposed from outside, while still protecting local needs. For example, local compliance with international trade rules on state subsidies may depend on complementarity in procedure, as the formality of imported practice rules is reconciled with the flexibility of local performance standards. Thus, complementarity affects the potential for non-local rules and local norms to be mutually sustaining. *Legitimacy* concerns the extent to which members of local communities support the purposes and consequences of selective adaptation.<sup>2</sup> Whereas the forms and requirements of legitimacy may vary, the effectiveness of selectively adapted dispute resolution norms and practices depends to an important degree on local acceptance. For example, if local economic actors challenge efforts to regulate production costs according to international anti-dumping rules, this will affect the possibilities for selective adaptation. Other factors, such as coincidence, socio-economic or political crisis, and voluntary experimentation may also play a role.

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1. See: Bohr, 1963; Rhodes, 1986: 13.

2. See: Weber, 1978; Turner and Factor, 1994.

#### 4. Selective Adaptation of Human Rights Norms: The Right to Development in Comparative Context

The dynamic of selective adaptation is illustrated in the ways that divergent international human rights norms have been accepted by developing economies. In contrast to liberal norms of individual liberties and civil and political rights, many developing economies have emphasized the right to development. The right to development has been the focus of much debate and discussion, particularly in the context of its relationship to other human rights and in light of the economic development achievements and aspirations of states in the East Asian Region.<sup>1</sup> A comparison of two major human rights documents of 1993 - the Bangkok Declaration and the Vienna Declaration - reveals significant differences of view concerning the right to development and its place in international human rights law. The Bangkok Declaration suggested that state governments should be free to give development goals priority over other human rights policies, which themselves could be limited by local cultural and historical conditions.<sup>2</sup> This approach was viewed with some trepidation by outside observers, in part because the Bangkok Declaration also suggested that the recognition and enforcement of human rights generally should be controlled by local governments free from outside scrutiny.<sup>3</sup> The Vienna Declaration, by contrast, stressed that the lack of development may not be used to justify abridgement of internationally recognized human rights, thus underscoring the principles accepted elsewhere that all human rights (including the right to development) are universal, indivisible, and interrelated.<sup>4</sup>

The contradiction over the relationship of the right to development and its attendant circumstances and other human rights reveals significant philosophical differences concerning the nature of development and the nature of rights. While these contradictions are unlikely to be resolved in the short term, the approach to development embodied in the Bangkok Declaration may have less than positive political implications for authoritarian development regimes. More importantly, these differing perspectives play a significant role in the formation of institutional purpose as an element of institutional capacity.

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1. See: Potter, 1997.

2. See: Bangkok Declaration, 1993.

3. Article 24 of the Bangkok Declaration ("Final Declaration of the regional meeting for Asia of the World Conference on Human Rights", supra) provides that the conceptualization and eventual establishment of national human rights institutions should be left to the States to decide.

4. See: United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, Arts. I (5) and I (10), in 32 I.L.M. 1661 (1993) at 1665 and 1666. While the Bangkok Declaration repeated some of the standard doctrinal language of human rights law on universality and indivisibility, its emphasis on the prerogatives of state governments and the contextualization of rights marked a significant departure.

#### **4.1. Summary of the Discourse of the Right to Development**

While it would be superfluous in the extreme to retrace in detail the genealogy of the right to development, a brief summary may be useful as background. It is useful as well to note the institutional context within which these debates take place.

##### **4.1.1. Recognition of the Right to Development as a Human Right**

International recognition of the right to development as a human right has often been traced to a speech by Mr. Justice Keba M'Baye, First President of the Senegal Supreme Court, to the International Institute for Human Rights in 1972.<sup>1</sup> However, the idea has long-standing roots in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other international instruments.<sup>2</sup> The politics of North-South relations and particularly the call for a "New International Economic Order" have contributed as well to assertions about the existence of a right to development.<sup>3</sup> Support for the right to development has been found in scholarly studies,<sup>4</sup> and gradually a series of international instruments has emerged recognizing and expanding on the right to development.<sup>5</sup> Ideas about the right to development have undergone further revision in the context of the dynamic growth of economies in the East Asian region, and suggestions that these economic successes vindicate an "Asian" cultural approach to development that stands as an alternative to much of Western human rights thinking.<sup>6</sup>

But there have been dissenting voices. Some suggest that the right to development is little more than an attempt by authoritarian governments to

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1. See: M'Baye, 1972: 503. Also see: Espiell, 1981: 192; Barsh, 1991: 322.

2. See: Rich, 1983: 287; Nanda, 1992: 41-61.

3. For a useful collection of articles presented at a 1991 seminar convened in Calcutta by the Committee on Legal Aspects of the New International Economic Order of the International Law Association, see: Chowdhury, Denters, & Waart, eds., 1992; Also See: Bedjaoui, 1987: 87-116.

4. Among the earliest and most articulate proponents of the right to development have been Roland Rich and Philip Alston. See: Rich, 1983: 287; in Crawford, 1988: 39-54; Alston, 1981; Alston, 1988 and Alston, 1991: 216; For a critical review of Alston, See: Donnelly, 1985: 473.

5. Of particular importance have been the UNESCO Secretary General's Report on the Right to Development (E/CN.4/1334) (1979); the United Nations General Assembly's Declaration on the Right to Development (Res 41/128 (1986); and the UNESCO Commission on Human Rights' Report on the Global Consultation on the Right to Development as a Human Right E/CN.4/1990/9/Rev.1 (1990).

6. Perhaps the most comprehensive articulation of the right to development in the context of the East Asian experience was the 1993 Bangkok Declaration, in which the emphasis was placed on local historical, cultural and religious conditions as context for human rights conditions. See: Bangkok Declaration, 1993. Also see "Human Rights: Vienna Showdown", 1993: 16.



insulate their regimes from outside scrutiny.<sup>1</sup> Sceptical observers also suggest that the right to development has little if any legal support and is in effect an attempt to enshrine the laudable goal of development as a right, rather than recognizing that development may be the end-product of the enforcement of various civil, political, economic, social and/or cultural rights, but is not (and should not be) a right in itself.<sup>2</sup> Other critics have suggested that the emerging doctrine of the right to development gives undue attention to economic growth, which not only entrenches a flawed view of development generally, but also works to further the subjugation of disadvantaged groups for whom the right to development ought to operate most strongly.<sup>3</sup>

A middle ground of sorts is occupied by observers who accept the notion of a right to development, but who insist that it operate only as a complement and not a substitute for other human rights.<sup>4</sup> The interaction of development with other human rights has been seen to require that the local peoples affected by economic development projects have meaningful opportunities for participation and consultation.<sup>5</sup> The right to participation has been expanded yet further in an effort to suggest that it might be a basis for protection of cultural rights against oppression from authoritarian states.<sup>6</sup>

#### 4.1.2. Institutional Contexts

Debates over the right to development operate against a background of political structures that affect and often pre-determine the content of the debate. Of particular importance are the views of national governments, international aid agencies, non-governmental organizations and the scholarly community. Although there are of course significant interdependencies among these institutions, their identity, power, and goals each play a significant role in determining the content of views expressed by their representative interlocutors.

As international law is the creation of states, it is not surprising that state

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1. See: Vatikiotis and Delfs, 1993: 20.

2. See: Donnelly, 1992: 78; also see: O'Manique, 1992: 383.

3. See: Charlesworth, 1992: 190; also see: Mannina, 1992: 91.

4. The text of the 1994 Vienna Declaration stands as a forceful articulation of this view, "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights" See United National World Conference on Human Rights, "Vienna Declaration and Programme of Action", Art. I (10), in 32 I.L.M. 1661 (1993) at 1666. For scholarly expressions of this perspective, see: Howard, 1985: 607; Kibwana, 1993: 43; Mansell and Scott, 1994: 171; Osinbajo and Ajayi, 1994: 727.

5. See: Ginther, 1992: 55; Paul, 1990: 235; Broadlow, 1992.

6. See: Radin, 1993: 695.

governments have played a critical role in discussions of the right to development. Governments in developing states have been particularly eager to have a right to development recognized at the international level, and for institutional mechanisms for enforcement to be put in place. Thus, for example, the UNESCO Secretary General's Report on the right to development emphasized the moral duty of industrialized states to repair the economic disparities that characterize their relations with developing countries, an NIEO theme that has been taken up repeatedly in subsequent instruments on the right to development.<sup>1</sup> Obviously, such an approach to international rights and duties suits the economic interests of developing states, particularly where implementation mechanisms and policies are established. On the other hand, international instruments on the right to development also reflect the views of industrialized states in noting the importance of domestic development efforts.<sup>2</sup>

Much of the discussion over the right to development has concerned efforts by international aid agencies to explain and justify their activities. As with most formal institutions, international aid agencies have organizational interests and a parochial commitment to continuing their work and maintaining control over it.<sup>3</sup> Thus, aid agencies have been quick to respond to human rights criticisms of their work. Employees of aid agencies, while careful to note that they speak in their personal capacity, more often than not reflect the views of their employers. Thus, in response to claims that international aid should be tied to the human rights records of recipient countries, the General Counsel of the World Bank has argued that the Bank's charter mandates an effort to promote economic development and the raising of living standards, without direct attention to political questions.<sup>4</sup> As well, the point is made that the right to development gives the Bank's activities a direct human rights element. In response to claims that they play insufficient attention to local participation, international aid agencies often resort to examples of linkages with local elite organizations without much reflection as to whether these linkages contribute to meaningful local participation.

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1. See: UNESCO Secretary General, Report on the Right to Development (E/CN.4/1334) (1979) at p. 20; United Nations General Assembly, Declaration on the Right to Development (Res 41/128 (1986) at Preamble; and UNESCO Commission on Human Rights' Report on the Global Consultation on the Right to Development as a Human Right E/CN.4/1990/9/Rev.1 (1990) at Art. V (F).

2. See: United Nations General Assembly, Declaration on the Right to Development (Res 41/128 (1986) at Art. 3 and UNESCO Commission on Human Rights' Report on the Global Consultation on the Right to Development as a Human Right E/CN.4/1990/9/Rev.1 (1990) at Art. V (A).

3. See generally: Packenham, 1973.

4. See: Shihata, 1988: 39 and Shihata, 1992: 19. Also see: Mr. Shihata's comments on a panel entitled "Environment, Economic Development and Human Rights: A Triangular Relationship?", in Proceedings of the Eighty-Second Annual Meeting of the American Society of International Law (1988) at pp. 41-45.

The role of NGOs in the debates over the right to development has become increasingly important.<sup>1</sup> While they often are subject to repression from local governments - either through direct repression or through the establishment of government organized competitors (GO-NGOs),<sup>2</sup> non-government organizations have often embarked on courageous efforts to articulate views on development matters that stand in contrast to those of state governments and international development agencies.<sup>3</sup> And while they are often accused of being dominated by local elites rather than broadly participatory, NGOs have shown a capacity for expanding the discourse of the right to development beyond the confines often imposed by state governments.

While academic scholars are usually employed by universities, their loyalties are often to schools of thought rather than to the organizations with which they are associated. These loyalties play a significant role in setting the parameters for academic discussion. Thus, for example, scholars who criticize the right to development adopt liberal paradigms which focus on the individual as the primary beneficiary of political rights.<sup>4</sup> Other critics have challenged the right to development through allegiance to and application of the principles of feminist theory.<sup>5</sup> By contrast, those who have argued in support of the right to development have done so by reference to ideas about the importance of collective rights as at least equal to (and often with priority over) individual rights.<sup>6</sup> In each of these lines of argument, the views expressed owe as much to the authors' underlying conceptual paradigms as they do to their immediate research and analysis. Thus, along with the political perspectives of national governments and the institutional perspectives of aid agencies and their employees, the views of academics on the right to development reveal structural determinants which are not less real for their basis in ideas rather than organizations.

#### **4.2. The Nature of Development and the Nature of Rights**

Discussion about the right to development reflects different ideas about the nature of development and the nature of rights. An examination of these

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1. See: Jones, 1993: 23. For discussion of the potential role of NGOs in human rights monitoring, see Kent, 1995.

2. See: Crothall, 1993: 8-9; Also see: Hom, 1993: 12-15.

3. For discussion of the role of NGOs at the Bangkok Conference, see Jones, 1993: 8-9, 22. Also see: Jones, 1993: 35-36.

4. See: Donnelly, 1992: 78.

5. See: Charlesworth, 1992: 190; Waring, 1992: 177.

6. See: Rich, 1983: 287; Alston, 1991.

underlying paradigms is useful in understanding the broader debates about the right to development.

#### **4.2.1. Dimensions of Development**

Among the many points of conflict in approaches to development are the questions about the international dimensions of development and underdevelopment; the goals of development; and the implications of development for social, economic and political relations.

##### **a. International Dimensions of Development: The Issue of Dependency**

Between supporters and opponents of the right to development, the basic issues revolve around issues of international political economy. Proponents of the right to development are heavily influenced by the conclusions of dependency theory.<sup>1</sup> Critics on the other hand suggest that dependency theory explains very little, and that local conditions offer more powerful explanations for development and under-development.

The cadre of scholars broadly labelled dependency theorists, hold in general that underdevelopment in all its forms is due in large part to the exploitation and oppression of the industrialized West - first through colonialism and later through domination of the international finance, technology, and commodity systems.<sup>2</sup> Early proponents of dependency portrayed local elites rather crudely as corporatist allies of foreign capital, serving as conduits for investment and also as the primary local beneficiaries.<sup>3</sup> Their commercial and consumption activities are seen to support the objectives of foreign investment, by substituting short-term parochial goals for priorities of building the technological and infrastructural foundations for long-term development.<sup>4</sup>

Critics have suggested that proponents of dependency theory have indulged in wholistic ideological viewpoints that are not amenable to falsification or

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1. For example, the Human Rights White Paper issued by the People's Republic of China in 1991 makes much of the century of colonial oppression suffered by China during the 19th and early 20th centuries. See "Text of Human Rights White Paper", in FBIS Daily Report - Supplement, Nov. 21, 1991.

2. There is a rich and wide-ranging literature on the problems of dependency. Among the most useful works are Baran, 1968; Frank, 1967; Furtado, 1964; Galtung, 1971: 81-117; Portes, 1976: 55-85; Wallerstein, 1974: 1-26; and Wilber, ed., 1979. For a survey, and no uncritical, survey of the dependency literature, see: Packenham, 1992.

3. See: generally, Cardoso and Faletto, 1979; Baran, 1979: 91-113. Also see: Wilber and Weaver, "Patterns of Dependency: Income distribution and the History of Underdevelopment", in Wilber, 1979: 114-129. For a critique, Wilber, 1979: 93-94.

4. See: generally, Singer, 1972 and Muller, in Wilber, 1979: 151-178.

testing, even to the point of descending into what one observer has called a "fusion of scholarship, politics, and theatre".<sup>1</sup> Rather than explain conditions and causes of underdevelopment, dependency theorists are accused of overlooking local political and policy causes for underdevelopment.<sup>2</sup> Pointing to the successes of the East Asian NICs, critics of dependency theory have suggested that local conditions can overcome the effects of external oppression, even to the point of rendering it irrelevant to the question of development.<sup>3</sup>

While arguments continue to proliferate as to the strengths and weaknesses of dependency theory, it remains influential in the discourses of the right to development and of human rights generally. Indeed, not a few East Asian political leaders have suggested that the human rights agenda of the West is aimed at perpetuating the dependency of the developing world.<sup>4</sup>

### **b. The Goals of Development**

Among proponents of the right to development, there is substantial disagreement over the goals of development. While most scholars and international instruments agree that development means more than simply economic growth, some national governments have suggested that economic growth is the primary feature of development.

The primary documents articulating a right to development are fairly clear that development entails more than simply economic growth. Thus, the UNESCO Secretary General's Report indicates that development includes both material and non-material elements.<sup>5</sup> The UN General Assembly Resolution on the Right to Development contains similar provisions - indicating that development is a comprehensive phenomenon entailing economic, social, cultural, and political elements.<sup>6</sup> These views are supported and reiterated by a substantial body of scholarly literature. In the wake of perceived failures of development policies that gave primacy to economic growth,<sup>7</sup> the field of development

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1. See: Packenham, 1992: 315.

2. See: Haggard, 1990: 19-22.

3. See: Osinbajo and Olukunoyisola, 1994: 727.

4. See: comments of Malaysian Prime Minister Datuk Seri Mahathir Mohammad in Michael Vatikiotis and Robert Delfs, "Cultural Divide: East Asia claims the right to make its own rules", 1993: 20.

5. See: UNESCO Secretary General, Report on the Right to Development (E/CN.4/1334) (1979), p. 13. Most recently, see the UNESCO Secretary General's Position Paper delivered to the 1995 Copenhagen Summit, in which the point is made that development is first and foremost social, rather than economic.

6. See: United Nations General Assembly Declaration on the Right to Development (Res 41/128 (1986), Preamble and Art. 1.

7. See: Walt Whitman Rostow, 1960.

studies has moved steadily toward a multi-dimensional view of development.<sup>1</sup> This theme appears throughout the literature on the right to development, which asserts consistently that development means more than simply economic growth.<sup>2</sup>

Despite this apparent uniformity, a number of national governments in the East Asian region suggest that development means primarily if not exclusively economic growth. Thus, the Bangkok Declaration draws an explicit link between development and the international macroeconomic system.<sup>3</sup> In its various human rights White Papers, the government of the PRC explicitly adopted a position supporting the primacy of economic growth by stressing the right to subsistence as primary right from which all other rights derive.<sup>4</sup> Similarly, the yearly reports issued by the PRC government on economic and social development give clear priority to economic achievement.<sup>5</sup> Singaporean representatives have consistently made clear their conclusions about the primacy of economic growth as a precursor to other aspects of development.<sup>6</sup> These views stand in marked contrast to the conclusions of international instruments and development scholars that development must mean more than economic growth. More importantly, they have implications for the ways in which state governments address the relationship between economic development and other social, cultural and political relationships.

### **c. Development and Social, Economic and Political Relations**

Tied closely to notions about the goals of development are questions about the

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1. A seminal work in pointing to the failures of uni-dimensional development policies was Packenham, 1973. Other influential early works were Ul-Haq, 1976.
  2. See: van Boven, 1980; Espiell, 1981; Rich, 1983: 287; Nanda, 1985: 431; Howard, 1985: 607; Bradlow, 1992; Paul, 1992; Kibwana, 1993; Mansell and Scott, 1994: 171; Charlesworth, 1992: 190.
  3. See Bangkok Declaration, 1963: Preamble and Art. 18.
  4. See: "Text of Human Rights White Paper", in FBIS Daily Report - Supplement, Nov. 21, 1991; "The Progress of Human Rights in China," Xinhua Domestic Service, 27 December 1995, in FBIS Daily Report: China, December 28, 1996, pp. 8-26. State Council Information Office. 2000. White Paper: Fifty Years of Progress in China's Human Rights. State Council Information Office. 2001. Progress in China's Human Rights Cause.
  5. See e.g., "Statistical Communique of the State Statistical Bureau of the People's Republic of China on the 1993 National Economic and Social Development" (Feb. 28, 1994), in China Economic News Supp. No. 3, Mar. 14, 1994, in which nearly six pages of the seven page report are devoted to economic growth statistics. This pattern was repeated in the 1994 Communique. See "Statistical Communique of the State Statistical Bureau of the People's Republic of China on the 1994 National Economic and Social Development", in China Economic News Supp. No. 1, Mar. 27, 1995.
  6. Speaking "in his personal capacity", Kishore Mahbubani, a deputy secretary of Singapore's Ministry of Foreign Affairs, suggested that "[e]conomic development is the only force that can liberate the Third World". See: Mahbubani, 1993: 26. Also see Choy, Huat, Cheong, and Yeoh, ed., *Business*, 1990, which emphasizes economic and business growth as the touchstone of Singapore's development. Similar sentiments are evident in Low and Heng, 1992. Also see comments of Chee, Executive Director of the Singapore International Foundation in Hans De Jonge, 1993: 301.

relationship of development to social, economic and political relations. Thus, as might be expected, international instruments and scholarly analyses that assert development to mean more than simply economic growth also argue that the pursuit of development cannot operate to the detriment of other human rights. The UNESCO Secretary General's Report asserts that the right to development operates in tandem with other civil, political, social, cultural, and economic rights.<sup>1</sup> The UN General Assembly Resolution on the Right to Development asserts that as a human right the right to development is indivisible and interdependent on other human rights.<sup>2</sup> Similarly, the scholarly literature is nearly uniform in its insistence that the right to development cannot be used to justify denial of other human rights.

However, these views are contradicted by policies and behavior of various governments in the East Asian Region. Reflecting their conclusions about the economic bases for development, some states have subordinated the enforcement of human rights norms in social, economic, and political relations to policy goals of economic development. Relying partly on a critique of liberal paradigms that limit state involvement in economic life through to establishment of free market systems supported by private law rules and institutions,<sup>3</sup> the right to development has been used to justify continued restriction of effective judicial systems that might lay a foundation for meaningful civil and political rights.<sup>4</sup> By asserting that countries have the right to determine their own political systems through which to pursue economic, social, and cultural development, the Bangkok Declaration clearly subordinated the pursuit of civil and political rights.<sup>5</sup> China's human rights White Papers emphasize suggest that civil and political relations must continually be subordinated to the pursuit of the right to development.<sup>6</sup> The Director of the State Council Information Office has supported explicitly the primacy of economic conditions as the basis for

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1. See: UNESCO Secretary General, Report on the Right to Development (E/CN.4/1334) (1979), p. 13.

2. See: United Nations General Assembly Declaration on the Right to Development (Res 41/128 (1986), Art. 6.

3. Liberal economic policies are seen to undermine local capacity to control foreign capital, as the transnational character of foreign business inhibits control by local governments through traditional legal mechanisms. See generally, Keohane and Ooms, 1975: 186-206. Also see Ghai, Luckham, and Snyder, eds., 1987; Vicun, "The Control of Multinational Enterprises" and Franklin B. Weinstein, in Modelski, 1979: 296-308 and 338-346; Muller, 1973-74: 71-102; United Nations, Multinational Corporations in World Development, 1973; and Hymer, in Bhagwati, 1972: 113-135. In the international trade context, see Kennedy, 1991: 373-396.

4. Perhaps the most direct expression of this sentiment has been attributed to Malaysian Prime Minister Mahathir Mohamad: "developing nations cannot always afford luxuries such as human rights . . . liberty must take a back seat to the exigency of economic expansion . . . you must eat before you vote." See: Kwa, 1993: 28.

5. See: Bangkok Declaration, 1963: Art. 6.

6. See: "Text of Human Rights White Paper", in FBIS Daily Report - Supplement, Nov. 21, 1991.

development: "[W]e enable our people to have the economic foundation upon which they can enjoy political rights".<sup>1</sup>

#### **4.2.2. The Nature of Rights**

Debates over the right to development also reflect fundamental differences about the nature of rights. These differences include divergent views on the sources and beneficiaries of rights.

Much of what might be termed the conventional human rights discourse derives from European ideas about the nature of rights. The inalienable character of human rights and the claim that they are enjoyed by virtue of being human is entrenched in the Universal Declaration of Human Rights as well as the International Covenants on Civil and Political and on Economic, Social, and Cultural Rights. These ideas about the inherency of rights reflect European natural law theories about the equality of human beings,<sup>2</sup> which in turn derived from a range of political and economic interests.<sup>3</sup> Despite recent efforts to reconceptualize rights as claims set in a context of diverse social, political and economic interests,<sup>4</sup> the notion of inherency retains its appeal and distinguishes the European ideal of rights from that which is emerging in the East Asian region.<sup>5</sup>

In contrast to natural rights theories that view rights as inalienable and intrinsic to the human condition, proponents of the so-called "Asian approach" to rights suggest that rights are conferred by social organizations- families, communities, and governments. Under this approach rights are not inherent, but rather are specific benefits conferred and enforced at the discretion of the state. Such an approach permits governments to silence their critics under the guise of legal process.

Divergent views on the sources of rights have led in turn to significant differences concerning the beneficiaries of rights. In keeping with natural law theories that treat rights as inherent to human beings, the European liberal tradition has long held that human individuals are the primary beneficiaries of

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1. See: "Interview with Zhu Muzhi, Director of the State Council Information Office" (Xinhua, Nov. 2, 1991), in FBIS Daily Report-China, Nov. 4, 1991, pp. 15-16 at p. 16.

2. See: generally Murphy and Coleman, 1990. among the primary sources for this view are Aristotle's *Ethics and Politics*; Cicero's, *The Republic*, and Aquinas' *Treatise on Law*. Also see: generally, Lukes, 1973 and Raz, 1986.

3. See: Tigar and Levy, 1977.

4. See: Generally and Waldron, 1984. Also see: Raz, 1984: 194.

5. See: Dworkin, 1978.



rights.<sup>1</sup> Reflecting this tradition, international human rights instruments provide that human rights are enjoyed by individuals, while the bulk of scholarly literature on human rights suggests as well that the primary beneficiary is the individual.<sup>2</sup> While currently there is a growing body of literature that challenges this view,<sup>3</sup> or at least suggests that individual rights can be meaningfully enforced only in the context of community,<sup>4</sup> the primacy of the individual in the dynamic of legal rights and obligations remains a dominant feature of European and North American rights doctrine.

In the course of the human rights discourse, some governments in East Asia for example claim that groups and communities should be the primary beneficiaries of rights, and by implication at least that the rights of individuals should be subordinated.<sup>5</sup> This approach is supported by arguments about social and historical traditions, and references to an East Asian familial tradition that derives from Confucianism and its assumptions about authority and hierarchy in social organization.<sup>6</sup> In this regard, it is useful to note that while the tradition of collective rights in the Asian tradition is much discussed, there is also significant evidence to suggest that the role of the individual was once highly prized.<sup>7</sup> The importance of the individual in traditional Chinese philosophy, for example, came gradually to be suppressed as a result of the political and ideological imperatives of the Chinese state.<sup>8</sup> Moreover, it should be noted that

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1. See: generally, Lukes, 1973. also see: Raz, 1986.

2. See: generally, Kindred, et al., ed., 1993: Chapter Ten.

3. See: generally and Schwartz, 1991: 39-56.

4. See: Waldron, 1987: 296 Triggs, in Crawford, 1988: 141-157.

5. For indicators of the Chinese view, see: references to the primacy of national political stability and the livelihood of people throughout the country, in PRC Human Rights White Paper, supra, p. 4 and referenes to human rights conditions of the Chinese people as whole in "Interview with Zhu Muzhi, Director of the State Council Information Office" (Xinhua, Nov. 2, 1991), in FBIS Daily Report-China, Nov. 4, 1991, pp. 15-16. See e.g. Hans De Jonge, "Democracy and Economic Development in the Asia-Pacific Region: The Role of Parliamentary Institutions", supra. Also see: Boo Tion Kwa, "Righteous Talk", in Far Eastern Economic Review, June 17, 1993, p. 28.

6. See: generally and Kent, 1993: 30-32; also see: Christensen, 1992: 469. The importance of Confucianism as a basis for a collectivist legal order is the focus of many officially sanctioned studies of Chinese legal culture. See e.g., Chinese Society for the Study of Confucianism and Legal Culture, ed., Confucianism and Legal Culture (Shanghai: Fudan University Press, 1992.)

7. See: Munro, 1969: 17: "all people are equally deserving; all should be tolerated, none singled out for favor". While the Taoists did espouse a primitive solidarity within society, this was derived from a fundamental respect for the identity of the individual. See: generally and Needham, 1956: 99, et seq. and pp. 139, et seq.

8. For discussion of individualism and its suppression by early Confucian orthodoxy, see: Balazs, 1964: 21-22, 177. The emergence of activism and reformism in the "new text Confucianism" of the 19th century raised the possibility of increased tolerance for individualistic scholarship and research within the literati elite a significant departure from the staid intellectual collectivism of prior years, although this too was ultimately unsuccessful. See: Elman, 1984: 26-36 and 1990: Chapter Nine.

Confucianism and the collectivist norms it has engendered have been severely criticized by many contemporary Chinese thinkers as overly authoritarian and repressive.<sup>1</sup> Nonetheless, the Confucian tradition remains important in the views of some governments in East Asia regarding the beneficiaries of rights.

These basic differences over nature of development and the nature of rights pose significant obstacles to attempts to reconcile differing approaches on the human right to development - differences which are entrenched further by the institutional contexts within which the various views are articulated. In this regard, it is of particular interest to note the emphasis placed by the 1993 Bangkok Human Rights Declaration on a "dynamic and evolving process of international norm-setting" as a context for human rights ideals.<sup>2</sup> This suggests a hope on the part of some East Asian governments that the human right to development as a multi-faceted, inherent and inalienable right might ultimately yield to a different vision, one that holds the right to development as priority that permits economic growth to take precedence over such other human rights as may be conferred by state governments on their subjects.

The affirmation of the human right to development has put fundamental questions about development and rights on the public agenda of international law and politics. The discourse may yield increasingly effective calls for a multi-dimensional approach that validates social, cultural, and political development as essential counterparts to economic growth. And while it remains to be seen whether authoritarian regimes in the East Asian region will come to adopt such an approach in the near term, the liberalization policies of Taiwan and South Korea suggest that political self-preservation may mandate the adoption of comprehensive development strategies. The development aspirations of the people in the region generally would seem to depend on similar transitions from state-controlled uni-dimensional economic development to a more comprehensive approach. This in turn will depend on how the philosophical differences and political implications of the right to development are resolved.

## **5. Conclusion**

Enforcement of international human rights norms depends on the capacity of local political and legal institutions. Institutional capacity depends on issues of location, orientation, and cohesion, but most of all on factors of institutional

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1. See: Yang, 1992; Ruoshui, 1986: 217-233; Also see: Kent, 1993: 136-153.

2. See: "Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights", 1993: Art. 8. Also see: Osinbajo and Ajayi, 1994: 727.

purpose. Questions about institutional purpose invite discussion of the relationship between the goals of certain international human rights norms and the goals of local political authorities. The right to development offers a vision of human rights that differs markedly from the liberal ideals of individual rights, and offers an example of the ways in which the dynamic of selective adaptation operates to mediate international norms and local enforcement. Selective adaptation might also offer an approach to resolving tensions between conflicting international and local human rights norms, and thereby a bases for mutual understanding and common commitment to recognizing and protecting the rights of all people.

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