

THE HUMAN RIGHTS FRAMEWORK



The Global Regime of Human Rights

The human rights regime has become truly international. It has established a new international morality. Because international human rights have been established by a consensual process, they have universal validity.

Much of this consensus has already been translated into morally and/or legally binding agreements at an international level. The Commonwealth's own statements and pledges on human rights and poverty eradication are morally binding statements that reaffirm and reflect legally binding international and domestic obligations of member states. There are no 'Commonwealth human rights' as such, however member states are signatories not only to United Nations conventions but to regional commitments such as the European Convention and the African Charter on Peoples' and Human Rights and the American Convention on Human Rights.

These commitments should be familiar terrain for policy-makers. However, the constant breaches of human rights standards in the daily lives of citizens; the

lack of consciousness within the Commonwealth and its ruling elite that human rights are as much a legal obligation as a moral imperative; and the lack of knowledge about the existence of an alternative empowering framework amongst the citizenry (especially the poor, who are as deprived of information as they are of more tangible entitlements); demand the constant reiteration of obligations undertaken by states.

Though the international community has a nascent appreciation of the importance of human rights, the emphasis is largely on civil and political rights. While a strict and universal observance of these rights would undoubtedly alleviate poverty, it is however critical that governments and international organisations, including the Commonwealth, acknowledge and implement social, economic and cultural rights, which more obviously deal with the basic necessities of the human person.

The global system of human rights consists of various components. Three of the most important components of the existing framework are: the different levels at which rights are defined and protected; the various beneficiaries and guarantors of rights, and the methods and machinery to implement, supervise and enforce rights.

Levels: International, Regional and National

The global system of rights is constituted at the international, regional and national level. Since the setting up of the UN there has been an exponential growth in international human rights law. The UN Charter committed its members to the promotion and protection of all human rights. The UN marked its entry into the field in 1948 by adopting the Universal Declaration of Human Rights (UDHR) - since then many conventions have been negotiated and ratified by member states. The UN has sponsored a complex set of interlocking conventions and a network of supervisory bodies. In the area of human rights major functions of the UN include consensus building; norm setting; increasing national capacities and supervision of the extent to which states in fact abide by obligations they have undertaken under the various conventions. In the exceptional circumstances of the oppression by a state of its own nationals, the UN may even make direct interventions, even if armed force is required. The Office of the High Commissioner for Human Rights (OHCHR), now has over 20 field offices, which supervise the protection of rights and offer technical assistance.

The growth of conventions and institutions at the international level was paralleled by the establishment of the European Convention of Human Rights, providing the first instance of the protection of rights at the regional level. The Convention is enforced by the European Court of Human Rights. Since then, regional systems of human rights have been established for the Americas and

Africa, though, there are differences in the scope of rights and the methods of enforcement. Another 'regional' system has developed in recent years under the auspices of the Organisation for Security and Cooperation in Europe (OSCE), in which Canada also participates - so far the progress has been in developing norms and in methods of persuasion.

There are many advantages in having regional systems - they take the load off the international system and they bring the pressure of friendly, neighbouring states to bear on offending states. Equally important, they represent the consensus of the states as to the standards of behaviour of governments acceptable in the region. Perhaps the absence of regional systems in Asia and Pacific-Australasia is due to the lack of such a consensus. Consequently, regional systems are uneven, with Europe being best integrated and certainly the most effective.

The third level is the national. This is the most important level for giving legal effect to human rights norms; through constitutional guarantees and complementary laws, and by giving effect to international or regional treaties. Once treaties are ratified, countries are obliged to take measures to bring domestic laws in line with the convention, where it does not automatically become part of the domestic law. But at the time of signing, states may sometimes enter caveats indicating a limited acceptance of one or other clause in the treaty. Most violations of rights are dealt with, or at least in the first instance, in national courts or other human rights institutions. It is at this level that the key struggle for human rights is conducted, and the resistance to it waged.

The different levels are integrated through a regime of treaties which are effective at the national level, but which are supervised at the regional or international level, and through the respect paid by national governments and judiciaries to elaborations of rights by regional or international tribunals. The inscription of these rights in international instruments has expanded the scope of the operation of human rights. It has brought an important change in the character and purpose of international law. It has made individuals and their rights a central concern. The manner in which a state treated its citizens used to be regarded as its internal affair. The concept of state sovereignty provided a shield for states against external intervention, even external comment. State sovereignty and non-intervention in the domestic affairs of a state are still the corner stone of the international order under the United Nations Charter. But the notion of what is 'domestic' has changed under the Charter's imperative to promote and protect all human rights.

The right of states, regional organisations and the international community to criticise states which violate the human rights of their nationals is increasingly recognised. The eruption of civil wars, centering often on ethnic conflicts, has increased the involvement of the international community in the affairs of

states. This involvement is most dramatically manifested in humanitarian intervention, but also takes the form of mediation and conciliation, strengthening national capacity for the promotion of and respect for human rights, monitoring the observance of treaty obligations, and the imposition of sanctions. The lack of immunity for heads of states for torture and other similar crimes, and the establishment of an International Criminal Court, has reinforced this trend.

The Beneficiaries of Rights

Rights have traditionally been restricted to citizens, but an increasing number of states extend non-political rights to *all* residents. However, many constitutions still restrict the scope of rights and discriminate against immigrants. International instruments are ambivalent; they speak as if only political rights are restricted to citizens, but they do not seem capable of enforcing the wider view of *everyone* being entitled to rights. In a globalising world, the restriction of rights to citizens, especially when citizenship is conceived of in narrow racial or ethnic terms, is a serious limitation on people's exercise of rights.

So long as rights were attached to citizenship, there was a notion of a standard set of rights and obligations that fitted all. But soon after the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted - which are available to 'everyone' - the international community turned its attention to specific groups of persons.

The idea of group rights was prompted by a concern with vulnerable communities, particularly minorities. Conventions for the protection of racial minorities, women, children, indigenous peoples and migrant workers were adopted. For the most part they reiterate all the rights under the two Covenants, but they also provide a basis for affirmative action, special policies, protective institutions and networking.

In the classical traditions of human rights, only individuals had rights; those who adhere to this approach are uncomfortable with rights of groups and this grounds much of the resistance to newer ideas like the right to development. But the notion of group rights has assumed a particular importance in multi-ethnic societies, where it has in some cases become the organizing matrix of society, such as in Fiji.

Most legal systems also extend 'human' rights to corporations and other entities, at least those rights that they are capable of exercising and those that are of importance to them. Critics complain that to extend human rights to corporations is an abuse of the concept.

Duty-Holders

The state has traditionally been seen as responsible for the fulfilment of human rights. Its principal obligations include respecting, promoting, protecting and fulfilling *all* human rights. *Respect for human rights* requires the state to refrain from conduct that would deprive people of their rights, such as torture, closing schools for minority cultures, or arbitrarily restricting the freedom of speech or movement. *Promotion of respect for rights* consists of various activities, including promoting human rights education and providing support for institutions which uphold rights, such as human rights commissions. This function is the responsibility of official and non-official bodies.

The duty to *protect rights* requires the state to protect rights against violation by public authorities or other persons and groups. Much of criminal law is based on this duty. To discharge this obligation the state has to actively ensure law and order and for example: a police force that is trained in human rights; well run and adequately resourced independent judiciaries and human rights commissions; effective sanctions against those who violate rights of others; and legislation to protect the environment and regulate the sale and administration of medicines and drugs. The discharge of this duty may require that the state should not de-gazette forests or alienate land in which communities have traditionally lived.

The duty to *fulfil* rights requires the state to take positive steps to ensure that people who do not have access to rights gain access to them. State subsidies for health, education and food, the provision of free legal aid services, assistance through grants of land and building materials to the homeless so that they can build their own homes, and affirmative policies, all help fulfil rights.

The state-centric paradigm of the human rights framework precludes non-state actors from being duty-holders. Most legal actions to enforce human rights are directed at states' violations of rights. Increasingly, however, the human rights framework is striving to cover powerful non-state actors and make them responsible for actions that create poverty or reverse social achievements. The human rights regime is seeking to capture the private sector, international financial institutions and third-party states. However, the precise extent of the obligations of these bodies has as yet not been clarified.

Enforcement and Supervision

The task of enforcement of rights is in the main, the responsibility of the state. The primary institutions for the enforcement of rights are national. Typically, rights are enforced in court through the judicial process. In recent years other institutions, such as ombudsmen, and human rights or equality commissions, have been established as additional protections. These follow less adversarial

procedures than courts, and offer mediation and reconciliation. Access to these bodies is easier, cheaper and more informal than to courts. These institutions tend to be multi-functional, with information and education being important responsibilities. They can also oversee the national human rights situation and produce annual and thematic reports. But courts remain the final arbiters of violations, and ultimate authorities for the interpretation of human rights provisions.

In countries, which are part of a regional system of human rights, regional commissions or courts can play an important, supplementary role. The role of the European Court of Human Rights is crucial in that it makes the final interpretations of the European Convention which are binding on national governments and courts. A supervisory function is also exercised at the regional level for states which are members of regional systems.

The international system plays little role in the enforcement of rights. However, the first steps towards international enforcement have recently been taken with the establishment of tribunals for war crimes in the former Yugoslavia and Rwanda and the imminent establishment of the International Criminal Court, as agreed in Rome in 1998.

Despite this, the international system has an important, or more accurately, a potentially important role in the supervision of the protection and enforcement of rights. This supervision takes two forms: one is primarily political and is the responsibility of the UN Human Rights Commission and the mechanisms associated with it, like special *rapporteurs* who keep problem countries under scrutiny and report back to the Commission, or examine and elaborate on thematic areas such as extra-judicial killings, disappearances, or violence against women; the other is more 'judicial,' the task being performed by specialist, independent committees - such as the Committee on Economic, Social and Cultural Rights - set up under human rights treaties to keep under review states' fulfilment of their international human rights obligations. In addition where there are optional protocols in place - as recently put in place under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) - individuals, and sometimes states - as under the Convention for the Elimination of All Forms of Racial Discrimination (CERD) - can bring complaints before the Committees. Under the latter Convention if states fail to resolve the complaint through mediation, either state can refer the matter for a binding decision to the International Court of Justice.

Most major treaties provide for periodic reports to these bodies; this is the principal means of supervising a state's performance of its treaty obligations. Even when there is a complaints procedure, the decision of the body is not strictly enforceable, although it provides a valuable opportunity for the body to elaborate the provisions of the treaty and explain the scope of rights protected

by it-and the permissible derogations. This has been a particularly valuable aspect of the work of the UN Committee on Human Rights, set up under the ICCPR. Under the Convention for the Rights of the Child (CRC), UNICEF and other UN agencies assist in the review and in the making of recommendations.

Working with the UN

NGOs can usefully make submissions to the conventions' treaty bodies, as a form of monitoring governments and assisting the committees in developing their positions.

A coalition of anti-poverty NGOs in Canada submitted information in 1998 to the CESCR, as part of the scheduled review of Canada's periodic report, regarding the impact of the repeal of social security legislation on the right to adequate standard of living of vulnerable groups such as single mothers. After considering the response of the Canadian Government, the Committee concluded that the repeal of the relevant legislation "entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada." It went on to say that: "The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced."⁶⁹ It also criticised provincial governments in Canada for arguing in court cases that Canada's Charter of Rights and Freedoms should be interpreted in a way that denied legal remedies to those whose social and economic rights were violated, and urged that economic and social rights not be downgraded to "principles and objectives."

The full potential of the supervisory role of the international system has yet to be realised. Until now meagre resources have been provided to the UN and the treaty bodies, many of whom can only meet once or twice a year for a fortnight or so, have inadequate secretariat support, and virtually no follow-up machinery.

The Commonwealth itself has a mechanism for dealing with "serious and persistent" violations of the principles contained in the Harare Declaration, which subsumes in itself all the international human rights norms. The Commonwealth Ministerial Action Group (CMAG), comprised of a rotating group of Foreign Ministers, interprets its mandate narrowly to take action only in the event of an unconstitutional overthrow of a democratically elected government and occasionally it will, as in the case of the Gambia, keep a country under scrutiny. The steps taken range from an expression of collective disapproval to suspending a country from membership. The CMAG mandate is currently under review by the Commonwealth High Level Review Group.

The Substance of Economic, Social and Cultural Rights

The treatment of the corpus of human rights as if it is constituted by two quite separate streams of human rights, on the one hand, civil and political and on the other, social, economic and cultural, is, as argued, a fallacy. The substance of economic, social and cultural rights cannot be neatly segregated because each right has dimensions of the one integrated and inherent in the other. However, in this section we do not describe those rights which are

predominantly civil and political, as they are well known and have been analysed in previous CHRI reports. Suffice it to say that they protect personal freedoms and physical security of individuals, the freedoms of expression and belief, political rights to participate in public affairs, the right to form and operate associations, the right to equality, and the due process of the law. Here the focus is on the multi-tiered regime of economic, social and cultural rights. Importantly and inevitably, as will be self-evident, these rights themselves incorporate certain aspects of civil and political rights.

The International Level

The Preamble to the Charter of the United Nations commits its members to promote economic and social progress and better standards of life in larger freedom and to employ international machinery to achieve these objectives. The General Assembly has the obligation to promote international co-operation in the economic, social, cultural, educational and health fields⁷⁰ and the UN has the general obligation to promote higher standards of living, full employment, and conditions of economic and social progress and development.⁷¹ The Preamble of the UDHR has as one of its objectives the “freedom from fear and want” and several of its provisions seek to secure the economic, social and cultural rights indispensable for a person’s dignity and the free development of his or her personality.⁷² It acknowledges everyone’s right to work, including the right to just and favourable remuneration, ensuring to himself and his family an existence worthy of human dignity and supplemented, if necessary by other means of social protection.⁷³ Article 25 proclaims everyone’s right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Everyone has the right to education, which shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.⁷⁴ Finally, the Declaration acknowledges everyone’s right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.⁷⁵ The family, which is the “natural and fundamental group unit of society” is entitled to protection by society and the state.⁷⁶ Fundamental to the Declaration is the equality of all persons, regardless of, for example, sex, race, or social origin. Members of the UN have committed themselves to a social and international order in which these and other rights can be fully realized.⁷⁷ These commitments have been elaborated and given binding form by signatories to the ICESCR. The broad framework for these rights is self-determination by virtue of which all peoples may “freely determine their political status and freely pursue their economic, social and cultural development.”⁷⁸

The UN Declaration on the Right to Development states that the “right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.”⁷⁹ It also states that the human person “is the central subject of development and should be the active participant and beneficiary of the right to development.”⁸⁰ While all human beings have a responsibility for development, states have the “right and duty to formulate appropriate national development policies that aim at the constant improvement of the well being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.”⁸¹

The Right to Development has not been well received by some western governments. However, the document proclaiming the Right to Development is valuable for establishing a broad and humanistic definition of development as “a comprehensive economic, social, cultural and political process, which aims at constant improvement of the well-being of the entire population and of all individuals” and “in which all human rights and fundamental freedoms can be fully realised.” It provides a basis for the integration of various strands of rights, pointing to conditions under which all kinds of rights can be enjoyed.

It is, however, necessary to temper enthusiasm for this right, for it has been promoted by many states whose commitment to human rights is suspect. Its detailed formulations could easily be used to obscure or evade the obligations of states for ensuring human rights, attribute the failure to ensure rights to wrong causes, and close off international scrutiny of the national record of observance of human rights. By itself the Declaration scarcely adds new rights, and its usefulness in providing a way to balance different kinds of rights or as a framework for achieving rights in a globalising world with new powerful actors, is limited. However, with refinement, and consensus, it could provide a useful basis for an integrated approach to human rights.

Other International Conventions

While the ICESCR is the primary framework treaty for economic, social and cultural rights, other instruments also provide these rights for specific groups. Economic, social and cultural rights are incorporated into other major conventions that make up the human rights framework and are articulated in accordance with the specificities, particular needs and vulnerabilities of different groups, in recognition of their historically derived disadvantages.

All the conventions in their full elaboration contribute to a coherent, though not fully comprehensive, international framework of economic, social and

cultural rights which addresses different sets of beneficiaries. Two of the most important are CEDAW and the CRC.

CEDAW (1979) provides a charter for human rights. It places discrimination against women in a broad context, recognising that such discrimination is “an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and humanity.”⁸² Importantly it recognises that “in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs.” Therefore, state parties are required to “take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men,”⁸³ while another article authorises affirmative action to achieve this purpose.⁸⁴ State parties have undertaken to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and practices which are based on stereotyped roles for, or the idea of the inferiority of, either of the sexes.⁸⁵ They must take all appropriate measures to suppress all forms of traffic in women and exploitation or prostitution of women.⁸⁶ They must ensure women complete equality of political and civil rights with men.⁸⁷ Likewise women are guaranteed equal rights with men in the fields of education,⁸⁸ employment,⁸⁹ health⁹⁰ and in other areas of economic and social life, in particular rights to family benefits, bank loans, mortgages and other forms of financial credit, and participation in recreational, sports and cultural life.⁹¹

CEDAW gives women full equality before the law, including the right to conclude contracts and to administer property.⁹² Women are also guaranteed equal rights in marriage and family life, including: the right to freely choose a spouse and to marry only with their own free and full consent; full equality in and management of family property; and protection against marriage when below the prescribed minimum age of marriage.⁹³ The Convention requires states to take into account the particular problems faced by rural women and the significant role they play in the economic survival of their family, including their work in the non-monetised sectors of the economy. Consequently, it must ensure to them agricultural loans and credit, participation in all community activities, training and literacy and the organisation of self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment. More broadly, states must ensure them the enjoyment of all rights, including participation and adequate living conditions, particularly in relation to housing, sanitation, electricity, water supply, transport and communications.⁹⁴

The CRC, the most widely ratified of all human rights conventions, recognises that “in all countries in the world there are children living in exceptionally difficult conditions” who need special consideration.⁹⁵ The central theme of the Convention is stated in Art. 3.1 as follows:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Recognising that every child has the inherent right to life, states agree to ensure “to the maximum extent possible the survival and development of the child.”⁹⁶ The child is to be assured a nationality, in part to avoid statelessness, and the development and protection of his or her identity.⁹⁷ One of the central themes of the Convention is the integrity and protection of and assistance to the family, for as the preamble states, family is the “fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children” and such protection and assistance would enable the family to “fully assume its responsibilities within the community.” Several provisions aim to maintain the family and to avoid the separation of the child from his or her parents, unless such separation is judged by a judicial institution to be in the best interests of the child, as when parents abuse the child.⁹⁸ The CRC assures children the usual civic, legal, social, economic and cultural rights, but specifies in detail how they should be applied to the special circumstances of children. Thus the right to physical and emotional security is reformulated as protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (including sexual abuse), whilst in the care of parents, legal guardians or any other person who has the care of the child.⁹⁹ The right to health specifies that states must diminish infant and child mortality, provide pre and post-natal care for expectant mothers, and abolish traditional practices prejudicial to the health of children.¹⁰⁰ Children have the right to be protected from economic exploitation and from any work that is likely to be hazardous or harmful to the health or the development of the child.¹⁰¹ Children are to be protected from the illicit use of narcotics¹⁰² and trafficking and sexual exploitation.¹⁰³ The CRC, unlike CEDAW, is particularly solicitous of the cultural milieu and rights of the child.¹⁰⁴ Every child has the right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.¹⁰⁵

The special vulnerabilities of other groups, such as indigenous people,¹⁰⁶ ethnic minorities,¹⁰⁷ workers¹⁰⁸ and refugees,¹⁰⁹ have also gained the attention of the human rights regime that has articulated many economic, social and cultural rights, which, coupled with civil and political rights will ensure that these groups are not discriminated against, often benefit from affirmative action, have access to employment, housing, education and other conditions of life and can participate as full members in the political and social lives of the society they live in.

The Regional Level

The main regional instruments for economic, social and cultural rights are the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Social Charter. These have been signed up to by a significant number of Commonwealth states in their respective regions.

The African Charter on Human and Peoples' Rights

The African Charter, which has been acceded to by all Commonwealth African states accords high priority to economic, social and cultural rights. The preamble urges that attention be paid to the right to development and notes the interdependence of all rights.

The Charter guarantees rights to: work “under equitable and satisfactory conditions,”¹¹⁰ education,¹¹¹ “the best attainable state of physical and mental health,”¹¹² culture,¹¹³ and the family.¹¹⁴ All peoples are guaranteed the right of self-determination which includes the inalienable right to freely dispose of their wealth and natural resources, while state parties agree to “eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources.”

The Charter sets up the African Commission on Human and Peoples' Rights which has wide ranging functions to promote and protect. These include: encouraging national human rights institutions; making recommendations to governments; proposing national legislation; interpreting the Charter at the request of a state, the Organisation of African States (OAU) or any organisation recognised by the OAU; and any other functions conferred on it by the OAU. There is provision for inter-state complaints, under which the Commission may investigate, if all local remedies have been exhausted, and submit its findings to the concerned states and the OAU. If certain minimal conditions are met, complaints can also be made by groups or persons. But, here again the Commission's powers are merely advisory. This machinery, which has been relatively ineffective so far has been strengthened by a Protocol adopted in 1998, which establishes the African Court on Human and Peoples' Rights with jurisdiction to enforce all Charter rights, including social and economic rights.¹¹⁵ The Protocol requires 15 countries to bring it into force. As of January 2001 only 4 states had ratified it, of which the Gambia is the only Commonwealth country.

American Convention on Human Rights

The Commonwealth states who have signed and ratified the American Convention are Barbados, Dominica, Grenada, Jamaica and Trinidad and

Tobago. This convention obligates state parties to ensure “the realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.”¹¹⁶

The American system is served by both a Commission and a Court; the functions of the former are largely promotional, but it may also receive complaints made by another state (if the state has accepted such jurisdiction) or by a group or individual, of violations of rights by a state. The functions of the Commission are to promote friendly settlement of the complaint, failing which, it may investigate the complaint and make a confidential report to the parties. The jurisdiction of the Inter-American Court, which is optional, is both advisory and binding. Recently the Commission has accepted a complaint from the Toledo Maya Cultural Council, an NGO, against Belize, objecting to concessions for logging and oil exploration of large foreign corporations in the rain forest which seriously impinge on the survival of indigenous Mayan Communities. This step was taken after the Supreme Court of Belize did not hold any hearing. If proved, this would constitute a breach of Belize’s obligation to protect human rights.

The European Social Charter

The Commonwealth countries that have signed and ratified the European Convention of Human Rights and the Social Charter are the UK, Malta and Cyprus.

The Social Charter was adopted by the Council of Europe in 1961 to supplement the European Convention of Human Rights which does not contain any economic, social and cultural rights (although the European Court of Human Rights has read some of these rights into the Convention). It aims to improve the standard of living and promotion of the social well being of both rural and urban populations within the general framework of rights. Rights which are protected by the Convention are specially oriented towards workers. They take in a series of rights associated with full employment, safe and healthy working conditions, association and collective bargaining. They include: special protection for women workers; protection of children and young persons against physical and moral hazards; the right to vocational training; the highest possible standard of health attainable; social security for workers and their dependents; social and medical assistance for anyone without adequate resources; and everyone’s access to social welfare services. Special provisions are made for disabled persons and mothers and children, and the family, as a fundamental unit of society, has the right to “appropriate social, legal and economic protection to ensure its full development.”

The Charter imposes the “legal obligations of an international treaty”¹¹⁷ but the performance of these obligations is supervised by non-judicial methods. Supervision is based on biennial reports by each state. In the first instance these are examined by a Committee of Experts, to which the ILO may be invited. The report and comments of the Committee are then reviewed by a Sub-Committee of the Governmental Social Committee, an inter-governmental body, which in turn submits its report, along with the national report and comments of the Experts, to the Committee of Ministers, who by a two-thirds vote, “make to each Contracting Party any necessary recommendations.”¹¹⁸ The Committee of Ministers also has the benefit of the views of the Consultative Assembly, which itself receives the comments of the Experts.¹¹⁹

The European Court of Human Rights has begun to integrate civil, political, economic, social and cultural rights in interesting and potentially effective ways. It declared that: “whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”¹²⁰

A good example of how economic rights can be protected even when there is an apparent clash between different rights is provided by the Court. In one case, it has held a serious case of environmental damage and accompanying health problems to be a violation of the protection of private and family life and invoked economic, social and cultural rights to restrict the scope of other rights, such as the right of property. In another example, a landlord’s challenge to rent control legislation was rejected on the basis that the government in question was protecting the right to housing.¹²¹

The National Level

Indirect Enforceability

Early national constitutions did not protect economic, social, and cultural rights. A partial break with this tradition was the adoption of Directive Principles of State Policy, which found their way, via the Indian Constitution of 1950, into Commonwealth constitutions where they are now quite common. The inspirations for including directive principles and the sense of social and economic justice that underlie them, have deep roots in Indian nationalism and the modern India envisioned at Independence. Described as the conscience of the constitution, the Directive Principles of State Policy represent goals to which its framers committed the nation.

In a country emerging from colonial subjugation, steeped in social stratification and gender subordination, with embedded systems of tied labour and large scale unemployment and illiteracy, the Directive Principles require that state policies and actions go to reduce inequalities of income, status and opportunity, not only among individuals, but also amongst groups of people residing in different areas or engaged in different vocations.

Toward the creation of an egalitarian society the state has to ensure that all citizens have the right to an adequate means of livelihood; that the distribution of ownership and control of material resources best serves the common interest; that the operation of the economic system does not lead to the concentration of wealth or the means of production to the detriment of the common good.

In order to protect from exploitation and uplift disadvantaged groups it has to ensure: that citizens are not forced by economic necessity to enter a vocation unsuited to their age or strength; that men, women and children are not abused; and that children, in particular, have opportunities to develop. Other Directive Principles provide for: free legal aid for the needy; guarantees of a living wage; the protection of historically disadvantaged castes, tribes, and other weaker groups; the improvement of nutrition and health; the provision of free and compulsory education for children under 14 years; participation rights in local government and, for workers in management; and the protection and improvement of the environment and safeguarding of forests and wild-life.

Still others declare that “within the limits of its economic capacity and development, the state shall make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”

Though not enforceable in courts, the Directive Principles “are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”¹²² For many years the courts interpreting the Constitution used the Directive Principles merely as guidance for the government and not as legally binding principles that translated into enforceable rights.

Gradually however, this changed and it is now recognised that “harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.”¹²³ The Directive Principles prescribe the goals while the fundamental rights lay down the means by which those goals are to be achieved.¹²⁴ The Indian position now is that enforceable fundamental rights are to be interpreted in the light of directive principles and that these principles should, whenever possible, be read into fundamental rights.

The scope of India's fundamental rights and freedoms, which were essentially fashioned along the lines of western classical liberal individual rights, has thus been considerably expanded. For example: the courts have given a wide definition to the right to life to mean something more than mere survival or animal existence,¹²⁵ but the right to live with human dignity and have all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, as well as freely moving about and mixing and co-mingling with fellow human beings.¹²⁶ Adding further to the content of this 'right to life' the court has explicitly used non-justiciable directive principles to include protection of health, provision of education, and just and humane conditions of work¹²⁷ and has recently added that it guarantees access to medical services, especially in an emergency. The state cannot ignore its constitutional obligation to provide adequate medical services to preserve human life on account of financial constraints.¹²⁸

Taking a leaf from the Indian book, the Bangladesh Supreme Court has expanded the right to life in its own constitutional context as not limited only to the protection of life and limb necessary for the full enjoyment of life but including, among other things, the protection of the health and longevity of a ordinary human being.¹²⁹

Despite these bold moves, the judiciary is neither particularly qualified nor willing to establish entitlements to economic and social benefits¹³⁰ and, particularly in India or Bangladesh, unable to enforce judgments that recognise social and economic rights. The reading of the directive principles into fundamental rights, regardless of the way it has expanded or changed the understanding of fundamental rights, does not give directive principles *per se* a secure legal standing and does not make them directly enforceable.

Nevertheless courts have put them to good use. Courts protect directive principles from threats by requiring due process before they can be denied. Courts have used directive principles as the basis for giving directions to governments, legislatures and administrators to promote social justice. They have also used directive principles to restrict the scope of fundamental rights when the exercise of the latter negates or threatens a protection accorded by the directive principle. For example, the directive principle on living wages and decent conditions of work has been used to uphold the reasonableness of the restrictions imposed by the Minimum Wages Act.

Indian courts have decided that although directive principles are unenforceable by the courts, and courts cannot direct the legislature or the executive to enforce them, once a law is made in pursuance of them, the courts can order the

state to enforce the law, particularly where non-enforcement leads to the denial of a fundamental right. Sometimes the courts have gone further and based a right on a directive principle, as on education, to hold that “every child/citizen of this country has a right to free education until he completes the age of fourteen years.”¹³¹ Alternatively they have used directive principles to impose a duty on the state to regulate the activities of private institutions, such as preventing the winding up of a company without consultation with workers or obliging the state to pass laws regulating the fee structure of private colleges, so as to ensure that high fees do not lead to the total exclusion of poor students.

Finally, courts have used directive principles to fashion novel legal remedies, such as the establishment of welfare funds to assist needy communities or to require the state to provide employment for parents if otherwise their children would have to work in hazardous conditions. In these ways the courts have blurred the distinction between justiciable and non-justiciable rights and given substantial force to economic and social rights.

A number of Commonwealth states, such as Ghana, Namibia, Uganda, Nigeria, Papua New Guinea and Sri Lanka, have adopted the directive principles scheme. In the 1995 Uganda Constitution, directive principles include gender balance and the fair representation of marginalised groups, the welfare and maintenance of the aged, the right to development, and access to education, health services, clean and safe water, decent shelter, adequate clothing, food security and pension and retirement benefits. The Ghanaian Constitution enjoins the state to eradicate corrupt practices and the abuse of power, protect the environment, secure participation rights of the people, safeguard the health, safety and welfare of all persons in employment, provide educational facilities at all levels and in all parts of the country, including free, compulsory and universal basic education, and promote indigenous cultures. Although in most cases directive principles are non-justiciable, that they constitute binding legal obligations is obvious from the obligations they sometimes impose. For example, the Ghanaian Constitution says that directive principles “shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.”¹³² The President has to report to Parliament, at least once a year, the steps taken for the realisation of the directives, particularly regarding basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.¹³³

The right to non-discrimination is emerging as a particularly fruitful basis for the enforcement of social and economic rights. The Canadian Supreme Court has declared that the failure of hospitals which run government schemes for health

care are in breach, for lack of *de facto* equality of Article 15 of the Charter of Rights, if they do not provide sign interpreters for deaf patients.¹³⁴ The Court said that the “principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.”¹³⁵ The Court reiterated its earlier view that “a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of Article 15.”¹³⁶

In this way there exists great potential for overcoming the technical and procedural deficiencies of the ICESCR and weaknesses and procedural difficulties that attend the realisation of economic, social and cultural rights at the national level. For example, the concept of equality is the basis for affirmative action. This focuses on remedial action for the disadvantaged and deprived communities, that is now recognised in a number of international instruments (such as the CERD, CEDAW and the Right to Development). Many Commonwealth constitutions require or urge the state to institute affirmative action policies, although for the most part they are not mandatory, but they do provide a defence against a challenge on grounds of discrimination.

India and South Africa are two outstanding examples, where the obligations on the state are based on the moral and political recognition of past injustices to particular ethnic or social groups. The recent Fiji Constitution¹³⁷ imposes a legal obligation on the government to institute schemes for preferential policies for poorer communities and groups. Several other Commonwealth countries such as Malaysia, Canada, and Australia also have preferential policies.

Direct Enforceability

Some of the difficulties that India has faced in the implementation of directive principles, combined with the increasing recognition that all kinds of rights are interdependent and indivisible and that at least some aspects of all rights can be judicially enforced, has persuaded some countries to make economic, social and cultural rights directly enforceable. In its 1995 Constitution, Uganda has made enforceable the right of all persons to education, culture, a safe and healthy employment environment, the socio-economic rights of children, and the rights of minorities and persons with disabilities. The 1997 Fiji Constitution refers the courts to current practice and understanding of human rights when interpreting the Fiji human rights provisions. By far the most far reaching provisions for justiciability and integration of economic, social and cultural rights with civil and political rights are to be found in the South African Constitution.

The economic and social rights included in the South African Constitution can be divided into three main types.¹³⁸ The first category consists of children’s socio-

economic rights; the right of everyone to basic education, including adult basic education; and the socio-economic rights of detained persons, including sentenced prisoners. The obligation of the state in relation to these rights is not qualified by any reference to 'progressive realisation' and resource constraints.

The second category entrenches the right of everyone to 'have access' to adequate housing, health care, food, water and social security. The obligations of the state here are qualified by the terms 'available resources' and 'progressive realization.'

The third category prohibits certain kinds of conduct by public and private authorities, including prohibition of eviction of people from their homes without an order of court made after considering all the 'relevant circumstances,' and of the refusal of emergency medical treatment. Labour, environmental, land and cultural rights are also protected. Obligations are placed on the state to respect, protect, promote and fulfil these and other rights. South African courts, particularly the Constitutional Court, have played a creative role in the development of jurisprudence of these rights and the modalities of enforcement.

Finally, in giving effect through domestic legislation to international conventions such as CEDAW, CRC and other specialised instruments, which incorporate many social and economic rights, a number of Commonwealth states have imported these concepts, making them enforceable in local courts and through other quasi-judicial or administrative bodies.